

Traditional natural resource conflict resolution *vis-à-vis* formal legal systems in East Africa: The cases of Ethiopia and Kenya

*Tsegai Berhane Ghebretkle**

Abstract

The article analyses how the formal legal systems in Ethiopia and Kenya marginalised and prevented traditional forms of resolving conflicts over natural resources. Both countries best illustrate two rapidly growing economies in transition. However, in Ethiopia and Kenya, conflicts over natural resource have to be understood in relation to their respective histories, politics and legal frameworks. Ethiopia maintained its freedom from colonial rule with the exception of a short-lived Italian occupation from 1936 to 1941. Nonetheless, like all other African nations, it has a colonial heritage self-imposed onto its legal systems through the process of codification. In contrast, Kenya was a British colony until its independence in 1963 and its colonial administrative structures had different impacts on its traditional institutions and systems dealing with resolving conflicts of natural resources. The political dimension of natural resource conflicts in these two countries is manifested in the low recognition given to the

* Dr Tsegai Berhane Ghebretkle is a Post-Doctoral Research fellow at the Institute for Dispute Resolution in Africa (IDRA), University of South Africa. He has obtained his LL.B. at Addis Ababa University, Ethiopia, LL.M. at the University of Oslo, Norway, and Ph.D. at the University of Warwick, United Kingdom.

traditional institutions. The political motives and justifications for marginalising traditional dispute-resolving mechanisms in both countries are primarily based on the belief that providing a uniform and modern legal regime would promote socio-economic development and also serve as a precondition for effective nation building. The main argument in this article is that the formal mechanisms for resolving conflicts over natural resources in both countries – which adopted the Western-style systems – need to be complemented by traditional institutional practices. It highlights the need for synergy between the formal and traditional institutions. This synergy is characterised as a form of hybrid natural resource conflict resolution. The article attempts to explore the regime of traditional natural resource dispute resolution in Ethiopia and Kenya, and recommends a way forward.

Keywords: Ethiopia, Kenya, codification, customary law, formal legal system, natural resources, formal conflict resolution and traditional conflict resolution

1. Introduction

In common with most other regions in Africa, East Africa has witnessed many conflicts over its land and natural resources (ECA 2012: ix). As Fisher and others (2000:5) note, conflict is a ‘relationship between two or more parties who have, or think they have incompatible goals’. The African Centre for the Constructive Resolution of Disputes (ACCORD 2002:4) defines conflict as

... a state of human interaction where there is disharmony or a perceived divergence of interests, needs or goals. There is a perception that interests, needs or goals cannot be achieved due to interference from the other person(s).

Conflict is likely to have several impacts, which may include harm to both humans and the natural resource base. It is a very complex and multi-dimensional social process (Woodhouse and Duffey 2000:21).

Traditional natural resource conflict resolution *vis-à-vis* formal legal systems

Conflict partly springs from the increasing demand on natural resources owing to

population growth, but also as a result of the continued depletion of these resources in both quantity and quality due to degradation, overuse and over-harvesting, governance deficits, and external factors such as climate change and commercial pressure (ECA 2012:ix).

Even if the concept of natural resource is seldom specified, the World Bank Glossary defines natural resources as ‘materials that occur in nature and are essential or useful to humans, such as water, air, land, forests, fish and wildlife, topsoil, and minerals’ (World Bank 2016). Natural resources can be classified as either renewable or non-renewable. As per the United States Institute of Peace (USIP) (2007), renewable resources ‘such as cropland, forests, and water can be replenished over time by natural processes and – if not overused – are indefinitely sustainable’. Non-renewable resources ‘such as diamonds, minerals, and oil are found in finite quantities, and their value increases as supplies dwindle’ (USIP 2007). In most cases, a nation’s access to natural resources often determines its wealth and status in the world economic system.

With regard to the typology of conflict, one could say it is usually a confusing concept over which scholars in the field have not been able to reach consensus. However, it is categorised in many ways – taking the nature of conflicting parties, conflict issues or conflict causes as a parameter (Ramsbotham et al. 2005). Conflict resolution practitioners take into account all levels of conflict, including but not limited to family, criminal, civil, sexuality, gender, multinational and financial.

Conflict is part of life, and when it is wisely handled it could serve as an engine of progress. However cohesive a society might appear, it could be harbouring conflicts. We cannot expect a society with different interests and value systems to be immune from conflict. But the point is that, even if conflict is a common denominator to every society, it does not mean that all societies use similar ways of settling their conflicts. In their various societal, socio-economic and political contexts, societies indeed differ

in the modalities they use to resolve conflict. Still, in the formal or/and informal methods they make use of, there are some shared similarities.

Although there are different practices in the world with regard to the use and management of natural resources, it is clearly visible that natural resources is a source of conflict in society. In East Africa and elsewhere, when countries are endowed with natural resources and they are not wisely and properly managed, they turn out to be a curse rather than a blessing. In more recent times, however, some of these evil effects might be reversing as more local management is used.

East Africa is one of the regions on the African continent endowed with rich and diverse natural resources, with amazing potential for their sustainable development. Such development, however, is premised on the need to have in place sensible mechanisms for dealing with conflict, mechanisms which take into consideration the existing different traditional institutions in addition to the existing formal legal frameworks.

