

WORKING TOWARDS RESTORATIVE JUSTICE IN ETHIOPIA: INTEGRATING TRADITIONAL CONFLICT RESOLUTION SYSTEMS WITH THE FORMAL LEGAL SYSTEM

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Most legal scholars study the formal legal system, focusing on principles of law and state-sanctioned procedures and institutions.¹ However, we know that this is only one aspect of the complex landscape of dispute resolution. In every country, community, and organization, systems of informal dispute resolution systems – often based on community customs or familial relationships, or embedded in institutional practices – run alongside the “official” state sanctioned processes. Despite their lack of formal authority and legitimacy, these informal alternatives may have as great, or even greater, an impact on the lives of those who use them as the state-sanctioned system. A growing interest in informal systems of dispute resolution has spawned a vibrant literature representing the intersection of many disciplines, including law, anthropology, sociology, and social psychology. Scholars of conflict resolution in their various disciplinary guises explore the substance and the role of informal systems of disputing and dispute resolution and their relationship, if any, to the formal legal system.²

This paper considers how the multiple realities of dispute resolution in any environment affect the work of conflict resolution practitioners. Conflict resolution practitioners are almost always invited in by representatives of the formal legal system, and their work generally focuses on managing – and perhaps reforming – this system. In practice, they cannot ignore the existence of paral-

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¹ Austin Sarat & Susan Silbey, *Dispute Processing in Law*, 66 DENV. U. L. REV. 472, 459–462 (1989).

² For an anthropological analysis, see LAURA NADER, *LAW IN CULTURE AND SOCIETY* (1997) and SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS* (1990); in sociology see, for example, PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF THE LAW: STORIES FROM EVERYDAY* (1998); and in peace studies see, for example, JOHN BURTON & FRANK DUKES *CONFLICT: PRACTICES IN MANAGEMENT, SETTLEMENT AND RESOLUTION*, (1990).

lel informal systems of conflict resolution that may undermine or distract from the formal state system. These may include structured alternatives to law, such as religious tribunals or community mediation programs. There may be other, more informal but equally significant family or community-based processes which provide their own social order outside the legal system. Whatever form an informal system takes, it is a mistake to overlook or underestimate its impact on the formal legal process and any reforms or innovations planned there. Whether invited to assess existing systems, or to develop new processes or models, practitioners and consultants often find themselves mediating between formal and informal systems already in place.

The second part of this paper focuses on a particular example of the intersection of a formal and an informal system in the development of an innovation – Restorative Justice (RJ) programming – within the formal criminal justice system. It describes my experience working in the People’s Republic of Ethiopia and efforts to introduce RJ as an alternative regime within current criminal system. The dilemma facing reformers in Ethiopia – though this initiative is supported by the highest levels of government and the judiciary – is how to affect reform of the criminal justice system in a way that harnesses the energy of Ethiopia’s vibrant culture of informal tribal conflict resolution processes. In many regions of Ethiopia and especially those far from regional centers, these informal processes are in fact more influential and affect the lives of more Ethiopians than the formal system, which is remote from the lives of many ordinary people. How can the formal justice system become an appealing and appropriate alternative to customary justice for Ethiopians who have little or no contact with the formal justice system? How can RJ principles be legally entrenched in a way that is compatible with community traditions and customs of dealing with conflict, yet maintain the oversight of the State to ensure that human rights and due process are respected? And perhaps most important of all, how can trust and collaboration be enabled between the key players – the tribal elders and the officers of the state system – for the good of Ethiopia’s many diverse communities?

Despite the focus of this paper on Ethiopia, there are many lessons here for RJ programming in the West, which still wrestles with the dilemma of its relationship with the formal criminal justice system.³ The issues I encountered working in Ethiopia are familiar

³ See section “The Case of Ethiopia,” *infra*.

ones in the West. Those committed to RJ question whether working with the state will dilute or undermine “alternative” approaches and whether the state can be trusted to be the steward of RJ programs. Whose justice is Restorative Justice – the individual actors, their communities, or the state which must enforce and oversee its outcomes? Many would argue that the very essence of RJ is its fidelity to intuitive and organic forms of informal justice within any given community, and that its adoption by a State machinery inevitably detracts from that authenticity.⁴ Throughout this paper, I shall reflect on parallels these challenged for RJ models and similar issues which arise wherever dispute resolution systems are provided and administered – often by distinctive religious and cultural groups - as an alternative to the state system, civil or criminal. What is the relationship between such informal systems and the formal justice system? Can the formal and informal systems work together? How should the interests of cultural diversity on the one hand, and respect for universal rights of due process and equality on the other, be balanced when it comes to the relationship between state and non-state justice systems?

COMPARING AND CONTRASTING FORMAL AND INFORMAL DISPUTE RESOLUTION SYSTEMS

First, it is important to be clear about what we mean when we describe one dispute resolution model as the “informal,” rather than the “formal” system in any one jurisdiction, community or organization. I shall propose definitions which do not intend to suggest a hierarchy for formal versus informal processes; but rather a means of distinguishing between each and how their distinctive character impacts on the dispute resolution environment.

In all societies, it is common for people to look to shared substantive norms to resolve problems rather than to resort to legal norms, whether or not there is also a strong formal system of law. This may be in part because of a lack of knowledge or awareness of legal rights; but numerous studies suggest that equally important are the significance of social, economic and non-legal norms within daily life.⁵ These community norms may be so strong that a resort

⁴ See Howard Zehr, *Changes Lenses*, 97–105 (1990).

⁵ See the many stories and examples in PATRICIA EWICK & SUSAN SILBAY, *THE COMMON PLACE OF THE LAW: STORIES FROM EVERYDAY* (1998). For an analysis of the impact of social

to law is regarded as inherently unethical and inappropriate.⁶ In these communities – whether religious, geographic, ethnic or other – an appeal to the formal system of rules may be seen as disloyal to the sufficiency of internal community norms.⁷ To others, informal systems of dispute resolution simply appear more relevant, appropriate and accessible than generic imposed legal norms. Whatever the reason, informal systems are often as or more vital to the social ordering of a community than the formal rules of law that co-exist.

