2. Towards widening the constitutional space for customary justice systems in Ethiopia

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Introduction

Ethiopia exhibits a typical feature of many non-Western societies, wherein the formal state sponsored legal system functions alongside a multitude of non-formal legal systems. The state judicial system, which began in a rudimentary way at the beginning of the twentieth century, took a definite shape in 1942 with the enactment of the first proclamation on judicial administration. Through this law, Emperor Haile Selassie's government intended to create a judicial system with jurisdiction throughout the country. With the enactment of six codified laws (Penal Code, Civil Code, Commercial Code, Maritime Code, Criminal Procedure Code and Civil Procedure Code) from the late 1950s to mid 1960s, the imperial government made it clear that legal relations in Ethiopia would no longer be governed by any customary legal system.

The drafters of the codes, especially those of the Civil Code of 1960 (with a total of 3367 articles), attempted to incorporate some customary norms in areas dealing with family, successions and property (Vanderlinden 1966–67:259). The Civil Code then declared that any rules – written or customary – dealing with matters covered in the Code that had not been saved by explicit reference or incorporated into the Code were repealed (Art. 3347). Although the other codes did not include such clear repeal provisions, they were enacted with the aim of bringing about the complete displacement of any non-formal sources of law that were hitherto in operation.

The Ethiopian government's policy of derecognizing customary justice systems continued until the fall of the military government (also known as Derg or Dergue) in 1991. But, contrary to the official policy of the government, the customary justice systems of the various ethno-cultural communities of Ethiopia have never stopped functioning. As studies by Gebre *et al.* (2012), Donovan and Getachew (2003), Pankhurst and Getachew (2008) and others show, most of the non-urban population of the country – about 85 per cent of its population – primarily uses the customary justice system to settle their disputes.

The government led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), which ousted the Derg and came to power in 1991, introduced – among other things – a policy of cultural self-determination for the ethno-linguistic communities of the country. As part of this policy shift, the 1995 Constitution recognized the right of customary and religious laws and courts to preside over cases in the areas of family and personal matters where the disputants have given consent to be heard by these forums. The Constitution is, however, silent regarding the place of customary justice systems in other areas of civil law and in criminal law. The central argument of this chapter is that Ethiopia needs to undertake a legislative reform at both federal and state levels to clearly recognize customary justice systems in criminal matters and additional areas of civil law. At the same time, legislative reform needs to put in place mechanisms for creating and sustaining harmonious cooperative relations between the formal and customary legal systems. Any law enacted should also make sure that the interpretation and application of customary law is undertaken in a manner consistent with the fundamental rights and freedoms guaranteed by the Ethiopian Constitution and international human rights standards applicable to Ethiopia. The chapter makes suggestions on how these legislative aims could be met.

The chapter proceeds as follows. The next section (section two) presents a succinct summary of the trajectory of customary justice systems to the coming into force of the 1995 Constitution. Section three explores the space given to customary justice system under the 1995 Constitution of Ethiopia. Section four presents arguments and options for the full recognition of customary justice system in Ethiopia. Finally, the chapter closes with a brief conclusion.

Customary justice system in Ethiopia before the 1995 constitution

Ethiopia has more than eighty different ethno-linguistic communities. These communities have memberships that range from millions to a few hundred. Each of them has its own indigenous governance and dispute settlement institutions, laws and mechanisms that have enabled them to live harmoniously and at peace internally as well as with others with whom they share land, water or other resources. Each cultural community may have more than one internal dispute settlement institution, each of which applies to certain sections of the group and has developed separately owing to geographical or other reasons.

Customary dispute settlement institutions and norms have been in existence for perhaps as long as the communities themselves and certainly long before the formal state laws and institutions were created and applied to these communities. Based on the existing evidence, the history of customary justice systems in Ethiopia can be categorized into four broad eras: the whole period preceding the mid-fourteenth century; the period between the mid-fourteenth century and early

twentieth century; the period from the early twentieth century to the ratification of the Ethiopian Constitution in 1995; and the post 1995 constitutional order.

Before the fourteenth century justice was predominantly administered on the basis of the Biblical precepts of the Old Testament (Fetha Nagast:xvii). Although not much is known about the legal norms utilized by most of the non-Christian parts – including those professing Islam–of the population during that time, it is safe to assume that the cultural groups applied their own norms to govern their relations internally and with their neighbouring groups. This, however, is not to say that customary norms were not in use in the Christian or Judeo-Christian parts of the country. Rather, customary norms were used alongside the Old Testament precepts to fill gaps or otherwise supplement the royal sources of law (Bililign 1969:152). It is also known that, at least from the Aksumite period (around the tenth century BC), the monarchical regime exerted its control over the populace through royal edicts and proclamations to collect tax, declare war and make peace.