In Ethiopia and Kenya, natural resource conflicts need to be understood in relation to their respective histories, politics and legal frameworks. Historically, Ethiopia is usually cited as the one instance where the colonial power had minimal impact on its existing legal system. However, like all other African nations, it has a self-imposed colonial heritage in its legal systems through the process of modernisation. In contrast, Kenya was a British colony until its independence in 1963. The colonial administrative structures had different impacts on Africa's traditional institutions and systems dealing with natural resource conflict resolution.

In both countries, politics also plays a significant role in marginalising traditional conflict resolution mechanisms in the area of natural resources. The political motives and justifications for marginalising traditional dispute mechanisms in both countries are primarily based on the belief that providing a uniform and modern legal regime would be necessary for the socio-economic development and would serve as a precondition for effective nation building.

With regard to the legal frameworks of the two countries, in Kenya, the colonial legal system was developed on the presumption that the law of the colonial power was superior to the traditional native customs (Odhiambo 1996). The colonial power in Kenya justified their actions on the pretext that they were bringing the benefits of modern government, economics and culture to Kenya (Odhiambo 1996). The legal systems and institutions introduced during the colonial era became the formal legal structure. Nevertheless, the traditional systems still operated, both formally and informally. Even though Ethiopia had its own civilisation, ideologies and cultures, ways of thinking and acting, as well as its own indigenous institutions (Jembere 2012:10), it nevertheless accepted modernisation through the adoption of legislation which followed Western models. In its drive to modernise, Ethiopia pursued a far-reaching legal reform in a series of codifications. However, unlike Kenya, which was influenced by the Anglo-American legal system, Ethiopia's modernisation process was influenced by both continental European and Anglo-American legal systems.

The main argument in this article is that the formal mechanisms for resolving conflicts over natural resources in Ethiopia and Kenya – which adopted the Western-style systems – need to be complemented by traditional institutional practices. The article highlights the need for synergy between the formal and traditional institutions. The synergy is characterised as a form of *hybrid natural resource conflict resolution*.

It is argued that as East Africa continues to develop and strengthen its traditional institutions for resolving conflict over natural resources, this should attract the attention of government, practitioners and policy-makers, and they should realise that these institutions deserve a recognised place instead of being subsumed in the formal system. It highlights the need for synergy between traditional and modern institutions of natural resource conflict resolution. It contends that it is important not only to give due recognition to traditional institutions but also to facilitate increased collaboration with the formal institutions. However, the article cautions that the recognition of traditional institutions should not be a ground upon which to deter the analysis and consideration of their limitations.

The article also argues that the success of traditional dispute resolution over natural resources in Ethiopia and Kenya depends on the fact that natural resource related conflict is linked to the social setting and cultural aspects of the community concerned.

2. The formal legal system *vis-à-vis* traditional or informal systems

Before dealing with the impact of the formal legal system on the traditional/informal natural resource conflict resolution in Ethiopia and Kenya, it would be appropriate first to put into perspective how the two concepts – formal legal system and traditional/informal systems – are defined in this article, reflecting the various strands of development each country and system have witnessed. Section 2.1 below defines the formal legal system. Section 2.2 defines the traditional/informal system. Section 2.3 deals with the analysis of the main issues associated with a hybrid system of dispute settlement aimed to combine the best of each system and achieve a synergy of interests between local communities and central government.

2.1 The formal legal system

The formal legal system in both Ethiopia and Kenya has been greatly influenced by the operation of a conventional (court system) mechanism of conflict resolution rooted in the Western legal tradition following common law and civil law systems. The strong underpinning by the rule of law has a tendency towards a more rigorous scrutinising and monitoring – whether internally or externally – for signs of partiality, entrenched inequalities or lack of due process (Macfarlane 2007:493). The formal system is most obviously visible through the introduction of written laws. It is centralised within the structure of the state system. It is also underpinned by a strong constitutional tradition and the operation of the constitution itself. All the processes and decisions are implemented through government and state institutions. It emphasises the determination of guilt and the executing of retributive punishment by physical or material penalties, often but not always without giving due regard to the re-incorporation of the offender into the community.

There is a strong tradition of rule-based decisions, but these are open to interpretation and formal remedy through further legal procedures and courts. Such a system gives pre-eminence to lawyers and legal opinions and is therefore often expensive and time consuming. It may exclude the poor and local communities, though this may not be fully intended in the design of the system. Pressure groups and non-governmental organisations (NGOs) may find it possible to obtain a voice but this is often difficult because of the costs involved. Some legal systems have given priority to NGOs as a means of re-balancing the system but this is often difficult to achieve.

As we can infer from the above paragraph, the formal legal system may find itself at odds with the traditional/informal system. However, the irony is that the traditional/informal system is persistently available in everyday life, and is able to deal with natural resource conflict resolution.

2.2 The traditional or informal system

Before dealing with the traditional/informal system let us first see what tradition means. The British philosopher H.B. Acton (1952/53:2) defines tradition as 'a belief or practice transmitted from one generation to another and accepted as authoritative, or deferred to, without argument'. The American sociologist Edward Shils (1981:12) defines it as 'anything which is transmitted or handed down from the past to the present'. While Samuel Fleischacker (1994:45) defines tradition as 'a set of customs passed down over the generations, and a set of beliefs and values endorsing those customs'.

However, considering the above definitions, this article argues that it is wrong to assume that tradition does not require justification. It is not always true that there is opposition between tradition and reason. Rather, tradition can be rationally examined by its followers. What is more, tradition is not completely authoritative and it is subject to criticism. If tradition were not subject to criticism and not subject to reason as defined above, the development of human culture would cease. The argument is not that tradition does not work; it is that it needs modernising.

