

Study Session 5

Unit -5 Religious & Customary Dispute Settlement Mechanisms

Study Session Outline

- I. Religious & Customary Dispute Settlement Mechanisms
- II. Religious means of dispute adjudication mechanisms
- III. Customary Law
- IV. Dispute Resolution and Customary Law:
- V. Customary Dispute Settlement mechanisms: Overview of the practice of Somalia, Sudan, South Sudan and Ethiopia

Study Session Duration

Each Study Session requires a 2 hours of formal study time.

INTRODUCTION

You are welcome to your final unit of learning in this module. This unit will cover the religious and customary Dispute settlement Mechanisms. It specifically deals what the basic features of religious and customary dispute resolution mechanisms are, and what the foundations of both dispute resolution mechanisms. Finally, the unit deals with the Overview of the practices of customary dispute settlement mechanisms taking the experience of Somalia, South Sudan, Sudan and Ethiopia.

Learning Outcomes of this study unit five

Upon completion of this unit students will be able to

- Define and discuss the religious and customary adjudication mechanism
- Discuss the application of customary rules in dispute settlement mechanisms
- explain how religions can play as arbitrator in dispute mechanism
- elaborate the application of customary mechanisms in dispute settlement in Somalia, Ethiopia, Sudan and South Sudan

Unit -5 Religious & Customary Dispute Settlement Mechanisms

5.1 Religious means of dispute adjudication mechanisms

Religious adjudication is a mechanism by which religious or other institutions apply religious rules and procedures in order to solve disputes. In solving disputes some religious institutions apply loose and easy procedures in order to solve disputes, often through mediation, negotiation and provision of advises to the parties based on the religious principles and often by clergy men. While other religious institutions employ more formal, strict and prolonged procedures. (Broyde).

Under the following section we shall discuss the religious dispute settlement mechanisms under Judaism, Christianity, and Islam.

5.1.1 Judaism

Judaism has been one of the pioneer religious institutions in the history of religious arbitration. It has a wider root in Israel and the United States. This method of dispute settlement applies procedures that are closer to the secular court system. The system employs a highly specialized areas of religious laws, Jews scholars, Jewish law (Shulchan Aruch, the authoritative code of Jewish Law) and other religious principles of the Jewish religion in solving disputes.(Broyde).

Usually dispute adjudication in the Jewish system begins with an informal mediation or arbitration-like process. This process is known as '*bitzua*' or a '*p'sharah*'. Individuals called '*rabbi*' or panel of arbitrators hear the arguments of both sides and decide the case. The decision given by the rabbi can either be binding or non-binding depending on the case. When the decision is not binding, either party or both can take the case to Jewish court known as *Beth Din*.

5.1.2 Christianity

Christianity has developed its own dispute resolution mechanisms through ADR which likes more of negotiation or mediation. Moreover, it employs a less formal method of dispute resolution mechanism.

This method of dispute settlement is deeply rooted in the teachings and principles of the Christianity, especially of the New Testament. The Christian taught teach and encourage everyone

to settle their disputes in a peaceful manner. This method of dispute settlement makes it resemble more to negotiation and conciliation than Arbitration. (Broyde).

5.1.3 Islam

Islam, like other religions has its own religious way of dispute settlement. the procedures and methods of dispute settlement are more or less similar to the other religious mechanisms with the view of adhering to religious principles. The Quran is the source of all the religious principles that is used in solving disputes peacefully. Peaceful settlement of disputes is encouraged in Islamic religion similar to other religions.

In addition to the Quran, the Islamic dispute settlement practice has developed specialized intermediaries named '*quadis*'. Those intermediaries are like judges who interpret and apply the shari'a law. Negotiated solutions are sought by the Islamic way of dispute settlement. Negotiation, conciliation, and mediation are the typical methods of settling disputes through the application of the Islamic law and by the law interpreters, the Quadis.

5.2 Customary Law

It is often stated that customary law plays significant contribution in the development of legal systems both in civil and common law legal systems. It is a body of rules developed by the practice of certain community with the intention to be bound by the practice. Some definitions of customary law also state that customary laws are intrinsic parts of certain society that are deeply rooted in the cultures of the society. (Abdo, 2009).

