Law and Development, and Legal Pluralism in Ethiopia

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Elias N. Stebek and Muradu Abdo (Editors)

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Customary Dispute Resolution Mechanisms and the Rule of Law:

Areas of Convergence, Divergence and Implications

Assefa Fiseha[♣]

1. Introduction

The essential features of customary dispute resolution mechanisms (CDRMs)[1] have been already identified in various literature. This chapter aims at analysing the relations between CDRM and the rule of law and examines the areas of convergence and divergence. The focus is on the central issue of why people obey (or not obey) the law and customs and whether the response to this question has anything to do with the content of the rule of law and CDRMs. The key area of convergence is that the rule of law and CDRMS reflect largely agreed upon basic values of society and social norms. It is this common feature and the belief that the law/CDRMs are fundamentally just that explains society's willingness to abide by them. Yet this needs a slight modification, as the rule of law is sometimes understood merely as a formal/procedural guarantee devoid of any content. The value loaded conception of CDRMs goes much further than the rule of law in terms of ensuring social justice and peace. The CDRMs and the values that guide them are largely antithesis to 'positive law' as articulated by John Austin (1995)[2], Hart (1994)[3] and Raz (1979)[4]. The CDRMs have limitations when it comes to rights of women and they are founded on the

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[1] See Alula Pankhurst and Getachew Assefa eds. *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Addis Ababa: United Printers, 2008); Gebre Yntiso, Fekade Azeze, Assefa Fiseha eds. *Customary Dispute Resolution Mechanisms in Ethiopia* (Addis Ababa, Eclipse, 2011).

[2] John Austin (1995), *The Province of Jurisprudence,* (Cambridge: Cambridge University Press).

[3] H. L. A. Hart (1994. 2nd edn). *The Concept of Law,* (Oxford: Clarendon Press,

[4] Joseph Raz, *The Authority of Law, (*New York: Oxford University Press, 1979).

idea of collective rights and responsibilities while the rule of law is largely a liberal concept founded on the autonomy of the individual. The study is based on observations drawn from various case studies and secondary sources.

To put the discussion in context, perhaps it is vital to highlight the complex relationship between CDRMs, the constitution and the rule of law within the existing constitutional and legal framework in Ethiopia. The Preamble to the 1995 FDRE Constitution commits itself to '...building a political community founded on *the rule of law ...*' (emphasis supplied). The Constitution guarantees individual as well as group rights and provides various institutional mechanisms of enforcement. Unlike other constitutional systems where such guarantees are stipulated by laws other than the constitution, human rights in Ethiopia are constitutionally guaranteed. Right to equality and specific rights related to women and children are clearly stipulated in the constitution and this puts both theoretical and practical challenges to some of the religious and customary practices within the different communities. It is declared that 'The constitution is the supreme law of the land. Any law, *customary practice*.....which contravenes this constitution shall be of no effect.' It is true that the constitution opens some space for religious and customary based norms and institutions (Arts 34, 78). Yet the same constitution dictates that such norms and institutions or practices can only be valid in so far as they do not violate norms in the Constitution.

Drawing the borderline between the religious and customary norms on one hand and the formal law on the other is a very delicate process left to the implementing institutions. Yet at a formal level one could say that the foundations for the rule of law and an important space for religious and customary values are enshrined in the constitution.

The key challenge apart from the difficult task of drawing the thin line between CDRMs and the formal law is our conception of the law in general and the rule of law in particular. Is the rule of law an instrument of power – where emperors or elected institutions impose their own will on the people? Or is it a means for consolidating power as has been the case in Ethiopian history for long? For example, Emperor Haile Selassie wanted the 1931 and 1955 constitutions for legitimizing his power and for consolidating his dynasty, the military junta for building 'socialism' and now for a constitutional developmental state. Or does the rule of law apart from establishing public institutions impose some limits on public institutions? Does the rule of law also regulate or shape power? Is not the constitution as already noted a higher norm in the sense that legitimacy of public institutions derive from it and whatever they can do is constrained by it?

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The way political actors and the public conceive the rule of law has serious implications.

Before delving into consideration of these issues, it may be pertinent to make some remarks about Ethiopia's constitutional development. In a span of six decades, Ethiopia has seen more than five 'constitutions'[5], each constitution on average serving only for a decade with little or no continuity between them (in the sense of positive constitutional and institutional development) and hence a high degree of constitutional instability, obviously an outcome of the political instability that reigned for the most part of the 20th century.

One can state safely that both the 1931 and 1955 constitutions were imposed rather than outcomes resulting from due considerations of historical, economic, cultural and social realities of Ethiopia. If constitutions are meant to be laws in which the various aspirations and values of the public in general are expressed, that is, as covenants between the governor and the governed, a democratic expression of the will of the people, then, both constitutions fail to meet these requirements. It should be noted that constitutionalism as a culture, though a much broader notion, is very much linked with this aspect of constitution making. It is not without reason that many constitutions start by declaring 'we the people…' Both constitutions provided for supremacy of the Emperor than the law and did not reflect the wishes of the Ethiopian people. Nor did the constitutions intend for limiting the powers of the Emperor as he remained supreme for more than four decades.

The making of the 1987 Constitution marked a new phase as there was an effort to engage the public at grass root level but because of the regime's nature (a military junta) whatever was promised in the constitution was never realized in practice and thus remained merely on paper. The short span (only four years) and the civil war as well overshadowed its importance.

Another essential point related to the Ethiopian context is that there is a widely held view that considers constitutions merely as instruments for promoting the political will of the victorious ones/ruling elites of the time and not of the people *per se* and hence are viewed as instruments of submission, hence the saying *"Negus Aykeses Semay Aytares"*, which means '*an Emperor shall not be sued, same as the sky cannot be ploughed*'. They are not results of negotiated outcomes or of a publicly held consensus. We should note that all past constitutions were done away with

[5] The list goes like this: the 1931, the Revised Constitution of 1955, the draft constitutional monarch of 1974 (that never came into force), the 1987 PDRE Constitution, the Transitional Period Charter and the FDRE Constitution (1995).

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unconstitutionally and no section of society ever tried to restore them. Thus we have the dilemma of having a constitution but failing to respect/enforce it. These very challenges still haunt Ethiopia today. Thus constitutionalism and the rule of law are yet to take roots in Ethiopia.

The chapter is based on observations drawn from various case studies and secondary sources. Section 2 briefly examines the essential features of CDRMs. Section 3 highlights the challenges and limitations in CDRMS followed by Sections 4 and 5 that respectively deal with the meaning and evolution rule of law, and its convergence and divergence with CDRMs.