As Kwame Gyekye (1997:263) notes, 'Tradition has reached to the point where it is because successive generations have criticised it and enhanced it at the same time'. Equally true is that tradition does not have objective authority; all its objectivity emanates from the evaluative activities of recipient generations (Gyekye 1997:263). Thus, as far as this article is concerned, it endorses the definition of tradition as it is given by Kwame Gyekye (1997:263):

Any cultural product that was created or pursued by past generations and that, having been accepted and preserved, in whole or in part, by successive generations, has been maintained to the present. (Note that 'present' here means a certain, a particular present time, not necessarily our present, contemporary world).

Tradition is always a manifestation of power in society and is susceptible to change. It is a myth to think traditions are immune from change. Traditions evolve and get altered over time. Or, as Giddens (2000:58) puts it, traditions are invented and reinvented. This also implies the fact that there is no such thing as pure tradition in our world.

Giddens (2000:59) argues that it is simply wrong to suppose that for a given set of symbols or practices to be traditional, they must have existed for centuries. For him endurance over time is not the key defining feature of tradition. What is distinctive about tradition is that it defines a kind of truth (Giddens 2000:59). He further argues that traditions are always properties of groups, communities or collectivities. For him 'Individuals may follow traditions and customs, but traditions are not a quality of individual behaviour in the way habits are' (Giddens 2000:59).

'Traditions have their own guardians – wise men, priests, sages' (Giddens 2000:59). But the guardians are not the same as experts in the modern state structure. The guardians derive their position and power from the fact that they are capable of interpreting traditions' ritual truth. They translate the meanings of the holy texts or symbols involved in the communal rituals (Giddens 2000:60).

In the traditional or informal mechanism, unlike the formal legal system, all its processes and decisions do not come through the government apparatus; rather they are informally resolved through the norms and values of society. In this regard, Macfarlane (2007:492) notes that in all societies, it is common for people to look to shared substantive norms to resolve problems rather than to resort to legal norms. He further notes that traditional/informal systems tend to be perpetuated by traditions of oral history rather than by a codified and memorialised formal legal system. In every country, community or organisation, a system of informal dispute resolution – often based on community customs or familial relationships, or embedded in institutional practices – runs alongside the ‘official’ state sanction processes (Macfarlane 2007:487). Traditional mechanisms of conflict resolution institutions aim to restore peace and harmony between the disputing family members, neighbours, clan or local groups so that the former litigants can continue to live together in frequent interaction (Assefa and Pankhurst 2008:260). In traditional mechanisms of conflict resolution, the elders look for win-win solutions and in the final analysis their aim is repairing severed relations among the disputants.

The essence of this article is that it is imperative to include traditional/informal natural resource conflict resolution in Ethiopia and Kenya and that the act of the state to get rid of traditional practices altogether through the process of codification should not be accepted. Traditional natural resource conflict resolution mechanisms are needed, and will always persist, because, as Giddens (2000:64) correctly puts it, traditions ‘give continuity and form to life’. But it should be underlined that traditions should be sustained not for the sake of sustaining them but since they can effectively be justified as a complement to formal codified ways of natural resource conflict resolution.

2.3 The complementarity of the formal and informal systems

Currently it looks as if there is a need to talk on the emerging synergies between traditional and modern institutions of dispute resolution. Therefore, it is important not only to give due recognition to such institutions but also to facilitate increased collaboration between them. Nonetheless, the emerging recognition of traditional institutions should

not deter us from the analysis and consideration of their limitations. One of the glaring limitations is violation of human rights. In this regard Fiseha (2013:123) notes:

They are male dominated and women are largely excluded from the process. Besides, there are some cultures and practices that still allow discriminatory and harmful practices such as female genital mutilation, early marriage, polygamy, rape, abduction and exchange of women as a means for ending blood feud between groups.

However, it is unarguable that, when these limitations have been rectified, traditional legal institutions will continue to play a role in dispute resolution. One major reason, which is very pertinent in East Africa, is that the formal system of natural resource dispute resolution is not in a position to handle all natural resource related disputes by itself; hence the state will need to devolve responsibilities to local communities. Of course, at this juncture it must be clear that it does not mean the state has completely lost its status as a point of reference in dispute resolution, but the reality underscores the notion that traditional institutions should have a complementary role.

The second reason is that – in East Africa and elsewhere – traditional institutions of dispute resolution have the potential to contribute to the democratisation process. Just like many state-mandated institutions they open up spaces for ordinary citizens to participate in public processes such as natural resource dispute resolution and implementing environmental justice. The necessity is to find a system that takes account of local needs and addresses these.

In the sections that follow, the article deals with the impact of the formal legal system on the traditional or informal natural resource dispute resolution in both Ethiopia and Kenya. First, it starts from the practice in Ethiopia and then proceeds to Kenya.