The common characteristic of informal systems of dispute resolution is that their outcomes are neither sanctioned nor supported by the state legal machine. Some so-called informal processes are highly structured and organized, yet they are “informal” in the sense that they operate outside the formal legal system and often draw on principles and procedures considered by their users to be more legitimate and appropriate than those offered by the formal system. A good example of such informal systems is religious tribunals which operate outside the jurisdiction of the state, drawing on their own norms and procedures (although these often overlap with state norms and procedures). In the West, the best-known examples include the use of Islamic personal status law in marriage and divorce processes offered by community leaders and imams; the more formalized structure of the Ismaili Conciliation and Arbitration Boards; or the Rabbinical Court (Beit Din) used by some members of the Jewish community.⁸ In some secular states, religious tribunals are afforded limited recognition although this is increasingly controversial.⁹ In most cases these and other less

norms in the context of legal disputing, see JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 178–188 (1990).

⁶ See, e.g., R.C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBOURS SETTLE DISPUTES* 142 (1991) (for the description of the Shasta County ranchers).

⁷ For example, some Muslim men and women regard resort to the family courts in divorce as escalation and a public shaming of the other party. This is described and referenced in interviews Macfarlane, *supra* note 8.

⁸ See, e.g., Irshad Abdal-Haqq & Qadir Abdal Haqq, *Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States* 1 J. ISLAMIC L. 61–88; Kellie Johnston, Gus Camelino & Roger Rizzo, *A Return to ‘Traditional’ Dispute Resolution: An Examination of Religious Dispute Resolution Systems* (2000), www.cfcj-fcjc.org/full-text/traditional.htm; ISRAEL GOLDSTEIN, & SYNDEY WALLACH, *JEWISH JUSTICE AND CONCILIATION: HISTORY OF THE JEWISH CONCILIATION BOARD OF AMERICA, 1930-1968, AND A REVIEW OF JEWISH JURIDICAL AUTONOMY* (1974); Beth Din of America Homepage, www.bethdin.org (for information on rabbinical court rules and processes); Ontario Ministry of the Attorney General Homepage, www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/appendix-v.pdf (for the rules of procedure of Ismaili Conciliation and Arbitration Boards in Canada).

⁹ For example, the controversy over the recognition of the outcomes of religious tribunals in Ontario under the Arbitration Act 1991 (hereinafter, the “Act”). The Act was recently amended

structured alternative systems function “beneath the radar,” operating as private ordering without the sanction or oversight of the state.

The absence of state sanction sets up a number of consequences for the *modus operandi* of informal systems. The functionality of informal systems is entirely dependent on their acceptance by their constituency or constituencies, and their enforcement is a social rather than a legal phenomenon. Where there are strong social cohesion and social enforcement systems, this becomes a sufficient replacement for state sanction and reduces the need for centralized enforcement of rules and sanctions. Contrary to Thomas Hobbes’s prediction, it appears that the absence of law does not necessarily lead to social chaos and civil strife.¹⁰ Instead, social order often appears spontaneously in situations untouched by formal law and dispute resolution.¹¹ Equally, where social ties are weaker or in flux, and traditional authority is under challenge, the absence of a central authority may eventually weaken the efficacy of an informal system. Both formal and informal systems have authority figures, although access to such authority and its scope is often more clearly delineated in formal legal systems. The credibility of both formal and informal systems rests significantly on the respect afforded to its third party decision-makers, however they are appointed and whatever their particular roles. While it is true that in the case of informal systems the third party has no formal legal sanctions to back up his or her decision, other social and political sanctions may come into play.

Similarly, the reality of sanction and enforcement within a formal state system is not automatic, but dependent in practice on public acceptance or submission, free or coerced. Both types of systems require a minimum level of acceptance – perhaps simply the failure of resistance – among their community in order to function effectively at all. This may take many different forms. While judges and courts in Canada and the United States operate with

to exclude recognition of any arbitral decision that is not made according to Ontario law. See Bill 27, Family Law Statute Amendment Act 2006, amending 1991 Arbitration Act 1991 in relation to family arbitration.

¹⁰ Hobbes’ view is epitomized in this quote from *Leviathan*, 1651:

For the laws of nature (as justice, equity, modesty, mercy, and, in sum, doing to others as we would be done to) of themselves, without the terror of some power, to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge and the like.

Id.

¹¹ See, e.g., ROBERT AXELROD, *THE EVOLUTION OF CO-OPERATION* (1984).

both legal and populist, or moral, authority, we can identify instances of a similar dynamic of acceptance and support in informal systems. For example, the authority and respect afforded to elders in First Nations communities who advise and direct community disputes,¹² or imams in mosques who conduct marital counseling and sometimes Islamic divorce processes. The imams and the elders have no formal legal authority, but they are regarded by their communities as morally authoritative.¹³ If the solidity of this authority were challenged or reduced in either case, the informal systems presided over by the elders and the imams would no longer be able to influence disputing and dispute resolution.

Structural differences between formal and informal systems affect their capacity to evolve and change. Informal systems tend to be perpetuated by traditions of oral history rather than codified and memorialized in a formal legal system. This means that by their very nature, informal systems are sometimes able to be more responsive and flexible in their application and development than formally regulated systems. Informal systems tend to be less bureaucratic but also less consistent, and practice is more likely to vary between generations and regions. In many ways, challenge and change within informal systems occur in the same way as within a formal legal model, with power to resist or effect change inevitably focused in particular individuals or constituencies. However, the lack of centralization common to informal systems may allow for local variations and incremental changes that do not engage the whole system.

