Legal Pluralism: Its Promises and Pitfalls for Ethiopia[*]

ALEMAYEHU FENTAW[**]

Introduction

This article aims at analyzing the functioning and implementation of legal pluralism in the multinational federal set-up of Ethiopia. The first section explores the prevalent condition of legal pluralism in Ethiopia today. Through the study of the constitutional decentralization of legislative and adjudicatory authority that has been taking place in the country, elements of legal pluralism are identified and explained. The focus is on *structural pluralism*, particularly *state* constitutionalism. In the second section, another aspect of legal pluralism is analyzed, *formal legal pluralism*. Finally, arguments are marshaled, on the basis of the empirical case selected for analysis the *abbo-gerreb* of Wejerat and Raya-Azebo, in support of the proposal to redraw the current frontiers of formal legal pluralism in order to create enough public space where the dominant non-state actors carry out their traditional functions of legislation and adjudication with respect to criminal matters. It is important to note that the thrust of the article's argument rests upon two premises: One is that the Ethiopian formal legal system fails to penetrate the country's indigenous legal cultures; another is that such loss in the lgitimacy has its roots in the country's Codification Project of the 1960's, which was marked by high influx of Western transplants.

I. 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. The ideas of multinational federalism and legal pluralism are mutually reinforcing. The present politico-legal order of Ethiopia is based

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[**] Assistant Lecturer in Law, Faculty of Law, Jimma University

upon a federal Constitution which was adopted in 1994.[1] In Ethiopia today multinational federalism is given expression in Article 8 of the Constitution, what might be called the sovereignty clause, which vests sovereignty in the various ethno-national groups of the country, and Article 39 which reassures these groups their "unconditional right to self-determination, including secession."[2] As a manifestation of their right of self-determination on a cultural level, every ethno-national group has 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,"[3] which he considers as one of the two variants of horizontal legal pluralism in addition to structural pluralism. This presses on the idea of multinational federalism.

On a different plane, legal pluralism also rests upon the very idea of federalism, be it mononational or multinational. That is to say, federalism is inherently and inextricably intertwined with 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.[4] Logically speaking, such a division of powers, especially legislative power between the two level of governments, necessarily entails pluralism in the law. This is exactly what has been referred to as "structural pluralism"[5] by Friedman. Consequently, in ways that would reflect diversity in the law 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 fledgling and yet under construction.[6]

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1 Proclamation No 1/1995, A Proclamation to Pronounce the Coming in to Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st Year No 1, [Hereinafter, FDRE Constitution]

1 Id

2 Lawrence M Friedman, The Legal System a Social Science Perspective (New York Russell Sage Foundation,1975), P. 222

3 FDRE Constitution, Art 45 Cum 47

4 Id

5 Dolores A Donovan et al, "Homicide in Ethiopia Human Rights, Federalism and Legal Pluralism, " 51 The American Journal of Comparative Law (Summer 2003), p 510

In the language of students of federalism, both "territorial" and "non-territorial" solutions to the question of self-determination are discernible in the new Ethiopian Constitution. Much that has gone to claims of self-government in Ethiopia in the past is at the heart of the country's current politico-legal order. 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.[7] Non-territorially, attempts have been made to accommodate the interests of cultural and religious communities.[8] For instance, Muslims are given adjudicatory authority in accordance with Islamic law with respect to civil matters.[9] 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 astrictive membership in a community through lineage and marriage.[10]

Following the tack taken by Professor Andreas Eshete, I propose to consider legal pluralism as a federalist policy and practice "under the unfavorable condition aspect of nonideal theory,' 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."[11] Andreas remarks that "Federalism is a public value tailored to conditions unfavorable to constitutional democracy that are not universal but rather peculiar to certain

7 FDRE Constitution, Art 39 (3)

8 Ibid, Art 39(2)

9 Ibid, Art 34(5)

9 Cited in Rainer Baubcock. Mutational Federalism territorial and non territorial,1stdraft.http //www.imer,mah se/hemsida-[redacted] multinational-federation-territorial and non territorial

