

The Challenges of Integrating Customary Water Rules
Under the Formal Water Governance in Ethiopia:
Towards Legal Pluralism

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Article	Abstract
<p>Keywords: Water Rules; Formal Water Governance; Ethiopian policy; Sustainable Development.</p> <p>Article History Received: Dec 31, 2024; Reviewed: Feb 3, 2025; Accepted: Feb 9, 2025; Published: Feb 12, 2025.</p>	<p>Customary water rules are not adequately incorporated into the Ethiopian formal water governance framework despite their vital role in ensuring sustainable and equitable utilization of scarce water resources. Using the traditional doctrinal legal research methodology, this research seeks to examine the extent of recognition given to customary water rules under the Ethiopian formal water governance regime. Drawing on the theory of institutional (in)congruence, the research makes a textual analysis of the Ethiopian formal water governance legal framework using both primary sources (national and international laws related to water governance) and secondary sources (relevant books, journal articles and online sources). The article argues that there is a limited recognition of customary water rules under the Ethiopian formal water governance system which has led to conflicts, inefficiencies, and unsustainable use of water resources. This is due to the value clash between the formal water rules built on the notion of water as a resource for commodification, and customary water rules that see water as sacred and communal part of communities sociocultural and ecological being. As a result of this value clash, customary water rules, however important</p>

sustainability tenets they might lend, are not easily amenable into the formal water governance framework without in the first place questioning its basic foundations. It is concluded that strategies such as incorporating ecosystems based approaches, recognizing and integrating traditional knowledge, and promoting participatory decision-making process can assist in bridging the gaps between the commodification and preservation values.



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Introduction

Customary water rules have played and continue to play a vital role in the governance of water resources in Ethiopia as in many other countries. Customary water rules refer to the traditional practices and norms that have been developed and adopted by communities for generations to manage their water resources. These rules basically consist of traditional practices and norms that guide the use and management of water resources within communities. Customary water rules, in many rural areas, are deeply embedded in the cultural fabrics of the society and are considered as the primary device for water allocation and dispute resolution.

However, for centuries, customary (water) law has been the primary mode of regulation in many indigenous communities.¹ However, with the onset of colonialism and the imposition of Western Legal Systems, customary law had often been marginalized and disregarded. For instance, the 1960 Civil Code of Ethiopia, which is imported from Europe², categorically bans the application of customary rules.³ As a result, many 'post-colonial' societies inevitably

¹ Marco Ramazzotti, "Customary Water Rights and Contemporary Water Legislation: Mapping out the Interface", *FAO Legal Papers*, No. 76 (2008): 1-41, <https://openknowledge.fao.org/server/api/core/bitstreams/6b90f097-2ed1-4a0f-a1bc-5907f69fae9f/content>.

² Rene David, "Sources of the Ethiopian Civil Code", *Journal of Ethiopian Law IV*, no. 2 (1967): 1-25, <http://ejol.aau.edu.et/index.php/JEL/article/view/7498>.

³ Federal Democratic Republic of Ethiopia (FDRE), "Civil Code of the Federal Democratic Republic of Ethiopia", Proclamation Number 165/1960, *Negarit*

saw tension and conflict between traditional and state legal systems. It is necessary to incorporate customary water rules into the formal law system in pursuance of legal pluralism. This is so because it mainly helps to promote legal pluralism and cultural diversity within a given society. Legal pluralism, by recognizing and respecting traditional forms of law, can promote social cohesion, justice and access to legal remedies for marginalized parts of the community.⁴ There are different approaches to inculcate customary law into formal legal order, namely, incorporation, dual-coexistence, and integration.

The Ethiopian government, in recognition of the importance of customary water rules, has recently attempted to incorporate customary water rules into the formal legal and regulatory frameworks. This formal water governance system includes, *inter alia*, policy, legislation and institutional frameworks to regulate water resources and ensure equitable access to water for all users. It is worth noting that some efforts have been made with the view to harmonizing customary water rules with the existing formal laws and policies in addition to involving local communities in the decision making process of water management. A case in point is the Ethiopian water resource management policy that encourages the incorporation of customary water rules and the participation of local communities in water resource management planning. It also promotes community-based organizations and local water user associations as important actors in the implementation of water governance measures.

The incorporation of customary rules into the formal water governance system in Ethiopia is, however, still an ongoing process with a number of challenges ahead. Some of these challenges, for example, include potential conflict that may arise between customary water rules and the requirements of formal regulation that leads to confusion and uncertainty. While the formal water rules are built on

Gazette, Year 19 No. 2 (1960): Article 3345, [https://lawethiopia.com/images/codes/Civil%20Code%20\(English\).pdf](https://lawethiopia.com/images/codes/Civil%20Code%20(English).pdf).

⁴ Alice Tay, "Legal Culture and Legal Pluralism in Common Law, Customary Law and Chinese Law", *Hong Kong Law Journal*. 26, no. 194 (1996): 1-35, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/honkon26&div=30&id=&page=>.

the notion of water as a resource for commodification, customary water rules see water as sacred and communal part of their sociocultural being. As a result of this value clash, customary water rules, however important sustainability tenets they might lend, are not easily amenable into the formal water governance framework without in the first place questioning its basic foundations. It is, therefore, necessary to adopt strategies such as incorporating ecosystems based approaches, recognizing and integrating traditional knowledge, and promoting participatory decision-making process in order to bridging down the gaps between the commodification and preservation values. In this respect, the research article, play an important role by closing the existing research gap in investigating the openness of the formal water legal framework for incorporating customary water rules in Ethiopia and making policy recommendations thereon.