In the mid-fourteenth century, the Fetha Nagast ('Law of Kings') was imported from Alexandria Egypt at the request of Emperor Za'ra Ya'qob (r. 1434–68) for use in the Christian part of the country (which had large Judaic community before the advent of Christianity in the fourth century[1]). According to Abba Paulos Tzadua[2], the Fetha Nagast 'was originally written in Arabic by the Coptic Egyptian writer Abu-l Fada'il Ibn al-Assal' in the 1230s (Fetha Nagast:xv). It replaced the Old Testament of the Bible as the main source of law at the formal level for the Judeo-Christian part of the Ethiopian society and remained so until the early twentieth century. But, for various reasons, the application of the Fetha Nagast was not pervasive. In fact, its application is said to have been limited to the clergy, the imperial court and limited sections of the Christian community. The ecumenical code was not readily accessible to those who were in charge of the administration of the law, both physically as there were few copies of the code in the entire country and because most people did not understand Ge'ez, the language in which it was expressed (Singer 1970:74). Thus, again, most people continued to use their customary dispute settlement institutions and laws to maintain peace and order and to go about their daily lives (Fetha Nagast:xxvii).

The third era began with the coming to power of Emperor Menelik II (r. 1889–1913). In 1907, for the first time in the country's history, ministerial departments were established. Hitherto, at least theoretically, the Emperor made all the

1 Kaplan (1992:17) for example notes, that "according to some Ethiopian traditions, half the population of Aksum was Jewish prior to the advent of Christianity".

2 Paulos Tzadua is a Catholic bishop who translated the *Fetha Nagast* from Ge'ez to English, originally published in 1968 by the Law Faculty, Haile Selassie I (current Addis Ababa) University. 'Ge'ez' (also sometimes referred to as 'Ethiopic') is a classical language of the Christian and Jewish population of Northern Ethiopia. It is currently a liturgical language of the Ethiopian Orthodox Tewahido and also Catholic churches in Ethiopia and Eritrea.

decisions single-handedly with the help and advice of some very close personnel. The Emperor's decision to create various departments was motivated by his desire to 'modernize' the governance and justice system of the country for the benefit of all its inhabitants (Mahteme-Selassie 1970:53). Among the ministries established was the Ministry of Justice. It was declared that the Minister of Justice was to serve as the head (chief) of all the judges in the country and that he was responsible for ensuring that all judgments conformed to the Fetha Nagast. From that time on, the formal institutions for the administration of justice were more pervasively applied, at least in theory.

The establishment of the ministries was followed quickly by the creation of a division of courts under the Minister of Justice known as *Afe Negus*, (lit. 'mouth of the king', Amharic), that were to preside over every territory in the country. Before this, appeals within a particular province were passed to the provincial governor, who acted as both administrator and high court judge. In the new courts, appeals from the provinces were heard by the *Afe Negus* himself, while appeals regarding the death penalty were heard by the Emperor. Accordingly, six divisions of courts, with two judges each, were created to have local jurisdiction over the parts of the country that were placed under their remit. This court structure continued until the Italian invasion in 1935. It was formally replaced through a law promulgated in 1942 by four tiers (*mikitil woreda*,[3] *woreda*, *awraja*[4], high courts) below the *Afe Negus*, with the Imperial Supreme Court presiding over the latter. A decree issued after the 1942 judicial administration law allowed governors and lower officials to sit as presiding judges in the lower (*mikitil woreda*, *woreda* and *awraja*) courts (Geraghty 1970:443).

Attempts were also made to enact procedural and substantive laws especially in the areas of criminal justice. The Penal Code enacted in 1930, and the judicial administration decree of 1943, are the two important laws worth mentioning in this regard. The 1930 Penal Code drew heavily on the criminal law part of the Fetha Nagast (Singer 1970:131) and superseded it. It is also noteworthy that Haile Selassie's policy of legal unification set in motion with the enactment of the 1942 judicial administration law left room for Sharia law and customary law, the latter of which was to deal with small claims and petty offences. A law passed in 1942 (replaced by another law enacted in 1944), allowed *khadis* and *naibas* councils[5] to adjudicate cases based on Islamic law (Singer 1971:136). This law was replaced by a subsequent law on the same subject passed in 1944 (*ibid*.).

3 The *mikitil woreda* court level was later abolished by Judicial Administration Proclamation No. 195/1962. *Mikitil woreda* was an administrative unit below *woreda* (district) level.

4 *Awraja* was an administrative unit encompassing some *woredas* under it. It is not in use currently.

5 *Khadi* (also *qadi*) was a mid-level Sharia court judge, and *naiba* was the lowest Sharia court judge.

