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**LEGAL PLURALISM IN LIGHT OF THE FEDERAL  
AND STATE CONSTITUTIONS OF ETHIOPIA:**  
*A Critical Appraisal*

**Advisor**

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**By**

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**June 2004**

**Addis Ababa**

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During my stay at the Law School of AAU I was stupefied and even terrified by what Paulo Frier, in pedagogy of the oppressed, calls “the petrified and lifeless” education that has been offered for almost a

generation in the best tradition of “bank-clerks”. I , for one, wish posterity a time when they and their children get the best education in the best tradition of the liberal arts. Hurrah for the humanist, revolutionary educators!

Alemayehu Fentaw

Addis Ababa

Surely, then, while collections of laws, and of constitutions also may be serviceable to those who can study them and judge what is good or bad and what enactments suit what circumstances, those who go through such collections without a practiced faculty will not have right judgment (unless it be spontaneous), though they may perhaps become intelligent in such matters.

Aristotle

There is hardly any kind of intellectual work which so much needs to be done, not only be experienced and exercised minds, but by minds trained to the task through long and laborious study as the business of making laws.

John Stuart Mill

## Introduction

As a word of apology, I had never made it a point to work on such a bafflingly unqualified topic as the present one. Originally, I had a very limited agenda and ambition: *State constitutionalism in conditions of pluralism: the case of Ethiopia*. My aim was to subject Ethiopian state constitutions to critical scrutiny; to appraise their failures and successes in light of the doctrine and practice of state constitutionalism elsewhere; for instance, to see whether our state constitutions, like American state constitutions, afford local peoples greater protection through their judiciary than the federal constitutions. Generally, my aim was to see how and to what extent Ethiopian state constitutions could enrich our legal system. My second point, very much related to the first, was to explore some of

the ways in which state constitutionalism is deemed helpful in promoting diversity in a multinational federal setting, particularly in Ethiopia. Nevertheless, as it turned out, because of a reformulation brought to bear upon this writer, the focal point has been left nothing but a marginal attention. Perhaps, as it is usually the case with fellow colleagues, I might have failed in the proposal brief to get my message across, or the vice versa. So much for the apology.

This thesis aims at analyzing the functioning and implementation of legal pluralism within the multinational federal setting of Ethiopia. Through the study of the institutional (constitutional) devolution or decentralization of legislative and adjudicatory authority that is taking place in the country, elements of legal pluralism will be identified and explained. Furthermore, through the study of my empirical findings in addition to others', coupled with established theory and generalizations, I shall attempt to explore the structure of the Ethiopian legal system. The relationship among the multiple layers of the country's legal structure is also examined, including the chief challenges posed by the fact of legal pluralism.

In the first part of Chapter 1, a history of the evolution of the center/periphery cleavage in Ethiopia will serve, at least, to contextualize, if not prognosticate, the federal solution introduced over the last ten years. This will be done, in large part, by telling two parallel, albeit in a way related, accounts of the country's political and legal history. At this point it is important to bear in mind that the center/periphery model has also been proposed as providing tools for analyzing the structure of Ethiopia's legal system. It is argued that the codification project lost legitimacy as long as the process of

drafting and enacting the six codes that are still in force was totally dominated by expatriate experts and compatriot elites. It is further contended that one way to think about Ethiopia's past law projects is as a historic process that has gone on for over forty years and has been continually challenged. If we understand the legal codification projects of the mid-20<sup>th</sup> century as a historical process rather than a one-shot experience, this is the story of the homogenization process. Yet, there is a parallel story of the survival of legal pluralism.

Moreover, it is maintained that the very homogenization process, spurred by the codification project, has to be seen as part of the long-sought goal of centralization pursued by Emperor Haile Sellasie, despite the latter's claim about modernization. In view of this, we can say that the post-Codes Ethiopia provides the setting for the contest between legal universalism and legal pluralism. Then legal universalism, first, found expression in the enactment of a uniform Civil Code (1960) while legal pluralism ultimately ended up in the recognition and legitimation of the varied ethnically and religiously based personal laws (1994). Second, it brought about the enactment of a uniform Criminal Code (1957), leaving little public space for the non-state actors such as customary, criminal law authorities, In this way, the politico-legal history is used to account for the tension between unity and diversity in contemporary Ethiopia.

In the second part of Chapter 1, we shall see, in a preliminary way, how and to what extent the Ethiopian federal formula attempts to strike a balance between unity and diversity, particularly legal diversity. In this regard, following the tack taken by Professor Andreas, in treating federalism as an aspect of non-ideal theory, I propose to

consider legal pluralism as an important federalist policy and course of action under unfavorable conditions. For such an approach helps us, at a theoretical level, avoid the Communitarian mistake to correlate legal pluralism with multiculturalism and the consequent need for unqualified recognition. Normatively, having adopted “the unfavorable condition” aspect of non-ideal theory we shall attempt to conceptualize, albeit in an all-too sketchy manner, federalism and delineate the bounds of pluralism along the line of political liberalism.

Chapter 2 examines the concept of legal pluralism in light of different theoretical perspectives on the nature of law. Its introductory section provides important definitions and classifications current in modern literature on legal pluralism, which are helpful in analyzing and understanding the structure of the Ethiopia legal system. In what way does the present Ethiopian constitutional order *de jure* establish a formal relationship between official and nonofficial laws? The next section sets the notion of legal pluralism in legal anthropological perspective and attempts to explore the nature of law, and hence, the plurality of rule structure. In the section that follows, attempts shall be made to appraise the success and failures, at a more profound level, of Anglo-American legal theory. In particular, we shall attempt to point out some of the descriptive failings of analytical positivism in conditions of pluralism. In the last two sections, the theoretical considerations will eventually wind up in a model for analyzing law in diverse communities, particularly Ethiopia.

The first section of Chapter 3 unravels, though in broad outline, the varied constitutive layers of the structure of the Ethiopia legal system. The second section explores the prevalent condition of legal



pluralism in the federal set-up on Ethiopia. The focus is on *structural pluralism*, particularly *state constitutionalism*. Next another aspect of legal pluralism is analyzed, *formal legal pluralism*, in two consecutive sections. First, the emergence, alongside its current frontiers, of formal legal pluralism is explored. Second, arguments are marshaled, on the basis of the empirical case selected for analysis-the abbo-gerreb of Wejerate and Raya Azebo, in support of the proposal to redraw the current boundaries of formal legal pluralism to create public space where the dominant non-state actors carry out their traditional functions of legislation and adjudication with respect to criminal matters.

Chapter 4 is the final and major part of the analysis and deals with the two chief challenges posed by the fact of legal pluralism: adequate protection of basic human rights and forum shopping (pertaining to the larger problem of conflict of laws). In the first section, human rights are explored theoretically as limits on pluralism. The bill of rights contained in the federal and state constitutions of Ethiopia as well as the international human rights covenants signed and ratified by the government of Ethiopia arguably must in real life terms serve as limits to whatever diversity that may legitimately exist in Ethiopia. At the heart of this paper lies the tension between legal universalism and legal pluralism as well as the resultant challenge to adequate protection of the human rights of Ethiopian citizens. In the second section, we shall attempt to portray, with a broad brush, the second chief challenge to the smooth operation of law posed by the fact of legal diversity, coupled with the existence of inter-state legal intercourse: forum shopping. In the concluding section, I shall sum up my arguments and findings and reflect on their implications.

# CHAPTER ONE

## 1. UNITY AND DIVERSITY IN CONTEMPORARY ETHIOPIA

### ***1.1 A Prognosis of the New Politico-Legal Order***

In the following section a succinct review and interpretation of some of the main developments in Ethiopia's recent history will pave the way for subsequent discussion of the Ethiopian model of federalism. I shall do this, in large part, by adopting a critical attitude in the exploration of literature on history and social anthropology. It has been pointed out that a glimpse at the past is useful. First, it throws significant light on the making of the present political order. Second, it offers a yardstick to measure the distinctive features of the new politics.<sup>1</sup>

"The roots of Ethiopia's new political order are easier to discern in recent history."<sup>2</sup> The political history of Ethiopia is generally analyzed through the evolution of one major cleavage: center/periphery. The center-periphery framework, as an alternative approach to political development, has one novelty: "its emphasis on the crucial role of elites".<sup>3</sup> According to Edward Shils's formulation, the center constitutes that part of society "in which authority is possessed,"<sup>4</sup> while the periphery is constituted by "the hinterland... over which authority is exercised."<sup>5</sup> Alternatively, center may also be defined in terms of "... the realm of values and beliefs espoused by the ruling authorities."<sup>6</sup> In the words of Arend Lijphart, "[t]he implications of this model for plural societies is that there must be political domination by a center."<sup>7</sup>

The center-periphery cleavage, manifesting itself in various forms, has affected the political landscape of Ethiopia with variable intensity since the ascension to the throne of Emperor Haile Sellassie. Mapping the history of this cleavage helps to identify what professor Andreas calls the “unfavorable conditions”<sup>8</sup> that prompted the emergence of federalism in Ethiopia.

During the imperial era, the primary source of conflict was the endless rivalry between the monarchy in the center and the regional nobility. With the overthrow of the monarchy in 1974, the nationalist liberation movements came to replace the nobility as regional forces. Following the demise of the Derg in 1991, the nationalist liberation movements conquered the center. This cleavage, in effect, has historically translated itself into two alternative models of state restructuring: centralist -authoritarian and federalist- democratic.

In what follows I shall attempt to throw light on the relations and tensions between center and periphery by taking a brief excursion back in time with a view to figuring out the “unfavorable conditions” with which the Ethiopian polity was burdened.

### **1.1.1 A Brief Account of Ethiopian Political History**

#### **1.1.1.1 Prelude**

Emperor Menelik II (r. 1889-1913), spurred on by a fierce ambition of empire-building, embarked on a campaign of expanding his rule from the central highland regions to the South, West and East of the country and established the current map of Ethiopia, a country

housing more than eighty different ethnic groups. Bahru Zewde writes that:

Menlik... pushed the frontier of the Ethiopian state to areas beyond the reach even of such renowned medieval empire-builders... as Amda Tseyon ... In the process, the Ethiopia of today was born, its shape consecrated by the boundary agreements made after the Battle of Adwa in 1896 with the adjoining colonial powers.<sup>9</sup>

Put differently, the nineteenth century witnessed the radical shift of the country from an “outpost of Semitic civilization” to what Carlo Conti-Rossini called “*un museo di popoli*” (a museum of peoples).<sup>10</sup>

Following his successful campaigns of expansion, if not conquest, to the periphery, Menelik sent governors from the center to administer the periphery. They were sent with contingents of their own so that they would install themselves in the vicinity for their respective administrations. Having been unsalaried, the administrators along with their soldiers were maintained by a system which in lieu of wages allotted each man the overlordship of certain number of tenants. In the words of Margery Perham, “the land was regarded ... as confiscated to the crown, a varying proportion being allotted to the conquered chief and people and the rest used to reward or maintain Amhara, and especially Shoa soldiers, officials and notables.”<sup>11</sup> As a result, the subject people were literally reduced to tenants and become victims of national oppression.

#### **1.1.1.2 Center And Periphery In Post-Liberation Ethiopia**

Haile Sellassie's rule (r.1930-1974) was marked by a ceaseless rivalry between the monarchy and the nobility. The promulgation of the first constitution in 1931 was seen as the first move towards settling the

center-periphery rivalry by affirming the absolute power of the crown. Andreas remarks that “[t]he political triumph of the center over the regions, initiated and legitimated by the constitution, was practically demonstrated when the Emperor prevailed over Abba Jiffar II of Jimma and Ras Hailu of Gojjam in 1932.”<sup>12</sup> Apart from a brief interlude during the Ethio-Italy war (1935-1941), Emperor Haile Sellassie resumed the historic task of centralizing the state which he had begun in the first half of the decade following his ascension to the throne. In connection with this, Bahru Zewde has the following to say:

The period after 1941 witnessed the apogee of absolutism. The tentative beginnings in this direction of the pre-1935 years matured into untrammelled autocracy. The power of the state reached a limit unprecedented in Ethiopian history.<sup>13</sup>

Donald Levine, in the preface to the second edition of *Greater Ethiopia* has also this to say:

Throughout Ethiopian history there have been tensions between the national center and diverse regional and ethnic groups. Yet the bureaucratic centralization of the postwar years was bound to exacerbate these tension.<sup>14</sup> (*Italics mine*)

Although the 1955 revised constitution granted basic freedoms to speak, to assemble and to vote, essentially it was, to use Bahru’s words, “a legal charter for the consolidation of absolutism.”<sup>15</sup> Article 5 expressly spells out the absolute powers of the emperor: “By virtue of His Imperial Blood, as well as by the anointing which he has received, the person of the Emperor is sacred, His dignity... inviolable and His power... indisputable.”<sup>16</sup> In the words of John Spencer, the 1955 constitution was “a screen behind which conservative positions could be entrenched.”<sup>17</sup> Furthermore, Amharic was made the official language, and what is worse, it alone was used in all the newly

established institutions. The Ethiopian Orthodox Church was accorded the official status of national religion.<sup>18</sup>

Now let us turn to a brief discussion of the resistance that Haile Sellassie's rule faced from the periphery. First, his autocratic rule was met with peasant rebellions, and latter with nationalist resistance in Eritrea, in Tigray, in the Oromo areas, in Sidamo, and in Ogaden. Andreas writes succinctly that:

Nationalist struggle was a reaction against the suppression of national and regional identity as well as the encroachment on land often by people from other nationalities. Peasant revolts were directed against the growing burdens of taxation and tenancy, highhandedly administered by officials appointed or backed by central government.<sup>19</sup>

It is very important at this juncture to note that there has been a shift of emphasis from an all inclusive national identity to a particularist national (ethnic) identity. In the words of Donald Levin "primordial assertions germinated during the last years of Haile Sellassie and sprouted under the Derg."<sup>20</sup>

In view of the foregoing, it should be clear that both Menelik and Haile Sellassie pursued three distinct but interrelated goals, namely, centralization, modernization and integration.<sup>21</sup> Although all of them had a lasting effect on the legal and political culture of the country, I would like to, by de-emphasizing modernization, draw attention to centralization and integration, and try to make a general remark about unity and diversity in contemporary Ethiopia.

In an effort to bring about national integration, emperors Menelik and Haile Sellassie embarked upon cultural and religious homogenization by way of Amharization and Orthodox Christianization. First, Menelik's

conquest of the southern areas resulted in the suppression of local customary law by Abyssinian (Amhara-Tigre) traditional laws and practices. The southern conquest had the same effect on the indigenous laws as colonialism in most the third world countries.<sup>22</sup> Next, the legal transplants of the 1950's and 1960's , on which I shall dwell later, had a detrimental effect on customary laws of the country in general. Paul H. Brietzke, commenting on the integration attempts, wrote that:

Strong disintegrative forces exist in most societies, but Ethiopia is nonintegrated even in comparison with most other Third World states; internal armed combat has been a constant feature ... Traditional integrative devices such as conquest, the charismatic authority of an emperor, and the progressive Amharization of an Ethiopian national culture and legal system... failed to secure a high degree of national unity- the ultimate prize of social integration.<sup>23</sup>

### **1.1.1.3 The 1974 Coup: The Rise Of Socialist Autocracy as The Centralizing Ideology**

As Lovise Aden, commenting on the tendency to describe the events of 1974 as a revolution, points out: "Although the events in 1974 are most commonly described as a revolution, implying fundamental changes to the society *the continuities from the imperial regime to the new military regime became more apparent as the years went by after the coup.*" <sup>24</sup>(Italics mine) Andreas is clear on this point:

The government that supplanted Haile Sellassie *perpetuated his quest for centralization* (italics mine). The overthrow of the monarchy offered an opportunity to reconsider Ethiopia's imperial status and to redress the plight of aggrieved cultural communities, who increasingly saw themselves as captives of the empire. Despite declarations of cultural equality and occasional gestures in the

direction of cultural autonomy, the successor regime showed little sign of political will to seize this opportunity. Instead, the commitment was to a unitary state in order to uphold what was called the "indivisibility of Ethiopian Unity".<sup>25</sup>

The military government's initial program, *Ityopia Tikdem* or Ethiopia First, was a telling example of, to use Andreas's words, "the priority accorded to an inclusive national identity".<sup>26</sup> The new regime did not only refuse to give recognition to Eritrean nationalism, but also outlawed any conduct challenging the state's integrity.<sup>27</sup> Derg's conception of national unity eventually degenerated into an obsessive dogma which brooked no cultural or ethnic diversity among the peoples of Ethiopia. In fine, Mengistu's linguistic and cultural oppression, actually, ended up stimulating regionalism and peripheral nationalism in Ethiopia.

