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Original Article

Bridging Legal Gaps with Customary Practices of Conflict Resolution as Restorative Justice: Comparative Analysis of *Gadaa* System with Ethiopian Criminal Law

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Abstract

Conflict is inevitable in social life. It appeals to devising different systems and mechanisms to maintain peace and social cohesion. Now a day modern laws are supposed to maintain justice and social cohesion. Criminal law in particular applies when crime is committed. The modern criminal justice system however is criticized by many scholars as it gears toward punishment rather than restoring peace and social cohesion within the community. This makes the justice system unreliable as it fails to maintain social cohesion. *Gadaa*, on the other hand, is known for making peace while resolving conflicts. The Oromo people, with cultural practices like 'Ilaaf ilaamnee', 'Jaarsummaa', 'Gumaa', and others deliver justice while restoring peace within the society than the modern criminal justice system. This article scrutinized provisions of the Ethiopian criminal code and its emphasis on peacemaking compared with the *Gadaa* system. Necessary data is gathered from literature and black letter laws. These laws include the criminal code, criminal procedure, and criminal policy of Ethiopia the main sources for the analysis of criminal law. Relevant literature on the *Gadaa* system of dispute resolution is intensively reviewed. The research method therefore is qualitative. The research finding shows Ethiopian criminal law is exiguous on restorative justice; while the *Gadaa* system is effective in restoring peace while delivering justice. This in turn calls for inclusion and adequate accommodation of the *Gadaa* dispute resolution method in Ethiopia's criminal law. Lawmakers need to amend the criminal code and criminal procedure to adequately accommodate *Gadaa* practices of dispute resolution that restore peace and maintain social cohesion while delivering justice.

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Introduction

Social norms and disputes are as old as human society.¹ Every human society has norms that regulate relations of its members. Conflict or disputes are as old as human society. Disputes could be of civil or criminal nature. Prior to the emergence of the modern state and its formal justice system, human society had customary rules, procedures, and institutions through which disputes were resolved.² When a dispute arises, particularly in criminal cases, the main stakeholders involved are victims, offenders, and the community within which the crimes had been committed. Reconciliation is the main justice administration process in customary dispute resolutions. Scholars like Elechi³, Llewellyn & Howse⁴, Van Ness,⁵ and Zehr⁶, apart from being the community-based, customary justice systems aimed at restoring the dismantled relationships by providing reparation to the victims for the harm caused to them by the crimes. Reintegration of offenders with the community is another aim of the customary justice system.

While Ethiopian societies have used their own mechanisms of dispute resolution methods since ancient times to nowadays, the government has established the so-called

modern criminal justice system which is characterized as a retributive one. In Ethiopia, particularly when it comes to criminal matters, diverse indigenous justice systems operate de facto without state recognition. Hence, the two systems (the modern justice system; the system imported from westerns which indigenous people see as alien to them, and the customary justice system) coexist in an uneasy relationship. Customary dispute resolution mechanisms not only solve disputes between parties but also maintain peace and social cohesion in the community. Such kind of dispute resolution mechanisms therefore are hailed as restorative justice which currently is gathering monuments even in western countries.

The Oromo, for instance developed the *Gadaa* system long ago which governs all aspects of their life. Long before the emergence of the modern state and its formal justice system, people had their own varieties of customary practices through which they settle conflicts and build peaceful coexistence. The *Gadaa* system is one of the interesting ways of conflict resolution institutions and is well respected among the Oromo community in Ethiopia.⁷ After the

¹ Aberra Degefa Nagawo, Beyond the Individualization of Punishment: Reflections on the Borana Oromo's Collective Criminal Responsibility, *HARAMAYA LAW REVIEW* 6 (2017): 29-42.

² Aberra Degefa Nagawo. (2013) the Impact on Offenders of Rivalry between the Formal Criminal Justice System and the Indigenous Justice System: Experiences among Borana Oromo in Relation to the Crime of Homicide.

³ Elechi, O.O. (2004). Human rights and the African Indigenous justice system, A paper for presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8-q2, 2004, Montreal, Quebec.

⁴ Llewellyn, J. J. & Howse, R. (1998). Restorative justice – a conceptual framework. Law Commission of Canada.

⁵ Van Ness, D. (2005, April). An overview of restorative justice around the world. Eleventh United Nations Congress on crime prevention and criminal justice. Bangkok.