Method

Using the traditional doctrinal legal research methodology, this research seeks to examine the extent of recognition given to customary water rules under the Ethiopian formal water governance regime. Drawing on the theory of institutional (in)congruence, the research makes a textual analysis of the Ethiopian formal water governance legal framework using both primary sources (national and international laws related to water governance) and secondary sources (relevant books, journal articles and online sources). Accordingly, the article is organized in nine sections. While section one introduces the article, the second section deals with the nature and importance of customary water rules. Sections three and four are respectively devoted to some examples of customary rules and their legal status both under international and national laws. Section five deals with the extent of recognition of customary water rules in Ethiopia, followed by section six that deals with the various approaches to incorporate customary water rules in the formal water governance system. While section seven addresses the reasons behind the limited recognition of customary water rules in Ethiopia, section eight deals with the possible strategies

to incorporate customary water rules. Finally, section nine, concludes the article.

Result and Discussion

A. Customary Water Rules: Nature and Importance

Customary water rules refer to the traditional practices and norms that have been developed and adopted by communities for generations to manage their water resources.⁵ These rules basically consist of traditional practices and norms that guide the use and management of water resources within communities. Customary water rules, by their nature, are deeply embedded in the cultural fabrics of the society in many rural areas and are considered as the primary device for water allocation and dispute resolution.⁶

The benefits of customary water rules over the formal water governance system are manifold. No doubt that water is an invaluable natural resource that occupies a critical role in sustaining life, economies and ecosystems. Water is a scarce and essential resource for life, thus its appropriate management is crucial for sustainable development. It is an indispensable, but challenging endeavor, to ensure fair and efficient water resource allocation and management if we have to sustain livelihoods.

Although the conventional formal water governance system, often driven by top-down approaches and government regulations, have been widely implemented in the process of water resource management, customary water rules that had evolved through community practices have also demonstrated their effectiveness.⁷ Customary water rules, thus, offer a number of advantages over the

⁵ Jessica Troell and Stephanie Keene, "Legal Recognition of Customary Water Tenure in Sub-Saharan Africa: Unpacking the Land-Water Nexus", *International Water Management Institute (IWMI) Research Report*, Volume 182, (2022): 1-33, <https://doi.org/10.5337/2022.215>.

⁶ *Ibid.*

⁷ Barbara Koppen, "Living Customary Water Tenure in Rights-Based Water Management in Sub-Saharan Africa", *International Water Management Institute (IWMI) Research Report*, Volume 183, (2022): 1-41, <https://doi.org/10.5337/2022.214>.

formal water governance system that includes, but not limited to, enhanced equity and efficiency, ecosystems preservation, social cohesion, and adaptability to local contexts. These traditional knowledge systems, developed and refined for over generations, significantly contribute to the achievement of sustainable development.⁸ They offer a comprehensive and holistic approach to water management, one that is deeply rooted in indigenous knowledge and wisdom. Policy makers can harness the powers of local wisdom and community engagement with the view to realizing sustainable and equitable water resource management by acknowledging the values of customary water rules and integrating them into the formal water governance system.

1. Sustainability, Equity and Efficiency

Customary water rules significantly contribute to sustainable development by promoting water conservation and efficient utilization.⁹ For example, many traditional societies practice water harvesting techniques such as building reservoirs, tanks and canals for capturing and storing rainwater. Such techniques enable local communities to mitigate water scarcity during periods of low rainfall and assure a reliable supply of water for different uses. Customary water rules can also promote efficient irrigation, mulching techniques, and sharing scarce water resources among multiple users in a community. These practices improve water efficiency and unnecessary minimize wastage which contributes to sustainable agriculture.

As they are basically passed down through generations, customary water rules are formulated based on community needs and reflect cultural values and social norms.¹⁰ Consequently, customary water rules often give priority to equitable access to water resource in

⁸ *Ibid.*

⁹ David Hankel, "Community Based Water Systems: Preserving Livelihood, Ecology and Community", *Human Ecology Review* 20, no. 2 (2014): 75-96, <https://www.jstor.org/stable/i24707622>.

¹⁰ Elizabeth Gachenga, "Customary Law Systems for Water Governance and the Human Rights Based Approach to Water: A Case of Marakwet of Kenya", *Strathmore University*, (2013), <https://suplus.strathmore.edu/server/api/core/bitstreams/d6ffe6d9-cd0f-48f3-8f60-2225b35385bd/content>.

such a way that assures fair distribution among various users. Customary water rules provide a platform for dialogue and collaboration as they involve local stakeholders in decision making processes.¹¹ This will, in turn, foster a sense of ownership and encourage a responsible use of water resources. This kind of bottom-up approach helps enhance social equity, prevent conflicts, and boost the overall efficiency of water resource allocation and management.

2. Preservation of Ecosystem

It is likely that formal water governance systems usually give primacy to economic development over environmental sustainability.¹² At the center of customary water rules, conversely, lies a deep rooted relationship between communities and their surrounding ecosystem. Indigenous cultures have a deep-rooted respect for nature and acknowledge the interdependence between humans and the environment. They also recognize the interconnectedness of water resources with biodiversity, watersheds, and the overall ecosystem health. Customary water rules safeguard sensitive environments and maintain ecological balance not least because they often include provisions for water conservation practices such as seasonal allocation and restrictions on water-intensive activities.¹³ Customary water practices, for example, prohibit activities that may harm water quality or quantity, such as unsustainable extraction, and encroachment on water catchment areas. As a consequence of this kind of community-based stewardship, there will be increase in sustainable water use practices and long-term preservation of ecosystems.