3. The formal legal system and traditional/informal natural resource conflict resolution in Ethiopia

3.1 The formal legal system in Ethiopia

Historically, Ethiopia was the oldest independent state in Africa with a feudal land-holding system. With the collapse of Feudalism and its institutional arrangement in 1974, a revolutionary Marxist–Leninist military regime was institutionalised. Accordingly, there were radical land reforms oriented towards changing ownership patterns in favour of the poor and marginalised peasants and small landowners. With regard to the genesis of natural resource related laws and policies in Ethiopia, Pankhurst (2003:65) notes that government policies need to be seen in the context of shifting global ideologies. For instance, ‘the Military Regime’s intervention in natural resource management stemmed from an allegiance to socialist policies advocated by the Eastern Block’ (Pankhurst 2003:65). Hence, the natural resource conflict resolution institutions introduced during the Marxist–Leninist regime were new and not based on traditional authority. The regime’s ideological basis of devolving decision-making authority to the community level institutions was also very new to the people. Equally true is that ‘Western aid after the 1985 famine and global views among donors about linkages between drought and deforestation prompted massive environmental rehabilitation initiatives through terracing and eucalyptus planting’ (Pankhurst 2003:65). Yeraswork (2000:12) also notes that ‘these conservation campaigns in effect reinforced state power and undermined community management by taking control of large tracts of local pasture and farmland’.

In Ethiopia the codification process was sought by simply importing foreign laws, little related to Ethiopian behaviour patterns and little understood by those affairs they were meant to affect. In the 1950s and 1960s Ethiopia attempted to copy different laws from different countries. The aim was to modernise society and the legal system. Singer (1970/71:308) quotes the vision of Emperor Haile Selassie:

The necessity of resolutely pursuing Our programme of social advancement and integration in the larger world community ... make[s] inevitable

the closer integration of the legal system of Ethiopia with those of other countries with whom We have cultural, commercial and maritime connections. To that end We have personally directed the search for the outstanding jurists of the continent of Europe to bring to Us the best that centuries of development in allied and compatible systems of law have to offer.

According to the Emperor's statement, the spirit of introducing different laws in the 1950s and 1960s was to integrate Ethiopian legal traditions and institutions with those of foreign systems of law and thereby achieve development. Different codes were enacted in Ethiopia which were predominantly drawn from European sources. For instance, a Penal Code was enacted in 1957, Maritime, Commercial and Civil Codes in 1960, a Criminal Procedure Code in 1961 and a Civil Procedure Code in 1965 (Beckstrom 1973:559). Before the introduction of these codes the law in Ethiopia was mostly dominated by customs, tradition and some legislation in the form of statutes and decrees. With regard to the law in the pre-codification period in Ethiopia, Beckstrom notes that:

Until the 1950's the law of Ethiopia was a rather amorphous mix. There was some legislation in the form of statutes and decrees, primarily in the public law sphere, as well as a Penal Code that had been promulgated in 1930. But, taking Ethiopia as a geographical whole, by far the major de facto source of rules governing social relations was found in the customs and traditions of the various tribal, ethnic and religious groupings (Beckstrom 1973:559).

However, the transplantation of laws from different countries was not a successful project. This is because of the fact that the law was often imposed not as a result of a consensus and also because it failed to deliver democratic ideas or influences. It has clearly not brought the development and modernisation the government was looking for.

Beckstrom notes that 'Ethiopia is one of the world's least economically developed countries, with a low literacy rate and poor technical and administrative capabilities. Thus, one can theorise that the laws of more developed nations might not easily take root in Ethiopia' (Beckstrom 1973:559). Singer (1970/71:308) argues that 'the basic shortcoming of the

Traditional natural resource conflict resolution *vis-à-vis* formal legal systems

program [codification process] was the attempt to institutionalise legal values without first investigating the readiness of the various segments of Ethiopian society to accept a shift in power structure'. Clapham (1973:333) argues that 'it is in the inadequacies of state power as an instrument of development that much of the answer to the problem/puzzle of Ethiopian failure is to be found'.

The codification process of the 1950s and 1960s in Ethiopia was influenced by the belief that the law could be used as an instrument of change by imposing it from above without any visible public participation and without analysing the political, economic and social context. By then the theory of law as a means of social engineering was dominant. However, the failure could be explained in relation to the failure of law and development movement that was initiated in the United States.

Snyder (1982:373) notes that 'the movement was born as America's cold war foreign aid programs in the late 1950's'. Trubeck and Galanter (1974:1062) also note that '[the movement] adopted the basic tenets of modernisation, adhering to the notion that evolutionary progress would ultimately result in legal ideals and institutions similar to those in the West'. They labelled these legal ideals and institutional similarity as legal liberalism. They identified legal liberalism as a situation in which

- 1) society is made up of individuals who consent to the state for their own welfare;
- 2) the state exercises control over individuals through law, and it is constrained by law;
- 3) laws are designed to achieve social purposes and do not offer a special advantage to any individuals or groups within the society;
- 4) laws are applied equally to all citizens;
- 5) courts are the primary legal institutions with the responsibility for defining and applying the law;
- 6) adjudication is based upon a comprehensive body of authoritative rules and doctrines, and judicial decisions are not subject to outside influence; and
- 7) legal actors follow the restraining rules and most of the population has internalised the laws, and where there are violations of the rules enforcement action will guarantee conformity (Trubeck and Galanter 1974:1062).

However, Gardner (1980: xii and 401) labelled the movement as 'Legal Imperialism'.

Scholars such as Snyder (1982:373) note that the law and development movement did not succeed. He argues that its failure lies in its assumption that 'the answer to many problems in underdeveloped countries lay in the modernisation of legal and social structures according to an idealised version of United States history' (Snyder 1982:373). Marryman (1977:483) notes that 'the law and development movement has declined because it was, for the most part, an attempt to impose US ideas and attitudes on the third world'. Tamanaha (1995:486) notes that the crisis of the movement lies in its assumption that 'law can solve the many problems facing the developing countries'.