Customary dispute resolution mechanisms employ the traditionally developed laws and practices in order to solve the disputes. The local elders are also used as adjudicators of the dispute the families and neighbors of the disputing parties also play significant role in bridging the gaps that existed between the disputing parties.

The authority of customary practices and decisions are based on the societal values and respect given to the customary law and the dispute settling system. The society has developed the *opinio-juris* (intention to be bound) and decisions given by the customary bodies will have binding effect on the parties.



Dear Learners, can you discuss the distinction between religious and customary dispute resolution mechanisms?

1.2.1 Dispute Resolution and Customary Law: Traditional courts and Modern Courts

Traditional court is system of justice that employs customary law or uncodified rules where sanction is the enforcement mechanism.(Broyde). In Africa, traditional dispute resolution mechanisms have been practiced for ages. Africans are naturally communal and many parts of Africa practice indigenous traditional dispute resolution mechanisms. For example, in Somalia, Sudan and Ethiopia traditional dispute settlement mechanisms have wider acceptance in areas such as marriage, family, succession, and land disputes are resolved by customary dispute resolution mechanisms.

Sometimes traditional dispute resolution mechanisms contradict with fundamental rights such as women's right, children etc. In such instances the formal laws enacted by the sovereign authority may put limits and regulations. For example, the Constitution of Ethiopia provides that laws, customary or religious laws that contradict with the constitution and international laws to which Ethiopia is a party is void. (Choudree, 1996).

5.2.2 Formal and Informal Customary and Religious Dispute Settlement

Generally customary law governs many aspects of life in the community such as family matters, succession, land issues, and other socio-economic and political matters.(Broyde).

Customary law is deemed to be either formal or informal when settling disputes among specific communities. In light of this, customary law is generally unwritten and it is transferred from generation to generation. Even though customary laws are assumed to bind certain community where the laws were originated, it also extends to bind third parties where such third party has not

initially intended to be bound by that customary law, but simply because the third party is found within the jurisdiction of that community. In this manner customary laws seem to have more formal characteristics.

customary and religious dispute settlement mechanisms seem to be intertwined in terms of sorting out communal conflict through peacefully spiritual or traditional means. As mentioned on the above, major religions are part of customary law and dispute settlement because such problems need to be resolved in accordance with religious mechanism. However, these mechanisms may include:

- Mediation: a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.
- Arbitration: a neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on the dispute.

5.3 Customary Dispute Settlement mechanisms: Overview of the practice of Somalia, Sudan, South Sudan and Ethiopia

Customary laws and dispute settlement mechanisms is widely accepted and practiced area in many African countries. In Eastern African Nations also many sources indicate that the customary dispute settlement mechanisms had wider application especially before the emergence of colonialization in Africa. Even after colonialization, the modern legal system had suffered from lack of legitimacy and many still accept the traditional dispute settlement mechanism. The following section tries to overview the practices of customary law and dispute settlement mechanism in Ethiopia, Somalia, Sudan and South Sudan.

1.3.1 Ethiopia

In Ethiopia, customary laws and customary dispute settlement mechanisms are deep rooted in the Ethiopian community especially in the rural areas. The source of legitimacy of those customary norms emanates from the traditional, religious values of the community instead of the state.

Since Ethiopia is a country of multi ethnic composition, the cultural values and customary practices vary from place to place. That means there is no uniform application of customary laws throughout the country.

The cultural or traditional dispute settlement mechanisms in Ethiopia is often practiced in rural areas where there is lack of infrastructure to access the formal justice system, in areas where there is lack of legitimacy (as the modern laws are perceived ignorant of the cultural realities of the community on the ground) and areas where there is lack of resource and skilled personnel who can adjudicate cases under the formal method. The *Gada system* in the Oromo community, the traditional dispute settlement of the Gurage and *Sidama*, community, *Siraat wejerat* of the wejerat people in northern Ethiopia can be good examples where customary dispute settlement mechanisms have got wider application.

In a nut shell, the customary dispute settlement mechanism plays important role in complementing the formal justice system in Ethiopia.