In 1947, a proclamation (No. 90) was passed establishing local judges called *atbia dagnias*. Proclamation No. 90/1947 allowed the *atbia dagnias* to adjudicate civil claims up to the value of 26 Ethiopia Birr (about 9 USD at the time), and to impose a criminal fine of up to Birr 15 (Singer 1970:313). The men appointed as *atbia dagnias* were highly regarded local people, such as large landholders, who had already been unofficially exercising the power formally given to them by Proclamation No. 90/1947. The *atbia dagnia* was empowered to settle disputes by compromise (Amharic '*erq*') within his local jurisdiction without limit as to the amount or type of dispute. If unable to broker a compromise in a dispute within his material jurisdiction, he could then move to adjudicate the case, but if the case exceeded his material jurisdiction, he would pass it to the appropriate court (Singer 1970:313).

Between the late 1950s and mid-1960s, Emperor Haile Selassie I (r. 1930–1974) made a comprehensive move, on a revolutionary scale, to replace all existing laws (customary or otherwise) with codified formal law. This was the pinnacle of the drive to 'modernize' Ethiopia's legal system begun by Emperor Menelik II. It seems ironic, however, that while maintaining that 'no modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation' (Fetha Nagast: Preface), Emperor Haile Selassie instructed foreign experts who had no or very little knowledge about Ethiopian society to draft the major codes of law.[6] The Emperor believed that 'law is a unifying force in a nation' and that 'one of the goals sought to be attained by the enactment of modern codes and other legislation is that the law be uniform throughout the Empire' (Haile Selassie I 1964:vi). He also averred that although the codes drew in part on foreign sources, they were drafted to accord with Ethiopia's needs and ancient legal traditions' (ibid.).

However, it is questionable whether Emperor Haile Selassie's convictions resonated with the drafters of the codes who, it seems, understood their task to be to create a new set of laws for Ethiopia. For example, Rene David, speaking about the civil law, stated that Ethiopia's approach was aimed at the total abolition of customary law (outside those customary rules that would be incorporated into the code) and the enactment in its place of a ready-made system of foreign law (David 1962/63:188–189). David made an assumption that 'Ethiopians do not expect the new Code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program 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' (David 1962/63:193). David also spoke about the fact that some customs might not be worth preserving as they were repugnant

6 The 1957 Penal Code was drafted by Professor Jean Graven (Swiss); 1960 Civil Code was drafted by the French comparative law jurist Rene David; the Commercial Code (also of 1960) was drafted by professors Escarra and Jauffret (also French jurists); 1961 Criminal Procedure Code by Sir Mathews of the UK (Sand 1974:12,14).

to justice and likely to be rejected by the people in the future (David 1962/63:194). David further justified the almost wholesale importation of foreign civil law into Ethiopia by the fact that there was no custom at all in certain areas of the civil law, such as contracts, and that the multiplicity of cultures with diverse customary laws in Ethiopia made it impossible to codify or follow custom in the country (David 1962/63:195). Thus, except in certain areas of the Civil Code dealing with family law, successions and property law, where the rules reflected indigenous notions (Vanderlinden 1966/67:59), most of its provisions were essentially based on European legal rules. It needs to be noted that the Civil Code made it poignantly clear in its repeal provision (Art. 3347) that it abrogated or replaced all laws, written or customary, previously in force.

The ideas reflected by Rene David with regard to the Civil Code were shared by all the foreign experts that drafted Ethiopia's legal codes at that time. Indeed, it seems they were acting on instructions from the Emperor's government to draft the laws based on the legal systems of developed nations (Sand 1971:5). The Penal Code (1957) and the Commercial Code (1960) hardly gave any regard to the customary laws and institutions of Ethiopian society. The only reference the Penal Code made to 'customary law' was in Art. 10 dealing with transitory issues, which states that applications for the cancellation and reinstatement of judgments made under penal legislation repealed by this Code or 'customary law fallen into disuse' shall be governed by the Penal Code. The expression 'customary law fallen into disuse' makes it clear that the intention of the Code was to supersede customary law. In a few other places (Art. 97, confiscation of property; Art. 550, duels; Art. 770, disturbance of work or rest of others; and Art. 806, petty theft) the Penal Code refers to 'custom' as fact, not law. The fact that the 2004 Criminal Code, which replaced the 1957 Penal Code, does not have provisions analogous to Art. 10 of the 1957 Penal Code makes it clear that customary law in criminal law areas had already been nullified by the 1957 Penal Code, and that the Criminal Code had no intention of reviving it.

The same was the case with the Criminal Procedure Code of 1961, which – aside from its incorporation of a section on the *atbia dagnias,* entitled 'Atbia Dagnias with summary jurisdiction'[7] – was almost totally based on European (mostly Anglo-American) rules of criminal procedure. The *atbia dagnias*, as earlier noted, were established in 1947 as local judges to hear very minor civil and criminal cases.