Another program, which was meant as a socialist gesture, constitutes a range of radical policies.<sup>28</sup> The most important and comprehensive was probably the land reform whose significance lies not only in demolishing the economic foundation of feudalism, but also in removing a major cause of national discord in some parts of the country. Commenting on the land question alongside the nationality question, Pausewang writes:

"In 1974, the key to legitimacy of the new government of the Derg lay in solving the *land question*. The land reform of 1975 was clearly a response to a compelling political demand of necessity. In 1991 no new government could have hoped to win legitimacy without solving the *nationality issue*. A far reaching decentralization was, at that moment, the only chance to keep Ethiopia together. It would be denying realities to ignore this need."<sup>29</sup> (Italics in the original)



In the following years, the regime focused on the consolidation of its power. Meanwhile, urban opposition forces led by the Ethiopian Peoples Revolutionary Party (EPRP) gathered momentum and engaged the military government in urban guerrilla warfare. And the military's reaction to EPRP's challenge was fatal. The Red Terror was declared in 1977, where the Derg and its supporters hunted EPRP members, imprisoning 30,000 and killing over several thousand of them.<sup>30</sup>

From 1976 onward, demands for regional autonomy became significantly more intense. After 1976, Mengistu emerged as the unchallenged leader, "the continuities from the imperial era became more prevailing."<sup>32</sup> Like Haile Sellassie, Mengistu who was under the illusion that his regime was that of Ethiopian state, perpetuated the despotic centralization and deprived other regional opposition forces of legitimacy. Under his rule, the nationalist liberation movements replaced the role of the nobility as centrifugal forces. Despite the regime's appeal to a socialist ideology, the Derg was identified with "an Amhara suppresser"<sup>33</sup> by the nationalist liberation movements. Siegfried Pausewang, a close observer of the Ethiopian politico-legal order, has this to say:

Mengistu's regime increasingly reverted to the Pan-Ethiopian ideology of national development, abandoning the initial liberatory promise of the revolution to allow all ethnic groups their freedom of cultural development and ethnic self-determination. Instead, the ideology of 'nation building' with Amharic as the common language and Amhara as the leading nationality was becoming official policy again.<sup>34</sup>

A coalition of three ethnic insurgent groups, namely, the Eritrean People's Liberation Front (EPLF), Tigray peoples Liberation Front (TPLF),

and Oromo Liberation Front (OLF) overthrew the Derg and set up a civilian government in 1991. With the demise of the Derg in 1991, Ethiopia's borders returned to where it was nearly a century ago. In July 1991, the National conference on peace and reconciliation was held in Addis Ababa which was meant to lay foundations for a transitional period. In this conference, Eritrea, represented by EPLF, was an observer, as it became a de facto independent state.<sup>35</sup> Commenting on the 1991 Ethiopian revolution Christopher Clapham writes that:

The overthrow of the Mengistu government in May 1991 amounted to more than the collapse of a particular regime. It effectively marked the failure of a project, dating back to Menelik's accession in 1889 of creating a 'modern' and centralized Ethiopian state around a Shoan core. This project, which provided theme for Haile Sellasie's long reign, was tested to self-destruction by a revolutionary regime which provoked a level of resistance that eventually culminated in the appearance of Tigrean guerrillas on the streets of Addis Ababa – a dramatic reversal of the process which, over the previous century, had seen central armies moving out to incorporate and subdue the periphery.<sup>36</sup>

This assembly, as it appears from its composition, made it crystal-clear that state restructuring, henceforth in Ethiopia, will scrupulously follow ethnic lines. Donald Levine remarks that “[W]hen ... these ethnic insurgent groups overthrew the Derg it was not surprising that ethnic allegiances and identities became politicized in consequence”.<sup>37</sup>This was evident when the right to self-determination, including and up to secession made its way to the National Charter. Furthermore, Proclamation No. 1/1992 delimited the boundaries of the self-governing ethnically based regions. As Andreas notes : "The history and identity of the protagonists that emerged in the wake of the

victory over tyranny thus explains why ethnic federalism proved to be a decisive political instrument in Ethiopia's transition to democracy.<sup>138</sup>

In this manner the ideology of national self-determination and autonomism made its way into Ethiopian democratic political consciousness. In sum, the development of peripheral nationalism, regionalism and autonomism can be regarded as an unintended outcome of the extreme centralization pursued by Haile Sellassie and Mengistu. The rise of regional self-government during the Transitional Period was thus largely due to a desire to establish democratic institutions which would guarantee the right of national self-determination. Since then democratization has been inextricably linked to the protection of the sovereignty of Ethiopia's nations, nationalities and peoples. Such a generalization has its support in the works of several historiographers. A case in point is the following statement by Harold Marcus and Kevin Brown:

The Mengistu regime never understood that the insurgencies in Eritrea and Tigray were political in nature and required a political solution. The leadership in Addis Ababa saw Ethiopia in highly centralized terms and believed that any success by provincial movements would undermine the state's character. Though the struggle was couched invariably in Marxist terms of class and dialectic the fight was between conceptualizations of Ethiopia as a unitary nation or as a federal, even ethnically based, state.<sup>39</sup>

### **1.1.2 A Brief Note on Ethiopian Legal History**

Let us now turn to a brief discussion of Ethiopia's legal history, with an eye to unfolding the political salience of diversity, and the various ways in which diversity was subjected to uniformity by the law. This in

a way helps to make out a case for legal pluralism under Ethiopia's new constitutional order.

Adopting the periodization suggested by Getachew Assefa, Ethiopian legal history may be divided into two periods, taking the year 1957 as a watershed.<sup>40</sup> Until 1957, Ethiopia did not have a distinct formal legal system. Rather, it had, to use the words of Paul Brietzke, "numerous and overlapping systems of laws"<sup>41</sup> According to Brietzke, there are, on the one hand, "customary rules", which were used to regulate the day-to-day activities of individual members of the numerous ethnic groups. On the other hand, there are "traditional rules", which were used to regulate various relations within the Amhara-Tigre Empire and the Orthodox Church from the 14<sup>th</sup> onwards.<sup>42</sup> Therefore, during the pre 1957 period, except for the 1923 law of loans, the 1930 Nationality Act and the 1948 statute of limitations. Ethiopian normative orders were informal, unsystematized, undifferentiated and particularistic customary laws.<sup>43</sup> In this connection John H. Beckstrom writes that:

Until 1950s the "laws" of Ethiopia was a rather amorphous mix. There were some legislation in the form of statutes and decrees, primarily in the public law sphere, as well as a Penal code that had been promulgated in 1930. But taking Ethiopia as a geographic whole, *by far the major de facto source of rules governing social relations was found in the customs and traditions of the various tribal and ethnic and religious groupings.*<sup>44</sup> (Italics mine)

Since 1957, however, a comprehensive process of codification, which mainly drew upon European sources, took place in Ethiopia. A Penal Code (1957), Civil Code (1960), Commercial Code (1960), Maritime Code (1960), Criminal Procedure Code (1961), Civil Procedure (1965). This codification process was guided by the modernization ambition

of the Emperor. The Emperor, in the preface to the Civil Code, has pointed out:

The progress achieved by Ethiopia requires the modernization of the legal framework of our empire's social structure... in order to consolidate the progress already achieved and to facilitate further growth and development; precise and detailed rules must be laid down.<sup>45</sup>

Thus a comprehensive legal transplant was carried out throughout this period. In other words, the legal rules and principles found in the newly enacted codes had been taken in the main from European sources. Professor Rene David, the draftsman of the Civil Code, commenting on it writes that:

The development and modernization of Ethiopia necessitate the adoption of a "ready-made" system...while safeguarding certain traditional values to which she remains profoundly attached Ethiopia wishes to modify her structures completely, even to the way of life the people. They wish it to be a programme envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create.<sup>46</sup>

For David, therefore, once Ethiopia had opted for the path of legal modernization, it could not have settled for anything less than adopting a foreign legal system. He maintained the view that it would not have been practical to wait for a law to emerge from within the indigenous culture. This appears starker nowhere than in his statement that Ethiopia could not afford to wait 300 years to have a modern system of private law.<sup>47</sup> The adoption of a Civil Code based on the French model, would according to David, "assure as quick as possible a minimal security of social relations."<sup>48</sup> However, the rationale for these western imports cannot be modernization. It must lie elsewhere. Lawrence Friedman is helpful in unmasking the real motivation: "a single, uniform system of law should act as a tool of

unification; like a common language, a common law should help wield a single nation out of the jumble of classes or tribes. ... The new nation will have to be built from the center. The center will have to grow at the expense of provinces...and outlying culture...<sup>149</sup>

Julio Faundez points to a major flaw in David's thought as well as the ill-founded project of adopting a Civil Code based on the French model. Because of its centrality to my critique of the premises and orientations of the past law projects I wish to make throughout this paper, I set it out in its entirety.

David's remarks on Ethiopia's Civil Code could be seen simply as a legal consultant's rationalization of the assignment that he had undertaken. It could be argued that David misrepresents the choice confronting an external legal consultant; for in the statement quoted above he appears to suggest that the choice was between either waiting for a modern indigenous legal culture to emerge or introducing an imported Civil Code. An alternative course of action would have been to ensure that the new legislation was as far as possible consistent with local practices.<sup>50</sup>

Furthermore, Faundez points to an important problem raised by legal transplantation namely, the question of whether the role of an external legal adviser amounts to policy making.<sup>51</sup> This raises the problem of legitimacy of the enacted laws. Brietzke joins tune with us in saying that "the 1960 codes represent an almost complete break with the past. They also illustrate virtually all of the pitfalls that attend legal transplantations."<sup>52</sup> He goes on to say that:

Notwithstanding the eclectic approach claimed by the French draftsmen [R. David & Jean Escarra], the predominant flavor of the Ethiopian codes is French. The draftsmen displayed an interest in the internal logic of abstract concepts rather than their social effect, and, above an ethnocentrism.<sup>53</sup>

Although it was claimed that a very eclectic approach was deployed, I tend to dismiss as disingenuous such a claim. For the bulk of the legal system, procedures and structures introduced tended to impose western patterns upon a non-western polity. In so doing, much of value in the traditional /customary systems such as informal dispute resolution and group rights tended to be ignored. In short, despite claims that allowances were made for pockets of native jurisprudence, the legal system introduced by these codes worked to the detriment of the customary laws of the various ethnic groups in Ethiopia. According to John Beckstrom, in order for transplants to bring about the desired result, the economic and cultural gaps between the importing and exporting states should be the least.<sup>54</sup> He points out that: “[...] no greater distance has existed between the receiving country and the places of origin of the transplanted laws than in the Ethiopian experience.”<sup>55</sup>

In fact, as David explains, he actually tried to incorporate elements of customary laws into the code. Yet, in the words of Beckstrom, “explicit incorporation was ... minimal.”<sup>56</sup> Because of diversity of local customs and lack of systematic survey of the same in Ethiopia, “there was little for the drafts men to draw upon except fragmentary and largely impressionistic reports.”<sup>57</sup> Beckstrom makes a further point:

Some additional “Ethiopianization” of the codes occurred in the Codification Commission and Parliament before enactment, but this appears to have been as much a reflection of the personal preferences of the elite, urbanized individuals in those bodies as of the customary practices of the Ethiopian masses.<sup>58</sup> (Italics mine)

Following the tack taken by Getachew, I contend that the codification process failed to understand that the formal legal system only reaches

a small section of the population as in most developing countries. Thus, by focusing largely on the formal legal system the codification process went astray, as it ignored customary laws and other informal systems of law. The legitimacy crisis of the formal legal system was further deepened where the application of the codified laws, both in the civil and criminal jurisdiction, has actually been displaced by indigenous norms and practices. As Brietzke points out “Many centuries of legal history and social relations are not transformed into a *tabula rasa* by simply legislating custom out of existence”.<sup>59</sup> That is what Arthur Schiller meant by an Ethiopian “fantasy law”<sup>60</sup> embodied in Civil Code Article 3347(1): Unless otherwise expressly provided all rules whether written or customary previously in force, concerning matters provided for in this code shall be replaced by this code and are hereby repealed.<sup>61</sup>

One way to think about the 1960 Civil Code is as a process that has gone on for over 40 years and has been continually challenged. For much of that period, the tendency appeared to be in the direction of greater homogeneity. Since 1991, forces of difference appear to have strengthened the heterogeneity of personal law, culminating in adopting varied family laws by the regional states. Unity, if not better, homogeneity was served powerfully in law by the processes of codification. The homogenization of personal law was effected through an express repeal of the ethnically as well as religiously based personal laws. Besides the great wave of legal codification by the continental European drafter in the mid-twentieth century swept away the particularities of criminal law (Via the penal code of 1957), preserving neither religious nor customary penalties.



Getachew Assefa, an Ethiopian legal scholar, has recently suggested that the adoption of a federal system could give latitude for legal pluralism:

... The existence of the traditional mechanism of undertaking legal affairs in the various Ethiopian communities is one... aspect of the problem of legitimacy crisis of formal legal system. To do away with this problem, mechanisms of harmonizing the modern legal norms and the traditional ones must be designed. With the adoption of the federal form of government in Ethiopia, the system of allowing the play of traditional norms in various parts of the country (the states) could be easily done.<sup>62</sup>

Before leaving this discussion I want to draw attention to the theme of this paper: If we understand the codification projects as a historical process instead of a one-shot experience, this is the story of the homogenization process. Seen in this light, it forms part of the country's political history. Yet there is a parallel story of the survival of legal pluralism that will be unfolded in due time.

I shall elaborate on the entrenching of a federal system and the constitutional attempts at accommodating legal pluralism in Ethiopia in subsequent sections.

## ***1.2 Ethiopia: A Multinational Democratic Federation***

21<sup>st</sup> August, 1995 is the date of the official establishment of the Federal Democratic Republic of Ethiopia. Yet, the process of federalization in general and that of devolution of power in particular had started during the transitional period.

Article 1 spells out the nomenclature of the state unequivocally: the “constitution establishes a Federal and Democratic State Structure.”<sup>63</sup> Following the preamble, the Constitution vests ultimate sovereignty

“in the Nations, Nationalities and Peoples”<sup>64</sup> of Ethiopia. It further stipulates that “this constitution is an expression of their sovereignty.”<sup>65</sup> Article 39 reaffirms this notion of sovereignty by formulating the right to self-determination and secession as entitlements belonging to Ethiopia’s ethno-territorial groups.<sup>66</sup>

The self-determination clause of the new Ethiopian constitution largely draws upon the Transitional Charter’s article two, and asserts that “[e]very nation, nationality and people have an unconditional right to self-determination, up to and including the right to secession.”<sup>67</sup> The definition of “nations, nationalities and peoples” is basically the same as in Proclamation No 7/1992: “[...] a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and an identifiable, and predominantly contiguous territory.”<sup>68</sup> Of the criteria set forth, it is only language and territory which are relatively easy to ascertain, and it is therefore justifiable to say that the constituent units of the Ethiopian federation are predominantly defined on a linguistic and territorial basis.<sup>69</sup> Thus, preference is made to the term ethno-territorial groups.

Article 47 lists member states of the Federation. The fourteen autonomous regions defined in proclamation 7/92 are reduced to nine as a result of the merger of the southern regions into one in 1994.<sup>70</sup> Since the sovereignty rests with each nations, nationalities and peoples rather than with the member states of the federation, sub-article (a) stipulates that “Nations, Nationalities and peoples within

the states enumerated in sub-Article 1 of this article have the right to establish, at any time, their own states."<sup>71</sup>

According to the federal constitution, the federal government, with a bicameral parliament and a Prime Minister as head of government, is invested with the power of, among other things, national defense, foreign relations, monetary policies and foreign investment, and the formulation and execution of national standards on health, education, science and technology (Art. 51). The various regional states hold extensive powers. They all have equal powers and duties, which is indicative of the constitutionally symmetrical characteristic of Ethiopian federalism.<sup>72</sup> All regional states are entitled to draft and ratify their own constitutions, to enact legislations, to forum their own organs of government, to elect own officials, to such state education, to every taxes, to establish and administer state police force. Besides, as per article 52 (1), all residual powers are reserved to the states.<sup>73</sup>

Article 39(2) bestows three distinct but interrelated entitlements upon each ethno-territorial group (a) the right to speak, to write and to develop one's own language; (b) the right to express, to develop and to promote one's own culture; (c) and finally, the right to preserve its history. By this constitutional provision Framers realize and give effect to the multicultural nature of the Ethiopia polity. Sub-article 3 stipulates that each ethno-territorial group "has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation at State and Federal governments."<sup>74</sup> This right, I argue that, can be so broadly construed as to include the right

to develop and maintain one's own laws and institutions subject only to the human rights provisions of the federal constitution. Such a construction had been endorsed by the 1997 cultural policy document of Ethiopia. Which stated that the constitutionally guaranteed cultural right includes the right to be governed by one's personal laws: customary or religious. As per article 62(3), the House of Federation is the competent state organ to "decide on issues relating to ... self determination, including the right to secession."<sup>75</sup> Moreover, being the final arbiter of constitutionality, the House is expected to play a vital role in shaping the future of the country's jurisprudence.

Following Getachew Assefa, I argue that in view of the "unfavorable conditions" of the country's legal-political history, Articles 34(4) and 78(5) of the federal constitution can be seen as moves in the right direction.<sup>76</sup> According to Art.34 (4), legislations giving recognition to religious or customary marriages may be passed. Besides sub-article 5 of the same provides that in personal and family matters, disputes may be adjudicated in accordance with religious or customary laws if the disputants wish to do so. This obviously elevates informal legal pluralism to the level of what Gordon Woodman calls "State legal pluralism."<sup>77</sup> Moreover, the federal constitution, in addition to according recognition to religious and customary laws, confers extensive legislative powers on the State Council. Accordingly, some states have already enacted their own family laws.

### ***1.3 Federalism, Diversity And Its Bounds***

In the preceding sections, I attempted to explicate the present politico-legal order in terms of the country's history. Very roughly, we

have looked at the evolution of the center/periphery conflict, particularly how the peripheral cleavage, having assumed nationalist form, came to be more important than that of class. Now we shall turn to a discussion of federalism, a central feature of the new politico-legal order in Ethiopia, especially how and to what extent federative arrangements can accommodate diversity in a plural democratic federal setting. In so doing, I lay greater emphasis on cultural and legal pluralism.