3. Social Cohesion

Customary water governance systems promote collective decision making which fosters social cohesion.¹⁴ This is so because

¹¹ *Ibid.*

¹² David Hankel, *Op.Cit.*, p. 9

¹³ Barbara Koppen, *Op.Cit.*, 7

¹⁴ Getachew Zerfu, "Management Aspects of Rural Water Sustainability in Ethiopia", *IHE MSc Thesis*, SE/3 (2002): 1-236,

customary water governance systems are predicated on the notions of community interdependence and shared responsibility for water resources. In this sense, customary water rules mostly promote cooperation, self-regulation, and common goal which build trust and strong social bonds among members of a community.

An important aspect of customary water rules is the emphasis they place on community participation and collective decision making.¹⁵ In many traditional societies, water allocation decision is reached through consensus taking into account the needs and priorities of all the concerned stakeholders. This inclusive approach leads to fair and sustainable water management practices by ensuring a fair representation to the interests of all community members. Individuals, when allowed to participate in water management decisions, develop sense of belongingness that is the requisite of a strong community fabric. By involving individuals and communities in decision making processes, customary water rules foster local ownership and stewardship of water resources that eventually minimizes potential conflicts and supports sustainable development. Moreover, customary water rules help to ensure the voices of marginalized groups are heard and their interests are protected by prioritizing their needs.¹⁶

4. Adaptability to Local Contexts

Formal water governance systems, compared to the informal ones, have so standardized structures and implementation frameworks that they struggle to address varying local needs.¹⁷ On the other hand, customary water rules are not only embedded in local contexts but are inherently flexible. Customary water rules can easily adapt to changing social, economic and hydrological circumstances as they are shaped by generations of trial and error. This adaptability, *in turn*, empowers

<https://ihedelftrepository.contentdm.oclc.org/digital/collection/masters2/id/41846/>.

¹⁵ *Ibid.*

¹⁶ Toufik Ftaita, "Community Water Management: Is It Still Possible? Anthropological Perspective", *Dossie Antropologia E Agua* 16, no. 1 (2011): 195-212, <https://doi.org/10.4000/aa.1161>.

¹⁷ Elizabeth Gachenga, *Op.Cit.*, p. 10

communities to better respond to unforeseeable challenges like climate change and population growth. The incorporation of customary water knowledge and practices into the formal system can also increase their resilience and effectiveness.¹⁸

B. Customary Water Rules and Practice in Ethiopia: Some Examples

There are multitudes of traditional water rules and practices in Ethiopia that play vital role in ensuring the sustainable management and utilization of water resources. Ethiopia, a country known for its numerous lakes, rivers and underground water, has a robust history of diverse water management practices which have developed and refined for over centuries. This section seeks to explore some examples of customary water rules and practices in Ethiopia with the view to highlighting their significance in water resource management. Although the country has multitudes of customary water rules and practices, the section is devoted to some notable examples only.

One example of customary water rules in Ethiopia is the ‘Gada System’ that has played a vital role in the conservation and equitable distribution of Water Resources in Oromo Society.¹⁹ This system is characterized by a strong sense of communal ownership and responsibility with water seen as a shared resource. Customary water rules in the ‘Gada System’ are based on principles of equity, sustainability and cooperation. Key figures within the ‘Gada System’, known as Aba Gadas, shoulder the responsibility of upholding and enforcing customary water rules.

¹⁸ *Ibid.*

¹⁹ Demisachew Tadele and Abiyot Lelisa, “Assessment of Water Resources Management and Past Works on Water Points Development in Borana Rangelands, Southern Oromia, Ethiopia”, *International Journal of Water Resources & Environmental Engineering* 11, no. 2 (2019): 39-44, <https://academicjournals.org/journal/IJWREE/article-abstract/CD7492860170>.

Another example of customary water rule practiced in Ethiopia is the “*Qene*” system.²⁰ A term derived from the Amharic language in Ethiopia, ‘*Qene*’ refers to a traditional community-based water allocation scheme. Water, in this system, is allocated to various users on the basis of a predetermined set of rules and taking into account the specific need of each user. A local committee or council composed of respected members of the community will oversee such water allocation. The ‘*Qene*’ system provides an equitable water distribution mechanism ensuring the availability of water both for domestic and agricultural consumptions especially in times of water scarcity.

Another example of customary water rules practiced in Ethiopia is “*Birr Kat*”.²¹ Generally, ‘*Birr Kat*’ is a traditional practice that consists of mobilizing local community members to collectively commit their labor and resources in order to construct and maintain water infrastructure. Individuals and households, in this system, voluntarily contribute their time and resources to excavating, maintaining and repairing water sources like wells, canals and ponds. In this respect, the practice of ‘*Birr Kat*’ fosters a sense of collective ownership, responsibility and pride within a community while simultaneously ensuring the sustainable utilization and management of water resources.

Furthermore, a traditional practice termed as “*Haregot*” is widely exercised in Ethiopia.²² Basically, ‘*Haregot*’ is a customary water rule which entails an obligation on individuals or communities who reside nearby water bodies to protect and conserve these resources. It, more specifically, involves such rules as an obligation to refrain from polluting water bodies, preventing overfishing, and preserving the surrounding ecosystems. The importance of this practice lies in maintaining ecological balance, preventing resource depletion, and promoting sustainable water management.

²⁰ Mehretie Belay and Woldeamlak Bewket, “Traditional Irrigation and Water Management Practices in Highland Ethiopia: Case Study in Dangila Woreda”, *Irrigation and Drainage* 64, no. 4 (2019): 435-448, <https://doi.org/10.1002/ird.1748>.

²¹ *Ibid.*

²² Getachew Zerfu, *Op.Cit.*, p. 14

In conclusion, the above examples of customary water rules and practices in Ethiopia clearly highlight the country's robust cultural heritage and its people's deep connection with water resources. While these customary water rules are founded upon local beliefs and usages, they have proven effective in ensuring the sustainability of water resources. Customary water rules can, therefore, compliment the formal water governance system in a number of ways provided that they are appropriately integrated.

