4. Understanding customary laws in the context of legal pluralism

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Introduction

Legal pluralism, which is defined as the co-existence of more than one legal system in a given social field (Pospisil 1971, Griffiths 1986, Moore 1986 in Merry 1988:870), is prevalent in contemporary Ethiopia, as in other parts of Africa. Five normative legal regimes (one state law and four non-state laws) can be identified in the country. The codified state law was introduced from Europe in the 1960s and subsequent laws were issued later. The non-state legal systems include: i) the numerous forms of customary law characterized by both commonalities and differences between and within ethnic groups operating independently; ii) the *Sharia* courts that have been in existence for a long time, have been recognized by three successive governments, and currently operate with jurisdiction over family and personal issues; iii) the certified commercial arbitration forums that provide arbitration and mediation services in commercial, labour, construction, family and other disputes; vi) the spirit mediums believed to operate as mediators between humans and supernatural forces.

The customary laws operate in parallel with the other forms and, despite pressure from the state law, have proved to be resilient and dominant in the entire continent. Hence, it is tempting to investigate the persistence, the characteristics, the effectiveness and the prospects of these popular legal systems. Despite identifiable gaps and drawbacks, customary laws have been recognized as the best option for handling group conflicts and ensuring peaceful coexistence among families and communities.

However, due to certain inadequacies studies on customary laws run short of informing theory and policy. First, concepts borrowed from Western alternative dispute resolution (ADR) literature have been used interchangeably and confusingly. Hence, a lack of conceptual clarity has hindered communication and prevented in-depth understanding of the functional differences between the various legal orders. Second, the absence of efforts to identify and analyse customary laws systematically has constrained our knowledge about which of

the core values underlying customary laws are worth appreciating and which key challenges are worth addressing. In other words, the lack of comprehensive knowledge has prevented the development of theoretical frameworks and concrete policy ideas. This paper, therefore, intends to shed light on these two issues by drawing illustrations from a few countries, with a special focus on Ethiopia as a case study.

Prior to colonization in the nineteenth century, customary laws governed all the affairs of the people of Africa. Following the introduction of codified modern legal systems from the West, legal pluralism became the reality in African legal systems. Many customary laws survived colonialism and marginalization by formal justice systems(Kariuki 2015, Mutisi and Sansculotte-Greenidge 2012). These deep-rooted and widely accepted institutions are likely to remain relevant and crucial in addressing intra- and inter-group conflicts on the continent (Mutisi and Sansculotte-Greenidge 2012). The popularity of customary laws may be explained with reference to the qualities that make them preferable to the state law, as will be shown further below.

Many African states have given constitutional recognition to customary laws. For example, in South Africa, Section 166(e) of the Constitution and Section 16(1) of Schedule 6 recognize the judicial powers of traditional leaders. Likewise, Articles 34(5) and 78(5) of the Ethiopian Constitution make reference to customary laws. In Rwanda, where the famous *gacaca* courts handled genocide cases, the integration of *abunzi* mediation into the legal system (Organic Law No. 31/2006) is one of the recent developments that point to the relevance of customary courts in contemporary Africa. According to Cuskelly (2011:6)

> The highest level of recognition of customary law is found in African constitutions, both in terms of the number of countries with relevant provisions and the breadth of aspects of customary law covered. Of 52 African constitutions analysed, 33 referred to customary law in some form…. there is a high level of recognition of traditional and customary institutions, as well as a broad recognition of customary law in the courts and relating to land. At the weakest level of recognition of customary law, a large number of African constitutions have provisions relating to the protection of culture or tradition.

Besides the recognition, in many countries the actual relationship between the state law and the customary laws has been inadequately articulated. The Ethiopian Constitution (Articles 39:2 and 91:1) provides, in broad terms, for the promotion of the cultures of nations, nationalities and peoples of the country. Article 34:5 makes more specific and direct reference to adjudication of disputes relating to personal and family matters in accordance with customary laws, with the consent of the parties to the dispute. Article 78:5 also states that the House of People's Representatives and State Councils can give official recognition to customary courts. Thus

far, the particulars of Article 34:5 have not been determined by law and the official recognition stipulated in Article 78:5 has not been given.

The inadequate constitutional provision in Ethiopia led to the existence of different views about the relevance of customary laws in the country: while the proponents of the state law want the customary legal forum to give way to the modern unitary legal forum, the advocates of customary laws argue that the state-centred unitary approach must give way to different alternative paradigms. Many legal experts justify the relevance of non-state law by the fact that it reduces the caseload of formal courts. Ordinary people welcome the existence of legal pluralism because it provides multiple options to justice seekers. And still others (scholars, practitioners, etc.) advocate for a reform of the legal system in order to create a hybridized brand that contains elements of the formal and the informal laws.

