



**A MOVE TOWARDS RESTORATIVE JUSTICE IN ETHIOPIA:
ACCOMMODATING CUSTOMARY DISPUTE RESOLUTION
MECHANISMS WITH THE CRIMINAL JUSTICE SYSTEM**

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Dedicated to my grand parents

“Yikanu Lijalem!!!!”

Abstract:

Restorative justice is an alternative way of thinking about crime and justice which views crime as a violation of a relationship among victims, offenders and community instead of putting a state as a sole victim, and has the objective of “putting right” or “healing” the wrong and to restore the broken relationship in the community.

Unlike the restorative justice perspective, the Ethiopian criminal justice system views crime primarily as an offense against the state and a violation of its criminal laws, either in the form of commission or omission. Under the Ethiopian criminal justice system, neither the victims are given an opportunity to fully participate in the process nor is there a legal procedure which enables the public prosecutor to adequately protect the victim`s interest. The focus of the public prosecutor is to convict the accused\offender and get him\her punished, instead of encouraging him\her to take responsibility to undo the wrong he\she has committed. The Ethiopian criminal justice system also excludes the community from participation; and if the community is said to be participating in the process, it is only in the form of providing information about the commission of the crime and appearing as a witness in the criminal proceedings.

On the other hand, 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 recognized by law. The customary dispute resolution mechanisms are run by elders; involve reconciliation of the conflicting parties and their respective families using different customary rituals; emphasizing on the restitution of victims and reintegration of offenders, and aims 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 is an enormous advantage to implement the ideals of restorative justice in the Ethiopian criminal justice system, restorative justice has not yet taken root in the criminal justice system of Ethiopia.

This thesis, therefore, examines whether there is a place for restorative justice in the Ethiopian criminal justice system; examines the compatibility of the Ethiopian customary dispute resolution mechanisms with the core values and principles of the modern restorative justice systems; and assesses the potentials to implement restorative justice ideals by accommodating

the customary dispute resolution mechanisms with the formal criminal justice system in the future.

The study is conducted based on interviews, legislative analysis, and analysis of other relevant literature. The findings of the study show that the notion of restorative justice is almost non-existent in the current Ethiopian criminal justice system though it manifests some elements of restorativeness. It also shows that the Ethiopian customary dispute resolution mechanisms are compatible with the values and principles of restorative justice though they are not legally recognized and well organized programs; and that a consensus has recently been reached regarding the importance of using customary dispute resolution mechanisms as a basis to implement restorative justice in the Ethiopian criminal justice system.

Key words: Restorative Justice, Criminal Justice System, Customary Dispute Resolution Mechanisms, Ethiopia.

Abbreviations

ADR	Alternative Dispute Resolution
Art.	Article
CDR	Customary Dispute Resolution
CJS	Criminal Justice System
CYPFA	Children, Young Persons and other Families Act
FDRE	Federal Democratic Republic of Ethiopia
FGC	Family Group Conferencing
HPR	House of Peoples Representatives
JLSRI	Justice and Legal System Research Institute
MoJ	Ministry of Justice
NMS	Norwegian Mediation Service
RJ	Restorative Justice
RJVPT	Restorative Justice Values and Principles Test
SC	Sentencing Circles
VOM	Victim Offender Mediation

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CHAPTER ONE: INTRODUCTION

1.1. Stating the Problem

Different factors contributed for the arousal of my interest to write my thesis on the issue of Restorative Justice (RJ) in Ethiopia. The first factor was the lecture I had about restorative justice as part of the curriculum to the course on conflict resolution and conflict transformation (SVF-3024). The lectures and my readings about restorative justice made me understand the philosophies, values and principles of Restorative Justice.

Restorative Justice, as its foundational premises, views criminal conflict as an injury or violation of a relationship among victims, offenders and community members;¹ and the “property” of those involved in the conflict.² It compliments retributive punishment of offenders as a basis for justice, with aims to heal injuries of all parties involved in criminal conflict: victim, offender and the communities. Instead of merely focusing on punishment, restorative justice processes contribute for reintegrative shaming to happen.³

Moreover, restorative justice processes provide victims a central role to play in the process and meet their needs for information about the reasons for the crime and the circumstances of its commission; and allow them to be heard which may in turn facilitate their psychological healing.⁴ Further, members of the community take a more active role in the justice process; and the process involves discussion and negotiation among the parties with a stake in the dispute.⁵ In a collaborative discussion, the parties are given an opportunity to express their feelings, present their side of the story, and reach to a consensus about the damage the offense has caused, the offender’s responsibility, and what should be done to restore the previous peaceful relationships.⁶

1 Zehr, H. (1985), ‘Retributive Justice, Restorative Justice’, in *New Perspectives on Crime and Justice: Occasional Papers*, Issue No. 4, MCC Canada Victim-Offender Ministries Program and MCC U.S Office of Criminal Justice, p.4. However, the criminal justice system, on the contrary, views crime primarily as an offence against the state and it is up to the state to respond.

2 Christie N. (1977), ‘Conflict as Property’, *the British Journal of Criminology*, Vol. 17, No. 1, p.4.

3 Braithwaite, J. (1989), *Crime, Shame and Reintegration*. Cambridge University Press, p.55. Jhon Braithwaite argued that one of the most powerful forms of social control is shaming, which comprises of either stigmatizing shaming or reintegrative shaming. According to Braithwaite, stigmatizing shaming is a characteristic feature of retributive justice system which considers the offender as permanently deviant and 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 denouncing the offence but not the offender, and by acknowledging the wrong and extending support.

⁴ Zehr, H. (2005), *Changing Lenses: A New Focus for Crime and Justice (3rd ed.)*, Herald Press, p. 191.

⁵ Daly, K. (1999), ‘Revisiting the Relationship between Retributive and Restorative Justice’, Paper presented at Restorative Justice and Civil Society Conference, Australian National University, p.5

⁶ Wenzel, M. and et al (2008), ‘Retributive and Restorative Justice’, *Law Hum Behav.*, Vol. 32, p. 376.

The lectures and the readings not only increased my knowledge about the philosophies, values and principles of restorative justice but also made me realize how important the introduction and implementation of those values and principles in the Criminal Justice System (CJS) of Ethiopia where many ways of Customary Dispute Resolution (CDR) mechanisms, which resonate well with those values and principles, exist.

The second factor which motivates me to write my thesis on this issue relates to my prior personal experience and knowledge about the Ethiopian criminal justice system and the role played by the customary dispute resolution mechanisms in resolving criminal disputes. Before I came to Norway, I graduated in Law and used to teach the criminal law of Ethiopia and other law courses at Addis Ababa University, Bahir Dar University Distance education center, and Alpha University College which enabled me to realize the limitations associated with the Ethiopian legal system particularly the criminal justice system.

Despite the fact that the Ethiopian criminal justice system is the principal system to deal with crimes, it suffers from lots of limitations. From the Ethiopian criminal justice system perspective, crime is viewed primarily as an offence against the state rather than a violation of relationships between the parties and the community at large;⁷ and it is the state's sole responsibility to respond to it relying on retributive punishment. The Federal Democratic Republic of Ethiopia (FDRE) Criminal Code Art. 1, paragraph 2 states that “the code aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.”⁸ Hence, the criminal law of Ethiopia, like many other countries' laws, emphasises on punishment as an instrument to preventing the commission of crimes.

However, mere imposition of punishment is non-constructive, often “encouraging rather than discouraging criminal behavior” and does not hold the offender accountable.⁹ Hence, the Ethiopian criminal justice system fails to take any step to encourage offenders to take responsibility and correct the wrong they have committed. In addition, the criminal justice system's focus on punishment is said to overlook the sense of social relationship exist in the

⁷ Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, *Federal Negarit Gazeta*, Proclamation No.414/2004, Art. 23.

⁸ *Ibid*, Art. 1, paragraph 2.

⁹ Zehr, H., 1985, *Supra* note 1, p.2.

social structures of the Ethiopian communities.¹⁰ For example, revenge is a culturally accepted practice in almost all parts of Ethiopia. It is clear, therefore, that the mere punishment of the offender has not succeeded to eliminate the long-standing cultural practice of revenge.

Moreover, the criminal justice system marginalizes victims of crime and makes them “mere footnotes of the process.”¹¹ This is manifested by the fact that the criminal proceedings are initiated by the public prosecutor instead of by the victim of the crime. The victim of the crime is not in the center of the proceeding whose role is limited only to make compliant to the police that the crime is committed against him\her and is merely reduced to the status of witness, if at all, the public prosecutor wants him\her to be a witness.¹² Additionally, whatever may be the outcome of the case in the criminal court, the victim does not get any significant benefit to mitigate his\her victimization; nothing\little is done to help the victim restore and repair the damage caused to him\her by the crime. This is because the offender may be punished by death, imprisonment, and\or fine or other forms of monetary punishments, which goes to the government treasury and not to the victim. That means that there is no or very little possibility to compensate the victims of the crime.

Furthermore, the criminal justice system excludes community ownership over the criminal matters. Although the community, family members of the victim and even the family members of the offender are all secondary victims, and have needs directly related to the crime,¹³ the criminal justice system deny them an opportunity to take part in the process. Finally, the state-based system is inaccessible, expensive, time-consuming, and complex.¹⁴

Parallel to the formal criminal justice system of Ethiopia, societies also have their own customary way of dealing with crime. In many regions of the country and especially in those 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

¹⁰ Macfarlane, J. (2007), ‘Working towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with Formal Legal System’, *Cardozo Journal of Conflict resolution*, Vol.8, No. 487, p. 488.

¹¹ Zehr, H., 1985, *Supra* note 1, p.1.

¹² *Ibid.*

¹³ McCold, P. (1995), ‘Restorative Justice: the Role of the Community’, Paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston, p. 2.

¹⁴ Dhami, MK. And Joy P. (2007), ‘Challenges to Establishing Volunteer-Run Community-Based Restorative Justice Programs’, *Contemporary Justice Review*, Vol. 10, No. 1, p.11.

the traditional societies.¹⁵ According to Julie Macfarlane, it is common for all societies to “look to shared substantive norms- religious, customary and/or traditional- to resolve problems instead of resorting to legal norms due to the importance of those non-legal norms within daily life.”¹⁶ Macfarlane further argues that, in some regions of Ethiopia, the non-legal norms are “so strong that a resort to law is regarded as inappropriate; or customary systems of dispute resolution simply appear more relevant, and accessible than imposed and top-down legal norms.”¹⁷ Experiences in different regions of Ethiopia also 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.¹⁸

Despite these factual roles of customary dispute resolution mechanisms, however, the procedural and substantive laws of Ethiopia including the Constitution exclude their application in criminal matters. In the Federal Democratic Republic of Ethiopian Constitution, 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. The Constitution, Article 34 (5) states that “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.”¹⁹ 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.

The combined influence of the aforementioned factors made me wonder whether there is a space or room for the introduction and implementation of restorative justice in the Ethiopian criminal justice system; whether the Ethiopian customary dispute resolution mechanisms are compatible with the values and principles of restorative justice; and to examine the prospects to implement restorative justice in Ethiopia. It also made me wonder whether the introduction of restorative justice process alternatives through the recognition and use of customary

¹⁵ Macfarlane, J. , 2007, Supra note 10, p. 488.

¹⁶ Ibid, p. 489

¹⁷ Ibid, p. 490.

¹⁸ Zeleke, M. (2010), ‘Ye Shakoch Chilot (the court of sheiks): a Traditional Institution of Conflict Resolution in Oromiya Zone of Amhara Regional State, Ethiopia’, *African Journal on Conflict Resolution*, Vol. 10, No. 1, p. 75

¹⁹ Constitution of the Federal Democratic Republic of Ethiopia, 1994, *Federal Negarit Gazetta*, Proclamation No. 1\1994, Art. 34.

dispute resolution mechanisms, for defined groups of offenders and offences, would contribute for the delivery of better justice in Ethiopia.

As a result of the influence of these factors, and as being an Ethiopian legal professional and student of peace studies, I felt this is the appropriate area for me to research on.

1.2. Objectives of the Study

In line with the problems stated above, this thesis has the following objectives. First, it explains the mode of operation of the contemporary criminal justice system of Ethiopia and examines whether there is a place for restorative justice in the Ethiopian criminal justice system. Second, it assesses the legal, *de jure*, and factual, *de facto*, jurisdictions of Ethiopian customary dispute resolution mechanisms in resolving criminal matters, and their compatibility with the core values and principles of restorative justice. Finally, it explains the potentials and opportunities to implement restorative justice ideals in the Ethiopian criminal justice system in the near future.

1.3. Sources

This research uses both primary and secondary sources. It uses primary sources such as legislations like the Criminal Code, Criminal Procedure Code, the Constitution; and draft legislations like the draft Criminal Procedure Code and the draft Proclamation on Community Service. In addition, the primary data were collected from interviews with legal experts from different sectors of the government. The primary data are also complimented by secondary sources such as books, journal articles, and other relevant documents. Books which contain a collection of research works contributed by different authors regarding the mandates, roles, and functioning of customary dispute resolution mechanisms in different regions of Ethiopia are examined in detail. Particularly, the books titled “Grass-Roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution” edited by Pankhurst, A. and Assefa, G; and “Customary Dispute Resolution mechanisms in Ethiopia” edited by Yntiso, G., Azeze, F. and Fiseha, A. are the most important books containing lots of research works on the customary dispute resolution mechanisms of Ethiopia contributed by many authors in the area which are used as main sources.

Even though the number of materials on the issue of restorative justice in the Ethiopian context is almost none, there are vast literatures such as books, scholarly articles, and journals on restorative justice in general. These secondary materials on restorative justice are mainly

accessed through the internet especially via the Google scholar search tool of the library of University of Tromsø; and Restorative Justice Online: <http://www.restorativejustice.org/>.

1.4. Research Questions

In line with the research problems and objectives stated above, the research questions of this study are:

- Is there any space for restorative justice in the Ethiopian criminal justice system?
- What are the legal, *de jure*, and factual, *de facto*, jurisdictions of Ethiopian customary dispute resolution mechanisms in resolving criminal matters?
- Are the Ethiopian customary dispute resolution mechanisms compatible\consistent with the values and principles of restorative justice?
- What are the opportunities to implement restorative justice into the Ethiopian criminal justice system in the future?

1.5. Background of the Study Area

The study is conducted in Ethiopia, a land-locked country located in the horn of Africa bordered by Eritrea to the North, Djibouti and Somalia to the east, Sudan and South Sudan to the west, and Kenya to the South. It covers a total area of 1,100,000 square kilometers; and is the second most populous country in Africa with more than 85,000,000 inhabitants, 85 % of which are living in the rural areas.²⁰

The country was ruled by successive monarchs until 1974 where the reign of Emperor Haile Selassie I was ended and a group of military junta known as Derg took over the power and ruled the country up until 1987. In 1987, the so called civil government under the name Ethiopian People's Democratic Republic was established and ruled until it was defeated by the currently ruling government in 1991.

Since 1991, Ethiopia has adopted ethnic based federal state structure where the country is divided into nine regional states namely Afar, Tigray, Amhara, Oromia, Somalia, Beni Shangul Gumuz, Southern Nations and Nationalities, Harari, and Gambela.

The country is a multiethnic society comprising of more than 80 ethnic groups, the majorities of which are the Oromos and Amharas.²¹

²⁰ Ethiopia Country Report, available at: <<http://www.rad-aid.org/pdf/Ethiopia-Country-Report2.pdf>>.

²¹ Ibid.

Each region has multiple customary dispute resolution mechanisms based on its specific customs, traditions, language and religious beliefs. Hence, the common features of the customary dispute resolution mechanisms of each region are examined in general manner based on secondary sources or the previously conducted research works. However, interviews were conducted only with legal professionals in the capital city, Addis Ababa.

1.6. Scope of the Study

Though the customary dispute resolution mechanisms can be used to resolve both the criminal and non-criminal (civil) matters, this study focuses on the assessment of the role of Ethiopian customary dispute resolution mechanisms in criminal matters. This is because the concept or the term restorative justice is frequently used for criminal matters unlike the term Alternative Dispute Resolution (ADR) which is used for civil matters. Further, the study explores the existence of a place for restorative justice in the Ethiopian criminal justice system; the mandates and compatibilities of Ethiopian customary dispute resolution mechanisms with the core values of Restorative Justice; and examines the future prospects for the implementation of restorative justice into the Ethiopian criminal justice system. The issue of how to institutionalize the customary dispute resolution mechanisms and how to integrate them with the criminal justice system of Ethiopia are beyond the scope of this thesis research.

1.7. Challenges of the Study

I am a young Ethiopian legal professional researching on the issue of restorative justice in Ethiopia, and this may raise the ethical question of neutrality.

Due to my status of being an insider researcher, one may tend to question the freedom of my arguments and legislative interpretations from bias. As an insider researcher, therefore, the challenge I encountered was possible bias during interviewing, interpretation and analysis of the data.

1.8. Limitations of the Study

The study examines the role, mandate, mode of operation of the customary dispute resolution mechanisms of Ethiopia and its compatibility with the core values and principles of restorative justice in a general manner. It does not pin point to a specific type of customary dispute resolution mechanism, out of many which are available in every region, and study it in detail. Hence, generality may be considered to be the limitation of the study. Moreover, to gain a much broader picture, it would have been important that the views of customary leaders or elders about their adjudication process were obtained. The interviews were

conducted only with legal professionals working in different positions. They are members of the Judiciary, staffs of Ministry of Justice (MoJ) and public prosecutors, staffs of the Justice and Legal System Research Institute (JLSRI), private lawyers and University lecturers. The views of customary leaders or elders about the norms they use in the conflict resolution process, and an observation (ethnographic study) of the customary dispute adjudication processes was not conducted. The existence of multiple types of customary dispute resolution mechanisms in Ethiopia coupled with the short field work period makes it difficult to conduct interviews with customary leaders or elders, and to conduct ethnographic observation of the process of their adjudication. Hence, the interview data presented in this research paper may be considered as one sided reflecting only the views of persons from legal background.

1.9. Safety Valves

To reduce the possible bias, attempts are made to maintain a level of objectivity at all stages of the research. Additionally, in an attempt to rectify the failure to conduct interviews with the customary adjudicators or elders and to observe the process of their adjudication, ample research works on the mandates, role and mode of operation of customary dispute resolution mechanisms in Ethiopia are consulted.

CHAPTER TWO: METHODOLOGICAL FRAMEWORK

2.1. Qualitative Approach

Conventionally, there are two dominant approaches, also called `paradigms`, to social research: the qualitative and quantitative approaches. These approaches differ in their underlying philosophies – epistemology -²² and technical aspects - methods of data collection. Epistemologically, the quantitative approach is influenced by the natural science model of research and is rooted in the philosophy of positivism.²³ Positivists believe that scientific knowledge can be discovered through rigorous methods of experiments maintaining the requirements of objectivity and neutrality; and believes that these requirements of objectivity and neutrality are achieved by maintaining distance between researcher and subjects of the study.²⁴ On the contrary, qualitative approach has been influenced by an “epistemological position that rejects the appropriateness of a natural science approach to the study of humans” and their activities.²⁵ It is related to the interpretivist (constructionist) world view which assumes that “realities exist in the form of multiple constructions, the form and content of which depends on the persons who hold them.”²⁶ Qualitative approaches stress that social science should be concerned with the “interpretative” understanding of the people under study by closely listening and treating them as human beings with nugget of knowledge and experiences, instead of mere subjects of study.²⁷

Regarding the specific methods of data collection (technical level distinctions), quantitative research uses different social survey techniques such as structured interviewing and self-administered questionnaire, experiments, structured observation, the analysis of official statistics.²⁸

²² World Views, Paradigms, and the Practice of Social Science research, P. 10, available at: <http://www.sagepub.com/upm-data/13885_Chapter1.pdf>. Epistemology is concerned with “what and how we can know about reality, and what counts as valid knowledge” (see World Views, p. 10). While the traditional scientific method is based on an empirical epistemology which believes that we can know about the world through experiments; whereas constructionist epistemology views that knowledge is obtained in the experience and context of the researcher, and rejects the idea that research is “a way of coming to know what is objectively real” (see World views, p.10).

²³ Bryman, A. (2003), ‘Quantitative and Qualitative Research: Further Reflections on their Integration’, in *Mixing Methods: Qualitative and Quantitative Research*, Brannen J. (ed.), London, Ashgate, p.59.

²⁴ Introduction to Qualitative Research, Part One, P. 5, Available at: <[http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/9780632052844/001-025\[1\].pdf](http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/9780632052844/001-025[1].pdf)>.

²⁵ Bryman, A., 2003, Supra note 23, p.59

²⁶ World Views, Supra note 22, P.9.

²⁷ Introduction to Qualitative Research, Supra note 24, p. 7.

²⁸ Bryman, A., 2003, Supra note 23, p.58

The qualitative approach, on the other hand, employs participant observation, semi and unstructured interviewing, focus groups, and the qualitative examination of texts, among many others.²⁹ These data collection methods also have an impact on the flexibility of the two approaches: qualitative approach is regarded as flexible whereas quantitative approach is inflexible.³⁰ In quantitative methods such as surveys and structured questionnaires, researchers question same questions to all participants so as to make comparison easier; and the response of the participants are ‘close-ended’, yes or no type, which does not open forum for dialogue.³¹ On the other hand, qualitative methods are more flexible in that they give space for dialogue between the researcher and the participants; that they mostly use ‘open-ended’ questions which give a chance for participants to reply in their own words.³²

Because of the existence of such differences, there was a continuous debate about the superiority of quantitative versus qualitative approaches to research which is known as “paradigm wars”, a phrase “stemmed from the perception of qualitative and quantitative approaches as distinct and competing paradigms based on fundamentally different principles;” and implicating that the two approaches cannot be meaningfully combined.³³

In response to such ‘paradigm wars’, mixed method came to be recognized as a useful research approach during the 1980s.³⁴ Alan Bryman stated that “despite the existence of occasional debates and skirmishes about the incompatibility of qualitative and quantitative approaches, most researchers take a perception and view that qualitative and quantitative research can be meaningfully mixed.”³⁵ According to Bryman, most research questions could be thoroughly addressed by the combination of methods used in both approaches. In conducting a research using mixed methods, the qualitative methods help us to understand the objects studied in detail and a quantitative method helps us to quantify (convert to numbers and codes) the data to ease the analysis of qualitative data using computer software,³⁶ and to

²⁹ Ibid, p.59

³⁰ Mack, N. and et al (2005), *Qualitative Research Methods: A Data Collector's Field Guide*, Family Health International, North Carolina, p.3.

³¹ Ibid.

³² Ibid, p.4.

³³ Bryman, A. (2006), ‘Paradigm Peace and Implications for quality’, *International Journal of Social Research Methodology*, Vol. 9, No. 2, p.113.

³⁴ Rocco, T. and et al (2003), ‘Taking the Next Step: Mixed Methods Research in Organizational Systems’, *Information Technology, Learning, and Performance Journal*, Vol. 21, No. 1, p. 20.

³⁵ Bryman, A., 2006, Supra note 33, p.114.

³⁶ Bryman, A., 2003, Supra note 23, p.70.

achieve the necessary precision³⁷ which is said lacking in qualitative approach due to its character of “thick description.”³⁸

However, this does not mean that every piece of research must use both approaches in combination. The crucial arbiter for the selection of the appropriate methodological approach is the adequacy of particular methods for answering research questions or problems, i.e. what we are trying to find out determines the choice of methods to be used.³⁹

This research paper relies on the use of the qualitative approach. The research questions are found to be properly addressed by the qualitative approach. This paper tries to find out whether there is a space for the introduction and implementation of restorative justice in the Ethiopian criminal justice system; to explore the legal and factual mandates of customary dispute resolution mechanisms in resolving criminal disputes; to examine whether the Ethiopian customary dispute resolution mechanisms are compatible with the values and principles of restorative justice; and to examine the opportunities to implement restorative justice in the Ethiopian criminal justice system in the future. Hence, the concern of the qualitative approach on textual and documentary analysis, and its focus with meanings and the way people understand things makes it the most appropriate methodological approach to this research.

In line with this approach, I have used in-depth interviews as method of data collection for it helps me to explore the feelings and experiences of the people concerned in detail and help me to obtain detailed information. In particular, semi-structured in-depth interviews⁴⁰ were employed to explore the views of the selected informants on the issue.

Eleven informants from the members of the judiciary, staffs of Ministry of Justice and public prosecutors, staffs of Justice and Legal System Research Institute (JLSRI), and private lawyers and peace consultants were interviewed.

³⁷ Hammersley, M. (2003), ‘Deconstructing the Qualitative-Quantitative Divide’, in *Mixing Methods: Qualitative and Quantitative Research*, Brannen, J. (ed.), London, Ashgate, p.42.

³⁸ Geertz, C. (1973), *The Interpretation of Cultures: Selected Essays by Clifford Geertz*. New York: Basic Books.

³⁹ Creswell, J. (2003), *Research Design: Qualitative, Quantitative and Mixed Methods Approach* (2nd ed.). London: Sage Publications, p. 13.

⁴⁰ Kvale, S. and Brinkmann, S. (2009), *Interviews: Learning the Craft of Qualitative Research Interviewing* (2nd ed.). London: Sage Publications Ltd, p. 1. According to Kvale, S. and Brinkmann, S., semi-structured in-depth interviews are organized around a set of predetermined open-ended questions, with other questions emerging from the dialogue between interviewer and interviewees. Unlike the structured interview, semi-structured interview makes the interviewee more participant in meaning making.

Moreover, the in-depth interviews are accompanied by the method which involves the analysis and interpretation of different legal texts and documents pertinent to the issue under investigation. The analysis and interpretation of the relevant provisions of the FDRE Constitution, the Ethiopian Criminal Code, the Criminal procedure Code (both the old and the new draft), the draft Proclamation on Community Service, the Ethiopian Criminal Justice Policy, and other documents are conducted.

Nevertheless, a thorough understanding of the subject matter would have required a combined use of the qualitative and quantitative approach such as questionnaires. Questionnaires could have been used to survey the attitudes and perceptions of wide range of victims, offenders, and local communities about the role of customary dispute resolution mechanisms in resolving criminal disputes. If questionnaires were used in combination with the in-depth interviews and methods of qualitative analysis of legislative texts, variations about customary dispute resolution mechanisms operation and frequencies in utilizing those mechanisms in resolving criminal disputes could have been identified. Tables and figures would have also been used to analyze the data using numbers such as the number of criminal disputes resolved every year in different parts of Ethiopia using the customary dispute resolution mechanisms.

2.2. Reliability and Validity in Qualitative Research

David Silverman stated that “unless you show your audience the procedures you used to ensure that your methods were reliable and your conclusions are valid, there is little point in aiming to conclude a research dissertation.”⁴¹ Silverman makes a point that reliability and validity are essential components of an authentic research.