7 Arts. 223 and 224 of the Criminal Procedure Code, the *atbia dagnias* were empowered to whenever possible settle by compromise all cases arising within their local jurisdiction of minor offences of insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed 5 Birr. If he cannot bring about a compromise, the *atbia dagnias* can then move to adjudicate the case with the help of two assessors and, on conviction, can impose a fine not exceeding 15 Birr. His decisions are appealable to the *woreda* court with local jurisdiction.

While the Criminal Procedure Code maintained the *atbia dagnias* and gave them jurisdiction over minor criminal offences, the Civil Procedure Code enacted in 1965 did not mention them as having any civil jurisdiction. A Ministry of Justice circular sent out to the provincial governors immediately after the adoption of the Civil Procedure Code did, however, state that the *atbia dagnias* courts could continue to exercise their civil jurisdiction if the parties agreed to submit their disputes to them (Geraghty 1970:428).

The dominant paradigm of replacing customary law with foreign-influenced formal laws and institutions of justice continued under the Derg regime (1974–1991). The defining character of the Derg was its importation of a socialist-oriented legal system based on Marxist-Leninist teachings, and its rejection of the liberal notions of the West. But when it came to customary justice systems, the Derg's policy position had the same effect of relegating and disregarding customary justice systems as that of the previous regime.

The fall of the Derg and coming to power of the EPRDF in May 1991 ushered in the current era in the development of the relationship between the Ethiopian state and the customary justice system. The EPDRF government clearly distanced itself from earlier regimes by proclaiming, among other things, the cultural self-determination of the country's ethno-cultural communities as official state policy. The EPDRF's interim constitution, the 1991 Charter of the Transitional Government (the Charter), states that every nation, nationality or people in Ethiopia is, among other things, guaranteed the right to: preserve its identity and have it respected; promote its culture; and administer its own affairs within its own defined territory (Art. 2). However, while the Charter openly embraced the cultural and other rights of self-determination of nationalities, it did not make specific reference to customary laws or courts. In this regard, it followed suit with all the earlier Ethiopian constitutions. Moreover, one of the most important pieces of legislation enacted during the transitional period (1991–1995) under the ambit of the Charter was Proclamation No. 7/1992, which organized the national/regional self-governments of the country and divided up judicial power between central and regional formal courts without any mention of non-formal courts (see Art. 10(9) and Arts. 23–24). The 1995 Constitution, on the other hand, reflected a clear policy shift in its embracing of customary (and also religious) laws and courts, albeit only in the areas of family and personal matters. The next section of this paper will explore the relevant constitutional, legal and policy regimes regarding customary justice under the current constitutional dispensation.

Customary justice system and the 1995 constitution of Ethiopia

As earlier noted, the 1995 Constitution of Ethiopia signalled a move away from the abolitionist position with regard to non-state justice system pursued by Ethiopia's

governments since Haile Selassie's time. The framers of the Constitution adopted an approach that opened up space for the application of some customary laws and courts on the basis of subject matter. Accordingly, Art. 34(5) of the 1995 Constitution states:

> This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with [religious or] customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.

To go full circle on the matter, the Constitution makes provisions for religious and customary courts in Art. 78(5), thus:

> 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. 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.

Art. 34 of the Constitution, which is part of the Bill of Rights of the Constitution, deals with 'marital, personal and family rights'. Other provisions of this article enshrine constitutional standards that need to be respected regardless of religious or cultural or communal considerations. Thus, it is declared that men and women without any distinction as to race, nation, nationality or religion, have equal rights while entering into, during marriage and at the time of divorce, and that marriage shall be entered into only with the free and full consent of the intending spouses. The Constitution also makes clear that the recognition of marriages concluded under systems of religious or customary law must be based on normative standards to be specified by law. Furthermore, the Constitution stipulates that laws shall be enacted to ensure the protection of the rights and interests of children at the time of divorce.

The Constitution's substantive standards in its other provisions are likewise noteworthy. Art. 35 enshrines the rights of women, underscoring their complete equality with men in the enjoyment of constitutional rights and their right to protection by the state against harmful customs. The Constitution explicitly states that 'laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited' (Art. 35 [4]). In its declaration of the cultural objectives of the country (Art. 91), the Constitution also states:

> The Government shall have the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions that are *compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution* (emphasis added).

Added to these is the Constitution's supremacy clause, which emphatically states that 'any law, customary practice … which contravenes [the] Constitution shall be of no effect'.

