Integrating Traditional and State Institutions for Conflict Prevention: Institutional, Legal and Policy Frameworks in Ethiopia

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Abstract

Despite the prevalence of traditional institutions and the growing official and academic need to 'recognize,' 'empower' and incorporate them in the state system, competition and harmony between the two persists. There are seventy-six officially listed ethnic groups in Ethiopia, and there exists a great plurality of livelihoods, social organizations, belief systems, and political and legal systems in the country. Notwithstanding the human right issues, traditional institutions operating outside the state are the dominant form of conflict prevention and resolution in Ethiopia. However, the relationship between traditional institutions and state institutions remains unclear. Previous researches either focus on the constitutional set-up and legal framework of states, or their scope is too specific relating to local case studies and their relationship with the state local institutions. This relationship does not, however, only involve legal issues or concerns at the bottom, but it is also an issue of governance and political structure. This article is based on content and document analysis and examines the harmony and competition between the state and traditional institutions in Ethiopia. I argue that despite their practical prevalence, the policy, legal and institutional frameworks in Ethiopia do not plainly address the relationship between the state and traditional institutions. Although *de facto* recognition seems to exist, the practice shows that the state that envisages the importance of traditional institutions undermines their role in case of conflict with state institutions.

Key terms:

Conflict prevention · Integration · Traditional institutions · State institutions

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1. Introduction

The continuing role and influence of traditional institutions of conflict resolution in Africa is apparent. These traditional institutions continue to demonstrate their relevance in day to day lives of the society. Nonetheless, the relationship between the state and traditional institutions should not be taken for granted for it is a contested terrain fraught with complexities. Previous researches conducted on the subject either focus on the constitutional set-up and legal framework of states[1] or are too specific taking a specific local case study and analyze the relationship with the state local institutions.[2] The relationships are not, however, of only a legal issue, but also involve issues of governance and political structure.

Researches that focus on the cooperative or competitive aspect of traditional and state institutions have addressed the issue of justice by analyzing the linkage *vis-a-vis* the court system of a country.[3] In this Article,

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[1] Susanne Epple and Getachew Assefa (2020), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions,* transcript Verlag.

[2] Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center.

[3] Alula Pankhurst & Getachew Assefa (2008), *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (1st ed.), Centre Français des études éthiopiennes; Gebre Yinteso, Fekade Azeze & Assefa Fisseha (2012), *Customary*

an attempt has been made to grasp the legal, institutional and policy frameworks of Ethiopia to address the current status of traditional institutions.

This article will focus on the enabling conditions in Ethiopia at the macro level by taking laws, policies and the institutional setup of the country which are directly related to traditional institutions. The FDRE Constitution, Codes of the 1960's (i.e., the Civil Code, the Civil Procedure Code, the Criminal Procure Code), and the 2004 Criminal Code are part of the key national legal frameworks that are analyzed. The policy analysis involves the Criminal Justice Policy, the Crime Prevention Policy, and the Peace Policy Implementation Strategy. Institutionally, the Ministry of Peace, the Federal Police Commission, the Ministry of Justice, the House of Federation (HoF), the House of Peoples and Representatives (HPR) and the Reconciliation Commission are consulted.

The first three sections briefly discuss national legal frameworks and traditional institutions in Ethiopia. The next section deals with policy frameworks and traditional institutions in Ethiopia with the aim of assessing the accommodativeness thereto. Sections 3 to 7 address laws, policies and institutional frameworks in the accommodation traditional institutions.

2. The Role of Traditional Institutions in Conflict Prevention: An Overview

2.1. Traditional institutions

Research works have examined traditional institutions under various designations: 'popular dispute resolution mechanisms'[4], 'traditional institution of conflict resolution'[5], 'customary dispute resolution

Dispute Resolution Mecahnisms in Ethiopia, Volume 2, Ethiopian Arbitration and Conciliation Center; Fekade Azeze Assefa Fisseha & Gebre Yinteso (2011), *Annotated Bibliography of Studeis on Customary Dispute Resolution Mecahnisms in Ethiopia,* Ethiopian Arbitration and Conciliation Center. *See* also Susanne and Getachew, *supra note* 1; Gebre et al, supra note 2;

[4] Gebreyesus Teklu Bahta (2014), "Popular dispute resolution mechanisms in Ethiopia: Trends, opportunities, challenges, and prospects" *African Journal on Conflict Resolution* Vol. 14 No. 1.

