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Troubled judicial itineraries: the in-between out-of-court cases and the revitalization of customary laws in Eritrea

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I spent 2 years in Eritrea, from February 2005 until February 2007, and that was not too much for gathering data:

- Because of the language learning
- Because of the internal political situation that I cannot talk about here
- The general lack of data, even the basic one in anthropology and the total lack of data about customary law and implementation of national reforms during the last 40 years.

[DIAPO 1]

I began my fieldwork in 2005 looking how the eritrean government try to keep customary law working on dispute resolutions.
For that I choose 2 institutions people told me they are using customary law:

- The newly established Community Court
- The Family Arbitration which deals with divorce cases
- With the time I also came across mediation done at the family level.

Before going into the core of my presentation, let me comment the word Revitalization of my title: I have to specify that this word reflect the idea of the government regarding it's politics about the customary laws.
It's not a conceptual conclusion I have on the processes I describe.

Today, I will stand on some example of speeches about customary laws and practices. What I want first to discuss are the justifications which refer to customary laws.
I will come across 3 examples that look paradigmatic to me.

From these 3 examples I want to retrace the way I changed step by step the frame of my fieldwork during my stay in Eritrea.

Let me begin with the **Community Courts** because it is the first arena where I began to think how people think about customary laws.

[DIAPO 2]

The official state discourse related to Community Court is based on 2 justifications for its implementation:

The first one is **Access of justice** with its usual topics of...

- Minimizing the over-crowding of the courts...
- Easy access to court for everyone
- And economy of time and money

The second justification is based on the alleged **Problems occuring in the former judicial system**

[DIAPO 3]

Along this line, the declared role of the state is to:
Ensure the continuty of the culture of reconciliation...

What the state wants is to delegate a certain amount of judicial works out of it's courts
And framing this judicial work by registration in a local court.

The customs mentioned refer to a way of solving disputes but not to substantive norms at all.

When you ask further to the office of Community Court in Asmara on that topic they reply that: given the fact that 25% of the elected judge are illiterate and that none of them have knowledge of the Code (they even don't have a copy), they assume that the judges will refer to local norms.

Why nobody care about these norms and laws at this level?
I think it's a kind of compromise the government is ready to accept

Exept the fact that the social composition of Eritrea make difficult to speak about specific substantive norms at the national level, I think also that the fact of not speaking about specific norms is related to the nationalist ideology.
This discourse has considerably put pressure on people to hide publicly subnational identities.

> But customary Laws are presented by Elders first as a territory with clear borders. Where I was in the countryside, a book of law (Debter) was before the reference of laws for that area. This book of law was seized by EPLF and never returned back.

[DIAPO 4]

In the countryside, there is still a great social pressure to resolve disputes with elders but in the cities, driving disputants to a mediation process is the main work of the Community Court Judges:

After at least 2 or 3 failed attemps of mediation they will handle the case and give a decision on it. However, they decide which case must go to mediation first and which case should be handled by them through adjudication directly.

Fights and disputes among family or neighbors are always oriented toward mediation outside the court.

For that kind of cases, Judges refer to the customary laws in order to convince parties to follow a mediation process. The emphasis is put on:

- The wisdom of culture

- The compensation system which recreate friendship
- The national task to keep such customs in Eritrea
- They will drive disputants to try 2 times mediation because “harmony” has to be kept among the people.

Here, we can witness the way customary laws is recast as something peaceful and what in comparison, state’s procedure is: something which does not recreate necessarily harmony.

Here is a small example :
Since 5 months an old woman was claiming the money she spent in the hospital after a fight, she had receipts to show, but the Judges were always sending her to an other mediation round.
The Jugde said:

« even if it's very simple for us to order you this money from the other party we want you do it by the culture. » i.e. with mediators.

Basically, the case was freezed because the other party mediators don't go to the meeting and the community court knews this.

The Judge say to the old woman that mediation is not working because she doesn’t want to reduce her claims in order to bring back peace among her and the other.

An other judge continues:

« It could have be easy to give you a decision. But the responsability Community Court has is to take care of the people and to bring peace among them. The main reason is not accuser/accused and it's not also paying a compensation or not; it is taking all the bad things down and making peace. Since it is the main reason, you have to work to perform it. »

This is a quite coerictive way of using mediation. Moreover, the judge knows already how the case has to be finished. And for the old woman, going out of the court means going out of the state’s law. For nearly all the claimants, this is a big disappointment.

Playing on the 2 procedures they can use, the Judges introduce or recast a kind of division of the judicial work:

- Small penal cases, family matters and small land disputes are mediated
- Contract cases, debts, administrative claims are adjudicated directly without going first to mediation.

As agreements cannot be appealed but decision of the judge can be, only cases handled by judges can go further in state's courts for appeal.
And cases are defined along the line the judges demarcate the state from the culture :

Family and community problems have to be handled by culture or customs, contracts and economical claims are for the judges.

