

# A Critical Analysis of Alternative Dispute Resolution Mechanisms in Bench-People; the Case of “Tomo”, South-West Ethiopia: A Cross-Sectional Study

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## ABSTRACT

**Background:** Dispute resolution is an indispensable process for making social life peaceful. Alternative Dispute Resolution (ADR) is a term used to describe several different modes of resolving legal disputes. Accordingly, “Tomo” is one of the Alternative Dispute Resolution Mechanisms in Bench-Community. Hence, this study critically examined the practice of Tomo institution in Shey Bench District, South West Ethiopia.

**Methods:** A cross-sectional study design was conducted. Data was collected through participant observations, Focus Group Discussions and Key informant interviews. Then the data collected through FGDs & interviews was transcribed, translated and synthesized. It was enriched by observations.

**Findings:** Tomo is named from the clan of “Tomo” in Bench community and it has traditional spiritual basis called “shinabossind”. It has four typical features called informality, adjudication without evidence, lack of code of conduct and Spirituality. Tomo adjudicates disputes whose facts are denied by the parties. The decisions passed by Tomo institution is believed to be fair, low costly and without delay. Besides, the institution of Tomo shares the burden of cases in formal courts. Tomo solves disputes such as theft, adultery, murder and other crimes committed in hidden and sophisticated manner.

**Conclusion:** The institution of Tomo has four typical features called informality, adjudication without evidence, lack of code of conduct and Spirituality. Tomo verdicts fairly, low costly and without delay. It shares the burden of cases in formal courts.

**Keywords:** Alternative Dispute Resolution, Tomo, Bench-People, Ethiopia

## INTRODUCTION

### Background

Customary dispute resolution mechanisms are the traditional practices used to resolve conflicts and maintain peace and stability in the community (1). Due to the multi-ethnic composition in Ethiopia, there is no uniform application of customary law all over the country. For instance, the institution of Gada system in Oromo, shimagalle in Amhara and the other ethnic groups has similarly adopted their dispute resolution systems based on their own values and norms (2).

The recent incorporation of ADR mechanism in the legal policy has been with the lukewarm attitude by the government organ and civil society. However, the existing practices on the ground and in practice have peaked –up the

need to resort to other means of dispute resolution method rather than relying entirely on the conventional courts (3). The modern legal code which recognized and incorporate ADR are the 1960 civil code; art 3318 -334 6, the 1965 civil Procedure code: art 244(2) (g), 315-319,350- 357, the revised family code of Ethiopia art 119(1), and the labor proc. No.377/2000 (4). Besides, the 1995 FDRE constitution recognized the Ethno- linguistic and religious diversity in the country. It does so inter alia by giving recognition to the settlement of disputes by customary and religions court in its article 9(1), 34 (4) & (5), 37 and article 78(5) (5). Tomo is a traditional dispute resolution mechanism in Bench community. But currently its legal ground for application is questionable because of the development of domestic and international laws. Hence, this research

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examined the legal implication of Tomo customary dispute resolution mechanism in Bench community; Ethiopia.

### Significance of the Study

The study elucidated the history, peculiar features and social perspectives to the legal institutions. Besides; it described the differences of Tomo proceedings with that of formal court proceedings. This could help the local courts to be clear on the gaps and prepare capacity building trainings for elders of Tomo institution. Further, it clarifies the reasons of community preference of Tomo institution over the formal courts to legal scholars. It also paves the way for further studies.

## METHODS

### Study Area & Period

The study was conducted in Shey-bench district; Ethiopia, from Oct 10-30/2017. Shey-bench district is located 575 KMs South-West of Addis Ababa.

**Study Design:** Cross sectional study design was used. Data collection techniques used was observations, key informant interviews, group discussions and review of legal documents.

### Scope of the Study

The study assessed the history, peculiar features and social perspectives of Tomo institution.

### Limitation of the Study

The time and budget constraint might have affected the scope of the study.