Whether formal or informal, every system manifests a natural tendency towards stasis and the maintenance of the status quo¹⁴ – so that some informal systems may become as proscriptive and intolerant as the formal state systems they reject. The extent of rigidity and prescription is often illustrated by attitudes towards system

¹² See S.M. Stiegelbauer, “What is an Elder? What Do Elders Do? The Role of Elders as Teachers in Culture-Based Urban Organizations,” available at: <http://www.brandonu.ca/Library/CJNS/16.1/Stiegelbauer.pdf> (describing the role of the elders as natural community leaders and teachers); Catherine Bell, “Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada” in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS: CANADIAN AND INTERNATIONAL PERSPECTIVES* 241, 246-253 (C. Bell & D. Kahane, eds. U. of British Columbia Press, 2004) (for descriptions of a variety of roles played by elders in community dispute resolution).

¹³ Macfarlane, *supra* note 8. The moral authority of the imam is evidenced in many interviews conducted for this project in 2006/7 and referenced in this paper.

¹⁴ The tendency towards stasis is a widely recognized element of systems theory. On systems theory generally, see GERALD M. WEINBERG, *AN INTRODUCTION TO GENERAL SYSTEMS THINKING* (2001).

“outsiders” who may inadvertently violate a tacit or assumed norm – for example a new lawyer who comes to town and unintentionally acts contrary to the conventions of the local Bar regarding negotiation and settlement.¹⁵

Formal legal systems tend to be more rigorously scrutinized and monitored – whether internally or externally – for signs of impartiality, entrenched inequities and lack of due process.¹⁶ Informal systems are not subject to the same level of external standard-setting, and sometimes their *modus operandi* is virtually unknown outside the community they serve. Simply gathering data on the operation of informal systems is also more challenging since in many instances no written records are kept.¹⁷ Our concerns over the norms and values of informal systems of justice usually relate to the acceptance of traditional inequalities – such as differential treatment based on different “castes”¹⁸ – that formal systems are often under greater pressure to monitor and eliminate.

Nonetheless, as this brief analysis has demonstrated, formal and informal systems share many common features. Both require a minimal level of community support or minimal acceptance. Both have internal power hierarchies that can control over the extent of challenge and change, although in informal systems this may be more diffuse and fragmented. While formal systems are more likely to have a codified system of rules and procedures, in-

¹⁵ Legal scholars have developed the concept of local legal culture to explain idiosyncrasies related to the local functioning of law and relationships among lawyers; for example the judicial philosophy of a particular judge, the collegiality of the local Bar and its impact on information exchange, or the attitudes of the local Bar towards innovatory procedures or new settlement processes. For example, see the contracts drawn by each group between Toronto and Ottawa commercial lawyers in Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2 J. DISP. RESOL. 241, 313–318 (2002).

¹⁶ For example, by international treaties and conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination (ratified by the United Nations General Assembly resolution 2106 (XX) of 21 December 1965); the International Convention on the Rights of the Child (ratified by the United Nations General Assembly resolution 44/25 of 20 November 1989); the Convention on the Elimination of All Forms of Discrimination against Women (ratified by the United Nations General Assembly resolution 34/180 of 18 December 1979).

¹⁷ Once again, the use of Islamic family law principles to resolve issues upon divorce for Muslims is a good example. There are no formal records or memorialized procedures for these informal processes which can be scrutinized by those outside the community – yet those within the community are well aware of how they work and how to access them.

¹⁸ See Tsega Endalew, Luba Basa & Harma Hodha, *Traditional Mechanisms of Conflict Resolution in Metekkel, Ethiopia*, Office of the United Nations High Commissioner for Human Rights Homepage, <http://www.ohchr.org/english/law/pdf/crc.pdf>. For example, Tsega Endalew reports that Oromo society regards non-Oromo castes as unequal to the Oromo and subject to various attacks until “liberated” via familial and community relationships. See *id.*

formal systems evidence a strong inherent normative structure. Even or perhaps especially within a family unit, there are often (tacit and assumed) norms of behavior, interaction and hierarchy. A similar dynamic is observable in neighborhoods, in religious groups, or within professional groups, to give but a few examples. In each case, the absence – or relative superficiality – of formal rules gives way to informal systems of behavior and norms known only to group members.

Both formal and informal systems evolve local cultural variations, including different levels of tolerance to change. The types of cultural assumptions and values that drive discretion and innovation within disputing systems are themselves a reflection of the broader cultural values of the community. For this reason, we should expect to see some overlap between the internal cultures of the informal and formal systems of distinctive states or cultural communities. Just as Geert Hofstede demonstrates that the image of the “manager” varies between different cultural systems in, for example, China, Europe, the United States, and Japan,¹⁹ so too does the image – the role, responsibilities and impact – of the third party decision-maker. Within any one “macro” (albeit not homogeneous) cultural system – such as the United States or Japan – the assumptions of the formal and informal systems may be closer than to one another than those of the formal legal systems of two different cultures.²⁰ In other words, formal and informal systems of disputing located in the same country or culture may have more in common than we might think. There will be important lessons in each for the conflict resolution practitioner whose task is to navigate – and perhaps even negotiate – between the two.

WHY DO PEOPLE USE INFORMAL SYSTEMS?

In order to for the conflict resolution practitioner to better understand the relationship of informal systems to state systems, it is important to recognize the range of reasons that non-state justice systems become significant alternatives to law. The social conditions under which an informal system develops, and is sustained,

¹⁹ Geert Hofstede, *Cultural Constraints in Management Theories*, 7(1) THE ACADEMY OF MANAGEMENT EXECUTIVES (1993).

²⁰ For a description of differences between so-called “low-context” (for example the US) and “high-context” (for example Japan) cultural systems see S. Ting-Toomey, *Towards a Theory of Conflict and Culture*, in CONFLICT AND NEGOTIATION, 72–75 (W. Gudykunst et al. eds., 1985).

are critical to understanding the reasons that they are preferred by their constituent communities, as well as how the informal system understands its relationship to the jurisdictional state system. Some informal systems maintain a system of dispute resolution which pre-dates the formal legal system, and has historically developed independently of it. The reason for preferring the traditional system may be tied to a religious obligation that sees the informal system only as compatible with religious beliefs and values (for example the choice of a religious arbitration or mediation by a religious authority). It may be more broadly cultural, where those who choose this option do so as a means of retaining and enhancing their cultural identity, because only the “alternative” system meets their need to maintain traditional and comfortable rituals (for example of birth, death, marriage and divorce).²¹ They may also do so at least in part because of community or family pressure to continue to maintain these traditional systems, and their own wish to be seen to behave appropriately in the eyes of their community and family. These examples of informal systems do not intend to offer a threat to the state system, but wish to be “left alone” to evolve their own processes and norms.