Here the community courts:

- Contribute to force communities to be responsible for types of cases
- Let the higher judges to follow the cases they want
- Customary laws is expelled from the courts as much as possible

Here I think, we see a kind of dispute shopping: community court works like a commutator for cases.

These kind of expectations and speeches Judges and Caseholders have, bring me to be more focused

on how people built their justifications based on the perception they have of customary law and state's regulations.

let's go now to a specific case... outside court frameworks... and apparently working on customay laws...

In november 2005, I was invited by a friend, who is an ex fighter and now a mediator in family disputes, to follow a meeting where a deal for **blood money payment** between 2 families was being negociated.
This case is about a death injury in a car accident in Asmara.
Both police and court advise the families to fix an amount of money for drying the blood because sometimes vendetta can happen.

[DIAPO 5]

I was witnessing the very end of the process when finally everything, apparently, was settled.
I cannot tell you all about the ceremony but both sides were saying that following the custom they did this and this and the were able to bring back peace among them.

Finally, when the plastic bag full of banknotes was in the hands of one of the offender's family, ready to be given, an old man from their side begin to say that for the sake of Saint Mary and if they wanted to be blessed by her for such a moment of friendship, the victim's family has to give her a share.
What a powerful declaration!
10'000 over 120'000 (700 of 8000 dollars) were deduced from the bag and finally 110 thousand was given to the victim's family.
Then, the guests get chairs and beer and all togheter get food served by women. Everything was looking very customary and religious.

But when the offender's family turned back to their village, a last negociation happen publicly within the victim's family:
An old man, the patrilateral uncle of the victim, ask how much from the plastic bag he will bring to the village (following the idea that blood money should be redistributed within the extended family).
At that time, a big switch happens in the talks.
The man who invited me, well known for his knowledge of the State Law, opposed him politely but firmly and was helped by others people present.
They reply to the old man they were always following the Civil Code of Eritrea and it was not blood money payment, so this kind of money should be given to the widow because the burden is on her.
No way to divide the amount of money because it's the law of Eritrea. Again, what a strong declaration, the old man quickly zip his mouth.

But which Code? And which article?
Payment of blood money is supported by the government beside the penal procedure in different ways. But no article state to whom the money must be given.

It could be a policy or more generally even, an understanding of governmental policies. But here, more importantly, it is a line of argument which is strong because it refers to the government. They were in fact following the National Law and that's a sufficient justification.

Some days later, I ask my friend about the Code and he answered me this :

« There is no article but that's not important what is important is that we follow what the government ask us to perform and help the widow. »

He told me further they answered the old man saying the amount of money is maintenance for the widow and this money will be for her, living now in the compound of her brother-in-law.

Here we are in a complete situation of combined norms:

1. The amount of money (120.000 nakfa) was fixed on a customary way. Religious invocation had also an effect.
2. The definition of the beneficiaries of blood money follow some idea of the government.
3. The residence of the widow follow the levirate practice and the money will be administrated by her brother-in-law.
4. The justification of my friend could also be supported by local norms working in their area (in the case where the father of the victim is deceased the major part of the money go to the brother's victim, if no brother finally to the patrilateral uncle)

The general principle used here to claim the money for the widow is in the definition of the family in the reformed Civil Code: nuclear family must replace the concept of extended family
The idea of maintenance is driven from the practice of negotiating divorce and by itself it's already a combined law.

Anyway, good point for the government here: advising the disputant to use customs, state's definition of family was also mobilized.
And good example on how different norms are mixed and mobilized. That's one example where while promoting a customary way of solving disputes, the state make it's way too without any direct influence and imposition.

Here at least, the state is as powerful as Saint Mary, it seems far away but it is still influential.
Or, we can say following Akhil Gupta: nothing is strictly in or outside the state.

In Community court as well as in informal negociations like this or in Family Arbitration, the state can rely on new actors like ex-fighters who are in the age to be mediators.
In the current political situation, these people are highly influential in the dispute resolution even if they are not playing their state role or if they are not consciously working for applying the state norms.
Few dares to oppose them strongly and this imply a perception of what the eritrean government is for the citizens and this has a strong impact on how norms are mobilized. Moreover, Civil Code, National Law, State and Government are often interchangeable in the speeches.

This example show again the importance to know who, when and why people refer to different kind of laws in their justification.

Moreover, if we want to understand how people are building justification we have not only to focus on the law but also to see for example:

- How people frame historical events like the liberation or the war
- How people frame their interests along their access of resources
- How people feel about social and political control.

Lets take one last example to see what are the limitations of refering the law in dispute processes

The institution of **Family Arbitration** is much more older than community court.
It was implemented by the Civil Code drafted by René David during the empire of Haile Sellassie in 1960.

Regarding Family Dispute, David chooses a very pragmatic solution.
His view for the family disputes is the following:

- They have to be kept outside the court, with family arbitrators, as it was the case before with customs.
- David want to keep the customs alive because he realized that it will be impossible to implement quickly the civil code all over Ethiopia.
- He assumed that year after year with educational programs the family arbitrators will come closer to the civil code.