3.2 Impact of the formal legal system on traditional natural resource conflict resolution in Ethiopia

In Ethiopia, side by side with the formal natural resource conflict resolution mechanism, societies also have their own traditional ways of dealing with resolving conflict over natural resources. In many regions of Ethiopia, the traditional natural resource conflict resolutions are more influential, more accessible and stronger than those of the formal, imposed and command-and-control regulatory system.

The traditional dispute resolution mechanisms are practices employed to resolve conflicts and maintain peace and stability in the rural communities. In this regard Enyew (2014:137) notes that traditional dispute mechanisms in Ethiopia are

[v]ibrant in rural areas where the formal legal system is unable to penetrate because of a lack of resources, infrastructure and legal personnel as well as a lack of legitimacy, for the modern law is seen as alien, imposed, and ignorant of the cultural realities on the ground.

Traditional practices are deeply rooted in different ethnic groups of Ethiopia and arise from age-old practices that have regulated the relationships of the peoples in the community (Regassa et al. 2008:58). They are associated with the cultural norms and beliefs of the peoples, and gain their legitimacy from the community values instead of the state (Jembere 1998:39). In other

Traditional natural resource conflict resolution *vis-à-vis* formal legal systems

words, the traditional dispute resolution mechanisms of Ethiopia function on the basis of local traditional practices or cultural norms. However, due to the multi-ethnic composition of the country, the traditional laws of Ethiopia are different from ethnic group to ethnic group and as a result they do not have uniform application all over the country.

In Ethiopia, traditional dispute resolution mechanisms are administered by elders. The elders' main target is to reconcile the conflicting parties and their respective families. They emphasise

the restitution of victims and reintegration of offenders; and aim at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by avoiding the culturally accepted practices of revenge (Enyew 2014:145).

Though traditional dispute resolution mechanisms continue to play a significant role, the laws of Ethiopia do not provide adequate breathing space for these practices (Assefa and Pankhurst 2008:5). This was manifested by the repeal provision of the Ethiopian Civil Code that abrogates the application of customary laws. This repeal provision (Civil Code of the Empire of Ethiopia 1960: Art. 3347(1)) reads:

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

This legal provision rendered all customary practices out of use – irrespective of whether they were consistent or inconsistent with the provisions of the Civil Code – by the mere fact that the Code covered and regulated such matters. This transplantation process was, thus, a drastic measure taken against customary dispute resolution mechanisms and made them lose formal legal recognition and standing. *De facto*, however, customary dispute resolution mechanisms remained functional on the ground, as the transplanted laws were unable to penetrate local communities and gain legitimacy.

In the aftermath of the Dergue regime, the coming to power of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) has brought about a significant change in recognising the role of the traditional justice system. The government's introduction of the principles of ethnic federalism in the Federal Democratic Republic of Ethiopia (FDRE) Constitution (1994) has shifted the paradigm of relations between customary and state-designed legal systems. The enactment of this Constitution revived formal legal recognition of customary laws. One of the relevant constitutional recognitions is provided under Art. 34(5) of the Constitution, which reads:

This Constitution shall not preclude the adjudication of disputes relating to *personal* and *family* laws in accordance with religious or customary laws with the consent of the parties to the dispute (emphasis added).

According to the above legal provision, customary dispute resolution mechanisms are legally authorised to regulate personal and family matters as long as the conflicting parties give their consent to that effect. In line with this legal recognition given to customary laws, the Constitution (Art. 78(5)) also authorises the House of People Representatives and State Councils to establish and to give official recognition to religious and customary courts. These provisions obviously show that the FDRE Constitution took some important steps towards recognising legal diversity or pluralism by recognising customary laws and their institutions. However, such recognition is still limited to civil (i.e. personal and family) matters. The Constitution does not rectify past mistakes and fails to extend the legal recognition to applying customary dispute resolution mechanisms in matters involving natural resources. This, despite the fact that they are still being used to resolve conflicts and serve as the main way of obtaining justice, especially in rural Ethiopia.

Hence, the Constitution limits the mandate of the customary dispute resolution institutions only to *private* and *family* disputes by specifically excluding their application to conflicts relating to natural resources. In the Ethiopian case, these natural resources are not *personal* or *family* issues; instead, they are public issues. For instance, Art. 40(3) of the Constitution clearly states: 'The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia'.

Nonetheless, with regard to this limitation certain interpretative arguments may arise. For instance, one could argue that the absence of express recognition in the Constitution of the application of customary laws to natural resource conflict resolution does not necessarily mean that they are totally excluded from application. One could argue that if that were the case, the Constitution would have provided expressly for that. In the light of a broader, holistic interpretation of the Constitution, it could be argued that a total exclusion of the application of customary laws to natural resource conflict matters would defeat the overall objectives of the Constitution to ensure lasting peace and to maintain community safety.

On the other hand, the *a contrario* interpretation of Art. 34(5) of the Constitution may be understood as implying an explicit prohibition of the application of customary dispute resolution mechanisms to natural resource conflict matters. However, the article seems to favour the first line of argument, which favours the broader, holistic interpretation. This is important as it helps to give formal legal status to applying customary laws in natural resource related conflicts.

In short, Ethiopia exhibits plural legal systems – both multi-layered state laws and customary laws, though formal recognition is not given in very clear terms to the use of customary dispute resolution mechanisms in natural resource conflict issues. However, how the House of Federation which is empowered to interpret the Constitution or the Supreme Court (especially the Cassation bench) will decide on such issues is something to be seen in the future.