In other cases, the motivation for preferring an informal system is more overtly political where, for example, the legal system is based on a Western colonial model, or where it is regarded as the tool of an illegitimate or corrupt government.²² Some of these community alternatives to law are created and sustained by groups who feel marginalized or intimidated by the formal justice system, preferring to retain control over dispute resolution within their own cultural, familial and sometimes religious norms. These types of non-state justice systems are most likely to be seen as a threat to the hegemony of the state and to face varying degrees of state opposition, including in some cases efforts to shut them down or assimilate them into the state system.

²¹ For example, those who choose to use Islamic family law processes conducted by Imams, or those who prefer the adjudication of the Beit Din, to the formal family courts, often explain this as a matter of religious and cultural familiarity and comfort. For interview data relating to the choice of Islamic divorce processes, see Macfarlane, *supra* note 8.

²² In Colombia, where I visited in 2004, community justice programs which operate in many towns and cities are an alternative to what many regard as a hopelessly corrupt and inadequate government. They represent an effort to establish order and stability where government has failed to protect its citizens from the violence of Colombia’s internal drugs wars. See, e.g., Annette Pearson, *Can Colombian Community Justice Houses Help the new Criminal Justice System Achieve Restorative Results?* (Dec. 2-5, 2004) (Paper, Massey University, Albany, New Zealand) Centre for Justice and Peace Development, Massey University), “Colombia’s Houses of Justice” available at <http://www.ohchr.org/english/law/pdf/crc.pdf>.

In this context it is important to recognize that the *raison-d'être* of many Western RJ programs has historically been to provide a counterpoint to the formal state system, enabling direct dealing with conflict resolution by individuals and communities instead of being filtered through a web of procedural rules, legal principles and justice professionals.²³ Many of the original initiatives in community mediation which established RJ programming were motivated by an extreme dislike or mistrust for the state system and its officers. Advocates of community justice argued that no amount of system reform could eliminate the effects of institutionalization and bureaucratization, which treats all individuals as formally equal, and thereby fails to recognize the reality of diversity and differences in power.²⁴ In this way, the philosophical, political and religious origins of RJ manifest a strong anti-government and anti-institutional bias.²⁵ Among a small number of North American Muslims a similar sentiment (the rejection of state systems of control and scrutiny) is advanced as a reason for preferring Islamic divorce processes.²⁶

In contrast, some informal systems are neither a conscious religious or cultural choice, nor an assertion of political values. Rather, they are simply a reality of tradition and practice. In countries where legal institutions (such as courts, police, lawyers) remain inaccessible and unfamiliar to many people, traditional customary alternatives remain the dominant method of conflict resolution, notwithstanding the parallel existence of a state system. In many parts of Africa, traditional customary practices of informal justice are far more significant and prevalent in the lives of ordinary people than formal justice systems. The first (and perhaps only) resort to conflict resolution for many ordinary people in Africa is to their established systems of elder arbitration and media-

²³ See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977); ZEHR, *supra* note 5.

²⁴ For a classic exposition of the arguments for a rejection of the State system and the development of community-based justice, see Raymond Shonholtz, *Neighbourhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 5 (1984).

²⁵ For example, Quaker groups have often been associated with community-based justice initiatives and share this ideology. Pointing to the similarities between community-based justice processes and Quaker meetings and organizational structures, Lawrence Sherman relates this to a Quaker ethic which he sums up as "optimistic about man, pessimistic about institutions." Lawrence Sherman, *Two Protestant Ethics*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 35 (H. Strang & J. Braithwaite eds. 2001) (citing the historian, DIGBY BALTZELL, PURITAN BOSTON AND QUAKER PHILADELPHIA: TWO PROTESTANT ETHICS AND THE SPIRIT OF CLASS AUTHORITY AND LEADERSHIP (1979)).

²⁶ Macfarlane, *supra* note 8.

tion, relying heavily on kinship networks and social authority. For some people, these processes are all they have ever known or participated in these traditional processes are all they have ever known or participated in. There is deep rooted mistrust of the formal justice system.²⁷ Self-help is a strong community value and this often means taking care of one's family and property without resort to any outside "official" sources of authority.²⁸

These types of non-state justice systems are often complex and sophisticated and have historically provided a complete justice alternative. They represent the continuity of traditional customs of dispute resolution and are less likely than overt political alternatives to be seen as a threat to the authority of the state. Instead, the intellectual elite tends to dismiss them as unsophisticated "village processes" which are unimportant in the development of a "modern" society, and a throw-back to the customs practiced in the country of origin, and inappropriate in a new and different context. This debate often takes place, for example, between recent immigrant groups and those more established and integrated into a different culture in a "host" country, who may advocate for the abandonment of traditional dispute resolution processes. For example, in Canada, some Muslims regard traditional Islamic dispute resolution processes as out-of-place and unnecessarily isolationist in a multicultural society.²⁹ In Africa traditional dispute resolution processes are looked down on by more educated groups, who consider them to be embarrassing vestiges of tribal society that have no place in a sophisticated, post-colonial Africa. In some cases, informal justice systems, especially their breaches of human rights, are seen as a risk to the international credibility of the state.³⁰

²⁷ Sometimes based explicitly on religious differences. For example one Muslim man simply explained to me that he preferred the Imam's adjudication to that of a family court judge because the latter "does not know Allah."

²⁸ Moreover numerous Muslim men and women have reported to me that resorting to the formal legal system would be regarded by their family and community as an escalation of their dispute. Interview transcripts on file with the author.