## FINDINGS

### The Practice of ADR Mechanisms in Bench Community

Elders, religious leaders and tribe or clan leaders have the role to solve disputes based on norms, moral values, and traditional practices and beliefs of the community<sup>1</sup>. The administration of justice system in the history of Bench society was not separated from their traditional beliefs<sup>2</sup>. The function of both religious and administration of justice was run by single body called "Tiyat" which means King. In the community of Bench there were different

"Tiyat", but the one who has sovereign power is called "Bench Tiyat". Within the jurisdiction of each "Tiyat" there are sub administrative organs called "kommt".

Besides, during the reign of king Haileselese, *Kommts* act as the agent of the government to collect tax from the people<sup>3</sup>. At the time of Derg the power of "Tiyat" was restricted. The reason is that the Derg tried to abolish land Lords and the administration of king system. Derg follows "Legal centralism" approach in which all justice was under the control of government. But after the coming of current FDRE government in 1995; the power of traditional institutions was revived<sup>4</sup>.

Customary dispute resolution mechanism in Bench community is often led by elders who are typically well known and respected in the community. The parties to the dispute choose the elder who will mediate their issue and usually select them based on their reputation, understanding of community values and experience. When the crime is of a serious nature; the offender or his/her family will often initiate the mediation process. In minor criminal cases, the victim usually initiates the process. Because in Bench culture, "the victim's side is duty bound to take vengeance against the killer or one of the killer's families and close relatives." Once mediation begins; the victim, offender and their family members meet with the selected elders and discuss on the dispute. The offender is then permitted to tell his or her side of story. There are no limits on the topics that can be discussed in this proceeding, unlike the one in the formal court proceedings. If the offender denies his or her act; the victim may call witnesses, or try to persuade the offender to admit his omission. When the offender's guilt is established, the process switches to determine the punishment to be imposed. The punishment is based on the nature and gravity of the crime, as well as cultural norms<sup>5</sup>. Punishment can range from apologizing to compensating the victims' family. Minor crimes can be resolved by an apology, but more serious crimes results in compensation to the victim or the victims'

<sup>1</sup>Matar Bersuab; ( 55 years old - Shey bench woreda – Edir leader) ; interviewed on Oct 20 /2010E.C

<sup>2</sup>TT Bezuab (60yrs old – North Bench- village leader); interviewed on Oct 25/2010E.C

<sup>3</sup> Ergat Yarinbab ;( 50yrs old - Mizan Teferi – former leader Edget kebele); interviewed on Oct 28/20010 E.C

<sup>4</sup> Belay ula (45Yrs old - North Bench Woreda ) interviewed Oct 25/20010 E.C

<sup>5</sup> Grazmach Tafese H/Meriam - Head of Tomo institution, interviewed on oct 25/2010 E.C.

family. Compensation is determined by the circumstances of the crime, the toll on the victim the offender’s motivation, and the offender’s economic standing. Compensation may take the form of livestock, person/woman and may be collected from offender or the offenders’ family and clan members. Once the compensation has been set, the offender goes through an apology ritual. Oaths may be done in which the offender and Victim affirm that the conflict is over.

### **The Institution of Tomo**

The institution of Tomo is found in Shey-Bench District; Tikimt Ishet Kebele, Ethiopia. It is one of the traditional dispute settlement institutions in Bench community. It is named from the clan of "Tomo" in Bench tribe. It has a spiritual basis. It is believed that its foundation is related with traditional god called "shinabossind" which is worshiped by Tomo community.

Interviewees in this study suggested that Tomo existed before the reign of Haile Selassie. During the derg regime, the justice policy prohibited the resolution of conflicts with other methods except formal court proceedings. Hence, the function of Tomo was restricted<sup>6</sup>. Currently, in line with the provisions of 1995 FDRE constitution, the traditional institution of Tomo settled disputes in line with formal state courts. The leaders of Tomo clans are nominated as judge. They used customary laws, norms and spiritual authority to settle cases. In practice; Tomo solves disputes that are without evidence and those with denied facts. But sometimes disputant brings cases which are proved with evidence. The reason is that they need justice without delay, low costly and satisfactorily.

### **Features of Tomo**

The study revealed four features of Tomo; i.e. Informality, No need of evidence, Lack of code of conduct, and Spirituality.