Therefore, the statement in Art. 34(5) of the Constitution, cited above, needs to be viewed within the context of the broad normative position taken in the Constitution. The Constitution gives primacy to individual rights even in the face of possible challenges to such rights from religious, cultural or communitarian positions. It has taken the position that the human rights standards enshrined in it shall apply uniformly to men and women that come under the Constitution's jurisdiction, regardless of their religious and cultural background. But at the same time, the Constitution has also chosen not to force its rights' standards on those who may want to settle disputes arising in the areas of family and personal matters in accordance with the rules ordained by religion or custom. By allowing an exception to the uniform standards it espouses with regard to fundamental rights and freedoms, the Constitution accommodates the wishes of those individuals who, while being aware of their right to have personal and family matters regulated by the country's civil law, consent to having their disputes in these areas adjudicated on the basis of religious or customary law. Therefore, the Constitution as such does not subject individuals to the operation of religious and customary laws but rather gives individuals themselves the right to choose.

The Constitution stated in Art.34(5) that particulars regarding the adjudication of disputes by customary and religious laws would be determined by a law to be enacted on the matter. In pursuance of that, Proclamation No. 188/1999 (*Federal Courts of Sharia Consolidation Proclamation*) was enacted by the House of Peoples' Representatives and deals comprehensively with the structures and hierarchies of the Federal Sharia Court, the jurisdiction of each hierarchy, the applicable substantive and procedural laws, the appointment of judges and the governance system of the Court. However, to date, no law has been enacted regarding customary laws and courts. Indeed, regulating the particulars of customary courts and laws in Ethiopia is not an easy task because of the sheer number of cultural communities in the country, each with their own customary norms. It is hoped that the suggestions made later in this chapter indicate some ways of surmounting this difficulty.

The constitutions of the Ethiopian regional states have the same dispensations as the Federal Constitution regarding the customary and religious laws, courts and other normative standards discussed in the preceding paragraphs. As is the case at the federal level, although most regional states have enacted legislation on the Sharia courts, none has enacted laws regarding customary laws and courts.

Now that we have seen the place of customary (and religious) family and personal laws and courts in the Ethiopian constitutional order, the next question is whether the customary justice system has any de jure place with regard to other civil matters and in criminal matters. The answer to this question is not readily

available in the constitutional texts. And the issue has been further complicated by the discrepancy between what seems to be the position of the constitutions (both federal and regional) and the provisions of some sub-constitutional laws enacted by the regional states' legislative councils.

To begin with, the Federal Constitution – to which all regional constitutions conform – does not make any further reference to customary laws and courts beyond its reference to them in relation to family and personal matters in Arts. 34(5) and 78(5). The Federal Constitution empowers the federal legislature, the House of Peoples' Representatives (HoPR), to make major laws such as penal law – although the state may enact penal laws on matters that are not specifically covered by the federal penal legislation – commercial law and labour law. The HoPR is also empowered to make laws on the utilization of land and other natural resources, interstate commerce and foreign trade, patents and copyrights, and to enact civil laws that the House of the Federation deems necessary for establishing and sustaining the economic unity of the federation (if not decided as such by the House of the Federation, civil matters remain part of the states' competences).

The laws that fall under the law-making competence of the federal legislature are applied nationally: they apply throughout the territory and to all persons that happen to be within the territorial jurisdiction of Ethiopia. This by implication means that, except for the customary family and personal laws (which have been clearly given formal space by the Constitution), all other matters – civil and criminal – fall within the remit of formal laws and are governed by them. Thus, because of the silence of the Federal Constitution – and, as they currently stand, of all regional state constitutions – regarding the place of customary law in areas other than family and personal matters, it would be plausible to conclude that customary law is not given any formal (de jure) recognition to deal with matters falling outside family and personal laws.

While the above-presented reading of the federal and regional states' constitutions is correct, I hasten to add three important points. First, many studies have shown that, in reality, the customary justice systems of Ethiopia's ethno-linguistic groups have always exercised jurisdiction over all kinds of disputes involving family, personal, civil and criminal matters without any jurisdictional limitations based on the matters in dispute (see for example Gebre *et al.* 2012, Pankhurst and Getachew 2008, Melaku 2018). Thus, although the formal constitutional structure ignores the vitality of customary justice systems, the reality has always been that most disputes – from the simplest to the most complex, such as homicide cases (see Donovan and Getachew 2003, Pankhurst and Getachew 2008) – especially outside urban locations, get resolved through customary systems. This makes it plain that the formal constitutional position does not reflect reality.

The second point regards a development that emerged after the 1995 Federal Constitution came into force and that is a reason for optimism about the grad-

ually widening space for customary justice systems. As earlier noted, the Federal Constitution seems to be in favour of a uniform application of the formal legal system with regard to all matters other than family and personal matters. This is also the position of regional state constitutions. However, of late, there seems to have been a policy shift on the part of the federal government in the direction of being more accommodative towards customary justice systems in the area of criminal matters. In 2011, the federal government of Ethiopia endorsed a 'Criminal Justice Policy'. The Policy declared the government's resolve to recognize the customary justice system as an integral part of the country's criminal justice system. The two relevant paragraphs of the Policy read as follows:

> Even if the crime committed is a serious crime, if the Attorney General (AG) is of the opinion that the settlement of the dispute by customary means brings about the restoration of lasting harmony and peace among the victim and the wrongdoer than it would be the case if the case was to be resolved by the formal justice avenue, then the AG may in consideration of public interest decide not to prosecute such a crime. In cases of crimes that are punishable with simple imprisonment or upon complaint, the investigation or prosecution can be interrupted if the disputing parties have settled their differences through reconciliation and upon the initiation or request of the parties (FDRE Criminal Justice Policy 2011:14–15).