4. The formal legal system and traditional/informal natural resource conflict resolution in Kenya

4.1 The formal legal system in Kenya

Now we turn to examine Kenya in a similar manner – by discussing the role of traditional law followed by an analysis of how it might be integrated into the modern legal system.

Kenya is a former British colony which gained its independence in 1963. Prior to colonisation, indigenous traditional laws and customs were used

to resolve conflicts and disputes. Among the traditional Kenyan people, conflict resolution was dependent on the people's ability to negotiate. Nonetheless, 'with the arrival of the colonialists, western notions of justice such as the application of the common law of England were introduced in Kenya' (Muigua 2010:39). The colonial system introduced the adversarial court system, which greatly eroded the traditional conflict resolution mechanisms in Kenya (Muigua 2010:39).

Muigua (2010:39) also notes that before the country was colonised communities in Kenya had their own conflict resolution mechanisms. Whenever a conflict arose, negotiations were conducted. The council of elders or elderly men and women could act as third parties in the resolution of the conflict (Muigua 2010:27). Disputants could be reconciled by the elders and close family relatives and advised on the need to co-exist harmoniously (Muigua 2010:27). The existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others, geared towards fostering peaceful co-existence among Kenyans (Muigua 2010:27), is sufficient evidence that these concepts are not new in the country; they are practices that have been in use for a very long period (Muigua 2010:27).

With regard to the effect of legal transformation in Kenya, Michael Ochieng Odhiambo (1996) notes that '[t]he British were directly involved in running the country, affecting traditional resource management systems and institutions'. He further notes that

[s]ince independence, the country's historical issues related to natural resources have been dominant in shaping the country's structure, especially since the country has maintained the political structure inherited during the colonial period. Today, several resource management conflicts in Kenya have stemmed from the country's move to economic liberalization through free markets. Ownership policies specific to natural resources have progressively been moving towards privatization in order to compliment economic policies. This has resulted in private land tenure replacing communal tenure and weakening traditional practices (Muigua 2010:27).

4.2 Impact of the formal legal system on traditional natural resource conflict resolution in Kenya

In Kenya, traditional dispute resolution is recognised in Art. 159 of the 2010 Constitution. This recognition is based on the assumption that access to justice should be ensured for every citizen, whether it be in courts of law or in informal forums that avoid the procedural hurdles of formality in the court system. It could also be argued that, as indicated in Art. 11(1) of the same Constitution, this recognition is meant to recognise the diverse cultures of various communities as the foundation of nation building.

Art. 159(2)(c) of the 2010 Constitution mandates the courts to be

guided by ... traditional dispute resolution mechanisms provided that they do not contravene the bill of rights; are not repugnant to justice and morality or result in outcomes that are repugnant to justice or morality; or are not inconsistent with the Constitution or any written law.

During the colonial period, the colonists regarded Kenyan customary law as inferior to written laws and therefore felt they had to place limitations on its application (Okoth-Ogendo 2003:107). After independence, statutes such as the Judicature Act (Cap. 8, Laws of Kenya) and the Magistrate Courts Act (Cap. 10, Laws of Kenya) were enacted to guide courts when determining customary law claims. That was the situation until the promulgation of the 2010 Constitution. For instance, the courts in Kenya have applied S3(2) of the Judicature Act to declare customary law repugnant to justice and morality. However, the challenge to the application of the repugnancy clause is that Kenyan laws do not define what justice and morality mean. In such a situation, judges have had wide discretion in determining what is repugnant to justice and morality. What is more, these two Acts set out the hierarchy of the laws and also determined the scope of traditional law.

With the Promulgation of the 2010 Constitution, the law-makers created an opportunity for exploring the use of traditional dispute resolution mechanisms (TDRMs) to manage conflicts over natural resources (Art. 159(2)(c)). One of the principles enshrined in the Constitution is the encouragement of communities to settle land disputes through local

community initiatives consistent with the Constitution (Art. 60(1)(g)). The implication of such provisions is that before a matter is referred for court adjudication, communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts (Art. 67(2)(f)). This is a significant provision considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.

However, in Kenya, the existence and applicability of customary law have to be proved in court. For instance, the Court of Appeal of Kenya in the *Atemo v. Imujaro* case ([2003] KLR 435) decided that customary law has to be evidently proved in court for it to be regarded as law. Similarly, in *Ernest Kinyajui Kimani v. Muiuru Gikanga and Another* ([1965] EA 735), the court held that where customary law was not notorious or written, the party relying on it must prove it in court. Compared to the other sources of law in Kenya – the Constitution, statutes, common law and equity, which the courts take judicial notice of – the existence and applicability of customary law have to be proved. From this one can argue that the fact that customary law has to be proved in court illustrates the low place it occupies in the juridical order. What is more, the existence of grounds such as repugnancy and subjection to other written laws provides fertile ground for the rejection of customary law.

In the Judicature Act, customary law is used only as a guide; while in the Constitution, the courts are to be guided by TDRM principles. No law requires the courts to apply customary law or TDRMs; they are to be used only as a guide. The implication is that the courts may refuse to apply them even in appropriate cases, since they are only a guide. Consequently, the judicial officers hearing a certain matter have absolute discretion in applying customary law within the formal justice system. However, the Constitution seems to clarify the juridical place of customary law at least by recognising it. This may contribute to greater recognition and the promotion of traditional justice systems by courts as a means of enhancing access to justice.