⁶ Zehr, H. (1990). Changing lenses: A new focus for crime and justice. Scottsdale: Herald Press

⁷ Desalegn Chemedda, Seleshi Awlache, Regassa Ensermu, Mukand S. Babel, and Asim Das Gupta, (2007). Indigenous system of conflict resolution in Oromia, Ethiopia. CAB International Water

formation of modern Ethiopia, laws that govern the social life of its people are transplanted from Westerns putting aside mechanisms developed by the community.

Currently, the criminal justice system applies whenever a crime is committed. Ethiopian criminal law sees crime as an offence committed against the state and focuses on punishing such acts to deter others. Nowadays, the Ethiopian criminal justice system is criticized as it gears towards punishment rather than restoring peace and maintaining social cohesion. Every justice system including ours aims at delivering justice to the needy and maintaining social cohesion. This in turn calls for restorative justice practices. Looking for such practices in indigenous knowledge and modern law and filling gaps in law in that regard is the purpose of this research. As far as my knowledge is concerned I did not find any research that compares and contrasts restorative justice in the Ethiopian criminal justice system and the *Gadaa* system of conflict resolution.

1. Problem Statement

Apart from the formal criminal justice system, societies have their own customary ways of dealing with dispute whether it is of crime nature or civil matters. This kind of practice exists everywhere in the world; especially in Africa. In Ethiopia, almost in all regions of the country, and especially in the remote and peripheral areas, these customary dispute resolution mechanisms are more influential and applicable than the formal

criminal justice system, which is considered alien to traditional societies.⁸

In the Oromo society of Ethiopia, the customary norms are more strong, relevant, and accessible to the people than the formal justice system which is blamed for the dalliance of justices. Moreover, experiences in different regions of Ethiopia show that people, even after passing through the procedures and penalties in the formal criminal court, tend to use the customary dispute resolution mechanisms for reconciliation and in order to control acts of revenge. Especially in the western part around West Showa zones where I served as public prosecutor, a criminal who committed an act of homicide cannot safely live coming home after finishing the penalty imposed on if not finished reconciliation process through *Gumaa* practice. There is an incident which I remember being a public prosecutor who was killed by a relative of a victim of homicide after coming out of prison serving five years of punishment for the crime he committed. This is because the formal justice system simply punishes the criminal leaving the wound unhealed which makes the formal justice system non-restorative.

On the other hand, what the westerner opt to say is traditional or informal dispute resolution massively practiced in Ethiopian society even more liked than the formal justice system restore peace and at the same time resolves conflict between disputant at individual as well as clan level. Such solving problem-solving institutions and practices

Management Institute (IWMI) ILRI – Ethiopia Campus, Addis Ababa.

⁸ Macfarlane Julie. (2007) Working towards restorative justice in Ethiopia: Integrating traditional

conflict resolution systems with the formal legal system. *Cardozo Journal of Conflict Resolution*, 8 (487), pp. 487–509.

were not given the places it deserve in the modern criminal justice system of Ethiopia; even though the primary objective criminal justice system is to bring peace and order to the state and the people of the country. Looking for alternatives to the formal criminal justice system available to bring sustainable peace within the society is therefore very crucial. This research is also triggered to search for alternatives that Ethiopian societies have been practicing to solve disputes and restore peace when it is ruined by conflict.

2. Objective of the Research

This research intended to explore a better method that helps to resolve disputes while healing the wounds of victims of crime. By doing that, the legal gaps of the current criminal justice system are meant to fill. The primary objective therefore is to examine indigenous dispute resolutions people have been using despite formal recognition by the legal system. It also examined the legal gaps the Ethiopian criminal justice system has to bring restorative justice which is a gathering monument in the current world view. In general, through identifying legal gaps in our criminal justice system and revealing customary practices of dispute resolution that bring restorative justice in society; the researcher wants to bridge the gap making it the objective of the research. What we call the integration of indigenous dispute resolutions into the Ethiopian criminal justice system enhances functional contributions in solving disputes and serving justice, peace, and stability in the community.

⁹ Terry Hutchinson. (2015) The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming

3. Methodology of the Research

This is a research into law where much time is devoted to textual analysis of laws in discussion. It is, therefore, a desk research that demands doctrinal legal research methodology. Doctrinal research methodology is employed since it is the appropriate methodology for this kind of study. The feasibility of doctrinal research methodology been proved long years ago for research into law. In the early nineteenth century, Christopher Langdell argued “Law is a science; indeed a science with its own principle or doctrine calling it ‘legal science’, and the law library as a ‘lawyer’s laboratory’” in combating critics against doctrinal research methodology from physical sciences. According to him, the ‘Library to legal researchers is what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist’⁹ and, therefore, doctrinal analysis has been and still is the dominant legal research methodology.