The Policy underscores that any decision by the Attorney General not to prosecute crimes shall be based on public interest considerations. It further states that what constitutes public interest shall be stipulated in the criminal procedure law and directives to be issued by the Attorney General. The Policy does not specify how the formal and customary justice systems should communicate and interact in the event that the Attorney General decides to leave a case to the customary justice system. Thus, although the Policy suggests the government has shifted its policy towards embracing customary justice systems, more concrete steps need to be taken to work out the relationship between the two systems. The most effective way to do this would obviously be through legislative reform, which could be effected at the sub-constitutional level without necessarily involving an amendment to the Federal Constitution.

The third point is that, through their sub-constitutional legislation, the regional states have already entrusted customary justice institutions with certain jurisdictions in areas other than family and personal matters. This, again, arguably does not accord with what seems to be the shared position of the federal and regional states' constitutions. But, in my view, these legal developments show the policy shift towards opening up space for customary justice systems, which was not the case in the early 1990s when the constitutional norms were being negotiated.

The customary justice system in states' sub-constitutional laws

As earlier noted, laws passed by regional states, notably in relation to rural land administration and utilization and social courts, have bestowed different levels of jurisdiction on customary institutions. A few examples are presented here.

The lowest judicial structures found in the *kebeles*, the lowest administrative units, are the social courts. Some regional states have established and defined the jurisdiction of the social courts, empowering them to settle disputes based on customary law. For example, the Amhara Social Courts Proc. No. 246/2017 stipulates that one of its objectives is to enable the settlement of disputes amicably through the *shimgilinna*[8] process. The proclamation also states that social courts shall undertake their activities based on the local custom, tradition and practices, and that the judges of social courts shall be directed solely by formal (state enacted) law or local tradition and custom. Similarly, the Social Courts Proclamation No. 127/2007 of Oromia Region states that judges in social courts can settle disputes based on the regular law or through customary means.

Rural land use and administration laws provide another set of laws through which regional governments allow customary institutions to settle disputes. According to the Oromia Rural Land Use and Administration Proclamation No. 130/2007, anyone who has a land-related case should first apply to the *kebele* administration where the land is situated. Then, the disputing parties should select two arbitral elders each, after which they should agree on a chairperson for the elders' panel. The chairperson may also be co-opted by the four elders. If both the parties and the elders can not agree on the presiding elder, the *kebele* administration will appoint one. The law states that the elders' panel is to be given 15 days to submit a written decision on the dispute. Once submitted, the decision of the elders' panel should be registered, and officiated copies given to the disputing parties. Dissatisfied parties can lodge an appeal – attaching the copy of the elders' decision –with the *woreda* (district) court with local jurisdiction, and they also have the right to appeal to the high court with local jurisdiction. The Afar Regional State's Rural Land Use and Administration Proclamation No. 49/2009 takes a similar approach to that of Oromia, except that it does not require the decision of the arbitral elders to be submitted in writing. Likewise, the Amhara Rural Land Use and Administration Proclamation No. 252/2017 provides that if disputing parties fail to settle their disputes amicably, they can entrust their case to elders of their choosing. If that fails, the case can be taken to the *woreda* court, with a right to appeal to the high court. The Rural Land Use and Administration Proclamation No. 110/2007 of SNNPR sets forth an almost identical procedural approach to the settlement of land-related disputes. The above examples of regional land-use and

8 Reconciliation through local elders.

administration laws regarding the use of social courts give a clear indication that formal government institutions at the regional level have determined to extend the jurisdiction of customary justice institutions beyond what seems to be allowed by their constitutions. Of course, this still represents only a fraction of the variety of disputes that customary institutions settle in reality.

Challenges faced by customary justice systems

As noted earlier, although the formal legal system at the regional state level does carve out more space for customary justice systems beyond family and personal matters, there is still a huge gap between what these institutions do in reality and the recognition accorded to them. This situation has created many challenges for the customary justice institutions and for people who happen to be disputants before them, especially those who benefit from the decisions that are handed down by these institutions (see Desalegn and Melaku, this volume).