2. Essential Features of CDRMs

2.1 Conflict transformation and community peace

One of the unique features of customary dispute resolution is the fact that it aims not only at settling disputes among parties (adjudication) but also at resolving conflicts and restoring community peace. Unlike the formal justice sector that primarily aims at settling disputes between parties, CDRMs aim at restoring severed relations and hence at ensuring community peace. This feature is crucially relevant today given the recurrence of various kinds of inter-group conflicts in Ethiopia. It is true that governmental institutions at federal and state level are engaged in addressing such disputes. The common limitation that one observes is that such exercises often fail to transform conflict or to bring lasting peace between communities.[6]

To be more specific, governmental efforts are limited to calming down the crisis without addressing the root cause and without making sure that the inter-group dispute is transformed from hostility and conflict to positive cooperation and interaction. Formal court judgments create sense of winner-loser mentality among the disputing parties forcing them to exhaust all the appeal structures without ensuring peace and harmony between them and their respective communities. In other words, the difference between formal justice and CDRMs is a choice between confrontation and conciliation. CDRMs focus on settling the particular dispute, reconciling the interests, and more importantly restoring broken relations and putting order in the community. In the context of CDRMs, conflict is viewed not as an individual incident but as disruption of community peace whose integrity needs to be restored (Zartman, 2008:224). A very good manifestation of this

[6] See, for example, Mitiku Duressa, Managing Inter-ethnic Conflict: The Case of Oromo and Gumuz in Anger and Dhidhessa Valley (MA thesis, ECSC, 2009); Zeleke Menebo, The Role of Horizontal Intergovernmental Relations in the Management of Conflicts: The Case Study of Halaba and Arsi Oromo Ethnic Groups (LL.M thesis, ECSC, 2011).

is the fact that the reconciliation process engages the perpetrator's and the victim's entire family, a core element of which is the perpetrator's repentance and the victim's forgiveness.

The formal conflict resolution mechanisms often emphasize the resolution of the material causes of conflicts (resource and power are often the focus) without dealing with the psychological and cultural traumas that often trigger retribution. CDRMs deal with values, beliefs, fears and suspicions, interests and needs, as well as with both material and non-material causes of conflicts. Issues related to status, honors, recognition and respect often play critical role in conflicts and are the focus of CDRMs in the process of healing wounds.

Indeed, one of the basic reasons for the current resurgence of the study of CDRMs is related to the fact that the formal conflict resolution mechanisms have proven to be inadequate for some recurring conflicts in many parts of the world including Africa. While earlier on CDRM was considered to be moribund and unsuited for addressing modern conflicts because such conflicts recurred more commonly among states, after the Cold War, conflicts among non-state actors became more frequent. There is also global resurgence in the politics of identity after the end of the Cold War. This led to the view that society's involvement in conflict resolution is crucial and this gave renaissance to the field of CDRMs (Juma 2005: 490-95; Chirayath et al, 2006).[7] In the last decade alone, the World Bank has sponsored in many countries, including Ethiopia, major reforms related to the justice sector because of inefficiency and delay in the courts and failure to respond to the demands of globalization, expansion of investment and issues related to human rights, thus giving rise to the reconsideration of alternative ways of dealing with disputes such as the CDRMs.

2.2 Strong link with belief systems and morality

Another feature of most CDRMs is their strong link with spirituality, faithfulness and search for truth. The opening of peace processes, the elders' insistence in finding out the truth and their reliance on oath to find out the truth particularly when there is lack of evidence, the peace rituals (curses

[7] *See* Modibo Ocran (2006), "The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa", 39 *Akron L. Rev*. 465; Laurence Juma (2002), "Reconciling African Customary Law and Human Rights in Kenya: Making A Case for Institutional Reformation and Revitalization of Customary Adjudication Processes", 14 *St. Thomas L. Rev*. 459

and blessings), and the use of sacrificial animals indicate the role of belief systems in CDRM. One of the key attributes for the prominence of the elders, among other things, is the commitment to and/or fear of supernatural powers. The values that govern CDRMs emanate from religious and moral principles. For example, in the central highlands (between 15th century and early 20th century) there has been a blend of secular and religious matters in the law (the *Fetha Negest*) that gave it intrinsically a sacred character.

2.3 CDRMs versus formal law

CDRMs derive from the custom (a repeated practice of what people do instead of what people ought to do as in law) of the people as practiced over a long period of time and accepted by the community as governing principle and hence binds the society as a violation of which entails social consequences and even punishment (Ocran 2006; Juma 2002).[8] DRMs are often unwritten; the rules can be traced to the customs and practices of the people which have been handed down to succeeding generations. These rules are based on conceptions of morality and depend for their effectiveness on the approval and consent of the people. It is a manner of resolving disputes with its emphasis on compromise, reconciliation and adjudication.

In comparison, the law is enforced by the agents of the state such as courts and the executive body and the state has a monopoly over the use of force. In other words, it is more coercive than customary law. Formal law is proclaimed by the state and is a reflection of the will of the majority in power (in the democratic sense) while customary law is the result of repeated practice as accepted by the community emanating from precedents, custom, morality, religion or as approved and proclaimed by traditional institutions like the *Baito* (norm setting body in Tigray), *Gada* (democratic decision making and norm setting body of the Oromos), elders council, etc. Formal law, when proclaimed by the state, is expected to have a general applicability defining rights and duties of every citizen. Customary law, on the other hand, varies spatially and from one locality to the other and the emphasis is on collective responsibility, collective rights and respect for long established institutions.

Formal law and customary law, however, do not necessarily operate in complete isolation. One can influence the other. Customary law can serve as a source of law. Formal law and judicial practice also influence customary law. In most African countries colonial law negatively affected customary law and today the human rights discourse is exerting significant impact on customary law in Africa (Ocran 2006). Another essential point is while

courts are duty bound by law to dismiss a case or acquit a suspect if there is lack of evidence, in many societies, CDRMs resolve disputes and identify criminals even for cases that cannot be verified through the formal justice system through different techniques including oath.

2.4 Elders and reconciliation

One of the hallmarks of CDRM is that its management is almost always by elders, although the manner in which they are constituted and the roles they play may vary in different societies. In most cultures, based on their reputation, impartiality, familiarity with the community norms, wisdom, and rich experience, elders are elected upon the request of the parties in dispute often on an *ad hoc* basis (although some may be elected/selected several times to handle various disputes). Their primary function is to reconcile the differences that have arisen between the parties through compromise and reconciliation even though adjudication is not ruled out.

In some societies like the Sidama, Afar, Gamo, Shekacho, Issa, and Oromo, there are various types of elders and different hierarchies for resolving various types of conflicts. In the central highlands of Amhara and Tigray, it is a generic name as the elders may investigate family disputes such as dispute between husband and wife, inheritance and related issues and it is consequently called *ye bête-zemed gubae* (family council). Usually those who were witnesses or guarantors of the marriage are the ones who become the members of the family council as they are believed to be the closest to know family details and keep family secrets. For cases other than family/marital disputes, a certain number of elders called *Shimagiles* (wise men) are selected to serve as conciliators.

The elders that serve the crucial function are primarily known for their readiness and openness for understanding the root cause of the conflict. Particularly crucial in this respect is the importance of listening to both parties. The elders also underscore the importance of discussion as a prerequisite for the reconciliation to be productive. The gathering has to be conducted in a safe environment where none of the parties feels insecure. Otherwise, the elders believe that reconciliation made in an unsafe environment will not work and may even trigger the conflict again.

Secondly, the elders are known for their high sense of justice, impartiality, spirituality, and truthfulness. Throughout the reconciliation process, the elders are able to keep the confidence of both parties. It is a tradition in reconciliation that whatever the elders happen to know in their capacity as peace makers is kept secret even in the rare cases where the elders fail to reconcile the parties and the latter decide to submit their case

before a formal court. No elder is allowed to testify before a court as a consequence of the confidentiality they ensure to the parties.

Thirdly, the elders should have the right mix of patience, tolerance and persistence. If their efforts at the home of the aggrieved did not work, they will fix their next appointment in a respected man's house or a religious institution (believing that changing locations may bring a different outcome). Elders never give up until the case is settled.