In qualitative research, reliability refers to the consistency and trustworthiness of research findings.⁴² To make the qualitative research more reliable, Moisander and Valtonen quoted in Silverman (2006) suggest that, the research process should be transparent in a sense that the approach, methods of data collection and analysis, and theories used in the research should be sufficiently described in relation to the objectives of the research.⁴³ Moreover, factors intervening to the interview setting and undermining the reliability of the interview data should be minimized; and the ethical issues of a research should be properly observed.

⁴¹ Silverman, D. (2005), *Doing Qualitative Research: A Practical Handbook* (2nd ed.). London: Sage Publications Ltd, p.209.

⁴² Kvale, S. and Brinkmann, S., 2009, *Supra note 40*, p.245

⁴³ Silverman, D. (2006), *Interpreting Qualitative Data: Methods for Analyzing, Talk, Text and Interaction* (3rd ed.). London: Sage Publications Ltd, p.282.

The research approach used in this thesis, how it is appropriate to answer the research questions, and the techniques of data collection are explained under section 2.1 above. The sampling technique and the type and number of participants interviewed, the advantages and possible challenges of my insider status; and the cautions taken to minimize the possible bias and to maximize the reliability of the interview data, are discussed below in more depth.

Validity, in qualitative research, on the other hand, refers to “truth” in a sense that “the extent to which the research findings accurately represents the social phenomena to which it attempted to investigate.”⁴⁴ It also refers to the extent to which the data collected by interview reflect the real feelings and expressions of interviewees. In qualitative research, the validity of the information from the interview can be tested using different methods such as triangulation.⁴⁵ Triangulation refers to “the attempt to get a `true` fix on a situation by combining different ways of looking at it or different findings.”⁴⁶ It helps us to compare data obtained from one method of data collection with other method, and see if they corroborate each other.⁴⁷ That is, data collected through an interview can be cross-checked against the data collected using questionnaire, focus group discussion, observation, books, articles and other documents.

In this thesis, the validity of the data collected by interview is examined in relation to other research works about the issue or related issues, and supported by the analysis of legislative and policy documents (see also section 2.6 on data analysis below).

However, it is worth noting that reliability and validity cannot be achieved accurately in any piece of research as the factors affecting validity and reliability cannot be fully avoided. This is especially true to qualitative research in general and insider research in particular, where the degree of subjectivity and possibility of bias are higher than quantitative researches.⁴⁸ Therefore, a researcher is expected to exert maximum efforts to minimize the possible factors affecting reliability and validity of the research, instead of attempting to avoid them all in all.

⁴⁴ Silverman, D., 2005, *Supra* note 41, p.210, quoting Hammersley, 1990, p. 57.

⁴⁵ *Ibid*, p. 212. The other possible way of testing validity is called respondent validation in which case the researcher will send the tentative results to his interviewees and refine it in light of the interviewees' reaction and comments. However, it is criticized as a flawed method because giving a decisive voice privileged status to the interviewees may not always be proper, and instead of, some argue, considering such feedback as a direct validation technique, it should be treated as another source of data (see Silverman, D., 2005, p.212). Moreover, respondent validation technique is most appropriate if it is easy to access informants frequently.

⁴⁶ *Ibid*, p.212

⁴⁷ Silverman, D., 2006, *Supra* note 43, p.290

⁴⁸ *Ibid*, p.282

2.3. Sampling Technique and Interview Data (Knowledge)

Kvale and Brinkmann asked: “If you want to know how people understand their world and their lives, why not talk with them?”⁴⁹ They indicate that interviews are proper methods to know about people’s opinion, feelings, and experiences with regard to a certain issue. However, interview requires the selection of appropriate informants (sample or subset of the population) for the study using the appropriate sampling methods. There are three most commonly used sampling methods in qualitative research: purposive sampling, quota sampling, and snowball sampling.⁵⁰

I have used purposive sampling technique to choose my informants. This technique helped me to select targeted or the “right” persons based on their experience, position and expertise in areas relevant to the study without not necessarily fixing the sample size in advance.⁵¹ I have chosen appropriate persons from the members of the judiciary, staffs of Ministry of Justice and public prosecutors, staffs of Justice and Legal System Research Institute (JLSRI), and private lawyers and peace consultants. I have used the respondents’ prior profile and academic work, and recommendations of their respective heads as their heads are presumed to have more opportunity and rapport to know their staffs’ profile.

Regarding the knowledge generated from the interview data, there are two dominant views: while some view it as a mine merely collected (data-mining conception), others view it as produced (co-constructed).⁵² In the former perspective, “knowledge is understood as buried metal and the interviewer is a miner who unearths the valuable metal.”⁵³ According to Kvale and Brinkmann, the knowledge is reserved deep inside the informants and the interviewer is expected to dig it carefully.⁵⁴ As Mats Alvesson stated “advocates of this view are eager to establish a context-free truth about what is really ‘out there’ by following a research protocol and gathering responses relevant to it, minimizing researcher influence and other source of bias.”⁵⁵ To that end, the interview will be “carefully planned and tightly structured.”⁵⁶

⁴⁹ Kvale, S. and Brinkmann, S., 2009, *Supra* note 40, p. 1

⁵⁰ Mack, N. and *et al*, 2005, *Supra* note 30, p.5. Quota sampling involves the determination of the number of informants (sampling size), in advance, during the designing stage based on certain criteria for each characteristics like age, place of residence, marital status, profession, race etc. The other type of sampling technique, snowballing also known as chain referral sampling, is often used to “find and recruit ‘hidden populations’, i.e, groups not easily accessible to researchers through other sampling strategies, using participants or informants with whom contact has already been established”(see Mack, N. and *et al*, 2005).

⁵¹ *Ibid*, p.5.

⁵² Kvale, S. and Brinkmann, S., 2009, *Supra* note 40, p.48.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ Alvesson, M. (2011), *Interpreting Interviews*. London: Sage Publications Ltd, p.11.

The latter perspective, on the other hand, views interview research as actively constructed in the interaction between interviewer and interviewee, instead of merely found or mined.⁵⁷ Advocates of this view emphasize on the importance of interactivity with and closeness to interviewees so as to obtain genuine data. They described a positivist thinking of avoiding involvement into a discussion or providing a personal suggestions during the interview process as an outdated technique, and instead they encourage the interviewer to “engage in an actual conversation with `give and take` and emphatic understanding.”⁵⁸ Fontana and Frey, as quoted in Alvesson, pointed out that interactivity with and closeness to interviewees minimize the danger that interviewees are guided by expectations of what the researcher wants to hear stating:

“interactivity with and closeness to interviewees makes the interview more honest, morally sound, and reliable because it treats the respondent as an equal, allows him or her to express personal feelings, and therefore presents a more `realistic` picture that can `t be uncovered using traditional interview methods.”⁵⁹

Interview data (knowledge) in this essay is treated in line with the “interview knowledge as produced” perspective. The main reason for this is the fact that I am an insider researcher which necessarily requires interaction with and closeness to my informants. As stated below in more depth, my insider status, due to shared characteristics, role and experience with my informants, made me interactive with and close to them. My informants were not also mere respondents of questions but were active participants who engaged in a hot discussion of the issue investigated which in turn helped me to obtain detail data about the issue at hand.

2.4. The Benefits of Being an Insider Researcher and the Issue of Objectivity

In qualitative methods such as in-depth interviews and participant observation the relationship between the researcher and the area or subjects of the study become a point of discussion and debate. There has been continuous debate regarding whether the researcher should be an

⁵⁶ Ibid, p.11

⁵⁷ Kvale, S. and Brinkmann, S., 2009, Supra note 40, p.54.

⁵⁸ Alvesson, M., 2011, Supra note 55, p. 14

⁵⁹ Ibid, p. 14. This thinking resembles to `romanticism` perspective of interviews which requires the researcher to create a more “genuine human interaction, rapport, trust and commitment with the interviewee thereby turning the interview into a `warm` situation.” Mats Alvesson argues that the “researcher`s intervention can transform the interview subjects `from a repository of opinions and reasons or a wellspring of emotions into a productive source of knowledge` by empowering the interviewee to freely express him\herself and produce open, rich and trust worthy talks”(see Alvesson, M., 2011, p.14).

insider,⁶⁰ sharing the characteristic, role, or experience of the participants; or an outsider sharing no commonality with them.

Proponents of the insider position claim that being an insider researcher is advantageous in many respects as insider status enables researchers to be easily and rapidly accepted by their participants;⁶¹ that it makes participants more open to researchers because there is an assumption of commonality;⁶² that it reduces power asymmetry and counter-control behavior of informants⁶³ which inherently exists in qualitative research; and that it increases the depth of the data collected, among many other advantages.

On the contrary, proponents of outsider research claims that interviewing from outside is more beneficial because participants may explain insider information to an outsider more genuinely.⁶⁴ In some circumstances, insider status may be an impediment to obtain the required data as “cultural norms and taboos may make it difficult for insiders to raise certain issues.”⁶⁵ Marliz Rabe noted that “an outsider could have access to better information than the insider because he\she does not need to adhere to the norms of the community.”⁶⁶

60 Dwyer, Sonya C. and Buckle, Jennifer L. (2009), ‘The Space Between: on being an insider-outsider in Qualitative research’, *International Journal of Qualitative Methods*, Vol. 8, No.1, p. 58. Insider research also known as native research refers to the situation when “researchers conduct research with the area and/or populations of which they are also members so that the researcher shares an identity, language, and experiential base with the study participants” (See Kanuha quoted in Dwyer and Buckle, *The space between: on being an insider-outsider in Qualitative research*, cited above). Jodie Taylor understood insider research beyond the normal friendship established in the field in the due course of the study (i.e. informant friendship) and she preferred to use the term “intimate insider”. Taylor described intimate insider research as: “a situation where the researcher is working at the deepest level, within their own ‘backyard’; that is, a contemporary cultural space with which the researcher has regular and ongoing contact; where the researcher’s personal relationships are deeply embedded in the field; where one’s quotidian interactions and performances of identity are made visible; where the researcher has been and remains a key social actor within the field and thus becomes engaged in a process of self-interpretation to some degree; and where the researcher is privy to undocumented historical knowledge of the people and cultural phenomenon being studied.” (See Taylor J., ‘Intimate Insider: Negotiating the Ethics of Friendship when Doing Insider Research’, *Qualitative Research*, Vol.11, No. 1, 2011, p. 9).

61 Ibid.

62 Ibid. Dwyer and Buckle describes this benefit of being an insider as: “one has a starting point (the commonality) that affords access into groups that might otherwise be closed to outsiders. Participants might be more willing to share their experiences because there is an assumption of understanding and shared distinctiveness; it is as if they feel, ‘You are one of us and it is ‘us’ versus ‘them’, those on the outside who don’t understand” (see Dwyer, Sonya C. and Buckle, Jennifer L., 2009, p. 58).

63 Kvale, S. and Brinkmann, S., 2009, *Supra note 40*, p. 33-34. Research work particularly qualitative interview involves a power asymmetry between the researcher (interviewer) and the informants. It is the interviewer who initiates and defines the interview setting, decides the interview topic and prepares interview questions; and also has a monopoly to transcribe, interpret and report the informants’ replies. On the other hand, in reaction to the dominance of the interviewer, interviewees may show a counter-control behavior such as that they may withhold information, talk around the subject matter, and may protest to the interviewer’s questions. Therefore, being an insider researcher helps to reduce such types of power asymmetry and counter-control behaviors of the interview situation by creating a “dominance-free zone of interaction” (See Kvale S. and Brinkmann S., p. 33-34 cited above).

64 Kanuha, Valli K. (2000), ‘Being Native versus Going Native: Conducting Social Work Research as an Insider’, *Social Work*, Vol. 45, No.5, p.444.

65 Rabe, M. (2003), ‘Revisiting Insiders and Outsiders as Social Researchers’, *African Sociological Review*, Vol. 7, No. 2, p.157.

66 Ibid.

The proponents of outsider perspective further argue that “being a member of the group under study is neither necessary nor sufficient to being able to ‘know’ the experience of that group; that sometimes not being a member of the group can better facilitate the knowing of the group because those external to the experience might be able to appreciate the wider perspective than one also internal to the experience.”⁶⁷ It means that being an outsider may enable the researcher to see things with “new eyes” which insider researchers may be unable to see or may take for granted.⁶⁸

The insider-outsider dichotomy debate also relates to epistemological roots of insider and outsider perspectives. Insider research arises from constructivism and romanticism epistemologies.⁶⁹ These epistemologies “view the research processes and products as ‘co-constructions’ between the researcher and the participants in the research; regard the research participants as active ‘informants’ to the research; and attempt to give ‘voice’ to the informants within the research domain.”⁷⁰ Hence, according to these epistemologies, the researcher is encouraged to conduct research maintaining close contact with his\her participants. On the other hand, the outsider research perspective arises from positivist epistemology which believes that scientific knowledge can be acquired through rigorous experiments by maintaining distance between researcher and those studied.⁷¹

In short, the insider-outsider dichotomy debate suggests that the researcher should occupy either an “insider” or “outsider” position (either\or position) so as to conduct an authentic research.

However, some scholars argue against the insider-outsider dichotomy claiming that it is not possible to locate researchers as an exclusive “insider” or “outsider” in social research. Marlez Rabe observes that “the status of a social researcher as ‘outsider’ and ‘insider’ is neither static nor one-dimensional, and therefore to be an insider and outsider is a fluid status.”⁷² In a similar vein, Taylor argues that “one can never assume totality in the researchers’ position as either an insider or as an outsider given that the boundaries of such

67 Dwyer, Sonya C. and Buckle, Jennifer L., 2009, Supra note 64, p. 58

68 Rabe, M., 2003, Supra note 65, p.157

69 Breen, Luran J. (2007), ‘The Researcher in the Middle: Negotiating the Insider\Outsider Dichotomy’, The Australian Community Psychologist, Vol. 11, No.1, p. 164.

70 Ibid.

71 Introduction to Qualitative Research, Supra note 24, p.5.

72 Rabe, M., 2003, Supra note 65, p.150

positions are always permeable.”⁷³ Further, David Hellowell writes that “there may be some elements of insiderness on some dimensions of the research and some elements of outsidersness on other dimension”⁷⁴ giving a simple example that a young woman interviewing an older woman has an element of insiderness on the gender dimension, but also possesses the element of outsidersness on the age dimension.⁷⁵ Therefore, Marlize Rabe suggests that “references to outsider and insider should not be taken in any absolute sense; instead these concepts should be understood as operating on a continuum, and a particular researcher should shift between a different roles associated with being an insider and outsider, or at times simultaneously acting both as an insider and outsider.”⁷⁶ As a result, some scholars have introduced the notion of “the space between” or “the researcher in the middle” as an alternative approach to being an exclusive insider or outsider researcher. This notion is based on the idea that “holding membership in a group does not denote complete sameness within that group; and likewise, not being a member of a group does not denote complete difference.”⁷⁷ Some researchers like Kanuha developed “strategies for researching at the hyphen of insider-outsider” where “insider and outsider status are understood as a binary of two separate preexisting entities which can be bridged or brought together to conjoin with a hyphen and in which the hyphen can be viewed as a dwelling place for researchers.”⁷⁸ Therefore, this notion allows the researcher to occupy the space between, the position of both the insider and outsider than insider or outsider.

Considering the above views, I would argue that there is no hard and fast rule which dictates the researcher to hold an exclusive `insider` or `outsider` status, or `middle positions`. Again, there is no fixed rule of thumb to say being an “insider” researcher is beneficial or risky. It all depends on the type of research and problems to be addressed (the sensitivity nature of the issue), the nature or personality of the researcher and the participants; and the researchers ability to utilize the benefits and managing the possible disadvantages associated with holding an insider status.

⁷³ Taylor, J. (2011), `Intimate Insider: Negotiating the Ethics of Friendship when Doing Insider Research`, *Qualitative Research*, Vol.11, No. 1, p. 6.

⁷⁴ Hellowell, D. (2006), `Inside-Out: Analysis of the Insider-Outsider Concept as a Heuristic Device to Develop Reflexivity in Students Doing Qualitative Research`, *Teaching in Higher Education*, Vol. 11, No. 4, p. 490.

⁷⁵ Ibid, p. 490

⁷⁶ Rabe, M., 2003, Supra note 65, p.150

⁷⁷ Dwyer, Sonya C. and Buckle, Jennifer L., 2009, Supra note 60, p. 60

⁷⁸ Ibid.

In this specific research work, I consider myself as an insider researcher. I have conducted qualitative in-depth interviews with eleven male Ethiopian legal professionals, some of whom are my former class mates and colleagues, who were selected based on purposive sampling technique. I have also collected different legislative documents pertinent to the issue under study and I have used a legal method to interpret them. Therefore, the fact that the study relates to legal issues (restorative justice); that I am a young Ethiopian who knows the culture and language of the study area; that I am legal professional who knows the different techniques of legislative interpretation, and who used to teach the Ethiopian Criminal law and other law courses in different higher educational institutions in Ethiopia coupled with the above characteristics of my informants make me consider myself as an insider to the research.

My position as an insider researcher was an advantage and a help in collecting the required data. Unlike the case for researcher who does not occupy the position of an ‘insider’, the recruitment of informants was not a problem for me as it was not much difficult to establish trust and rapport with them. My familiarity also helped me not to face the problem of gate keeping which is normal and common in many Ethiopian offices. I was able to easily access my informants without the gate keepers asking me to clarify why and on what issues I want to conduct the interview.⁷⁹ It also helped me to have smooth and prolonged period of interview due to common understanding of the legal jargons and sense of intimacy which sometimes is accompanied by talks outside the issue of the study or surrounding to it which one is only privy to as a result of intimate contact. Being an insider, I was able to access some official documents which otherwise are not open to outsiders, in particular, draft laws which are at the stage of initiation or discussion. I was also invited to participate in a national regional states justice organs forum on restorative justice organized by Justice for All and Prison Fellowship Ethiopia.⁸⁰ The fact that I am a legal professional made me eligible to participate in the national forum in which only legal professional from different regions of Ethiopia can participate. This invitation by one of my informants was also a clear example that showed me how my informants were concerned to my research. Therefore, despite the above debates

⁷⁹ It is not easy to have access to informants of the like I interviewed in many of Ethiopian offices without passing through routine procedures. Firstly, the interviewer should submit the letter of introduction from the institution hosting his\her study to the head of the office and get a written approval of permission to conduct interviews. Second, he\she is required to clarify on what issues he\she wants to conduct an interview to the get keeper (i.e. secretaries in Ethiopian case) before contacting the person to be interviewed. Even after all these, the researcher may be told that the person whom he\she wants to interview is not in the office, busy or is not willing to be interviewed.

⁸⁰ Justice for All and Prison Fellowship Ethiopia is a local NGO established in 1992 and is performing different advocacy works for the improvement of the justice administration system of the Country. It is specifically conducting different activities relating to previous law reform, and adoption of new laws to fill the gaps in the existing laws, among many other activities.

about the pros and cons of researching from the inside, being an insider has been a benefit to my specific field work experience as I wouldn't be able to collect this much data in this short field work time had I not possessed an insider status.

Though these are some of the benefits I have acquired as an insider researcher, I do not wish to suggest that my insider position is entirely problem-free. While doing the research, issues related to the potential for data distortion and my lack of objectivity have worried me.

Objectivity can be understood as the researcher's freedom from bias. According to Kvale, S. and Brinkmann, S., objectivity refers to "reliable knowledge undistorted by personal bias and prejudice which can be systematically cross-checked and verified."⁸¹ The issue of objectivity is also an ethical requirement which requires the researcher not to impose his/her own bias on the issue under investigation.

The question of the researcher's objectivity is particularly crucial when the researcher is an insider in which he/she has a direct involvement in the process: i.e. the possibility of bias becomes more evident in insider research. Taylor argues that:

*"Insiderness coupled with intimate knowledge of and an emotional attachment to one's informants makes objectivity incredibly difficult and leaves very little room for analytic distance, because an 'intimate insider' has a strong personal investment in the field as he/she comes to know his/her field in the deepest and most familiar of ways."*⁸²

The other reason relates to the fact that the term 'objectivity' is mostly associated with positivist epistemology which view reality as an "external objective phenomenon, existing independently of human consciousness" and which require the researcher to be an outsider so as to capture and accurately represent an objective truth.⁸³ Hence, positivists may argue that, because of the researcher's involvement and familiarity in insider research, the researcher in insider research is not objective and the outcomes are not accurate.

⁸¹ Kvale, S. and Brinkmann, S., 2009, Supra note 40, p.242.

⁸² Taylor, J., 2011, Supra note 73, p. 15.

⁸³ Rooney, P. (2005), 'Researching From the Inside: Does it Compromise Validity?', a Discussion, Level 3, Issue 3, p.4, available at: <<http://arrow.dit.ie/cgi/viewcontent.cgi?article=1004&context=ltcart>>.

However, new epistemological models, such as constructivism and romanticism, contrast with the previous positivist model. These epistemological perspectives believe that “truths or meanings do not exist independently; and instead of uncovering an ‘objective truth’, we create truth or meaning through engaging with realities in our world.”⁸⁴

These epistemological perspectives brought new perceptions regarding the role of the researcher and the notion of objectivity. Scholars claim that objectivity in the positivist sense (complete objectivity) is impossible arguing that “when carrying out research we inevitably draw from our social, cultural and historical background at all stages of the research process.”⁸⁵ Hence, they suggest that researchers are expected to conduct a research in a systematic manner by minimizing the impact of their possible biases.⁸⁶ Hence, according to Hammersley, “minimizing the impact of researcher’s biases on the research process, conducting research in consciousness of his\her socially situated character and to make the researcher's position vis-à-vis the research process transparent” are important activities researchers are expected to do in order to maintain the level objectivity.⁸⁷

In my research, as having an insider status, there was a tendency that my insider and tacit knowledge creates possible insider blindness, i.e I sometimes used to make assumptions and tend to take replies for granted.

There was also a tendency to lead my informants in a direction I want. However, prior awareness of my position as an insider researcher made me cautious and careful not to take replies for granted and not to lead my informants in a way I need thereby minimize, if not totally eliminate, the potential for bias. I also tried to manage the problem of objectivity following the strategy used by Bennett to minimize bias and to maintain the level objectivity in insider research. Bennett, as quoted in Taylor, proposes a “strategy of the necessary ‘unlearning’, or at least the objectification of those ‘taken for granted’ attitudes.”⁸⁸ As Taylor rightly states, unlearning the familiar is “a difficult, but not impossible, process which requires practice.”⁸⁹

⁸⁴ Ibid.

⁸⁵ Ibid, p. 4, quoting Hammersley 2000.

⁸⁶ Ibid, p. 5, quoting Hammersley and Gomm 1997.

⁸⁷ Ibid, quoting Hammersley, 2000.

⁸⁸ Taylor, J., 2011, Supra note 73, p.16

⁸⁹ Ibid.

Self-critique, due to prior awareness of my insider status, has enabled me to maintain some distance from and “unlearn” my own tacit and insider knowledge, which otherwise would have lead me to take replies for granted. This strategy enabled me to see inward to myself and to emphasize on the issue of study. I also took the necessary precaution during the analysis of my data so as to minimize the possible bias.

2.5. Ethical Issues in Interview

Ethical problems in interview research arise due to the difficulties of “researching private lives and placing accounts in the public arena”⁹⁰; as well as due to the asymmetrical power relations between interviewer and participants.⁹¹ Ethical issues exist at any stage of the research process and should be addressed from the beginning to the final reporting. During the designing stage of the project, ethical issues involve securing the participants` informed consent, maintaining their confidentiality, and considering the possible consequences⁹² of the study.⁹³ At the transcription stage, it involves maintaining the confidentiality of the interviewees, and addressing the question whether a “transcribed text is loyal to the interviewee`s oral statement”.⁹⁴ The confidentiality and anonymity of interviewees during reporting the findings of the research should also be considered.⁹⁵ Hence, observing the ethical requirements of a research is an important and integral part of proper research.

Accordingly, I have submitted my project proposal to the ethical review board (Norwegian Social Science Data Service) before going for field work and have secured their comments. The Data Protection Official confirmed that the project does not involve serious ethical issues on the grounds that this project does not involve establishing a manual personal data filing system which contains sensitive personal data.

During the field work, before the interviews were started, the free and informed consent of the informants to participate was obtained and my background and objectives of the interview were explained. I have explained to my informants that they are selected for the interview

⁹⁰ Kvale, S. and Brinkmann S., 2009, *Supra* note 40, p. 62, quoting Brich et al, 2002.

⁹¹ *Ibid*, p.76.

⁹² *Ibid*, p.73. The consequences of the study are determined by balancing the possible risks to the participants with the benefits expected from their participation in the study. According to Kvale, S. and Brinkmann, S., the possible risk to the participants should be the least possible, or the “sum of potential benefits to a participant and the importance of the knowledge gained from the study should outweigh the possible risk to the participants” in order to safely conduct the research (see Kvale, S. and Brinkmann, S., p. 73). Thus, the researcher is ethically required to make sure that the possible risks to the participants are minimal, or less than the expected benefits of the study before deciding to carry out the study.

⁹³ *Ibid*, p. 63

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

because they are the “right” persons to and have expertise knowledge about the issue. My informants were also told that their confidentiality and anonymity will be maintained in a way that any information acquired from them will be kept in secret and will not be disclosed for purposes other than the objective of the study, and that their identity will not be disclosed unless they consented to that effect.

However, the study is neither politically sensitive nor does it involve sensitive personal data. Besides, the issue of the study is Ethiopian Government`s current area of interest in which the government is also working and encourages further study on the area; and the selected informants occupy key government positions and are conducting some studies on issues related to such initiatives. Therefore, the confidentiality and anonymity of informants was not as such an issue. Instead the informants want to be credited for their time and valuable information with their full name. Hence, they fully consented to the disclosure of the information and their profile in the analysis and reporting of the research, if necessary.

2.6. Analyzing Interview Data

As stated above under section 2.2, triangulation enables us to verify the authenticity and accuracy of the data obtained through interview by comparing and contrasting it with the data obtained from other sources.

The interview data of this thesis is analyzed using triangulation as a technique for it helps to test the accuracy of my respondents’ views. This is mainly done by making references to the available legislative and policy documents pertinent to the issue under investigation, and other research works and relevant materials about the issue or related issues.