#### **Informality**

Tomo is an informal dispute settlement mechanism which settles disagreement between parties through traditional ways, i.e. out of court room proceedings.

#### **Adjudication without Evidence**

Disputing parties prefer Tomo; whenever, there is a denied fact and the case became difficult to

be entertained by other means of informal or formal dispute settlement mechanisms. The reason is that in Tomo institution the parties themselves are believed to disclose the facts.

Further it is believed by the community that if one or both of the disputing parties deny the facts, they will face a bad consequence. This bad consequence is believed to happen due to a spirit called shinabosind. Shinabosind acts if either or both of the disputing parties deny the facts. Hence, no one speaks wrong before Tomo proceedings<sup>7</sup>.

### **No Code of Conduct**

There is no code of conduct (procedural regulation) that guides elders of Tomo in deciding cases. They guided by customs experiences than ethical principles.

### **Spirituality**

Tomo uses oath and traditional beliefs system for case investigations<sup>8</sup>. The oath is conducted in the name of shinabossind spirit; where the parties are expected to disclose the facts or otherwise face the bad consequence for their denial.

### **The Role of Tomo**

In practice there are wrongs which are either civil or criminal in nature where facts are denied by parties or committed without evidence. Such sophisticated cases can't be easily investigated and tried in formal court rooms. The reason is that in court, no one can be convicted without sufficient evidence that prove beyond reasonable doubt.

In such cases the guilty one often released free. Hence, this sometimes brings a revenge conflict between or among the parties. But Tomo creates a solution in solving dispute through customs, norms and traditional values of the community. And it brings peace and stability within the community in addition to formal Courts.

### **Tomo Proceedings**

Tomo has no codified customary laws of conflict resolution. In this study we could see that, elders use oral customary laws and spiritual methods for adjudicating disputes. Tomo resolves the local social conflicts where facts are

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<sup>6</sup> WorguYishku – North Bench worded- story teller- interviewed on oct 25/2010 E.C

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<sup>7</sup>Nopa Komtikes (55 yrs old) - Aman –Kometa Kebele – interviewed on Oct 28/2010 E.C

<sup>8</sup>Observation + interview with elders – on Oct 25/2010 E.C

denied or crimes are committed without evidence. The Victims party shall apply the case to Tomo. The Tomo institution issue summons for the attendants of defendant, and adjourns date for parties. When both parties appear, plaintiff or the victim speaks facts of the case to the elders of Tomo. The defendant also forwards his side. Before Tomo no need of proving evidence to the fact. Parties should disclose the truth by themselves. The reason is that it used both customary and spiritual means of dispute settlement mechanisms.

Tomo institution investigates a case through customary mechanisms & spiritual means. In customary mechanisms, elders decide the case in accordance with customary practices, values and norms of the community. When the defendant accepts the fact raised by plaintiff they pass decision. If not they proceed to the spiritual means; where the principle of spirituality applies. While using spiritual principle, the defendant admits the fact in most of the time; for it is believed to have bad consequences on life. But in both stages there is no coercion with power for admission. Parties have the right to reject the decision. In practice most of the time the decision of Tomo is binding and enforceable by the clients.

### **Why People Prefer the Institution of Tomo over Formal Courts?**

The study revealed that people prefer the institution of "Tomo" than formal legal institutions due to its effectiveness, speedy trials, less cost and immediate action<sup>9</sup>. And also when there is no evidence to prove the existence of fact before regular courts, they prefer Tomo<sup>10</sup>. The reason is that regular courts lack mechanisms and knowledge to investigate and identify criminals who committed crime without evidence and on cases that lack evidence. Besides; facts are disclosed by parties themselves, no need for evidence. The study further revealed that it is believed the one who deny the facts will face a bad consequence. One of the respondents replied that, unlike regular court there is no challenge of corruption before Tomo<sup>11</sup>. Tomo adjudicate cases without any ground of

discrimination. Even though it has a background of spiritual basis it is not religious.