5.3.2 Somalia

The Somali customary law is referred to as the '*Xeer Soomaali*'. The customary law consists of unwritten rules and procedures that pass from generation to generation. The customary law provides rights and obligations widely accepted by kins and clans and covers several issues starting from family matters, socio-economic issues property and the administration of natural resources. (Somaliland, 2021). The administration of natural resource particularly refers to agriculture and pastoralism. The 'Xeer' reflects some aspects of shari'a law. Unlike the secular laws and Shari'a law, the 'Xeer' particularly regulates the relation between clans even though there are also aspects that regulate the remaining communities in Somalia. (Somaliland, 2021).

The 'Xeer' has been used as a tool of conflict management and dispute settlement mechanism for ages. Clan elders have used the 'Xeer' as dispute settlement platform even in the absence of governments. The system allows any adult male to serve as an elder and permits him speak in council (Shir).(Somaliland, 2021). However, in practice elders are selected from the clans, based on their age. In practice elders are selected as representatives of their clan for their attributes, which

may be age, oratory powers and wealth (Somaliland, 2021). In a nut shell the council of elders have proven that they can play an important role in keeping peace and order even in the absence of governments.

5.3.3 South Sudan

Customary law is one of the sources of law in South Sudan and an important component for keeping the peace and order of South Sudan. Many reports reveal that around 90% of the disputes that arise within the South Sudanese Communities are resolved by customary laws and traditional leaders. Customary law and dispute settlement mechanism is preferred in South Sudan, because it is less costly, more flexible and more effective in terms of bringing amicable solutions and has a wider legitimacy among the community. (Women, 2010).

In South Sudan, the community prefer family matters especially that are related to private matters to be resolved out of court system, by resorting to customary means. This is because of fear of shame as a result of exposure to the public.

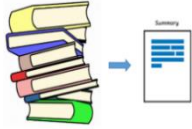
There may also be possibilities that traditional rules and procedures may not go in harmony with the so called 'global orders' (Human rights regimes). If the nation has accepted the human rights conventions, it has to treat the incompatibility by using domestic legislation (Women, 2010).

5.3.4 Sudan

Customary laws in Sudan serve in establishing peace, harmony between parties and among the society by way of conciliation, compromise and compensation or rebuilding of social imbalance (Parmar, 2007).

Human Rights activists argue that customary laws and customary dispute settlement mechanisms contradict with the fundamental human rights. However, it should be noted that the sources of many international human rights norms. Hence, neglecting traditional/customary laws is totally impossible and difficult to detach those practices from the community who already give values and authorities for the traditional/customary laws. In order to balance the discrepancy, it is recommended that domestic laws bridge the gaps that may exist between the customary laws and the state made laws and human rights instruments.

Disputes that are handled by the customary laws may be appealed to formal courts if parties to the dispute are aggrieved by the decision. Formal laws also include principles from the religious and customary laws. For example, the Sudanese Family Code includes *shari'a* principles as well as interpretations of some ‘manshurat’, in addition to the interpretations rendered by the supreme court (Shari’a circuit)



Unit Summary

Dear learners, under unit 5 we have seen that people can also rely on religious or customary means of dispute adjudication. The religious methods of dispute settlement mainly are founded on religious principles and canons of different religions. The process and the decision are accepted by the disputing parties mainly because the parties accept the values and principles of that religion. Accordingly, different regions have their own dogma or canon-based dispute settlement mechanism.

Similarly, customary norm is also used as dispute settlement mechanism. Customary norms are norms that a certain society have developed with the intent to be bound by the process and any decision based on the customary norms.

In addressing the experience of some east African countries with regards to the use of customary practices as dispute settlement mechanism, we have seen that in some countries like Ethiopia, the customary dispute settlement mechanisms are widely used in rural communities where there are problems of accessing the formal justice system. In other east African countries such as Sudan, South Sudan and Somalia, also customary dispute settlement mechanisms are widely applicable by the community.

Self- review Questions

1. Discuss the religious dispute resolution mechanism
2. What is customary law and customary dispute resolution mechanism?
3. Elaborate formal and informal customary and religious dispute settlement?
4. Discuss and define customary dispute settlement Mechanism?
5. What are the roles of elders in customary dispute settlement mechanisms?
6. Using examples, explain the customary laws applicable in Somalia, Sudan and Ethiopia
7. To what extent does the customary law provide protection for women and children?
8. What are the main challenges that surrounds customary dispute settlements?