CHAPTER THREE: THEORETICAL FRAMEWORK

3.1. Theories on Restorative Justice

3.1.1. What is Restorative Justice?

There is no consistent and universally accepted definition for restorative justice partly due to the growing nature of the field. Some restorative justice scholars even question the need to define restorative justice arguing that defining it might limit the concept to a particular context, or limits its responsiveness to local needs, and they opt to leave it undefined to give space for it to further flourish.⁹⁶ On the contrary, failure to define it may have a danger that the concept of restorative justice may be applied to practices that are not, in fact, restorative.⁹⁷ This possible danger of misusing the concept leads scholars to provide their own working definitions in their writings. While some scholars, in their working definition, describe restorative justice in terms of its core values and principles,⁹⁸ some others have resorted to defining it negatively in terms of what restorative justice is not by comparing it with criminal justice system.⁹⁹ The latter approach is based on the assumption that restorative justice is better understood relative to criminal justice system as comparison helps to see what it shares with and differs from the criminal justice system.¹⁰⁰ Some of the commonly used working definitions of restorative justice are provided below.

Tony Marshal 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.”*¹⁰¹

Howard Zehr has refined Marshal`s definition as:

*“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.”*¹⁰²

⁹⁶ Sharpe, S. (2010), `How Large Should the Restorative Justice “Tent” be?`, in *Critical Issues in Restorative Justice*, Zehr, H. and Toews, B. (ed.). Lynne Rienner Publishers, p.18.

⁹⁷ Tshela, B. (2004), `The Restorative Justice Bug Bites the South African Criminal Justice System`, *SA Journal of Criminal Justice*, Vol. 17, No.1, p. 11.

⁹⁸ Van Ness, D. (2005), `An Overview of Restorative Justice Around the World`, a Paper presented in the 11th UN Congress on Crime Prevention and Criminal Justice Workshop, Bangkok, p. 4.

⁹⁹ Schmid, D.J. (2002), `Restorative Justice: a New Paradigm for Criminal Justice Policy`, *VUWLR*, Vol.34, p.93.

¹⁰⁰ Llewellyn, J.J. and Howse, R. (1998), `Restorative Justice: a Conceptual Framework`, a Paper prepared for the Law Commission of Canada, p.15.

¹⁰¹ Marshal, Tony F. (1999), `Restorative Justice: an Overview`, A Report by the Home Office Research Development and Statistics Directorate, p.5.

The most comprehensive working definition of restorative justice was provided by Robert Cormier which goes:

*“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.”*¹⁰³

All of the above working definitions, though they differ in their forms of expressions, contain a common notion of participating all 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.

Generally, there is no single and an all-encompassing definition to be used by all, other than the diversity of working definitions and descriptions provided by different scholars, for restorative justice. The lack of an all-encompassing definition to restorative justice may be the result of “the failure of scholars to produce an underlying theory to explain and justify the diversified restorative justice practices.”¹⁰⁴ The development of wide range of restorative justice programs and practices in the recent years makes providing a single definition and theory of restorative justice difficult.

3.1.2. The Rationales and Key Principles of Restorative Justice

Restorative justice views crime and the responses to it in a way different from the formal Criminal Justice System. It is a way of looking at crime and justice through a different lens, “restorative lens”, as alternative and complementary to the criminal justice system for the latter fails to meet the needs of the victims, offenders, and the community at large.¹⁰⁵ Nils Christie observes that the formal criminal justice system, with professional lawyers and judges playing a dominant role in the process, tends to exclude the “legitimate owners of the

¹⁰² Zehr, H. (2002), *The Little Book of Restorative Justice*, Good Books, Intercourse, p. 40.

¹⁰³ Cormier, R, Restorative Justice: Directions and Principles-Developments in Canada, available at:<http://scholar.google.no/scholar?hl=en&q=Restorative+justice%2C+directions+and+principles%2C+developments+in+Canada&btnG=&as_sdt=1%2C5&as_sdt=>>.

¹⁰⁴ Schmid, D.J., 2002, Supra note 99, p.93

¹⁰⁵ Zehr, H., 2005, Supra note 4, p. 184

conflict”, namely the victim, the offender, their families and the community members, from playing any meaningful role in the justice process.¹⁰⁶

The criminal justice system marginalizes and puts the victims of a crime into the periphery making them mere footnotes in the process.¹⁰⁷ Zehr stated:

*“If victims involve in their case at all, it will likely be as witnesses if and only if the state needs them as witnesses. The offender has taken power from them and now, instead of returning power for them, the criminal law system also denies them power.”*¹⁰⁸

That is, a victim of a crime is “a sort of double loser, first, vis-a-vis the offender, and secondly being denied rights to full participation in the criminal justice ritual.”¹⁰⁹ Additionally, whatever may be the outcome of the case in the criminal court, the victim does not get any significant benefit to mitigate his\her victimization; nothing helps the victim to restore and repair the damage caused to him\her by the crime.¹¹⁰

The criminal justice system does not work for offenders either as it does not encourage them to be accountable, to understand the consequences of their wrongful action, and to assume responsibility to right the wrong.¹¹¹ The criminal justice system, which bases itself in the “just desert” theory of justice, emphasizes on determining guilt through adversarial contest between legal professionals representing the state and the offender, and punishing the latter for his\her wrongdoing.¹¹² It aims to incapacitate the offender both as retribution for the current crime and as a strategy to avoid possible future crimes through the imposition of punishment. Hence, it fails to make the offender feel responsible, sincerely accept his\her wrong, and be determined to undo it.

The criminal justice process also assumes monopoly over the justice system and excludes the wider community from participation claiming that the public is represented by the public

¹⁰⁶ Christie N., 1977, Supra note 2, p.4.

¹⁰⁷ Zehr, H., 1985, Supra note 1, p.1.

¹⁰⁸ Ibid.

¹⁰⁹ Christie N., 1977, Supra note 2, p.3

¹¹⁰ This is because the state court simply punishes the offender either by death, imprisonment, by fine or other forms of monetary punishments, which goes to the government treasury and not to the victim, depending on the gravity of the crime. That is, there is no\little, through separate civil claim, possibility to compensate the victims of the crime.

¹¹¹ Zehr, H., 1985, Supra note 1, p.2.

¹¹² Ibid.

prosecutor. It ignores the fact that the family members of the victim and the offender, and other community members are all secondary victims who, directly or indirectly, have a stake to the crime.¹¹³

In response to such limitations of the criminal justice system and with a view to rectify them, restorative justice is advocated as an alternative way of thinking about crime and justice. In other words, the rationale for the emergence and advocacy of restorative justice is to compliment the criminal justice system so as to rectify the limitations associated with it.

Restorative Justice, as its foundational premises, views criminal conflict as a violation of a relationship among victims, offenders and community instead of putting a state as a sole victim;¹¹⁴ and the “property” of those involved.¹¹⁵ Christie argues that the conflict, which is the property, should be restored to their “legitimate owners” who should be involved in determining the harm and repairing it.¹¹⁶

In line with such fundamental premise, and to “put right” or “heal”¹¹⁷ the wrong, and to restore the broken relationship in the community, restorative justice is guided by some key principles, sometimes also called values.¹¹⁸ These principles of restorative justice are discussed below.

The First Principle of restorative justice is that it aims to *restore and reintegrate the parties* into the community by focusing on and addressing harms and needs of the stakeholders of the crime.¹¹⁹ Since restorative justice views crime as a harm done to parties and communities rather than putting the state as a sole victim,¹²⁰ it tries to identify the injuries and needs of victims, offenders and communities and addresses them positively. It addresses the physical harm and material loss the primary victims may have sustained. Similarly, restorative justice

¹¹³ McCold, P., 1995, Supra note 13, p. 2.

¹¹⁴ Zehr, H., 2005, Supra note 4, P. 181.

¹¹⁵ Christie N., 1977, Supra note 2, p. 7.

¹¹⁶ Ibid.

¹¹⁷ Zehr, H., 2005, Supra note 4, p.186. According to Zehr, healing the victim does not imply that “he\ she should forget the violation, but instead it means a sense of recovery, or a degree of closure.” Similarly, while healing of the offender involves making him\her accountable and responsible for his actions, healing of the community implies returning the communities’ sense of wholeness which was disturbed by the crime (see Zehr, H., 2005, p.4).

¹¹⁸ The terms “values” and “principles” are mostly used interchangeably by many authors of restorative justice, though some other scholars distinguish values from principles; see for example Zehr, H., the little book of restorative justice, p.38.

¹¹⁹ Zehr, H., 2005, Supra note 4, p.182.

¹²⁰ Ibid. Howard Zehr, while recognizing the public dimension of crime, argues that crime is first an offense against people and their relationship, and that should be the starting point to deal with it instead of considering the state as a primary victim of a crime.

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 victimization;¹²¹ or *resulting injuries* which are “caused by the crime itself or its aftermath.”¹²² Especially, the resulting injuries may be caused by the “criminal justice system’s response as it stigmatizes and alienates the offender from the community and family relationships.”¹²³ Hence, restorative justice, through family care and community support, aims at healing the injuries of offenders thereby facilitating their reintegration into the community.

Moreover, communities, both “communities of care” and “communities of place”¹²⁴ are injured by the crime in a way that the “sense of safety, order, and wholeness in the community is threatened; and common values of the community are violated.”¹²⁵ Restorative Justice, thus, enables the community to reinforce community values, and restore the safety and order in the community by recognizing their role in the justice process.

Hence, restorative justice is ultimately concerned about the *restoration of victims and reintegration of offenders* into the community, as well as maintaining the well-being of the community by addressing their respective harms and needs.

Second, restorative justice is concerned in making *amends* or *repairs* to the harms resulted from the crime by imposing obligations on the offender and the communities.¹²⁶ 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 *restitution* in which the offender returns the property of the victim or makes financial payments, or performance of community services so as to recompense the primary victim and the community at large respectively.¹²⁷ It may also be *symbolic* which involves making apology by the offender and showing sincere remorse in a way that he\she acknowledges his wrongful

¹²¹ Van Ness, D. and Strong, K.H. (2010), *Restoring Justice: An Introduction to Restorative Justice* (4th ed.), Anderson Publishing, p.45.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ McCold P. (2010), ‘What is the Role of the Community in Restorative Justice Theory and Practice?’, in *Critical Issues in Restorative Justice*, Zehr H. and Toews B. (ed.), Lynne Rienner Publishers Inc., p.156. McCold uses the terms “micro-communities” or “primary stakeholders” to refer to “communities of care” which comprises 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 “secondary stakeholders” in lieu of “communities of place” to refer to a group of persons defined by geography or membership instead of emotional connections or personal relationships with the victim or the offender which may include neighbors and residential communities(see McCold P., 2010, p.156).

¹²⁵ Van Ness, D. and Strong, K.H., 2010, Supra note 121, p.44

¹²⁶ Zehr, H., 2002, Supra note 101, p. 33.

¹²⁷ Van Ness, D. and Strong, K.H., 2010, Supra note 121, p.87

acts.¹²⁸ In this connection, restorative justice also imposes obligations on communities to extend support and encouragement to the offender so as to enable him\her carry out his\her obligations to make amends.¹²⁹

The Third Principle of restorative justice is that it *involves the legitimate stakeholders* 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.”¹³⁰ Van Ness and Strong, on the other hand, uses 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 to determine the final outcome.¹³¹ Encounter, on the other hand, means that victims are given a chance to physically meet the offender in a safe environment to discuss about the crime, harms and the appropriate responses to it.¹³²

The involvement of stakeholders in the process is a manifestation of their *empowerment*. Restorative justice processes empower the victims. Wenzel, M. and et al argue that crimes, at least symbolically, imply an offender’s “usurpation of power and status, and the disempowerment and degradation of victim.”¹³³ They further argue that offenders, while committing a crime, “take advantage of their victims, put themselves above others and assume a position of superiority; disrespect victims and their rights, express low regard for them who therefore feel humiliated and disempowered,” which symbolically implies status\power relations.¹³⁴

In a restorative justice process, offenders are mostly required to admit their wrong doings, to show remorse, and to offer an apology and ask for forgiveness.¹³⁵ According to Wenzel, M. and et al, the offenders’ admission of wrongdoing indicates that “their appropriation of power

¹²⁸ Schmid, D.J., 2002, Supra note 99, p.96

¹²⁹ Zehr, H., 2002, Supra note 102, p. 28

¹³⁰ Ibid, p. 22

¹³¹ Van Ness, D. and Strong, K.H., 2010, Supra note 121, p.119

¹³² Ibid, p. 49, 65. The principle of encounter does not, however, deny the possibility for indirect mediation also called “shuttle diplomacy” where the victim and offender do not meet face to face instead information is passed by the mediator between them in certain circumstances (See Bradt, L. and Bouverne-De Bie M. (2009), ‘Victim-Offender Mediation as a Social Work Practice’, *International Social Work*, Vol. 52, No. 2, p.183; and Van Ness and Strong, *Restoring Justice*, p.66).

¹³³ Wenzel, M. and et al, 2008, Supra note 6, p. 380.

¹³⁴ Ibid.

¹³⁵ Ibid, p. 382.

was illegitimate; their concession that they owe the victims an apology amounts to an acknowledgment of their rights and an expression of respect for them” thereby restoring the power\status relation.¹³⁶ Some scholars further argue that “the offenders’ request for forgiveness subjects them to the victims’ will to grant the same; and by granting forgiveness, victims can assert a moral superiority, and their ‘magnanimity’ emphasizes the offender’s ‘inferiority’” thereby restoring the power\status relation.¹³⁷ Restorative justice practices, therefore, may *empower* the victim by allowing their participation, and by giving them a chance to suggest ways of resolving the crime and addressing the harm as McCold plausibly stated 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.”¹³⁸

Similarly, restorative justice may empower the offender by giving him\her the chance to involve in the process, in the discussion with the victim, and other members of the community; and in the determination of his own punishment. According to punishment as “communication” perspective, punishment should be a two-way communication, not a one-way directive aimed at a passive offender.¹³⁹ Hence, restorative justice processes empower the offender instead of making him\her a passive receiver of the unilateral decision imposed by the court. Moreover, the participation of the communities in restorative justice is also a sign of their empowerment. It enables them to identify and address the root cause of the crime so as to prevent the commission of further crimes for the saying goes “no one knows better than the community the root causes of a crime committed within a community.”¹⁴⁰ It also helps them to stop the professional lawyers and judges from “stealing the conflict”, and to “own their conflict” and its resolution.¹⁴¹ Therefore, the principle of engagement, in addition to giving victims and offenders a bigger role in the process, recognizes the community as victims of the crime and their role in the justice making process.¹⁴²

¹³⁶ Ibid.

¹³⁷ Ibid, p. 381, quoting Heider, F. (1985), *The Psychology of Interpersonal Relations*, New York: Wiley.

¹³⁸ McCold P., 2010, *Supra* note 124, p.168.

¹³⁹ Duff, R.A. (1992), ‘Alternative to Punishment or Alternative Punishments?’, in *Retributivism and Its Critics*, Cragg W. (ed.), Franz Steiner Verlag Stuttgart, p.151.

¹⁴⁰ Zehr, H., 2002, *Supra* note 102, p. 28.

¹⁴¹ Christie N., 1977, *Supra* note 2, p.4.

¹⁴² Zehr, H., 2002, *Supra* note 101, p.25-26. However, there are controversies about what constitutes the community. Zehr stated that, for the sake of RJ processes, community refers to micro-communities which consists of “communities of care”; as well as communities of place (i.e. people who live nearby and interact with each other) that are directly affected by an offense.

Further, the participation of those who care about the offender and the victim in the process is a necessary condition to effectively communicate shame to the offender thereby reintegrating him\her into the law abiding communities, as discussed in section 3.2 below.

Generally, the involvement of the legitimate stakeholders in the process is an important principle of restorative justice which empowers and gives them a chance to freely express their feelings and determine the appropriate outcomes to it.

Fourth, 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.¹⁴³ The voluntary participation of the victim and\or the offender also includes their freedom to withdraw such consent at any time during the process.¹⁴⁴ This freedom given to the parties to freely decide whether to participate in the process or to withdraw in the mean time is an important feature of restorative justice.

The Fifth Principle of restorative justice is that it envisions a *collaborative sanctioning process* in dealing with the crime.¹⁴⁵ 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 emphasizes on processes that are flexible, collaborative and inclusive; and outcomes that are mutually agreed upon rather than externally imposed.¹⁴⁶ This collaborative process may help the parties to discover the whole truth about the wrong doing including the causes, harms, community values, and their future relationships.¹⁴⁷ Restorative justice, in a deliberative and 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.¹⁴⁸

¹⁴³ Luna, E. (2003), ‘Punishment Theory, Holism, and the Procedural Conception of Restorative Justice’, *Utha Law Review*, Vol. 205, No.1, p.291.

¹⁴⁴ Basic Principles on the Use of Restorative Justice Programs in Criminal Matters, Economic and Social Council Resolution, E\2002\INF\2\Add.2, 2002, Art. 7.

¹⁴⁵ Schmid, D.J., 2002, Supra note 99, p.96.

¹⁴⁶ Zehr, H., 2002, Supra note 102, p.24.

¹⁴⁷ Van Ness, D. (2002), ‘Creating Restorative Systems,’ in *Restorative Justice and the Law*, Walgrave L. (ed.), Willam Publishing, p. 134-135.

¹⁴⁸ Zehr, H., 2005, Supra note 4, p.191.

The above guiding principles of restorative justice amplify the fact that restorative justice emphasizes on the importance of the role of crime victims, the offender and community members through their active participation in the justice process; making offenders directly accountable to the victim and communities they have harmed; restoring the material losses of victims; and providing opportunities for discussion and negotiation which may lead to community safety, societal harmony, and sustainable peace for all.

In Ethiopia, the customary dispute resolution mechanisms are run by community elders who well know the norms and customs of the community; and give opportunities for the “legitimate owners of the conflict”, namely the victim, offender, their families and the community, to discuss about the matter, the compensation to be paid to the victim, and their future relationship. After the decision is reached, the offender asks for an apology kneeling on the ground, and the restoration of their prior relationships is symbolized through instruments of “reintegrative” rituals, as discussed in chapter five in more depth. Hence, the customary dispute resolution mechanisms in Ethiopia are in line with the values or principles of restorative justice except the fact that they are not well organized restorative justice programs and are not given full legal recognition for their functioning (see below, in chapter five).

3.1.3. Restorative Justice: Its Relations with the Criminal Justice System

As stated in the above section, the rationale for the emergence and advocacy of restorative justice is to rectify the limitations associated with the criminal justice system. Nonetheless, it is by no means a substitute to the criminal justice system. It is rather an alternative approach which aims to compliment the criminal justice system so as to remedy its shortcomings. Different reasons can be mentioned why restorative justice cannot be a substitute for criminal justice system.

The first reason relates to the *voluntary nature* of restorative justice processes. According to the UN principles on the use of restorative justice in criminal matters, restorative justice processes can only take place when the victim of the crime freely agrees to participate in the process and without feeling coerced to do so.¹⁴⁹ Similarly, participation in a restorative justice process requires the consent of the offender and his\her admission of guilt, showing remorse and acceptance of responsibility for his\her actions as the fact finding phase of the criminal

¹⁴⁹ Basic Principles, Supra note 144, Art.7.

justice system does not exist in restorative justice processes.¹⁵⁰ Therefore, if either the victim or the offender or both refuses participation, for any reason, restorative justice processes will have no application and the case necessarily should go to the criminal justice system.

The second reason which shows that restorative justice cannot substitute the criminal justice system relates to the *shortcomings of restorative justice* itself. First, restorative justice processes may be inappropriate for some types of crimes. As shown below in the discussion of restorative justice models, restorative justice processes mainly target minor types of crimes like property offense, and crimes which are not punishable for longer years of imprisonment.¹⁵¹ Using restorative justice processes in cases of serious crimes is argumentative as victims and the public may not be willing to engage in the processes. It is argued that many victims of serious crimes, like torture, sexual assault, attempted murder and other forms of human rights violations do not want to use restorative justice processes, as having any contact with the offender may cause a sense of renewed trauma and re-victimization.¹⁵² In other words, the more serious the crime is, the less receptive the victims may become to encounter the offender.¹⁵³ According to Gaudreault, in case of serious crimes, many victims may prefer “a healing process and measures that will help distance them from the offender instead of meeting him\her face to face.”¹⁵⁴ Therefore, such types of serious crimes must undergo the retributive justice process which shows the necessity of the criminal justice system. However, it does not mean that the door is totally closed and that restorative justice processes do not apply to serious and violent crimes. It can be used after a good victim support activities are arranged by families or others. There are also instances in which restorative justice processes were utilized to crimes of serious human rights violation (atrocities) by countries in transition under the topic of transitional justice, such as the case of the truth and reconciliation commission of South Africa.

The second limitation of restorative justice processes which necessitates the criminal justice system is its inappropriateness for some types of offenders. Most of the time, as shown below from the restorative justice models, restorative justice processes focus on young-first time

¹⁵⁰ Nylund, A. (2011), ‘Restorative Justice and Victim-Offender Mediation in Norway’, in *Cross Border Law in the North*, Part 1, p.281.

¹⁵¹ Schmid, D.J., 2002, *Supra* note 99, p.104.

¹⁵² Gaudreault, A. (2005), ‘The Limits of Restorative Justice’, Paper published in the Proceedings of the Symposium of the École nationale de la Magistrature, Paris: Édition Dalloz, P.8, available at: <http://www.victimweek.gc.ca/pub/pdfs/restorative_justice.pdf>.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

offenders and may not be suitable for *recidivists* and dangerous criminals. Recidivists are offenders who commit crimes repeatedly¹⁵⁵ and as a result their participation in restorative justice processes may not bring good outcomes as they may not show real remorse and assume accountability. Hence, such types of offenders may not be suitable persons to engage in restorative justice processes amplifying the necessity of the criminal justice system.

Moreover, there are also crimes which do not have a specific individual victim such as tax evasion and counter fitting of currency in which case the application of restorative justice processes may not be sound.

In short, due to these and other possible reasons, restorative justice and criminal justice system are not mutually exclusive to each other and restorative justice processes cannot completely replace the criminal justice system; instead they are meant to compliment the dominant criminal justice system.

3.1.4. Models of Restorative Justice

In line with the above values and principles, different restorative justice models, also called restorative justice programs or processes,¹⁵⁶ or encounter programs,¹⁵⁷ are developed around the world. The UN Economic and Social Council's resolution of the basic principles on the use of restorative justice programs in criminal matters defines restorative justice processes 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."¹⁵⁸ These programs do not exhibit uniform structure and form. This is because the "essence of restorative justice is not the adoption of one form or process; rather it is the adoption of any form or process which reflects restorative values, and which aims to achieve restorative objectives and outcomes."¹⁵⁹

¹⁵⁵ Criminal Code of the FDRE, Supra note 7, Art. 188.

¹⁵⁶ Basic Principles, Supra note 144.

¹⁵⁷ Van Ness, D. and Strong K.H., 2010, Supra note 121, p. 66.

¹⁵⁸ Basic Principles, Supra note 144, paragraph 2.

¹⁵⁹ Mousourakis, G., *Restorative Justice Conferencing in New Zealand: Theoretical Foundations and Practical Implications*, p. 46, available at: <<http://www.kansai-u.ac.jp/ILS/PDF/nomos27-04.pdf>>. The UN Economic and Social Council's resolution of the basic principles on the use of restorative justice programs in criminal matters defines restorative outcomes as "an agreement reached as a result of a restorative processes, such as reparation, restitution and community service, which aims at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender" (See Basic Principles on the use of RJ in criminal matters, cited above, paragraph 3).

Hence, depending on the choice of the parties, types of conflict, and resources, different restorative justice programs are functioning in different countries. However, the well known models of restorative justice, which are considered to be the ‘hallmarks of restorative justice processes’, are: Victim-Offender Mediation (VOM), Family Group Conferencing (FGC), and Sentencing Circles (SC).¹⁶⁰

3.1.4.1. 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. The mediation process of criminal conflicts is known as Victim–Offender Mediation,¹⁶¹ also sometimes known as Victim–Offender Reconciliation.¹⁶²

Umbreit 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 behavior while providing important assistance and compensation to the victim.*¹⁶³

The VOM programs consist of four phases.¹⁶⁴ The first phase is case referral and intake where cases are referred to the Victim-Offender Mediation by the police, prosecutors, or judges in the form of diversion before prosecution, 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 serving as a condition of probation or mitigation of penalties.¹⁶⁵ The second phase is preparation for mediation where the mediator first meet with each party separately before bringing them together in order to “listen to their story of what happened, to explain the program, to invite their participation, and prepare them for the meeting.”¹⁶⁶ The mediator`s

¹⁶⁰ Van Ness, D., Morris, A. and Maxwell, G. (2001), ‘Introducing Restorative Justice’, in *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Morris, A. and Maxwell, G. (eds.), Hart Publishing, p.6.

¹⁶¹ Umbreit, MS. (2009), ‘Victim-Offender Mediation in Canada: the Impact of an Emerging Social Work Intervention’, *International Social Work*, Vol. 42, No. 2, p.216. Victim-Offender Mediation is different from civil case related mediation like divorce or commercial disputes whose aim is mainly to compromise the disputants and reach to a settlement. Victim–Offender Mediation, on the other hand, is primarily ‘dialogue-driven’ which focuses on healing the victim, restoring the losses, making the offender accountable and reintegrating him back to the society (see Umbreit, 2009, p. 216).

¹⁶² *Ibid*, p.217. Van Ness and Strong argue that the term Victim-Offender Mediation (VOM) is frequently in use and preferred over Victim-Offender Reconciliation (VOR) because the term reconciliation mainly refers to the outcome instead of the process, and it may also imply a duty on the part of the victims to reconcile with their offenders (see Van Ness and Strong, *Restoring Justice*, p.67).

¹⁶³ *Ibid*, p.215.

¹⁶⁴ *Ibid*, p.217.

¹⁶⁵ *Ibid*, p.216.

¹⁶⁶ *Ibid*, p.217.

separate advance meeting with the parties enables him to get information about the crime, to establish rapport, and to know the behavior of both parties ahead of time.¹⁶⁷ The third phase is the mediation phase, the heart of the mediation process, which involves the joint victim-offender meeting, and focuses on the discussion about the particulars of the crime and hearing of the parties' feelings.¹⁶⁸ It is the "story telling" stage in which the parties are given an opportunity to speak about their version of the events.¹⁶⁹ The victim is able to let the offender know how the crime affected him/her, to receive answers to questions he/she may have, and to directly participate in determining a proper form of punishment to the offender; and the offender is able to know the full impact of his/her action, to take direct responsibility for his/her behavior and express remorse, and to participate in the determination of a plan for making amends.¹⁷⁰

Bradt and M. Bouverne-De Bie states that these phases of victim-offender mediation do not exist in case of indirect mediation, also called "shuttle diplomacy", where the victim and offender do not meet face to face instead the mediator carries information back and forth between them.¹⁷¹ This indirect mediation may be a proper process for some sensitive and serious cases though a face to face mediation is a rule as it has "high potential for mutual understanding of the parties."¹⁷²

The third stage of Victim-Offender Mediation usually culminate in the parties reaching an agreement to restore losses incurred in the form of the offender's punishment, and how and in what modality he/she can repair the harm caused by his/her wrong.¹⁷³ Finally, the follow-up phase involves the follow up and enforcement of any negotiated reparation agreement by the mediator or the court, and intervening if another conflict arises between the parties in the mean time.¹⁷⁴

¹⁶⁷ McCold P. (2001), 'Primary Restorative Justice Practices', in *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Morris, A. and Maxwell, G. (eds.), Hart Publishing, p.44.