### **TYPES OF CASES HANDLED BY TOMO INSTITUTION**

In practice; Tomo adjudicated disputes which are denied by parties<sup>12</sup>. When cases are civil in nature or simple crime which affects only individual interest Tomo entertain it. But if the case is grave criminal case or human rights violation which affects public interest, they forward it to the responsible body of governmental institution (police or court). For instance, when Tomo investigates and finds the one who commits homicide, they immediately report it to the concerning government authority.

### **TOMO INSTITUTION VERSUS FORMAL JUSTICE SYSTEM**

Formally, both institutions have no legally recognized relationships and supportive role. But they have a common objective which is attaining justice<sup>13</sup>. With regard to authority Tomo uses customary laws, social norms and traditional beliefs as a source. But formal justice system bases its authority on the laws, rules and regulations which are enacted with concerning organ of government and proclaimed by state.

### **SOCIAL PERSPECTIVES TOWARDS TOMO INSTITUTION**

Society requires justice without delay. However, dispute settlement proceedings of formal justice system are time consuming and costly. It also requires much evidence for adjudication. In reality, it is very difficult to come up with tangible evidences for every case in court. Hence, society lacks confidence and trust on formal justice system.

According to the interviewees the decision passed by Tomo dispute settlement mechanism is fair, low costly and without delay. Other respondents reflect that the institution of Tomo reduces or shares the burden of case load over formal courts<sup>14</sup>. And they recommend that it is better when the concerning government organ supports and recognize the institution. The

<sup>9</sup>Cherinet Chirga (55 years old)- Mizan-Edget kebele - interviewed on Oct 18/2010 E.C

<sup>10</sup>Girma Basha (45 yrs old)- Head, Public Service & HR Bureau at Bench Maji- interviewed on Oct 15/2010 E.C

<sup>11</sup> Hala Asuab (45yrs old) - Shey-Bench – T/Eshet – Kebele – Village leader- interviewed on Oct 21/2010 E.C

<sup>12</sup> GrazmachTafese H/mariam (42 yrs old)- She Bench woreda – leader Tomo institution- Oct 21/ 2010 E.C.

<sup>13</sup>Meseret Shanko- President, Bench Area First instance Court - Bench-Maji zone – Oct 18/2010 E.C

<sup>14</sup>Adisu Shiferaw- Private Attorney in Mizan Teferi- interviewed on Oct 28/2010 E.C

respondents also suggested that Tomo solves disputes which are more dangerous for the well-being of society, but committed or done without evidence. For instance; theft, adultery, homicide and other crimes which are committed in hidden and sophisticated manner are usually entertained by Tomo institution<sup>15</sup>.

## **DISCUSSION**

Tomo is one of the traditional dispute settlement institutions in Bench community, South West Ethiopia. It is named from the clan of "Tomo" in Bench people. It has a spiritual basis. It is believed that its foundation is related with traditional god called "*shinabossind*" which is worshiped by Tomo community.

In this study all of the respondents were aware about the institution of Tomo. Majority of them said that Tomo has a significant role in solving disputes among individuals of their localities and it also shares work load of the regular courts. The study revealed four typical features of Tomo namely informality, adjudication without evidence, lack of code of conduct and Spirituality. Due these features, Tomo is preferred by most of the local communities. Especially, adjudication without evidence was cited by all of the respondents as a major advantage of the Tomo and is why Tomo is preferred to other dispute settlement mechanisms.

Besides; Tomo plays a great role in solving disputes where facts are denied or there is no evidence for adjudication in formal court system. The 1995 constitution of Ethiopia recognized the adjudication of personal and family matters in accordance with customary and religious courts. Hence, impliedly their decisions are recognized, unless otherwise it contradicts with mandatory provisions of the law. Tomo adjudicated disputes which are denied by parties, either it is civil or criminal in nature<sup>16</sup>. When cases are civil in nature or simple crime which affects only individual interest, Tomo entertain it. But if the case is grave criminal case or grave human rights violation which affects public interest, they forward it to the responsible body of governmental institution. The 1960 civil code incorporated the adjudication of civil cases with customary dispute settlements methods.