²⁹ For example one Muslim community leader in Canada commenting on informal family dispute resolution processes conducted in the mosque told me that in his view, folkloric "village" customs needed to be discouraged and integrated into the mainstream. His particular concern was that traditional Islamic principles were unhelpful in establishing gender equality in Muslim families and enabling women to participate fully in Canadian society once their responsibilities as primary caregivers for children are finished. This remark is not untypical for some who would describe themselves as "modernizers" within this community. Interview with Muslim Community Leader, Nov. 20, 2006 (transcript on file with the author).

³⁰ For example, I heard many judges and prosecutors in Ethiopia express concern about the continued practice of using girls and women as bargaining chips in the resolution of a tribal dispute.

Just as commitment to informal justice systems rests on a range of varying social and political conditions, the response of the state to informal alternatives varies equally widely. The conflict resolution practitioner must always examine the different social conditions and cultural aspirations surrounding any one informal system in planning her approach when mediating between formal and informal systems. This understanding will provide the answers to the typical practical and conceptual questions which arise, such as : how does the formal system understand and how far does it tolerate the role of the informal system? How does the informal system regard the formal system and what are its reasons for preferring an alternative? Looking into the future, must one system ultimately assimilate the other? How should the mixture of disdain and disconnect expressed by those committed to each system be handled in efforts for dialogue and integration? Could or should two or multiple systems continue to co-exist? And how should a conflict practitioner, who is almost always from working within and “for” the formal system, address and resolve the tensions between multiple systems of dispute resolution?

CONNECTING FORMAL AND INFORMAL JUSTICE SYSTEMS:
THE CASE OF ETHIOPIA

These questions loomed large when I visited the People’s Republic of Ethiopia in June 2006 to work with Prison Fellowship Ethiopia, an Ethiopian non-governmental organization (NGO) advocating for criminal justice and prison reform. One of the poorest countries on Earth, Ethiopia has a population of seventy-four million people, of whom forty-five percent are under fourteen years of age. Infant mortality is almost 100 of every 1000 live births. Life expectancy for men is forty-eight, and fifty years for women. The population is incredibly diverse. First it is culturally diverse – Ethiopia contains sixty-two separate tribal groups, which include at least seven distinct ethnic groups (Oromo, Amhara, Tigre, Sidamo Shankella, Somali and Afar). It is diverse linguistically, with eighty different languages and more than 200 dialects spoken throughout the country (the official language of Ethiopia is Amharic). There is also diversity of religion, with a majority of Ethiopians identifying as Muslims, a large group practicing the Ethiopian Orthodox faith,

some who follow traditional animist religious practices and yet others who are converts to Christianity.³¹

My first task in Ethiopia was to deliver a three-day workshop on Restorative Justice to a group of forty-five high-level judges, prosecutors, and government officials from all over the country. The fact that the workshop was opened by the Ethiopian Minister of Justice and was attended by so many high-level officials, quickly made it clear that this initiative was strongly supported by the state legal system.

During the workshop it also became clear that the formal criminal justice system had little impact on the management and resolution of criminal behaviors in many parts of the country where traditional tribal processes prevail. From the workshop participants, I learned that few of the country's sixty-two tribes utilize the State criminal justice system, preferring their own village processes instead. Since there was representation at the workshop of each of Ethiopia's nine regional governments, I was able to learn about several cultures and practices of informal dispute resolution, which share a number of common features including a reliance on elders and kinship networks, a strong attachment to the concepts of honor and revenge, and the importance of age and seniority in assessing blame and determining outcomes. Revenge killings were described as normative in some tribal cultures and regarded as a matter of honor. It was also clear that sometimes these informal village processes reflected and perpetuated attitudes towards women and girls that treated them as little more than chips in a bargain over the resolution of a quarrel. For example, juvenile marriage, child abduction, and the exchange of women between families were among the approaches used to wipe out a "debt" following the murder of a relative. Many of those present at the workshop acknowledged that such practices were not unusual within their own tribal groups.

In these discussions I also learned the importance of restoring relationships and community functionality. Living in harsh physical conditions, it was pointed out to me more than once, means that resolving conflict is not only an important aspiration but a practical necessity if people are to find a way to share meager resources. Extreme poverty and hardship has an indelible impact on customs of conflict resolution, in ways that we may not fully understand in the West.

³¹ For these and other facts about the People's Republic of Ethiopia, see Central Intelligence Agency Homepage, <https://www.cia.gov/cia/publications/factbook/geos/et.html>.

This discussion about the operation of informal dispute resolution systems throughout the country must be considered in addition to what we know about the formal criminal justice system in Ethiopia. The Marxist government of Ethiopia presides over a criminal justice system that uses a penal code largely modeled on European codes and subsequently adopted by Emperor Haile Selassie.³² Similarly, the present Ethiopian Criminal Procedure Code is based on processes which are recognizable to North American and European criminal lawyers, but more typical of procedures developed twenty or thirty years ago. It includes fewer protections for offenders than we are accustomed to seeing in today's modern criminal procedures, and only limited distinctions are drawn between adult and juvenile offenders.³³ The Criminal Procedure Code (the "Code") also contains extremely limited discretion for police and prosecutors, which is probably reinforced in practice by the country's contemporary Marxist leanings. The Code sets out a series of steps in criminal investigation, charging, and trial that require police and prosecutors to proceed with a matter to trial in all but the most doubtful cases. Police (Article 23) and prosecutors (Articles 40(1) and 42) have a duty to ensure that criminal convictions are sought wherever possible. While this public duty is a serious matter, the present structure leaves no opportunity for prosecutors to identify certain matters that may be more appropriate for pre-charge or pre-trial diversion into a RJ program. The court has some discretion in ordering adjournments of trial (Article 94), but these do not include adjournment for the purposes of diversion into RJ.

My tentative sense of the substance and state of the country's criminal justice system was greatly advanced by a remarkably frank, hour-long private conversation with the Ethiopian Minister of Justice, Asefa Kesito, following the workshop. Minister Kesito described the criminal justice system as highly inefficient because it takes second place to informal systems in many parts of the country. He stated that many rural and village communities do not refer complaints to the police or prosecuting authorities, but instead deal with them using traditional tribal processes. Even where the State brings forward a prosecution and the matter eventually reaches trial, the current conviction rate is less than twenty per-

³² Criminal Procedure Code (Proclamation No. 185 of 1961) (Eth.), *available at* <http://www.worldlii.org/catalog/2672.html>.