10 Endries Eshete, "Ethnic Federalism. New Frontiers in Ethiopian Politics," paper presented at the 1st National Conference on Federalism, Conflict and Peace Building, Addis Ababa, 5-7 May 2003, P.3

societies."[12] For him, therefore, a general justification of federalism grounded in "a invariant particularist value is utterly indefensible. Instead, federalism is justified to th extent that it comes to terms with the unfavorable conditions that prompted it in ways tha enhance or, at least, do not compromise democratic ideals of universal reach" [13]

What transpires from the foregoing is that legal pluralism is an important federalist policy and practice in keeping with the demands of nonideal theory. Seen in this light, legal pluralism can serve as an essential federalist policy and course of action, 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." [14] 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. 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. [15] 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

12 Id

13 Id

14 John Rawls, The Law of Peoples, in Stephen Shute et al (eds.), On Human Rights The Oxford Amnesty Lectures (New York, Basic Books, 1993), p. 68

15 Rainer Baubcock, Mutational Federalism territorial and non -territorial.1stdraft.http ://www imer mah se/hemsida-forskning/multinational-federation-territorial and non territorial

> equally. ... *In these and similar 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. [16] [Italics mine]

Now, I shall turn to an all-too-sketchy exploration of the system of dual constitutionalism entrenched in the Ethiopian Constitution and its import on legal pluralism in all its ramifications. 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"[17],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 as an institutional modality for implementing legal pluralism through legislative and judicial federalism. 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, among other things, of liberty and diversity in a multinational federal setting like ours, and all within bounds. Also, related to this is the question of whether or not the doctrine of greater protection, as in the United States can be made to underpin state constitutionalism in Ethiopia.

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,

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16 Id

17 FDRE Constitution, Art 50(5)

equal protection, guarantees against unreasonable search and seizure, etc., abound. [18] Thus the question is: Have the state bills of rights simply been superseded or rendered redundant by their federal counterpart? Should state judicial organs rely exclusively on federal standards in order to decide such common matters? Can state legislative organs enact State Criminal Procedure Codes with a view of implementing the state bills of rights?

The theory and practice of state constitutionalism in the U.S. rests upon the doctrine of greater protection. State courts in the U.S. have always tended to read their constitutions in order to provide greater protection than found under analogous provisions of the federal Constitution. [19] This offers invaluable lessons for Ethiopian state courts and legislatures. Accordingly, state constitutionalism in Ethiopia can be oriented towards providing greater protection in the same fashion. State courts in Ethiopia should devote themselves to a purposive reading of their constitutions in order that they are well-placed to extend greater protection to the civil rights and liberties of their residents. They can legitimately depart from federal standards in deciding original state criminal matters in which the accused person's constitutional guarantees of due process, equal protection, or guarantees against unreasonable search and seizure are at stake.

On the other hand, 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 Criminal Law. [20] It is therefore of the essence of state constitutionalism to afford its citizens greater protection. For example, the legislature of

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18 See the Amhara and Tigray State Constitutions

19 Judith S. kaye, "Dual Constitutionalism in Practice and Principle"61St. John's Law Review(1987),pp.399-429

20 For a fascinating discussion of strategies for implementing legal pluralism in the federal set- up of Ethiopia, see Donovan, supra n 6, at 546-549.

Afar Region may require stricter standards for search and seizure than the federal Constitution (alongside the Criminal Procedure Code of 1965) requires with respect to offences falling 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. [21] 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.[22] 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,"[23] 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

21 See Family Law of Tigray, Amhara, Oromiya, SNNP, and the Revised Family Code

22 The Family Law of Tigray, Awaj No 3/91,Arts 27-32,In view of the variety in the content of the family laws, forum shopping seems inevitable

22 Donovan, Supra'n 6 at 546

> 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.[24]

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."[25] "The real power of the states," he concludes, "in respect to the law is therefore the administration of justice, not legislation" [26] Therefore, legislative federalism is not realized in Ethiopia. The center continues to overshadow 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.[27]

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

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24 Ibid. P. 548

25 Endnas, Supra n 11, P. 25

26 Id

27 Id

federalism can play in Ethiopia Donovan and Getachew claim, "[t]he 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."[28] "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."[29]

Legal universalism otherwise known as legal monism has been identified with liberal ideas about equal citizenship. As has been pointed out by James Tully, while legal pluralism relates to equitable treatment, legal monism correlates with identical treatment.[30] 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 multinational/pluralist federal set-up such as ours that allows for diversified, territorially and culturally defined communities. Thus, multinational federalism makes a paradigmatic case for legal pluralism under unfavorable conditions.