2.5. Rooted in values and norms and validated through popular participation

Modern Ethiopia is an amalgamation of numerous ethnic groups each with its own functional customary justice system. The informal justice transcended the formation of the nation state and the introduction of the formal justice structure because the CDRMs are rooted in societal values and norms and continue to be cherished through popular participation. The *Gada* system of the Oromo with its *jaarsummaa, gumi, qaalluu, gumaa* and the *Aba Gada* plays a vital role in conflict resolution and decision-making. Similarly, the various ethnic groups have their respective institutions and structures responsible for resolving conflicts. A common element of all these institutions is that they originate from the rich traditions and norms of each society and they remain relevant because of the continued engagement of the community.

In the northern and central highlands, for example, justice was undertaken through the institution of *wonber* (a word that was used before the term "judge" was coined in the early 1930s). Although the higher level of administration of justice was linked to the formal government institutions, the lowest level retained its traditional and local flavour. The number of the *wonber* was usually three and they had no salary (Fisher, 1971). The *wonber* must hold the hearing publicly in the village assembly place, churches or any other public place and it is essential to their judgment that they should call upon the advice of a jury of knowledgeable villagers, over whose opinions they hold a casting vote.[9] This is perhaps the oldest evidence indicating public participation in the administration of justice.

[9] According to informants, this tradition existed before the establishment of the *Atbia Dagna* by Emperor Haile-Selassie. Another institution called *Kal Hatse* (perhaps the Amharic equivalent is *Kelate*), literally the `words of the Emperor`, was responsible for executing the judge's decision and orders. The modern equivalent to it appears to be the police.

Below the *woreda*-level formal justice, the Ethiopian government established social courts[10] nearly across the country to play to some extent the role already played by the CDRMs. The social courts are considered as manifestations of grassroots democracy, and the individuals who serve these institutions are elected by the people. Traditionally, customary laws adopted by consensus and the performance and effectiveness of these local institutions are evaluated regularly by the local people. Many of these features are still maintained in the new laws of the social courts. Residents of the locality are allowed to give opinion on a case before the judges make final decision. This is a mechanism for ensuring participation of the local people in the administration of justice and a means for ensuring the transparency of the process. Very much linked to this point is that the law applicable to the community is a law made by the people themselves or is adopted by their assembly. Such a process gives the law legitimacy and ensures its smooth implementation. This means that CDRMs in general are guided by the culture, norm and tradition of the society in which they operate. As Aberra Jembere (2003:839) notes, "[c]ustomary law is made by the people and not the state" and derives its legitimacy "from participation and consensus of the community."

2.6 Mechanisms of enforcement

As already mentioned above, the elders while reconciling the disputing parties also give decisions. While decisions given by the formal justice system rely on the police and the executive for their enforcement, the decisions rendered by the elders are often legitimate and parties often discharge voluntarily. The fact that the elders carry heavy moral weight because of years of accumulated wisdom, deep knowledge of community norms, impartiality and integrity, and are often chosen by the parties leaves little room for non-compliance. Yet the collective nature of CDRM as opposed to the individual rights system of the human rights regime has also implications. Social cohesion is ensured through social pressure and morality rather than threat or act of litigation. In other words, the threat of withdrawing kinship services from a recalcitrant along with moral and ethical considerations reinforces the overall system of societal order and social control.

2.7 Proximity, simplicity and easy access

[10] While in form social courts are not CDRMs in the classic sense, the law establishing them gives them the mandate of resolving misunderstandings and restoring community peace without necessarily and rigidly following the law.

Apart from the fact that the formal laws were a bit detached from the society to whom they were meant to apply, another factor that may have hindered the application and relevance of the formal laws is related to the proximity and simplicity of CDRMs. In many of the cases, parties to a dispute are not required to apply their case in written form; nor are they required to pay fees to the elders (a few exceptions of the quasi CDRM institution in Nuer, Gambella). As the CDRM institutions exist in nearly every locality, parties to a dispute are not required to travel long distance to have access to these institutions. This saves the time, resources spent and inconvenience caused to parties in getting access to the regular courts now available only at a *kebele/woreda* level and higher echelons of administration. It is well known that formal courts and the law enforcement institutions are expensive. Flexibility and simplicity are key features of the CDRM institutions. The cases are also handled by elders chosen by the parties who have trust and faith in them and consequently in the process. The fact that the parties are judged by elders of their choice, whom they know very well for their impartiality and familiarity with the norms of the community, also implies that the process is more legitimate. The simplicity and flexibility in the process also enhances speedy resolution of disputes.

2.8 Collective versus individual responsibility: Clash of values?

Clash of values seems to be visible at least on issues related to notions of marriage and inheritance between the formal law and human rights regime, on the one hand, and the customary practices of some societies on the other. Western based laws often focus on individual rights and individual responsibility for crimes, prohibit bigamy, ensure equality between men and women (at least formally) while CDRMs are firmly based on collective responsibility, for example, during compensation and responsibility for fault or crimes. If a perpetrator is found at fault by the elders and is required to compensate the victim, the entire family or members of his clan usually contribute to the amount of compensation fixed by the elders.

The notion of individual ownership is also at times least understood in some societies. Even today where land is publicly and constitutionally declared to be a state property at federal and state level, the notion of land "ownership" in most pastoral communities (for example, Afar and Somali) is a communal one making the debate (public versus private land ownership) even more complicated.[11] This conception of land ownership at times creates tension with private investors as pastoral communities often have little understanding of private leased landholding. As CDRMs are based on

[11] See Mohammud Abdulahi (2007: 85-125).

tradition, there is the allegation that they weakly respond to the demands for investment and business.

3. Challenges in CDRMs and Limitations

3.1 The impact of new developments on CDRM

CDRMs are influenced by urbanization and new socio-political realities. As Zartman (2008:7) puts it, "… tradition is likely to have been updated, adjusted and opened to new accretions in order to stay alive through changing times. Traditional does not mean unaltered or archaic." Several case studies illustrate, CDRMs could, indeed, be affected by new developments. The expansion of new religions (protestant and fundamentalist Islam) in some parts of Oromia seem to have serious impact on CDRMs. Believers of these new religions believe that various CDRMs are archaic and even against faith in general that they should be done away with. As a result, tensions occur between those who want to maintain the institutions and the proponents of the new religion.

In Tigray, there is a dilemma on the role of social courts.[12] Currently, the social courts as an institution seem to be at cross roads. In practice, there is a widespread confusion as to whether to maintain them as social courts - institutions for resolving root causes of social ills in every *tabia/kebele* (hence more in line with the role of the *shimagiles)* or if they would best serve as the lowest unit within the regular court administration. The practice, contrary to the law, indicates that the young and productive force and women constitute the lion's share of the judges in the social courts - and this composition has created some problems. First, given the ever increasing cost of life, the judges are more interested in engaging in their day to day activities than in the administration of justice. Although there is a token payment for some judges in the social courts, for the most part it is a free service. Secondly, the young judges usually lack the necessary skills to reconcile that comes from life long experience. They also do not enjoy the level of respect and trust that the *shimagiles* enjoy in the *tabia/kebele*.

[12] See for details Assefa Fiseha, *Customary Dispute Resolution Mechanisms in Tigray* in Gebre Yentiso, Fekade Azeze, Assefa Fiseha eds. Customary Dispute Resolution Mechanisms in Ethiopia (Addis baba, Eclipse Printers, 2011) pp.361-385.

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Therefore, the way forward seems to be either to fully give the social courts responsibility back to the *shimagiles* or officially declare them as the lowest level of the regular court structure and probably dissolve the *woreda* courts.