Customary dispute and conflict handling mechanisms have received increasing scholarly attention as evidenced by the growing number of studies and publications. The regional level comparative works of Zartman (2000), Ogbaharya (2010), Mutisi and Sansculotte-Greenidge (2012) and Kariuki (2015), among others, deserve mention. Country-specific studies and publications are also numerous. The depth and breadth of studies in Ethiopia have been revealed by the edited volumes on customary conflict handling mechanisms by Alula Pankhurst and Getachew Assefa (2008), Gebre Yintiso *et al.* (2011, 2012) and Elias Stebek and Muradu Abdu (2013). However, as Kane *et al.* (2005:3) rightly argue, research on African customary laws has not been systematic and comprehensive:

> [I]t is important to note that insufficient research has gone into understanding both the dynamics and the operation of customary law tribunals and into assessing the content and status of most customary laws to ensure that they in fact reflect the values and mores of the communities (…). We recommend comprehensive research into the universe of dispute resolution services (…). We recommend that a participatory assessment of the contemporary status and content of customary laws be carried out in order to open up knowledge of customary laws and ensure that the voices of all stakeholders are actually heard as these laws naturally evolve.

It is equally important to acknowledge the weaknesses of customary legal practices, which can be challenged on grounds of gender insensitivity, discrimination against minorities, breach of other human rights, weak procedural fairness in adjudication and punishment, lack of uniformity and lack of records. The practices are sometimes incompatible with national laws and international standards and norms. Some of the most serious weaknesses, such us gender insensitivity, discrimination against minorities and breach of human rights, have to do with established cultural values and practices that perpetuate social inequality. In societies where men are viewed as superior to women and the participation of the lat-

ter in customary legal practices remains limited or non-existent, customary laws tend to disregard or violate the rights of women. Similarly, in cultures where minority groups such as artisans or hunters experience social exclusion, customary laws tend to reinforce the existing inequality and discrimination. On the whole, breaches of human rights in the application of customary legal practices emanate from structural factors that warrant change through awareness creation and the legal enforcement of laws protecting the rights of disadvantaged groups. In today's world, where transnationalism, multiculturalism and rapid social transformation are bridging the global – local divide, the incompatibility of customary laws with the changing context in which they operate has become an issue that must be addressed.

This chapter has been written with the firm conviction that its approach will enable researchers to generate knowledge amenable to comparative analysis, scientific generalization and/or policy application.[1] I recognize that a comprehensive study of African customary laws would be extremely difficult and rather unrealistic given their vastness and their diversity. However, systematization of the existing knowledge we have will lead to a consolidation of perspectives on the communalities and differences of the customary laws, to an identification of the essential underlying values worth promoting, and an evaluation of the principles and practices viewed as unfavourable in today's world.

Towards conceptual clarity

As stated in the introduction, the undifferentiated and at times confusing use of certain concepts has hindered our understanding of and communication about the functional differences between the various legal orders. The key terms often used to describe customary laws – dispute, conflict, negotiation, mediation, arbitration, conciliation, dispute settlement, conflict resolution, conflict management, and conflict transformation – come from the 'alternative dispute resolution' (ADR) literature of the West. This section, therefore, attempts to reflect on the meaning of these terms and the appropriateness of their use in the context of customary laws. Before discussing each term, it is important to present briefly the context and the historical background of ADR.

ADR was conceived in the United States by legal practitioners and law professors with the intention of reforming the justice system through the introduction of

1 This paper is based on my own research on customary conflict resolution in various parts of Ethiopia (see Gebre 2012, 2016a, 2016b) and extensive literature review. Earlier versions were published in the Journal of Ethiopian Law (Gebre 2014) and in an edited volume I co-edited with Itaru Ohta and Motoji Matsuda (2017).

non-litigious methods (Nader 1993). The early advocates of ADR in the US turned for inspiration to customary laws, which were viewed as more humane, therapeutic and non-adversarial (Avruch 2003:352). Ugo Mattei and Laura Nader (2008:77) argued that ADR was used as a disempowering tool, 'to suppress people's resistance, by socializing them toward conformity by means of consensus-building mechanisms, by valorising consensus, cooperation, passivity, and docility, and by silencing people who speak out angrily.' In England, the history of voluntary conciliation and arbitration goes back to 1850, where these methods were used to address industrial disputes, with 'the highest hopes of abolishing strikes completely by the most ruthless application of arbitration' (Hicks 1930:26).

ADR as applied in the West is different from the customary laws practised in Africa. For example, the Western institutional settings focus on individuals, while African cultures consider the collective as the unit of social organization (Grande 1999). Accordingly, ADR procedures in the West are closed, while African conflict handling procedures are open to the public, and therefore transparent. Because of the differences in focus, context and procedures, the terminology used in ADR cannot be transferred to customary laws without customization. In the West, there are four common ADR methods: negotiation, mediation, conciliation, and arbitration. During mediation, mediators do not propose a solution, while conciliators can suggest non-binding agreement ideas during conciliation. During arbitration, arbitrators apply the law, start the process by receiving a written consensus from the parties, and have the power to administer a legally enforceable award, even internationally. ADR also differentiates between dispute settlement, conflict resolution, conflict management and conflict transformation. Simply transferring these concepts from ADR to customary laws without explanation leads to confusion and misunderstanding.