³³ Criminal Procedure Code, Article 172 (Eth.), *available at* <http://www.worldlii.org/catalog/2672.html>.

cent.³⁴ By this stage – usually several years following the original incident – local tribal justice had already been resolved and witnesses were notoriously reluctant to testify, which undermines the State's ability to prove their case.

Despite the low conviction rate, Ethiopia's prisons are inadequate for the number of prisoners (estimated by Prison Fellowship Ethiopia to be 70,000).³⁵ A staggering eighty-five percent of those serving prison sentences have been convicted of murder, perhaps reflecting the use of tribal processes for all but the most serious offenses. At the same time, staff at Prison Fellowship Ethiopia, as well as the governor of a prison I visited, told me that when an individual was released following a prison term he may be vulnerable to further retribution if a tribal determination required this.³⁶

I was beginning to understand that there is a profound disconnect between the formal and the informal systems in Ethiopia. Any innovations within the formal legal system, such as the introduction of RJ process alternatives for defined groups of offenders, would have to confront the reality that only by harnessing the energy of the informal justice systems could such an innovation have any real impact, let alone succeed. Ignoring the existence and significance of the non-state justice system, with its own procedures and norms, was not practicable. A relationship between formal and informal systems would be necessary to ensure that RJ was effectively implemented to provide alternative justice for some offenders and their communities, rather than simply a little-used and largely ignored dimension of the formal criminal justice system.

It was tempting to speculate that the philosophical and practical orientation of RJ could offer a vehicle for integrating the best of both the informal and formal systems in Ethiopia. By the end of the workshop, many participants had drawn the conclusion that RJ held real promise as a means to respect and incorporate many of the traditional values of tribal justice. Although they were also officers of the state, the judges and prosecutors present at the workshop could speak from their own experiences with tribal customs and approaches to informal justice. Their descriptions emphasized the practical, as well as moral, necessity of a community-oriented view of justice such as that espoused by RJ. Where people live in poverty and basic resources such as clean water, food, and housing

³⁴ Interview with Asefa Kesito, Ethiopian Minister of Justice (Jun. 12, 2000).

³⁵ Prison Fellowship International, Ethiopia, http://www.pfi.org/db_directory/affiliates/6402 (last visited Feb. 6, 2007).

³⁶ In-country interview with Ken Riegert, Prison Fellowship Ethiopia on June 6, 2006.

are scarce there it a practical necessity to find ways to live together in peace and order. Members of impoverished communities depend on one another to meet basic needs, and share the experience of poverty and suffering. It hardly needs to be said that the continent of Africa has suffered and continues to suffer disproportionate deprivation and violence; a lack of basic necessities, including health care and housing, political instability, and a failure of economic development; and that much of this is attributed to the continued effects of European colonialism.³⁷ This means that the whole community suffers from the consequences of crime, both morally and practically. It also suggests a spirit of compassion and solidarity with human suffering that emerges within communities when their most precious and enduring resources are friendship, mutual sympathy, and support.

This partly explains why some African writers associate a quality of generosity of spirit, sometimes characterized as forgiveness, with African moral philosophy. In this worldview, it is a part of our human responsibility to be a moral agent, however harsh our circumstances. In fact, the harsher the conditions, the closer the developmental relationship between the individual and the community. The African philosopher Kwame Gyekye describes a concept of “moderate communitarianism” within African societies.³⁸ This concept understands the development of a self as a moral process in which the individual is shaped by the community in which he or she grows up. “Personhood” is characterized by moral virtues that emphasize kindness and compassion towards others, and that are acquired largely as a result of a process of socialization. Nonetheless, in Gyekye’s model, the process of moral development also enables independent moral choices to ensure that personal morality is more than simple conformity to community norms. For this reason, Gyekye describes African communitarianism as “moderate” because authentic moral development leaves space for individual challenge or even the rejection of some traditional values. The virtues and values of moderate communitarianism suggests an approach to “justice” that is community rather than rule-driven,

³⁷ For one account of the effects of colonialism, see WOLE SOYINKA, *THE OPEN SORE OF THE CONTINENT: A PERSONAL NARRATIVE OF THE NIGERIAN CRISIS* (1996). A theme of poverty and suffering runs through much contemporary fictional writing about Africa. See, e.g., J.M. COETZEE, *DISGRACE* (1999) (the Booker award winning novel); ANTIJE KROG, *COUNTRY OF MY SKULL* (1999) (describing the TRC hearings).

³⁸ See RICHARD H. BELL, *UNDERSTANDING AFRICAN PHILOSOPHY: A CROSS-CULTURAL APPROACH TO CLASSICAL AND CONTEMPORARY ISSUES* 62–63 (2002) (the discussion of Gyekye’s “moderate communitarianism”).

and thus appears to be highly compatible with RJ principles. Gyekye contrasts the communitarian worldview with Western views of justice as “rights.” “In the communitarian moral universe, caring or compassion or generosity not justice, which is related essentially to a strictly rights-based morality, may be a fundamental moral category.”³⁹

Similar themes regarding an African notion of “justice” have emerged from the South African experience with the Truth and Reconciliation Commission (TRC), which attempted to purge the legacy of suffering by confrontation, acknowledgement and admission rather than forced confessions and punishment.⁴⁰ The concept of “ubuntu” is widely associated with the work of the TRC although it has a much longer history in African culture.⁴¹ Archbishop Desmond Tutu has described “ubuntu” – roughly translated as “restoring a balance that has been lost” – as central to traditional concepts of African justice. Tutu describes “ubuntu” as follows: “Retributive justice is largely Western. The African understanding is far more restorative – not so much to punish as to restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.”⁴²

The possibility of a partnership between informal and formal justice in developing pilot RJ programs, where the formal system recognized and promoted the best values (such as “ubuntu”) and practices (such as communitarianism) of the informal system, emerged as an “obvious” conclusion for the workshop participants. What emerged from my subsequent discussion with the Minister of Justice was the idea for a project to introduce RJ principles into Ethiopia’s formal criminal justice system, offering the possibility of a constructive partnership between the state and the non-state systems. As one might expect, the Ethiopian Minister of Justice, as well as the judges and prosecutors in the workshop, placed a strong emphasis on maintaining the oversight and regulation of the formal criminal justice system, especially in those areas where it presently

³⁹ KWAME GYEKE, *TRADITION AND MODERNITY: PHILOSOPHICAL REFLECTIONS ON THE AFRICAN EXPERIENCE* 70 (1997).