C. The Status of Customary (Water) Rules: International and National Laws

Since time immemorial, communities all over the world have developed their own customary water rules governing the use, management and allocation of water resources.²³ These norms have, from time to time, been shaped by local, cultural and ecological factors ensuring sustainable water management practices. It is, however, worth noting the fact that there is a growing need to evaluate the level of recognition of customary water rules under International Law following the increasing complexities of water-related challenges and their trans-boundary nature.²⁴

1. Customary Water Rules Under International Law

Although a soft law, the United Nations Declaration on the Rights of Indigenous People (UNIDRIP) clearly establishes the rights of indigenous people to own, use, develop and control their traditionally owned or otherwise occupied and used lands, territories, waters and coastal sea and other resources.²⁵ Such an entitlement, presumably, entails the use, by indigenous people, of their own

²³ Jessica Troell and Stephanie Keene, *Op.Cit.*, p. 5

²⁴ Marco Ramazzotti, "Customary Water Rights and Contemporary Water Legislation: Mapping out the Interface", *FAO Legal Papers Online*, no. 76 (2008): 1-41, <https://landportal.org/library/resources/faodocrep7bc1d1ed-9847-4ac8-ac0e-51079967612b/customary-water-rights-and>.

²⁵ United Nations (UN), "Declaration on the Rights of Indigenous People", *General Assembly Resolution* 61/295, (2007), https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.18_declaration%20rights%20indigenous%20peoples.pdf.

customary rules in using and managing their resources envisaged under the provision. The declaration calls upon countries to legally recognize and protect their lands and resources with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned and specifically to recognize Indigenous Peoples' land tenure systems within these territories.

International Law provides for a framework used for regulating of trans-boundary water resources and fostering cooperation among states. A case in point is the United Nations Convention on the Law of Non-Navigational Use of International Watercourse (also called the UN Watercourse Convention) which lays down the principles regarding water related activities between countries sharing water courses.²⁶ This convention, however, does not recognize customary water rules explicitly while it mainly capitalizes on the legal aspects of water governance.

Customary water rules, in spite of their exclusion for the formal international water governance framework, have gained acceptance in regional legal frameworks and practices. In this respect, include the Australian Aboriginal customary water rights²⁷ and the customary water management practices of Canada²⁸ are some notable examples.

2. Customary Water Rules under National Law: The Policy and Legal framework

In Ethiopia, as in many African countries, there is water scarcity and competition for water resources.²⁹ In an attempt to deal with such challenges, the country has attempted to recognize and integrate customary water rules into its formal water governance system, albeit

²⁶ United Nations (UN), "Convention on the Law of Non-Navigational Use of International Watercourse", *General Assembly Resolution* 51/229, (1997), https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

²⁷ Donna Craig and Elizabeth Gachenga, "The Recognition of Indigenous Customary Law in Water Resource Management", *Journal of Water Law* 20, no. 5 (2010): 278-284, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675996.

²⁸ Linda Nowlan, "Customary Water Laws and Practices in Canada", *Food and Agriculture Organization (FAO)*, (2008): 1-42, https://www.fao.org/fileadmin/templates/legal/docs/CaseStudy_Canada.pdf.

²⁹ Jessica Troell and Stephanie Keene, *Loc.Cit.*, p. 5

not adequately. The country aims to ensure equitable and sustainable utilization of its water resources by integrating customary water rules in the formal water governance system.³⁰ This approach is largely predicated on the recognition of the knowledge and expertise of local communities in managing their water resources. The approach seeks to combine such traditional practices with modern water management techniques for the best possible outcome. In this way, it is possible to promote community participation, ensure water resource sustainability, and address water challenges in the country.³¹

The Ethiopian Water Resource Management Policy not only acknowledges the importance of customary water rules but also encourages their incorporation into the formal legal framework of the country.³² It is possible to integrate customary water rules into a country's formal legal framework in a number of ways. One of such ways is through the establishment of Water User Associations (WUAs). Water User Associations (WUAs) are community-based organizations that are in charge of the management and distribution of water resources at local levels.³³ These associations, most often than not, incorporate customary water rules into their bylaws and decision making processes.

The 1995 Ethiopian Constitution does not as such give adequate recognition to customary water rules. The constitution, under its third chapter, in fact recognizes the applicability of customary rules only in relation with the adjudication of disputes related to

³⁰ Imeru Tamirat, "Policy and Legal Framework for Water Resource Management in Ethiopia", *International Conference on Water Management in Federal and Federal-Type Countries*, Forum of Federations, (2008): 1-20, <https://www.forumfed.org/document/policy-and-legal-framework-for-water-resources-management-in-ethiopia/>.

³¹ *Ibid.*

³² Federal Democratic Republic of Ethiopia, "The Ethiopian Water Resources Management Policy", *Ministry of Water Resources* (1998), <https://faolex.fao.org/docs/pdf/eth158196a.pdf>.

³³ Erfje Aarnoudse, Alvar Closas and Nicole Lefore, "Water User Associations: A Review of Approaches and Alternative Management Options for Sub-Saharan Africa", *International Water Management Institute (IWMI) Working Paper* 180, (2018): 1-77, <https://www.iwmi.org/news/iwmi-working-paper-180/>.

personal and family law.³⁴ In light of the Constitution, the Ethiopian 2000 water resources management proclamation³⁵ along with the 2005 water resources management regulation³⁶ serve as bedrock of water law in the country. These legislations seek to set up a hierarchical system of water rights which prioritizes state control and regulation of the country's water resources. The main objective of this centralized model of water governance is to ensure an equitable and sustainable utilization of water resources by all users.