From its very nature, textual analysis of laws in discussion is mandatory, and the right methodology for law research that analyzes laws and existing literature about the restorative practice and conflict resolutions that Oromo societies have been using since time immemorial. Therefore, the researcher primarily devotes much time to expounding provisions of criminal policy document documents, criminal laws, criminal procedure, and analysis of materials on *Gadaa* and restorative related justice-related issues.

the Law; ELR December 2015 | No. 3 - doi: 10.5553/ELR.000055, 131.

4. Results and Discussion

Under this section discussion on analysis of different laws, criminal policy and different customary dispute resolution mechanisms such as *Gumaa*, *jaarsummaa* and *ilaaf ilaammee* that has been there for a long time are made.

4.1. Analysis of the Ethiopian Criminal Justice System on Restorative Justice

Ethiopia’s criminal justice system sees crime as an offense against the state and views justice is served when the offender is punished. The reading of the first article of the FDRE criminal code reveals this. It says, “*The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to ensure peace and security of the state, its people and inhabitants for the public good.*” The code believes this purpose can be maintained through the punishment of deviants to deter them and others from further committing crimes. In the criminal justice system the participation of victims and society in the process is limited to the extent of giving testimony about the crime and the outcome is win-loss. Such a kind of justice system is known as retributive in the literature. In retributive justice, healing the victim’s wound and building peace in the community is not an issue. The practices of in the current Ethiopian criminal judicial system look like retributive.

a) Restorative Justice in Criminal Justice Policy

Ethiopia developed its criminal justice policy document in 2015. In the document,

restorative justice elements are introduced, and customary dispute resolution is allowed when some preconditions are fulfilled. These preconditions include repenting, asking apology, readiness to compensate the victim, and the like. As explained in the introduction of the criminal justice policy, the purpose of its enactment was to make the criminal laws in harmony with the constitution, to modernize the existing criminal laws, to ease the complex procedure of conflict resolution, and to establish a strong criminal justice system that is efficient and effective to name a few. In the preamble of the policy, we find a reason for such policy which reads as follows:

በሥራ ላይ ያለ ሕጎችን ከሕገ መንግሥቱ ጋር ለማጣጣም ብዙ ሥራዎች የተሠሩ ቢሆንም ከወንጀል ፍትሕ ሥርዓቱ ተጨባጭ ሁኔታ አንፃር ሲታዩ ግሌጽነት የሚጎድላቸው፣ ኋላቀርና መሠረታዊ ክፍተት ያለባቸው፣ የፍትሕ አካላት ህጎቻቸውን እና ህገመንግሥት የሚሰጡት አገልግሎት በግልጽነት፣ በተጠያቂነትና በፍትህነት መርሆች ላይ የተመሠረቱ አለመሆን፣ ሂደቶቹም ረጅም ጊዜ የሚወስዱና የተንዛዙ፣ ኋላቀርና ክፍተት ወጭ የሚያስከትል እንዲሁም ከቢሮክራሲያዊ አደረጃጀትና አሠራር ዘይቤ ያሌተላቀቁ በመሆናቸው ችግሮቹ መፈጠር በተጨማሪ እንደመንስዔነት ሊጠቀሱ ይችላል። በፍትሕ አካላት መካከል ሉኖር የሚገባው ሀገራዊ ራዕይ ላይ የተመረኮዘ የሥራ ትብብርና ግንኙነት በሚፈልገው ደረጃ ያላመኖር እና በመስኩ የተሠማሩ ባለሙያዎች የአመለካከት፣ የሥነምግባርና ሙያዊ ብቃት ደረጃ አነስተኛ መሆን እና የመሳሰለ ጉዳዮች በፍትሕ ሥርዓቱ ውስጥ ለተፈጠሩ ችግሮች በመንስዔነት ሊጠቀሱ የሚችሉ ናቸው።¹⁰

¹⁰ The FDRE Criminal justice policy /የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ ፍትሕ ሚኒስቴር የካቲት 25/2003 ዓ.ም.

The literal translation of the above quote from the criminal justice policy of Ethiopia is as follows. “Even though many works have been done to harmonize existing laws with the constitution when viewed from the perspective of criminal justice policy, they lack clarity, are backward, and have fundamental gaps. The services provided by the judiciary to society and the constitution are not based on the principles of transparency, accountability, and justice. The processes take a long time, are complicated, and incur high costs as well as they are independent of the bureaucratic organization and operation style. Working in cooperation and communication based on the national vision that should exist in the judiciary is not at the required level and the level of attitude, ethics, and low professional competence of the professionals in the field can be cited as problems created in the justice system.”