¹⁶⁸ Umbreit, MS., 2009, Supra note 161, p.217

¹⁶⁹ Van Ness, D. and Strong K.H., 2010, Supra note 121, p.67.

¹⁷⁰ Ibid, p.67

¹⁷¹ Bradt, L. and Bouverne-De Bie M. (2009), 'Victim-Offender Mediation as a Social Work Practice', *International Social Work*, Vol. 52, No. 2, p.183.

¹⁷² Roberts, A.W. (2010), 'Is Restorative Justice Tied to Specific Models of Practice', in *Critical Issues in Restorative Justice*, Zehr, H. and Toews, B. (ed.), Lynne Rienner Publishers Inc., p.242.

¹⁷³ Van Ness, D. and Strong K.H., 2010, Supra note 121, p.67. The modalities of reparation are determined by the mutual agreement of the parties, and mostly take the form of financial restitution, in-kind service, or other forms of reparation provided by the parties.

¹⁷⁴ McCold P., 2001, Supra note 124, p.41.

VOM programs are criticized of having application, as shown in the above definition, only to young offenders and property or minor offences. However, as a reaction to this criticism, VOM for adult offenders and cases involving serious offence are developed in different countries on the belief that “a restorative approach could never be fully realized as long as its application continued to be limited to certain offenders and certain phases within the criminal justice system.”¹⁷⁵ The Norwegian restorative justice approach, the Norwegian Mediation Service (NMS), which consists of both Victim-Offender Mediation (VOM) and Family Group Conferencing (FGC), is one example which is working with juvenile and adults alike.¹⁷⁶

In sum, VOM programs seek to empower the participants to resolve their conflicts by their own in a fertile environment. Unlike the structured court system, it allows victims to confront the offender, express their feelings, ask questions, and have a direct role in determining the punishment; and allows offenders to take responsibility for their actions which is manifested in their expression of remorse and their commitment to make amends to the victim.

3.1.4.2. Family Group Conferencing (FGC)

Family Group Conferencing is conceptually an extension of the 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.¹⁷⁷

The practice of FGC is first developed in New Zealand, though it is subsequently adapted in Australia and is being used in different countries in its various forms,¹⁷⁸ based on the traditional family conference of the Maori people with the passing of the *Children, Young Persons and their Families Act of 1989* (CYPFA) that recognized its use for young offenders in the form of diversion;¹⁷⁹ and allows the participation of victims, offenders, community members, and other criminal justice professionals in the process.¹⁸⁰

¹⁷⁵ Bradt, L. and Bouverne-De Bie M., 2009, Supra note 171, p.185

¹⁷⁶ Hydle, Ida (2008), 'From Local Trial Projects to State Owned Services: Empirical Research on Restorative Justice in Norway', *CPS working papers*, No. 11, p.107. Hydle stated that the FGC in the Norwegian Mediation Service focuses on civil cases instead of criminal matters.

¹⁷⁷ Mousourakis, G., Supra note 159, p.43.

¹⁷⁸ Schmid, D.J., 2002, Supra note 99, p.106. The Australian model of FGC is similar to that of the New Zealand model except that it is coordinated and facilitated by police officers instead of a youth coordinator (see Van Ness and Strong, *restoring justice*, p.68, cited above).

¹⁷⁹ Mousourakis, G., Supra note 159, p.50. This Act makes New Zealand the first state which provides a separate legal framework for restorative justice though some commentators criticized the legislation as an “attempt to maintain professional supremacy rather than devolving responsibility for the local communities”, for it allows the criminal justice professionals to involve in the process (see V. Jantzi, *what is the role of the state in Restorative Justice?*, in *critical issues in Restorative Justice*, H. Zehr and B. Toews (ed.), Lynne Rienner Publishers Inc., 2010, p.191; Masters, G., *What happens when RJ is encouraged, enabled and/or guided by legislation?*, in *critical issues in RJ*, p.230).

¹⁸⁰ *ibid.*

FGC involves different stages similar to the VOM. Firstly, a youth justice coordinator or facilitator arranges the conference after consulting the victim's and young person's families following a case referral by the police, public prosecutor or the Youth Court before the charge, after a charge but before admission of guilt, or after the finding of guilt respectively.¹⁸¹ Then the youth justice coordinator opens the conference by introducing those present and explaining the procedure; the police supply the conference participants with detailed information regarding the alleged crime; the young offender explain about what happened and makes admission of his wrong;¹⁸² the victim is invited to speak about the personal impact of the criminal act and to ask questions directly to the offender; and then all the participants discuss the young person's behavior and share their views about how to solve the matter.¹⁸³ Finally, after a full plenum discussion is conducted as to how to repair the harm caused, the young offender and his family will discuss privately to suggest a plan and will rejoin the full conference and present their recommendations, and a discussion continue with the whole participants until a decision is reached.¹⁸⁴ The decision or recommendation imposed on the offender in the form of punishment may include performance of 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.¹⁸⁵ After an agreement has been reached, the youth justice coordinator will prepare a written record of the decisions and recommendations agreed and a copy of a decision will be given to the youth court for approval.¹⁸⁶ The young offender is required to adhere with the decisions of FGC and his\her families assume 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.¹⁸⁷

In recent years, similar to VOM, the application of the FGC is extended from only young offenders to adult offenders in many countries on the condition that there is a direct victim and the crime is not grave in nature.¹⁸⁸

¹⁸¹ Ibid, p. 51.

¹⁸² Schmid, D.J., 2002, Supra note 99, p. 101. The young person's admission of the crime is a requirement to use FGC. However, no pressure, coercion and inducement should be exerted on the young person to admit an offence as it is clearly condemned by the UNESCO resolution of basic principles on the use of RJ programs in criminal matters, paragraph 13 (c).

¹⁸³ Van Ness, D. and Strong K.H., 2010, Supra note 121, p.69.

¹⁸⁴ Schmid, D.J., 2002, Supra note 99, p.102.

¹⁸⁵ Mousourakis, G., Supra note 159, p.53.

¹⁸⁶ Schmid, D.J., 2002, Supra note 99, p.102.

¹⁸⁷ Mousourakis, G., Supra note 159, p.55.

¹⁸⁸ Schmid, D.J., 2002, Supra note 99, p.104.

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 though there is suspicion that other involved professionals may dominate the decision making process and may limit the “legitimate owners” of the conflict from playing a central role.

3.1.4.3. Sentencing Circles (SC)

Sentencing circle is derived from aboriginal peacemaking practices in Canada.¹⁸⁹ 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.¹⁹⁰ It is an alternative approach in which the judge receives sentence opinion from the community in lieu of receiving formal sentencing submission from the public prosecutor and the offender or his/her defense attorney.¹⁹¹ The very purpose is to reach at a constructive outcome or punishment which better meets the needs of the victim and the community at large, and which could make the offender responsible than a mere incarceration.

The first stage of the process involves introduction of the participants in the circle, reading of the charge, and opening remarks by the prosecutor and the defense lawyer.¹⁹² Then the community members speak and discuss the matter.¹⁹³ The discussion, however, is not exclusively on sentencing plan of the offender as may be literally understood from its name; instead they discuss beyond the current crime including the extent, causes and impacts of similar crimes on victims and the community at large, and about what should be done to prevent similar crimes in the future.¹⁹⁴ Finally, 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.¹⁹⁵

The community problem solving dimension is the most important aspect of sentencing circles as it gives more emphasis on community involvement with many community members

¹⁸⁹ Van Ness, D. and Strong K.H., 2010, Supra note 121, p.69.

¹⁹⁰ Canadian Resource Center for Victims of Crime (2011), ‘Restorative Justice in Canada: What Victims Should Know’, P. 5, available at: <<http://www.crcvc.ca/docs/restjust.pdf>>.

¹⁹¹ Lilles, H. (2001), ‘Circle Sentencing: Part of Restorative Justice Continuum’, in *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Morris A. and Maxwell G. (eds.), Hart Publishing, P.162.

¹⁹² Schmid, D.J., 2002, Supra note 99, p.108.

¹⁹³ Van Ness, D. and Strong K.H., 2010, Supra note 121, p.70.

¹⁹⁴ Lilles, H., 2001, Supra note 191, P.163.

¹⁹⁵ Van Ness, D. and Strong K.H., 2010, Supra note 121, p.70.

attending, an important aspect for reintegrative shaming to happen.¹⁹⁶ It is used for both young and adult offenders, and for crimes of not minor nature as the process is long which requires patience and commitment from all participants.¹⁹⁷ Therefore, sentencing circles provides victim, their families and the community at large an opportunity to express themselves, address the offender, and to take part in developing and implementing a plan relating to the offender's sentence.

3.1.5. The Place of Punishment in RJ Models and their Position in RJ Continuum

From the above discussion about the models of restorative justice, two points are worth mentioning. First, the places of punishment in restorative justice models; and second the position of restorative justice programs in the continuum of restorative justice.

Punishment is still part of restorative justice practices despite the critics that restorative justice is a “soft option” chosen to avoid punishment. Restorative justice processes aim to get the offender recognize his\her wrong doing; to be shamed by his\her community of care; to show remorse and make apology; and to assume commitments to repair the harm in order to concretize the apology.¹⁹⁸ According to Duff, these acts of encountering the victim, shaming by communities of care, repentant recognition of the wrong, and taking burdensome reparative commitments are “punitive processes which constitute a punishment to the offender.”¹⁹⁹ In other words, these are “restorative punishments”,²⁰⁰ which are meaningful and are imposed with a purpose to achieve restoration and healing.²⁰¹ Moreover, unlike the criminal punishments which make the offender passive receiver of a unilateral punishment imposed by the judge, restorative justice's punishments are “communicative”²⁰² in a sense that the offender is a participant in the determination of his\her own punishment.²⁰³

The above restorative justice models, though considered as the main restorative justice programs, are not also equally restorative. These programs fall at different levels in the

¹⁹⁶ Zehr, H., 2004, *Supra* note 4, p.260.

¹⁹⁷ Lilles, H., 2001, *Supra* note 191, P.163.

¹⁹⁸ Duff, R. A. (2002), 'Restorative Punishment and Punitive Restoration', in *Restorative Justice and the Law*, Walgrave, L. (ed.), Willam Publishing, p, 94. Duff argues that the apology made by the offender should not be mere verbal expression; instead it should be strengthened through some form of reparation to the victim, undertaking some service to the victim or the community, or pledging to enter a rehabilitative program which will avoid the factors that trigger the offender to commit a wrong.

¹⁹⁹ *Ibid*, p. 96

²⁰⁰ Zehr, H., 2005, *Supra* note 4, p.210

²⁰¹ *Ibid*, p.210; Duff, R. A., 2002, *Supra* note 198, p. 82

²⁰² Duff, R.A., 1992, *Supra* note 139, p. 51.

²⁰³ *Ibid*.

“continuum of restorative justice.”²⁰⁴ According to the continuum of restorative justice, a particular process or program is not necessarily required to possess all the values and principles of restorative justice to qualify as restorative justice process. It is enough for those values to exist partially within the two ends of the continuum so that it will be assessed to be less or more restorative.²⁰⁵ Though the degree of restorativeness of restorative justice practices can be tested against the general Values and Principles of Restorative Justice (RVPT), scholars also propose some specific criteria. Howard Zehr provides some specific questions that must be answered in assessing the degree of restorativeness of restorative justice programs. These specific questions provided by Zehr include:²⁰⁶ does it address harms, needs, and causes?; is it victim oriented?; are offenders encouraged to take responsibility?; are all the stake holders - victims, offenders, and communities of care - involved?; is there an opportunity for dialogue and participatory decision making?; is it respectful of all parties?²⁰⁷

Hence, a particular restorative justice process can be evaluated either as fully, mostly, partly, or non restorative depending on how that practice answers the above guiding questions examined in a case by case basis even though there is no uniform and fixed standard of measurement. Thus, the restorative justice models described above may fall either at the fully or mostly restorative part of the continuum according to these guidelines.

The Ethiopian customary dispute resolution mechanisms, as highlighted above and as will be discussed in chapter five in more depth, run by community elders, involve and provide opportunities for the victim, offender, their family members, and the communities to discuss about the matter, the compensation to be paid to the victim, and culminates with reconciliatory celebration or feast in an aim to ceremoniously reintegrating the deviant party into the community, and avoiding vengeance by the victim and his\her families. Therefore, these practices, no doubt, are compatible with the values and principles of restorative justice and lie somewhere within the continuum of restorative justice with different degrees of restorativeness.

²⁰⁴ Zehr, H., 2002, *Supra* note 102, p. 54-58; Van Ness, D., 2002, *Supra* note 147, p. 131. The “continuum of restorative justice” is a concept which allows restorative justice processes or programs to be evaluated as fully, mostly, partly, or non restorative based on Restorative Justice Values and Principles Test (RVPT). The continuum is important to avoid an improper dichotomization that a practice is either restorative, embracing all values and principles, or not restorative in which all values and principles of restorative justice are absent (see Van Ness, D., 2002, p. 131).

²⁰⁵ Van Ness, D., 2002, *Supra* note 146, p. 131.

²⁰⁶ Zehr, H., 2002, *Supra* note 102, p. 56

²⁰⁷ *Ibid.*

3.2. The Theory of Reintegrative Shaming

The theory of reintegrative shaming explains why restorative justice processes might be successful in reintegrating the offender into his\her community.

John Braithwaite defined shaming as “all social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and \or condemnation by others who become aware of the shaming.”²⁰⁸ From psychological point of view shame is described as “a feeling generated by the actual or imagined negative response of others to our behavior.”²⁰⁹ Therefore, shaming can be either disintegrative or reintegrative shaming.

Disintegrative shaming is stigmatizing shaming in which the offender is tagged as a criminal and is physically or symbolically separated from his community as no effort is made to reconcile him\her with them.²¹⁰ Stigmatization, Braithwaite argues, is the most important factor that pushes individuals to criminal subcultures as it outcasts offenders.²¹¹

Maxwell and Morris also observed that stigmatic shaming produces feelings of “humiliation, desire for revenge, and increases the likelihood of subsequent deviant behavior instead of feelings of guilt and remorse.”²¹²

The formal criminal justice system is often related to the disintegrative shaming as many of its rituals indicate the separation of the offender from the community.²¹³ The facts of the offender’s placement in the dock during trial, and in a separate cell after sentencing are manifestations of stigmatic nature of the formal criminal justice system. The shame communicated by the judge in the court leads to “unacknowledged shame”²¹⁴ which may cause “irrational aggression”²¹⁵ on the part of the offender and eventually leads to

²⁰⁸ Braithwaite, J., 1989, Supra note 3, p.100.

²⁰⁹ Maxwell, G. and Morris, A. (2010), ‘What is the Place of Shame in Restorative Justice?’, in *Critical Issues in Restorative Justice*, Zehr, H. and Toews, B. (ed.), Lynne Rienner Publishers Inc., p.135.

²¹⁰ Braithwaite, J., 1989, Supra note 3, p.55.

²¹¹ Ibid, pp. 67, 101. Braithwaite defines sub-cultures as “groups which provide various types of systematic social support for criminal behaviors such as supplying members with criminal opportunities, values and attitudes which weaken conventional values of law abidingness, or techniques of neutralizing conventional values”(see Braithwaite, J., 1989, p.101).

²¹² Maxwell, G. and Morris, A., 2010, Supra note 209, p.142.

²¹³ Braithwaite, J. and Mugford, S. (1994), ‘Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders’, *British Journal of Criminology*, Vol. 34, No.2, p.142.

²¹⁴ Scheff, T.J. and Retzinger, S.M.(1997), ‘Helen Block Lewis on Shame: Appreciation and Critic’, in *The Widening Scope of Shame*, Lansky, Melvin R. and Morrison, Andrew P. (eds.), London, The Analytic Press, p.145.

²¹⁵ Ibid.

disconnection from his\her social bonds.²¹⁶ Donald L. Nathanson, in his compass of shame, suggests that when “unacknowledged” shame is triggered the offender may engage in one or more of the four patterns of behavior: withdrawal, attack of self, avoidance, or attack of others, in defense against the experience of such shame.²¹⁷ Therefore, the shame produced by the formal criminal justice system is stigmatic in nature.

Reintegrative shaming, on the other hand, involves the community disapproval of wrong doing accompanied by 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.”²¹⁸ It is shaming with respect in a sense that the shaming relates to the offender`s wrongful act and not to his\her real personality.²¹⁹

The related concepts of *interdependency*, i.e. the extent in which individuals are dependent to each other to achieve their respective needs, and *communitarianism* are the necessary conditions for effective reintegrative shaming.²²⁰ Individuals are more likely to be shamed by other individuals if they are in different webs of relationships.²²¹

Moreover, interdependent societies are more likely to be communitarian. However, mere interdependency does not imply communitarianism. According to Braithwaite, societies are to be considered as communitarian: individuals must be in interdependencies which show special qualities of mutual help and trust; that group interests prevail over individual interests; and that interdependencies entail collective responsibility to monitor their community members for their adherence to community values.²²² Unlike individualistic cultures²²³ which pass the responsibility of crime control to the state, communitarian societies emphasize on shaming by “communities of care” instead of an impersonal state.²²⁴ In these types of

²¹⁶ Ibid.

²¹⁷ Nathanson, D.L. (1997), ‘Shame and the Affect Theory of Silvan Tomkins’, in *The Widening Scope of Shame*, Lansky Melvin R. and Morrison Andrew P. (eds.), London, The Analytic Press, p. 134.

²¹⁸ Braithwaite, J., 1989, *Supra* note 3, pp. 55,100,101.

²¹⁹ Luna, E., 2003, *Supra* note 143, p.231.

²²⁰ Braithwaite, J., 1989, *Supra* note 3, p. 89

²²¹ Ibid.

²²² Ibid, pp. 85, 100

²²³ Ibid, p. 86. John Braithwaite argues that the ideology of individualism affects the social control and sanctioning capacities of families and communities, and as a result individualistic cultures have no or little option to deal with crimes than delivering the responsibility for crime control to the state.

²²⁴ Ibid, pp. 86-87.

societies community members assume an obligation to shaming a particular offender and then supporting him\her to remain part of the law-abiding communities.²²⁵

John Braithwaite further argues that reintegrative shaming is superior to stigmatization as it minimizes risks of pushing those shamed into “criminal sub-cultures.”²²⁶ Maxwell and Morris, on the other hand, are critical of such conclusion of Braithwaite. They argue that “the intent of the shamer cannot necessarily determine the effects on the shamed” in a sense that the shaming intended, by the shamer, to be reintegrative might be viewed or internalized by the offender as stigmatic.²²⁷ They suggest that the shaming must be “right” and should be carefully designed in a way to have a reintegrative effect.

In order to make the shaming “right” and have reintegrative effect, it must be conducted by those people whose disapproval has a greatest impact and whom the offender respects such as his\her families, elders or close supporters, rather than by criminal justice professionals, as Braithwaite observes that the shame which matters most is not “the shame of remote judge or police officer, but the shame of the people who cares most about the offender” and vice versa.²²⁸ This is because shaming by the people who cares for the offender and whom the offender respects is more curative in a sense that the offender is forgiven and is still accepted by his\her communities, and they are by his\her side to provide him\her support to start life afresh.²²⁹ Moreover, cultural rituals of apology and forgiveness are important instruments for ending stigmatization and play a great role to make the shaming process “right” and reintegrative.²³⁰ The rituals may make the offender to internalize the shaming positively and reintegratively as intended by the shamers, namely families, close friends, and the community members.

Therefore, shaming is an important element of effective restorative justice process. Restorative justice involves the dialogue between victims, offenders, their respective families, and the community, and creates a fertile condition for shaming and makes shaming of the offender inevitable.²³¹ Braithwaite observes that restorative justice is the “most important

²²⁵ Luna, E., 2003, *Supra* note 143, p.231.

²²⁶ Braithwaite, J., 1989, *Supra* note 3, p.68

²²⁷ Maxwell, G. and Morris, A., 2010, *Supra* note 209, p.136

²²⁸ Braithwaite, J., 1989, *Supra* note 3, p. 87.

²²⁹ *Ibid.*

²³⁰ *Ibid.*, p.55.

²³¹ Maxwell, G. and Morris, A., 2010, *Supra* note 209, p. 133.

crime prevention implication of the theory of reintegrative shaming as families, close friends, and indigenous communities, instead of the state criminal justice professionals, are the primary sites of restorative justice.”²³² The presence and support of those who care most for the victim and the offender, and their discussion of the consequences of the wrong makes it difficult to avoid shame in restorative justice processes.²³³ However, their support and care after the shaming process, and the cultural rituals that follow also help to reintegrate the offender into his\her communities.

As highlighted in the above section and as discussed in chapter five in more depth, the customary dispute resolution mechanisms in Ethiopia involve and provide opportunities for the victim, offender, their family members, and community elders to discuss about the matter, the compensation to be paid to the victim, and culminates in a compromise in which there is neither winner nor loser. The resolution of the conflict is also symbolized through instruments of “reintegrative” rituals though these rituals vary from region to region depending on a particular customary practice.²³⁴ These customary rituals aim at restoring the prior relationship between the parties, ceremoniously reintegrating the deviant party into the community, and avoiding the cultural practices of revenge by the victim and his\her families.

Moreover, Ethiopian societies, especially in the countryside, are characterized as *communitarian*. This is because individuals are interdependent to each other through different social ties such as religion and clan system in which the whole family or clan members are subject to revenge, and are responsible for the crime if any of their clan members commits a crime.²³⁵ Hence, individuals have collective responsibility to monitor their clan members for their compliance to the community values, and in resolving the conflict after the crime is committed. Similarly, most Ethiopians live in a small, tightly crowded community sharing the scarce resources to ensure their continued mutual existence; and that they give high respect to elders and religious fathers which are important elements of communitarian society (see Chapter five).

²³² Braithwaite, J. (2000), ‘Shame and Criminal Justice’, *Canadian Journal of Criminology*, Vol. 42, No. 3, p.294.

²³³ Ibid.

²³⁴ Jembere, A. (1998), *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*. Rotterdam: Erasmus University, p. 40.

²³⁵ Talachew, G. and Habtewold, S. (2008), ‘Customary Dispute Resolution in Afar Society’, in *Grass-Roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, Pankhurst, A. and Assefa, G. (ed.), Centre Francais d’Etudes Ethiopiennes, Addis Ababa, p. 94.

Therefore, the customary dispute resolution mechanisms of Ethiopia have higher reintegrative shaming capacity as Ethiopian communities are highly interdependent, and as the customary dispute resolution mechanisms involve those people whose disapproval has a greatest impact and whom the offender respects, namely elders, religious fathers, and their community members.

3.3. Legal Pluralism

Legal pluralism refers to the existence of more than one distinct set of laws or legal orders within a particular country as opposed to the ideology of “legal centralism.”²³⁶ The ideology of “legal centralism” 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.”²³⁷ Legal pluralism, on the other hand, recognizes the existence and functioning of both the state law and customary laws within a particular country. Woodman 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.”*²³⁸

Woodman`s definition of legal pluralism particularly emphasizes on the relationship between “customary law and state law which arises out of a conflict of claims for legitimacy.”²³⁹ He further identifies two types of legal pluralism: Deep legal pluralism and State law legal pluralism.²⁴⁰

Deep legal pluralism refers to the situation in which state law coexisted with customary law.²⁴¹ This type of legal pluralism arises when a colonial master imposes state law which was different from the pre-existing customary law, while at the same time recognizing its separate existence.²⁴² Sally E. Marry argues that, though deep legal pluralism is more visible to “colonial societies in which an imperialist nation, equipped with a centralized and codified legal system, imposes this system on societies with far different customary laws”, it also

²³⁶ Griffiths, J. (1986), ‘What is Legal Pluralism?’, *Journal of Legal Pluralism*, Vol. 24, p.1-3.

²³⁷ Ibid, p.1-3.

²³⁸ Woodman, G. R. (1996), ‘Legal Pluralism and the Search for Justice’, *Journal of African Law*, Vol. 40, No. 2, p.157.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid, p.158.

exists in non colonized states.²⁴³ Hence, deep legal pluralism emphasizes on the recognition of customary laws and institutions as a separate form of legal systems. However, deep legal pluralism can also exist in the absence of state law's recognition to customary laws. It can exist in fact, which is called *factual, or de facto legal pluralism*, without formal recognition by the state laws in which case the customary laws continue to function side by side with modern state laws regardless of its rejection by the formal state law.²⁴⁴

Ethiopia exhibits unique deep legal pluralism in that it is not derived by colonialism, as Ethiopia was not colonized by any western nation, but by the fact of legal transplantation process. Ethiopia involved in a massive legal transplantation activities in the 1960s. The Ethiopian legal importation, which was triggered by ambitions to introduce modernity and change into the country, creates discontinuity from the traditional values because the process was conducted by foreigners who did not know local customary practices.²⁴⁵ Such ill legal transplantation process resulted in the exclusion of customary laws as manifested by the repeal provision, Art.3347(1), of the Ethiopian Civil Code which abrogates the application of customary laws.

This legal transplantation process, which excluded the customary laws, makes legal pluralism a *de facto* phenomenon leaving customary laws functioning independently on the ground.

The enactment of the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution shows a little *de jure* recognition to the customary laws. One of the relevant constitutional recognition is provided under Art. 34 (5) of the FDRE 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.”²⁴⁶ This recognition to the customary laws is, however, limited to civil matters which make the legal pluralism still *de facto* for criminal matters. Therefore, after the enactment of the FDRE Constitution Ethiopia manifests both *de jure* and *de facto* deep legal pluralism.

²⁴³ Marry, Sally E. (1988), ‘Legal Pluralism’, *Law and Society Review*, Vol. 222, No.5, p.874.

²⁴⁴ Hoekman 2002, quoted in Regassa, T., Genemo, U. and Yigezu T. (2008), *Restorative Justice in Oromia Baseline Study*, Justice for All and Prison fellowship Ethiopia, p.63.