### **1.3.1 Federalism: Methodological Considerations**

According to Stanford Encyclopedia of Philosophy, “Federalism is the theory or advocacy of federal political orders, where final authority is divided between sub-units and a center.”<sup>78</sup>In a federal state, “sovereignty is constitutionally split between at least two territorial levels so that units at each level have final authority and each act independently of the others in some area.”<sup>79</sup>

It is important to note that federalism is treated here as a normative concept. Yet such treatment is meant to enhance a proper appreciation of what federalism offers in view of such unfavorable conditions as were discussed earlier in this chapter. To oversimplify, federalism as a normative concept is not what we consider as a normative concept in its traditional sense, like liberalism or socialism, which provides answers to general questions of the good life, but more as a “programmatically orientation,”<sup>80</sup> or as an “institutional modality.”<sup>81</sup> Indeed, I subscribe to Andreas’s position that federalism should be treated “under the aspect of nonideal theory,”<sup>82</sup> which in the words of John Rawls, “deals with unfavorable conditions, that is with the conditions of peoples whose historical, social, and economic

circumstances make achieving a well-ordered regime, whether liberal or hierarchical, difficult, if not impossible.”<sup>83</sup> Andreas remarks that “Federalism is a public value tailored to conditions unfavorable to constitutional democracy that are not universal but rather peculiar to certain societies.”<sup>84</sup>

For him, therefore, a general justification of federalism grounded in “an invariant particularist value”<sup>85</sup> is utterly indefensible. Instead, federalism is justified to the extent that it comes to terms with the unfavorable conditions that prompted it in ways that enhance or, at least, do not compromise democratic ideals of universal reach”<sup>86</sup>

Once again, it is important to bear in mind that the previous account of the country's history was meant to serve this purpose, i.e. the purpose of explaining and even justifying the current political order. A discussion of federalism is indispensable because one way or another legal pluralism is intimately and inextricably linked to federalism, particularly multinational or asymmetric federalism. Federalism provides the setting for legal diversity, as legislative powers is divided between members of the federation and the central government. This is more so in a multi-national federal setting than in a mono-national one, inasmuch as the ethno-national groups will have their own indigenous customary laws which vary from group to group. Moreover, the claim for self-rule or self-determination carries with it legislative autonomy to a certain degree. As Joseph Thome Points out “[t]he growing phenomenon of legal pluralism throughout both the ‘developed’ and the underdeveloped’ world [was] demonstrated by the current manifestations of, and demands within, different nations of the world for ethnic and regional recognition in

both the law and in political organizations."<sup>87</sup> Legal pluralism, thus, appears to be an important federalist policy and practice. In keeping with the demands of nonideal theory, legal pluralism can be seen in a new light, i.e., as an essential federalist policy and practice, since nonideal theory "looks for policies and courses of action likely to be *effective* and politically *possible* as well as morally *permissible* for that purpose."<sup>88</sup> As we shall see, one way of improving the effectiveness of the formal legal system is embracing legal pluralism by adopting a flexible system of legislative federalism. Such a course of action will help incorporate at least the most dominant and influential customary law systems into the formal legal system; thereby increasing the latter's effectiveness. A major reason for the hitherto ineffectuality of the formal legal system is its inability to penetrate the "living laws of the peoples" (customary laws) of the country. Commenting on the importance of nonideal theory in relation to federalism, Andreas writes:

An application of the method of nonideal theory to federalism circumscribes the scope of an adequate interpretation of federalism. First, the perspective guides and shapes the selection of conditions unfavorable to democratic rule that call for federalist policies and practices. Second it requires us to show how the principles and structures of federalism promote democratic ideals by checking and exploiting unfavorable circumstances.<sup>89</sup>

### **1.3.2 Diversity in A multinational Federal Setting**

More often than not, many a student of federalism tends to take American Federalism for the standard case of federalism. However, the U.S. model of federalism is just one form of federalism. As Richard Simeon and Daniel-Patirck Conway have rightly observed, "[t]here is

no single model: federations differ along a great many dimensions, and each is in some sense *sui generis*”<sup>90</sup> Ferran Requejo has this to say:

If we remain within the orbit of American federalism, the answer to the question about the possibilities of regulating democratic citizenship in [multinational] societies is basically a negative one... It is fundamentally a 'territorial' model, and one that is governed by homogenizing interpretations of the democratic concept of 'popular sovereignty'- which avoids that basic question, unanswered in democratic theory, about who the people are, and who decides who they are- as well as ideas about equality of citizenship and equality between the federated units.<sup>91</sup>

Alfred Stepan remarks that “[d]espite the prestige of this U.S. model of federalism, it would seem to hold greater historical interest than contemporary attraction for other democracies”<sup>92</sup>. Therefore, this paper is limited to the multinational cases, as they are traversed by cultural pluralism, and hence, particularly useful for our purposes.

Alfred Stepan, in a seminal article, has identified two processes of federalization: ‘coming together’ and ‘holding together’.<sup>93</sup> The former refers to a situation where a formerly independent states form a union by ceding or pooling sovereign powers in certain jurisdictions for the sake of goods otherwise unattainable.<sup>94</sup> ‘Holding together’ federations arise from a previously unitary state to prevent a violent breaking apart of the multinational polity. Such federations, more often than not, give certain members of the federation particular jurisdictions.<sup>95</sup> In asymmetric federations, the constituent units have different bundles of authority; some may, for instance, have special rights regarding language or culture.<sup>96</sup> According to Alfred Stepan, asymmetric federations assign different linguistic, cultural and legal competences to different sub- units in order to hold the multinational



polity together. The crux of the issue, as Stepan sees it, is to accept federalism as a source of collective rights.<sup>97</sup> As he pointed it out. “[u]nder the symmetrical American model, many of the things that are most essential in a multinational context cannot be accomplished.”<sup>98</sup> He goes on to say that:

[...] while individual rights are universal, it is simply bad history to argue that in actual democracies all rights have been universal. Frequently, the struggle to reexamine the imperatives of political integration with the legitimate imperatives of cultural difference has led countries to award certain minorities group-specific rights such as those given to French speaking Quebec in Canada, to cultural councils in Belgium and to Muslim family courts in India.<sup>99</sup>

In India, religious rules determine family law with the effect that citizens belonging to different faiths are subject to different legal norms, and secular courts apply the law of the respective religious community. What defines the bounds of pluralism for Stepan? Obviously, human rights define the bounds of pluralism for Stepan as for Rawls. As Alfred Stepan notes “it is the obligation of the democratic state to ensure that no group-specific right violates individual or universal rights.”<sup>100</sup> For Rawls, human rights, being a distinct category of rights, give answer to the question of the limits of toleration. “They are part of a reasonable law of peoples,” he writes, “and specify limits on the domestic institutions required of all peoples by that law. In this sense, they specify the outer boundary of admissible domestic law of societies in good standing in a just society of peoples.”<sup>101</sup> On his view, human rights play the following roles: (1) the legitimacy as well as decency of a regime and its legal order hinges upon the fact that it honors the basic human rights of its citizens; (2) they also warrant justified and forceful intervention, in the

event of their violation, by other peoples; and also (3) they serve as a limit on whatever diversity that may exist among peoples.<sup>102</sup>

In a multinational federation, citizens of member states can be subject to different laws. Reginald Whitaker emphasises:

Modern federalism is an institutionalization of the formal limitation of the national majority will as the legitimate ground for legislation. Any functioning federal system denies by its very process that the national majority is the efficient expression of the sovereignty of the people. This defiantly has largely been resolved in federalist theory as students of federalism have accepted the legitimacy of divided sovereignty in a federation (Italics mine)<sup>103</sup>

It has been argued that asymmetrical federalism goes hand in hand with the practice of legal pluralism. Gagnon has the following to say:

Asymmetrical federalism follows the same path as federalism in the reconceptualization of citizen equality from the model of a unitary state in which all are treated identically under the law, but pursues the course a little further. It does so by accepting the belief that dissimilarity in jurisdiction as well as laws in appropriate for individual member states of a federation.<sup>104</sup> [Italics mine]

My aim in this paper is to appraise legal pluralism as an important federalist policy and practice under Ethiopia's new politico-legal order, subject to the human rights provisions of the 1994 Ethiopian Constitution. Also attempts shall be made to address the chief challenges posed by legal pluralism.

# Notes

## CHAPTER ONE

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# CHAPTER TWO

## THEORETICAL APPROACHES

### **2.1 What is Legal Pluralism?**

In what follows we shall attempt to canvass the concept of legal pluralism in a brief exploration of literature on theories of legal pluralism and legal anthropology. This theoretical part shall set the stage for the analysis, in a subsequent chapter, of the legal order of Ethiopia.

Legal pluralism is a “situation in which two or more legal systems coexist in the same social field.”<sup>1</sup> John Griffiths in a seminal work defines legal pluralism as “that state of affairs, for any social field in which behavior pursuant to more than one legal order occurs.”<sup>2</sup> Legal pluralism is, thus, presented as a fact or phenomenon, not a theory. It is, according to Griffiths, an inevitable corollary of social pluralism: “Legal pluralism is a concomitant of social pluralism; legal organization of society is congruent with its social organization.”<sup>3</sup> Social pluralism is, in the words of Kuper and Smith, “a condition in which members of a common society are internally distinguished by fundamental differences in their institutional practice...The prevalence of such systematic dissociation between the members of institutionally distinct collectivities within a single society constitute pluralism.”<sup>4</sup> On the other hand, legal pluralism has been considered as a universal phenomenon. “Law,” Griffiths writes, “is present in every ‘semi-autonomous social field’, and since every society contains many such fields, legal pluralism is a universal feature of social



organization.”<sup>5</sup> A situation of legal pluralism, therefore, “is one in which law and legal institutions are not at all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another.”<sup>6</sup>

Griffiths draws a distinction between the “social science” view of legal pluralism and the “juristic” view of legal pluralism.<sup>7</sup> The former refers to an empirical, anthropological existence of two or more normative orders.<sup>8</sup> Whereas “[a] legal system is pluralistic in the juristic sense,” writes Merry “when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system.”<sup>9</sup> The “social science” view relates to what is, more often than not, referred to as informal (a.k.a. empirical or anthropological) legal pluralism while the “juristic” view correlates with what is popularly known as formal legal pluralism. Formal legal pluralism “is a legal concept referring to the inclusion within the legal order of a principle of recognizing ‘other’ law. Legal pluralism in another (i.e., the anthropological or empirical) sense, however, covers any situation in which within the jurisdiction of a more encompassing entity (e.g., a state) a variety of differently organized systems of norms and patterns of enforcement effectively and legitimately control the behavior of specific parts of the population.”<sup>10</sup>

Another distinction current in literatures on legal pluralism is one between *de facto* and *de jure* legal pluralism, signifying the same thing as the formal/informal bifurcation.<sup>11</sup> Professor Gordon

Woodman also coined the terms “state legal pluralism” and “deep legal pluralism” to refer to formal and informal legal pluralism respectively.<sup>12</sup> Despite such variations in analytical categories, they all rest upon the same logic: whether or not non-state rules have been by way of legislative recognition incorporated into the formal legal system. Hence, in analyzing the Ethiopian legal order, in subsequent chapters, we shall avail ourselves of the formal/informal distinction. A further distinction, which turned out to be useful in the Ethiopian context, is that between horizontal and vertical legal pluralism.<sup>13</sup> The former refers to a situation in which each unofficial rule structure is on par with the official formal rule structure.<sup>14</sup>

Lawrence Friedman identified two forms of horizontal legal pluralism: cultural and structural pluralism.<sup>15</sup> Cultural pluralism arises in a context of what is, more often than not, called cultural federalism or non-territorial federalism.<sup>16</sup> An illustration is the religious family law systems in Israel and India. Nevertheless, structural pluralism is inexorably entwined with territorial federal arrangements or federalism proper.<sup>18</sup> For instance, all of the states of the American federation have legislative autonomy over commercial, family, criminal, torts, contracts and land law.<sup>19</sup> As we shall see, Ethiopia exhibits both informal and formal legal pluralism as well as cultural and structural legal pluralism.

## ***2.2 Legal Pluralism in Legal Anthropological Perspective***

The legal anthropologist sets out, in his academic odyssey of the concept of legal pluralism, with the discovery of indigenous laws of many kinds in colonial Africa and New Guinea.<sup>20</sup> The fact of legal pluralism was always considered as a salient feature of “primitive”

societies.<sup>21</sup> But the legal anthropologist discovered that this is also true of “modern” societies.<sup>22</sup> Paradoxically enough, the concept of legal pluralism was found to be applicable to advanced industrial states like Great Britain and the United States.<sup>23</sup> Two theoretical innovations in legal anthropology turn out to be very helpful in explaining legal pluralism.

Early in the twentieth century, Eugen Ehrlich discovered, in the Bukowina a province in the east of the Habsburg empire, that besides the central legislature in Vienna and its central arm of enforcement, there existed a customary law system that was much more important than the formal state legal system.<sup>24</sup> It evolved through a continuous practice, enjoyed a high degree of, individual and collective, acceptance, and hence, worked parallel to the state legal system or even supported it.<sup>25</sup> Ehrlich's discovery was severely criticized by Hans Kelsen who contended that the fact of a practice can never become a reason for legal validity and that customs become law only if they can be traced back to a *Grundnorm* (basic norm).<sup>26</sup> For a long time, Ehrlich's discovery was undermined by Kelsen's critique. It was Professor Leopold J. Pospisil, the Yale anthropologist, who rediscovered Ehrlich and used his theory for the description of law in modern societies. For Pospisil, modern societies, in addition to legislations(positive laws) have varied nonstate laws, which operate independently of the formal legal system.<sup>27</sup>

As we shall see in subsequent sections, the positivist paradigm of a self-contained and hierarchical legal system based on a rule of recognition needs to be understood as a partial perspective on law. Nevertheless, under the anthropological description, state law turned out to be very heterogeneous, incoherent, and comprising a bundle

of social norms of many kinds. Now let us turn to a brief discussion of early research in classic legal pluralism.

In the legal anthropological tradition definitions of what constitutes law and a legal system abound. Consequently, there is a good deal of definitions current in literature. Pospisil claims that "Any human society... does not possess a single consistent legal system but as many such systems as there are functioning subgroups."<sup>28</sup> By subgroups he means such segments or units of a society as lineage, ethnic or religious group. In his attempt at definition, Pospisil identifies three elements of law on the basis of studies made by Karl Llewellyn and E. Adamson Hoebel regarding the Cheyenne Indians of North America. These are: (1) *regularity* in present and future applicability of the rules; (2) *official authority*, which includes: (a) *obligations* pertaining to group members; (b) *supremacy* that the rule must prevail in case of conflict; (c) *system*, that the rule must form part of the system; and (d) *officialdom*, that the rule must be identified with the group as representing their order. Lastly (3) *sanction*, in the form of physical force.<sup>29</sup> According to Hoebel, "a social norm is legal if its neglect or infraction is regularly met in threat or in fact, by the application of physical force by an individual, or group possessing the socially recognized privilege of so acting."<sup>30</sup>

There are four factors whose presence, according to Pospisil, accounts for the existence of a legal system. These are: (1) adjudication or mediation; (2) sanctions; (3) obligations or Hoffedian rights, and (4) future applicability of the norms (or intention of universal applicability) established through settlement of disputes.<sup>31</sup> Moreover, Pospisil's conception of law seems to have been based on

the following presuppositions: (a) universality of law; (b) adequate knowledge of the existence as well as content of law on part of the members; (c) elimination of the problem of "dead rules" (d) dissolution of the conflict between legal principle and practice in the face of adjudication, and finally (5) dynamism in the law due to the identification of adjudication with the process of legal change.<sup>32</sup> Hence, on this view virtually every society has not just a legal system but a plurality of legal systems. Here almost all forms of social control are included in the definition of law. Pospisil hardly draws distinctions between legal rule and moral norm customary norm and legal rule or law making and adjudication.

The second innovation was made primarily by the legal anthropologist Sally Falk Moore. Hers is, in the words of Sally Merry, "the most enduring, generalizable, and widely-used conception of plural legal orders."<sup>33</sup> She discovered that there exist not only varied social actors who make valid norms and, hence a plurality of collective normative systems in a society, but that legal rules (in the positivist sense, i.e. positive laws) interact with other normative systems in a society.<sup>34</sup> However, early research in legal pluralism, such as the classic view considered earlier, in sharp contrast with Moore's view, saw the multiple normative systems as "parallel but autonomous".<sup>35</sup> Law, on Moore's account is not only internally pluralistic, but it is also externally dependent on other kinds of normative systems.<sup>36</sup> It is a "semi autonomous field"<sup>37</sup> besides other fields like religion and custom. The autonomous social field, according to Moore, is one that:

can generate rules and customs and symbols internally but that .... is also vulnerable to rules and

decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.<sup>38</sup>

Having de-emphasized legal autonomy and having concentrated on the embeddedness of law in other social fields, Sally Moore realized the existence of a multitude of interactions between these fields and their actors.<sup>39</sup> As a result, the positivist idea of the distinction between custom and legislation appeared to have been made unwarrantably. Law is then regarded as only one social field among others where actors negotiate about the validity of norms who at the same time are actors in other social fields with other normative systems.<sup>40</sup> In the course of these processes of negotiation the interests and intentions of these actors, as they are shaped by the various normative systems and as they shape these systems in turn, are continuously changing.<sup>41</sup> What is crucial in law is not its *statics* as a coherent system of “primary rules” and its *dynamics* controlled by “secondary rules”. Rather the continuous process of negotiating on legal validity on various levels and in different social fields different ways to make use of law, ways to circumvent it or to assimilate it to other normative orders: *Law as Process*.<sup>42</sup>

The diverse ethnic and religious groups in Africa, including Ethiopia order the multifarious activities of their individual members by rules from within (indigenous) and/or without (imposed) such groups.<sup>35</sup> Gordon Woodman emphasizes that::

Their rules may be appropriately termed “law”: there is no empirical distinction between them and state

laws other than the practice of certain institutions of the state to differentiate between them; ... To deny that the operative rules of conduct of semi-autonomous social fields other than the state are laws is to make an ideological, not a scientific assumption. Although usual in legal literature, it is analogous to the obfuscatory tendency to limit the term "society" to the community of a state.<sup>44</sup>

As we shall see, there is an apparent conflict between the anthropological accounts of law as a form of social control and the positivist model of law as a system of rules. Many an anthropologist considers law in the social and political context in which it exists, or the way people respond to rules or /and norms. In that sense, law is perceived as but one manifestation of relationships between individuals in a society, and whether a rule emanates from a "state" is considered less relevant. Positivists like Austin and Hart only consider official rules as law. Anthropologists such as Ehrlich and Pospisil look at law as rules but not necessarily official rules; they stress the customary basis of law. This brings us face to face with the issue of the challenge of legal theory by the fact of legal pluralism-- which shall await us until we make an all-too-sketchy formulation of positivism in subsequent sections. For the time being it suffices that we pay heed to contemporary disenchantment with positivism as a framework for the concept of law in diverse communities as well as legislation, to which in the words of Jeremy Waldron "legal positivism has traditionally given pride of place.... as a basis for law."<sup>45</sup>

Before leaving this discussion, it is important to notice Judith Shklar's critique of anthropology of law:

In any case, the habit of analytical jurisprudence of identifying any government with law and both with

enforcement, has been transferred to the study of primitive society in order to show that here, also, law exists, and that it exists just in the same way as in "matured legal systems." Nowhere has verbalism triumphed, more completely over the true task of description\_ that of qualifying and differentiating.<sup>46</sup>

### **2.3 The Place of Legal Pluralism in Legal Theory**

In the sections that follow, we shall deal with the main currents of Anglo-American legal thought with an eye to finding a place for the phenomenon of legal pluralism in such a rich philosophical tradition. In so doing, however, attention shall be focused upon the positivist paradigm, not undeservedly, being the ruling theory in the West. Particularly, Professor H.L.A. Hart's version of positivism shall be considered. Ground Zero for modern legal positivism is of course Hart's *The Concept of Law*, which has been regarded as the most authoritative statement of the positivist position in the Anglo-American tradition. In connection with it, it has been appropriately said that it "provides the foundations of contemporary legal philosophy in the English-speaking world and beyond."<sup>47</sup> Thus, we shall all too briefly engage in a critical examination of the main tenets of the positivist position. Against this background, we shall see whether modern legal theory, particularly legal positivism could avail us in the analysis of Ethiopia's legal order. Finally we shall conclude by making some general remarks in the form of a critique.