From this one can understand that, it seems possible to use both formal and informal justice systems to bring justice and peace to inhabitants for the general public good as set in the very first article of the Ethiopian criminal code. Yet customary dispute resolution is allowed only if the crime committed is petty, the offender is youth, disabled, or non-recidivist. This shows that criminal policy merely recognize restorative justice and gives discretion to the prosecutor to allow or not to allow criminal act to be solved through the customary practice of the judicial system under section 3.12 (c) of the policy document. The document under section 4.6.1 indicates the need for other laws to recognize restorative justice.

b) Restorative Justice in Criminal Code

In its very first Article, the FDRE criminal code aims ensuring peace and order through punitive measures. It seems such measures prevent crimes as their deterrence effect is high. The code sees punitive measures deter future criminals as they fear punitive measures incorporated in the criminal code. Once a criminal is punished for an offence he/she committed, others will take lessons from such a person according to this criminal code. Thus, the current Ethiopian criminal law views punishment as the main instrument to prevent crimes. However, mere imposition of punitive measure cannot be constructive and bring social cohesion and peace and order which is the main objective of criminal code.

In the criminal code, nothing is done to help the victim restore and repair the damage caused to him/her by the crime, and the community is excluded from participation in the process of the justice system and the ownership over criminal matters. Mere punishment does bring justice and uphold social cohesion when the community is sidelined in resolving such disputes. With the exception of limited provisions with restorative justice nature, due attention is not given to restorative justice in the Ethiopian criminal code. Some of limited provisions that have restorative principles are:

Provisions in the criminal code that talk about failing to bring a criminal matter to justice organs when it can only be initiated upon complaint; A provision like mitigating circumstance in sentences when a criminal has repented and apologized; paid compensation to victims of crime. In such cases, courts are expected to reduce the penalty while sentencing. Probation is

another provision in the criminal code that can be equated with restorative justice. 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 release pursuant to Articles 190-199 of FDRE criminal code. Parole also has restorative elements. What we call parole is granted by the pardon committee after receiving recommendations from the prison administration and taking into consideration of the behavioral reform of the criminal. One may see the details of Article 202 of the Criminal Code. Such limited provisions may not bring restorative justice; a justice that repair the wound of victims of crime and at the same time punish the wrong done.

c) Restorative Justice in Draft Criminal Procedure Code

The newly drafted criminal procedure gave large converge for restorative justice. For instance, it talks about the importance of restorative justice unequivocally under different articles like 158, 162, 163, 170, and the like to mention a few. It highlighted the importance of restorative justice; saying it is important to protect the right of victims and involve the societies in the justice system. According to this provision, therefore, the law enforcement/law-executing body can apparently apply restorative justice.

Its application is not limited to crimes initiated up on complaints but also on accusation. The problem is that, the procedure is yet to be approved by law law-making body and it is inapplicable as of now. Generally, despite little development of the restorative justice concept in the Ethiopian criminal justice system, there is the potential

for legal development with regard to restorative practices that most of the Ethiopian people apply in their day-to-day activities. Such can meet the needs of its population and reflect its cultural heritage. This shows the availability of restorative justice principles in the draft criminal procedure that has been on draft status for almost a decade.

4.2.Gadaa System and Restorative Justice

There is no consistent and universally accepted definition of restorative justice. However, working definition is given by Cormier: as such, “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”.

The Oromo people have developed a uniquely democratic sociopolitical structure known as *Gadaa*.” The *Gadaa* system governs all aspects of the Oromo people’s life. This includes mechanisms for dispute settlement. Different conflict resolution mechanisms; such as *ilaaf ilaammee*, *jaarsummaa*, *gumaa* (kwon as *gondooroo* in *Gujii*) are among dispute resolution mechanisms that Oromo people utilize. And they have similarities with the above working definition of Restorative Justice. Values of Restorative Justice are practiced by the Oromo and almost all parts of the country through different dispute resolution mechanisms that are developed as a part of the *Gadaa* system.

a) Gumaa as Restorative Justice Practices of Conflict Resolution

The term *gumaa* stands for many things in Oromo people. It could mean compensation, revenge, or reintegration of departed people for killing practices. It stands in this paper for reintegration. Through *Gumaa*; Oromo people restore peace in the community that waits to avenge the death of one relative by killing relatives of the killer. Modern criminal law only punish killer by imprisonment without reconciling societies and there are instance where victim are avenged even after the release of a criminal from prison cell. In this regard customary practice therefore better serves restorative justice than modern criminal justice system.