²⁴⁵ Mulugeta, A. (1999), *Anthropological Approach to Ethiopian Law: Legal Pluralism, and the Nature and Status of Customary Law in Ethiopia*, LL.B Thesis, Addis Ababa University (Unpublished), p.22.

²⁴⁶ Constitution of the FDRE, *Supra* note 19, Art. 34(5). The other provisions dealing with legal pluralism under the FDRE constitution include: the supremacy clause of the constitution (Art. 9), Art. 34(4), Art. 78(5).

The other type of legal pluralism identified by Woodman is *state law legal pluralism* which refers to a situation where parts of the customary law are recognized, incorporated into, and become parts of the state legal system without recognizing its separate independent existence.²⁴⁷ It is the process in which customary laws are incorporated into the modern state laws.²⁴⁸ State law legal pluralism can also be conceived as the diversity of laws within the state law system itself such as the case in a federal state structure where state law consists of multiple bodies of laws enacted and applied by the federal government and each regional state.²⁴⁹

Ethiopia also exhibits the state law legal pluralism in certain circumstances. Some aspects of customary laws are recognized and incorporated to some extent in the civil and family codes. This is particularly seen in the recognition of customary marriages in the family law²⁵⁰ and the use of “usage” or customary practices in the interpretation of contracts.²⁵¹ In addition, Ethiopia exhibits state law legal pluralism since the adoption of federal state structure in which each state is authorized to “enact and execute its own Constitution and other laws”²⁵² for matters falling under its jurisdiction, and in a way that does not contradict with the federal Constitution. This legislative power of the regional states and the resulting production of laws at different levels confirm the existence of state law legal pluralism in Ethiopia.

Generally, the concept of legal pluralism indicates the fact of laws in operation or the norm that diverse laws should function in co-existence. The concept has great importance for customary dispute resolution mechanisms as it recognizes their application and their existence. The other advantage of legal pluralism in Ethiopian context is the fact that diverse customary dispute resolution mechanisms give an avenue for alternative conflict resolution, and easy access to justice in the face of state’s inability to reach each and every remote areas and peripheries of the country. The validation and recognition legal pluralism gives to customary dispute resolution mechanisms is also important to develop restorative justice programs based on such customary dispute resolution mechanisms as these dispute resolution mechanisms are compatible to the reintegrative, healing and other values and principles of restorative justice.

²⁴⁷ Woodman, G. R., 1996, *Supra* note 238, p.158.

²⁴⁸ Marry, Sally E., 1988, *Supra* note 243, p.870.

²⁴⁹ Woodman, G. R., 1996, *Supra* note 238, p.159.

²⁵⁰ Family Code of the Federal Democratic Republic of Ethiopia, 2000, *Federal Negarit Gazette*, Proclamation No. 213\2000, Art. 1(2), 4.

²⁵¹ Civil Code of the Empire of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 161\1960, Art. 1713.

²⁵² Constitution of the FDRE, *Supra* note 19, Art. 52(2,b).

CHAPTER FOUR: THE ETHIOPIAN CRIMINAL JUSTICE SYSTEM AND ITS SPACE FOR RESTORATIVE JUSTICE

4.1. The Objective of Criminal Law

Ethiopia has passed through different criminal law traditions starting from *Fitha Negest* in the 15th century,²⁵³ the 1930 Penal Code,²⁵⁴ the 1957 Penal Code, the 1982 Special Penal Code and the 2004 Federal Democratic Republic of Ethiopian Criminal Code.²⁵⁵

The Ethiopian criminal law, as being the main formal legal system to deal with crimes, has the objective of “ensuring order, peace and the security of the state, its peoples, and inhabitants for the public good.”²⁵⁶ From the Ethiopian criminal justice system perspective, crime is viewed primarily as an offense against the state and a violation of its laws instead of the relationship of individuals and the community at large. Art. 23(1) of the Federal Democratic Republic of Ethiopia (FDRE) Criminal Code defines crime as “an act which is prohibited and made punishable by law. In this Code an act consists of the commission of what is prohibited or the omission of what is prescribed by law.”²⁵⁷ The Ethiopian criminal law, therefore, views crime as a violation of a law, either in the form of commission or omission, which is enacted to protect the public interest.

In legal terms, it is the state which has been violated and it is the state’s responsibility to respond to crimes. In an aim to respond to the current crime and the prevention of possible future crimes, the state relies on the punishment of offenders.²⁵⁸ In this regard, the FDRE Criminal Code Art. 1, paragraph 2, states that:

“the Code aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another

²⁵³ Pankhurst, A. and Assefa, G. (2008), ‘Understanding Customary Dispute Resolution in Ethiopia’, in *Grass-Roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, Pankhurst, A. and Assefa, G. (ed.), Centre Francais d’Etudes Ethiopiennes, Addis Ababa, p. 3. *Fitha Negest* (justice of the Kings) was a law imported from Egyptian Coptic church in the 15th century by Emperor Za`ra Ya`eqob (r. 1434-1468), and was translated from Arabic to *Ge`ez*. It was regarded as the first written criminal law of Ethiopia which contains both secular and religious rules, and was used to regulate both criminal and civil matters.

²⁵⁴ The 1930 Penal Code was regarded as the first secular Penal Code of Ethiopia which was regarded as the revision of the *Fitha Negest*. It, however, incorporated new developments on the principles of criminal law to meet the needs of the time (see Pankhurst, A. and Assefa, G., 2008, p.3, cited above).

²⁵⁵ Despite the different criminal law traditions, the term “Criminal Code” used in this thesis refers to the currently functioning Criminal Code (i.e. The Federal Democratic Republic of Ethiopian Criminal Code), unless specifically stated otherwise.

²⁵⁶ Criminal Code of the FDRE, *Supra* note 7, Art. 1, paragraph 1.

²⁵⁷ *Ibid*, Art. 23(1).

²⁵⁸ *Ibid*, preamble, paragraph 7.

*crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.*²⁵⁹

As the above legal provision clearly shows, the criminal law of Ethiopia emphasizes on the punishment of offenders as an instrument to achieve its objectives and to prevent the commission of crimes after giving advance notice²⁶⁰ of acts which are considered crimes together with their corresponding punishments with a view of warning individuals not to violate the criminal law.

4.2. Mode of Operation of the Ethiopian Criminal Justice System at a Glance

As already shown, the Ethiopian criminal law emphasizes on the punishment of guilty offenders with a view of achieving different purposes. In order to establish guilt and assessing the ultimate punishment to be imposed on the offender, the Ethiopian criminal justice system passes through different procedures or stages. These stages of the criminal justice system are discussed below.

4.2.1. Setting Justice in Motion

The first stage in the Ethiopian criminal justice system is setting justice in motion, which means making the criminal justice system start operating in respect of the alleged crime. The Ethiopian criminal justice system is set in motion by providing information to the police or public prosecutor either in the form of accusation or complaint.²⁶¹ Accusation or complaint is a formal statement, which should be reduced into writing, made by a complainant²⁶² to the police or public prosecutor with a view to proceedings being instituted.²⁶³ However, if the accused is a young person, the complaint or the accusation should be made directly to the court instead of to the police or public prosecutor.²⁶⁴

Although any person, who has witnessed the commission of a crime, has the right and sometimes a duty to report the commission of crime,²⁶⁵ it is the *victim* of the crime who

²⁵⁹ Ibid, Art. 1.

²⁶⁰ Notification of the people is achieved mainly through the publication of the law in the legal bulletin, *Negarit gazette*; and it is assumed that everyone is aware of the enacted law as ignorance of law is no excuse.

²⁶¹ Criminal Procedure Code of the Empire of Ethiopia, 1961, *Federal Negarit Gazeta*, Extraordinary Issue No. 1\ 1961, Addis Ababa, Art. 11 cum Art.13.

²⁶² Complainant is any person who provides information about the commission of a crime to the police or public prosecutor.

²⁶³ Criminal Procedure Code, *Supra* note 260, Art.11 cum Art. 13, 16, 17. While the terms “accusation” and “complaint” refer to information communicated to the police or public prosecutor, the term “complaint” is specifically used for crimes punishable only upon the request of the private victim.

²⁶⁴ Ibid, Art. 16(1) cum. Art. 172(1).

²⁶⁵ Ibid, Art. 11. The Ethiopian Criminal Code imposes a duty to report the commission of a crime for some serious crimes, such as crimes against the constitutional order, in which case failure to report brings criminal liability.

mostly reports to the police that a crime is committed against him\her. In other words, the victim is the first person to report to the police and to provide detail statements about the commission of a crime mainly because he\she is presumed to know the details of the offence more than anyone else.

However, there are exceptional situations by which the criminal justice system start operating without accusation or compliant is lodged. This is in the case of flagrant offences as defined under Arts. 19 and 20 of the Ethiopian Criminal Procedure Code. According to these legal provisions, an offence is considered flagrant if the offender has been found apparently committing, or attempting to commit, or has just completed committing the crime; or the offender is chased immediately after the completion or interruption of the commission of the crime.²⁶⁶ Moreover, an offence is regarded as flagrant or quasi-flagrant if the police arrive to the place immediately after the offence has been committed as not to give time not to lose sight of the offender; or if a cry for help has been raised from the place where the offence is being committed or has been committed.²⁶⁷

Therefore, for flagrant offences there is no need to make a formal reporting to start the criminal justice system operating except for crimes punishable only upon private compliant.²⁶⁸ This is because flagrant offences are fresh and the offender is still within the sight of the witness or the police.

4.2.2. Police Investigation

After receiving an accusation or compliant with details of the alleged crime, the investigating police officer starts the investigation process in order to establish whether the alleged crime is committed or not and whether it is committed by the suspected person. In case of crimes committed by young persons, however, the police cannot start the investigation process by him\herself. Instead, the court may give instructions for the police regarding the manner in which the investigation should be conducted, or it may directly instruct the public prosecutor

²⁶⁶ Ibid, Art. 19.

²⁶⁷ Ibid, Art. 20.

²⁶⁸ Ibid, Art.21. Crimes punishable only upon compliant are those crimes which does not disturb the peace, order and security of the state and the public; instead which affect only the private victim. In such types of crimes, the private interest prevails over the public interest and as a result of this the police do not have a power to investigate, and the public prosecutor to institute a criminal charge against the offender without the formal compliant made by the private victim irrespective of whether it is flagrant or not (Art. 212 of the FDRE Criminal Code). This is because the institution of proceedings against the will of the private injured party may be more harmful to him\her than the commission of the offence as it may disclose private matters to the public. These types of crimes include: Adultery (652 of the Criminal Code), sexual offense without violence against women in distress (Art.625 of the Criminal Code), failure to maintain ones family (Art.658 of the Criminal Code) etc.

to frame the charge and institute the proceeding without requiring the police to conduct further investigations if the accusation of the young person relates to a crime punishable with rigorous imprisonment exceeding ten years or with death.²⁶⁹

The police investigation process involves the arrest and interrogation of the suspect, search of persons and premises for the purpose of obtaining any things that may be used as an evidence for the case, as well as the calling of witnesses.

An arrest of the suspected person is made to ensure his\her presence before the police officer or the court. Arrest of the suspect can be effected immediately without warrant²⁷⁰ in case of flagrant offences²⁷¹; or with summon²⁷²; or with warrant if the suspected person fails to appear before the investigating police officer disregarding the summon issued to him\her.²⁷³ Once, the attendance of the suspect is obtained, the investigating police officer interrogates the former with a view to eliciting relevant information about the crime with which the person is suspected of.²⁷⁴ In such a case, the suspected person is “asked to answer the accusation or compliant made against him\her” without, however, being intimidated or coerced.²⁷⁵

To increase the chance of obtaining relevant information about the alleged crime, the police may also make searches and seizures. The search may be conducted on the *person or body* of the arrested person “if it is reasonably suspected that he\she has about his\her person any articles which may be material as evidence in respect of the offence with which he\she is accused or is suspected to have committed”²⁷⁶; and\or the *premises*, be it a residence or business premise, of the accused\suspected person so as to obtain certain items which could be present before a court as an exhibit.²⁷⁷

²⁶⁹ Ibid, Art. 172(2,3).

²⁷⁰ Ibid, Art. 53. Warrant of arrest is a document issued by a court authorizing the police to effect arrest for the purpose of ensuring the presence of the suspect\accused before the police and\or the court (see Art. 53 of the Criminal Procedure Code).

²⁷¹ Ibid, Arts. 50, 51.

²⁷² Ibid, Art. 25. Summon is a document issued by the investigating police officer and sent to the suspected person demanding the latter to appear before the police conducting the investigation.

²⁷³ Ibid, Art.26 cum Art. 52.

²⁷⁴ Ibid, Art.27.

²⁷⁵ Ibid, Art.27.

²⁷⁶ Ibid, Art. 32(1).

²⁷⁷ Ibid, Art. 32(2) and Art. 33.

Moreover, the police may “summon and examine *any person* likely to give information on any matter relating to the offence or the offender”²⁷⁸ so as to facilitate the investigation process. These persons may also appear as witnesses of the public prosecutor during court proceedings. The victim of the crime is the primary person to give detail information to the police and to appear as witness during the court proceeding mainly because he\she is presumed to have detail information about the alleged crime.²⁷⁹

Finally, the investigating police officer will submit a report of the investigation results to the public prosecutor with a view to starting court proceedings.²⁸⁰ The public prosecutor will start the prosecution of the accused unless he\she declines the case based on the grounds provided under Art.39 and 42 of the Criminal Procedure Code. The grounds by which the public prosecutor may decline the case after examining the investigation report stated under Art. 39 are: if the accused has died, or is infant or he\she cannot be prosecuted due to immunity. Moreover, Art. 42 stated that the public prosecutor may decline the case if he\she believes that the evidence is not sufficient to justify conviction; if it is not possible to find the accused and the case cannot be tried *ex parte*; if the period of limitation is lapsed or the offence is subject to pardon or amnesty; or if the public prosecutor is instructed by the Minister of justice not to institute a proceeding for the public interest. However, the law does not say anything about the fate of the case upon the public prosecutor`s refusal to institute a charge. In other words, where the case should go upon the decline of the public prosecutor?. This could be one possible room to divert the case to restorative justice options such as customary dispute resolution mechanisms in order to reconcile the parties and\or their respective families, and to restore their previous peaceful relationships. This is because, as can be understood from the above grounds, the declining of the case by the public prosecutor neither imply that the crime is not committed nor does it mean the end of the matter. It simply means that the legal requirements to institute proceedings before a Criminal Court are not fulfilled.

Hence, the victim`s interest is not still addressed and consequently he\she, or his\her relatives may keep grudge and may resort to vengeance unless reconciliation is reached through restorative justice options such as via customary dispute resolution mechanisms.

²⁷⁸ Ibid, Art.30.

²⁷⁹ Interview with Mr. Ashenafi Molla, Federal Public Prosecutor, Ministry of Justice, Gulele Sub-city Justice Office, July 2012.

²⁸⁰ Criminal Procedure Code, Supra note 261, Art.37.

On the other hand, if the grounds for decline do not exist, the public prosecutor start the prosecution of the accused by preparing a charge, a document used to initiate a case before a court for trial.²⁸¹ The charge should provide details of the alleged crime and the article of the law which is violated, “the time, place and person against whom or the property against which the crime was committed”²⁸² so as to enable the accused to understand the charge against him and to make reasonable decisions whether to plead guilty or not and to defend him\herself. After the charge is framed and lodged to the appropriate court, the actual proceeding or the trial will be started.

4.2.3. Trial

Trial is the heart of the criminal justice system in which the actual litigation process is conducted. In other words, it is the stage of the criminal justice system where the adversarial litigation between the public prosecutor, representing the state, and the accused or his \her representative is conducted.

The appearance of both parties before a court is a pre requisite to start the actual litigation. To that end, immediately after the public prosecutor files the charge to the appropriate court, the latter fixes the date of trial and summons both the public prosecutor and the accused to appear before the court at the fixed date and time.²⁸³ If the accused person is under custody, the court sends a letter to the prison administration to bring the accused on the fixed day before a court. If the accused is released on bail or not arrested and fails to appear before the court disregarding the court summon, the court may issue a warrant of arrest, *bench warrant*, so that a police is instructed to bring the accused on the fixed day.²⁸⁴

On the date of trial, the accused person shall personally²⁸⁵ appear before the court *adequately guarded* and in certain circumstances *chained* if it is believed that he\she is dangerous or may become violent or may try to escape.²⁸⁶ Moreover, the accused party is separately placed in a *dock* after his identity is verified.²⁸⁷

²⁸¹ Ibid, Art.38.

²⁸² Ibid, Art.111.

²⁸³ Ibid, Art. 123.

²⁸⁴ Ibid, Art.125.

²⁸⁵ Unlike civil case litigation, the personal appearance of the accused person is a mandatory requirement in criminal litigation even if he\she has an advocate or legal representative.

²⁸⁶ Criminal Procedure Code, Supra note 261, Art. 127(1,2).

²⁸⁷ Ibid, Art. 127(3).

Once the appearance of the parties before a court is secured, the court reads out and explains the charge to the accused and asks whether he\she pleads guilty or not guilty.²⁸⁸ If the accused pleads guilty, the court may convict him\her immediately or may demand the prosecutor to corroborate the plea with evidence if it is not satisfied with the plea of the accused.²⁸⁹ If the accused pleads not guilty, or pleads guilty but the court orders the plea to be corroborated with evidence, the actual adversarial litigation starts in a sense that both parties present their evidences and litigate to convince the court.

The public prosecutor takes the lead and presents his\her material evidences and call witnesses to prove his\her case. The witnesses pass through different phases of examinations such as examination in chief,²⁹⁰ cross-examination,²⁹¹ and re-examination.²⁹² The victim of a crime is a primary witness to the public prosecutor even though the law does not say that he\she should necessarily be a witness. However, the public prosecutor may not call the private victim as a witness if he\she finds another person who can prove the case better than the victim. This means that the victim of the crime is not in the center of the Ethiopian Criminal Justice System as discussed below in more depth.

After the public prosecutor presents his evidences and all the witness examinations are concluded, the accused is also given the chance to defend his case unless the court acquits him\her merely based on the evidences of the public prosecutor.²⁹³ The accused party or

²⁸⁸ Ibid, Art. 129, 132. If the accused denies the charge or admits the charge with reservation irrespective of the degree of reservation or the accused remains silent, the plea of not guilty shall be recorded (Art. 133 of the Criminal Procedure Code). On the other hand, the plea of guilty shall be recorded if and only if the accused admits the charge without reservation either by stating the offence by its names or by admitting every ingredient of the offence charged (Art. 134(1) of the Criminal Procedure Code).

²⁸⁹ Ibid, Art.134(1,2)

²⁹⁰ Examination in chief is an examination of witnesses by the calling party, i.e. by the public prosecutor in case of prosecution proceeding, and by the accused or his advocate in case of defense proceedings. The purpose of the examination in chief is to enable witnesses tell the court whatever they know about the crime. Hence, the questions put to them relates to any fact that is directly or indirectly related to the crime (see the Criminal Procedure Code, Art. 137(1,2)).

²⁹¹ Cross-examination is an examination of witnesses by the non-calling party, that is the examination of the witness by the accused or his advocate in case of prosecution proceedings, and the examination of a witness by the public prosecutor in case of the defense proceedings. The very purpose of the cross-examination is to destroy what has been established during the examination in chief by showing that the testimony is not true, contradictory or not reliable (see the Criminal Procedure Code, Art. 137(3)).

²⁹² Criminal Procedure Code, Supra note 261, Art. 136(3). Re-examination is an examination of witnesses by a person who conducted the examination in chief. Its purpose is to reestablish what has been demolished during the cross-examination or to clarify what has been confused during cross-examination (see the Criminal Procedure Code, Art.139).

²⁹³ Ibid, Art. 141. The court has a discretionary power to acquit the accused party after merely evaluating the evidences presented by the public prosecutor and without requiring the accused to defend him\herself. This is when the court is not convinced by the evidences of the public prosecutor that the accused party has committed the alleged crime. If the public prosecutor cannot proof beyond reasonable doubt to convince the court that the accused has committed the crime in the first instance, requiring the accused to defend his\her case has no purpose than a waste of time. As a result, the court may acquit the accused and release him\her without demanding him\her to defend him\herself (see Criminal Procedure Code).

his\her advocate, then, shortly explains his\her defense and presents his\her material evidences and call witnesses to defend his\her case.²⁹⁴ As in the prosecution proceeding, all the witnesses pass through all the examination stages in defense proceeding too. The accused party adversely litigates to demolish the facts established by the public prosecutor. However, he\she is not required to prove the case beyond reasonable doubt; instead he\she is required to prove the case only to the degree of creating a doubt over the proof of the public prosecutor.²⁹⁵

Finally, after both the public prosecutor and the accused party present their side of evidences, the court will render the judgment and pass a sentence weighing their respective evidences in light of the law.

4.2.4. Judgment and Sentencing

Finally, evaluating the evidences of both parties, the judge(s) rules whether the accused is guilty or not guilty. To determine the guilt of the accused, the court examines whether the accused proves his\her case to the extent of creating a doubt that is reasonable based on the oral arguments and the evidences presented. If the accused creates such reasonable doubt over the proof of the public prosecutor or develops the doubts in the mind of the judge (s) to a reasonable degree, the court will acquit the accused.²⁹⁶ In other words, it is only when the accused is not able to create such reasonable doubt that the court makes a ruling of convicting the accused for the crime charged.

If the accused is found to be not guilty, the judgment must clearly state and order for the acquittal of the accused, and if he\she is in prison, also orders for the release of the accused from custody.²⁹⁷ On the other hand, if the accused is found to be guilty, the court, after asking both the public prosecutor and the accused party for their sentence opinion by way of aggravation or mitigation,²⁹⁸ imposes the sentence or punishment on the offender stating the

²⁹⁴ Ibid, Art. 142.

²⁹⁵ Interview with Mr. Gashaw Tamire, Federal Public Prosecutor, Ministry of Justice, Nifassilk Lafto Sub-City Justice Office, July 2012.

²⁹⁶ Interview with Mr. Mehammed Haji Abubeker, Federal first instance Court, Menagesha first instance Court Judge, September 2012. Unlike civil cases where a preponderance of evidence is sufficient to win the case, criminal cases require the public prosecutor to prove the case beyond reasonable doubt, i.e. the burden of proof beyond the shadow of reasonable doubt, to get the accused convicted.

²⁹⁷ Criminal Procedure Code, Supra note 261, Art. 149(2)

²⁹⁸ Ibid, Art. 149 (3). Aggravating and mitigating circumstances are factors that must be considered before passing the sentence and are used to increase or decrease the punishment respectively. Some of the aggravating circumstances provided under the Ethiopian criminal law include: treachery, base motive, deliberate intent to do wrong, cruelty, abuse of

article of the law under which he\she is punished.²⁹⁹ In such a situation, however, neither the victim of the crime is given a chance to address the judge about the impact of the crime on him\her, to seek compensation, and to involve in the determination of the appropriate punishment of the offender nor the accused party has role in the determination of his\her punishment beyond expressing the sentence opinion for mitigation of the punishment. The judge unilaterally decides the appropriate punishment, leaving the accused as a passive receiver of its unilateral decision, and orders the appropriate organs to execute it subject to the right of the parties to lodge an *appeal*³⁰⁰ to the higher court.

4.3. Types and Purposes of Punishments

4.3.1. Types of Punishments

The punishments that the Court imposes, after establishing the guilt of the accused, varies depending on the nature and gravity of the crime, the circumstances of its commission as well as the character of the offender.³⁰¹ The Ethiopian Criminal Code provides three broad categories of punishments: principal punishments, secondary punishments, and measures.

Principal punishments are those punishments primarily and independently imposed on the offender for the crime he\she has committed and are further classified into three categories. These are pecuniary penalties, compulsory labor, penalties entailing loss of liberty or life of the criminal: imprisonment and death penalty respectively.

Pecuniary penalties also called monetary penalties are those penalties that affect the criminal's property which include: fine, confiscation,³⁰² sequestration,³⁰³ and forfeiture.³⁰⁴ Fine is the most commonly used type of monetary punishment which goes to the government

power, antecedents or past criminal record of the criminal, time and circumstances of the commission of the crime, criminal agreement, commission of a crime against victims deserving special protection, concurrence crimes, and recidivism (See Arts. 60, 67, 84, 85, 183, 184 of the FDRE Criminal Code). Similarly, the mitigating or extenuating circumstances include: the age, level of education, character, health, economic position, motive of the criminal, and the existence of provocative situation (see Arts. 82, 83, 179, 180 of the FDRE Criminal Code).

²⁹⁹ Ibid, Art.149(5).

³⁰⁰ After the sentence is pronounced by the judge, any person who is aggrieved by the decisions of the judge has the right to make an appeal to the court higher in rank for review of the decision.

³⁰¹ Criminal Code of the FDRE, Supra note 7, Art.88(2).

³⁰² Confiscation is a type of pecuniary penalty which involves the taking away of "any property which the criminal has acquired, directly or indirectly, by the commission of a crime for which he\she is convicted". It may also extend to any property lawfully acquired by the criminal if there is an express provision to that effect in the criminal code (see Art. 98 of the FDRE Criminal Code).

³⁰³ Sequestration is a type of pecuniary penalty which may be ordered by the court "when the criminal has been convicted and sentenced in his absence for conspiring or engaging in hostile acts against the constitutional order or the internal or external security of the state" (See Art. 99 of the FDRE Criminal Code).

³⁰⁴ Forfeiture involves the seizure of any material benefits given or intended to be given to a criminal to commit a crime or any fruits of a crime. Those seized materials will be forfeited to the state (See Art.100 of the FDRE Criminal Code).

treasury and is calculated having into consideration of “the degree of guilt, the financial condition, the means, the family responsibilities, the occupation and earnings there from, age and health of the offender.”³⁰⁵ The amount of fine imposed on the offender may extend from ten Ethiopian birr to ten thousand Ethiopian birr for natural persons and from one hundred Ethiopian birr up to five hundred thousand Ethiopian birr for juridical or artificial persons.³⁰⁶ As stated above, the amount of money collected in the form of fine as well as those confiscated or forfeited properties goes to the state and not to the victim of the crime. If the victim of the crime needs to get restitution or compensation for the damage caused due to the crime, he\she has to claim it through a separate civil action save some exceptions where a claim for compensation can be made as part of the criminal proceedings as discussed below.