The Ethiopian Water Resource Management Proclamation recognizes the rights of communities to managing and using water resources in accordance with their customary practices in as long as they do not conflict with its national interest.³⁷ This shows that government has taken steps to protect and regulate customary water rights in recognition of their importance in the process of water resource management. The problem, however, is that the recognition give for customary water rules under the Ethiopian formal system is limited. Customary water rules are seen as subordinate to the formal water governance system, and their application and enforcement are subjected to the discretion of the government. This kind of limited recognition of customary water rules leads to governance gaps since the needs and concerns of local communities cannot be adequately addressed.³⁸

There are multitudes of obstacles that lie behind the limited recognition of customary water rules into the Ethiopian forma legal

³⁴ Federal Democratic Republic of Ethiopia, "Constitution of the Federal Democratic Republic of Ethiopia", Proclamation No. 1/1995, *Federal Negarit Gazette*, Year 1 No. 1 (1995), <https://ecn1.org/sites/default/files/files/2021/EthiopiaConstitution.pdf>.

³⁵ Federal Democratic Republic of Ethiopia, "Water Resources Management Proclamation" Proclamation Number 197/2000, *Federal Negarit Gazette*, Year 6 No. 25 (1998), <https://faolex.fao.org/docs/pdf/eth44004.pdf>.

³⁶ Federal Democratic Republic of Ethiopia, "Water Resources Management Regulation" Regulation Number 115/2005, *Federal Negarit Gazette*, Year 11 No. 27 (2005), <https://faolex.fao.org/docs/pdf/eth121808.pdf>.

³⁷ Federal Democratic Republic of Ethiopia (1998), *supra* note 35.

³⁸ Reta Hailu, Degefa Tolossa and Getnet Alemu, "Water Institutions in the Awash Basin of Ethiopia: The Discrepancies between Rhetoric and Reality", *International Journal of River Basin Management* 16, no. 1 (2017): 107-121, <https://www.tandfonline.com/doi/full/10.1080/15715124.2017.1387126>.

system. One of such hindrances is the lack of clear mechanism for their incorporation into the formal legal framework.³⁹ Even if the law often acknowledges the importance of customary water rules, it does not provide for detailed guidelines for their recognition and implementation. This absence of clarity, in turn, creates ambiguity and widens the government's discretionary decision making power leading to inconsistent applications and potential conflicts. Another important obstacle is the limited capacity local communities in asserting and defending their customary water rights.⁴⁰ Many local communities are not, often, aware of their rights and the mechanisms to enforce them. The formal legal system is complex and inaccessible that makes it difficult for community members to effectively navigate the system and assert their interests.

In order to tackle these challenges, it is necessary to develop a comprehensive framework for the recognition and incorporation of customary water rules into the country's formal system.⁴¹ This framework will, among others, clarifies the procedure for recognition, define mechanisms for stakeholder participation, and creates forum for dispute resolution. In addition, capacity building initiatives must be taken with the view to empowering local communities to assert their rights and meaningfully take part in water resources management process.

D. The Extent of Recognition of Customary Water Rules in Ethiopia

The limited recognition, in Ethiopia, of customary water rules into the formal water governance system has led to multitudes of problems. Customary water rules that are developed and practiced among local communities have been indispensable in the management

³⁹ Ayalew Assefa, "Customary Laws in Ethiopia: A Need for Better Recognition?", *Danish Institute for Human Rights (DIHR) Working Paper*, (2012): 1-70, https://menneskeret.dk/files/media/dokumenter/udgivelser/ayalew_report_ok.pdf.

⁴⁰ *Ibid.*

⁴¹ Imeru Tamirat, *Op.Cit.*, p. 30

of the country's water resources for centuries. The meager place given for these rules is contributing to conflicts, inefficiencies, and unsustainable water resource exploitation.

The first negative effect of the limited recognition of customary water rules in Ethiopia is that it undermines the authority and legitimacy of such community-based regulations.⁴² Customary water rules are built upon traditional knowledge, usages, and beliefs that have evolved for over generations. These rules seek to ensure fair and equitable allocation and utilization of water resources by taking into account the specific needs, values, and cultural contexts of different communities. But the absence of formal recognition of these rules means that they are disregarded by individuals and the larger society which results in a sense of injustice and increases the likelihood of conflicts.

Secondly, the limited recognition of customary water rules into the formal system hinders an effective water resource management practice.⁴³ Across many parts of Ethiopia, customary water management techniques have proved their efficiency and sustainability. Local communities have been able to cope up with seasonal water variability and scarcity using mechanisms to allocate water in an equitable and efficient manner. By not incorporating these practices into national laws, we restrict our ability to preventing over-extraction, pollution and mismanagement of water resources. Consequently, unsustainable water use patterns that exacerbate water scarcity will emerge that endangers the livelihoods of communities that depend on such resources.

The third problem associated with the limited recognition of customary water is that it impedes the achievement of social and environmental justice.⁴⁴ Traditional water rules have for long occupied

⁴² Ayalew Assefa, *Op.Cit.*, p. 39

⁴³ *Ibid.*

⁴⁴ Madga Nassef and Mulugeta Belayhun, "Water Development in Ethiopia's Pastoral Areas: A Synthesis of Existing Knowledge and Experience", *Overseas Development Institute*, Save the Children, (2012): 1-50, <https://www.celep.info/wp-content/uploads/2016/11/Water-Development-in-Pastoral-Areas-of-Ethiopia2012-2.pdf>.

a central role in ensuring an equitable access to water resources, especially for marginalized and vulnerable sections of the society. The exclusion of these rules from the formal system further perpetuates inequality and discrimination. This is so because the most influential stakeholders who have greater political and economic resources will have the opportunity to exploit water resources without considering the needs and interests of those who rely on them for their survival. The end result of this will be social injustice such as denial of access to water, unequal allocation, and at times inadequate consideration for gender-specific water needs.