In addition, customary justice systems continue to face challenges even in the areas of family and personal matters. The main reason being that the legislation that was supposed to formally establish customary courts and delineate their jurisdiction, composition and the substantive and procedural laws they may apply, as well as their relationship with the formal laws and institutions, has yet to be enacted. This has made their legal standing very precarious. It has exposed them, for example, to abuse and exploitation by disputants who strategically engage in forum shopping, i.e. those who move back and forth between the customary and formal courts (see Desalegn, this volume).

Disputants in a case also live through a state of uncertainty, as one side may have addressed their complaint to the formal justice system while the other approached the customary justice institutions. This results in the matter ping ponging between the courts and the customary institutions. Since the formal courts do not consider customary legal systems as a legitimate avenue for dispute settlement, they do not take into account any processes that might have begun before the case was brought to them. So cases can start afresh with the formal courts after having been 'settled' through customary justice avenues. This raises the possibility that wrongdoers might be subjected to punishment twice for the same wrongdoing. In the case of homicide or grave bodily injury, a wrongdoer tried by the formal criminal justice system could still be subjected to the customary justice process of compensation payments, and vice versa (see Aberra, this volume). These are just some examples showing the challenges brought by the current imperfect recognition of customary justice system as part of the country's justice system. The need to workout the most acceptable and productive way of creating an interface between customary and formal justice systems is clear, and the next section explores ways in which the two systems could be productively integrated.

Options for an interlink between formal and customary justice systems

The problem of integrating formal and customary justice systems is shared by many countries in Africa, Latin America and Asia that were at the receiving end of legal transplantation, primarily from the legal systems of the colonial powers of the West. As noted at the beginning of this chapter, although Ethiopia does not share this colonial history, it has the same problem as a result of its voluntary borrowing of legal norms from the West.

Upon independence, many post-colonial states – and others like Australia and the USA – that inherited plural legal systems adopted various approaches to accommodating the non-formal legal system of their native communities. In the USA, for example, Indian Americans are generally subject to tribal law (not state or federal law) when the offender and victims are both Indians (18 USC § 1152). However, under the Indian Major Crimes Act, violent crimes are exempted from this exclusive grant of jurisdiction (18 USC §1153). In Papua New Guinea, under the Native Customs (Recognition) Act 1963, custom is recognized as a cultural fact (not law) in the formal court's determination of the guilt of a native offender (Dinnen 1988:25–26). Yet, at the same time, it should be noted that some people in the country, including judges, argue that customary compensation should be considered as a legitimate form of punishment and that courts should be seen 'as a consensual forum in which people actively participate in restoring harmony in communities disturbed by law breaking' (Dinnen 1988:9–10).

The state of various customary systems in Ethiopia is fundamentally different from those in Africa's postcolonial countries. There, customary systems were subject to various kinds of interference from the colonial administrators and their legal institutions (Pimentel 2010, Snyder 1981, Ige 2015). Various attempts were made to codify the local law, thereby creating a state version of customary law, different to the living or unofficial version of customary law. In Ethiopia, however, the customary justice system never lost its original character because the formal state remained aloof from the functioning of the customary systems and kept them at a distance from state institutions. For example, at no point in Ethiopia's history have customary court personnel been appointed by the government. As a result of this autonomy, the customary justice system has maintained its integrity and natural character.

The natural state of the customary law and institutions of Ethiopia's various communities needs to be maintained in any attempt to link customary and formal justice systems in the future. It is advisable for any government policy or legal intervention to allow customary institutions to be the sole interpreters and enforcers of customary law, but procedures need to be put in place to ensure that the workings of the customary justice system are consistent with constitutional human rights standards. This approach, as Pimentel (2010:4) observes, enables customary

justice systems to maintain their vitality and adaptability. It also rejects the creation of customary divisions within formal courts, such as were in place in Eritrea when it was federated with Ethiopia (Geraghty 1970:450), in which it is the formal court/judge who interprets and applies the customary law, and not the customary court.

Following David Pimentel (2010:15), I suggest that the linkages between formal and customary justice systems need to be guided by the following considerations: (1) the need to recognise and respect traditional cultures and customs; (2) the need to ensure that customary law and institutions do not violate the fundamental rights and freedoms enshrined in the Ethiopian Constitution, and those protected by the international human rights standards applicable to Ethiopia; and (3) the need to uphold the rule of law. These considerations will no doubt require some trade-offs, particularly as some cultures do not treat women as equal to men or have practices that violate fundamental rights of children (see Epple, chapter 14, this volume). But, this needs careful handling and any trade-offs should not strike at the heart of the fundamental rights of women and children. One of the most effective ways through which the primacy of the fundamental rights of women and vulnerable groups such as children and minorities can be protected is – as noted below – by empowering the reviewers of constitutions to uphold the constitutional human rights standards against any contrary rules in the communities' customary justice systems.