There is also widespread allegation of corrupt practices and hence the impartiality assumed is not any more there. In short, they do not enjoy the trust and respect from the community in the way they used to during the armed struggle or old times. As the judges work on a voluntary basis and without salary, they work only during holidays, overstretched by other social commitments. Thus, there is a delay of cases. At the local level, there are also frequent meetings called upon by the local administration. This is often done during the holiday when the judges are supposed to adjudicate cases. Because of all these reasons, there are many cases pending before the social courts. Speedy trial is thus getting compromised. In the older times, a decision made by *shimagiles* enjoyed the support of the court or was rarely reversed by the court. Now appeals to the *woreda* and higher level courts are becoming the norm rather than exception.

3.2 Limitations of CDRMs

Certainty and uniformity are among the challenges in CDRMs. Although some common features can be drawn from the various CDRMs that exist in Ethiopia, there is generally a great variation as they operate in a relatively small area. CDRMs are often unwritten. As a result, they are not only difficult to ascertain but the effort to have uniform laws is also cumbersome. It is, therefore, not even possible to describe the plethora of different systems that have existed at different times.

Another domain of challenges in CDRMs relates to *human rights*. Ethiopia is one of the few countries in Africa that has not only signed major international treaties on human rights, but has also expressly made such treaties part of its domestic law.[13] Ethiopia even goes further to state in

[13] The core international human rights instruments signed by Ethiopia include Convention on the Elimination of All forms of Racial Discrimination (21 Dec 1965, Ethiopia adopted this in 1976); International Covenant on Civil and Political Rights (adopted on 16 Dec 1966, Ethiopia adopted this treaty in 1993); The International Covenant on Economic Social and Cultural Rights (adopted on 16 Dec 1966, Ethiopia adopted this treaty in 1993); The Convention on the Elimination of all Forms of Discrimination Against Women (adopted on 18 Dec 1979, Ethiopia adopted this in 1981); The Convention on the Rights of the Child (adopted on 20 Nov 1989, Ethiopia adopted this treaty in 1991); The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 Dec 1984, Ethiopia adopted this treaty in 1994). Article 9 of the Constitution makes such treaties expressly part of Ethiopian Law.

Article 13 of its Constitution that such rights and freedoms shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and the international instruments it has adopted. One-third of the Constitution (Chapter Three) also contains a broad range of individual and group rights. Nonetheless, CDRMs in as much as they are acclaimed for their positive contributions in regulating societal behavior, have also some critical limitations that conflict with constitutional norms and the human rights regime.

In the early 1960s CDRMs were criticized as difficult to ascertain because of widespread variation and labelled as "primitive laws" hence implying "inferior laws" compared to the formal law (This was the conception prevalent during the making of the codes in Ethiopia) (David 1962: 188-89). In recent years, the widely held criticism against CDRMs has focused on their inability to adjust to the demands of the international human rights regime, as insensitive to gender equality and related individual rights and freedoms (Oppermann 2006).

As many of the case studies illustrate, CDRMs are male dominated in that women are largely excluded from the process. Besides, there are some cultures and practices that still allow harmful and discriminatory practices such as female genital mutilation, polygamy, early marriage, rape, abduction and exchange of women as a means for ending blood feud between groups. CDRMs are also blamed for denying women's right to asset and related opportunities including land and as result exposing women to exploitation and violence. These practices conflict with Ethiopia's commitment to human rights as stipulated in its constitution and the treaties.

Are human rights and CDRMs then necessarily strange bedfellows? As the example in Tigray (inclusion of a woman judge in social courts), CDRM practices in Oromia (where elders are trained to send rape and abduction cases to the formal courts) and gender based movements hint, it is possible to positively influence CDRMs to meet current demands without necessarily abolishing/undermining them. The South African experience is illustrative in this regard. South Africa's new constitution provides some space for customary law.[14] The same constitution also requires customary law to comply with constitutional norms and human rights (Bennett 2009). The regular courts are duty bound to ensure that the specific application of customary law in a case does not violate the bill of rights section of the constitution. In other words, the courts are duty bound to monitor the fact that customary law remains consistent with the bill of rights.

[14] See Yonatan Feseha's contribution in this volume for details.

Ethiopia has since 1995 adopted a federal system that aims to forge unity in diversity. The right to promote and practice one's culture is affirmed in the Constitution (Article 39). We have noted already that custom is one of the major sources of customary law. On the other hand, the same Constitution declares its supremacy and any law or customary practice that contradicts the Constitution is declared "null and void." This raises some of the daunting issues mentioned in the South African Constitution. Who is going to judge whether a specific customary law violates the constitution or not? Are such standards too high given the fact that the level of illiteracy is high and that of familiarity with constitutional norms is low? Whoever judges the constitutionality of customary law, is it a requirement to be well versed with the specific customary law and its contents? Otherwise, it will be difficult to judge it in the first place. Yet we know already that customary law, though widely practiced, is in many cases unwritten and varies from one locality to the other making the exercise of judging it more difficult. However, a number of provisions indicate that customary law will continue to exist, though the form in which it will do so remains far from clear.

4. The Meaning and Evolution of the Rule of Law

'I do not believe that there are many other peoples in the world who ***respect the law*** as much as the Ethiopian people do, and ***not many rules*** (of government) can boast ... in bringing about such respect for the law.'[15] (Nathan, 1951: 16) (emphasis by the author). This quotation was stated in 1951 by an advocate and advisor of the then Imperial Government of Ethiopia. Two points are noteworthy: that the Ethiopians as he knew them respected the law perhaps better than the people in the rest of the world and this respect for law was not necessarily of government law. What then was the source of law (apart from the law issued by the government) that the Ethiopians respected so much? Why is such law respected? These issues beg a much broader question of as to why people obey the law (whatever its source may be) and whether it has something to do with the concept of the rule of law.

The rule of law is a much contested concept. There is a debate whether it is 'end based' or implies 'institutional reforms'; these issues are often raised

[15] A shorter version of this part of the chapter was included in a book co-edited by this author. [Customary Dispute Resolution Mechanisms in Ethiopia (Addis Ababa: Eclipse Printers 2012)] but the presentation here is more abstract and is linked with the key but challenging issue of whether the rule of law is merely an instrument of power or whether it also shapes the behaviour of public institutions.

in relation to the World Bank's[16] post 1990 efforts to influence both donor and recipient countries. The debate also relates to whether the rule of law has content and hence 'thick' or strong or whether it is without content and hence 'formal' or 'thin' or 'weak'. Whether the rule of law guarantees merely 'procedural' or 'substantive' rights becomes immediately clear once we open standard texts on the matter. Rachel Kleinfeld once said, 'read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant—a trunk to one person, a tail to another' (2005:5). As will be shortly discussed in this part of this chapter, the concept of the rule of law is of interest to lawyers, political actors, economists[17], donor organizations such as the World Bank and to countries in various levels of development including those in transition from authoritarian systems. No surprise then that it may mean different things depending on whom we are referring to. Nonetheless there are minimum elements in which all seem to agree and the objective of this section is to

[16] The World Bank actively promoted the rule of law in many developing countries and as such never had a clear conception of the rule of law. Its understanding of the rule of law varied depending on the leader's view on the matter. The law and development movement both the old (in the 1960s law was conceived as a tool for development, social reform and lawyers role as social engineers where the state plays active role in the economy. This view failed owing to the weak link between law and development as well as problems of legal transplantation without grasping the local context) and the new (post 1990s following the collapse of communism and the end of Cold War, rule of law was designed as a tool for improving domestic governance: democracy (the third wave, human right (rights revolution)s and good governance based on the Washington Consensus-passive state) had also their impact on the World Bank); see Barron, 2005; Trebilcock and Daniels, 2008.