⁴⁰ For additional information on the Truth and Reconciliation Commission (TRC), see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

⁴¹ See, e.g., WILLIAM ZARTMAN, *TRADITIONAL CURES FOR MODERN CONFLICTS* 169–71 (2000) (discussing the link between “ubuntu” and traditional Xhosa – as well as Christian – philosophies).

⁴² RICHARD H. BELL, *UNDERSTANDING AFRICAN PHILOSOPHY: A CROSS-CULTURAL APPROACH TO CLASSICAL AND CONTEMPORARY ISSUES* 90 (2002) (citing Desmond Tutu).

has only minimal influence. Many of those present at the workshop, including the Minister of Justice himself, expressed particular concerns over the treatment of women and children in some traditional processes where they may be treated as little more than bargaining chips in deal-making. They were conscious of international criticism and anxious to ensure that the oversight of the state system could address these and other types of human rights abuses.⁴³

The idea began to take shape that integrating informal and formal systems through some type of partnership could see prosecutors and judges referring certain types of criminal cases – probably emphasizing juveniles and first-time offenders, as we do in the West – into a community-led justice process. Participants were clear that referral to RJ should only take place if there was a clear acceptance of responsibility (or at least a formal guilty plea). Referral could then take place at two stages in the criminal justice process – pre-charge (on the discretion of the prosecutor) and post-charge (at the discretion of the court). Participants advocated strongly for the idea that, while subject to legislative standards, RJ programs should be developed regionally to reflect the particular needs and customs of each tribal group. The RJ programs themselves would be overseen by the court, but administered by Local Justice Committees, composed of community members and representatives of the criminal justice system. Individuals with an existing role and authority within the community (for example, the elders) would be obvious candidates to participate as third parties in RJ programming. They would be offered training along with representatives of the prosecution service in order to ensure a shared understanding of process and procedure and to build relationships. The processes used – whether the Local Justice Committee preferred victim-offender mediation, circle conferencing or community panels, hearings or some other approach to processing cases – could reflect and perhaps incorporate existing customary practices. Finally, while the RJ process would determine the preferred sanction for the offender, such sanctions would be limited to those set out by legislation as alternatives to incarceration and would require the final approval of the court.

This discussion demonstrated the practical possibilities of establishing RJ pilots in some of Ethiopia's regions, especially with

⁴³ Ethiopia has been repeatedly criticized by UNICEF and the United Nations Committee on the Rights of the Child for failing to adequately protect the rights of children (see for example the UN Committee on the Rights of the Child Final Report on Ethiopia September 2006 Copy on file with the author).

the leadership of the local criminal Bench and prosecutors. However, the discussion also assumed that both the informal systems of dispute resolution represented by Ethiopia's tribal justice procedures, and the state criminal justice system, would welcome this type of partnership. From the perspective of the state agents present at the workshop, there seemed much to recommend this approach. But can it really work? What might the non-state systems think about partnering with the state? How far does each system need the other in order to derive the benefits of RJ programming? In the light of the information available, is this a feasible and ultimately beneficial approach?

POTENTIAL BENEFITS AND CHALLENGES OF INTEGRATING FORMAL AND INFORMAL JUSTICE IN ETHIOPIA

The macro question here is when and how might non-state justice systems gain benefits from co-operating with formal state systems, and do they outweigh some of the potential disadvantages? While still hypothetical, I shall attempt to apply this question to what I now know about the case of Ethiopia.

There are a number of ways in which Ethiopia's tribal justice processes might benefit from state involvement. The most obvious is the capacity of such involvement to harness state resources to ensure compliance with sanctions. In the debate currently taking place in the West over enforcement of arbitral awards handed down by religious tribunals, enforcement is the factor most commonly cited among those advocating for State recognition.⁴⁴ Such recognition offers non-state systems a mantle of legitimacy which may be important on a symbolic level as well as a practical one. As traditional lifestyles and practices are eroded by the advance of modernity, the involvement of the state in customary procedures may be a means to ensure that these traditions are kept alive and treated with respect. The involvement of the state may also serve to enhance the authority of third parties, especially if there is training and accountability for those acting in that capacity.⁴⁵

⁴⁴ See, e.g., Islamic Institute for Civil Justice in Ontario (Fall 2005), available at <http://muslim-canada.org/DARULQADAform.html> (Institute made this argument).

⁴⁵ For example, under the amended Ontario Arbitration Act, there requirements are being developed for record keeping by family arbitrators. At the time of writing, the most recent version of the required forms are available at <http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/arbitrator-form.asp>.

Those who support and participate in tribal processes yet are uncomfortable with one or more of its characteristics – entrenched gender discrimination, the trading of children, or the normative nature of revenge or “honor” killings – would also, my experience in Ethiopia suggests, welcome the intervention of the state that brought some promise of human rights and process standards. Change may be easier to accomplish via the imposition of such standards from an external agent (the state) than from within. However, for this to be a real incentive to work with the state, it is crucial that the formal criminal justice system is able to credibly offer such standards and protections.⁴⁶ The actual record of the formal system in Ethiopia in ensuring protection of vulnerable parties and eliminating gender discrimination is patchy at best, although there was universal expression of a principled commitment by workshop participants and by the Minister of Justice.