Half a century ago two prominent anthropologists – Paul Bohannan and Max Gluckman – espoused a debate on whether universal categories and terminologies should be used to depict the legal systems of different societies. Bohannan (1969:403) advocated for the use of native terms to be accompanied by ethnographic meaning, arguing that the use of universal categories acts as a barrier to understanding and representing the legal systems in different cultures. Gluckman (1969:535), on the other hand, argued in favour of translating native concepts into English, stating that the excessive use of local terms was serving as a barrier to cross-cultural comparison of legal practices. As Kevin Avruch (1998:60) rightly stated, the etic approaches that allow comparative analysis and the emic approaches that provide much deeper and contextualized insights are equally important in dealing with dispute/conflict. Since terminological usage has discrete implications for the outcome of a dispute/conflict situation, ensuring conceptual clarity is indispensable.

For analytical purposes, the terms that require differentiation are categorized into three: types of incompatibility (dispute and conflict); methods of handling incompatibility (negotiation, mediation, arbitration, and conciliation); and approaches to ending incompatibility (dispute settlement, conflict management, conflict resolution, and conflict transformation). This section attempts to clarify the meanings of these concepts to find out whether they have equivalent practices in Ethiopia and to reflect on the aptness of their use in the literature on Africa.

In this chapter, as part of the knowledge systematization effort, the concept of 'customary laws' has been used, intentionally avoiding the interchangeable use of such terms as 'indigenous law', 'traditional law', 'informal law' and 'customary dispute/conflict resolution mechanisms'. The term customary laws is preferred because of its common use in law schools, legal documents (e.g., constitutions), and major international publications.

Types of incompatibility

There exists a lack of uniformity in the literature in the use of the terms 'dispute' and 'conflict'. While some writers stress the differences between the two, others use them interchangeably. In the Ethiopian literature on customary laws, dispute and conflict have not been adequately differentiated. In *Grassroots justice in Ethiopia* (Pankhurst and Getachew 2008), the titles of ten out of eleven chapters carry the term dispute, but nowhere in the volume is it made clear whether the choice was meant to convey the message that the issues discussed are specifically about disputes and not conflicts. Likewise, the two volumes on *Customary dispute resolution mechanisms in Ethiopia* (Gebre *et al.* 2011) failed to differentiate between the two concepts. Many chapter contributors to these two books and others published in Ethiopia have used dispute and conflict without providing operational definitions, and at times interchangeably.

In order to ensure conceptual clarity in the field of dispute/conflict handling research, this chapter adopts John Burton's (1990:2) approach, which describes dispute as a short-term disagreement between two persons or groups over a specific set of facts and/or issues that are negotiable in nature, and conflict as a long-term and deeply rooted incompatibility associated with seemingly 'non-negotiable' issues between opposing groups or individuals. Non-negotiable issues include the denial of basic human rights and deprivation of essential economic resources such as land and water. If not settled, a specific dispute could turn into conflict, but a conflict cannot turn into a dispute.

Methods of handling incompatibility

The methods commonly employed to address individual or group disputes/conflicts outside of the formal court include negotiation, mediation, conciliation, and arbitration. The four methods of alternative dispute resolution, as practised in Western societies, vary in their respective meanings and approaches. For example, in the context of Western ADR mediators do not suggest solutions, conciliators suggest non-binding agreement ideas, and arbitration results are final and legally binding.

Scholars describing customary laws in Africa have used the terms listed above without questioning them. For example, Francis Kariuki (2015:13) wrote, 'conflict resolution amongst African communities has since time immemorial and continues to take the form of negotiation, mediation, reconciliation or arbitration by elders', without elaborating on the meanings of these terms in the African contexts. It is incumbent on researchers of African customary laws to make sure that the concepts they borrow from the ADR or other international literature adequately represent the local realities. In the literature on Ethiopia, these terms are also not sufficiently differentiated from each other and from their usage in the ADR literature. Tirsit Girshaw (2004:49), for example, states: 'Mechanisms like reconciliation and arbitration are common features of indigenous conflict resolution mechanisms.' Wodisha Habtie (2011:438–440) notes that negotiation, mediation and arbitration exist as distinct methods among the Boro-Shinasha. Among the Nuer, according to Koang Tutlam (2011:412), kinsmen and elders arrange mediation to determine the fine and ask the culprit to pay compensation to the victim. However, these and many other authors do not explain what they mean by concepts like mediation, reconciliation and arbitration.

This section therefore discusses the meanings of the four concepts (namely, negotiaion, mediationreconciliation and arbitration) and ADR proceedings (private in nature), so that researchers can establish whether there is a resemblance with the proceedings of the customary laws (public in nature) that they are studying.

In ADR, 'negotiation' is a mechanism whereby the parties that are directly involved in a dispute/conflict meet to resolve their differences, and reach an agreement without the involvement of a third party (Assefa 2012:245). If conducted without influence and intimidation, negotiation is known to be the most efficient and cost effective approach to handle a dispute/conflict. Since it is conducted on the principles of give-and-take and willingness to ease tension, private negotiators are expected to opt for compromise. Apart from this specific and narrow usage, the term negotiation is flexibly and broadly employed to refer to any discussion aimed at finding a middle ground, be it in the context of mediation, conciliation or an early phase of arbitration.