Nonetheless, Art. 159(3)(c) retains the hierarchical inferiority that existed prior to 2010 by introducing the repugnancy clause issue in relation to traditional justice mechanisms. By implication, traditional justice systems and customary law are still inferior to common law and principles of equity, of which courts do take judicial notice of under s 60 of the Evidence Act even though customary law has to be proved in court.

In addition, S3 of the Judicature Act also ranks the common law and principles of equity above customary law and in effect TDRMs. The only time customary law ranks over the common law is when the form has been codified into statutes – for instance, polygamy under s 3(5) of the Law of Succession Act. A challenge then arises due to the unwritten and uncodified nature of customary law. Inadequate codification of customary law principles into statutes ensures that customary law and TDRMs remain at the bottom of the legal totem pole.

Thirdly, Art. 159(3)(b) of the Constitution bars the application of TDRMs when they are repugnant to justice and morality. The Constitution and other statutes provide neither a definition nor do they clarify what justice and morality entail. Further, the courts have hitherto not interpreted justice and morality within the context of the challenged customs and TDRMs. Therefore, a judicial officer has leeway to determine what justice and morality are. More often than not, judicial officers use their own models of justice and morality or borrow from other areas and use them as standards to evaluate customary law or TDRMs. The position ignores the reality that different tribes, communities and ethnic groups have different customs. Using one custom as the means of evaluating the justice and morality of an unrelated custom amounts to subjugation.

5. Conclusion

In Ethiopia and Kenya, state and traditional systems can work together cooperatively, complementing one another. However, to realise this, a paradigm shift towards mutual respect and understanding of the formal and informal systems of natural resource conflict resolution is required.

To pave the way to this paradigm shift, it is advisable to consider focusing on synergy, on what each system could contribute to the constructive evolution of the other. If they cooperate and complement each other respectfully, they can strengthen one another through legitimacy, effectiveness, and capacity to support all citizens in resolving their conflicts. The connection between the traditional structures and state institutions in both countries can ensure sustainable conflict resolution. Ultimately, an effectively integrated state-local approach to natural resource conflict resolution can promote the larger agenda of peace and security in natural resource dispute resolution in both countries.

However, the comparative analysis of the legal frameworks of Ethiopia and Kenya shows that in both countries there is a tacit understanding in the sphere of government that the evolution of natural resource conflict resolution is from traditional systems to imported, formalised systems. What is more, the political situation in these countries has been oriented towards recognising government institutions to the neglect of traditional ones. In particular, the marginalisation of traditional conflict resolution mechanisms with respect to natural resources is evident. Moreover, the move towards the devolution of power in these two countries has often been limited to the decentralisation of executive authority.

In both countries there is a need to complement the formal justice system in managing natural resource conflicts with more informal mechanisms (traditional dispute resolution) as this would promote the spirit of the 2010 Kenyan and the 1995 Ethiopian constitutions. This complementarity also helps to promote Art. 48 of the Kenyan and Art 37 of the Ethiopian Constitution, both of which guarantee access to justice. Access to justice as enshrined in both Constitutions is to be realised where traditional processes and formal systems reinforce each other. However, although the Ethiopian and Kenyan Constitutions guarantee the right of access to justice and also go further to recognise traditional dispute resolution mechanisms, there are no elaborated legal or policy frameworks for their effective applications. The existing legal frameworks do not provide comprehensive guidelines

Traditional natural resource conflict resolution *vis-à-vis* formal legal systems

on linking traditional natural resource dispute resolution with the formal court process. This frustrates the utilisation of traditional natural resource dispute resolution in both countries.

Finally, without manipulating or politicising the traditional natural resource dispute resolution mechanisms, both countries should continue to embrace them. They merit being viewed as a key feature in natural resource dispute resolution in Africa.

Recommendations

- A task force to examine the role of traditional conflict resolution mechanisms in natural resources needs to be established in both countries. This task force should convene traditional leaders and other relevant stakeholders in order to map and understand the prevalence and use of TDRMs, as well as their intersection with the formal system.
- To institutionalise the complementarity of the formal and traditional conflict resolution in natural resources in Ethiopia and Kenya, both countries need to develop a clear legal and policy framework.
- The traditional conflict resolution mechanisms in natural resources need to be clearly recognised and their jurisdictions need to be clearly demarcated.
- An enforcement mechanism for the decisions of traditional dispute resolution mechanisms needs to be put in place.
- A mechanism for appeals from decisions of traditional dispute resolution mechanisms should be put in place.
- The relationship between the formal and traditional dispute resolution mechanisms also needs to be spelled out clearly.
- Traditions and customs in both countries need to be included in the formal education system. This helps to enhance respect for the culture in both countries.
- And in order to develop the jurisprudence of traditional dispute resolution in natural resource dispute resolution in both countries, their decisions need to be published and distributed.