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<sup>15</sup>Observation + Interview with elders

<sup>16</sup> GrazmachTafese H/Mariam (42 yrs old )- She Bench woreda - Oct 25/2010 E.C

However, the criminal law of Ethiopia and international human right laws ratified by Ethiopia totally excluded the adjudication of criminal matters by ADR system.

The 1995 FDRE Constitution, on the other hand, has addressed the application of customary laws in the country in its different provisions. Accordingly; the position of the FDRE constitution towards the recognition of customary laws is reflected under the following provisions: Art.9 (1), Art. 34(4) and Art. 34(5). These provisions declare that the 1995 FDRE constitution recognizes the enactment of customary or religious laws; unless otherwise contradicts with the constitution.

Besides; Art. 78(5) declare that the House of People's representatives can establish and give official recognition to religious and customary courts. Hence, from these provisions we can infer that the decisions of Tomo institution on personal or family matters which does not contradict with the basic principles of the constitution are acceptable in the formal court. According to the interviewees; the decisions passed by Tomo institution is fair, low costly and without delay. Besides they reflect that the institution of Tomo reduces or shares the burden of case load over formal courts<sup>17</sup>, and suggested that Tomo solves disputes which are more dangerous for the well-being of society, but committed without evidence. For instance; theft, adultery, homicide and other crimes which are committed in hidden and sophisticated manner are usually entertained by Tomo institution.

## **CONCLUSION**

Tomo is named from the clan of Tomo in Bench community and it has a traditional spiritual basis called "*shinabossind*". It has significant role in solving disputes among individuals of their localities and it also shares work load of the regular courts.

Tomo have four typical features called informality, adjudication without evidence, lack of code of conduct and Spirituality. Tomo adjudicates disputes which are denied by parties, either it is civil or criminal in nature. The 1995 FDRE Constitution, on the other hand, has addressed the application of customary laws in the country in its different provisions. The decisions passed by Tomo institution is fair, low costly and without delay. Besides, the institution of Tomo

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<sup>17</sup>Meseret Shanko -President, Bench area first instance court- interviewed on Oct 18/2010 E.C

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shares the burden of case load over formal courts. Tomo solves disputes which are more dangerous for the well-being of society, but committed without evidence. Theft, adultery, murder and other crimes which are committed in hidden and sophisticated manner are usually entertained by Tomo institution.

### RECOMMENDATION

The institution of Tomo works towards bringing justice in the society. It shares the case burden in the formal courts. Therefore, the local government should recognize and strengthen the Tomo institution. Local courts should give trainings on the basic principles of the constitution to elders of Tomo institution. Civil and criminal cases which are going to be handled by the Tomo institution should be clearly identified by the local courts and the Tomo institution. The enforcement mechanisms of decisions passed by Tomo institutions should be set by the local government and local courts. The local courts should give recognition to the decisions of Tomo institution. Further research should be conducted on the Tomo institution to explore its practice in detail & suggest communicating its applicability with the formal courts.

### DECLARATIONS

#### List of Abbreviations

**ADR:** Alternative Dispute Resolution

**FDRE:** Federal Democratic Republic of Ethiopia

**FGD:** Focus Group Discussion

#### *Ethical Approval and Consent to Participate*

Ethical clearance letter was obtained from Department of Law, School of Law & Governance, Jimma University. The participants were well informed about the purposes of the study and oral consents were obtained accordingly. The participants' rights to refuse or withdraw from participating in the study and confidentiality issues were considered.

**Competing Interests:** The authors' declare that

they have no competing interests.

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### AUTHORS' CONTRIBUTION

TE took the role from conception to development of the proposal, supervised the data collection, conducted the report writing and drafted the manuscript. KM critically reviewed and approved the final manuscript.

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The Constitution of the Democratic Republic of Ethiopia; proc. No. 1/1995, The 1960 Civil code of Ethiopia; The 2004 Revised criminal code of Ethiopia; Revised Family Code of Ethiopia; Labor proclamation NO.377/2003 of Ethiopia

**International Instruments Used:** UDHR, ICCPR.

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