Mediation as a dispute/conflict handling method involves the appointment of a neutral and impartial third party, e.g. a mediator, often a trained person or a

legal expert. He facilitates the dialogue between the parties in conflict and helps them reach a mutually acceptable agreement. It does not impose a binding solution (Le Baron-Duryea 2001:121). Mediation is often preferred to litigation because it is confidential, faster, fairer, cheaper, more efficient and addresses the unique needs of parties. The guiding principles of mediation are that it be voluntary, non-binding, confidential and interest-based. The parties are free to reach or withdraw from negotiated agreements. In order to facilitate the resolution of a conflict, a mediator performs a series of activities. He is expected to understand the perspectives of the parties, set ground rules for improved communication, encourage them to discuss in good faith and articulate their interests or concerns, remind them to make decisions on their own, and convince them to remain committed to a peaceful result. In mediation, parties may be represented by lawyers who argue their case, advocate for their clients and negotiate on their behalf. One might wonder whether mediation as practised in the West is consistent with African customary laws, where non-professionals handle disputes/conflicts in public.

The 1960 Civil Code of Ethiopia does not clearly recognize a mediation procedure. According to Assefa Fiseha (2012:247), it appears that the Ethiopian Civil Code combines mediation and conciliation. Researchers of African customary laws should bear in mind the fact that a mediator in the ADR context would not dictate the process, make a judgment, or suggest any solution.

Conciliation (or reconciliation) is another dispute/conflict handling method that involves the appointment of a neutral and impartial third party – a conciliator – to help parties reach a satisfactory agreement. Conciliators are appointed on the basis of their experience, expertise, availability, language and cultural knowledge. Louis Kriesberg and Bruce Dayton (2012:305) have stated that parties expect four important dimensions to be present in reconciliation for it to succeed: truth, justice, regard and security.

Conciliation and mediation have a lot in common, and sometimes the two terms are used interchangeably. In both methods, the parties retain the power to select their conciliators, the venue, the language, the structure, the content and the timing of the proceedings. Both techniques are flexible, time and cost-efficient, confidential and interest-based. The parties also retain autonomy to make the final decision without imposition by a third party. The difference between conciliation and mediation is that a conciliator can play a direct/active role in providing a non-binding settlement proposal. The Ethiopian Civil Code (Articles 3318–3324) duly recognizes conciliation and provides, among other things, details about the role of conciliators and conciliation proceedings.

Arbitration is the fourth major dispute/conflict-handling method. Here, parties voluntarily present their disagreement to an unbiased third-party arbitrator or arbitral tribunal. Arbitrators are expected to apply the law, and start the proceedings after receiving a written consensus (arbitration agreement) from the parties on the

content of their disagreement and their willingness to accept the 'arbitral award' in advance – the verdict issued after the hearing. Arbitral proceedings are conducted under strict rules of confidentiality, e.g. they are not open to the public. Like mediation and conciliation, arbitration is supposed to be more efficient, easier, faster and cheaper than litigation, and to be relatively flexible. Parties are free to choose their arbitrators, the venue, the language and the timing of the arbitral proceedings. Arbitration is different from mediation and conciliation in that: i) arbitrators have the power to administer a legally enforceable award; and ii) parties lose control over their ability to make a decision on their own. Arbitral awards are enforced even internationally because of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As practised in the West, the decisions of arbitrators are final and binding, and they cannot be reversed, even by the formal courts, unless the arbitration agreements were invalid. It would be interesting to know whether there exist customary courts in Africa that apply the formal law, require the submission of written arbitration agreements, and conduct private hearings away from the public.

Arbitration as an ADR method is legally recognized in Ethiopia and has been used to handle different disputes/conflicts (Tilahun 2007). Although the procedure seems to be similar to Western practices, Assefa (2012:25) notes that arbitration in the Ethiopian context is becoming more expensive than litigation and that arbitral awards are not necessarily final and binding, as courts tend to accept appeals from parties dissatisfied with the decisions of arbitrators. Such court interference is inconsistent with the principles of arbitration and unfairly diminishes the relevance and the credibility of the method.

Approaches to ending incompatibility

The ending of a conflict takes four major forms: dispute settlement, conflict management, conflict resolution and conflict transformation. In the Ethiopian literature, the terms dispute settlement, conflict resolution and conflict management are not sufficiently differentiated, while conflict transformation is a new concept, the local equivalent of which is yet to be found. Hopefully, the following discussions will clarify the common usage of the four terms, therby avoiding future confusion and interchangeable use.

Dispute settlement is an approach that removes dispute through negotiation, mediation, conciliation and arbitration. A dispute is settled – rather than resolved, managed or transformed – because it represents an easily addressable short-term problem that emanates from negotiable interests. Establishing the facts of the dispute and satisfying the interests of disputants are among the basic conditions that need to be met for successful dispute settlement. Depending on the methods employed, a third party may use persuasion, inducement, pressure or threats to ensure

that the disputants arrive at a satisfactory settlement. Dispute settlement strategies aim to end the dispute through compromises and concessions, without addressing the fundamental causes of the dispute or satisfying the basic demands of the disputants (Burton and Dukes 1990:83–87). Since it does not change the existing structures and relationships that cause disputes, the efficacy and durability of the settlement approach, compared to the resolution and transformation approaches, are considered to be limited.