Nevertheless, before considering Hart's concept of law, it is appropriate to take stock, albeit in an all-too-sketchy manner, of the significance of legal theory, in a preliminary way, since spelling out explicitly what one can do with theories is of overriding importance. What is a legal theory? What purposes does it serve?



To begin with Roger Cotterrell defines legal theory as “systematic theoretical analysis of the nature of law, laws or legal institutions in general.”<sup>48</sup> According to Samuel Shuman, theories of law are particularly helpful in our attempts to understand the essence of a community's structure.<sup>49</sup> He claims that the desire for understanding in itself points to, first, the instrumentality of legal theory in understanding a group's legal structuring,<sup>50</sup> and, secondly, a yardstick for measuring the degree of acceptability of a certain legal theory.<sup>51</sup> “That is,” Shuman writes, “if what is sought is understanding of the social group in which there is interest, then that theory about the legal structuring of the group which best enables one to understand the group is most likely to be a ‘good theory’”<sup>52</sup> “Legal theory,” Cotterrell chimed in, “seeks specifically to develop theoretical understanding of the nature of law as a social phenomenon.”<sup>53</sup> Thus, for both of them, the overriding motivation of the legal theorist is understanding. For Shuman, however, legal theory must be descriptive rather than predictive.<sup>54</sup> He emphasizes:

. . . Utilization of a theory of law better enables one to understand the relevant aspects of the group structuring when the theory is not an attempt to predict or reduce but simply to describe. When a theory of law describes the group legal structuring it is engaging in a philosophical task.<sup>55</sup>

As subsequent sections would reveal, law has to be treated, following Judith Shklar's suggestion, as an integral part of what she calls “a social continuum,”<sup>56</sup> as opposed to the received view that law is a distinct entity existing out there, which has gained wide currency in modern legal theory. Treating law in the social context within which it is found helps to make out a case for legal pluralism, which of course

is, as has been seen, a corollary of social diversity. In her critique of contemporary legal theory, Shklar put forth the strongest defense for pluralism:

. . . Social diversity is the prevailing condition of modern nation-states and . . . it ought to be promoted. Pluralism is . . . a social actuality that no contemporary political theory [of which legal theory is a part] can ignore without losing its relevance, and also as something that any liberal should rejoice in and seek to promote, because it is in diversity alone that freedom can be realized.<sup>57</sup>

What is it that constitutes 'law' or 'legal system'? Can we mark the law from non-law as well as the legal system from other social systems? The problem of defining law looms larger in Anglo-American legal thinking. The two dominating modern legal theories have been those of the Oxford positivist Professor H.L.A. Hart and the Harvard natural lawyer Professor Lon Fuller. The former, regarding law as a union of primary and secondary rules, has tended to downplay customary law and scarcely to admit its existence, in a modern legal system. The latter, being heavily ill-disposed towards the positivist law/morality dichotomy, would seem to have tended, like positivists, to slight customary law. Nevertheless, as his pronouncement, "law is the enterprise of subjecting human conduct to the governance of rules,"<sup>58</sup> reveals, Fuller comes closest to the view that 'law' need not be bound up with the state. Fuller's notion of law allows for non-state rule systems governing the various social institutions such as universities, corporations, and social groups.<sup>59</sup> Having accommodated non-state actors and non-state laws, Lon Fuller's "internal morality" provides a yardstick by which legality of the varied systems of rules can be measured.<sup>60</sup> As Roger Cotterrell notes, "Fuller refuses to see 'lawyers' law' as uniquely distinctive and is happy to

apply the term 'law' to the rule systems and processes of social groups and social institutions of many kinds."<sup>61</sup> Further discussion of natural law should not detain us, since here we are concerned only to confront positivist analytical jurisprudence with social realities such as diversity and to demonstrate its descriptive inadequacy in failing to take account of them.

### **2.3.1 Outline of the Legal Positivist Paradigm**

#### **2.3.1.1 The Structure of a Legal System**

According to the jurisprudential theory of Hart, a legal system's structure is composed of two distinct sets of rules: (1) Primary rules of obligation; (2) and secondary rules. In primitive societies, social cohesion is maintained only through what Hart calls "primary rules," which are essentially duty-imposing rules like rules restraining violence, protecting property, or punishing decent.<sup>62</sup> On Hart's account, a society comes to have a legal system only when its primary rules of obligation are joined by what Hart calls "secondary rules" in their operation.<sup>63</sup> On his view nothing short of the introduction of secondary rules could hope to effect transition from a pre-legal to a legal order. To quote Hart's own words – "The introduction of the remedy for each defect might in itself be considered a step from the pre-legal into the legal world; . . . certainly all three remedies together are enough to convert the regime of primary rules into what is indubitably a legal system."<sup>64</sup>

The secondary rules consist of three distinct rules, namely, *rules of change*; *rules of adjudication*; and *rule of recognition*, which have no counterpart in regimes of unofficial rules such as customary law systems.<sup>65</sup> These three binds of rules, which go by the name

secondary rules, serve on Hart's account as remedies for the three major defects of a regime of primary rules alone.<sup>66</sup> Consequently, the *rules of change* correlate with the *static* quality of a regime of primary rules.<sup>67</sup> They purport to provide the means by which new rules may be made or existing rules may be changed. Secondly, *rules of adjudication* remedy the operational *inefficiency* of a regime of primary rules.<sup>68</sup> They denominate bodies to perform authoritative adjudication according to certain rules. These rules specifically pertain to jurisdiction of and procedure to be followed by courts.<sup>69</sup> Finally, a rule of recognition is the simplest remedy for the certainty of the regime of primary rules.<sup>70</sup> It provides reference to a source, an official or a text, which is deemed an authoritative source of rules. The rule of recognition keeps track of those rules of the legal system which are valid and still in force.

Hart's version of positivism "has given pride of place to legislation... as a basis for law."<sup>71</sup> He maintains the view that law is defined positively in terms of its "pedigree," or institutional source, i.e. legislatures. Thus, for him, law is intimately and inextricably linked with the state. For a legal system to exist, according to Hart, two irreducible, minimum conditions must be fulfilled.<sup>72</sup> First, the rule of recognition together with the other secondary rules should be accepted as binding by state officials from an internal point of view.<sup>73</sup> Second, citizens should regularly obey the primary rules of obligation.<sup>74</sup> They need not obey these rules from an internal viewpoint. Hence, for a legal system to exist there must be general obedience to the primary rules, coupled with an acceptance by officials of the secondary rules from an internal view point.<sup>75</sup> At the heart of Hart's legal system of rules is the rule of recognition, as a master test, validating all other legal rules.

The concept of the rule of recognition represents the unity of a legal system. Thus all the rules of the legal system derive their validity from the rule of recognition. What emerges from this is the idea of a self-contained system of rules.

Of course, Hart concedes that some customary law systems have organs for change, adjudication, and centrally organized system of sanctions. Regarding a rule of recognition, it is not justified to deny that unwritten rules can be discerned.<sup>76</sup> It may as well be important to reduce all unwritten rules to writing which on his account is the first step in the transition from the pre-legal to a legal order.<sup>77</sup> What is decisive is that such a text has to be authoritative.<sup>78</sup> Thus, most customary law systems, if not all, do not qualify as legal systems.

What emerges from the above analysis is that a legal positivist such as Hart has difficulty finding a legal system in societies where the prevailing rules are unofficial rules like religious and customary laws. For only official rules, for a Hartian, constitute the structure of the legal system. Legal positivism flies in the face of the fact of legal pluralism.

### **2.3.1.2 Legal Positivism in the Analysis of the Ethiopian Legal System**

Many a law teacher in Ethiopia, as in the West, tends to analyze law solely as a system of formal rules decoupled from social reality. This approach is largely irrelevant to our purposes. Recalling that quick definitions are hard to come by, and should we reach one, it becomes an aid to, rather than a substitute for analysis, a working definition of law, which the present writer endorses would be such as those given by legal anthropologists at the beginning of this Chapter. Such a definition lays greater emphasis on the law in action and its

key role in maintaining social cohesion. It also helps us circumvent some of the vexing questions concerning the nature of customary laws such as those encountered in Anglo–American normative legal theory.

As Van Doren notes, “Where, as in Ethiopia, officials who make adjudicatory decisions may not justify decisions or where the sources officials refer to in justifying decisions may bear little relationship to actual norms used in making decisions, the Hartian system would be of very limited utility.”<sup>79</sup> A formal legal system, as we shall see, has been introduced into Ethiopia in the middle of the twentieth century. It has been imposed upon the informal indigenous normative systems such as customary law systems. Moreover, the formal state legal system has encountered serious problems of penetration. Consequently the diverse customary law systems continue to play a central role in the legal life of the peoples of Ethiopia. Hence there exists a hiatus between the law in action and the law in codes. This chasm poses an important question for a Hartian positivist, namely, in Van Doren's formulation, “how much of a gap can there be, consistent with the presence of a legal system?”<sup>80</sup>

At the heart of Hart's analytical jurisprudence lies the distinction between law on the one hand and custom and morality on the other. Thus, the prevailing norms of a society should originate from the official rule structure. Given that the formal legal system in Ethiopia has difficulty penetrating the “living customary laws of the people,”<sup>81</sup> the prevailing norms are far – removed from the official rule structure. Moreover, as has been seen earlier, one minimum condition for a legal system to exist on Hart's account is that officials

should accept the rule of recognition together with the other secondary rules from an internal point of view. Yet, on no occasion did Ethiopian officials tend to view at least the Western – based norms from an internal viewpoint.<sup>82</sup> Professor John Van Doren takes this to its logical conclusion:

There are comprehensive codes and there have been constitutions referred to in some circumstances as an official justification for decisions, but ignored emanating from the state is published, cannot be the source for the Ethiopian rule of recognition because laws set out these are not necessarily operative norms. A modern positivist would have difficulty finding a legal system in Ethiopia.<sup>83</sup>

Having rightly taken stock of the several rule systems that coexist with one another in Ethiopia, Brietzke also points out:

Analytical jurisprudence... makes theoretical assumptions which are wholly unrealistic if applied in Ethiopia. A fully coherent system in which each part relates consistently to all other parts simply does not exist; there are at least four levels of Ethiopian law, and they possess little internal coherence.<sup>84</sup>

Nevertheless, of late, arguably Ethiopia would seem to have succeeded in developing an all-encompassing rule of recognition. In analyzing the present legal order in Ethiopia, the Federal Constitution can avail us as the rule of recognition. This constitution, marking a complete break with the past, recognizes and legitimizes nonstate systems of rules such as religious and customary laws. Before 1994, the formal state legal system has simply been superseded and rendered inoperative by the “living customary laws” of the various ethnic groups of the country.<sup>85</sup> Moreover, during the Derg’s regime, at stake was legal obligation, since what accounts for obedience to rules issued by government was manipulation of mass terror.<sup>86</sup>

Early attempts at a formal legal system did not succeed due to the latter's inability to penetrate the deep-ingrained indigenous legal culture of Ethiopian peripheries, which constitute about 85% of the whole population.<sup>87</sup> In present –day Ethiopia, the Federal Constitution, unlike its precursors, recognize customary and religious laws with respect to personal status and family matters nonetheless.<sup>88</sup>

To the extent these rules can be traced to the constitution, though largely unwritten, they count as part of the present Ethiopian legal system as laid down by this very constitution. It would seem that nothing could avail us regarding customary criminal law, as distinct from customary personal laws. So far these rules have been operating in an anthropological sense, and, hence, do not qualify as law. However, arguably, as long as a general legal pluralistic framework has been laid down by the 1994 constitution as well as the nine federating regions has been provided with legislative powers with regard to offences that are not covered by the Federal Penal Law, customary criminal laws can be incorporated into the states legal system.<sup>89</sup> There is scope for promoting these laws to the level of formal legal pluralism. It only remains to be seen and the pros and cons of such a legislative recognition of customary penal laws shall be considered in Chapter 3.

Nevertheless, a united, hierarchically organized, and coherent legal system – by and large a progeny of modern positivism – cannot be realized in Ethiopia. In this regard, a comment by Professor Paul Brietzke is worth nothing:

If Ethiopian legal integration, certainty, and predictability could someday be secured along the



lines presupposed by analytical jurisprudence, the resulting law would be “no more human than a molecular, structure,” with “no nationality, no mind and no ends proper to its nature.”<sup>90</sup>

### **2.3.2 The Concept of Law: Revisited**

As Tie Warwick notes, “The image of law must change from an institution that finds the ‘right answer’ to disputes to one that negotiates patterns of consensus and dissensus.”<sup>91</sup> From a legal pluralist viewpoint, the insistence on the monistic model of rules with a hierarchy, a clear distinction between legal rules and social rules of many kinds, and with a clear distinction between primary and secondary rules with its logical consequence of a clear allocation of the legislative authority is nothing more than the ideology of professional lawyers. Roger Cotterrell is clear on this point:

[N]ormative legal theory, assuming itself to be not a specific, partial perspective or limited range of perspectives on law but a somehow complete perspective, turns into professional ideology. It purports to explain the way law is, rather than the way lawyers may think of it. It is ideological precisely because it does not even notice that its own perspective is inevitably limited and incomplete. It understands its limited view as a total one; the royal route to legal understanding.<sup>92</sup>

Contemporary legal theory has been accused of “legalism” which, according to Judith Shklar, is “a political ideology,” which “finds its strongest adherents in a professional group, the lawyers.”<sup>93</sup> She describes the notions of the rule of law, freedom under law, security of expectations, and vested interests as ideological manifestations of what she calls “legalism.”<sup>94</sup> Positivism’s most important failing has been its inability to explain the processes of adjudication and the making and unmaking of rules by nonstate actors. In dismissing positivism as a framework for a pluralist conception of law, I

unreservedly endorse the postmodern critique that “positivist law is inexorably entwined with particularist viewpoints that have repeatedly repudiated, repressed, and silenced the socially marginalized.”<sup>95</sup> Thus, legal positivism has been found to be ideological, one dimensional, and ethnocentric. <sup>96</sup> This theme of ideology recurs when professor Shklar writes:

In describing the legal institutions of the Tobriand Islanders [Malinowski] noted that in spite of the lack of courts of law and of any comparable machinery of enforcement, there did exist a sense of obligation and of duty to honor specific claims which amounted to an operative law. Whatever the merits of this view from the standpoint of anthropology may be, it does point to the need for flexibility in designating law from related phenomena, especially among people whose social life does not resemble that of modern western Europe and America.<sup>97</sup> [Emphasis supplied]

The challenge of legal theory by legal pluralism, thus, consists in nothing else than in lifting the threshold for legal theory to reconstruct its concepts of law. To frame a new conception of law, we need to abandon the idea of a municipal legal system with one legitimate legislator and one coherent rules structure. This approach will do justice to multicultural societies such as Ethiopia. A jurisprudence specially tailored to the demands of diverse communities and the problems of legal pluralism has to be *formulated* along these lines. “[A]s discovery begins with the awareness of anomaly,”<sup>98</sup> the allegedly universal legal theories, which all too often succumb into particularism, have to be reconsidered in light of the facts on the ground like legal pluralism. It logically entails, as Anne Hellum notes, “a deconstruction of the concept of a unified system of law. Sources of various practices on different levels are not ordered and harmonized within a methodological hierarchy, as is usually the case in Western Jurisprudence. These sources are described in their own

right as a process of different practices in interplay on different levels."<sup>99</sup>

The great upshot of this all, at a more profound theoretical level, is that, given legal monism's failings in conceptualizing law in multicultural societies, a legal pluralist paradigm should be adopted. In such a context, legal pluralism is needed not just in an empirical, anthropological sense, but in a normative, theoretical sense. The novelty of this approach is that it provides a framework for a multicultural conception of law. Nevertheless, it is not that the proposed approach is without limits. Anticipated objections include questions as to whether just adjudication of legal conflicts is possible as well as legislative legitimacy under a regime of legal pluralism. Another advantage of the proposed approach can be seen in terms of its potential for improving the descriptive limitations inherent in Anglo-American legal theory, in general, and positivism in particular.

Before leaving this discussion, I would like to quote from Gordon Woodman at great length, in view of its relevance to the issue at stake:

The issues discussed here suggest at a more profound levels of theory grounds for questioning the ideology of the unity of law, embedded in every modern constitution. It is doubtful whether any group of human beings may be said to order and their social relations according to a single system of law. If the paradigm for the study of constitutional orders of one legal system per nation is replaced with a legally pluralist paradigm, new questions will arise and old questions be reformulated. New questions of legitimacy will, e.g., be raised, for it will be such that state constitutions can neither be constitutive of nor provide the essential legitimacy for other legal orders. There will disappear any tendency to regard the developing o constitutional orders either as writing on

a blank legal state or as nothing more than the development of state law.<sup>100</sup>

As we shall see, the new Ethiopian Constitution, unlike previous constitutions, has done away with the notorious tradition of “writing on a blank legal state” by recognizing customary laws of the country. Woodman's observation fits nicely to Ethiopia's recent past, when legislative attempts had been made to abolish non-state laws. The Ethiopian legislature, in the post-codes period, made attempts to write on a legal *tabula rasa*, albeit to no avail.

## NOTES

### CHAPTER TWO

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- Journal of Comparative Law (Summer 2003) pp 510-529; see also Van Doren, supra at 79, pp 23-28
86. Brietzke, Supra at 84, pp 179-225; *"The Operative theory of Ethiopian Public Law, like that of many other states, is Austinian both before and after the revolution, law is the command of the sovereign sometimes described as "order backed by threats" or "the gunman situation writ large." p. 84*
  87. Donovan et al, Supra note 85, at 511
  88. Proclamation No 1/95, A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta 1<sup>st</sup>. year No. 1 Art 34(5)
  89. Ibid, Art. 52 (2) (b) Cum Art 55(5); see also Donovan et al, supra at 85, pp 539 -549.
  90. Brietzke, supra at 84, 56; see Van Doren, supra at 79, pp 25-28
  91. Tie Warwick, Legal Pluralism: Toward A Multicultural Conception of Law(Brookfield,VT: Ashgate Publishing Co.,1999),Reviewed by Nancy V. Baker, Department of Government, New Mexico State University,<http://w.w.w.....>
  92. Cotterrell, supra at 48, 229-230
  93. Shklar, supra at 46, 5
  94. Ibid, 20
  95. Cited in Baker, supra note 91,
  96. Van Doren, Supra note 79,at 25
  97. Shklar, supra at 46, 85
  98. Brietzke, supra at 84, 54
  99. Anne Hellum, Gender and Legal Change is Zimbabwe", Law and Crisis in the Third World, Sammy Adelman et al (eds.) (London: Hans Zell Publishers, 1993), 245
  100. Gordon R. Woodman, 'Constitutions in a World of Powerful Semi-autonomous Social Fields', in Third World Legal Studies (1989), 20.