[17] Liberal economists often emphasise the importance of freedom of contract, right to property and guarantees for investment; legal and institutional framework necessary for the free market economy and the importance of impartial and autonomous courts for enforcing these rights. See Barron, (2005). Yet the rule of law need not be associated with liberalism. As Tamanaha stated (1995: 476) 'Operating around the world today are many variations of the rule of law, coexisting with individualist-oriented as well as with communitarian-oriented cultures. It has always consisted more of a bundle of ideals than a specific or necessary set of institutional arrangements. A minimalist account of the rule of law would require only that the government abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral ... decision maker or judiciary to hear claims or resolve disputes. These basic elements are compatible with many social-cultural arrangements and, notwithstanding the potential conflicts, they have much to offer to developing countries'.

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highlight the meaning and evolution of the rule of law and then link it with CDRMs in the next section.

Unlike the pre-modern (Medieval) state where it *formally* enjoyed absolute and unbridled authority from its subjects but actually suffered from multiple/centrifugal actors such as the kings, estates, barons, churches, classes or cities issuing various laws, the modern state gave an exclusive monopoly to the state to enact laws (Costa, 2007: 76). In the modern state only a body authorized by law enacts it.

But even the medieval state's authority had some limits on its power. The lack of unity of law, the multiple and largely autonomous actors and the various kinds of privileges they claimed against the state, the requirement that such laws should conform to divine authority or natural law limited, albeit weakly, the power's of the state.[18] In this sense, the rule of law in its weak form (because the King largely remained the source of law and maintainer of order (Dicey 1951: 183) implied some limits on power existed since then (Costa, 2007: 76). As Tamanaha (2004:114) stated, 'the broadest understanding of the rule of law, ... is that the sovereign, and the state and its officials, are limited by the law.'[19]

Ethiopia's emperors as well exercised absolute power for centuries but a closer look at their institutions and structures indicate that the state was unable to penetrate deep into the society, and had to share power with the local nobility, the church and autonomous kingdoms in several parts of the country owing to its weak nature. Such was the feature of the state until the second half of the 19th century. That these autonomous local actors regulated

[18] Thomas Hobbes having seen the horrors of England's civil war and the anarchy resulting from it did advocate absolute power to be granted to the state so that it can ensure law and order. The subjects as per this perspective had no rights whatsoever against the absolute state, indeed he proposed absolute obedience to it. This is the positivist conception of law and sovereignty (cited in Sellers, 2010: 3).

[19] That government is limited by law implied two things: 'The first sense is that officials must abide by the currently valid positive law. The law may be changed by properly authorized officials, but until it is changed it must be complied with. The second sense is that even when government officials wish to change the law, they are not entirely free to change it in any way they desire. There are restraints on their law-making power. There are certain things they cannot do with or in the name of law. These restraints have been understood in terms of the dictates of natural or divine law, or a timeless customary law, which were the dominant views in the Middle Ages, or in terms of human or civil rights, which is the common phraseology today. The fundamental import of this second sense is that the sovereign's power over the positive law is itself restricted in legal terms (Tamanaha, 2004:115).

trade, ensured local security and allowed local customs to apply in the day to day affairs of life is well documented. Even in the 20th century Ethiopia where the Monarch and military junta are believed to have strengthened the structure of the state, the latter going to the extent of establishing smallest unit of government (Kebele), the large section of society in the rural areas and the lowlands continued to live their own way of life obeying the very norms that they knew for ages, not for fear of police arrest or a distantly existing emperor. This is not to mention the fact that topography, geography, size and the very weak infrastructure also had their impact. Thus what appeared to be an absolute state indeed had some limits, albeit weak, on its power. That is how the rule of law in its weak form began both at home and abroad. The rule of law and CDRMs in this weak sense emerged and provided some limits on power. But this weak form of rule of law and CDRM was transformed substantially both in shape and content with time.

In its broad sense, the rule of law today is, according Francis Fukuyama 'a species of positive law but only under a strict set of *procedural* rules[20] guaranteeing that the laws correspond to a *broad social consensus on basic values*.' (Fukuyama, 2010: 34). One can pose serious issues as to whether procedural rules alone reflect the essence of rule of law and that of CDRMs, but for now we can focus on the requirement that laws should reflect 'broad social consensus on basic values.' This is so because this feature of the rule of law is also the bedrock of CDRMs thereby showing that there is a great deal of convergence between the two.

Surely, there is a debate on the exact origins[21] of the rule of law and whether it is understood the same way across different legal systems and political communities.[22] The phrase 'rule of law' was not coined until the

[20] The procedural rules are not indicated in Fukuyama's article but are well known in the discourse on rule of law. Joseph Raz is reputed for articulating well what these procedural rules are (Raz, 1979).

[21] Some even trace (Miller, 2010: 11-18) the concept in ancient history of Greek particularly to the works of Plato and Aristotle but that seems farfetched. Athens and the towns around were well known for their direct democracy (though not inclusive even by then) which if not constrained could lead to popular despotism and tyranny. Indeed both thinkers insisted 'the philosopher king/ruler' supposed to have a lot of wisdom practical or philosophical need not be restrained by constitutions. The rule of law is largely a post medieval state development (Costa, 2007: 76).

[22] The British rule of law with its key features of supremacy of parliament and the tradition of curtailing the executive, the legal determination of individual rights and their protection through the common law judge; the unwritten constitution resulting from conventions; the German *Rechtsstaat* that placed sovereignty on parliament and the exclusive domain of parliament as a source and guarantor of

19th century (the phrase is attributed to Dicey and his book that was published in 1885). Yet the idea that the rulers and the people of different civilizations lived under a law that they themselves did not create (divine authority, religion, natural law being the main source), that such law imposed some restriction on rulers and that such 'law actually corresponded to the lived social norms and values of the community to which it was applied' (Fukuyama, 2010: 36) certainly predates the emergence of the modern state. It is this correspondence between law and social norms, (shared/common values traditions, customary laws in other words) and the people's belief that law is *fundamentally just*[23] and their subsequent willingness to abide by it[24] that is at the core of the rule of law (Fukuyama, 2010: 37).

CDRMs are not necessarily part of the formal law. They are normative orders emanating from custom (implying that they have been used for long), and norms of society and that they are made by the people by consensus. The fact that CDRMs are widely practised in Ethiopia both in the past and the present is already a well established reality. Thus, if we apply such basic and value loaded conception to customary law, the foundation of rule of law and customary law is largely the same. It is this foundation that the law is 'normally grounded in the values of the underlying society' (Fukuyama, 2010:41) that gives authority for the customary or the rule of law. In other words, the driving force for the people's respect for the rule of law or customary law is not the fear of punishment or the draconian nature of the law but its ability to manifest the lived values of the society. That the law should act as a check on arbitrary executive/monarchy's power and the content of the law should match society's cultural values has an old pedigree. There is this claim that the rule of law as a normative and institutional structure within which the legal system has the task of protecting human rights by constraining power (that can be exercised

rights mainly focusing on the formal meaning of the rule of law leading to two major world wars, later to be modified through inclusion of bill of rights in the constitution and the constitutional court as a key institution to enforce the Basic Law; the American version of rule of law based on the supremacy of the constitution, separation of powers, bill of rights and judicial review of legislation and decisions of the executive do indicate that there are normative and institutional differences among different legal systems (Zolo, 2007: 18-19).