Conflict management refers to the process of mitigating, containing, limiting or temporarily controlling conflict through the intervention of a third party. Conflict management steps are taken with the recognition that conflicts cannot be quickly resolved, and with the conviction that the continuation or escalation of conflicts can be somehow controlled as an interim measure. The conflict management process can succeed only when the conflicting parties have respect for the integrity, impartiality and ability of the third party. However, the strategy neither removes a conflict nor addresses the underlying causes (Lederach 1995:16–17). As Morton Deutsch (1973:8) notes, the main intention is to make the situation more constructive to the conflicting parties through lose–lose, win–lose, or win–win results. The management of a conflict must therefore soon be followed by other strategies that resolve the problem permanently.

Conflict management as defined in ADR has equivalent cultural and religious practices in Ethiopia. For example, among the Orthodox Christians, a priest might place a religious injunction on adversaries in order to temporarily halt offensive actions. In some cultures, offenders take refuge with individuals and institutions believed to be culturally and religiously sanctified to protect them against revenge (Alemu 2011:41).

Conflict resolution is an approach that decisively removes the underlying causes of conflict. Peter Wallensteen (2012:8) defines conflict resolution as 'a situation where conflicting parties enter into an agreement that solves their central incompatibilities, accept each other's continued existence as parties and cease all violent action against each other.' From this definition it is apparent that conflict resolution follows a mutual understanding about the problem to be solved and a firm commitment to address the root causes of the conflict. This can be accomplished through changes in the behaviours, attitudes, structures and relationships that incite or perpetuate conflict. A third party facilitates communication and enables the conflicting parties to come to a comprehensive agreement. Generally, the resolution approach leads to a long-term solution, as resolving conflicts – as opposed to settling disputes – demands more than just establishing the facts or satisfying the interests of the parties. However, it is important to note that conflict resolution may not remove all differences and may not lead to major structural changes that would avoid a relapse into conflict.

Conflict transformation provides the deepest level of change, which results from an improved and accurate understanding of the conflict in question. Conflict transformation underlines the need for major structural and relational change to address similar causes that might prompt a relapse into conflict. The structures, relations, issues and interests that have led to a conflict are all expected to change and allow the establishment of a new system and a new environment. In this regard, the transformational approach seems to have an interest in the aftermath of conflict and or post-conflict peace-building processes. John Paul Lederach (1995:17), the leading advocate and proponent of conflict transformation, writes:

> Transformation provides a more holistic understanding, which can be fleshed out at several levels. Unlike resolution and management, the idea of transformation does not suggest we simply eliminate or control conflict, but rather points descriptively toward its inherent dialectic nature. Social conflict is a phenomenon of human creation, lodged naturally in relationships. It is a phenomenon that transforms events, the relationships in which conflict occurs, and indeed its very creators. It is a necessary element in transformative human construction and reconstruction of social organization and realities.

The gist of Lederach's argument is that conflict – created by people in some kind of relationship – transforms the creators and their relationship. If unchecked or left alone, it can have destructive consequences for the people involved in the conflict. However, the adverse effects of hostile relations and negative perceptions can be modified through long-term and sustained processes that involve education, advocacy and reconciliation, and that improve mutual understanding and transform the people, relationships and structures for the better. Hence, conflict transformation is explained in terms of healing and major structural change, and as having positive implications for social transformation and nation building.

Values and virtues of customary laws

The studies undertaken thus far in Ethiopia indisputably reveal that customary laws are deeply rooted in cultural and religious values and are widely practised throughout the country. Especially in the countryside of Amara and Oromia Regions, it seems that comparatively few cases are taken to the state court (Woubishet 2011:194) and that most plaintiffs (more than 76 per cent according to Dejene) withdraw cases filed with formal institutions before proper investigation (Dejene 2011:271). It appears that the degree of resistance to the formal law depends on the intensity of state influence, which gets weaker from the centre to the periphery.

In 2011, I had the opportunity to coordinate research on customary laws in Ethiopia and organize a series of validation workshops in different regions. Many

of the professionals and practitioners in the justice sector who participated in the workshops acknowledged that customary courts have been helpful in reducing the workload of formal courts. As often seen on TV screens, in their efforts to address inter-ethnic conflicts, government officials have been openly co-opting influential customary authorities and judges. It is apparent that legal experts and authorities, who in the past were antagonistic towards customary laws, have now begun to recognize their virtues. This section therefore focuses on the underlying core values that may have contributed to the perpetuation, resilience and, in some cases, dominance of customary laws.

Restoration of social order

In places where people live in settings with strong networks of kinship, clanship, ethnicity, and other social groupings, disputes/conflicts between individuals are likely to engulf much larger groups. Unlike the formal courts, which define justice in terms of the penalization of perpetrators, customary laws focus on the larger groups (e.g., families, communities, clans, etc.) from both the perpetrators' and the victims' sides who may have been drawn into the trouble. This is because discord is viewed not only as a matter of individual differences that should be addressed, but also as something that disrupts the social order. The restoration of social order can therefore only be ensured when the larger groups drawn into a dispute/conflict come to grips with it and move forward, leaving the trouble behind them. Hence, the deliberations of customary laws often end with the repentance of the perpetrator's group and the forgiveness of the victim's group, which help bridge the social divide and heal the social scar.