## CHAPTER THREE

### LEGAL PLURALISM IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

My aim in this chapter is two-fold. First I shall attempt to unravel the complex structure of the Ethiopian legal system and describe the various ways in which its constitutive layers, in the form of competing normative orders, interact among themselves. Next, in subsequent sections, I shall examine the present constitutional order of the country with a view to unfolding the relation between the politico-legal system and legal pluralism with all its legal ramifications. This I shall do, in part, by an appraisal of the federal and state constitutions, with a view to addressing a question thrown up by the continued existence of the phenomenon of legal pluralism, namely in what ways has it been the practice in the past, and how far is it feasible in the present for Ethiopian constitutions to take account of non-state laws. In chapter 1, the codification processes of the mid-twentieth century have been conceptualized as a historical process- rather than a specific outcome- a process in which legal uniformity and legal pluralism jockey for dominance, though not for the whole field.

#### ***3.1 Structure of the Ethiopian Legal System: A View from Within***

Following Professors John Van Doren and Paul Brietzke, I maintain that the legal structure in present-day Ethiopian consist of, very roughly, six distinct sources. The current structure of the legal system can be compared to "layers of rock from different epochs,"<sup>1</sup> after Van Doren in a more picturesque manner. Accordingly, to take note of these

layers is of paramount importance, because in the words of Ugo Mattei "any legal observation is void of any analytic value unless the researcher is conscious of a layer of the legal system's structure in which he is conducting his studies," where he engages in the study of comparative interaction among different layer of the legal system."<sup>2</sup> As we shall see shortly, the Ethiopian polity or, if not better, the diverse ethno-national and religious groups in Ethiopia have always been ordering and structuring the various activities of their individual members as well as the relations among themselves with the help of their numerous and overlapping systems of laws. As Gordon Woodman points out: "[t]he continued existence of society requires and ordering of social relationships. In any specific historical circumstances, various systems of law may be available for this purpose."<sup>3</sup>

Brietzke undertook to identify the constitutive layers of the legal structure until the Derg's period-where his study left off. He discovered pluralism in Ethiopia where, in his own words "diverse customary laws, traditional state-sanctioned laws, Western imports, and recent socialist influenced proclamations continue to coexist."<sup>4</sup> Van Doren has come up with an extended listing and I, except for adding two more items to such a listing, have largely relied on him. Thus, unlike many jurists and anthropologists, who used to make a simple "modern" /"customary" laws dichotomy in the Third World, the following six sources of law form the six distinct layers of the legal systems structures these are: (1) Customary laws; (2) Islamic law; (3) traditional state-sanctioned laws; (4) Western imports; (5) socialist influenced proclamations of the Derg, (6) post 1991 proclamations mainly the new Ethiopian constitutions, both federal and state, and

numerous legislations issued in their wake. The following layers of the legal structure can easily be discerned and they account for the possibility of legal life in Ethiopia at least at present. The present Ethiopia legal system is plural, since the official, formal law is significantly, different from the living laws.

### **A. Customary Laws**

In Ethiopia, where a number of ethnic groups live, there are numerous ethnically-based law systems. Acknowledging this feature of social diversity prevalent in Ethiopia, Conti-Rossini described Ethiopia as "the museum of peoples."<sup>5</sup> The customary regimes of the various ethnic groups, consisting of unwritten norms, have been in place for long to regulate the daily lives of the members these groups. Most, if not all, of these groups have their own oral customs which vary from group to group. According to professor Dolores Donovan and Getachew Assefa, there are more than sixty customary law systems in Ethiopia.<sup>6</sup> They point out that the life style of each ethnic group depends on the geography of the lands which they inhabit<sup>7</sup>. Accordingly, inhabitants of the high mountain plateaus of Ethiopia in the North, West, South-West, South-central and North-west have been settled agriculturalists engaged in the activities of farming and animal herding for ages.<sup>8</sup> "Customary law," Donovan and Getachew write, Still, to a large extent, governs the lives of these settled farmers, especially those living in the far corners of the highland states. They are predominantly the Amharas, the Tigreans, the majority of Oromos, and many others such as the Gurage, Sidama, Kembata, and Wolayita, living in the Southern Nations, Nationalities and Peoples Regional State, one of the federating units of Ethiopia."<sup>9</sup> The nomadic pastoralists, such as the Afar, the Somalis, some part of Oromo, Anguak, Nuer, in the Eastern, Western, South-Western and North-Western peripheries of

Ethiopia, are generally "only loosely linked to the Ethiopian state and their lives are governed by their traditional systems of customary law."<sup>10</sup> In contrast, the formal state legal system had a very limited reach. Donovan and Getachew emphasize that "the modern state legal system governs the lives of the townspeople and those of the highlander farmers who live close enough to urban centers to fall under the influence of urban mores."<sup>11</sup>

Since there were hardly any formalized courts administering custom until the end of the 19<sup>th</sup> century, "each cultural community directed its affairs by a system of cohesion and equity through local notables and chiefs acting as arbiters."<sup>12</sup> Moreover, as the customary laws were not binding, these arbiters could disregard them. The minimal application of the Fetha Negest assured customary laws' position as the dominant legal order regulating almost every dimension of Ethiopian legal life, public and private. Given the vast rural population,<sup>13</sup> which accounts for 85% of the people of the country, and the minimal in the past and the present, application of the traditional state-sanctioned rules embodied in the Fetha Negest, and the mixing of Islamic law with local customary rules, it is understandable why customary laws become the dominant normative order. Ethiopian customary laws are generally unwritten, unstudied, diverse and largely unaffected by the various edicts issued by monarchs.<sup>14</sup> James Paul, former Dean of AAU Law School, characterized Ethiopian customary laws as "unwritten ... personal, ad hoc, geographically particularistic, informal, and undifferentiated from other norms and usages."<sup>15</sup> Despite such characterization, which is generally true except that they can be differentiated when it comes to individual ethnic group's customs, they played an

unprecedented role in the resolution of disputes by virtue of their resilience, in the face of the blanket repeal by Article 3347 of the Civil Code. We shall return to this topic when we discuss the Western-based codes. It is only recently in 1994 with the adoption of the Ethiopian constitution that customary laws are recognized with respect to personal status and family.

## **B. Islamic Law**

Islamic law takes its place within this pluralist framework as the law applicable to Moslems. As one of the oldest recipients of Islam, Ethiopia has a significant Moslem community. Although there was a general culture of tolerance in Ethiopia, the relation between state and Islam was embarrassing. Historically, the Moslem community was disfranchised, particularly in the Christian highlands, as they were excluded from the traditional land-holding system.<sup>16</sup> The *solomonoid* emperors considering themselves as lord protectors of the monophysite faith, i.e., Orthodox Christianity, ignominiously marginalised the Moslem community, relegating them to second class citizenship.<sup>17</sup> The Gagn interlude marked a departure from traditional state- Islam relation. Besides, forced conversion was brought to bear upon the Moselm community .<sup>18</sup> The post *Zemene-Mesafint* (Era of Princes) period saw the same tendency, as the empire -building started off by Tewodros.<sup>19</sup> Boru Meda Council is a case in point for which Emperor Yohannes IV had been hailed as a 'saint -hero'. The empire -building process called not just for the reconciliation of the prevalent doctrinal differences within the established Orthodox Christian church, but also for the unification of faith by stamping out Islam of the face of the Christian empire. <sup>21</sup>

Following his campaign to Harar, Emperor Menelik II called upon both moslems and christians to live and coexist peacefully.<sup>22</sup>

Islamic law has been used to regulate the secular and religious affairs of moslems since time immemorial. In Ethiopia, there are three sects of Islam, all of which belonging to the Sunni tradition.<sup>23</sup> These are: (a) the Shaffi, (b) Hanafi; and (c) Maliki.<sup>24</sup> The long de facto existence of Shaira courts in Ethiopia got recognition in law in 1942 when the *Proclamation for the Establishment of Kadis' Courts* was issued. This proclamation legitimized the competence of Islamic courts in matters relating to marriage, divorce, gifts, succession and will.<sup>25</sup> It provides that "any question regarding marriage, divorce, maintenance, guardianship of minors and family relationship provided that the marriage to which the question relates was concluded in accordance with Mohammedan law or when the parties are all Mohammedans shall fall under the jurisdiction of the Shari'a courts."<sup>26</sup> It further stipulates that the government will appoint the judges including the chief Kadi who was invested with a number of prerogatives ranging from working-out procedures and rendering final decisions in his appellate jurisdiction to attachment and execution.<sup>27</sup>

In 1944, the *Kadis and Naiba Councils Proclamation* No. 62/1944 was promulgated, repealing the earlier proclamation.<sup>28</sup> Under the new proclamation, Shari'a courts were re-established and a new set of courts were introduced. Pursuant to this proclamation, there are three sets of Islamic courts: (1) the Naiba council; (2) courts of the kadis' council and (3) the courts of Shariat.<sup>29</sup>

However, in 1960 a Western-based Civil code was enacted which purports to repeal Islamic law.<sup>30</sup> Despite the sweeping thrust of the repeal provision, Shari'a courts remain in tact and kept on functioning and applying their law independent of the regular state court structure. "The code" Abdulmalik writes, "remained a purely theoretical work devoid of real value in respect to those matters governed by the Sharia rules despite the fact that those matters were supposed to be ruled by the civil code which automatically would have brought the abrogation of the Sharia'a rules by virtue of Art. 3347 (1)"<sup>31</sup>

The 1994 Ethiopian Constitution also recognizes the independent validity of Islamic law and the competence of Islamic courts to adjudicate cases concerning personal and family law. In order to execute this constitutional provision the House of Peoples' Representatives has issued proclamation No. 188/1999.

### **C. Traditional State -Sanctioned Rules**

The traditional rules, overlapping and impinging upon the customary laws, were used to regulate affairs within the Christian highlands inhabited by the Amhara and Tigre from the 14<sup>th</sup> century on ward.<sup>32</sup> These rules derive their force from the Fetha Negest (meaning "the Law of Kings"). There is no consensus among historians as to the origin of the Fetha Negest. However, it is strongly believed to have been written in the 13<sup>th</sup> century A.D by an Egyptian and translated into Geez, the high language of the Ethiopian Orthodox Church, in about the 15<sup>th</sup> century A.D.<sup>33</sup> The Fetha Neget was used both as religious and secular law governing civil as well as criminal conduct. It was limited to such matters as successions to power, criminal punishment,



ecclesiastical and family, commerce, and land ownership.<sup>34</sup> Brietzke pointed out that "these laws were a part of the baggage that followed in the wake of Menelik's Southern conquests, and their impact on indigenous rules was similar to that of the laws transplanted to other parts of the Third World under European colonialism."<sup>35</sup> Thus the legal order superimposed was that of the Amhara, though resolution of disputes by local customary laws persisted.<sup>36</sup> Brietzke also stated that "there is no evidence that the Fiteha Negest was ever officially promulgated and, although it stimulated lively jurisprudence, it has often been subordinated to localized applications of customary laws and 'equity'.<sup>37</sup>

The Fetha Negest was never consistently applied ever since its introduction and thus customary laws persisted. A further obstacle in the way of its application was language, as it was available only in Geez.<sup>38</sup> Van Doren remarked:

By the mid-1950'sm the Fetha Negest was considered out-of-date and it was unclear that it was applied with any regularity. Article 3347 of the Civil Code, in effect, repeals the Fetha Negest. However, the Fetha Negest remains the text of the canon law for the Ethiopian Orthodox church and its tradition may continue to influence decisions today.<sup>39</sup>

#### **D. Western Imports**

A revised Constitution was adopted on the Silver Jubilee in 1955 and a new penal code was introduced in 1957 which largely drew upon its counterpart in Switzerland. In the 1960's, in rapid succession, a large body of law was introduced into Ethiopia, in the form of five codes, imported from Western countries with the Civil Law tradition. First, the Civil, Commercial and Maritime Codes in 1960, followed by

the Criminal Procedure Code in 1961, and finally, the Civil Procedure Code in 1965.<sup>40</sup>

Being conscious of the possibility of substantial resistance to the codes' implementation, Professor Rene David maintained that the codes would eventually be assimilated in the same manner as Roman law was absorbed in continental Europe.<sup>41</sup> David envisioned that the codes would shortly be applied in the supreme court in Addis Ababa, in the adjudication of cases the subject-matter of which of overriding importance as well as where a passage of time be effectively executed.<sup>42</sup> In view of the foregoing, David appears to share Watson's interpretation that law is highly mobile, and as such, his conception of the role of a foreign drafter comes closer to the Greek idea of the law-maker as an architect.<sup>43</sup> Professor Julio Faundez's comment is worth nothing:

Acknowledging... the fact that law is a highly mobile, cosmopolitan artifact does not endorse the view that national legal systems are empty shells waiting to be filled. Because law both legitimizes and controls the use of force, its form as well as, its content are not matters of in difference. In order to understand the role to law and to make meaningful recommendations about its reform, it is necessary to understand the political (state) and social (society) context in which it operates. Conversely, an adequate understanding of a particular state and society cannot ignore its laws and legal system.<sup>44</sup>

Van Doren points out that David's prediction of "acceptance by gradual assimilation"<sup>45</sup> regarding the legal transplants was little more than a utopia "while Ethiopia may be better off with the codes than without them" Van Doren opined, " even this forecast of acceptance by gradual assimilation was perhaps overly optimistic... the basic problem is that customary law continues to hold sway as administered by customary tribunals and mediators, and even the

exceptional use of government courts produces judgments which may not serve to implement code provisions."<sup>46</sup> Seen in this light it is no wonder that the expert drafters adopted the method of copying foreign laws, which has been dubbed as "one of the three entropic practices"<sup>47</sup> in addition to pluralism and fiats enforced by penal sanctions by Ann Seidman and Robert Seidman. "None of the entropic methodologies," they wrote, "contained a built-in assurance that the laws that would emerge would prove either effective or consonant with the rule of law"<sup>48</sup> What is needed is, apart from adequate knowledge of the social, political and economic context of the importing nation, in order for transplants to be effective they must be "communicated and comprehended by"<sup>49</sup> their addressees.

During the 1970's several studies demonstrated the indigestion of the civil code by the overwhelming majority of literate litigants in Addis Ababa. In such a study, Professor Beckstrom managed to show that the codes still had not taken hold in 1974, fourteen years after its enactment.<sup>50</sup> Professor Dolores Donovan and Getachew Assefa have also recently shown that the state legal system has been downplayed by the more effective and dominant customary law systems of Ethiopia, insofar as their research is concerned, that of the Amharas, the Gumuz and the Somalis.<sup>51</sup> Commenting on the Somali customary law system Vis-à-vis the official legal system they write "With the exception of the areas in and around the few large towns in the Somali Region, the modern state legal system has not penetrated the Somali legal culture. The Somali legal culture is hundreds of years old. The European-style legal system of the formal Ethiopian state arrived on the scene only thirty or so years ago."<sup>52</sup> "Ignorance," Brietzke writes "of the law is widespread in Western countries, too; if anything, Ethiopians know their customary law better

than Europeans know theirs."<sup>53</sup> "The point is that," Brietzke concluded," if customary laws are supplanted, an Ethiopian will interest himself in the new laws only to the extent that they touch on matters with which he is personally concerned. To the extent that laws rely on private initiative, they will not, of themselves, change behavior- a point David and Escarra failed to grasp."<sup>54</sup> Even though a law has been communicated to citizens by dint of the Negarit Gazeta, the high level of compliance observed in the West cannot reasonably be expected of Ethiopians. Brietzke rightly accounts for this contingency as follows:

A traditional jural postulate-the non interference of the central government in day-to-day life in the rural areas- is also at work and can only be overcome by legal penetration through the mass media, direct political or bureaucratic channels, and indirectly through peasant associations. . . a potentially valuable link between centers and peripheries will be slow to materialize, as the codes continue to be phenomena of the centers; and David's Francophile model of a new society embodied in the civil code, in national terms and happily so, remain a mere model.<sup>55</sup> [Italics mine]

According to Beckstrom the following factors are responsible for the low profile of the codes: 90% or more of the population are illiterate: the great majority of judges have received education only to the fifth grade; and there are only a few and relatively informally educated lawyers. Even the small group of non-lawyer educated persons, including business persons aware of the code, may not use it, e.g., bankruptcy is available but not used. Underdeveloped communication networks, lack of administrative facilities, and lack of a tradition of applying codes because of the historical reluctance to be bound by an application of existing rules.<sup>56</sup>

Areas of private law such as inheritance and family embody existing practice or where, divergent, the reforms introduced by the code

may be ignored by judicial nullification, or avoided through alternative dispute resolution. In very remote areas, where there are few and far-between state courts, customary laws will continue to hold sway. The codes are only resorted to in exceptional circumstances (e.g. tax or criminal matter) or where indigenous dispute resolution has failed.<sup>57</sup> In connection with this, Donovan and Getachew, Commenting on Gumuz, point out that “the courts are used only as a last resort, where settlement with the customary law has failed. Both the Gumuz people and the state administrators prefer that a case should be settled at customary law if possible, for settlements at customary law bring peace, whereas, judgments in the state court do not.”<sup>58</sup> Even in those cases, judges may be unaware of applicable legal provisions, misunderstand it, or simply refuse to apply it. Judges purporting to apply the codes, while ruling disputes, more often than not, advertently cited irrelevant provisions. In short, extensive field researches have to be conducted before generalizations are reached as to what extent the codes are in use outside of the metropolitan town and its surrounds.<sup>59</sup>

The following are other factors that impede penetration of the codes into Ethiopian legal culture.

First translation. As the codes master-texts were French and English, the Amharic versions suffer from poor translation and incompatibilities.<sup>60</sup> “Though rich and subtle,” Van Doren writes, “the Amharic language did not have a highly developed legal vocabulary. Hence the project to translate Professor David’s French text into Amharic proved formidable.”<sup>61</sup> An outstanding obstacle, albeit overlooked by these legal scholars, in connection with language, is that the code have been made available to the

populace in Amharic which is spoken only by a small portion of the peoples of Ethiopia.