b) *Jaarsummaa* as Restorative Justice Practices of Conflict Resolution

Among the Oromo, *Jaarsummaa* is an establishment that deals with all kinds of disputes ranging from simple quarrels to the most serious criminal cases, even homicide. *Jaarsummaa* is one of the institutions that the Oromo people used to resolve the conflict arising among people. A respected reliable person usually called *Jaarsa biyya* plays an important role in reconciliation practices and implement the rule and regulation needed for peace settlement. This is one of the valuable cultural practices that have been with the Oromo people since Oromo was born. The term '*jaarsaa*' in *Afaan Oromo* language literally means 'an old man'. However, in *jaarsummaa* context, it refers to mean that men take part as selected respected representatives of the community and have deep knowledge to settle the uprising as mediators whenever there is a dispute or conflict (Irshad & Muleta, 2018). Depending on the particular area of the Oromo people, different terms are used to refer to these

elders. They are simply called *jaarsa biyyaa*, *jaarsa* or *jaarsa araaraa* (Dejene, 2002).

Jaarsummaa is used as a reconciliation practice where *Jaarsi biyyaa*/elders play an important role in settling disputes between disputants. This is cultural practices used to solve any kind of dispute criminal or civil matters. In *Jaarsummaa*, respected elders are selected by conflicting parties and solve the problem bringing the parties together. Elders can decide on compensation for harm caused by the offender. Once the dispute between the parties is settled by *Jaarsummaa* fearing for revenge or further conflict is gone. It therefore brings peaceful coexistence of societies which also repair damage caused by crime. As it repairs harm caused by the offender, the parties won't wait time to avenge each other anymore. This means once the dispute is resolved, it restores the relationship that is damaged by the wrong done. So, dispute resolution through *jaarsummaa* brings restorative justice unlike the one given through a formal justice system that simply punish criminal and leave the victim unhealed.

c) *Ilaaf Ilaammee* as Restorative Justice Practices of Conflict Resolution

Ilaaf Ilaammee is the Oromo dispute resolution mechanism where disputants themselves come together and settle their disputes. *Ilaaf Ilaammee* resolves conflicts of a minor nature. In the criminal justice system such may work when a crime that must be initiated up on complaint is left without being brought to the attention of the prosecution. In general, the above Oromo ways of conflict resolution reflects the values of restorative justice and is good since it helps victim get

redress in addition to delivering justice. It also makes offender feel sorry for committing a crime. By contributing on the reintegration of offender to society and avoiding revenge the use of traditional conflict resolution methods mentioned above helps in reducing commission of crime. Moreover, it maintains social cohesion and peaceful coexistence even at the existence of crime and criminal acts.

5. Conclusion and Recommendation

5.1 Conclusion

Even though human beings and conflict have been coexisting, conflict demands proper management. If not properly managed, conflict may result in political, social, and economic destruction of human beings. Its cost therefore, depends on the type of resolution system that individuals use to settle disagreements. Restorative justice views criminal conflict as an injury or violation of the relationship between victims, offenders, and community members and the 'property' of those involved in the conflict.

The criminal justice system views crime as an offense against the state and aims at punishing criminals to maintain peace and order. However, it is hardly possible to maintain peace and order by mere punitive measures. Searching for indigenous conflict resolution is very important. This article compared availability of restorative values in Ethiopian criminal justice system and the *Gadaa* system based on the analysis of pertinent legislation and relevant literature on restorative justice. Restorative values are more available in the informal justice system than in formal criminal justice systems in the current Ethiopia in general and in the Oromo people in particular. The values of restorative

justice are more practiced in the *Gadaa* system of conflict resolution than in the criminal justice system in general and criminal laws of Ethiopia in particular.

5.2 Recommendations

The criminal policy of Ethiopia envisioned the need for the amendment of substantive as well as procedural laws to include restorative justice in our legal system. However, such amendment of the laws is yet to be done.

Therefore, it is recommended that the House of Peoples Representatives amend the criminal code and include restorative justice practices used in the *Gadaa* system or put an article that empowers the justice sector to utilize customary practices of restorative justice.

- The draft criminal produce needs to be approved to enable utilization of restorative justice included in the draft document.
- Justice sector professionals need to be trained to utilize restorative justice to maintain peace and order which is the objective of criminal law.
- All concerned bodies; including universities, Governments both federal and regional, have to develop projects that enhance customary institutions working on restorative justice.