[23] As illustrated later whether the rule of law implies just law is in itself at the center of the controversy. Raz (1977: 195-196) argues, rule of law does not imply rule of good law but to be sure CDRMs imply just norms approved by the consent of the particular community.

[24] Raz (1979: 212) as well stated rule of law itself is a simple one, meaning precisely what it says: "that people should obey the law and be ruled by it.

arbitrarily or may be abusive) is a feature of modern state (Zolo, 2007: 7,18-19).

Yet the idea that the law is a manifestation of society's existing norms that evolved over years and that the monarch's enactment or the other multiple actors of the medieval period had to respect divine authority or natural law goes far to the pre-modern epoch. True that the phrase 'rule of law' was not as such coined, but one of its core elements that the law must reflect the lived experience and values of the people was already well established before the phrase rule of law was coined. Such law emanated from religion, morality and long held traditions and conventions. Certainly such broadly agreed upon social norms have serious impact on the content of the law. This in turn brings back the issue whether the rule of law is 'thin' or 'thick[25],' 'procedural/formal' or 'substantive' already hinted by Fukuyama and whether CDRMs differ in this respect.

The rule of law as evolved in the 19th century continental Europe meant merely a 'positive law'[26] issued by the state and that meant only a principle of legality; that is, all authority must come from law, and this has little application to its content. The concept of sovereignty has shifted from the Monarch to the notion of 'consent of the governed', that is, power derives

[25] The law is assumed to contain certain universal values implying that the law must respect rights and moral principles. Raz (1979: 211) criticizes this notion of rule of law: 'The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law'. Rawls (1972: 235) joins this camp and states rule of law has nothing to do with human rights, justice, fairness or equality. As indicated later, thinner conception of rule of law suffers from or is equivalent to 'rule by law.'

[26] Positive law and legal positivism is strongly linked to the theories of John Austin and H. L. Hart. Accordingly the concept of law is related to the concept of sovereignty. All positive law (enacted by the state) is deduced from a clearly identifiable law giver. Every law is enacted by a sovereign in many cases the parliament and as this body enjoyed sovereignty, no body sets a limit on it, nor can one challenge it for its content (Austin, 1995), (Hart, 1994), also (Raz,1979) .

from the people and not from divine authority. The idea of citizenship with some perhaps natural rights has now taken ground both in France and the United States. Yet the revolutionary discourse (France in 1789 for example)[27] paid little attention to normative and institutional devices to implement those declared freedoms. The legislature in particular had no obstacles on its way in issuing whatever laws it wanted to enact. The rule of law meant simply lawfulness. This is the weak form or formal sense of rule of law. According to this version of the rule of law, all legal systems in which public powers have a legal source and form are legal states. This version corresponds to Austin's and Hart's theory of 'positive law' and the German *Rechtsstaat*[28] of the 19th century. It emphasizes on the secularization of the law, that is, separation of law and morals and the separation of law and justice. The law need not be just or true (Ferrajoli, 2007:323ff).

This point is however contested. As one author noted 'If the law can be reduced to the simple commands of those in power then the rule of law becomes an instrument of oppression and law becomes a weapon, like a knife, to be wielded for good or ill by whomever holds it in her hands' (Sellers, 2010: 3). Indeed this was dubbed later 'rule by law' and not rule of law (Kleinfeld: 2005: 14; Barak, 2006: 54). Because according to this version of rule of law a dictator or even the racist Apartheid could qualify this test as the law is devoid of its contents.

To be sure customary law is antithesis to 'positive law' as articulated earlier by John Austin (1995), Hart (1994) and Raz (1979). Renowned thinkers of the positivist legal thinking and based on the peculiar British tradition of the sovereignty of parliament (there is nothing that the British Parliament cannot do except changing the man to a woman and vice versa) insisted on the separation of law as a 'command of sovereign' and non law (religion, morality etc). Raz strongly contended reinforcing Hart that there is no conceptual relationship between law and morality. An unjust or immoral law does not cease to be a law and could be part of the rule of law. CDRM is largely founded on the consent and participation of communities in the law that governs them and this very law is strongly associated with morality, religion and tradition of the community. Customary law as such is a

[27] See the Declaration of the Rights of Man issued in 1789 that stated equality, fraternity and liberty.

[28] To be sure this concept has undergone its own transformation. Influenced by Kant's morality, it initially implied formal rights but between mid 19th and mid 20th centuries, it adopted a more positivist conception where the legislature had no limits on its way that led to two devastating world wars. Post WWII, rule of law took, as indicated later in this section, a thicker version of rule of law. Tamanaha (2004: 108-109).

conventional law that evolved over years of experience and a reflection of the norms and values of the society and in this sense CDRM is closer to or even goes much beyond the idea of Fuller's (1964) internal 'morality of law' than Hart's conception of the law in general or rule of law in particular. Fuller stipulated some eight conditions[29] for a legal system to qualify under the regime of rule of law. Yet there is doubt if these eight conditions stipulated are merely procedural guarantees much along what Antonin Scalia (1997) prefers to call due process of law in the 'procedural sense.' Leaving this debate aside, that CDRMs are incontestably grounded in society's deeper sense of justice, morality and norms is much clearer than Fuller's internal morality of law and its relations with morality. As illustrated later, CDRMs are consistent with the substantive (thick, stronger) version of the rule of law than with the formal (procedural, thin, weaker, softer) one.

The rule of law in the United Kingdom (UK), however, was stipulated differently. A. V. Dicey in his famous book 'An introduction to the study of the law of the constitution' first published in 1885 devoted a chapter on the rule of law with some implications on the content of the law in sharp contrast to continental Europe. He stated the rule of law to mean individual legal equality irrespective of social status and economic condition. This is what he called legal equality. Secondly, he stipulated the supremacy of law over arbitrary power (rule of law over rule of men), where he rejected personal privilege and the arbitrary or excessive discretionary powers of the executive and emphasized on the sovereignty of law whether it comes from the parliament or the case law (common law) hence the reign of law and judges, the 'law's empire' as it was to be coined later.

Arbitrary government cannot be accepted in a system where the rule of law prevails. The UK having had no written constitution, its ingredients came from years of settled conventions that derive from judge made law

[29] Fuller (1964: 96) labelled these requirements as 'internal morality of law' and includes that the law must be general and not targeting individuals, it must be clear, consistent, published and stable (that is it should not be changed every month or every year and should remain in force for some predictable time) so that it guides the behaviour of its subjects; the law should be prospective and not retroactive; that the law must be administered by an impartial courts that also assumes that there is fair trial and courts should be accessible to the people and administration's discretionary power must be curtailed. Some others have included that natural justice must be observed but this is not part of Fuller's list. (Fuller, 1964: 39, chapter two for details). Fuller himself admits that these are 'natural law procedures' further complicating the discourse (Fuller, 1964: 96). More substantive elements to the rule of law are advocated by Barak (2006: 55) where he argues the rule of law must conform to 'fundamental values of morality, justice and human rights...'

(common law). This law recognized the rights of English Man's freedoms and parliament later ratified them, the *Magna Carta*, the *Habeas Curpus* and the Bill of Rights being the most prominent ones. The common law courts had the extraordinary capacity to counteract the monarchy's absolutist demands in favour of the English Man's freedoms (Zolo, 2007: 7-14). The rule of law framed this way cannot be understood without implying on the content of the law: respecting and enforcing the rights of English man and the law as a product of reason and justice (Dicey, 1951: 140-180).