From many case studies on customary laws in Ethiopia (Gebre *et al*. 2011, 2012), it is apparent that families and large groups in many parts of Ethiopia are involved during the handling of disputes and conflicts initiated by individuals or small groups. To give an example, in 1999 I witnessed the reconciliation process in an adultery case involving two Gumz families, in which a young married woman admitted to having been impregnated by a young man in the same village. The case was brought to the attention of elders and clan leaders, who immediately summoned the family and relatives of the impregnator and those of the young woman's husband (who was away from the village at the time, in education). The problem between the two families was resolved through repentance and forgiveness in the absence of the husband, who was expected to agree to the deal upon his return to the village.

The staging of a forum for group involvement in customary peace-making processes is meant not only to resolve the dispute/conflict itself but also to help avoid possible relapses and spill over effects, and to ensure social order and community peace. Hence, justice and peace are served at the same time. It could be argued that

in communities with a strong sense of social bonding and group loyalty customary laws are well suited to transform hostility to solidarity at both the individual and group levels without creating a winner–loser situation. In this respect, customary laws exhibit irrefutable advantages over the formal law, which focuses only on the prosecution of the perpetrator, a measure that does not lead to community peace.

Quest for truth

The second important quality of customary laws is their unique and unparalleled strength in discovering the truth, which often poses a challenge for the formal justice system. The police often finds offences committed in secret and lacking evidence makes it difficult or even impossible to investigate. In the context of customary law, the victim's side is not expected to be open to discussion and forgiveness before the truth has been disclosed. Hence, the primary role of the actors who deliberate in cases under customary law is to discover the facts through a confession of the perpetrator or through investigation. In closely organized communities, people do not hesitate to expose culprits, and it is not uncommon for family members to testify against loved ones involved in unlawful acts. Thus, alleged perpetrators are rarely convicted on the basis of circumstantial evidence, and offenders rarely get away with wrongdoing for lack of witnesses or evidence.

Telling the truth is given high value for practical and religious reasons. On the practical side, the social life of people in communities is built around mutual trust. People make agreements and entrust things to each other without witnesses and without formal records. If the social contract of trust was allowed to crumble, the consequences for the individuals and the society at large would be grave. For example, untrustworthy individuals risk being dishonoured and disgraced among their own families and communities. A society would become dysfunctional without the basic principles that govern the behaviours and actions of its members. Hence, there exists a great deal of social pressure to tell the truth.

Regarding the religious aspect, telling lies while under oath is associated with a betrayal of faith that might have supernatural consequences. The case of the Nuer, for example, reveals the value attached to truth and its association with belief systems. There, '(t)he disputants swear an oath of innocence and the person who doesn't tell the truth is bound to suffer misfortune' (Koang 2011:425). Among the Woliso Oromo, 'customary courts attempt to prove the truthfulness of cases through the flow of information, directly from the disputants. Both parties are expected to be honest in providing information. (…) It is believed that the *waaqa* (higher spiritual being) easily identifies the truthfulness and falsity' (Dejene 2011:261–262). In short, while state legal institutions struggle to find the truth as people do not feel indebted to them, customary institutions can employ social and religious pressure to learn the truth from a community.

Public participation

As opposed to the closed and confidential ADR proceedings of the West, customary laws allow people to attend the publically held deliberations into disuputes/conflicts and to provide opinions on the validity or falsity of the evidence provided and/or the fairness of the verdict reached. Before Ethiopia was occupied by Italy in 1936, this was also the case for the customary justice system of the Ethiopian government: the Imperial Courts invited bystanders and passers-by to attend hearings and air their opinions.

Participation in the administration of justice characterizes the customary laws of many Ethiopian people (see for example Assefa Fiseha (2011:366–7) on Tigray and Abraham Tadesse (2011:123) on Sidama). Dejene (2011:261–276), who studied the Woliso Oromo, writes: 'Apart from direct participation, the community provides information and suggests ideas on the issue under litigation. Such informal discussions and public views are important to arrive at consensus at the end of the day. The final decisions are the outcome of these various views and suggestions from the community.' In addition, the openness of customary procedures and the participation of the community members in the administration of customary justice tend to limit opportunities for corruption and nepotism, as Koang (2011:429) noted about the Nuer.

Why is popular participation so important? First, the involvement of community members as observers, witnesses and commentators increases the credibility and transparency of customary laws. Second, non-confidential proceedings help to put public pressure on parties to honour and respect agreements. Non-compliance to decisions is rare, mainly because nonconformity is likely to be interpreted as a rebellion against community values and interests. Finally, since decisions are passed in the presence of community observers, the possibility for corruption and prejudiced judgment is limited.

Collective responsibility

Collective responsibility refers to a situation where social groups take the blame for offences perpetrated by their members and take responsibility for the consequences. This principle is widely common in cultures where group identification and group control mechanisms are strong, and where the idea of the individualization of crimes is uncommon. In such societies, members of a perpetrator's family may be subjected to retaliation as a form of collective punishment. Hence, to avoid such retribution, the families and relatives of wrongdoers often take the initiative to make peace. The perpetrator's family, lineage or clan may be required to take responsibility, express repentance as a group, and contribute towards compensation for the victim. In Dassanech and Nyangatom, South Omo Zone, even government

authorities seem to employ the principle of collective responsibility to put pressure on communities to apprehend and bring criminals to justice.