28 Donovan. Supra n. 6, at 506

29 Ibid. pp 506-507

30 James Tully and Alain G-Gagnon (eds) Multinational Democracies (Cambridge Cambridge University press 2001) ,p 329

II. Formal Legal Pluralism: Exploring the Bounds of the First Official Recognition

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. Here it is important to draw a distinction regarding the nature of legal pluralism. One helpful distinction is that between formal, or what Professor Gordon Woodman calls "state legal pluralism," and informal, or as Woodman calls "deep legal pluralism."[31] 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."[32]

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.[33]

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.[34]

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31 Gordon R. Woodman, "Legal Pluralism and Search for Justice," 40 Journal of African Law (1996),p44

32 Cited in Donovan, Supra n 6, at 542

33 FDRE Constitution, Art. 34(5).

34 Ibid, Art 78(5)

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.

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. [35] 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 into a three-level federal judicial structure, distinct from the regular 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. [36] Like the federal state judicial organs, all the federal Shari'a courts have been made accountable to the Federal

35 Ibid. Art 34(5)

36 Federal Courts of Shari'a Consolidation Proclamation No 188/1999

Judicial Administration Commission. [37] 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.[38]

Sub-Article (2) of the same reiterates the principle of parties' consent as the basis for the adjudicatory jurisdiction of Shari'a courts. [39]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. [40] Pursuant to Article 5(2), family 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. [41] 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."[42] 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

37 Id
38 Id
39 Id
40Id
41 Id
42 Id

either party have their case transferred to a regular court (Article 5(4).[43]So much for formal legal pluralism.

III. Informal Legal Pluralism: Crafting a Second Recognition.

In what follows, I hope to examine 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 persist 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 "anthroplogical 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" [44]

In most parts of Ethiopia, the traditional practice of dispute resolution in accordance with the ethnically based criminal norms applied by community elde 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. [45] 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. [46]

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43 Id

44 Id

45 Donovan,Supra n.6, P 542

46 'Legal extension' is a legal term of art denoting the degree to which a legal system seeks to penetrate and control social life However, 'legal penetration' refers to the extent to which a legal system actually penetrates and controls social life See generally, John H Merryman, The Civil Law Tradition (2nd ed , 1985),pp 656-703

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."[47] The formal legal system possesses little legitimacy; party 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.[48] 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 pubic recognition to the varied ethnically- and religiously- based personal laws within its territory. [49]

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."[50]

47 Donovan, supra n.114, at 512-529

48 The quoted language is taken from, John Rawls, The Law of Peoples, in Stephen Shute et al (eds), On Human Rights (New York: Basic Books, 1993) P 68 ff

49 John W Van Doren, "Positivism and the Rule of Law, Formal Legal Systems or Concealed Values A Case Study of the Ethiopian Legal System," Journal of Transnational Law and Policy (spring 1994), p 8ff

50FDRE Constitution, Art 34 (4) & (5) cum Art 78 (5)

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 is use of the state legal system to the exclusion of their customary system will have the backlash effect of de-legitimating the state court and by proxy, the state.* [51]

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. Recall that 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.