Sources

- ACCORD (African Centre for the Constructive Resolution of Disputes) 2002. *Transforming conflict*. Facilitator's reference manual. Durban, ACCORD.
- Acton H.B. 1952/53. Tradition and some other forms of order. Proceedings of the Aristotelian Society, 53, pp. 1–28.
- Assefa, Getachew and Alula Pankhurst 2008. Facing the challenges of customary dispute resolution: Conclusions and recommendations. In: Pankhurst, Alula and Getachew Assefa eds. *Grass-roots justice in Ethiopia: The contribution of customary dispute resolution*. Addis Ababa, Centre Francais d'Études Éthiopiennes. pp. 257–273.
- Beckstrom, John H. 1973. Transplantation of legal systems: An early report on the reception of Western laws in Ethiopia. *American Journal of Comparative Law*, 21 (3), pp. 557ff.
- Civil Code of the Empire of Ethiopia 1960. *Negarit Gazeta*, proclamation No. 161/1960.
- Constitution of the Federal Democratic Republic of Ethiopia. 1994. *Federal Negarit Gazeta*, Proclamation No. 1/1994.
- ECA (United Nations Economic Commission for Africa) 2012. Natural resource & conflict management – The case of land. Kigali, ECA.
- Enyew, Endalew Lijalem 2014. Ethiopian customary dispute resolution mechanisms: Forms of restorative justice? *African Journal on Conflict Resolution*, 14 (1), pp. 125–154.
- Fisher, Simon, Dekha Ibrahim Abdi, Jawed Ludin, Richard Smith, Steve Williams and Sue Williams 2000. *Working with conflict: Skills and strategies for action*. London, Zed Books.
- Fiseha, Assefa 2013. Customary dispute resolution mechanisms and the rule of law: Areas of convergence, divergence and implications. In: Stebek, Elias N. and Muradu Abdo eds. *Law and development and legal pluralism in Ethiopia*. Addis Ababa, JLSRI (Justice and Legal Systems Research Institute) Publications.
- Fleischacker Samuel 1994. *The ethics of culture*. Ithaca, Cornell University Press.
- Gardner, A. James 1980. *Legal imperialism: American lawyers and foreign aid in Latin America*. Madison, University of Wisconsin Press.
- Giddens, Anthony 2000. *Runaway world*. New York, Routledge.
- Gyekye, Kwame 1997. *Tradition and modernity: Philosophical reflections on the African experience*. New York, Oxford University Press.
- Jembere, Abera 2012. *An introduction to the legal history of Ethiopia: 1434–1974*. Addis Ababa, Master Printing Press.
- Macfarlane, Julie 2007. Working towards restorative justice in Ethiopia: Integrating traditional conflict resolution systems with the formal legal system. *Cardozo Journal of Conflict Resolution*, 8, pp. 487–509.
- Muigua, Kariuki 2010. *Traditional dispute resolution mechanisms under Article 159 of the Constitution of Kenya*. Available from: <<http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf>> [Accessed 12 June 2016].

Traditional natural resource conflict resolution *vis-à-vis* formal legal systems

- Odhiambo, Michael Ochieng 1996. Addressing natural resource conflicts through community forestry: The case of Eastern Africa. Paper prepared for E-mail Conference Addressing Natural Resource Conflicts through Community Forestry. January–March. Available from: <<http://www.fao.org/docrep/005/AC696E/AC696E03.htm>> [Accessed 4 June 2016].
- Okoth-Ogendo, H.W.O. 2003. The tragic African commons: A century of expropriation, suppression and subversion. *University of Nairobi Law Journal*, 1, pp. 107–117.
- Pankhurst, Alula 2003. Conflict management over contested natural resources: A case study of pasture, forest and irrigation in South Wello, Ethiopia. In: Castro, A. Peter and Erik Nielsen eds. *Natural resource conflict management case studies: An analysis of power, participation and protected areas*. Rome, Food and Agriculture Organisation.
- Pankhurst, Alula and Getachew Assefa eds. 2008a. *Grass-roots justice in Ethiopia: The contribution of customary dispute resolution*. Addis Ababa, Centre Francais d'Études Éthiopiennes.
- Pankhurst, Alula and Getachew Assefa 2008b. *Understanding customary dispute resolution in Ethiopia*.
- Ramsbotham, Oliver, Tom Woodhouse and Hugh Miall 2005. *Contemporary conflict resolution: The prevention, management and transformation of deadly conflicts*. Cambridge, Polity Press.
- Regassa, Tsegaye, Urgessa Genemo and Tena Yigezu 2008. *Restorative justice in Oromia: A baseline study*. Addis Ababa, Central Printing Press.
- Shils, Edward 1981. *Tradition*. London, Faber and Faber.
- Singer, J. Norman 1970/71. A traditional legal institution in modern legal setting: The Atbia Dagna of Ethiopia. *UCLA Law Review*, 18, pp. 308ff.
- Snyder, G. Francis 1982. The failure of law and development, *Wisconsin Law Review*, 1982, pp. 373–396.
- Tamanah, Brian Z. 1995. The lessons of Law-and-Development Studies, *American Journal of International Law*, 89 (2), pp. 470–486.
- Trubeck, David M. and Marc Galanter 1974. Scholars in self-estrangement: Some reflections on the crisis in Law and Development Studies in the United States. *Wisconsin Law Review*, 1974, pp. 1062–1102.
- USIP (United States Institute for Peace) 2007. *Natural resources, conflict, and conflict resolution – A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors*. Washington, D.C., USIP. Available from: <<http://www.usip.org/sites/default/files/file/08sg.pdf>> [Accessed 4 July 2016].
- Woodhouse, T. and T. Duffey 2000. *Peace keeping and international conflict resolution*. Bradford, United Nations Institute for Training and Research, POCL.
- World Bank 2016. *2016 Glossary*. Development Education Program, World Bank Group. Available from: <<http://www.worldbank.org/depweb/english/modules/glossary.html>> [Accessed 4 July 2016].
- Yeraswork, A. 2000. *Twenty years to nowhere: Property rights, land management and conservation in Ethiopia*. Lawrenceville, NJ, Red Sea Press.