Secondly, tensions between Christian and Islamic values complicate implementation of the codes, since the codes consecrated Christian values to the detriment of Islam.<sup>62</sup> The Codification Commission, being largely composed of an elite group, gave expression to the dominance of Christian and Amhara values. What is worse, since the foreign drafters represented European values, no one represented the diverse communities.<sup>63</sup> As a result; the voices of difference went on in solitude. To put it in a nutshell, the Codification Commission actually served little better than a group of translators.<sup>64</sup> This is in keeping with our conceptualization of the codification projects as a historical process in Chapter 1.

Thirdly, effective execution of the codes has been curtailed, as “they are frequently subject to extra-code norms.”<sup>65</sup> Although the Civil Code provisions regarding adoption have not been contested on substantive matters during the first decade, extra-code judicial concerns discouraged Swedish citizens from adopting Ethiopian children in the face of the absence of any legal ban on such adoptions.<sup>66</sup>

Fourthly, the continued de facto existence of Shari' a courts along with Islamic law stands in the way of the implementation of the Civil Code.<sup>67</sup> Shari' a courts continued exercising jurisdiction in the same way they did before 1960, i.e. in accordance with proclamation No. 62/1944. Finally, the Ethiopian Orthodox Church continued entertaining disputes despite the fact that its jurisdiction had been

abolished long before the enactment of the codes.<sup>68</sup> For example, if either party to a church marriage wishes a divorce, they must seek it from the church tribunal. Moreover, during the reign of Haile Sellassie, a dispute brought before the Emperor, used to be remanded by him to the Church tribunal.<sup>69</sup> Although the Civil Code purports to abolish the Church's jurisdiction, a parallel de facto jurisdiction exists with respect to matters of personal status and family, both in the first instance and appellate.<sup>70</sup>

Why it is that I want to lay greater emphasis on the codes is partly because I have to point to the ineffectual character of the formal legal system. What are we to make of this fact? Partly, because it helps us draw attention to a possible explanation of this phenomenon. The thrust of my argument is this: Such a general ineffectuality must be an instance of legitimacy crisis. Legislation is, as Brietzke points out, "*a faith or trust in organizations and procedures and is thus a resource in its own right* , fewer resources of other kinds are needed to secure compliance with directives regarded as legitimate."<sup>71</sup> Therefore the image that emerges from the above analysis is that of a multi-layer structure of the country's legal system which is marked by a high degree of interaction among the various normative systems. It has been suggested that the numerous customary law systems and Islamic law survived the legislative attempts at dismantling their operation. Post 1957 Ethiopia provided the setting for the contest between legal universalism and legal pluralism. As we shall see, the 1994 Ethiopian constitution represents the triumph of legal pluralism over legal universalism. This constitution, unlike past constitutions, realized that the policy of total legal uniformity pursued by the modern formal legal system is never

sustainable in the face of the cultural diversity of the country. In the past, the prevalent official opinion was that there should be a universal legal system for the whole country. In this connection, Paul Brietzke, writing on the role of the comparative approach in the reform of Ethiopian laws, recommends that:

Reforms should display an understanding of and, where possible, links with the past. New laws must, to state the obvious, be both concrete and seriously intended, avoiding the excessively symbolic or fantasy aspects of law which plagued Ethiopia in the past and which are poised to state a return under the banner of Ethiopia Tikdem. More people should be absorbed into the centers legal system. More all embracing legal values should be devised and made a part of the simultaneous evolution of a national culture and legal system.<sup>72</sup> [Italics mine]

In view of this, we can say that the center/periphery model, which has been used in the analysis of Ethiopian political development, can be also useful in the analysis of its legal order. Accordingly, the formal state legal system, introduced in the mid 20<sup>th</sup> century, arguably, can be treated as phenomenon of the center. On the other hand, the various customary law systems can be said to have been inextricably linked with the peripheries. As a result calls for the inclusion of "[m]ore people... into... the centers' legal system" can only be realized by extending full public recognition to the peripheries' customary law systems. In conclusion, there has been an unambiguous imposition of one system over the other. Yet the imposed western-styled legal order failed to penetrate fully, as it encountered a colossal resistance, and was survived by the indigenous "living customary laws" of the peoples of the country. Consequently, Ethiopia's current legal terrain is constituted of multiple systems of law that coexist and interact among themselves. Given that legal monism, as has been considered in Chapter2, fails to reconstruct the relations between



state and non-state laws, legal pluralism is needed, not in an anthropological sense, but rather in a normative sense. Such a reconstruction calls for an interactive constitution adopted through a democratic process. In the section that follows I shall attempt to appraise Ethiopia's new constitutional order to see whether it provides enough public space for the play of non-state laws and to delineate the bounds of pluralism. This paper is not limited to nonofficial laws only, because the concept of legal pluralism equally extends to official laws as well, and hence it shall deal with the official law dimension of legal pluralism.

## **3.2 *Ethnic Federalism and Legal Pluralism***

### **3.2.1 The Prevalent Condition of Legal Pluralism**

Ethiopia has dealt with diversity in ways that recognize legal identities on the basis of cultural as well as territorial boundaries. As has been suggested in preceding chapters, the ideas of federalism and legal pluralism are mutually reinforcing. The present politico-legal order of Ethiopia is based upon a federal Constitution which was adopted in 1994.<sup>73</sup> In Ethiopia today ethnic federalism is given expression in Article 8 of the constitution, what might be called the sovereignty clause, which vests sovereignty in the various ethnic groups of the country, and Article 39 which reassures these groups their "unconditional right to self-determination, including secession."<sup>74</sup> "As a manifestation of their right of self-determination on a cultural level, every ethno-national group have been left to their customary way of maintaining group cohesion. Particularly, as we shall see. Article 34 (5) of the same gives expression to what Lawrence Friedman calls "cultural pluralism," which he considers as one of the two variants<sup>75</sup> of

horizontal legal pluralism in addition to structural pluralism. This presses on the idea of cultural or non-territorial federalism.

On a different plane, legal pluralism rests upon the idea of federalism. Here federalism is inextricably linked to legal pluralism. In keeping with federal theory and practice elsewhere, the Constitution of the Federal Democratic Republic of Ethiopia has established a federal state structure where governmental powers are shared between the federal government on the one hand and nine constitutive units of the federation.<sup>76</sup> Logically, such a division of powers, especially legislative power entails pluralism in the law. This is what has been referred to as "structural pluralism"<sup>77</sup> by Friedman. Consequently, in ways that would reflect pluralism on a territorial basis, currently in Ethiopia there are one federal and nine state legal systems. While the federal is full-fledged and real, the state legal systems are yet under construction.<sup>78</sup>

In the language of students of federalism, both "territorial" and "non-territorial" solutions to the question of self-determination are discernible in the Ethiopian constitution. Much that has gone to claims of self-government in Ethiopia is at the heart of legal pluralism. Territorially, the growing importance of legal pluralism has been reflected in the demands of the country's ethnic groups for representation in their respective political and legal institutions, both at local and national levels.<sup>79</sup> Non-territorially, attempts have been made to accommodate the interests of religious communities.<sup>80</sup> For instance, Muslims are given adjudicatory authority in accordance with Islamic law with respect to civil matters.<sup>81</sup> In such cases, religious rules determine family law with the effect that citizens embracing

different faiths are subject to different legal norms. Although family law may seem too insignificant an area of jurisdiction to call this a case of non-territorial self-government, as Ayelet Schachar points out, it has alongside its distributive role regarding maintenance and succession, a demarcating function that determines ascriptive membership in a community through lineage and marriage.<sup>82</sup>

Rainer Baubock in his critique of non-territorial federalism points out that all cultural autonomy arrangements should not be regarded as an alternative model of federation.<sup>83</sup> Commenting on Indian and Israeli cultural federalism, he emphasizes:

I believe that they are... indefensible as a permanent feature of a stable liberal democracy. However, in the spirit of searching for arrangements that will help to prevent a violent breaking apart of multinational societies, liberals should be willing to consider the specific contexts that may justify such accommodation. Modern India has emerged in 1947 from the most violent and traumatic process of portioning along national and religious lines in human history. Given this record it was absolutely vital to provide the Muslim minority with strong assurances that the secular Indian state would not in fact turn into an instrument of Hindu rule. The history of religious strife since then has not made it any easier to build sufficient trust that neutral laws and state institutions will protect religious freedom for all communities equally. ... In these and similarly contexts case can be made that religious communities should be regarded as constitutive units of quasi-federation, where certain governmental powers will... remain within their autonomous non-territorial communities. As in any federation the constitutive units should be held accountable by federal institutions if their internal government violates federal guarantees of equal citizenship.<sup>84</sup> [Italics mine]

Another remarkable but related feature of the Ethiopian Constitution which bears upon legal pluralism is that it provides for dual constitutionalism. Pursuant to Article 50 (5) of the constitution, which

reads: “consistent with the provisions of this constitution, the [state] council has power to draft, adopt and amend the state constitution”<sup>85</sup> the nine federating units adopted their own constitutions. These constitutions have undergone revisions recently. In connection with them, I should say it is very important to view state constitutionalism in a new light and to enter a discourse on how it is possible to inject vitality into state constitutional law. As a word of warning I do not mean to defend state constitutionalism with an unheard-of audacity, but rather to raise a few issues as to whether it could properly serve the ideals of among other things liberty and diversity in a multinational federal setting like ours, and all within bounds. The thrust of my argument is this: state constitutionalism can serve inter alia as an institutional modality for implementing legal pluralism.<sup>86</sup> Besides, the doctrine of greater protection, as in the United State can be made to underpin state constitutionalism in Ethiopia.<sup>87</sup>

Given that we have both federal and state constitutions, federal and state bills of rights, federal and state judicial organs, the relation between them has to be worked out with purpose and clarity. Particularly striking are provisions that are parallel, if not identical, in both constitutions state and federal. For instance, the state constitutions generally tend to mimic their counterpart at the federal level. Common provisions dealing with due process, equal protection guarantees against unreasonable search and seizure etc., abound.<sup>88</sup> Thus the question is: Have the state bill of rights simply been superseded or rendered redundant by their federal counterpart? should state constitutional interpretive organs rely exclusively on federal standards in order to decide such common matters?

The theory and practice of state constitutionalism in the U.S. rests upon the doctrine of greater protection. State courts in America have always tended to read their constitutions in order to provisions vide greater protection than found under analogous provisions of the federal Constitution.<sup>89</sup> This offers a lesson for Ethiopian state legislatures. Accordingly state constitutionalism in Ethiopia can be oriented towards providing greater protection in the same fashion. Ethiopian state legislative organs could have imposed ceilings in the form of greater rights applicable within their own borders under their own constitutions as long as the federal floor is satisfied. And judgments by state courts on the basis of laws providing greater protection could be conclusive, sealed off from the Supreme Court's power of cassation. For instance, the legislature of Tigray region could enact a penal law providing for the abolition of death penalty with respect to offences falling outside the scope of the Federal Penal Law, and it remains to be seen whether it leaves elbow-room for the State Council.<sup>90</sup> It is of the essence of state constitutionalism to afford its citizens greater protection than the federal constitution. For example the legislature of Afar Region may require stricter standards for search and seizure than the federal Constitution (alongside the federal criminal procedure code) requires with respect to offences following within state jurisdiction.

The federal constitution in Article 50(5) spells out that "[t]he state council has the power of legislation on matters falling under state jurisdiction." Article 52(2) (b) also stipulates that the state council has the power "[t]o... enact . . . the state constitution and other laws." It has also power to legislate state employment law (Art.52 (f).

Furthermore, the states have legislative powers, albeit very limited, over civil matters.<sup>91</sup> So far some states have enacted family laws: Tigray, Amhara, Oromiya, and Southern Nations Nationalities and Peoples. In this connection it is important to bear in mind that there is variety in the content of the state family laws. With respect to marriageable age, the Family law of Tigray fixes 22 for men while it endorses the 18 years of age minimum adopted by all others. In stark contrast with others, Tigray and Oromiya allow bigamy (polygamy) in regard to customary and religious marriages.<sup>92</sup> In sum, there are three systems of family law currently in force in Ethiopia: the Revised Federal Family Code (2000), the 1960 Civil Code, and the State Family Codes.

However, as Donovan and Getachew observed, “the dearth of legislation effectively shifting power to the states [as well as] the legacy of [the country’s past] as a highly centralized state,”<sup>93</sup> militate against state constitutionalism in Ethiopia. The following comment by Donovan and Getachew is worth repeating:

The dead hand of the past, not just the Ethiopian legacy of monarchy and dictatorship, but also the European legacy of only one code of law governing all portions of the realm [i.e. legal universalism], is reaching out to choke away the local independence and innovation which is at the heart of a, successful federal system. State legislative independence, always important in a federal system in order for local government to respond appropriately to local conditions, becomes critical in a system of ethnic federalism such as that of Ethiopia.<sup>94</sup>

Despite the purported decentralization or devolution of legislative powers the Ethiopian regional states have little legislative autonomy. As professor Andreas notes, “What is dispersed to regional states is

executive power. If this is correct, the problem is to explain or explain away the legislative... powers that the constitution grants to member states.”<sup>95</sup> “The real power of the states,” he concludes, “in respect to the law is therefore the administration of justice, not legislation”<sup>96</sup> Therefore, legislative federalism is not realized in Ethiopia. The center continues to over shadow the peripheries/states as has been the case throughout Ethiopia's history. As Andreas points out one-party dominance establishes the legislative supremacy of the center.<sup>97</sup>

It has been suggested that there exists tension between legal universalism and legal pluralism in Ethiopia. While legal universalism engendered calls for uniform codes of law in the period between 1957 and 1965, legal pluralism, currently, recognizes and legitimizes the personal laws of Ethiopia's religious and customary groups. Since 1994 legal pluralism has been one way to give expression to Ethiopia's continuously and variously constructed multicultural society. In connection with this, emphasizing the role that legislative federalism can play in Ethiopia Donovan and Getachew claim, “The federal constitution is the first legislative recognition of that fact. The second legislative recognition of that fact should be enactment of a flexible federal statutory framework conferring a high degree of legislative autonomy on the Ethiopian regions. Once federalism is decided upon, flexibility and local autonomy come into competition with certainty as desirable values informing the laws.”<sup>98</sup> “Even more flexibility” they conclude, to allow for local variations in the law, is required when a federal government embraces, as has the Ethiopian government, the principle of the preservation of its multiple customary law systems.”<sup>99</sup>

Legal universalism otherwise known as legal monism has been identified with liberal ideas about equal citizenship. As has been pointed out by James Tully (see chapter one), while legal pluralism relates to equitable treatment, legal monism correlates with identical treatment.<sup>100</sup> Speaking analytically, legal pluralism posits groups, instead of individuals as the basic units of a multicultural society and state. Particular legal rights and obligations are bound up with collective identities such as Oromo, Gumuz, Tigre, etc., and to Muslim and Christian. Legal universalism treats individuals as the basic units of society and the state and imagines homogeneous citizens with uniform legal rights and obligations. Ethiopian law and politics, as can be gleaned from its legal and political history, have made the first step in the move from universalism to pluralism. It would seem that the tension between universalism and pluralism have been eventually resolved in favor of pluralism since the promulgation of the new Ethiopian Constitution, in 1994. In fine, legal pluralism, being a federalist policy and course of action is congenial to the practice of dividing, limiting, and sharing sovereignty in a pluralist federal setting such as ours that allows for diversified territorially and culturally defined communities. Thus, asymmetrical federalism makes a paradigmatic case for legal pluralism under unfavorable conditions.

### **3.2.2 Emergence of Formal Legal Pluralism**

Obviously legal pluralist ethos has played a central role in the making of the new Ethiopian constitution. In what might be called a major departure from the received constitutional tradition of the country, the Constitution of the Federal Democratic Republic of Ethiopia provides the framework for the independent validity of non-state or unofficial laws such as customary and religious laws in some fields of



social activity. It is to be recalled that in chapter two we have dealt with important classifications and definitions regarding the nature of legal pluralism. One helpful classification is that between formal, or what Professor Gordon Woodman calls “state legal pluralism,” and informal, or as Woodman calls “deep legal pluralism.”<sup>101</sup> Both formal and informal legal pluralism are discernible in Ethiopia. According to Andre Hoekema formal pluralism “is a legal concept referring to the inclusion within the legal order of a principle of recognizing ‘other’ law.”<sup>102</sup>

**Article 34 (5)** of the federal constitution provides that:

This constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious and customary law, with the consent of the parties to the dispute. Particulars shall be determined by law.<sup>103</sup>

**Article 78(5)** also stipulates that:

Pursuant to sub-Article (5) of Article 34 the House of Peoples’ Representatives and state councils can establish or give official recognition to Religious and customary courts that had state recognition and functioned prior to the adoption of the constitution shall be organized on the basis of recognition accorded to them by this constitution.<sup>104</sup>

As can be gleaned from the above cited constitutional provisions, formal legal pluralism under Ethiopia's new constitutional order is confined to certain matters: only personal status and family law. The state legal system, however, carried on to monopolize the public law areas of criminal law, constitutional law, labor/employment law and the like. Only personal law has been singled out for recognition. Nevertheless, this does not rule out the existence and active role of customary criminal courts, which are by far the most important institutions of dispute settlement as some researches indicate. We

shall return to this point later on. With respect to family matters, there is a dual family law system: the state recognizes official and non-official forums. The official forums consist of courts which are organized in a hierarchical order. The lowest courts are the Regional/Federal First Instance Courts, the High Court and the Supreme Court in that order of superiority. To name but a few of the nonofficial forums: the Shemagelle and the Family council in Tigray and Amhara, the Shari'a courts, and the church tribunals. And the choice whether to take a dispute to regular state courts or to one of those non-official forums is entirely left to the parties. In this regard, it is important to note that this situation constitutes the background for forum shopping, one difficulty posed by legal pluralism. It shall be raised in subsequent chapter.

In order to execute the constitutional provisions dealing with legal pluralism, the House of Peoples' Representatives has issued the Federal Courts of Shari'a Consolidation Proclamation No. 188/1999.<sup>105</sup> This legislation spells out the circumstances under which Islamic law can be applied by Shari'a courts. The hitherto existent Shari'a courts have been reconstituted in to a three- level federal judicial structure, distinct from the regular (state) federal judicial structure. These are: (1) Federal First Instance court of Shari'a, (2) Federal High court of Shari'a, and (3) Federal Supreme Court of Shari'a.<sup>106</sup> Like the federal state judicial organs, all the federal Shari'a courts have been made accountable to the Federal Judicial Administration Commission.<sup>107</sup> All of the State Councils have also given official recognition to Shari'a courts within their respective jurisdictions.