The other impact of the limited recognition of customary water rules is that it impedes the realization of sustainable development.⁴⁵ It is known that water plays a vital role in human's life such as agricultural activities, energy production, industrial manufacturing, and ecosystems preservation. Integrating customary water rules into the formal system provides the basis for ensuring sustainable water management, enhancing agricultural productivity, promoting renewable energy, and safeguarding fragile ecosystems. Any development activity taken in their absence is bound to lack considerations for long-term socioeconomic and environmental consequences and exacerbates water-related challenges.

E. Approaches to Incorporate Customary Water Rules in the Formal Water Governance: Legal Pluralism

There are three possible approaches to incorporate customary (water) rules into formal (water) law. These include incorporation, dual co-existence and integration. A brief discussion of them one by one is presented in what follows.

1. Incorporation

The incorporation approach involves inculcating elements traditional or customary law into the formal legal order while at the same time recognizing and respecting the legitimacy of both systems.⁴⁶

⁴⁵ *Ibid.*

⁴⁶ Alice Tay, *Op.Cit.*, p. 4

It specifically operates by recognizing customary water law as a source of legal authority alongside the formal legal system. In this approach different legal systems are integrated into a single unified system.

This approach allows for co-existence of different legal systems while promoting unity and consistency in the application of the law. It acknowledges the importance of indigenous knowledge and practices seeking to combine the strengths of both formal and informal legal order to better serve the needs of the society.⁴⁷ It calls for a more inclusive and pluralistic approach to law by emphasizing the vales of indigenous legal systems in the promotion of access to justice and enhancing the legitimacy of the formal legal order.⁴⁸

However, it seems that the incorporation approach makes customary law to draw its validity from formal law. But customary law does not, and ought not, draw its validity from formal law as they both should be considered one sources of law albeit separate. That is to say customary law is valid in itself independent of formal law. This is supported by Ehrlich's idea of living law, i.e the law which dominates life (ex. customary law) even if it has not been posited by legal propositions.⁴⁹

2. Integration

Integration is a more recent approach to legal pluralism that seeks to create a harmonious relationship between different legal systems, i.e customary and formal legal order. It involves the reconciliation of conflicting laws and values with the view to creating a more inclusive and cohesive legal framework.⁵⁰ This approach helps to bridge down the gaps between different legal orders and thereby promotes greater cooperation and understanding among diverse communities.

⁴⁷ *Ibid.*

⁴⁸ Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", *Sydney Law Review* 29, no. 29 (2007): 375-411, <https://www.austlii.edu.au/au/journals/SydLawRw/2008/20.pdf>.

⁴⁹ Eugen Ehrlich, "Living Law, and Plural Legalities", *Theoretical Inquiries in Law* 9, no. 2 (2008): 443-472 <https://doi.org/10.2202/1565-3404.1193>.

⁵⁰ Alice Tay, *Loc.Cit.*, p. 4

However, integration requires undertaking a daunting task of the need to harmonize two vast areas of laws, namely customary and formal law. It is quite difficult to harmonize customary and formal law as they are often predicated on varying, and often clashing, values. In addition, integrating customary law into the formal law kills its dynamic nature by locking its evolution into the formal law making-and-unmaking process. As shown elsewhere above, formal legal systems are typically based on written laws and statutes whilst customary rules are often unwritten and based on oral traditions. This can create tension between the two systems as formal law may not always reflect or accommodate the diverse customs and practices of the society. Integrating customary law into formal law may turn it into static law which is quiet contrary to its very nature. For these reasons, it is argued that customary (water) rules should be allowed to coexist alongside formal law as discussed below.

3. Dual Coexistence

In case of dual coexistence, separate legal systems (customary and formal laws) operate side by side within a given society.⁵¹ This approach, most importantly, acknowledges the autonomy of each legal system and enables individuals to choose which system they wish to be governed by. As such, it promotes diversity in legal practices and can cater to the needs of differing cultural and ethnic groups in a given society.

The dual coexistence approach, compared to the above two strategies, is advantageous for it enables customary rules flourish alongside formal law. It must, however, be noted that this approach may lead to multiple and contradictory layers of legal orders which can threaten unity. Nonetheless, it is possible to reconcile the two orders through an institutional arrangement like courts. This can be done by putting down general guiding principles that customary rules may not infringe.⁵² For example, a customary water rule may not be enforced

⁵¹ *Ibid.*

⁵² Adewale Taiwo, “Repugnancy Test and its Impact on Customary Law: Comparing the South African and Nigerian Positions – Some Lessons for Nigeria”, *Journal for*

when it runs afoul of public policy, natural justice, equity and good conscience. Applying the dual coexistence approach requires reconciling the often contradictors goals of customary and formal water rules to extract some general guiding principles that dictate when and to what extent customary laws are applicable. The following subsection is meant to address this challenge.

F. The Reasons for the Limited Recognition of Customary Water Rules in Ethiopia

As a country with ethnic and cultural diversity and traditions, Ethiopia holds a robust tapestry of customary water rules that had endured the test of time. These customary rules, as shown in the above section, are accorded low level of recognition in the formal system of the country. This section is devoted to exploring the reasons that lie behind the limited recognition of customary rules in Ethiopia.

According to the theory of institutional incongruence conflicts arise when there is misalignment between formal institutions (ex. laws, policies) and informal institutions (such as customary water rules).⁵³ In the context of water resources management customary water rules are often embedded in local traditions, culture, and historical relationships with water, hence they may significantly differ from the formal water law framework. Conflicts are bound to arise when the formal water governance framework, consequently, does not adequately consider and recognize the values, knowledge and practices embedded in customary water laws.