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51 Donovan, Supra n.6, p 542

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-ethic hostilities.[52]

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. [53] 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-grreb* is usually composed of three to twelve well-respected elders elected from among members of

52 Interview with Grazmach Messele Agizew (3Jan.2000), Alamata; Interview with Seyoum Teka, L L M Candidate at ECSC, former Prosecution Head of the Southern Zone of Tigray Region; Interview with Justice G/kirstos YukunoAmlak, the Tigray High Court, at Maichew (20 April 2004). Interview with Salih Haji, judge of the Afar Wereda court, at Asayita (6 May 2004)

53 Id

the community. Settlement of disputes, say homicide, by the *abbo-gerreb* needs to be initiated by the individual or family involved. And criminal responsibilities are 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 exist 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 of 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 10,000 Ethiopian Birr is made payable to the victim's family by way of compensation.[54]

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 *abbo-gerreb.*[55] 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.*[56] 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.*[57] 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. [58]

54 Id
55 Id
56 Id
57 Id
58 Id

Another instance of resistance to state judicial authority is found in the case of the *Hatsey brothers*. [59] In this particular case (Nov. 2000), Abrha Hatsey reportedly stubbed 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. [60] In sum, the formal criminal justice system proves no where less effective 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. [61]

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, though we shall not go into it for want of space.

Before leaving this discussion, it is important to pay heed to what researches regarding other customary law systems, albeit scanty, indicate. 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*. [62]An observer has reported that the Somali elders have

59 Id

60 Id

61 Id

62 Jemal Derie Kalif, "The Customary Resolution of Homicide Case In Ethiopian Somalis and Its Impact on the Regional Justice Administration" 1-59 (May 1999) (Unpublished Snr. Thesis on file at AAU Law Library)

often negotiated the dismissal of criminal charges on grounds of settlement by a customary process.[63] 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."[64] 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 courts and the police to obtain evidences relating to crimes particularly murder."[65] 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."[66]

IV.THE CHALLENGES OF LEGAL PLURALISM

Two chief challenges tend to complicate the effort to appraise the successes and failures of legal pluralism in Ethiopia: 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 synchronizing the state and non-state law systems. The problem of adequate protection of human rights figures in prominently, since the non-official norms axiomatically deviate, at least in some ways, from the official constitutional and statutory 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 article. 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.

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63 Id

64 Donovan, Supra n.4, at 523

65 Ibid,528

66 Id

1. Human Rights

What 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."[67] And Professor Andreas's proposal to treat federalism under nonideal theory has one virtue: 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."[68] For what purpose? The purpose of "achieving or working toward the ideal conception of the society of well-ordered peoples."[69] 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 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.[70]

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

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[67] John Rawls,.The Law of Peoples, in Stephen Shute et al (eds.) On Human Rights (New York: Basic Books, 1993), p. 68-ff

[68] Id

[69] Id

[70] Art 55(6), Constitution of the Federal Democratic Republic of Ethiopia (hereinafter, FDRE const.)

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) 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.[71] 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]"[72] and the International Covenant on Economic, Social and Cultural Rights [hereinafter, the "ICESCR]".[73] 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"[74] The Convention on the Rights of the Child,[75] the 1965 Convention on the Elimination of Racial Discrimination[76] and, the 1982 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. [Hereinafter, the "CAT"].[77] The Universal Declaration of Human Rights has also been adopted through the Transitional Period's Charter.

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[71] Adopted June 27, 1981, OAU Doc. CAB/ LEG/67/3rev. 5, 21 ILM 58 (1982), Ethiopia acceded on 15 June 1998.
[72] ICCPR Res. 2200A (XXI) (Dec. 1966); Ethiopia acceded on 11 June 1993
[73] ICESCR, UNTS No. 14531, Vol. 993 (1976); Ethiopia acceded on 11 June 1993
[74] CEDAW UNTS No. 20378, Vol. 1249 (1981); Ethiopia signed on 8 July 1980 and satisfied on 9 Sept 1981
[75] The Convention on the Rights of the Child, UN GA Doc. A/Res/ 4/25 (12Dec 1989) Annex; Ethiopia acceded on 14 May 1991.
[76] Convention on the Elimination of Racial Discrimination, 7 March 1966, 66 UNITS 195, Ethiopia acceded on 23 June 1976.
[77] CAT UN.GA Res. 39/46, Annex, Ethiopia acceded on 14 March 1994

On the other hand, the state constitutions, which are essentially replicas of their federal counterpart, contain bills of rights in their respective texts.[78] 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.