If we consider the arguments made in the West over the relationship between RJ programs housed in the non-state programs and in the formal criminal justice system, there may be potential disadvantages to Ethiopia’s informal justice systems partnering with the state. How many of these arguments and issues are relevant to Ethiopia, and how many will even be raised in the process of developing RJ pilots is hard to say, but it would be foolish to dismiss the experience of the West in this regard. These arguments focus on a pervasive sense that RJ programs which become government-sponsored or run, lose their radical edge and take on many of the bureaucratic, non-personal, inefficient characteristics of the formal justice system to which RJ was trying to offer an alternative. They may be co-opted, sell out and lose their “soul,”⁴⁷ in the same way as many have argued about court-connected mediation.⁴⁸ Many of these arguments revolve around the much larger question of whether the institutionalization of conflict resolution process is a “public good”. Some have argued that working hand-in-glove with the state will drain RJ (or existing informal processes) of their in-

⁴⁶ For example, in Colombia, the non-state justice systems do not presently see the government as able to offer such guarantees and, hence, there is no incentive to partner with them. See Pearson, *supra* note 23.

⁴⁷ See, e.g., Howard Zehr & Mara Schiff, *Restorative Justice for Crime Victims : the Promise and the Challenge*, in *RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND RESTORING COMMUNITIES* 87 (Gordon Bazemore, & Mara Schiff, eds., 2001).

⁴⁸ This is an ongoing debate in relation to civil court mediation. See Nancy Welsh *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U.L.Q. 788 (2001); see also Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?*, 6 HARV. NEGOT. L. REV. 101 (2001).

dependence, vitality, and responsiveness to particular communities, and re-introduce (or in the case of Ethiopia, introduce for the first time) a detached professionalization. They will hand over power and control to state actors with community members playing a mere supporting role, and in the process they will lose the “personal touch” which makes many non-state systems effective in managing local conflict.⁴⁹

It is also possible that the future development of a successful partnership between Ethiopia’s informal non-state processes and the formal criminal justice system will follow a course similar to that of successful RJ programming in the West. First, for any partnership to work, both systems must need and benefit from one another’s support. The Ethiopian state system clearly needs both the co-operation of those who have authority within the tribal processes, in order to ensure that new RJ programming is actually used and is effective in its outreach. At the same time, the informal systems may need the support of the State to maintain regional and tribal customs and lines of authority, as well as to control, and perhaps eventually eliminate, some of the unacceptable features of tradition, such as revenge killings and the trading of women and children. In the face of shared hardship, a RJ model may be able to incorporate many of the values of the traditional approach to conflict resolution including an emphasis on community, problem-solving, and compassion,

Second, so that RJ programming may be negotiated and ultimately implemented in a way that is regarded as credible, there needs to be sufficient trust between the actors on both sides. This means identifying the “right” community members with whom the state shall work and sharing training and development responsibilities. It also means that goodwill as well as co-operation is crucial to the actual implementation and continued shared management of programming.

Third, the correct balance for this partnership needs to be established and negotiated region by region. It is very difficult at this stage of the project to make predictions about what this balance might need to look like to be politically and practically effective in Ethiopia. The Law Commission of Canada’s 2004 Report on RJ recommended “the creation of a co-regulatory partnership between State and communities that would combine the vitality and local knowledge of community-based initiatives with the structure

⁴⁹ See Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 *MEDIATION Q.* 3 (1995).

and resources offered by government.”⁵⁰ This balance is described by Clifford Shearing using the analogy of “rowing” and “steering” “the correct balance between state and non-state partnerships is reached when state governments provide the overall direction and control of governance (“steering”) and provide a regulatory environment that will encourage non-state participants to engage in the “rowing” of governance.”⁵¹ Different regions of Ethiopia present different disputing cultures, with the non-state system dominant in some and less influential in others (for example in the urban areas around Addis Ababa). This complexity means that no one pattern of “partnership” is likely to work but must reflect negotiations and organization – albeit around shared goals and common evaluation criteria in each region. There are many other factors that complicate the establishment of such a balance between state and non-state actors in Ethiopia, including the relative security or insecurity of the government, an attachment to a Marxist ideology, and a perceived need to establish “law and order” throughout the country.

CONCLUSIONS

On the final day of the workshop, representatives from each of Ethiopia’s nine regions worked out a set of prosecution and/ or court-driven referral criteria, with a plan for local RJ processes. However, the judges and legal officers maintained that none of this could happen without amending legislation. They simply had no discretion within the existing Criminal Procedure Code (currently being revised by the Ethiopian Ministry of Justice) to develop RJ pilots or to refer cases to RJ. At my meeting with the Minister of Justice, I brought him this message. He and I reviewed the existing legislation and discussed where it may be possible for RJ referral to occur. He asked me to draft amendments that may help enable the development of some RJ pilots in the regions.

I returned home and drafted those amendments. Prison Fellowship Ethiopia (with funding from the Canadian International Development Agency) asked a local expert to review them. The draft legislation is presently being reviewed by the Ministry of Justice with the hope that they will be presented to the legislature,

⁵⁰ LAW COMMISSION OF CANADA, *TRANSFORMING RELATIONSHIPS THROUGH PARTICIPATORY JUSTICE* 26 (2004).

⁵¹ Clifford Shearing, *Transforming Security*, in JOHN BRATHWAITE, *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 14, 16 (2001).

sometime in 2007/8. At this point there is some optimism that a version of the amendments will find their way into the new legislation, and that some pilots can commence in 2008. Unfortunately, it appears highly likely that political circumstances (including the present the war in Somalia) will create further instability in Ethiopia, and will raise additional obstacles, for criminal justice reform.

Whatever the outcome of this project – and I hope to be able to continue this work in Ethiopia – it has taught me many important lessons about the relationship between formal and informal systems of justice which continue to inform my research and practice. These questions are writ large in RJ programming, but they have wider significance also, especially when we consider the range of informal or “alternatives to law” processes that exist and are still developing in the West. There are parallels with state management of religious tribunals, for example, as well as the development of court-based initiatives that draw on community customs and values. With respect to the relationship between the state and traditional conflict resolution practices, we are still at the very beginning of understanding what these relationships might look like and what different forms they might take.