Continental Europe's conception of the rule of law was merely formalistic in the sense that a supreme parliament had no limits on its way in proclaiming any law that may even restrict rights and freedoms. In this respect, the German version of the rule of law *Rechtsstaat* simply referred to a state acting in a legal form. The rule of law in this sense did not imply in the state being ultimately protecting individual rights. Indeed, European conception of the state in general was opposed to what one can see in the USA. The state in continental Europe was viewed until early 20th century positively as a guarantor of rights and welfare of its people. It was symbolized as a source of hope, not fear. Europe trusted the state and put little limits on the legislature in particular (Barak, 2006). Only the executive towards the end of the 19th century was put under some limitations based on parliamentary law and judicial control. It was a more formal understanding of the rule of law and the absence of normative and institutional structures that restrict the parliament that paved the way for the emergence of Nazi and other fascist regimes and the consequent disasters related to both world wars. The claim that the rule of law as a normative and institutional structure of the modern state in which the legal system is entrusted with the task of protecting human rights by constraining arbitrary political power was not achieved with the exception of the UK. Its emphasis on formality was clear. It only required the state to respect general rules (abstract). The law merely replaced the Monarch's personal orders. By imposing general forms and procedures, not specific contents, it was believed that legislative provisions can drastically reduce political discretion. In other words, the rule of law only constrained arbitrary executive power and not the legislative power (Zolo, 2007: 22). Due attention was not thus given to putting hurdles, norms and institutional barriers to the power of the state.

On the contrary, in the USA, once they gained their independence in 1776, the founder's view of the state was negative symbolized by fear, not hope. The founders emphasized the risks of tyranny and abuse of power by government. The state and its institutions were considered as threats to the right of the citizen that need to be curtained through horizontal separation of powers and vertical division of power between the center and the then

thirteen states. The complex nature of the 'checks and balances' is meant to reduce the fear of the citizen and no doubt these complex checks and balances among the various institutions of government gave birth to an early notion of the rule of law and constitutionalism in the United states, compared to Europe.

Europeans then shifted in the aftermath of the second world war to broaden the notion of the rule of law not only to manifest broadly agreed societal norms but also to articulate the idea of 'grundnorm' *(basic standards or fundamental norms)* which are very much related to the idea of divine authority or natural law of the medieval era, this time around that higher norm being reflected in the constitution. This in turn is based on two fundamental assumptions. First is 'political pessimism', namely that the dangerousness of political power is now beyond doubt. The state is not any more fully trusted. The second is 'normative optimism' namely the belief that arbitrary power can be constrained by law so as rights can be protected (Zolo, 2007: 21).

The constitution now, like a legal fashion begins by saying' we the people of Italy or Germany etc which is meant to reflect the idea that all sources of authority or public institutions need to derive their existence from the constitution. The constitution is required to reflect the broadly agreed upon social norms/consensus and not merely the wishes of the majority. While drafting constitutions, the general principle is that, it needs to be authored by the whole people and not merely by a majority. The latter has the mandate to enact a law in parliament once it wins a majority in parliament but not the constitution which must reflect the wishes of the majority and the minority. As such the fundamental belief is that the constitution is the reflection of the will of the people.

The rule of law as understood following the Second World War in all countries that claim to have a written and rigid constitution implies that there is a substantive limit on political actors and public institutions. The law must in the first place reflect the wishes of the people and more importantly must guarantee rights and freedoms. Significant in this regard is that shifting away from the 19th century positivist and rule by law conception, the Basic Law in Germany explicitly incorporates a substantive (thicker) version of the rule of law. Article 1 paragraph 2, stipulates the respect for and the protection of the dignity of man, irrespective of state's recognition in a constitution or statute. Even more crucial is the fact that the rights chapter of the Basic Law is 'eternal' not subject to amendment. The rights conception adopted is supra-moral order even higher than the Basic Law (Tamanaha, 2004: 108-109).

It is emphasized strongly that a mere declaration of such rights and norms in the law is not enough. If such law is to enjoy the status of a higher

norm because it reflects the wishes of the people then there must be an institution that checks not only the formal validity of laws enacted by the political branches but also controls the substantive validity of such laws with the higher norm. The rule of law was transformed from mere formal legality which did not put limits particularly on the legislature to a substantive legality where it restrained the power vested in political institutions. In other words, the rule of law understood today puts a limit on the power of public institutions and ensures freedom to the citizen. Human rights are enshrined in post WWII constitutions and constitutional courts that enforce the will of the people (the constitution) are established as safeguards against violations by the political branches; and the rigid procedure for amending constitutions was the culmination of the rule of law as understood in the second half of the 20th century.

The rule of law understood this way is now largely agreed upon across societies although the manner of getting it realized varies. Such level of understanding indicates that the rule of law is 'thick,' not 'thin' or is substantive and not formalistic.

5. The Rule of Law and the CDRM: Convergence and Divergence

The more formal understanding of the rule of law is incompatible with the CDRM that is founded on conventions and traditions that are based on the lived experiences of society. These lived experiences of society are largely based on the *society's* broad-based agreement on the *sense of equal and impartial justice*, religion (often manifested in the form of fear of God or higher force), and morality and guided by higher sense of truth. This goes much beyond Fuller's 'the internal morality of law' and remains consistent with Barak's substantive version of rule of law. This conception of CDRM understood largely conforms to the more substantive sense of the rule of law also called constitutional state that emerged after the Second World War. The rule of law in this sense means systems in which public powers are subject and hence limited to or constrained by law not only in their form but also in the content of their decisions. It denotes legal and political systems in which all powers, including legislative power are constrained by substantive principles provided in the constitution such as separation of powers and human rights (Ferrajoli, 2007: 323).

In many respects, CDRM as a process of dispute resolution and peacemaking as well as the norms that guide it such as truthfulness, equal treatment of parties, community peace are largely compatible with, if not better, than the rule of law. One core component of the rule of law is the due process of law also called procedural and formal justice. In all litigations, be

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it civil or criminal, parties are guaranteed to speedy trial by an impartial court of law that makes decisions only after listening to party's claims and counterclaims as well as evidences. The judge is required to have no stake in the outcome of the case and must treat parties equally. He must also provide equal opportunities to the litigants. It also implies that unless exceptional circumstances dictate, the process must be open and transparent not only to the parties but to anyone interested.

CDRM is guided by similar principles and values. In fact, CDRM even requires higher standards of justice by imposing loaded values on the trial process. The elders that are engaged in dispute resolution not only settle the particular dispute between parties but also are actively engaged in restoring severed relations in the community. Peace, not merely dispute resolution is the ultimate goal. The elders, the litigants and at times the community take an oath both before and after the conflict resolution to ensure that the process is guided by higher sense of truth and not a mere disposal of the case. The whole process is inspired by religious and moral values that pass from generation to generation. The elders conduct their sessions largely in public places that are open not only to the parties but also to the community. Public hearing and the duty of treating parties equally and impartially are key elements in the process of dispute resolution. The community plays an active role as well in the decision making process. The elders listen to knowledgeable community members before they make their decisions. The elders earn the trust from the community to make such dispute resolution and peacemaking because of their reputation for knowledge and wisdom that they have accumulated it over years, for their impartiality, and familiarity with the community norms.