**Article 4(1)** of Proclamation No. 188/1999 stipulates that:

Federal Courts of Shari'a shall have common jurisdiction over the following matters:

- a) any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded or the parties have consented to be adjudicated in accordance with Islamic law;
- b) any question regarding Wakf, gift/Hiba/, succession of wills, provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death;
- c) any question regarding payment of costs incurred in any suit relating to the aforementioned matters.<sup>108</sup>

Sub-Article (2) of the same reiterates the principle of parties' consent as the basis for the adjudicatory jurisdiction of Shari'a courts.<sup>109</sup>

Shar'a courts can assume jurisdiction "only where... the parties have expressly consented to be adjudicated under Islamic law." Tacit consent has also been provided for in addition to express consent.<sup>110</sup>

Pursuant to Article 5(2), failure to appear before the court amounts to consent to the court's jurisdiction on condition that the defaulting party has been duly served with summons.<sup>111</sup> Thus, the suit will be heard *ex parte*. Sub-Article (3) of the same provides, that "In the absence of clear consent of the parties for the case to be adjudicated by the court of Shari'a before which the case is brought, such [a] court shall transfer the case to the regular federal court having jurisdiction."<sup>112</sup> Moreover once a choice of forum has been made by the plaintiff and the defendant has consented to the jurisdiction of such a forum, under no circumstance can either party have their case transferred to a regular court (Article 5(4)).<sup>113</sup>

So much for formal legal pluralism.

### 3.2.3 Formal Legal Pluralism: Crafting A Second Recognition

In what follows I hope to explore the prospective development of formal legal pluralism in Ethiopia. As has been seen, formal legal pluralism in Ethiopia at the moment is confined to personal law. Yet, personal law matters aside, informal customary settlement of criminal cases persists in the face of the absence of any recognition by the state legal order. This phenomenon is explicable in terms of what Andre Hoekema calls “anthropological or empirical legal pluralism” which, in his own words, “covers any situation in which within the jurisdiction of a more encompassing entity (e.g., a state) a variety of differently organized systems of norms and patterns of enforcement effectively and legitimately control the behavior of specific parts of the population”.<sup>114</sup>

In most parts of Ethiopia, the traditional practice of dispute resolution in accordance with the ethnically based criminal norms applied by community elders is kept alive and well. Despite the extension of the formal legal system to all corners of the country, it has difficulty penetrating the indigenous legal cultures since its advent.<sup>115</sup> This is more so in the peripheries than in the center. For instance, the customary law systems hold sway in the day to day affairs of these nationalities: the Somali, the Amhara and the Gumuz.<sup>116</sup>

Recall that Ethiopia's formal legal system falls short of effective penetration, not to mention legitimacy, requisite of a legal system of a “society of well ordered peoples.”<sup>117</sup> The formal legal system possesses little legitimacy; partly because it has not been introduced via a democratic process as long as the forces of difference accounting for the vast majority of the country's population, were not

represented in the Codification Commission; and Partly because the drafters, having turned a deaf ear to the voices of difference and legal pluralism, adopted the method of copying foreign laws that have been imposed on the rich and matured indigenous legal culture of the country.<sup>118</sup> In view of its limited reach, state recognition of the most effective and well established customary law systems no doubt increases the reach and effectiveness of the formal legal system. Crafting such recognition also guarantees legitimacy of the state legal order in the eyes of its peoples. In Ethiopia currently one way to give expression to the demands of difference as well as legal pluralism, and thereby to overcome such a loss in legitimacy, has been to extend public recognition to the varied ethnically and religiously based personal laws within its territory.<sup>119</sup>

This is not enough nonetheless. It is only the first step in the transition from uniformity (universalism) to difference (pluralism). As I see it, nothing short of extending full public recognition to the demands of Ethiopia's diverse communities can hope to overcome the legitimacy crisis and ineffectuality of the formal state legal order. The job of extending full public recognition then can be done through what I call 'crafting a second recognition.' As Donovan and Getachew point out "statutory legal pluralism in Ethiopia could actually advance the establishment and consolidation of state power because recognition and incorporation of the ancient and widely accepted sources of authority, that are the customary law systems, legitimates the new federal state and its formal legal system."<sup>120</sup> According to them, three considerations tend to give impetus to the idea of providing the non-state actors public space necessary to carry out their legislative and adjudicatory functions.

The primary consideration is common sense: if it's not broken don't fix it. A second consideration is economics: formal courts and the law enforcement apparatus on which they depend are expensive. Third is legitimacy: excessive insistence on an unwilling population to use of the state legal system to the exclusion of their customary system will have the backlash effect of de-legitimizing the state court and, by proxy, the state.<sup>121</sup>

In what follows, we shall visit places and events in search of discourses and practices that bolster legal recognition of customary criminal proceedings and the debate over instituting a uniform penal code. In particular, we shall visit the contest, mainly in Wejerat and Raya-Azebo but in memory and discourse standing for Ethiopia, between the particularistic claims for legal pluralism and the universalistic claims for legal universalism. As has been seen in chapter 1 the great wave of legal transplantation in the middle of the twentieth century swept away the particularities of the traditional informal criminal justice system (via the Penal Code of 1957), leaving little public space for the non-state actors. Also it has been submitted that the new Ethiopian Constitution, in what seems a complete break with the country's tradition, furnishes public space where the non-state actors carry on doing their customary jobs of legislation and adjudication. The sole limitation on the exercise of authority by these private actors is provided by the human rights provisions of the federal constitution and the international human rights covenants which are signed and ratified by the Ethiopian government. The customary and state practices that we shall see shortly demonstrate the responsibilities which the traditional institutions have assumed despite the lack of any effort made to incorporate them into the state machinery.

The peoples of Wejerat and Raya-Azebo live in the Southern part of Tigray. They are predominantly agriculturalists. Although the formal state legal system, including the Penal Code of 1957, has been extended to the Tigray Region, particularly the rural areas of Wejerat and Raya-Azebo, it has always had difficulty penetrating the traditional informal criminal justice system. The *abbo-gerreb* (literally, father of the river) was and still is the dominant judicial body of the rural communities of Wejerat and Raya-Azebo. The *abbo-gerreb* has a key role in maintaining social cohesion among individual members of these communities. Especially the continued existence of the *abbo-gerreb* would appear to account for the maintenance of local peace and order, and above all sub-regional stability amid revenge killings as well as violent inter-ethnic hostilities.<sup>122</sup>

The age-old practice of dispute resolution by the ethnically based community elders, known as *abbo-gerreb*, persists to date among the people of Wejerat and Raya-Azebo. In particular since 1991, the *abbo-gerreb* has been re-established with a view to resolving inter-ethnic disputes arising between members of these communities and the neighboring Afar people, in a joint venture, by the governments of the Tigray and Afar Regions. As a result, the *abbo-gerreb* currently has jurisdiction over offences such as homicide, cattle raid, and disputes over grazing areas involving residents of the two regions.<sup>123</sup> In short, the powers and functions consist in mediating violent inter-ethnic disputes that would otherwise have to be handled by the state criminal courts. In view of this, we can say that the state courts of these regions have in fact relinquished their jurisdictions in favor of the customary criminal process.

A few words on the customary law of the *abbo-gerreb* are in order. The *abbo-gerreb* is usually composed of three to twelve well-respected elders elected from among members of the community. Settlement of disputes say homicide, by the *abbo-gerreb* needs to be initiated by the individual or family involved. And criminal responsibilities deemed collective rather than individual. With respect to *mens rea*, the general rule is that the mental element is irrelevant in cases of homicide, in so far as the payment of compensation is concerned. The mental element is more often than not taken account of at a later stage while determining the amount of compensation to the victim's family. Thus, there exists three categories of *mesn rea*: a) "*Tsaeda dem*", standing for intentional homicide; (b) "*Keyih dem*", denoting negligence; and (c) "*Tselim dem*", referring to accident. The underlying justification for the payment compensation irrespective of the killer's mental state is the maintenance of absolute peace lest there should arise a blood feud. An amount of up to 10000 Ethiopian Birr is made payable to the victim's family by way of compensation.<sup>124</sup>

With respect to resistance to state judicial authority, officials of the Tigray and Afar regional governments have reported that all of the offences involving residents of the two regions are exclusively brought before the *abbbo-gerreb*.<sup>125</sup> Moreover, the vast majority of intra-Raya-Azebo and Wejerat family feuds generated by homicide are dealt with and brought successfully to a halt by the *abbo-gerreb*.<sup>126</sup> Most such cases remain sealed off from the reach of the state criminal courts. There even were instances where persons arrested for homicide were released at the request of the *abbo-gerreb*.<sup>127</sup> In one case of the kind previously stated as inter-ethnic, reportedly after



arrest by the police of a suspect, the Tigray and Afar regional government authorities proceeded to settlement of the homicide by the *abbo-gerreb* which ordered payment of compensation, and negotiated withdrawal of charges against the arrested suspect.<sup>128</sup>

Another instance of resistance to state judicial authority is found in the case of the *Hatsey brothers*.<sup>129</sup> In this particular case (Nov. 2000), Abrha Hatsey reportedly stabbed Ato Tsehay with a knife, resulting in the death of the latter. This incident gave rise to a family feud in which a total of five men's lives have been taken. The state police could not arrest any one of the suspected killers, as the killers on both side of the fence had fled to the woods and went into open hostility with them. In response the state police arrested some persons from among relatives of both sides for allegedly indirectly taking part in the cycle of revenge. The state administration, being aware of the gravity of the matter and the ensuing instability, initiated settlement of the homicide by the *abbo-gerreb*. As a result, the perpetrators surrendered to the *abbo-gerreb*. The *abbo-gerreb* negotiated the release of all arrested suspected co-offenders. And having secured their release, the *abbo-gerreb* condemned the five perpetrators as murderers, and then ordered them to pay compensation.<sup>130</sup> In conclusion the formal criminal justice system proves no where ineffective in bringing blood feuds to a halt than in Raya and its surrounds. Nothing short of the payment of compensation by the offender and/or his relatives could hope to relieve the victim's relatives of their duty to strike back.<sup>131</sup>

In view of the foregoing we can say that states like Tigray and Afar have taken preliminary steps in the passage from legal universalism

(uniform penal law) to legal pluralism, by creating public space necessary for the play of traditional nonstate actors such as the *abbo-gerreb*. At this point in time to note that the customary law system poses a challenge to the adequate protection of the human rights of Ethiopian citizens is of overriding importance. We shall take issue with the challenge of human rights in chapter 4.

Before leaving this discussion it is important to draw attention to what researches regarding other customary law systems drive at. A study conducted in the Somali Region would appear to tip the scale in favor of legal recognition of the Somali customary law system known as the *Xeer*.<sup>132</sup> An observer has reported that the Somali elders have often negotiated the dismissal of criminal charges on grounds of settlement by a customary process.<sup>133</sup> As Donovan and Getachew note, "Generally the customary law and procedure are part of Somali heritage and still viewed as expedient and fair way of resolving disputes. The deviation of the modern law from the tradition seems to have developed a negative attitude towards the court and the police. The effect is double fold."<sup>134</sup> They go on to say, "First, people don't bring their case before the court even if that amounts to waiver of right. Secondly people do not cooperate with court and the police to obtain evidences relating to crime particularly murder."<sup>135</sup> Commenting on the customary law of the Gumuz, they also point out that "in order to preserve the peace, the representatives of the state prefer that criminal cases, including homicide be resolved amicably through the customary law."<sup>136</sup>

## NOTES

### CHAPTER THREE

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## CHAPTER FOUR

### THE CHALLENGES OF LEGAL PLURALISM: MEDIATING THE TWIN TENSIONS

Two chief challenges tend to complicate the effort to appraise the successes and failures of the federative arrangement in Ethiopia in relation to legal pluralism: adequate protection of human rights and forum shopping. These are at best challenges posed by the fact of legal diversity. Particularly, they complicate the task of synchronize the state and non state law systems. The problem of adequate protection of human rights figures in prominently, since the nonofficial norms axiomatically deviate, at least in some ways, from the official statutory and constitutional norms. On a different plane, legal pluralism gives rise to the notorious problem of forum shopping, which has been the subject of unending debates in contemporary conflict of laws. Of course, much of the intricate problems of conflict of laws are excluded, as they fall outside the scope of this paper. In the sections that follow, we shall attempt to paint, albeit with a broad brush, the two challenges and point to some possible ways of mediating them, so to speak.

#### ***4.1 Human Rights***

In chapter 1 and 3, federalism has been explored as an institutional modality for accommodating diversity, and in particular, for executing legal pluralism. Recall that what it is that defines the bounds of pluralism in Rawls's political liberalism is human rights. For Rawls points out that "[t]hey [human rights] set a limit on pluralism among peoples."<sup>1</sup> Professor Andreas's proposal to treat federalism

under nonideal theory, as set out in chapter 1, has one novelty: its tractability in our effort to make out a case for legal pluralism in the context of 'unfavorable conditions.' Legal pluralism, taken that way, falls within the province of federalist policies and practices that help a society burdened with unfavorable conditions get nearer to a well-ordered society. As Rawls notes, "Non-ideal theory looks for policies and courses of action likely to be *effective* and politically *possible* as well as morally *permissible* for that purpose."<sup>2</sup> For what purpose? the purpose of "achieving or working toward the ideal conception of the society of well-ordered peoples."<sup>3</sup> To say that human rights delimit the scope of pluralism in effect means differential treatment of citizens is permissible, subject only to the human rights provisions of the constitutions, both federal and state. In other words, pluralism in the law is to be tolerated as long as no one infringes the basic human rights of the peoples. Moreover, in a federal set-up, serious and gross violations of human rights by regional governments constitute a ground for "justified and forceful interventions" by the central government. In this regard, the 1994 in Ethiopian constitution calls upon the House of peoples' representatives, in no uncertain terms:

to take appropriate measures when state authorities are unable to arrest violations of human rights within their jurisdiction. It shall on the basis of the joint decision of the House, give directives to the concerned state authorities.<sup>4</sup>

Also Article 62 (9) of the Federal Constitution stipulates that:

It shall order Federal intervention if any State, in violation of this Constitution, endangers the constitutional order

Problems concerning human rights are pervasive; they arise almost everywhere. Yet, they loom large more often than not in conditions of pluralism (interlegality), as there is tension among the diverse

systems of law constituting the country's legal order. Such is the condition in Ethiopia today.

As a clause-bound reading of it reveals, the Federal Constitution has come to embrace the norms of international human rights in several ways: (i) by dint of inclusion of a bill of rights in the constitutional text; (ii) interpretive incorporation as per Article 13(2); and, finally, (iii) acceptance, ratification or accession to the various international human rights covenants and treaties (Art. 9(4)). Consequently, Ethiopia, has been member of the United Nations system of human rights treaties and one regional treaty, the "[Banjul] African charter on Human and Peoples Rights."<sup>5</sup> With respect to the UN system, she is a member state to the twin 1966 international covenants, i.e. the International Covenant on Civil and Political Rights [hereinafter, the "ICCPR"]<sup>6</sup> and the International Covenant on Economic, Social and Cultural Rights [hereinafter, the "IC ESCR"]<sup>7</sup>. She is also a party to the following covenants: the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, [hereinafter, the "CEDAW.]"<sup>8</sup> the Convention on the Rights of the Child,<sup>9</sup> the 1965 Convention on the Elimination of Racial Discrimination<sup>10</sup> and, the 1982 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. [Hereinafter, the "CAT"]<sup>11</sup> The Universal Declaration of Human Rights has also been adopted through the Transitional Period's Charter.

On the other hand, the state constitutions, which are essentially replicas of their federal counterpart, contain bills of rights in their respective texts.<sup>12</sup> In view of this, we can say that there is, theoretically, a two-level protection of human rights in the federal

set-up of Ethiopia: at federal level under the federal constitution and at state level under the state constitutions. However, what are missing, in practice, are institutions like judicial review (judicial federalism) as well as legislative autonomy of the constitutive units (legislative federalism). Put differently, unless either state legislative organs are vested with greater autonomy in relation to law-making or state courts are made to enjoy judicial review with respect to their constitutions, adequate protection of human rights can hardly be extended. Nor can the goal of two-level protection be achieved as long as regional courts and legislatures remain divested of judicial review and legislative autonomy, powers without which these organs cannot properly carry out functions constitutionally entrusted to them, let alone greater protection. What is it that marks out state organs of government from federal organs in respect of the protection of human rights? The fact that organs of the state governments are nearer than that of the federal government to local peoples distinguishes state organs and, as such, they are deemed to be responsive to the needs and demands of the local population. If state as well as federal courts are to enforce the human rights provisions of their respective constitutions, they must be able to read them. Such reasoning emanates not from a wishful thinking of a fancy law student, but from a purposive reading of Article 13(1) of the federal constitution, which stipulates that:

All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter.<sup>13</sup>

In view of the foregoing, we can say that there is still scope for constitutional interpretation of the federal bill of rights (i.e., Chapter 3 of the federal constitution) by Federal courts. Hence the federal bill

of rights furnishes the minimal standard for adequate protection of human rights. In other words, courts serve as checks on abuses and excesses of authority by state actors. A broader duty, to enforce the federal bill of rights, encompassing non state actors such as administrators of customary and religious law systems, is discernible in Article 9(2) of the federal constitution:

*All citizens, organs of state, political associations and other associations as well as their officials have the duty to ensure observance of the constitution and obey it.*<sup>14</sup>

The federal constitution guarantees rights to equal protection of all citizens of the federation. Accordingly, legislations, nonofficial laws, judicial judgments as well as administrative decisions and acts that violate the federal bill of rights are susceptible of judicial nullification.<sup>15</sup> The federative arrangements in Ethiopia, as can be gleaned from the preamble, aim to reach a political community, founded on the rule of law and democracy, capable of a lasting peace.<sup>16</sup>

Nevertheless, the prevailing norms in Ethiopia at present, as has been, considered, are nonofficial norms, particularly customary laws. In view of this, it is doubtful whether the rule of law exists currently in Ethiopia. Though the concept of the rule of law, like many other ideological concepts, is very hard to pin down, usually it is taken to mean that a nation-state is governed by laws - fixed legal rules - and not by the whims of a despot.<sup>17</sup> Commenting on African countries Gordon Woodman maintains that "there is in fact a strong adherence to the rule of law in much of Africa; but that this is adherence to the rule of non state law."<sup>18</sup> The problem in our case is that the prevailing norms are not only non state norms, but also deviate from the human rights norms of the federal and state constitutions. For present

purpose, we need to understand the notion of the rule of law in terms of the level of protection of human rights guaranteed as opposed to the legal ideology epitomized by positivism.