The major reason, therefore, that limits the recognition of customary water rules into the formal water governance system of the country is the clash of values and the resulting tensions of the two systems. The formal water governance system often places value on commodification, and privatized allocations and utilizations of water

Juridical Science 34, no. 1 (2020): 89-115, <https://www.ajol.info/index.php/jjs/article/view/62091>.

⁵³ Cathy Rubinos and Maria Bernedo, "Institutional Fit in the Water Sector", *Oxford University Press* (2022), <https://faculty.up.edu.pe/en/publications/institutional-fit-in-the-water-sector>.

resources for economic motives.⁵⁴ Formal water governance system, led by market-oriented approaches and economic development priorities, views water as a mere economic good to be allocated, bought and sold. This mechanism often employs pricing mechanisms, market-based allocation systems, and prioritizes uses with economic return like commercial or industrial activities. The aim is to promote efficiency, productivity and economic growth at the expense of sustaining water resources.

In sharp contrast to this, customary water rules give primacy to preservation of water resources, sustainability and long-term well-being of ecosystems and communities.⁵⁵ Customary water rules are grounded in cultural, ecological and social values that prioritize the preservation and sustainable management of water resources. These rules, most importantly, acknowledge the interconnection of water with the overall well-being of communities, ecosystem and the future generations. More specifically, customary water rules emphasize on equitable access, communal water management, and traditional practices that have sustained communities for generations.

The theory of intuitional incongruence, most importantly, suggests that any attempt to integrate customary water rules into the formal water governance system must first address the value divergences between the two systems.⁵⁶ Based on the literature and reports analyzed, attempts to recognize customary water rules under the Ethiopian formal water governance so far appear to be either a superficial cross reference to or an embodiment of customary water rules under the formal system. This reduces the important issues down to normative question, instead of addressing the value clash between the two systems which is the real limitation to recognize customary water rules.

⁵⁴ Amare Bantidar, Bamlaku Tadese, and Adey Nigatu, "Voices in Shaping Water Governance: Exploring Discourses in the Central Rift Valley, Ethiopia", *Water* 15, no. 4 (2023): 803-831, <https://doi.org/10.3390/w15040803>.

⁵⁵ *Ibid.*

⁵⁶ Cathy Rubinos and Maria Bernedo, *Op.Cit.*, p. 53

An investigation of some customary water practices (such as *Qene*, *Birkat*, and *Hareegot* systems) reveals that they give primacy to preservation of water resources, sustainability and long-term well-being of ecosystems and communities. In fact, water forms part of the socio-cultural and ecological beings of the community, as a result of which it is seen as a sacred entity. Therefore, customary water rules emphasize equitable access, communal water management, and traditional practices that have sustained communities for generations. Conversely, a closer look at the Ethiopian water resources management policy, proclamation and regulation reveals that they are predicated on the notions of water as a mere resource subject to commodification and private allocations. The formal water governance system, led by market-oriented approaches and economic development priorities, views water as a mere economic good to be allocated, bought and sold. This mechanism often employs pricing mechanisms, market-based allocation systems, and prioritizes uses with economic return like commercial or industrial activities. Therefore, customary water rules, however important sustainability tenets they might lend, are not easily amenable into the formal water governance framework without in the first place questioning its basic foundations.

In order to address this value clash, there is growing recognition of the necessity to incorporate environmental and social considerations into the formal water governance framework of a country.⁵⁷ This entails a fundamental reconsideration of the very goals of the Ethiopian water resources management policy, proclamation and regulation. It is worth noting that strategies such as incorporating ecosystems based approaches, recognizing and integrating traditional knowledge, and promoting participatory decision-making process can assist in bridging the gaps between the commodification and preservation values. This, in turn, requires and largely depends on

⁵⁷ Hugo Tremblay, "A Clash of Paradigms in Water Sector – Tensions and Synergies between Integrated Water Resources Management and the Human Rights-Based Approach to Development", *Natural Resources Journal* 51, (2011): 307-356, <https://digitalrepository.unm.edu/nrj/vol51/iss2/7/>.

finding the right balance between economic development and environmental sustainability.

Another important reason for the low level of recognition of customary water rules in Ethiopia is associated with historical factors. The Ethiopian legal system had historically been influenced by the colonial-imperial Western models of modernity and its legacy.⁵⁸ This led to the adoption of centralized legal system in disregard of traditional practices and customary rules including those related to water as well. The low level of recognition of customary water rules can be tracked back to this inherited system which does not acknowledge the longstanding and localized water management practices exercised by local communities all over the country. In this light, it is worth noting the 1960 Civil Code of Ethiopia that explicitly relegates customary rules to the formal legal framework of the country.⁵⁹

Thirdly, lack of documentation and codification plays an important role for the low recognition of customary rules in Ethiopia.⁶⁰ It is not an easy task to document and codify customary water rules since they are rooted on oral traditions. A formal legal system dominated by written statutes in Ethiopia, as in many countries, adds another layer of complication in the process of incorporating and enforcing customary water rules. Moreover, the lack of inclusive and comprehensive integration procedure presents a significant hindrance on the acceptance of these rules within the formal system.

Fourthly, centralized governance and poor local representation is attributed to the low level of recognition of customary water rules in Ethiopia. The Ethiopian governance structure tends to be centralized, concentrating key power and decision making on the federal organ.⁶¹ The inevitable consequence of this kind of top-down approach is that it dilutes the significance of localized water management practices and restricts the leeway for their incorporation into the formal legal system.