[DIAPO 6]

So letting a room for customs here means opening a space for gradual changes.
I think, this reasoning is still present for the Community courts.

It's too early for me to say if this project worked or not regarding Family Arbitration
Obviously, there are big differences between cities and countryside.

Let's go just thru some points for divorce cases in the city:

Today, it's apparently difficult to claim that divorce negotiations are following significant customary principles
but does it mean that the arbitrators are refering the civil code?
This is not clear at all.

Here, there is a difference with Community Court because some mediators are professionals (they work as chairmen among the disputants and their mediators).
Most of the time, there are 2 elders from each side and the chairman.
In most cases, the chairman is chosen by the court to work as a middleman in the process.
These chairmen are retired judges or prosecutors.

But there is a great ambiguity in this institution: some laws exist but it's not mandatory to apply them if we follow what René David said.
Chairmen know the laws but they are in a position where it is difficult to mention law principles during the negotiation of divorce. They try to follow law principles without referring them.

Most of them told me that referring explicitly to the law bring problems in the negotiation.
Doing this, the risk is to be accused of corruption in front of the judge and they have to keep good relation with them in order to continue to be assigned to cases.

Being too many times replaced or having too many agreements reversed by review or appeal will certainly diminish the reputation of these chairmen and consequently they won't be asked to follow cases anymore. The judges are also very embarrassed by accusation of siding or corruption; they have nothing else to do more than change the chairman to be sure negociation will work out.
Legally, divorce can be only declared by these so-called Family Arbitrators

In one case of property's division during a divorce
the husband refused to divide a house stating that the building belongs to his sister, even if the house was registered under his name. An ownership document existed but he wanted to prove by

witnesses that it wasn't his property.
The chairman refused to hear witnesses because he knew that the judge would be surprised if he stood with the man against an official valid document.
The husband accused the chairman of being corrupted because he was refusing to hear his witnesses.
The chairman resign and the judge assign an other chairman.

Besides organizing a negotiation between caseholders, what the chairmen haven to do mainly is to convince the caseholders to bridge facts to laws; making these kind of translation in that context is highly difficult.

Here, telling the judge there is a lack of neutrality is a very good way to continue claiming something the chairman refused and to replace him.
Then if after, a new chairman succeeds in a different way to make the caseholder to agree on the division of property, the judge can hardly ask for a review.
What he can review is mostly what doesn't appear in the agreement (generally, maintenance for children, guardianship, etc.)

With that, it's not uncommon to see agreement based on what people think as customary:
Women are convinced to take money instead of dividing a property. As by custom they should receive already a kind of alimony, the money of the division of property is rarely reaching the 50% mentioned in the Civil Code because during the negotiation these two issues: division of property and alimony are mixed together in an overall amount of money.

Here are some **conclusions**:

[DIAPO 7]

What I have chosen to do is to assess 3 emblematic patterns regarding law in Eritrea, not to discuss about extended case. The first one, is the way customary law is redefined and domesticated in a state's system. The second one, is the way governmental policies enter customary practices. And the third one, is the way codified law principles can be undermined.

1. Customary Law discourse with it's morality of avoiding litigation is a way to divide responsibility between courts and communities, it creates an implicit distinction between state's law and culture and what should be handled by each realm.

2. My second example shows how people can fetch principles, how they can mobilize an idea of law among others and how they can succeed to to give an authoritative definition of what is happening.
It also shows that some new actors came into the game with a different legitimacy (like the freedom fighters).
I think it's very difficult for me at this stage to speak about these connexions between identity, state and all the perceptions one can have on the power of state agents, ex-fighters and the administration. Here I still lack distance from usual eritrean discourse on hegemonic power of the government and political control. With the strong nationalist ideology, it's difficult to take distance from the Eritrean view of legal centralism.
For sure there is something like what Nader calls controlling processes where the perceptions of what the state wants is playing a great role. But I will need to build a methodological framework to speak about this issue in an appropriate way.

3.The Family Arbitration shows indeterminacies that are partly acknowledged in the civil code itself but also in the very practical work of mediation for divorce. Again, it's too early for me to

bring a comprehensive analysis of how these indeterminacies are played, perceived and mitigated but it drives me to what I think will be the core of my PhD and what I think it has to be described for Eritrea in Legal Anthropology.

In my fieldwork I'didn't follow only disputes like the ones described today but, moreover, following disputes pushed me to observe how people are dealing with other bureaucracies. In a way, I was following what Lipsky called street-level bureaucracies where citizens are claiming rights, papers and stamps (for land allocation, certificates, permit to travel, court decision, demobilization and so on).
I could follow in many cases how citizens feel the process they are in and what kind of explicit and implict meaning they put on it's indeterminacies and uncertainties. This leads me more towards the question of what is the state (the real fragmented one as well as the percieved one) than what is the customary law.

My current idea for my PhD is not to discuss disputes only. What I am thinking to do is to focus on different kind of justifications and perceptions citizens have in bureaucratical processes in order to understand how they perceive their relation with the Eritrean state according different standards they have.
Law is one of them, even a big one.

Thank you

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