From a Western perspective, collective responsibility for any wrongdoing does not seem fair or appropriate. One might well challenge the appropriateness of holding communities/groups responsible for offences committed by individuals. Yet, in an African context, blame-sharing seems to serve important purposes that are worth appreciating. First, blame-sharing represents a tacit recognition that the family or the group to which the perpetrator belongs failed to detect, discourage, stop or report an unjustified offence, and as such, they should take some responsibility. Second, when a verdict involves costly compensation being awarded to the victim's group, the principles of reciprocity, solidarity and sharing are often evoked to help members in trouble. Third, in a situation where the group (rather than the individual offender) is the target of retribution, the cost of not taking collective responsibility could be much higher than that of sharing the blame and jointly paying the fine.

One might also wonder whether sharing of the consequences of wrongdoing might encourage further crimes. However, it is unpleasant for a group to go through such trials and tribulations, which tarnish the group's reputation and image in society.Thus, repeated offences may strain the relationship between the perpetrator and his group, leading to harsher measures, such as humiliation, ostracism, expulsion from the community, capital punishment, etc. In other words, there are internal mechanisms that discourage and control offenders.

Accessibility, efficiency and affordability

In Ethiopia, the formal legal institutions are largely inaccessible to a significant proportion of rural communities. Most rural communities lack easy physical access to the formal courts because the district courts are located in the woreda (district) capitals, far away from most villages. Travelling to a *woreda* (district) capital to file a case would, undoubtedly, incur costs: money, time and energy. Moreover, dealing with the district courts can involve having to face unfamiliar and intimidating judges, return visits to the court, unexpected delays, and issues with language, for example, if local languages are not used in the courts. Although quasi-formal social courts exist in villages, their mandate is limited to civil cases and petty crimes, the punishments for which do not exceed one-month in jail and a 500 Birr (US $18) fine.

Conversely, customary laws provides alternatives that fairly adequately address these gaps and challenges. The people who apply customary law, often elders who speak the local languages and are appointed and entrusted by the parties, are readily available in every locality and provide speedy services free of charge (or for a nominal fee). Hence, customary law provides a more affordable and accessible way

to settle disputes than the formal courts. Unlike the formal courts, which are complicated and known for their rigidity, customary forms are characterized by flexibility and simplicity, making them more efficient. The inconvenience and dissatisfaction associated with repeated court appearances, unbearable delays, intimidating court procedures and corruption are also limited in the customary context.

Systematic and comparative research

Studies on customary law may be undertaken in a variety of ways depending on their purpose and design. In this section, with the idea of knowledge systematization in mind, attempts are made to outline and explain the salient variables useful for understanding the structures and procedures of customary law and the state of legal pluralism in Ethiopia. It is assumed that systematic study of customary law requires a structured research approach that ensures the collection and analysis of comparable data.

The structure of customary courts

This sub-section attempts to identify the judicial levels and frameworks, and the identity, legitimacy and terms of office of the people who handle cases. It needs to be noted that despite the constitutional provisions (i.e., Articles 34:5 and 78:5, discussed later), the customary legal systems operate independently of the formal court. Hence, the structure discussed in this section relates only to the customary legal order.

Regarding court levels, some societies have customary courts that are hierarchically organized and have procedures for appeal, while others lack fixed courts, hierarchy and the possibility of appeal. The absence of hierarchical structure does not necessarily deter complainants from taking their cases to other parallel levels for rehearing (Debebe 2011:348, Mesfin 2012:181). Some customary courts, such as the *mad'a* of the Afar people, handle different types of cases (Kahsay 2011:326), while others, such as those among the Woleyta, specialize in handling only specific cases (Yilma 2011:106).

In customary legal systems, the customary court judges are influential clan leaders, ritual specialists, religious leaders, senior elders, village administrators and lineage heads. These well-versed individuals are known for their wisdom, impartiality, knowledge of their culture, rhetorical skills or power to convince, and rich experience in handingling disputes/conflicts.

The power of the customary judges and others handling conflicts emanates from at least one of four sources: i) the consent of the parties to have their case handled by them; ii) an administrative position (e.g., clan chief) in the society; iii)

participation in certain rituals that entitle them to become judges, as is the case among the Sidama (Abraham 2011) and the Dassanech (Gebre 2012), or iv) leadership in religious institutions, as in some parts of Amhara (Birhan 2011). The legitimacy of legal authorities and their power are derived from secular and/or spiritual sources.

The terms of office of people who handle dispute/conflict vary depending on the sources of their authority. The role of those appointed by the parties in a dispute/conflict ends the moment the discord is dealt with. However, judges who acquire their authority by virtue of their religious or administrative posts, or by performing rituals, may continue to serve until they are formally replaced, unless they are required to step down for legitimate reasons, such as inability to function, poor performance or malpractice. While individuals with an excellent record of service are invited to handle cases repeatedly, those who fail to meet expectations are rarely given another chance. In all cases, those who handle disputes are under close public scrutiny and this helps to ensure their impartiality and competence.