⁵⁸ Reta Hailu, Degefa Tolossa and Getnet Alemu, *Op.Cit.*, p. 38

⁵⁹ Federal Democratic Republic of Ethiopia, (1960), *Op.Cit.*, p. 3

⁶⁰ Reta Hailu, Degefa Tolossa and Getnet Alemu, *Op.Cit.*, p. 38

⁶¹ Federal Democratic Republic of Ethiopia (1995), *Op.Cit.*, p. 34

Additionally, local communities who predominantly rely on such traditional water rules often lack adequate representation and participation in the law making process, which further reinforces the low level of recognition they received in the first place.

G. Methods to Incorporating Customary Water Rules into the Formal Water Governance System

There are a number of alternative ways to incorporate customary water rules into the formal water governance system of a country, each with its own pros and cons. In what follows, a brief discussion of these alternatives is presented.

1. **Recognition and Documentation:** The first step in the process of acknowledging the recognizing the significance of customary water rules is recognition and documentation.⁶² This means that customary water rules should be documented and codified so as to ensure clarity and consistency.
2. **Incorporation into Legal and Policy Frameworks:** Customary water rules should be incorporated into existing water laws and policies of a country.⁶³ This can be done by amending laws and regulations with the view to including provisions that recognize and respect customary water rules.
3. **Capacity Building and Awareness:** This requires taking steps to raise awareness of government officials, water resource managers, and stakeholders about the importance of customary water rules.⁶⁴ In order to achieve this, training programs and capacity building initiatives can be adopted to enhance understandings about customary water practices and their incorporation into the formal system.
4. **Collaboration and Inclusion:** Any water governance decision making process must essentially involve local communities,

⁶² Elizabeth Gachenga, *Op.Cit.*, p. 17

⁶³ *Ibid.*

⁶⁴ *Ibid.*

traditional leaders, and customary water use associations.⁶⁵ This helps to incorporate their expertise and perspectives in the formulation, implementation and evaluation of water management policies and practices.

5. Hybrid Governance Approaches: A hybrid governance model is one that combines together both formal and customary water governance systems.⁶⁶ The importance of this model is that it creates opportunities for joint decision making and shared responsibilities by promoting communication and collaboration between formal authorities and traditional water users.
6. Conflict Resolution Mechanisms: This requires the establishment of an effective dispute resolution mechanism which combines formal legal systems and customary dispute resolution practices.⁶⁷ The aim of this is to ensure a fair and culturally appropriate resolution of disputes and conflicts arising from the integration process.
7. Monitoring and Evaluation: Adopting regular monitoring and evaluation mechanisms vital for assessing the extent of effectiveness of the integration of customary water rules into the formal system.⁶⁸ This is important for identifying any gaps or challenges worth addressing and creates room for continuous improvement.

Conclusion

Incorporating customary (water) law into legal pluralism is a complex and nuanced process requiring a careful appraisal of

⁶⁵ Charles Sokile, Willy Mwaruvanda and Barbara Koppen, "Integrated Water Resource Management System in Tanzania: Interface between Formal and Informal Institutions", *International Workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa*, (2005): 1-13, <https://publications.iwmi.org/pdf/H038764.pdf>.

⁶⁶ Faustin Maganga, "Incorporating Customary Laws in Implementation of IWRM: Some insights from Rufiji River Basin, Tanzania", *Physics and Chemistry of Earth, Parts A/B/C* 28, Issues 20-27 (2003): 995-100, <https://doi.org/10.1016/j.pce.2003.08.011>.

⁶⁷ Elizabeth Gachenga, *Op.Cit.*, p. 17

⁶⁸ Charles Sokile, Willy Mwaruvanda and Barbara Koppen, *Op.Cit.*, p. 65

historical, social and legal factors. True that there are challenges and potential negative aspects to navigate through, there are also opportunities to promote justice, social cohesion and access to remedies. Incorporation, dual coexistence and integration are the three key strategies to legal pluralism that have shaped the legal systems of many countries. These approaches have had their own positive and negative impacts, promoting unity and diversity while simultaneously invoking questions about the relationship between different legal orders in a society.

According to the theory of institutional incongruence conflicts arise when there is misalignment between formal institutions (ex. laws, policies) and informal institutions (such as customary water rules). In the context of water resources management, customary water rules are often embedded in local traditions, culture, and historical relationships with water, hence they may significantly differ from the formal water law framework which is more based on values of commerce. An investigation of some customary water practices in Ethiopia (such as *Qene*, *Birkat*, and *Hareegot* systems) reveals that they give primacy to preservation of water resources, sustainability and long-term well-being of ecosystems and communities. Conversely, a closer look at the Ethiopian water resources management policy, proclamation and regulation reveals that they are predicated on the notions of water as a mere resource subject to commodification and private allocations. As a result of this value clash, customary water rules are not sufficiently recognized under the Ethiopian formal water governance regime. Based on the literature and reports analyzed, attempts to recognize customary water rules under the Ethiopian formal water governance so far appear to be either a superficial cross reference to or an embodiment of customary water rules under the formal system. This reduces the important issues down to normative question, instead of addressing the value clash between the two systems which is the real limitation to recognize customary water rules.

In order to address this value clash, there is growing recognition of the necessity to incorporate environmental and social considerations into the formal water governance framework of a

country. This entails a fundamental reconsideration of the very goals of the Ethiopian water resources management policy, proclamation and regulation. It is worth noting that strategies such as incorporating ecosystems based approaches, recognizing and integrating traditional knowledge, and promoting participatory decision-making process can assist in bridging the gaps between the commodification and preservation values. This, in turn, requires and largely depends on finding the right balance between economic development and environmental sustainability. It is therefore suggested to make a deep analysis about the differing, and often conflicting, values that lie behind the customary and formal water rules.

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