Practically legal pluralism poses a challenge to adequate protection of human rights. Where the state legal order gives recognition to ethnically - and religiously - based personal laws, there exists tensions and relations between the state and nonstate law systems. In such a regime, for instance, the human rights of women are at stake, as the nonstate systems of law tend to discriminate in at least some ways against them. To oversimplify, the present legal order of Ethiopia recognizes religious and customary personal laws. The new Ethiopian constitution also upholds the principle of non-discrimination on the basis of gender. However, for instance, the principle of *qawama*, in Islamic law, tends to discriminate against women. An authoritative interpretation of this principle has that men are guardians of women, being superior to the latter, and, hence, in family matters, men belonging to a certain household prevail over the women of that household.<sup>19</sup> Another instance of discrimination, found in Islamic law, is the law of succession which subjects women to half the share of men.<sup>20</sup> This, as I see it, is a clear violation of women's constitutional right to equal treatment in the inheritance of property (Article 35(7) of the federal constitution).<sup>21</sup>

The federal constitution, of course, alongside the CEDAW guarantees against any discrimination against women. Article 34(1) provides that ". . . They [men and women] have equal rights while entering into, during marriage and at the time of divorce."<sup>22</sup> Particularly Article 35(1) stipulates that "women shall, in the enjoyment of rights and

protections provided for by this constitution, have equal right with men."<sup>23</sup> Most importantly, Article 9 provides that ". . . Any law, customary practice or a decision of an organ of state or a public official which contravenes this constitution shall be of no effect."<sup>24</sup> Also the CEDAW calls for the elimination of discrimination against women in all societal spheres, including the law and marriage and family relations.<sup>25</sup> The convention calls upon State Parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>26</sup> Furthermore, it requires State Parties:

to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other prejudices which are based on the idea of the inferiority or the superiority, of either of the sexes or on stereotypes roles for men and women.<sup>27</sup>

The CEDAW also recommends, state parties to abolish "such customs, ancient laws and practice by ensuring *inter alia* complete freedom in the choice of a spouse, eliminating completely child marriages and betrothal of young girls before the age of puberty and establishing appropriate penalties."<sup>28</sup>

On a different plane, legal pluralism also poses a colossal challenge to adequate protection of the human rights of Ethiopian citizens. In societies where the practice of customary adjudication of offences is kept alive and well, such as the *xeer* of the Ethiopian Somali, the *abbo-gerreb* of Raya and its surrounds in South Tigray, and *Shemegelena* of the Shoa Amhara, the right to life of Ethiopian citizens is in jeopardy. Even should the Ethiopian state opt for the path of formalization of its diverse ethnically - based criminal rules



and practices along the lines suggested earlier (see chapter 3), the problem of adequate protection of the human rights of its citizens persists. More often than not a nation's criminal justice system is considered a litmus test of adequate protection of the human rights of its nationals.<sup>29</sup> In this connection, the federal bill of rights alongside the international human rights covenants which Ethiopia signs and ratifies constitute the bedrock beyond which neither state nor nonstate actors can go. Put differently, respect for the basic human rights enshrined in the federal constitution as well as the international human rights instruments ratified by Ethiopia perfectly satisfies the federal minimum for adequate protection of the human rights of its nationals.

With respect to the right to life, physical security and liberty, Article 14 of the federal constitution stipulates that "Every person has the inviolable and inalienable right to life, the security of person and liberty,"<sup>30</sup> Article 15 spells out the proviso on the right to life: ". . . No person may be deprived of his life except as a punishment for a serious criminal offence determined by law."<sup>31</sup> Moreover, the ICCPR in its Article 6(1), provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."<sup>32</sup> The UDHR also stipulates that "Everyone has the right to life, liberty and the security of person."<sup>33</sup> What are we to make of these provisions? The point of insisting on international human rights law is not to make out a legalistic case for Ethiopian government's responsibility for conforming the unofficial laws found within its territory to its international law obligations to protect and promote human rights, and, hence, its liability under international law. Rather, the point is to raise the normative question

of whether Ethiopia, like any other state in the same circumstances, should rectify the wrong human rights practices inherent in the nonofficial law systems within its territorial jurisdiction.<sup>34</sup> And it must be answered in the affirmative, given Ethiopia's declared commitment to the protection of the human rights of its citizens.<sup>35</sup>

## **4.2 Forum Shopping**

In present day Ethiopia, as has been seen earlier, there exists coexistence and interaction among the multiplicity of law systems within its boundaries. Each system of law provides an alternative basis for claiming rights. The legal anthropological approaches that recognize legal pluralism is helpful in understanding this complexity (see chapter 2). Individual litigants may choose one or another of these legal frameworks as the basis for their claims, in a process referred to as forum shopping. The challenge of forum shopping consists in "[m]aking use of jurisdictional options to affect the outcome of a lawsuit."<sup>36</sup> Faced with a situation of legal pluralism, people have adopted such strategies as forum shopping in response. It is in the words of Justice Rehnquist, a "litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."<sup>37</sup>

Another such strategy is what Gallanter calls "bargaining in the shadow of the law."<sup>38</sup> "By adopting such a strategy, unlike standard Cases of choice of law, where plaintiffs usually choose a single system of law to which they should stick until final resolution of the dispute, they can manage to move between two systems with a view to making a strategic use of them. Thus the judge is relegated to a lower level that of a mediator; and the Plaintiff uses the courthouse

as a shadow under which the plaintiff could coerce the defendant to produce the desired remedy.<sup>39</sup>

The challenge of intra-state forum shopping persists in countries where there is diversity of laws. It particularly looms larger in the absence of rules of private international law as in Ethiopia. Having taken stock of the prevalent condition of legal diversity in Ethiopia, Brietzke emphasizes:

To the extent that an individual comes into contact with agents of the center, he may live a poly-normative or even a partially normless life. Despite the numerous conflicts that arise between these normative orders, Ethiopian governments have never adopted conflicts-of-law (private international law) rules, and conflicts are settled solely on the basis of political expedience. No hierarchy can be confidently postulated among these legal systems, as particular outcomes depend upon who is making the decision and for what purpose.<sup>40</sup>

Forum shopping in Ethiopia at present occurs at different levels. Recall that in a federal set-up like ours there exists a variant of legal pluralism known as structural pluralism, denoting the coexistence of legislations enacted by constitutive units of the federation. Hence forum shopping arises in connection with, for instance, family laws of the regional states as well as that of the federal government. For the outcome of a lawsuit may depend on whether an action is brought in state or federal court. Likewise, the outcome of a dispute varies depending on whether it is heard in a customary tribunal or in a Shari' a court. Also the selection of a forum also plays a role in an interstate litigation. Abebe Mulatu, an Ethiopian legal scholar, emphasizes:

The variation in the family laws will pose difficulty "when families move from state to state during their married life and, if the marriage is dissolved the members of the broken

family move to different states." This necessitates the availability of rules of conflicts of laws or private international law to determine whether a certain state court has jurisdiction or whether its family law or the family law of another state is applicable in certain family cases.<sup>41</sup>

Forum shopping, resulting from the combination of interstate legal intercourse and legal diversity, therefore, threatens the smooth operation of law in the Ethiopian federal setting. In view of this, we can say that "If any court in Ethiopia is said to have jurisdiction over persons who are not domiciliary of that state then spouses will be induced to select states which have favorable law to their case."<sup>42</sup> For present purpose, it suffices to say that there exists such state of affairs, because of legal diversity and the eminent conflict among them.

# Notes

## CHAPTER FOUR

1. John Rawls, *The Law of Peoples*, in Stephen Shute et al (eds.) On Human Rights (New York: Basic Books, 1993), p. 68-ff
2. Id
3. Id
4. Art 55(6), Constitution of the Federal Democratic Republic of Ethiopia (hereinafter, FDRE const.)
5. Adopted June 27, 1981, OAU Doc. CAB/ LEG/67/3rev. 5, 21 ILM. 58 (1982), Ethiopia acceded on 15 June 1998.
6. ICCPR Res. 2200A (XXI) (Dec. 1966); Ethiopia acceded on 11 June 1993
7. ICESCR, UNTS No. 14531, Vol. 993 (1976); Ethiopia acceded on 11 June 1993
8. CEDAW UNTS No. 20378, Vol. 1249 (1981); Ethiopia signed on 8 July 1980 and satisfied on 9 Sept. 1981.
9. The Convention on the Rights of the child, UN GA Doc. A/Res/44/25 (12Dec. 1989) Annex; Ethiopia acceded on 14 May 1991.
10. Convention on the Elimination of Racial Discrimination, 7 March 1966, 66 UNITS 195, Ethiopia acceded on 23 June 1976.
11. CAT UN.GA Res. 39/46, Annex, Ethiopia acceded on 14 March 1994.
12. Chapter 3 of the Revised constitution of Tigray National Regional State, Tigray Negarit Gazetta, Year 10, No. 2, Proc. No 45/ 2001; for parallel provisions see all the state constitutions.
13. Art. 13(1), FDRE Const.
14. Art. 9(2), Id.
15. Art. 9(1), Id
16. Preamble, Id

17. P.S. Atiah, Law and Modern Society 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1995), P. 104
18. Gordon R. Woodman, "constitutions in a World of Powerful Semi-autonomous Social Fields," Third World Legal Studies (1989), P.1
19. Henry J. Steiner and Philip Alston, International Human Rights in Context: Law, politics, Morals 2<sup>nd</sup> ed. (Oxford: Oxford University Press), P. 393
20. Id, 394
21. Art. 35(7), FDRE Const.
22. Art 34(1), Id
23. Art 35(1), Id
24. Art 9(1), Id
25. CEDAW
26. ID
27. ID
28. ID
29. Dolores A. Donovan and Getachew Assefa, "Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism." 51 The American Journal of comparative Law (2003), P. 531
30. Art. 14, FDRE const
31. Art. 15, Id
32. ICCPR, Art. 6(1)
33. UDHR, Art 3
34. Donovan, supra n.29, at 538
35. Id
36. Th. De Boer, Recveil des course, Vol. 257 (1996), extract, P.30.
37. Cited in Friedrich K. Juenger, "Forum shopping: Domestic and International," Tulane Law Review, (1989), P. 553
38. M. Gallanter, "Justice in Many Rooms: Courts Private Ordering, and Indigenous Law," 19 Journal of Legal Pluralism 1-47 (1981).
39. Id

40. Paul H. Brietzke, Law, Development and the Ethiopia Revolution (London and Toronto: Associated University Press, 1982), P. 31
41. Abebe Mulatu, "Issues of Inter state conflict of Laws in Family cases in Ethiopia (Unpublished paper on file in the law library of AAU), p.2
42. Id,P.13
43. Cited in James Tully and Alain G-Gagnon(eds.), Multinational Democracies(Cambridge: Cambridge University Press,2001),p.356
44. Rainer Baubock, "Multinational Federalism: territorial and non-territorial"URL=<[http://www.imer.mah.se/hemsida-forskinning/rainer-baubock.pdf+multinational+federalism+ territorial\\_ and \\_non-territorial hl=en and ie=UTF.8](http://www.imer.mah.se/hemsida-forskinning/rainer-baubock.pdf+multinational+federalism+ territorial_ and _non-territorial hl=en and ie=UTF.8)>

## CONCLUSION

This thesis has aimed at appraising both the *formal* and *structural*, or to use the language of students of federalism, the *territorial and non-territorial* aspects of legal pluralism in the Ethiopian federal setting. The first objective was to see if the new constitutional order furnishes public space necessary for the play of nonstate actors, particularly ethnic and religious groups. In so doing, it has unraveled the constitutive layers of the country's legal structure, and hence, its pluralist framework. The second objective was to examine the prevalent condition of legal pluralism under the present constitutional order. On the one hand, it has presented the ways in which the state actors have brought about pluralism in the law. On the other hand, it has discussed how and to what extent *state constitutionalism* can serve as an institutional modality for implementing legal pluralism. The third objective was to explore the current frontiers of formal legal pluralism. Fourthly, it has put forth arguments, based on an empirical case\_ the *abbo-gerreb* of Wejerat and Raya-Azebo in Tigray, for extending full public recognition to the dominant customary law systems, at least the *abbo-gerreb*. Stated differently, arguments have been marshaled in favor of the need to redraw the present frontiers of formal legal pluralism to accommodate at least some of the well-established customary criminal processes. Finally, it has called particular attention to two major threats that the fact of legal pluralism presented to both the rule of law and the smooth operation of law in the Ethiopian multinational federal set-up.

The new Ethiopian Constitution represents a farewell to *legal universalism*, a state policy and practice, which was in place for over



thirty years. It provides for, at least in principle, pluralism as the dominant flavor of the present politico- legal order. In public as well as private life, political pluralism aside, pluralism in the law figures politically salient under Ethiopia's current constitutional order. In the course of this thesis, I claim that Ethiopia's new politico legal order can be explicated in terms of the evolution of the center/periphery conflict over the last fifty years or so. Accordingly, the rise of ethno-nationalist movements and identity fragmentation can be considered as the logical outcome of excess of universalism, spurred by national integration and centralization pursued by Emperor Haile Sellassie and Mengistu. I would be less than candid if I failed to acknowledge that the transition in the state's discourse from unity to diversity, with the attendant shift in the formal legal system's orientation from uniformity to difference, is perhaps the single most important factor behind the heightened attention to ethnic federalism and legal pluralism. This fact has been underscored in chapter 1.

In keeping with Andreas's proposal to treat federalism as the 'unfavorable condition' variant of nonideal theory, legal pluralism has been considered as an important federalist policy and course of action under unfavorable circumstances. Of course, I concur that "[n]eglecting the moral foundation of federalism is unproblematic so long as the practice of federalism is accepted." Yet I should like to draw attention to the crux of the matter: federative arrangements, including legal pluralism are in the words of Rainer Baubock "indefensible as a permanent feature of a stable liberal democracy. However in the spirit of searching for arrangements that will help to prevent a violent breaking apart of multinational societies, liberals

should be willing to consider the specific contexts that may justify such accommodation." What then necessitated legal pluralism in Ethiopia? One reason is the ineffectuality of the uniform, formal, state legal system, in the sense that the latter faced colossal challenge from the indigenous legal cultures of the diverse communities within Ethiopia. Another and yet related reason is the loss in legitimacy of the formal legal system in the eyes of the peoples of the country.

The central argument is that the formal legal system of Ethiopia was introduced in a way that made it lose legitimacy even before it was implemented. This is so because the codification project, premised on homogenizing universalism, has left little space for a balance between unity and diversity. Moreover, the legitimacy crisis of the formal legal system even after its introduction is due to its inability to penetrate the legal cultures of the country's diverse communities. In this connection, the persistence and dominance of the customary law systems in Ethiopia can be considered as witnessing to this fact.

The overall conclusion of this appraisal is that even if the new Ethiopian constitution has taken measures that, to a degree help to overcome, if not better, to mitigate the loss in legitimacy of the formal legal system, these are only steps in the right direction. One way to mitigate such a loss in legitimacy has been to extend public recognition to the ethnically and religiously based personal laws. Nevertheless, as I see it, nothing short of extending full public recognition to the ethnically based criminal law systems can hope to overcome the legitimacy crisis of the formal legal system. Consequently, I have maintained that state constitutionalism, in consonance with the general pluralist framework of the federal

constitution, can serve as an institutional modality for implementing legal pluralism in Ethiopia. Personal law aside, pluralism in the law can be brought about with respect to criminal law, without prejudice to the uniform (federal) penal law as regards offences falling within state jurisdiction. What remains to be done is to conform the nonstate law systems to the minimal standard for adequate protection of human rights. Furthermore, state constitutionalism may enable the constituent units of the Ethiopian federation to extend greater protection to their residents. For instance, the legislature of the Tigray Region can enact a criminal procedure code providing for stricter requirements for search and seizure with respect to offences covered by its penal law. In so doing, it executes the state constitutional provisions dealing with liberty and privacy, and hence affords its residents greater protection.

In closing, if the formal legal system of Ethiopia is to overcome the loss in legitimacy that it suffers from, it is clear that the option of ignoring the concept of legal pluralism simply does not exist. Again, if the Ethiopian state constitutions are to stay in place, they should be used in a manner that advances the ideals of liberty and diversity. With respect to liberty, the “greater protection” aspect of state constitutionalism will do the job. With respect to diversity, state constitutionalism may serve as an institutional modality for implementing legal pluralism.

## RECOMMENDATIONS

One cannot judge the success or failure of federalism in a multination state solely on the basis of its legally pluralist regime, for many other factors are at play. Most importantly, two challenges tend to complicate the effort to appraise the success or failure of Ethiopian federalism: adequate protection of human rights and forum shopping (conflict of laws). On the whole, having appraised the strength and weakness of the federative arrangements in Ethiopia, with special reference to legal pluralism, an important federalist policy and practice, I have arrived at the following points by way of recommendation.

On the one hand, the federal government should:

- (i) launch a state-led statewide field research by legal anthropologists, with an eye to studying and analyzing all of the customary law systems within its boundaries and conforming them to the minimal standards for adequate protection of the human rights of its citizens;
- (ii) extend full public recognition to the ethnically based customary law systems; particularly, redraw the boundaries of formal legal pluralism to accommodate at least the well-established and dominant customary dispute (criminal) settlement mechanism; stated differently, leave elbowroom for the nonstate actors;

On the other hand, the state governments should:

- (iii) assume a moral duty to execute their constitutions; and in order to effectively execute their constitutions, state judicial and legislative organs require judicial review and

legislative autonomy respectively. To keep Ethiopian state constitutions alive and well, state courts and legislatures need to draw lessons from experiences with state constitutionalism elsewhere. In so doing, state constitutional jurisprudence will be rendered responsive to local needs as well as the demands of diversity. For instance, American state constitutional jurisprudence is rich in this regard.

Both governments, federal and state, should:

(iv) enact codes of conflict of laws with a view to addressing the complex problem of choice of law, and tailored to meet challenges arising from legal diversity, especially forum shopping.

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