Compulsory labor is another type of principal punishment which may be imposed on the offender if “the crime is of *minor importance* and is punishable with *simple imprisonment* for not exceeding six months, and the criminal is healthy and not a danger to society”.³⁰⁷ It will be imposed as a substitute for *fine* if the offender is unable to pay it and a substitute for *simple imprisonment* if the court believes that such sentence is conducive to his\her reform than the imprisonment.³⁰⁸ In such a case, the criminal is required to serve the compulsory labor in his normal working place or in public establishment or public works subject to supervision, and the amount not more than one third of his wage or profit is reduced and paid to the state.³⁰⁹ Such compulsory labor may also be executed with restriction of the offender’s personal liberty, that is restricting the offender in particular place of work, or “without leaving his residential area or a restricted area under the supervision of the government official.”³¹⁰

Compulsory labor is prohibited, in principle, under the Ethiopian Constitution.³¹¹ Art. 18 (4,a) of the FDRE Constitution prohibits compulsory labor except for “any work or service normally required of a person who is under detention in consequence of a lawful order, or of a person during conditional release from such detention.”³¹² Thus, the use of compulsory labor as a form of punishment falls under the exceptional provision of the Constitution which prohibits compulsory labor. The important point to note here is that compulsory labor used as

³⁰⁵ Criminal Code of the FDRE, Supra note 7, Art. 90(2)

³⁰⁶ Ibid, Art. 90(1)

³⁰⁷ Ibid, Art. 103(1)

³⁰⁸ Ibid, Art. 96, 107.

³⁰⁹ Ibid, Art. 103 (2)

³¹⁰ Ibid, Art. 104

³¹¹ Ibid, Art. 18(3).

³¹² Constitution of the FDRE, Supra note 19, Art. 18(4,a)

a form of punishment under the Ethiopian Criminal Code is different from the community service ideals of restorative justice. This is because it is not a voluntary service undertaken to compensate the community instead it is a forced labor. Community service, on the other hand, is a voluntary service undertaken by the offender after sincerely recognizing and acknowledging the consequences of his\her wrong doing, and he\she is committed and convinced to compensate the victim as an outcome of restorative justice processes. The fact that Ethiopia has prepared a new draft law on community service also shows that it is different from the compulsory labor provided under the Criminal Code. However, both community service and compulsory labor are similar in that both are alternatives to custodial punishments.

The third categories of principal punishments provided under the Ethiopian Criminal Code are penalties entailing loss of liberty or life: imprisonment and death penalty respectively. Imprisonment can be *simple imprisonment* extending from ten days to three years imposed to “crimes of not very serious nature and committed by persons who are not a serious danger to society.”³¹³ It can also be *rigorous imprisonment* extending from one year to twenty five years or for life and imposed to “crimes of a very grave nature committed by criminals who are particularly dangerous to society.”³¹⁴ Similarly, death penalty is the most serious punishment entailing loss of life provided under the Ethiopian Criminal Code. As it involves the taking of the life of the accused, different conditions must be considered to carry out death penalty. These conditions as provided under Art. 117 of the FDRE Criminal Code include the gravity of the crime, exceptionally dangerousness of the criminal, the criminal should attained the age of eighteen at the time of the commission of the crime, the crime must be completed, absence of any extenuating circumstances, the law must expressly provide death penalty, the head of the state has to approve it and that it is executed when pardon or amnesty is denied.³¹⁵

The aforementioned principal punishments may be imposed either individually or cumulatively depending on the type of crime and the ruling of the Criminal Code.

Secondary punishments are those punishments which may be imposed together with principal punishments. Putting it differently, secondary punishments shall not be applied in the absence

³¹³ Criminal Code of the FDRE, Supra note 7, Art. 106.

³¹⁴ Ibid, Art. 108

³¹⁵ Ibid, Art. 117.

of the principal punishment or absence of express direction of the court to that effect except for young offender.³¹⁶ These secondary punishments include: Caution, reprimand, admonishment and apology; deprivation of rights; and dismissal from the defense force and reduction in rank.

The FDRE Criminal Code, Art. 122, states that, in certain crimes, the “court may, either during the trial or in its judgment caution, admonish or reprimand the criminal.” This particularly applies when the offender is young in which case the court may admonish or blame not only the young offender but also the parents or other persons legally responsible for the young offender if they failed to properly carry out their duties as a parent or guardian.³¹⁷ Moreover, the court may also “order the criminal to make a public apology to the person injured by the crime, or to the persons having rights from such injured person.”³¹⁸ Similarly, the court may order the deprivation of the offender of his\her *civil rights* such as the right to vote, to be a witness or surety; his\her *family rights* such as parental authority, tutorship or guardianship; and his\her right to exercise a profession, art, trade or to carry on any commercial activity for which a license is required.³¹⁹ These measures are taken if the nature of the crime and the circumstances of the commission of the crime make the offender unworthy to exercise any of the above rights. Furthermore, if the criminal is a member of the defense force and is convicted by a military court, a court may order “the reduction in rank of the criminal and his dismissal from a defense force”.³²⁰

The third categories of punishments provided under the Ethiopian Criminal Code are Measures. These measures are intended to hinder the offender from committing further crimes, and help to rehabilitate and reintegrate him\her into the community. Art. 134 of the FDRE Criminal Code has provided the general principle governing the imposition of measures which reads: “the general preventive or protective measures provided in this Code may be applied together with the principal penalty or after the principal penalty has been undergone when, in the opinion of the court, the circumstances of the case justify.”³²¹ These measures provided under the FDRE Criminal Code include: *measures applicable to partially or absolutely irresponsible* persons such as confinement if he\she is found to be a threat to a

³¹⁶ Ibid, Art. 121.

³¹⁷ Criminal Procedure Code, Supra note 261, Art.178.

³¹⁸ Criminal Code of the FDRE, Supra note 7, Art. 122.

³¹⁹ Ibid, Art.123.

³²⁰ Ibid, Art.127.

³²¹ Ibid, Art. 134

public safety or dangerous to persons living with him\her, or treatment for his\her mental disorder;³²² *measures applicable to young persons*, because they are not subject to ordinary penalties applicable to adults, which include admission to curative institution, supervised education, reprimand or censure, and school or home arrest;³²³ and *general measures for the purpose of prevention or protection* of the public from further crimes or disturbance such as seizure of dangerous articles which have been used or likely to be used for committing a crime, suspension and withdrawal of a license, closing of an undertaking which is used as a device to commit or further the commission of a crime³²⁴ to mention some of them. It is the discretion of the court to select the measures appropriate to the circumstances of the criminal in light of the crime committed.

In sum, the court, after establishing the guilt of the accused, imposes the appropriate principal punishments either together with secondary punishments and measures or alone, and orders the appropriate organs to execute it subject to the right of the parties to lodge an *appeal* to the higher court. The focus on the principal punishments clearly shows that the Ethiopian criminal justice system emphasizes on the retributive and deterrence purposes of punishment as discussed below.

4.3.2. Purposes of Punishment

The punishments provided under the Ethiopian criminal law, explained above, are meant to achieve different purposes. First, punishment is deterrent to the *general public* in a sense that it makes a criminal an example and gives a warning to all other potential criminals that they will be punished likewise; and *deterrent to the criminal* him\herself giving a lesson not to commit another crime under the fear of the same fate.³²⁵ Second, punishment has a *restraint or incapacitation* purpose by denying opportunities for the commission of other crimes either by confining or executing them.³²⁶ Third, it has *reformatory or rehabilitative* purpose in a sense that offenders can get reformed and become a law abiding citizens after serving the punishment. This is because it is assumed that they are given skill based education and vocational training while they are in prison so that they will be self sustained and law abiding after release.³²⁷ Retribution, which is inflicting pain on the criminal as legal revenge, is the

³²² Ibid, Arts. 130, 131.

³²³ Ibid, Arts. 157,158,159,160,161.

³²⁴ Ibid, Arts. 140, 142, 143,

³²⁵ Ibid, Art. 1 and the preamble, paragraph 8.

³²⁶ Ibid, Art. 1 and the preamble, paragraph 8.

³²⁷ Ibid, Art. 1 and the preamble, paragraph 9. However, the rehabilitation purpose of punishment is criticized for it seems arguing that prison is good, and it disregards the negative effects of imprisonment. Instead of being reformed, there may

other purpose of punishment under Ethiopian criminal justice system even though it is not explicitly stated under Art. 1, or in the preamble of the FDRE Criminal Code. The fact that the Ethiopian criminal justice system focuses on principal type of punishments shows the tacit inclusion of retribution as the other purpose of punishment.

Generally, the Ethiopian criminal justice system adopts a mixed purpose of punishment. This is based on the assumption that each purpose of punishment has its own shortcomings which should be complimented by other purpose of punishment. Therefore, the judge should consider either of the purposes or any combination of them while selecting and imposing the appropriate type of punishment though the Ethiopian Criminal Code does not explicitly indicate as to which purpose of punishment is given priority.

4.4. Is there Space for Restorative Justice in the Ethiopian Criminal Justice System?

As discussed above in more depth, the Ethiopian criminal justice system focuses on the law breaking of the offender, and is more interested in punishing the guilty offender. It does not encourage the offender to take responsibility to undo the wrong he\she has committed by performing some positive actions to the victim and\or the community at large. Similarly, as shown above, the accused person is required to personally appear before the court *adequately guarded*, or in certain circumstances *chained*, and is separately placed in a *dock* after his identity is verified during the trial. The fact that he\she is adequately guarded, chained and separately placed in a dock may lead the community to see him\her as permanently criminal with bad personality and may consequently segregate him\her. These acts may also increase the likelihood of subsequent deviant behavior of the offender as he\she may view him\herself hated and out casted by the community.³²⁸ Such perception of the community and self view of the offender may lead him\her to feel revenge and reoffend, or withdraw himself from the community which may eventually lead to disconnection from his\her social bonds.³²⁹ These rituals, therefore, manifest the stigmatic and disintegrative nature of the Ethiopian criminal justice system. Besides, the accused person is reduced to be a passive participant represented by the legal professional, his\her advocate, who mostly speaks in the criminal justice ritual. He\she has no role in the determination of his\her punishment beyond expressing the sentence

be high possibility that the criminal learns more advanced criminal techniques than he\she knew before his\her imprisonment. This is particularly true for developing countries like Ethiopia where there are no separate cells for recidivists and non-dangerous criminals, and sufficient skill based vocational training in prisons.

³²⁸ Maxwell, G. and Morris, A., 2010, *Supra* note 209, p.142.

³²⁹ Scheff, T.J. and Retzinger, S.M., 1997, *Supra* note 214, p.145.

opinion for mitigation of the punishment; and he\she is a passive receiver of the unilateral decision of the judge.

Moreover, the victims of the crime are not also in the center of the Ethiopian criminal justice system. Their role is limited to providing information in the form of accusation or complaint so as to set the justice in motion, or to be merely a witness for his\her own case if, at all, the public prosecutor needs him\her to be a witness. The public prosecutor may not call the private victim as a witness if he\she finds another person who can prove the case better than the victim. Thus, it is the discretion of the public prosecutor either to include or exclude the private victim in the criminal justice system as a witness. Even when the victim is called as a witness to his\her own case, he\she does not have a chance to properly encounter the accused as his\her communication with the accused is limited to answers to cross examinations. The victim is not also allowed to remain in the court room to hear the testimony about his\her case and to attend the full trial so as to avoid copying of testimonial words of other witnesses;³³⁰ and is “left outside the court room, perhaps, being angry and humiliated through a cross-examination in court.”³³¹ Though victims of a crime have an interest in attending and observing what is happening in the court trial, the Ethiopian criminal justice system excludes them from observing such rituals by the mere fact that they appear as witnesses of the public prosecutor.

Similarly, the victim of the crime is not given a chance to address the judge about the impact of the crime on him\her, and on the determination of the appropriate punishment to be imposed on the offender, and his\her right to restitution and compensation is not adequately protected. Moreover, there is no possibility to bring the victim and the offender together so as to enable them discuss the causes and consequences of the crime, reconcile, and thereby restore and maintain their peaceful relationships or preventing the possible future crime.

The Ethiopian criminal justice system also excludes the community from participation. If the community is said to be participated in the process, it is only in the form of providing information about the commission of the crime, i.e. in the form of accusation or complaint so as to set the justice in motion, and by merely appearing as a witness in the criminal proceedings.

³³⁰ Interview with Mr. Ashenafi Molla, Supra note 279. The general practice in the Ethiopian criminal justice system is that witnesses are not allowed to attend the trial so as to prevent them from adjusting their testimony to make consistent with what other witnesses have said.

³³¹ Christie N., 1977, Supra note 2, P.8.

Further, the current Criminal Procedure Code of Ethiopia leaves no opportunity for legal practitioners, i.e. for prosecutors, police and judges, to identify certain matter that may be more appropriate for pre-charge or post-charge diversion into restorative justice processes, like the use of customary dispute resolution mechanisms. Even worst, the procedural and substantive laws of Ethiopia including the Constitution exclude the use of customary dispute resolution mechanisms in criminal matters. Therefore, the notion of restorative justice is almost non-existent in the current Ethiopian criminal justice system.

Nonetheless, it does not mean that the Ethiopian criminal justice system shows no elements of restorativeness. It exhibits some elements of restorativeness though the term “restorative justice” is nowhere used explicitly in the criminal laws. These elements of restoraiveness are discussed below.

4.4.1. The Claim for Restitution or Compensation

As shown above, the amount of money collected in the form of fine as well as those confiscated or forfeited properties goes to the state and not to the victim of the crime. If the victim of the crime needs to be restituted or compensated for the damage caused due to the crime, he\she has to claim it through a separate civil action. However, there is a limited possibility by which the victim of the crime can bring a civil suit for compensation as part of the criminal case proceeding. Art. 101 of the FDRE Criminal Code is instrumental in this regard which states that:

“where a crime has caused considerable damage to the injured person or to those having rights from him\her, the injured person or the persons having rights from him\her shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation. To this end they may join their civil claim with the criminal suit.”³³²

The victim or his\her representative should apply, at the opening of the hearing, to the court trying the case so as to get the civil claim and the criminal case joined.³³³ The court to which the application is made may reject the claim for joinder of civil and criminal cases based on different grounds stated under Art. 155 of the Criminal Procedure Code which include, among others: if the determination of compensation requires numerous witnesses in addition to those called by the prosecutor or the accused; or if the court believes that the hearing of the claim

³³² Criminal Code of the FDRE, Supra note 7, Art. 101.

³³³ Criminal Procedure Code, Supra note 261, Art. 154.

for compensation is likely to confuse, complicate or delay the hearing of the criminal case. However, the dismissal of the application for joinder of the civil and criminal cases does not prevent the victim from instituting a separate civil suit in a civil court.³³⁴

If the court allows the joinder, the victim is entitled to take part in the proceedings and have, with regard to evidence, all the rights of an ordinary party.³³⁵ This means that the victim has a right to call witnesses other than those called by the prosecutor, if he\she wishes, and to address the court about the amount of compensation to be awarded at the end of the defense proceedings.³³⁶ The court, then, decides the amount of compensation, the necessary costs and fees by the offender as if it were a civil case after a criminal charge is settled.³³⁷

Joining the civil and criminal cases gives a victim or his\her representative (s) a quasi-party role and is faster and cheaper for them than instituting a separate civil proceeding. This is because, in most cases, the facts involved in the case and the evidences that may be produced by the public prosecutor to prove the criminal case are at the same time used to prove the civil claim.

Moreover, the court is given a discretionary power to increase the possibility that compensation is paid to the victim by ordering the compensation to be paid from other sources. In this respect Art. 102(1) of the FDRE Criminal Code states that:

“Where it appears that compensation will not be paid by the criminal or those liable on his\her behalf on account of the circumstances of the case or their situation, the court may order that the proceeds or parts of the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or part of the fine or of the yield of the conversion into work, or confiscated property be paid to the injured party.”³³⁸

According to this provision, the court is given a discretionary power to order compensation to the victim out of the money guaranteed as surety, imposed as fine, or from the sale value of properties confiscated from the victim if the criminal or those vicariously liable for him\her are found unable to pay the compensation.

³³⁴ Ibid, Art.155 (3)

³³⁵ Ibid, Art. 156(2).

³³⁶ Ibid, Art. 154(2), Art. 156 (2).

³³⁷ Ibid, Art. 159.

³³⁸ Criminal Code of the FDRE, Supra note 7, Art. 102(1)

Therefore, the joinder of civil and criminal cases so as to claim compensation is one of the restorative aspects of the Ethiopian criminal justice system. However, though joinder of civil and criminal cases is one of the exceptions by which the Ethiopian criminal justice system allows the victims or those having rights from them to involve in the process and to claim compensation, their participation is not automatic. That means they cannot participate in the process as of right.

Their participation depends on the discretion of the court, after determining the existence of considerable damage, to allow the joining of the civil and criminal cases and to order a compensation for them. Similarly, unlike the restorative justice ideal where the type and amount of compensation or restitution is mutually agreed by the parties, the Ethiopian criminal justice system gives the ultimate discretion to the judge to decide the amount of compensation based on the evidences produced. Moreover, some judges say that it is not common for Ethiopian criminal courts, in practice, to entertain the issue of compensation simultaneously with criminal proceedings for neither the victims are well aware of this possibility of claiming compensation side by side with criminal suit nor are the public prosecutors willing to lodge the claim for compensation as part of the criminal proceedings under the pretext of causing delay to criminal proceedings.³³⁹

In sum, the Ethiopian criminal justice system recognizes the issue of compensation or restitution due to victims though its practical application is limited and depends on the discretion of the court.

4.4.2. Conducting Private Prosecution

Conducting private prosecution is another exception the Ethiopian criminal justice system provides for victims and other stakeholders to intervene in the criminal justice process. This right to initiate a private prosecution arises when the public prosecutor refuses to institute a criminal charge due to insufficiency of evidence to justify conviction for crimes that are punishable only upon formal complaint.³⁴⁰ Where such decisions are made, the “victim of the crime or his\her legal representative; or the husband or wife on behalf of the spouse; or the legal representative of an incapable person” may conduct a private prosecution standing as a

³³⁹ Interview with Mr. Yiehyes Mitiku, Private Practitioner (Lawyer) and doing his PhD on Restorative Justice in Ethiopia, August 2012.

³⁴⁰ Criminal Procedure Code, Supra note 261, Art.44(1).

party.³⁴¹ On the day of the hearing, before reading out and explaining the charge to the accused and before asking whether he\she pleads guilty or not, the court attempts to reconcile the parties.³⁴² An attempt to reconcile the parties is given priority as crimes punishable only upon private complaint are involving more of private interest than public interest. If the reconciliation is effected, it will be recorded by the court to have the effect of a judgment.³⁴³

However, if the reconciliation has not been made, the court continues to hear the case as ordinary prosecution, and all the rules and procedures of ordinary trial (from Art. 123- Art. 149) are followed. In such a case, any of the aforementioned private prosecutors replace and assumes all responsibilities of the public prosecutor.

The fact that the Ethiopian criminal justice system provides an opportunity to victims or other persons stated above to appear as a litigant in the criminal cases, and the fact that the court exerts some effort to reconcile the parties manifests some aspects of restorativeness of the Ethiopian criminal justice system.

4.4.3. Probation and Parole

Probation and Parole provisions of the Ethiopian Criminal Law are other exceptional circumstances which manifest its restorativeness. Probation is a release of a convicted offender under the supervision of a probation officer subject to revocation upon default of the conditions attached to his\her release.³⁴⁴ The Ethiopian Criminal Code recognizes the idea of probation in which the court is given a discretionary power to order probation “having regard to all the circumstances of the case and if it believes that it will promote the reform and reinstatement of the criminal.”³⁴⁵ Accordingly, the court may place a convicted criminal on probation if he\she has not been convicted previously, does not appear dangerous to societies, and when his\her crime is punishable with fine, compulsory labor, or simple imprisonment for not more than three years.³⁴⁶ Moreover, the convicted offender is required to enter into an undertaking to be of good conduct, to meet the conditions or rules of conduct attached to the probation, to repair the damage caused by the crime or to pay compensation to the injured person in order to be placed under probation.³⁴⁷ Upon granting probation, the court shall place

³⁴¹ Ibid, Art. 47

³⁴² Interview with Mr. Gashaw Tamire, Supra note 295.

³⁴³ Interview with Ashenafi Molla, Supra note 279.

³⁴⁴ Ayele, A. (2006), *Restorative Justice in Ethiopia: the Law and the Practice*, LL.B Thesis, Addis Ababa University (Unpublished), p.34.

³⁴⁵ Criminal Code of the FDRE, Supra note 7, Art.190.

³⁴⁶ Ibid, Art.191.

³⁴⁷ Ibid, Art.197, 198.

the offender under the supervision of protector, guardian, or probation officer who shall keep in touch with the probationer and reports his situation.³⁴⁸

Nonetheless, the court has a discretionary power to revoke the probation if the probationer infringes one of the rules of conduct or conditions attached to it, or commits fresh crime during the period of probation.³⁴⁹ Moreover, the court may disallow probation where the offender has previously undergone a sentence of rigorous imprisonment or simple imprisonment exceeding three years and he\she is sentenced again to one of these penalties; and where the criminal is sentenced to rigorous imprisonment exceeding five years for the crime he is now tried.³⁵⁰

The Ethiopian criminal law also recognizes Parole whereby a prisoner is conditionally released before the completion of the term of imprisonment.³⁵¹ Parole may be granted by the court after receiving recommendations from prison administration and having into consideration of the behavioral reform of the criminal; and this process helps the offender to early join and reintegrate his\her families and the community. The Criminal Code (Art. 202) states the requirements that must be fulfilled to allow parole which include: the prisoner has to serve two-thirds of a sentence of imprisonment or twenty years in case of life imprisonment; the prisoner or the management of the institution must submit a petition and recommendation respectively; the criminal should present a tangible proof of behavioral reform during the period of imprisonment; the prisoner must repair or agreed with the victim or his\her families to repair the harm caused; and that the character of the prisoner warrant the assumption that he\she will be of good conduct when released.³⁵²

Similar to probation, parole is subject to certain conditions and the non-compliance of those conditions may led to the revocation of the parole in which case the prisoner would be sent back to the prison to serve the remaining sentence.³⁵³

The probation and parole provisions of the Ethiopian Criminal Code are important from the perspective of restorative justice. They are important to avoid the negative consequences of

³⁴⁸ Ibid, Art.199.

³⁴⁹ Ibid, Art. 200.

³⁵⁰ Ibid, Art.194(1,2)

³⁵¹ Ibid, Art.201.

³⁵² Ibid, Art.202(1)

³⁵³ Ibid, Art.206.

incarceration and to reduce prison population; enable the offender to remain within his\her community without breaking his\her social ties or to early join and reintegrate his\her families and the community respectively. They are also important steps to protect the interests of victims as they put repairing the damage caused by the crime or to pay compensation to the injured person as a requirement in order to be placed under probation or granted parole. Nonetheless, despite the legal provision, there is no organ established, to date, to supervise parolees and probationers and to report to the court as to the status of the offender.³⁵⁴

Generally, the above exceptional situations give some possibilities for victims of a crime to be compensated, and to participate in the criminal justice process as a litigant either by assuming a quasi-party status or by initiating private prosecution. However, restorative justice is not merely about the restitution and compensation of victims. It goes beyond that to heal injuries of stakeholders, to repair their relations, and to reintegrate the parties back to their law abiding communities. Similarly, the conduct of private prosecution is allowed in a very narrow exception only if the public prosecutor refuses to prosecute and for crimes punishable only upon compliant of the private victim. Further, the Probation and Parole provisions of the Criminal law are meaningless and remain paper values in the absence of organs meant to supervise parolees and probationers, and to report to the court as to the status of the offender. Therefore, these provisions are so limited and are insufficient to describe and manifest the idea of restorative justice in the Ethiopian criminal justice system. However, these exceptional provisions can serve as a basis to start a discussion on restorative justice, and to take the necessary reform measures in the Ethiopian criminal justice system so as to implement the restorative justice ideals.

³⁵⁴ Interview with Mr. Meazahaimanot, Federal Assistant Attorney General, Ministry of Justice, July 2012.

CHAPTER FIVE: THE ETHIOPIAN CUSTOMARY DISPUTE RESOLUTION MECHANISMS AND THEIR COMPATIBILITY WITH RESTORATIVE JUSTICE

5.1. What are Customary Dispute Resolution Mechanisms?

In addition to the formal criminal justice system discussed in the preceding chapter, there are different traditional practices that are 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 are named as customary law, pure peoples` law, indigenous law, or informal law.³⁵⁵ The names “customary”, “indigenous”, “informal”, or “pure peoples` law” implies the fact that the mechanisms or systems arise from age old practices that have regulated the relationships of the people in the community.³⁵⁶ They are associated with the cultural norms and beliefs of the peoples and gain their legitimacy from the community values instead of the state.³⁵⁷ These customary practices are communicated from generation to generation orally, and are assumed to be known by all members of the community.³⁵⁸ In other words, the customary dispute resolution mechanisms or processes of Ethiopia function on the basis of local customary practices or cultural norms. Besides, 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.

The customary laws of Ethiopia are mostly, though not exclusively, vibrant in rural areas where the formal legal system is unable to penetrate because of lack of resources, infrastructure, legal personnel³⁵⁹ as well as lack of legitimacy, for the modern law is seen as alien, imposed, and ignorant of the cultural realities on the ground.³⁶⁰

³⁵⁵ Jembere, A., 1998, Supra note 234, p.39

³⁵⁶ Regassa, T., Genemo, U. and Yigezu T. (2008), *Restorative Justice in Oromia Baseline Study*. Justice for All and Prison Fellowship Ethiopia, p.58.

³⁵⁷ Jembere, A., 1998, Supra note 234, p.39.

³⁵⁸ Regassa, T., 2008, Supra note 355, p.58.

³⁵⁹ Federal Democratic Republic of Ethiopia Central Statistical Authority, 2009, Statistical Abstract, Addis Ababa. According to the 2009 annual statistical abstract, the total numbers of judges serving at the federal and regional level courts in 2009 were only 7,706 of whom only 59 had LL.M, 940 had LL.B, 3681 had diploma, and the remaining were those who did not either complete high school or only have certificate. In terms of regional distribution, only 74 judges in Afar, 77 in Beni-Shangul Gumuz, 21 in Somalie, and 24 in Harari regions were serving the people (see the 2009 FDRE statistical abstract). Similarly, the total numbers of prosecutors serving at the federal and regional level justice offices were only 3,586, of whom only 36 had LL.M, 868 had LL.B, 2243 had diploma, and the remaining were those who did not either complete high school or only have certificate. In region wise, only 3 prosecutors in Afar, 51 in Beni-Shangul Gumuz, 52 in Gambella, and 21 in Harari regions were functioning (see the 2009 FDRE statistical abstract). This shows that the level of legal expertise is very limited in the country in general and in the rural regions in particular as those who holds LL.B and LL.M are mainly working in the urban centers.

³⁶⁰ Regassa, T., 2008, Supra note 356, p.58.