In this respect it is vital to rethink the debate whether the rule of law ensures only formal procedures to the disputing parties such as the right to be heard by an impartial judge or whether it also guided by substantive norms. This debate is particularly acute in the USA where supreme court judges like Antonin Scalia (1997) insist on the fact that due process merely ensures procedural guarantees even arguing to the extent that so long as those procedures are not violated the state can take away not only one's property but also one's life. In the UK the idea that the rule of law embodies rights and freedoms is a settled principle ever since Dicey articulated the rule of law being founded both in the reign of law emanating both from parliament and judge made law in 1885. CDRM as illustrated above guarantees both procedural and substantive rights to parties. The fundamental values that guide the process of dispute resolution and peacemaking go far beyond procedural guarantees.

Certainly the CDRM had its own limitations when compared to the rule of law. The rule of law ensures equality of all men and women before the law. Regardless of one's socio-economic status or political position, the rule of law dictates and ensures everyone to be equal. Yet this should be taken with some grain of salt. The American Declaration of Independence (July 4, 1776) upon the end of British rule stated: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.' The French Revolution of 1789 in its Declaration of the Rights of Man stated its commitment to 'equality, fraternity and liberty.'

Yet we know from history that such formal declarations were meant to apply only for the rich white man and the aristocracy. The minority (such as blacks), women, the illiterate and the poor who did not own sizeable amount wealth were excluded from the political process. Women gained their equality in the early 20th century and African Americans earned their equality only in 1954 and thereafter (Dahl, 1998). Despite these historical setbacks, the rule of law today in its 'thick sense' cannot be thought of without a regime of human rights. CDRMs in this respect are challenged owing to their widely known limitations for excluding women and children from participating in the process of dispute resolution and peacemaking.

Another area of divergence relates to the tendency to link rule of law with western liberalism (Tamanaha, 2004 argues there is no necessary link) based on individual rights and individual responsibility. In its more sophisticated sense, the rule of law points to the more complex relations between power (the state), law and the individual. That is, the law is capable of guiding one's behaviour and that it controls/regulates power. The state exercises minimal power for maintaining law and order, or it may provide welfare to its citizens in its more interventionist sense. In doing so power can be tempting and may cause terror, or its abuse can harm the individual. The rule of law requires that power needs to be curtailed to the extent that is necessary for maximizing freedom of the individual. It is not that the rule of law is against power as such; but unrestrained power can cause not only harm to the individual but could even destroy rule of law democracy and human rights all at once (Ferrajoli, 2007: 74-75) as is evidenced from world history. This is substantiated by two devastating wars in a short span of time that necessitated the establishment of the UN systems and subsequent international treaties on human rights – hence called the age of rights). Moreover, similar lessons can be drawn from African history because post colonial Africa has suffered much under the hands of so called 'big men'

that diminished the role of institutions including the rule of law under one party system.

The rule of law minimally dictates that power needs to drive from law and needs to be restrained for the sake of the individual's freedom. Rule of law in general and individual rights in particular focus on the individual's responsibility. This is, for example, the foundation of modern criminal law that it is the individual who bears the responsibility for crimes he/she committed. The rule of law conception of justice is strongly linked to this idea. CDRM largely focuses on collective peace and settlement of disputes in which the individual case that has to be decided is viewed not in isolation but as part of the process of ensuring community peace and order. Obedience to societal norms and customs is largely based on the belief that such norms are fundamentally just. CDRM's understanding of the sense of justice is different from the rule of law conception of justice even if we were to subscribe to the idea that rule of law is 'thick'. CDRMs emphasise collective responsibility. When an individual is found to be guilty of an offence, the compensation that he has to make to the victim is largely the product of contributions from his family, clan and the community. Even if the perpetrator was to be found guilty by regular/formal courts and gets released after serving his sentence, it does not mean that justice is done to the victim or his family. If the perpetrator is to be integrated into the community, he must go through the process of peace making based on his repentance and victim's forgiveness to heal the wound he inflicted. Then rituals follow between the two families meant to restore social harmony. Only then one can say justice is done. In light of these illustrations CDRMs (unlike the rule of law) focus on the collective, not the individual.

The rule of law as understood today is broadly against monopoly of power in one institution, party or individual. We thus know many constitutions that provide for separation of powers and vertical division of powers between the center and sub state entities. In CDRMs, the communities, not the state, are the actors. The elders combine and exercise complex powers. They set, establish or amend existing norms in the community. They investigate cases either on their own initiative or as requested by the conflicting parties and finally decide the case and restore community peace. Actors in CDRMs combine a whole set of functions and responsibilities whereas in the rule of law, power needs to be dispersed among several institutions and functionally differentiated.

6. Concluding remarks

What comes out clearly is that the law needs to be grounded in society's sense of justice, norms and lived realities. This understanding is at the core

of both the rule of law and CDRMs. It is this deeper understanding of rule of law and CDRM that commands higher level of respect and voluntary obedience to the law and customs of society than the fear of the police or the state. It is also this factor that explains a better and smoother implementation of the law and customs.

Another crucial point related to this point is the rule of law as a highly contested notion that gives rise to debates whether it is thick versus thin, substantive versus procedural, weak versus strong etc. The rule of law understood in the weak, thin or procedural sense is not compatible with CDRM. As Barak (2006:54) stated, this conception is 'an impoverished notion of rule of law' that is formalistic and devoid of content. The CDRM is rather compatible with the substantive, thick or stronger version of the rule of law. Actors at various levels of government need to take this into account in the process of designing policies and laws. The modern welfare state with its ambitions to intervene more in society's affairs is often tempted to care less on this fundamental point. The plans and policies it wants to achieve can only be effective if they reflect the wishes, norms of the people and society's sense of justice. Nonetheless, it does not mean that CDRM is free from weaknesses. Previous works have highlighted several of its weaknesses particularly in relation to rights of women that policy makers need to take into account while rectifying the deficiencies in the system.

We have started out the chapter by raising important questions related to our conceptions of the rule of law and perhaps it is vital to conclude by pointing out some issues for further work. The emphasis in the introduction of this chapter was on the dilemma of having constitutions and yet failing to abide by them when it comes to constitutional/legal limitations on power, the dilemma often presented as 'constitutions without constitutionalism'. Is it possible to achieve development, fight corruption and ensure impartial justice/speedy trial without violating the grand norms in the constitution? Have the constitution and rule of law been able to shape the behaviour of public institutions, for example, the executive? The government has introduced serious reforms related to measures that aim at eradicating poverty, fighting corruption, justice sector reforms to ensure speedy trial etc.

Some of these reforms were introduced under controversial conditions when it comes to the constitution. For example, whether bail should be denied to all persons suspected of corruption remained a thorny issue when the law on anticorruption was enacted. Whether court reforms need to blend with the justice sector reforms under which the executive predominated the process and hence compromising the judiciary's autonomy is an issue still unresolved. Whether socio economic rights (expansion in education, health services, infrastructure, etc) need to take precedence over civil and political

rights is a critical issue out on the table. As a consequence of the 'developmental state', there is obviously an emphasis on the socio economic sector. Can democratization be achieved under this dilemma? The question remains: can we achieve development, speedy trial, and fight corruption without compromising constitutional values and the rule of law in its thick sense? At the end of the day the constitution and rule of law in its 'thick sense' must be able to shape the behaviour of public institutions and the leaders. The rule of law is not merely an instrument of power. It also sets some limits to it when the need arises.

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