The above suggestion calls for the maintenance of the separation between the customary and formal justice systems (what Pimentel 2010:23 calls 'the equal dignity approach'), but at the same time for the creation of a review mechanism to ensure that the former upholds constitutionally protected rights and freedoms. There is no rational reason why the formal justice system should crush the customary systems and become the sole justice dispenser, so long as the customary systems conform to the minimum standards of human rights protection (Donovan and Getachew 2003:539). What the formal state machinery must be concerned with is ensuring that those subject to its jurisdiction benefit from the minimum human and group rights protections guaranteed by the Constitution. With a mechanism to achieve this in place, customary justice systems should generally be left alone to evolve, adapt and change through their own internal dynamics, as they have always done.

As stated above, the creation of a productive interlink between formal and informal justice systems demands that customary justice systems should not be subordinated to the formal system through appeal or other such means. The question arises, thus, of how it is possible to check whether customary courts and institutions are observing the minimum human rights guarantees outlined in the Constitution if their decisions are not appealable to the formal courts. There are ways to do this. First and foremost, it is necessary to believe in the capacity of custom-

ary justice systems to change and adapt to keep abreast of the world in which they function and with which they interact (Pimentel 2010:25, Donovan and Getachew 2003:550). Then, the constitutional review system, whereby the decisions of customary courts are reviewed for violations of constitutionally guaranteed rights and international human rights standards, can be used. My suggestion is that the decisions of customary courts should not be subjected to the appellate review of federal or regional state courts but rather should be subjected directly to the constitutional review process. The constitutional reviewer – in Ethiopia's case, the House of the Federation with the technical recommendation from the Council of Constitutional Inquiry (Ethiopian Constitution: Arts. 62(1):83–84) – could then fashion its decision in a manner that respects the autonomy of the customary system involved and allows its adherents to engage in what Abdullahi An-Na'im (1992:27) calls 'internal cultural discourse' to readjust its position vis-à-vis the constitutional standards.

I believe that, as part of the above suggestion, it is also possible to design a cooperative system in which jurisdiction over serious crimes that endanger national security and social harmony and that jeopardize constitutionally protected rights, such as the right to life, may be either ceded to the formal justice system or handled by the two legal systems jointly, and in a manner that allows the traditional justice system to fully embrace any joint activity. This limited intrusion into the territory of customary institutions is justifiable given the state's constitutional responsibilities to maintain a minimum protection of rights (Donovan and Getachew 2003:538).

The realization of the above suggestions would inevitably call for new laws at both federal and state levels detailing the interlinkage, cooperation and autonomy of the two legal systems. The requirement to be consistent with the minimum human rights standards of the Constitution would, of course, also need to be clearly spelled out in the law.

The question of how to determine the jurisdiction of the formal and customary justice systems is another major issue that needs to be settled in law. The suggestion that the customary justice systems should be kept separate from the formal system normally creates a situation whereby both the formal and customary courts can have concurrent jurisdiction over a given case. For example, in a civil dispute involving a hire-purchase contract, both the formal court with local jurisdiction in the area and the customary court of the community there have jurisdiction over the case. How then should a disagreement between the plaintiff and the defendant on the legal forum to be used be resolved? Is it plausible to state in the law that the forum where the case was filed first has the jurisdiction? Or should the law provide that the court, whether formal or customary, where the case was filed should decide whether it should decide the case or transfer it to the other court? These are very difficult questions that the law needs to somehow settle. One way to deal with this – at least for most civil law disputes – is to extend the consent requirement in article 34(5) of the Constitution, whereby both parties are required to formally give

their consent to their case being lodged with a customary court. The law could also make provision for the transfer of cases from the formal court to the customary courts when both parties demand it. It might also be possible to explore whether there are circumstances under which customary institutions would voluntarily relinquish jurisdiction over certain individuals that do not abide by the customs of the community (see Aberra, this volume).

Summary and conclusion

This chapter has shown the state and development of customary justice systems in Ethiopia, and explored the relationship between the formal (state) law and legal institutions and the informal (customary) ones. As explained, from the late 1940s the Ethiopian government directed its attention to putting in place legal institutions following the model of Western legal systems. This attempt was accompanied by a policy of uprooting customary justice systems and replacing them with codified law. With the coming into force of the 1995 Constitution, the policy of hostility to customary law and institutions was replaced by an accommodative policy that explicitly recognizes customary family and personal laws and courts. However, as we have seen, the space given by the Constitution to the various customary justice systems in Ethiopia does not match the practical vitality of these systems, which encompass all areas of law. Therefore, recognition of customary justice systems should be widened to acknowledge the fact that they work on cases from all areas of dispute, including criminal cases. In order to do so successfully and sustainably, the government should formalize this recognition through a well-crafted law to be made by the federal, and regional, legislatures. It is hoped, the suggestions made in this chapter will assist policy-makers in accomplishing that task.

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