Hence, in the face of such shortage of resources, infrastructure, and legal personnel, the customary dispute resolution mechanisms play a very vital role in the administration of justice. These customary mechanisms are applied by the traditional institutions and elders of the community who are well known to and are chosen by the mutual consent of the conflicting parties.³⁶¹

5.2. Legal pluralism and the Status of Customary Dispute Resolution Mechanisms in Ethiopia

The concept of legal pluralism refers to the existence of more than one type of laws within a particular country, as explained in section 3.3 above.³⁶² The concept, in addition to the multiple state laws enacted by federal and state governments in federal state structure,³⁶³ emphasizes on the “relationship between customary law and state law which arises out of a conflict of claims for legitimacy.”³⁶⁴

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 huge legal transplantation activities through a “grand codification process”³⁶⁵ in which six codes namely the Penal Code, the Civil Code, the Maritime Code, the Criminal and Civil Procedure Code, and the Commercial Code were produced from 1957 to 1965. The Ethiopian legal importation, which was induced by ambitions to introduce modernity and change³⁶⁶ into the country, creates discontinuity from the traditional beliefs and values. This is mainly because the codes were drafted based on European experience and the “whole transplantation process was conducted by expatriate scholars³⁶⁷ who were ignorant of local customary and cultural practices”³⁶⁸ of Ethiopia. It may be argued that legal transplantation is a common and normal practice in law making process. However, the transplanted laws are required to be contextualized to the actual and real situation of the country after being discussed and

³⁶¹ Jembere, A., 1998, Supra note 234, p.39.

³⁶² Griffiths, J., 1986, Supra note 236, p.1-3.

³⁶³ Since Ethiopia adopts a federal state structure, each state has the power to “enact and execute its own Constitution and other laws” for matters falling under its jurisdiction, and in a way that does not contradict with the federal Constitution which resulted in the existence of multi-layered laws confirming the presence of state law legal pluralism.

³⁶⁴ Woodman, G. R., 1996, Supra note 238, p.157.

³⁶⁵ Mulugeta, A., 1999, Supra note 245, p.16.

³⁶⁶ Fiseha, A., Yntiso, G. and Azeze, F. (2011), ‘The State of Knowledge on Customary Dispute Resolution in Ethiopia’, in *Customary Dispute Resolution Mechanisms in Ethiopia*, Yntiso, G., Azeze, F., and Fiseha, A., (ed.), the Ethiopian Arbitration and Conciliation Center, Addis Ababa, P.23.

³⁶⁷ Since most of Ethiopian laws are influenced by the civil law tradition, most of its drafters were from civil law countries. Rene David of France (the drafter of Ethiopian Civil Code), Philip Graven of Switzerland (drafter of the 1957 Penal Code), and Jean Escara of France (drafter of the Ethiopian Commercial Code) were some of the expatriate scholars involved in the Ethiopian legal transplantation process.

³⁶⁸ Mulugeta, A., 1999, Supra note 245, p.22.

deliberated by the national parliament. In the then Ethiopia, 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 in the ground.

The consequence of such ill legal transplantation process was the exclusion of customary laws from application considering them anti-thesis of modernity and change which is manifested by the repeal provision of the Ethiopian Civil Code that abrogates the application of customary laws. These repeal provision, Art. 3347(1) of the Civil Code reads:

*“Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be repealed by this code and hereby repealed.”*³⁶⁹

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 covers and regulates the matter. However, despite the blind prohibition of customary laws` separate existence, some attempt was made to incorporate some aspects of customary laws in the Civil Code itself. This is particularly seen in family matters regarding the recognition of customary marriages and matters concerning inheritance,³⁷⁰ and the use of “usage” or customary practices in the interpretation of contracts.³⁷¹

The transplantation process which resulted in the exclusion of customary laws was, thus, a drastic measure taken against customary dispute resolution mechanisms which makes them lose formal legal recognition and standing. However, customary dispute resolution mechanisms remain functional on the ground as the transplanted laws were unable to penetrate into the local communities and get legitimacy.

In other words, despite the absence of *de jure* recognition of customary laws, they are *de facto* operative parallel to the formal state laws. The rationale for such reliance of the people on

³⁶⁹ Civil Code, Supra note 251, Art. 3347(1).

³⁷⁰ Ibid, Art. 606, 807.

³⁷¹ Ibid, Art. 1713.

customary laws is the lack of cultural legitimacy of the modern law among the people, and the peoples` deep attachment to the customary law systems.³⁷² Therefore, the legal transplantation process which resulted in the exclusion of the customary laws makes legal pluralism a *de facto* phenomenon in which customary laws are functioning independently on the ground.

The enactment of the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution revives a formal legal recognition to customary laws. One of the relevant constitutional recognition is provided under Art. 34 (5) of the FDRE 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.”*³⁷³

According to the above legal provision, customary dispute resolution mechanisms are legally authorized to regulate personal and family matters as long as the conflicting parties give their consent to that effect. Therefore, family disputes such as disputes over inheritance, marital disputes; and personal disputes such as breach of contract can be resolved via customary dispute resolution mechanisms. In line with this legal recognition to customary laws, the Constitution also authorizes the federal House of People Representatives (Parliament) and State Councils (regional law making organs) to establish and to give official recognition to religious and customary courts.³⁷⁴ These articles obviously show that the FDRE Constitution takes some important steps to recognize legal diversity or pluralism by recognizing customary laws and their institutions.

However, such recognition is still limited to civil matters, and the Constitution does not rectify the past mistakes and it fails to extend the legal recognition to the customary mechanisms` application to criminal matters, despite the fact that they are still being used on the ground to resolve criminal matters and serve as the main ways of obtaining justice especially in rural Ethiopia.³⁷⁵ 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

³⁷² Mulugeta, A., 1999, Supra note 245, p.22

³⁷³ Constitution of the FDRE, Supra note 19, Art. 34(5). The other provisions dealing with legal pluralism under the FDRE constitution include: the supremacy clause of the constitution (Art. 9), Art. 34(4), and Art. 78(5).

³⁷⁴ Ibid, Art. 78(5).

³⁷⁵ Regassa, T., 2008, Supra note 356, p.58

country.³⁷⁶ People also resort to customary dispute resolution mechanisms for reconciliation even after a verdict, be it conviction or acquittal,³⁷⁷ is given by the formal criminal justice system in order to avoid the cultural practice of revenge by the victim or his\her relatives.³⁷⁸ Hence, the status of customary dispute resolution mechanisms` application to criminal matters still remains *de facto*.

Nonetheless, certain interpretative arguments may arise in this regard. For example, some legal scholars argue that the absence of express recognition to customary laws` application to criminal matters in the Constitution does not necessarily mean that they are totally excluded from application;³⁷⁹ they further claim that the Constitution would have provided express provision excluding customary law`s application to criminal matters had the legislature intended as such;³⁸⁰ and they call for a broad and holistic interpretation of the Constitution, as total exclusion of customary laws` application to criminal matters would defeat the overall objectives of the Constitution to ensure lasting peace and maintaining community safety. On the other hand, the *acontrario* interpretation of Art. 34 (5) of the Constitution may be understood as implying an explicit prohibition of the customary dispute resolution mechanisms` application for criminal matters. However, the first line of argument which favors the broader and holistic interpretation is important, as it helps to give formal legal status to customary laws` application to 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 made so as to give sufficient legal recognition and formal status to customary dispute resolution mechanisms` application to criminal matters. This may include the amendment of the FDRE Constitution to include a clear constitutional clause which recognizes the customary dispute resolution mechanisms` application to criminal matters. The inclusion of a clear constitutional clause recognizing customary dispute resolution mechanisms` application

³⁷⁶ Gemechu, D. (2011), `The Customary Courts of the Weliso Oromo`, in *Customary Dispute Resolution Mechanisms in Ethiopia*, Yntiso, G., Azeze, F., and Fiseha, A. (ed.), the Ethiopian Arbitration and Conciliation Center, Addis Ababa, p.270.

³⁷⁷ Unlike the Customary Dispute Resolution mechanisms, the decision rendered by the formal Criminal Justice System does not erase the victim`s or his\her families` demand to take the cultural norm of revenge as it does not involve in the reconciliation of the parties.

³⁷⁸ Zeleke, M., 2010, *Supra* note 18, p. 74.

³⁷⁹ Interview with Mr. Desalegn Mengiste, Justice System Reform Office Director, Ministry of Justice, July 2012.

³⁸⁰ *Ibid*.

to criminal matters is a necessary and important measure to avoid interpretative arguments concerning their status.

Moreover, the theory of legal pluralism can be used as a basis to elevate the status of customary dispute resolution mechanisms` application to criminal matters.

5.3. Mode of Operation of the CDR Mechanisms³⁸¹

The customary dispute resolution mechanisms are handled by elders, *non-specialized 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.³⁸² However, their composition, number, and the procedure they follow may vary from ethnic group to ethnic group depending on a specific local custom and practice. Unlike the judges of the formal legal system who are appointed by a state based on their knowledge of state laws, elders are chosen by the conflicting parties themselves or their respective families in an *ad hoc basis* based on their “reputation for high sense of justice, impartiality, deep knowledge of community norms, wisdom and rich experience.”³⁸³ 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 processes involve different stages which are discussed below.

5.3.1. Setting CDR Mechanisms in Motion

The customary dispute resolution processes of Ethiopia are set in motion by the offender himself, by his\her families or close relatives; and in some minor crimes by the victim or his\her families.³⁸⁴ When a crime is committed, the perpetrator, the victim, their respective families, or any third party observers run to elders who well know the norms and customs of the community and ask them to help the settlement of the conflict.³⁸⁵ The community elders who are asked to settle the matter will call the parties in public places; or in very serious

³⁸¹ Since it is claimed that almost all ethnic groups in Ethiopia have their own distinct customary law systems with specific variations, the writer of this thesis tries to present the mode of operation of Customary Dispute Resolution mechanisms in a general manner.

³⁸² Fiseha, A., 2011, Supra note 366, p. 27. The elders are called by different names depending on the language of each ethnic groups and regional variations. For example the terms “*shimagilles*” in Gondar, Gojjam and Tigray, “*sheni*” in south wello, “*jaarsa*” in Oromo are used to refer to elders. (See Pankhurst, A. and Assefa, G., 2008, `Understanding Customary Dispute Resolution in Ethiopia, p.15; Gemechu, D., 2011, p.256).

³⁸³ Ibid.

³⁸⁴ Regassa, T., 2008, Supra note 356, p. 66. The victim or his\her relatives make 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 sham for the victim`s side to take the initiative to customary dispute resolution mechanisms instead of taking vengeance (see Gemechu, D., 2011, p.261).

³⁸⁵ Ibid, p.66

crimes, they will go to the victim`s and/or his/her families` home to persuade them for peaceful resolution.

In very serious crimes, such as homicide, the victim`s family may not initially be willing to engage in the customary dispute resolution processes demanding to take revenge against the victim or his/her relatives. In almost all of Ethiopian societies 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 families and close relatives.³⁸⁶ 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 doing the same.³⁸⁷ This cultural duty to take revenge is aggravated by the societal praise of a person who kills the killer or one of the killer`s family members as hero, for he restores the dignity of his family; and by belittling and insulting those who did not take avenging action as cowards.³⁸⁸ Consequently, the victim`s families may not easily submit to the customary dispute resolution mechanisms in the first instance. However, elders insist and pressurize them to come to the process, and mostly do not leave without getting their consent to come to the peaceful settlement.³⁸⁹

Once the victim or his/her families agree to engage in the process of the customary dispute resolution, the actual deliberation and reconciliation stage will start.

5.3.2. Deliberation and Reconciliation

After obtaining the willingness of the victim or his/her families 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 circle with the victim, offender,³⁹⁰ and their respective family members to discuss about the matter.³⁹¹ 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 of its commission, its consequences, and how it can be settled are discussed. The victim personally or his/her families, as the case may be, are given the first chance to explain the crime and its

³⁸⁶ Zeleke, M., 2010, Supra note 18, p.73

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Interview with Mr. Abera Degefa, Lecturer at AAU School of Law and doing his PhD on Customary wisdom and its contributions to the Criminal Justice System, July 2012.

³⁹⁰ 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 mediating back and forth between the two parties until agreement is reached.

³⁹¹ Regassa, T., 2008, Supra note 356, p. 66.

impact.³⁹² 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.³⁹³ 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.³⁹⁴ This unrestricted freedom of expression in the customary processes is essential to identify the root causes of the conflict tracing back to the tail of a narrated long story.

If the offender denies the commission of a crime in his presentation of the case, the elders may allow the victim or his\her families to call witnesses; or in the absence of witnesses, they try to convince and persuade the offender to tell the truth employing different strategies.³⁹⁵ They may in particular strongly warn him\her as to the seriousness of social sanctions he\she is going to endure if the truth is discovered later in time.³⁹⁶ If they do not succeed in convincing the offender, he\she may be required to prove his\her innocence by swearing in front of the elders and they dismiss him\her free while refusal to swear constitutes admission.³⁹⁷ On the other hand, if the offender admits the commission of a crime, which is mostly the case, a discussion will be opened as to the appropriate decision to be imposed on the offender.

The decisions may vary depending on the type and gravity of the crime,³⁹⁸ and a particular customary practice. Some minor crimes and crimes committed within close relatives may merely require an apology or forgiveness without compensation which is known as “*yiqir leIgziabher*”, forgiveness in the name of God.³⁹⁹ The very purpose in such a case is to restore the parties in a position they were before the commission of a crime and ensuring sustainable community peace.

³⁹² Pankhurst, A. and Assefa, G., 2008, Supra note 253, p.11.

³⁹³ Ibid.

³⁹⁴ Gemechu, D., 2011, Supra not 376, p.261.

³⁹⁵ Pankhurst, A. and Assefa, G., 2008, Supra note 253, p. 11.

³⁹⁶ Social sanctions are the most powerful instruments of obtaining obedience in many societies in Ethiopia. These social sanctions may include social exclusion such as refusal to help with burial, exclusion from local associations like *iddir*, exclusion from traditional collective system of work, he\she lose any assistance at the time of hardship; and curse by the elderly people (Pankhurst, A. and Assefa, G. (2008), ‘Understanding Customary Dispute Resolution in Ethiopia, p.63). Therefore, the offender most of the time do not deny the crime fearing those social sanctions.

³⁹⁷ Gemechu, D., 2011, Supra note 376, p.262.

³⁹⁸ The different customary practices pass various types of decisions depending on the type of crime such as inter-personal, intra and inter clan or ethnic group conflict; depending on whether the crime is minor or serious; and whether it is committed intentionally, by negligence, or accidentally.

³⁹⁹ Pankhurst, A. and Assefa, G., 2008, Supra note 253, p. 15.

The most common decision is, however, the payment of compensation which is also named as *kassa*,⁴⁰⁰ *gumaa* or blood money.⁴⁰¹ 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 number of families he\she supports.⁴⁰² Subject to negotiation, some customary practices even have a scale of compensation which describes the types of crimes with the corresponding amount of compensation to be paid to the victim.⁴⁰³ The compensation may be paid in cash money or in kind such as camels, cattle, or sheep and goats.⁴⁰⁴ Unlike the formal criminal legal system which is guided by the principle of *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 for the payment of compensation determined by elders.⁴⁰⁵ This collective responsibility to pay compensation manifests the communitarian character of the Ethiopian societies, and is sometimes important for it puts collective responsibility to monitor their family or clan members for their compliance to the community values.

In some societies like the Beni-Shangul Gumuz, compensation may take a 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 on the belief that “life is only paid back with life” thereby ending hostilities by creating marital (affinal) relationship.⁴⁰⁶ Though this practice is believed important to maintain sustainable peace between the two groups, it may infringe the human rights of a woman because the marriage is conducted without her consent, and she is given as a thing.

⁴⁰⁰ The term “kassa” is the Amharic term used mostly in the Amhara and Tigray regions to refer to compensation to be paid to the victim or his\her families regardless of the type and seriousness of the offense.

⁴⁰¹ The term “blood money” or the oromo term “gumaa” refers to compensation to be paid to the victim`s families in the homicide cases.

⁴⁰² Pankhurst, A. and Assefa, G., 2008, *Supra* note 253, p.66.

⁴⁰³ Talachew, G. and Habtewold, S., 2008, *Supra* note 234, p.100. The Afar customary law determines the amount of compensation, subject to negotiated reduction, to be paid to the victim for every crime depending on the type of crime and level of the harm caused to the victim. For example, different amount of compensation for homicide is fixed depending on whether the crime is committed intentionally, negligently, or accidentally. Moreover, in case of bodily injury the length and depth of the injury measured by using fingers is taken into account to determine the amount of compensation (see Talachew, G. and Habtewold, S., 2008, p.100).

⁴⁰⁴ Pankhurst, A. and Assefa, G., 2008, *Supra* note 253, p.68.

⁴⁰⁵ Fiseha, A., 2011, *Supra* note 366, p.30.

⁴⁰⁶ Besie, B. and Demie, L. (2008), ‘Customary Dispute Resolution in Beni-Shangul Gumuz with Emphasis on Shinasha Society’, in *Grass-Roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, Pankhurst, A. and Assefa, G. (ed.), Centre Francais d’Etudes Ethiopiennes, Addis Ababa, p.124; Gluckman M., “The Peace in the Feud” in *Custom and Conflict in Africa*, Oxford: Blackwell Publishing, p.13 also describes the role of marriage in repressing vengeance by turning enemies to friends and relatives.

Generally, this stage of the customary dispute resolution process ensures the participation of victim, 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 families are 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.

5.3.3. Customary Rituals and Enforcement Mechanisms

After the compensation is decided and the conflict is settled, the offender asks an apology kneeling on the ground, and the restoration of prior relationships is symbolized through instruments of “reintegrative” ceremonies or rituals⁴⁰⁷ though these rituals vary from region to region depending on a particular customary practice.⁴⁰⁸ Dejene Gemechu has described one of the dramatic customary rituals of the Weliso Oromos as:

*“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.”*⁴⁰⁹

According to Dejene, the act also implies that the killer regrets his/her wrong and shows sincere remorse by “appeasing the offended.”⁴¹⁰ 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.”⁴¹¹ In the Amhara region, in the customary practice of *shimgilina* (elders` mediation), and also in many other ethnic groups of Ethiopia, reconciliatory celebration or feast is arranged by the offender after the end of the dispute resolution. In this feast, the offender`s side slaughter a cattle and the conflicting parties and their families come together and eat together, the village community is also invited to the feast where sometimes the families become relatives through reconciliatory inter-

⁴⁰⁷ The settlement or reconciliation process and the customary rituals may take place in the same date or at different date. Usually, the customary rituals are conducted some days after the settlement is reached allowing time for preparation.

⁴⁰⁸ There are numerous customary dispute resolution mechanisms in Ethiopia. It is believed that almost all ethnic groups in Ethiopia have their own distinct customary law system and the government is currently trying to conduct proper anthropological inventory of customary laws which help us to make such a bold claim.

⁴⁰⁹ Gemechu, D., 2011, Supra note 376, p.265.

⁴¹⁰ Ibid.

⁴¹¹ Regassa, T., Supra note 356, p.60

marriages.⁴¹² Their eating together from the same plate, which otherwise is considered a taboo, signals the end of enmity, their togetherness and pledge to live peacefully in the future. In some parts of the region also, the “conflicting parties intermix *`qollo`*, roasted grains, prepared by the two families to symbolically signal that the two families are now intermixed beyond simple resolution of the conflict.”⁴¹³ Moreover, in some parts of Ethiopia, such as in 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 as a concluding remark, and the conclusion of the ritual process is mostly pronounced by the blessing of elders.⁴¹⁴

The oath administered, the fear of curse by community elders, and other social sanctions such as condemnation and isolation of the defaulting party by the community members as violators of the community values, upon non-compliance of the decision, serve as instruments to enforce the decision instead of punishment used by the formal criminal justice system.⁴¹⁵

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 families.

The ritual practices are mainly forward-looking and aiming to reintegrate the offender into his\her community, and preservation of future communal peace and harmony.

5.4. Limitations of CDR Mechanisms

Though the customary dispute resolution mechanisms are useful tools of administering justice in Ethiopia as discussed above, they are not without shortcomings. These shortcomings are mainly related to its non-compliance with human rights standards particularly to the unequal treatment of women with men. Most of the time, in most customary dispute resolution mechanisms of Ethiopia, women are not equally treated with men. Getachew Assefa and Alula Pankhurst, 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

⁴¹² Ibid, p.62; Gluckman also describes the role of marriage in repressing vengeance by turning enemies to friends and relatives.

⁴¹³ Ibid.

⁴¹⁴ Zeleke, M., 2010, Supra note 18, p.73

⁴¹⁵ Itansa, I. (2011), ‘The Quest for the Survival of the Gada System’s Role in Conflict Resolution’, in *Customary Dispute Resolution Mechanisms in Ethiopia*, Yntiso, G., Azeze, F. and Fiseha, A. (ed.), the Ethiopian Arbitration and Conciliation Center, Addis Ababa, P.310.

relative to represent them.”⁴¹⁶ 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 part of Oromia regions, the amount of compensation for female victims is half of that which may be due for male victim.⁴¹⁷ Besides, as stated above, girls may be provided as a wife to a relative of a deceased in the form of compensation, *bride compensation*, against their consent.⁴¹⁸

Moreover, due to the effects of modernization and urbanization processes, the importance of customary dispute resolution institutions is declining. First, the community leaders or elders are accused of corrupt practices and being politicized by the government which in turn may affect the impartiality of their decisions.⁴¹⁹ Second, the peoples, especially those closer to the townships, become less reliant to the traditions and customary beliefs, and are more reluctant to go through such systems. As a result, they may fail to comply with the decisions of elders.

Therefore, the limitations associated with the customary dispute resolution mechanisms should be properly addressed so as to utilize those mechanisms as an asset and a basis to implement restorative justice in the Ethiopian criminal justice system. Necessary measures should be taken to re-orient the customary dispute resolution mechanisms to make them consistent with the contemporary human rights principles. This in particular requires the provision of the necessary training to elders (traditional adjudicators) to make them aware and up to date with the constitutional principles and international human rights treaties that Ethiopia has ratified. But these training should not be delivered in a way to abuse the age-long traditional customs.

5.5. Ethiopian CDR mechanisms: Compatible with restorative justice values and principles?

As shown above, most of the modern restorative justice programs are developed based on, and shaped by customary or indigenous processes as the “underlying philosophy of indigenous processes that justice seeks to repair the torn community fabric following crime has resonated well with and informed the modern restorative justice ideal.”⁴²⁰ Similarly, tracing its historical roots, Theo Gavrielides writes that the “roots of restorative justice

⁴¹⁶ Assefa, G. and Pankhurst, A. (2008), ‘Facing the Challenges of Customary Dispute Resolution: Conclusions and Recommendations’, in *Grass-Roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, Pankhurst, A. and Assefa, G. (ed.), Centre Francais d’Etudes Ethiopiennes, Addis Ababa, p.264.

⁴¹⁷ Pankhurst, A. and Assefa, G., 2008, Supra note 253, p.10.

⁴¹⁸ Besie, B. and Demie, L., 2008, Supra note 406, p.124.

⁴¹⁹ Intisa, I., 2011, Supra note 415, P. 113.

⁴²⁰ Van Ness, D., 2005, Supra note 98, p. 2.

practices are ancient, reaching back into the customary practices and religions of most traditional societies though the term restorative justice is coined in the 1970s.”⁴²¹ Hence, the customary processes are used as a basis for modern restorative justice programs 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 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 about the crime, harms caused and the appropriate responses to it. In addition, in line with the principles of *inclusion* and *participation* of restorative justice, the customary dispute resolution mechanisms of Ethiopia allow the presence of the victim, offender, their respective families, other community members, and promote their active participation in the conflict resolution process. With an aim to discovering the whole truth about the wrong doing, the customary dispute resolution mechanisms give the parties maximum freedom to explain and narrate every details of the conflict and to vent their feelings without limiting them to some relevant issues. In addition to elders who are chosen to manage and lead the customary dispute resolution mechanisms, other community members are not also prohibited from attending in the process.⁴²² In some customs, such as the Orom, youths are required and encouraged to attend the customary dispute resolution processes so as to make them know and learn the wisdoms of customary practices in order to ensure the existence and continuity of the customs from generation to generation.⁴²³ This manifests the focus of the Ethiopian customary dispute resolution mechanisms on community participation as Abera Jembere rightly stated that the legitimacy of Ethiopian customary dispute resolution mechanisms are rooted in and remain relevant due to “the participation and consensus of the community.”⁴²⁴

⁴²¹ Gavrielides T. (2011), ‘Restorative Practices: From the Early Societies to the 1970s’, Internet Journal of Criminology, p.3, available at: <http://www.internetjournalofcriminology.com/Gavrielides_Restorative_Practices_IJC_November_2011.pdf>.

⁴²² Interview with Mr. Techane Mergia, Legal researcher in the Supreme Court of Oromia, August 2012.

⁴²³ Ibid; Interview with Mr. Abera Degefa, Supra note 389.

⁴²⁴ Jembere, A., 1998, Supra note 234, p.39.

Similarly, the customary dispute resolution mechanisms, like the modern restorative justice processes, emphasize on the *restitution* or *compensation* of victims. It involves 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.⁴²⁵ 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.

Moreover, the *reintegration* of the offender into his\her community through the process of reconciliation is the other main feature of Ethiopian customary dispute resolution mechanisms that it shares in common with modern restorative justice. 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”⁴²⁶ and facilitate his\her reintegration into the communities. 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, elders, and those who care most about the offender and the victim, their respective close families, in the customary dispute resolution process plays an important role to effectively communicate “shame” to the offender and help to reintegrating him\her into the law abiding communities.

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 involve the shaming of both the offender, and the victim as well as his\her 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 families and 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 makes them get rid of the grudge; as

⁴²⁵ Pankhurst, A. and Assefa, G., 2008, *Supra* note 253, p. 15.

⁴²⁶ Braithwaite, J., 1989, *Supra* note 3, p.55,100,101.

well as due to the fear of curse by community elders, and condemnation and isolation by the community members as violators of the community values. This is mainly because failure to comply with the decisions is considered as disregarding the customary values, as the decision is reached based on customary norms; or disrespecting the elders and is regarded as a shameful act. 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 the act of revenge, and are attuned to the reintegrative 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 preventing the culture of revenge. Further, the customary dispute resolution mechanisms use elders as mediators or arbitrators 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 restorative part of the continuum of restorative justice even though their functioning is not fully recognized by law and that they are not well organized programs.