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

[78] 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.

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.*

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.[79] 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.[80]

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.[81] 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." [82]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

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[79] Art. 9(1), FDRE Const
[80] Preamble, Id
[81] P.S. Atiah, Law and Modern Society 2nd ed. (Oxford: Oxford University Press, 1995), P. 104
[82] Gordon R. Woodman, "Constitutions in a World of Powerful Semi-autonomous Social Fields," Third World Legal Studies (1989), P.1

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.[83] Another instance of discrimination, found in Islamic law, is the law of succession which subjects women to half the share of men.[84] This, as I see it, is a clear violation of women's constitutional right to equal treatment in the inheritance of property.[85]

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." 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." Most importantly, Article 9 (1) 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." Also the CEDAW calls for the elimination of discrimination against women in all societal spheres, including the law and marriage and family relations. The convention calls upon State Parties "to take all appropriate measures, including legislation, to modify or

[83] Henry J. Steiner and Philip Alston, International Human Rights in Context: Law, politics, Morals 2nd ed. (Oxford: Oxford University Press), P 393
[84] Id, 394
[85] See Art 35(7), FDRE Const

abolish existing laws, regulations, customs and practices which constitute discrimination against women."[86] 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.[87]

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."[88]

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, 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.[89] 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

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[86] CEDAW
[87] Id
[88] Id
[89] 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

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," 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." 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." The UDHR also stipulates that "Everyone has the right to life, liberty and the security of person." 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 making the unofficial laws found within its territory compatible with 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.[90] And it must be answered in the affirmative, given Ethiopia's declared commitment to the protection of the human rights of its citizens.[91]

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. 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."[92] Faced with a

[90] Donovan, supra n.29, at 538
[91] Id
[92] Th De Boer, Recveil des course, Vol 257 (1996), extract, P.30

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."[93]

Another such strategy is what Gallanter calls" bargaining in the shadow of the law.[94] "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.[95]

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:

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[93] Cited in Friedrich K Juenger, "Forum shopping: Domestic and International," Tulane Law Review, (1989), P. 553

[94] M. Gallanter, "Justice in Many Rooms: Courts Private Ordering, and Indigenous Law," 19 Journal of Legal Pluralism 1-47 (1981).

[95] Id

> 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.[96]

Forum shopping in Ethiopia at present occurs at different levels. 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.[97]

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[96] Paul H. Brietzke, Law, Development and the Ethiopia Revolution (London and Toronto: Associated University Press, 1982), P. 31

[97] 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

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."[98] For present purpose, it suffices to say that there exists such state of affairs, because of legal diversity and the eminent conflict among them.

Conclusion and Recommendation

This article 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 under the Ethiopian multinational federal set-up. 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. 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*. Put 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.

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

[98] Id, 13

private life, political pluralism aside, pluralism in the law figures politically salient under Ethiopia's current constitutional order.

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." [99]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."[100] 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 of the 1960's, 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

99 Tully,Supra n. 30, at 329

100 Baubcock, Supra n 15

legitimacy of the formal legal system, these are only preliminary steps taken in the right direction. In my view, 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 see to it that the nonstate law systems conform 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, state legislatures can enact criminal procedure codes providing for stricter requirements for search and seizure with respect to offences covered by its penal law. Alternatively, state courts can read their constitutions and the Code of Criminal Procedure in order to extend greater protection in respect of state offences.

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 doctrine" of state constitutionalism will do the job. With respect to diversity, the "legislative and judicial federalism" aspect of state constitutionalism may serve as an institutional modality for implementing legal pluralism.

One cannot judge the promises of legal pluralism in a state like ours solely on the basis of its legally pluralist regime, for many other factors are at pay. Most importantly, two challenges tend to complicate the effort to appraise legal pluralism: adequate protection of human rights and forum shopping. On the whole, having analyzed the implementation of legal pluralism in Ethiopia, 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.