The procedures of customary courts

This sub-section focuses on the events/activities that occur between when a dispute arises and when it is resolved. These include: reporting cases, evidence collection and verification, deliberation and verdict, closing rituals, and enforcement mechanisms. Reporting cases to customary courts is a collective responsibility rather than a matter to be left to those directly involved. Family members, relatives, neighbours or anyone who has knowledge about the dispute/conflict is expected to report it. In many cases, the culprit or his/her kin will admit their guilt and report incidents to ensure quick conciliation. It is also common for the party of the victim to file a case with the judicial body instead of resorting to vengeance.

The ultimate objective of customary courts is to achieve genuine conciliation after the disclosure of the truth. The truth is expected to surface through confession or public investigation, which may involve a review of the evidence and witness testimony. Thanks to the high value accorded to truth, serious offences committed in secret and in the absence of witnesses are often solved through customary procedures. The handlers remind disputants to restrain themselves from doing things that can derail the process, hurt feelings or exacerbate social disorder. Apart from those directly involved in a dispute/conflict and their witnesses, representatives of the parties (often family members) and ordinary spectators of the deliberation may be asked to air their views and comment in the interests of reconciliation and community peace.

When guilt is admitted or proven with evidence, the case comes to a close, and a verdict will be passed, often by consensus between the parties involved, although it does not preclude coercion by customary judges (when persuasion fails). The of-

fender's group may have to pay compensation to the victim's side, and express sincere repentance, which is often reciprocated with forgiveness by the victim's group. Regarding compensation, there exist significant variations across cultures. In some societies, fixed payment regimes exist, while in others, fines are determined later based on the severity of the offence and sometimes the economic capacity of the offender. Compensation may be paid immediately, in piecemeal over a short period of time, or as a long-term debt inherited by generations.

Most customary court rulings end with closing ritual performances that involve sacrificial animals, the expression of a commitment to the agreements made, curses for wickedness and nonconformist behaviours, and blessings for righteousness and conformity. Such rituals of partly divine content are believed to deter rebellious tendencies and avoid a relapse into discord. Alongside the spiritual harm that such rituals are believed to inflict on the defiant, social pressure (e.g., defamation, ostracism, etc.) and physical measures (e.g., punishment, property confiscation, etc.) may be used to enforce customary court decisions. Handing an offender to the formal justice system provides another way of dealing with the disobedient.

Summary and conclusion

The plural legal orders of Africa came into being as a result of three processes: transplantation from Western countries, imposition from authoritarian states, and derivation from local values and traditions. Compared to the transplanted and imposed law, the local level customary laws seem to enjoy widespread acceptance throughout the continent and especially in rural areas, where the majority of African population resides. Moreover, they have received growing attention by researchers, as evidenced by an increaing number of research reports and publications.

However, this unprecedented study of customary legal practices has not led to comprehensive knowledge amenable to comparative analysis, scientific generalization, or policy application because of gaps in the use of terminologies, identification of the virtues of customary laws, and articulation of research strategies. This has warranted the need to systematize knowledge about customary laws. With this in mind, this chapter hopes to have accomplished the following. First, besides clarifying the meaning of concepts borrowed from the ADR literature, attempts have been made to shed light on the comparability of the various terms to customary legal practices. Second, the core values of customary laws worth recognizing have been identified and organized. These include the restoration of community peace, transparency, accessibility, efficiency, affordability, flexibility, simplicity, familiarity, and sense of belongingness. Third, the variables useful for understanding the structures and procedures of customary laws have also been discussed. In this way,

the chapter has made a modest contribution to better understanding and informed appreciation of customary laws.

Customary law faces existential challenges that have put it at crossroads. It is criticized for gender insensitivity, weak procedural fairness in adjudication and punishment, breach of human rights, lack of uniformity, and incompatibility with changing contexts. The application of some customary laws obviously violates classic liberal rights, such as privacy, personal dignity and bodily integrity. The breach of the rights of women and minority groups in the application of customary legal practices are structural problems that largely emanate from the established cultural norms in every society and culture. In order to remain relevant and effective in the twenty-first century, the custodians of customary legal practices should demonstrate adaptation, flexibility and sensitivity.

In Ethiopia, the constitutional recognition of customary laws remains inadequate in that the particulars of Article 34:5 have not been determined by law and the official recognition stipulated in Article 78:5 has not yet been given. Consequently, the interactions between state law and customary law are arbitrary, inconsistent, unregulated, and quite unpredictable. In some cases, the two legal systems unofficially recognize each other and cooperate to the extent of transferring cases or exchanging information. There are instances where government authorities and custodians of customary laws work together in addressing inter-ethnic conflicts. There are also situations where the formal and customary courts operate side-by-side exhibiting indifference and tolerance. Sometimes, both get antagonistic, especially when one intervenes in the domains and activities of the other. The inadequate constitutional provision and the consequent anomalous practices have led to the existence of different views about the relevance of customary laws.

There is a need to regulate the relationship between the two legal systems within the context of legal pluralism and avoid anomalies within a country. Policy makers have to reckon with the relative indispensability and the manifest irreplaceability (in addressing group conflicts) of the customary laws discussed in this paper, and fulfil the constitutional promises without further delay. Given the historical factors, the cultural differences, and the limitations of the state law, the ideal strategy would be to maintain and strengthen legal pluralism to provide multiple legal service options to citizens.

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