CHAPTER SIX: PROSPECTS FOR RESTORATIVE JUSTICE IN ETHIOPIA

6.1. Promises to Implement Restorative Justice

Though the idea of restorative justice is not yet developed in the Ethiopian criminal justice system, save those elements of restorativeness discussed in chapter four, there are some developments in recent years which could provide fertile grounds to introduce and develop it in the near future. A consensus, which is supported by certain actions, has been reached regarding the role and importance of using customary dispute resolution mechanisms as a basis to implement restorative justice in the Ethiopian criminal justice system. Similarly, new documents and legislations including the Criminal Justice Policy, the draft Criminal Procedure Code, and the draft Community Service Proclamation, which provide some rooms for the implementation of restorative justice in the Ethiopian criminal justice system in the form of diversion to the customary dispute resolution mechanisms, have enacted. These new documents and legislations coupled with the presence of customary dispute resolution mechanisms which are compatible with the values and principles of restorative justice are some of the good promises and potentials to implement restorative justice in the Ethiopian criminal justice system in the near future. These promises are discussed below.

6.2. Consensus on the use of CDR mechanisms as a basis for restorative justice

The greatest opportunity for the introduction and implementation of restorative justice in the Ethiopian criminal justice system is the presence of multiple customary dispute resolution mechanisms which resonate well with the values and principles of restorative justice. Since most of the Ethiopian communities are traditional and religious who live up to, and have great respect for the customary and religious rules,⁴²⁷ the implementation of restorative justice using customary dispute resolution mechanisms would be much easier. Some scholars consider the wisdom of customary practices of Ethiopia as a valuable asset to implement restorative justice.⁴²⁸ Using customary dispute resolution mechanisms to develop restorative justice programs is also consistent with the constitutional provision of ensuring access to justice;⁴²⁹ and the recognition of the nations, nationalities, and peoples` right of self determination, autonomy and control over the administration of the justice system provided under the FDRE Constitution.

⁴²⁷ Interview with Mr. Gardew Assefa, Private peace consultant, August 2012.

⁴²⁸ Interview with Mr. Abera Gedefa, Supra note 389.

⁴²⁹ Constitution of the FDRE, Supra note 19, Art. 37.

Recognizing this fact, currently, a consensus have been reached as to the use of customary dispute resolution mechanisms as a basis to implement restorative justice in Ethiopia on the assumption that the purpose of criminal law is better achieved through the use of customary dispute resolution mechanisms.⁴³⁰

To that end, the government is conducting further study on the customary dispute resolution mechanisms of different ethnic groups as a first step. The Ministry of Justice (MoJ) has allocated certain amount of budget and a study on the customary dispute resolution mechanisms of some selected regions such as Tigray, Southern Nations and Nationalities, and Afar is being conducted.⁴³¹ The Justice and Legal System Research Institute (JLSRI) is also conducting a similar study on the customary dispute resolution mechanisms of Beni-Shangul Gumuz, Gambella, and Afar regions.⁴³² Similarly, different advocacy organizations, such as Justice for all and Prison fellowship Ethiopia, are undertaking pilot studies⁴³³ and organizing discussion forums with judges, prosecutors, police, parliamentary members, and adjudicators of customary dispute resolution mechanisms or elders about the customary dispute resolution mechanisms in different regions and their link with restorative justice.

Furthermore, legal professionals tend to recognize the role of customary dispute resolution mechanisms in resolving criminal matters so as to reduce the case loads. For example, judges and prosecutors practically began to allow the use of customary dispute resolution mechanisms to minor crimes, and crimes punishable only upon private complaint, for such types of crimes do not highly involve the public interest.⁴³⁴

Therefore, the presence of multiple customary dispute resolution mechanisms, though they are not well institutionalized and organized, which are compatible with the values and principles of restorative justice coupled with the current movements towards their recognition are important steps to implement the ideal of restorative justice in the Ethiopian criminal justice system. This begs, however, an important question about how to institutionalize the

⁴³⁰ Interview with Mr. Yidnekachew Kebede, Legal Researcher and Customary Law Research Team Leader, Justice and Legal System Research Institute (JLSRI), September 2012.

⁴³¹ Interview with Mr. Dessalegn Mengiste, *Supra* note 379.

⁴³² Interview with Mr. Isayas Ayele, Assistant Legal Researcher, Justice and Legal System Research Institute (JLSRI), September 2012; Interview with Mr. Yidnekachew Kebede, *Supra* note 430.

⁴³³ Justice for all and Prison fellowship Ethiopia is sponsoring studies focusing on the customary dispute resolution mechanisms of different regions in Ethiopia and their relationships with restorative justice. The pilot study of the Oromia region is already completed and published; while those of Amhara and Afar regions are ready for publication.

⁴³⁴ Interview with Mr. Meazahaymanot, *Supra* note 354. However, some scholars argue that it is not reasonable to limit the scope of customary dispute resolution mechanisms' application only to minor crimes and crimes punishable upon private complaint on the ground that they are factually being used to resolve serious crimes such as homicide, inter-ethnic and inter-religious conflicts (Interview with Mr. Isayas Ayele).

customary dispute resolution mechanisms. This point is beyond the scope of this thesis and requires detailed research.

Nonetheless, it is important to mention the views raised during the national regional states` justice organs forum on restorative justice organized by Justice for all and Prison fellowship Ethiopia from August 16 to 17, 2012 held in Adama. The debate concerning how to institutionalize the customary dispute resolution mechanisms of Ethiopia oscillates between two different views. The first view claims that it is enough to give sufficient legal recognition to customary dispute resolution mechanisms without establishing separate state sponsored institutions which practice them.⁴³⁵ Proponents of this perspective argue that giving sufficient legal recognition to customary dispute resolution mechanisms by itself is a sufficient way of institutionalizing them, as it gives legal authority for traditional institutions which are currently operating; and that establishing a separate state sponsored institution may risk to be politicized and may lead the community to lose trust in elders.⁴³⁶ The second view, on the other hand, claims that separate state sponsored institutions which can exercise customary dispute resolution mechanisms are necessary requirements to implement restorative justice in the Ethiopian criminal justice system. Proponents of this view argue that the existence of separate institutions will make diversionary referrals by the judges or public prosecutors to such institutions easier.⁴³⁷

The second view seems sound as organized 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 organize or institutionalize the customary dispute resolution mechanisms, especially in a way that does not jeopardize their indigenous character, and to adequately demarcate the state`s involvement and role in such institutions. In particular, proper mechanisms should be designed to prevent a state from politicizing customary dispute resolution institutions and from using them as another instrument to exercise control over the criminal justice system.

⁴³⁵ Interview with Mr. Gardew Assefa, Supra note 427.

⁴³⁶ Ibid.

⁴³⁷ Interview with Mr. Techane Mergia, Supra note 422.

6.3. The New Criminal Justice Policy and Other Draft Legislations

The consensus on the use of customary dispute resolution mechanisms as a basis to implement restorative justice in Ethiopia is further strengthened by the enactment of new Criminal Justice Policy and other draft legislations which provide conducive environment to implement restorative justice via customary dispute resolution mechanisms.

6.3.1. The FDRE Criminal Justice Policy

Ethiopia has introduced a new criminal justice policy in September 2011 with an aim to rectifying the age old problems of the criminal justice system and to introduce new legal thinking, practice and procedures in the Ethiopian criminal justice system.⁴³⁸ Creating a procedure for the use of customary dispute resolution mechanisms⁴³⁹ so as to provide fair and sustainable solution for crimes is part of the new legal thinking and practices given due attention under the newly enacted Ethiopian criminal justice policy.⁴⁴⁰

The policy states that “the criminal case can be referred to the customary dispute resolution mechanisms at any stage of the criminal justice process upon the request of the public prosecutor or the accused, or upon the motion of the court” so as to make the criminal justice system speedy and accessible.⁴⁴¹ It provides general principles guiding the referral of criminal cases to the customary dispute resolution mechanisms which include that the customary dispute resolution mechanisms can be used: taking into account the type of crime, the character of the accused, and the circumstances of the commission of the crime; if it is believed that the interests of the public and the victims are better protected by the use of customary dispute resolution mechanisms than the regular court system; if the accused or the offender is youth (juvenile), female, disabled, elderly, non-recidivist criminal, and he\she is accused of crimes punishable with simple imprisonment and a reconciliatory agreement is reached between the accused and the victim.⁴⁴² The criminal justice policy also provides specific conditions which must be fulfilled to refer the criminal case to customary dispute resolution mechanisms which include:⁴⁴³ the accused person must willfully admit all ingredients of the crime and sincerely express his repentance in writing after receiving

⁴³⁸ Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, 2011, Ministry of Justice, Addis Ababa, preamble (Translation mine).

⁴³⁹ Though the Criminal justice policy uses the general term “out-of -court mechanisms” to refer to any dispute resolution mechanism alternative to the formal criminal justice system including the modern ADR processes, I specifically used the term “customary dispute resolution mechanisms” for the purpose of this thesis. This is because the customary dispute resolution mechanisms are the most dominant and an age old alternative mechanisms in Ethiopia.

⁴⁴⁰ Criminal Justice Policy of FDRE, Supra note 438, preamble.

⁴⁴¹ Ibid, p.37.

⁴⁴² Ibid, p.38

⁴⁴³ Ibid.

sufficient legal advice to that effect; the accused person must ask for an apology to the victim, and must express his\her readiness to retribute or compensate the damage caused; and the accused person should be informed, in advance, that he\she has the right to refuse the referral of the case to customary dispute resolution mechanisms, all of which are the basic elements in a restorative justice ideal.

Guided by the above general principles and specific conditions, the police, prosecutors, and judges are given discretionary power to refer the criminal case to customary dispute resolution mechanisms. To be specific, the police may stop the investigation process, upon the request of either of the parties, for crimes punishable by *simple imprisonment* or only upon *private compliant* on the condition that a reconciliatory agreement is reached between the accused and the victim.⁴⁴⁴

Similarly, the public prosecutor *may not institute* a case if he\she is convinced that the criminal case between the accused and the victim will be sustainably solved via the customary dispute resolution mechanisms rather than the regular court system;⁴⁴⁵ and if he\she is of the opinion that these mechanisms will help the accused to reform him\herself from his\her criminal behavior, and to be reintegrated into and live peacefully within the community than passing through the regular criminal justice system.⁴⁴⁶ In such cases, the public prosecutor is given a discretionary power to refer the case to the customary dispute resolution mechanisms; and even to participate in the reconciliation process, in the determination of the appropriate compensation, and may also order the accused to perform community service as a form of punishment.⁴⁴⁷

The criminal justice policy also authorizes the court (judges) to divert some criminal cases, after the charge is instituted by the public prosecutor, to customary dispute resolution mechanisms by considering the above general guiding principles and after examining the fulfillment of the above specific conditions.

The newly enacted criminal justice policy, therefore, provides a fertile ground and a basis to implement restorative justice in Ethiopia. It provides a general framework to implement restorative justice in the Ethiopian criminal justice system through the use of customary dispute resolution mechanisms. However, since a policy is not a law, but rather a document

⁴⁴⁴ Ibid, p.13.

⁴⁴⁵ Ibid, p.37.

⁴⁴⁶ Ibid, p.40

⁴⁴⁷ Ibid, p.40

merely showing the government's direction and focus regarding the justice system, a separate law into which the aspirations and principles of the policy will be translated is required to implement and give force to the policy. Hence, a separate law on restorative justice which provides a detailed guideline on how to make referrals to the customary dispute resolution mechanisms, and which may regulate the discretionary power of the police, prosecutors, and judges while making referrals is required.

6.3.2. The Draft Criminal Procedure Code

Ethiopia has prepared a draft Criminal Procedure Code with the aim to reforming the existing and currently functioning Criminal Procedure Code because it is old enacted in 1961, and does not incorporate new legal thinking and practices such as the inclusion of the restorative justice ideal into the criminal justice system. The draft Criminal Procedure Code has the objective of incorporating this new thinking into the system; and to that end, it includes new provisions compatible and convenient to introduce restorative justice.

Mirroring the new Criminal Justice Policy, the draft Criminal Procedure Code provides discretionary power to public prosecutors and judges to divert the criminal case to customary dispute resolution mechanisms with the aims to: utilize the limited resources for other serious crimes which cannot be referred to customary dispute resolution mechanisms;⁴⁴⁸ to easily integrate the offender into his\her community and reduce recidivism; to help the offender take responsibility and show remorse for his wrongdoings; and to protect and give voice to the victim and communities at large.⁴⁴⁹

Accordingly, the public prosecutor or the judge may divert the case to customary dispute resolution mechanisms, if he\she, after considering the impact of diversion on the public interest and the rights of the victim and the accused, believes that resolving the criminal case through customary dispute resolution mechanisms will result in a better solution than the regular court system.⁴⁵⁰ According to Art. 171 of the draft, the public prosecutor or the judge may divert a case to customary dispute resolution mechanisms when the accused or the offender is youth (juvenile), female, disabled, elderly; or the accused or the offender is under serious physical or mental illness during the commission of a crime or the hearing; and the accused or the offender is willing and ready to compensate the victim for the harm caused due

⁴⁴⁸ Criminal Procedure Code of the Federal Democratic Republic of Ethiopia, 2010, Draft Legislation, Ministry of Justice, Addis Ababa. Art. 170 (2) provides that serious crimes stated in the Ethiopian criminal code cannot be referred to CDR mechanisms.

⁴⁴⁹ Ibid, Art.169.

⁴⁵⁰ Ibid, Art. 170(1,2)

to his\her wrong, requirements which are almost a direct reflections of the criminal justice policy.⁴⁵¹

The draft also states the circumstances in which diversion to customary dispute resolution mechanisms is not allowed which include: if the accused or the offender is released on parole in another or similar crime; or the accused or the offender is undergoing the customary dispute resolution mechanisms in another or similar crime; or the offender was found guilty of another or similar crime within not more than two years prior to the current offence and had punished for it or solved it through customary dispute resolution mechanisms; and if the circumstances of the commission of a crime constitutes aggravation of penalty.⁴⁵²

Regarding the timing, the proposed Criminal Procedure Code allows diversion to customary dispute resolution mechanisms to be made at any stage of the criminal justice process. The public prosecutor may decide the diversion of criminal cases which are *under investigation* or after the *completion of the investigation* process but before a charge is instituted, either upon the request of the accused or in its own motion on the condition that the accused person willfully admits all ingredients of the crime and sincerely express his\her repentant in writing after receiving sufficient legal advice about his\her right not to admit the crime and to refuse the diversion.⁴⁵³ Nonetheless, once the *charge is lodged* to the court, it is the power of the judge to divert the case to customary dispute resolution mechanisms upon the request of the accused or the public prosecutor, or in its own motion taking into account the above conditions.⁴⁵⁴

Thus, the draft Criminal Procedure Code tries to provide fertile conditions and rooms for the implementation of restorative justice ideals in the criminal justice system, which is lacking in the currently functioning Criminal Procedure Code. In particular, it gives recognition to customary dispute resolution mechanisms` application to criminal matters, and states the guiding principles and conditions to make referral to them thereby maximizing the possibilities to implement restorative justice. Nonetheless, the draft Criminal Procedure Code`s recognition of customary dispute resolution mechanisms` application to criminal matters in the form of diversion is open to argument in the absence of a clear constitutional clause which recognizes their application to criminal matters. This is because any law or

⁴⁵¹ Ibid, Art. 171.

⁴⁵² Ibid, Art. 172.

⁴⁵³ Ibid, Art. 170(5) cum Art. 173 (1,C,D&E).

⁴⁵⁴ Ibid, Art. 170 (6)

customary practice which contradicts with the Constitution is null and void.⁴⁵⁵ Hence, the amendment of the Constitution to include a clear constitutional clause recognizing the customary dispute resolution mechanisms` application to criminal matters is necessary to avoid such arguments.

Similarly, though the draft Criminal Procedure Code provides a framework to implement restorative justice through diversions to customary dispute resolution mechanisms, its application is limited only to minor crimes and crimes punishable upon private complaint. Hence, the draft Criminal Procedure Code should reconsider its scope of application to include some serious crimes too. For example, inter-ethnic and inter-religion conflicts may be better resolved via customary dispute resolution mechanisms than the criminal justice system. This is because it may not be suitable to entertain such types of criminal conflicts in the court room for the parties involved in the conflict may be huge in number, and that the punishment of any member of those groups may not end the conflict unless reconciliation is reached in accordance with the customary or religious rules of those groups. Furthermore, it is also possible to combine both restorative justice options using customary dispute resolution mechanisms and the formal criminal justice system in other serious crimes as well. The law may give due recognition to the settlement of the criminal conflict and reconciliation of the offender with the victim or his\her families through customary dispute resolution mechanisms, and consider that fact and reduce the penalty provided under the Criminal Code thereby giving space for both criminal justice and restorative justice options. This modality is both backward looking in that the criminal is punished by reduced penalty under the criminal law for his\her offending; and forward looking in that the parties and their respective families are reconciled not to resort to vengeance and pledge for their peaceful future relationships.

Hence, the draft Criminal Procedure Code should be better reframed in a clear manner reconsidering its scope, and taking into account the ongoing discussions, debates and studies on the customary dispute resolution mechanisms in different regions before it becomes final and effective law.

6.3.3. The Draft Community Service Proclamation

Ethiopia has also prepared a draft law on Community Service in July 2011 under the advocacy and sponsorship of the advocacy organization called Justice for all and Prison fellowship Ethiopia. This draft proclamation is prepared with the objective to providing

⁴⁵⁵ Constitution of the FDRE, Supra note 19, Art.9.

detailed rules and principles guiding the imposition and execution of community service orders in lieu of other forms of punishments provided under the FDRE Criminal Code;⁴⁵⁶ to establish supervisory organs responsible to execute the community service orders;⁴⁵⁷ and to determine the rights and duties of the offender while performing community service and to regulate the measures to be taken by the court or other supervisory organs if the offender stops working the community service.⁴⁵⁸

The draft proclamation authorizes the judge to order community service if: the offender is found guilty of committing minor crimes punishable with fine or simple imprisonment not more than six months; or the court believes that performing community service will reform the offender better than serving other forms of punishments; and if the offender is found capable of performing community service.⁴⁵⁹

The proposed proclamation also establishes federal organs responsible to supervise and execute the community service order. These federal organs include: a *community service national committee* which is a higher organ authorized to enact national rules to execute community service;⁴⁶⁰ a *community service executive officer*, a natural person who submits a pre-sentencing report to the court examining whether an offender is capable of performing community service orders and who supervises whether the offender is properly performing the community service order;⁴⁶¹ and *the beneficiary or hosting organization*, a public or government institution where the offender performs the service and which supervise the day to day activity of the offender.⁴⁶² It also authorizes the regional councils to enact specific laws and to establish community service executing organs to the grass roots level.⁴⁶³

The recognition of community service as one form of punishment will facilitate the implementation of restorative justice in the Ethiopian criminal justice system. Nonetheless, the draft proclamation does not distinguish community service from compulsory labor provided under the FDRE Criminal Code. Instead, it uses the terms “community service” and “compulsory labor” interchangeably and regards the draft proclamation as an instrument

⁴⁵⁶ Community Service Proclamation of the Federal Democratic Republic of Ethiopia, 2011, Draft legislation, Addis Ababa, executive summary, paragraph 6.

⁴⁵⁷ Ibid, summary, paragraph 7.

⁴⁵⁸ Ibid, executive summary, paragraph 13.

⁴⁵⁹ Ibid, Art. 5.

⁴⁶⁰ Ibid, Art. 16

⁴⁶¹ Ibid, Art. 23-24.

⁴⁶² Ibid, Art. 25-26

⁴⁶³ Ibid, Art. 14(2)

enacted to provide detail procedures to implement the compulsory labor provisions of the FDRE Criminal Code.

However, as stated in chapter four, community service and compulsory labor are different things though both of them are non-custodial punishments. Hence, necessary correctional measures should be taken and the draft should be reframed in a way separating the two concepts. Yet, despite such conceptual muddle, taking action and steps to introduce a community service proclamation by itself is a good beginning and is a necessary step to implement restorative justice in the Ethiopian criminal justice system in the near future.

Generally, if all of the necessary correctional measures are properly taken, the recently prepared Criminal Justice Policy, the draft Criminal Procedure Code and Community Service Proclamation, coupled with the fact that Ethiopia is rich in customary dispute resolution mechanisms, which are compatible with the values and principles of restorative justice, are the biggest opportunities to properly install restorative justice ideals into the Ethiopian criminal justice system. Besides, the current advocacy works, studies, discussions and debates about the importance of implementing restorative justice, and as to how to implement it, using customary dispute resolution mechanisms, shows the fact that the issue has got the attention of the Ethiopian justice organs; and these discussions and debates are important steps to make necessary reform measures convenient to implement restorative justice in the Ethiopian criminal justice system in the near future.

Chapter Seven: Conclusion

The Criminal Justice System, though it is considered as the principal system to deal with crimes, suffers from lots of limitations such as that it does not address the needs of crime victims and makes them mere footnotes of the process; it separates the offender from its social ties, emphasizes on punishment as an instrument to incapacitate the offender both as retribution for the current crime and as a strategy to avoid future crimes instead of taking steps to encourage them to assume responsibility and undo the wrong they have committed; and it gives to a state a monopoly over the justice system and excludes community participation in the criminal matters for it views crime as primarily an offence against the state rather than a violation of relationships between the parties and the community and assuming that the communities are represented by the public prosecutor.

Restorative justice is advocated as an alternative way of thinking about crime and justice in an aim to compliment the criminal justice system and to rectify the limitations associated with it. Restorative justice, as its foundational premises, views crime as a violation of a relationship among victims, offenders and the community instead of putting a state as a sole victim, and emphasizes to “put right” or “heal” the wrong and to restore the broken relationship in the community.

To that end, restorative justice is guided by some key values or principles. First, it aims to *restore and reintegrate the parties* by identifying and positively addressing the harms and needs of the stakeholders of the crime, namely the victim, offender and communities at large. Second, it emphasizes on making *amends* or *repairs*, be it concrete or symbolic reparations, to the harms resulted from the criminal act. Third, it allows the *voluntary* involvement of *the legitimate stakeholders* to the crime in a collaborative process by giving them an opportunity for direct and full participation in a safe environment to discuss about the crime, harms and the appropriate outcomes that are mutually agreed upon rather than externally imposed.

In line with the above values and principles, different restorative justice models or programs such as Victim-Offender Mediation, Family Group Conferencing, and Sentencing Circles are developed in different countries, such as Canada, New Zealand, and Australia, mainly based on the traditional or customary practices of indigenous or aboriginal peoples. These models of restorative justice are important processes to end stigmatization and for reintegrative shaming to happen as they involve the people who most care for the offender and whom the offender

respects; and different cultural rituals of apology and forgiveness are integral parts of the processes. These restorative justice models also use “restorative” and “communicative” punishments which are imposed with a purpose to achieve restoration and healing rather than merely inflicting pain on the offender; and they fall either at the fully or mostly restorative part of the continuum of restorative justice.

Since the Ethiopian criminal justice system is no exception, it suffers from the aforementioned limitations. The Ethiopian criminal justice system focuses on the law breaking of the offender, and is more interested in punishing the guilty offender. Its rituals are also disintegrative and stigmatic to the offender. The victims are not also in the center of the Ethiopian criminal justice system as their role is confined merely to providing information in the form of accusation or complaint so as to set the justice in motion, or to be merely a witness in their own case upon the discretion of the public prosecutor. Besides, their right to restitution and compensation is not adequately protected; and there is no possibility to bring the victim and the offender together so as to enable them to discuss the causes and consequences of the crime, reconcile, and thereby restore and maintain their peaceful relationships. Similarly, the state monopolizes the administration of justice by excluding the communities from having any meaningful say.

Hence, the notion of restorative justice is almost non-existent in the current Ethiopian criminal justice system except for the fact that it shows some elements of restorativeness by recognizing the right of victims and those having rights from them to involve in the process and to claim compensation. This is done via the joinder of civil claims with criminal action; by conducting private prosecution upon the refusal of the public prosecutor to institute a criminal charge due to insufficiency of evidence to justify conviction for crimes that are punishable only upon formal complaint; and by providing Parole and Probation possibilities to the offender in a very rare cases.

On the other hand, despite the Ethiopian policy of “turning a blind eye” to the customary dispute resolution mechanisms, they are playing an important role to resolve conflicts of any kind and maintain peace and stability in the community. The customary dispute resolution mechanisms use elders as mediators or arbitrators 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; emphasizes on healing and restitution, 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 avoiding the culturally accepted practices of revenge. Hence, the customary dispute resolution mechanisms of Ethiopia are compatible with the values and principles of restorative justice, namely encounter, inclusion, participation, restitution or compensation, and reintegration; and may fall either at the fully or mostly restorative part in the continuum of restorative justice.

Despite this fact, however, the currently functioning criminal laws of Ethiopia including the Constitution neither recognize the customary dispute resolution mechanisms` application for 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 restorative justice processes like the use of customary dispute resolution mechanisms.

Nonetheless, in recent years, there are certain promises and a consensus has been reached regarding the role and importance of using customary dispute resolution mechanisms as a basis to implement restorative justice in the Ethiopian criminal justice system. This consensus is accompanied by certain actions which include different advocacy works, studies, discussions and debates about the importance of implementing restorative justice and as to how to implement it using customary dispute resolution mechanisms; as well as the preparation of the criminal justice policy and other draft legislations which provide fertile conditions for the implementation of restorative justice in the Ethiopian criminal justice system in the form of diversion to the customary dispute resolution mechanisms.

In spite of these recent developments which provide a conducive environment to implement restorative justice in the Ethiopian criminal justice system, still a lot is needed to be done. First, the Constitution should be amended to include express provision which recognizes the customary dispute resolution mechanisms` application to criminal matters. Second, the recently enacted draft laws such as the draft Criminal Procedure Code and Community Service Proclamation should be better reframed in a clear manner by avoiding conceptual confusions, reconsidering its scope of application, and taking into account the ongoing discussions, debates and studies on the customary dispute resolution mechanisms in different regions of Ethiopia, and should be well deliberated in the parliament, to acquire legitimacy, before it becomes final and effective laws. Third, the customary dispute resolution mechanisms should be properly organized or institutionalized without, however, affecting their indigenous character, and by properly delimiting the role and involvement of the state in

such institutions. Fourth, necessary measures should be taken to properly address the limitations associated with the customary dispute resolution mechanisms in order to utilize those mechanisms as an asset and a basis to implement restorative justice in the Ethiopian criminal justice system.

Generally, if all of the above and other necessary measures are properly taken, Ethiopia has a potential to develop restorative justice systems which meets the needs of its peoples and reflects its cultural heritage by legally recognizing, organizing, and accommodating the customary dispute resolution mechanisms with the formal criminal justice system.

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