[5] Meron Zeleke (2010), "*Ye Shekoch Chilot* (the Court of the Sheikhs): A traditional institution of conflict resolution in Oromiya zone of Amhara regional state, Ethiopia". *African Journal on Conflict Resolution*, Vol.10, No.1.

mechanisms'[6], and 'traditional methods of conflict resolution[7]. Alula and Getachew noted that the prefix 'alternative' does not show the Ethiopian context in the sense that "in some regions of the country these forms of dispute resolutions are fairly strong in contrast to the state justice system". Furthermore, the word 'informal' does not seem to be acceptable because there are traditional institutions that have strong rules and even recognitions in some regional states.

The word 'traditional' is used in this article for two reasons. First, 'customary' refers to custom-based norms and practices usually practised in conflict resolutions. The prefix 'customary' implies that these institutions are founded on custom/customary rules while carrying out their functions. However, the term traditional shows the 'traditionality' of these institutions without reference to the source of their power or decisions. It is a synonym to the word 'tradition' used in like the 'common law tradition' or 'civil law tradition' which connotes an established system of laws for a long period of time. Second, I argue that traditional institutions have roles in preventing conflicts whether the bases of their functions may or might not be attributed to custom.

2.2. Conflict prevention

A review of major literature on the subject shows lack of consensus regarding its definition. According to Ackerman, much of the conceptual confusion over the concept of conflict prevention is related to two questions: Should conflict prevention be limited only to the early and non-escalatory stages of conflict, or also encompass the escalation and post-conflict stages of a conflict (….) or should conflict prevention address only the immediate causes of conflict or also its underlying roots, or both?[8]

Thus, different definitions of conflict prevention are discussed in the literature.[9] Leaving the controversy on the taxonomy of conflict prevention,

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[6] Alula and Getachew , *supra* note 3

[7] Martha Mutisi & Kwesi Greenidge (ed) (2012), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, Africa Dialogue Monograph Series No. 2/2012, African Centre for the Constructive Resolution of Disputes (ACCORD), South Africa: Durban

[8] Alice Ackermann (2003), "The Idea and Practice of Conflict Prevention", *Journal of Peace Research*, Vol. 40, no.3, p.340.

[9] Among the widely known definitions the following can be cited: (i) "conflict prevention refers to non-violent (or creative) conflict transformation and encompasses activities designed to defuse tensions and prevent the outbreak, escalation, spread or recurrence of violence" (the ECOWAS Conflict prevention framework); (ii) "Constructive actions undertaken to avoid the likely threat, use or diffusion of armed force by parties in a

definitions along the concept can be categorized into two: those which extend conflict prevention to have a role in all phases of conflict and those that limit conflict prevention to the early phase only. In this article, conflict prevention is defined broadly and refers to preventing the emergence and reemergence of conflicts and preventing the escalation of conflicts. This research adopts the definition given by the Carnegie commission and the ECOWAS conflict prevention frameworks.

2.3. Conflict prevention and traditional institutions

I have shown elsewhere[10] that traditional institutions have a role in conflict prevention. One of the elements of conflict prevention is preventing its escalation. The following table summarizes instances of methods of preventing escalation of conflicts among different ethnic groups in Ethiopia.

Ethnic group (Regional State)	Method of prevention	How it works
Afar	Habi	guarantees the good behavior of the parties before a reconciliation starts
Oromia	Waata	A system of custody of the offender and a means of preventing direct contact between the conflicting parties
	Sagada	convincing the victim family not to resort to a revenge[11]
	Siinqee	A way of prevention escalation of conflict[12] where women carry their *siinqee* and automatically stop a conflict/war

political dispute" (Wallenstein); (iii) "the use of diplomatic techniques to prevent disputes arising, prevent them from escalating into armed conflict…and prevent the armed conflict from spreading" (Boutros-Ghali); (iv) "the aim of preventive action is to prevent the emergence of violent conflict, prevent ongoing conflicts from spreading and prevent the re-emergence of violence (Carnegie Commission)".

[10] Awet Halefom (2022), "The Role of Traditional Justice Institutions in Peacebuilding: Lessons Learned from the Gereb in Northeast Ethiopia" Wilson *Center Africa Program Research Paper* No.31.

[11] Mulgeta Negasa (2011), Sereguma dispute resolution mechanism in Adea Liben Wereda (Amharic), in Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center, p.239.

[12] Tolosa Mamuye (2011), The Siinqee-women's institution for conflict resolution in Arsii p.287 in Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center, p. 287

Kebena (SNNP)	Hooda	a system of preventing escalation of conflict before reconciliation process
Guraghe (SNNP)	Keterat	a system of preventing escalation of conflict before reconciliation process
Shoa (Amhara)	Exile (offender and his family)	Exiling the offender and his family before any reconciliation process[13]
Irob (Tigray)	Priests and Deacons holding up a cross to prevent escalation	The victim's family respectfully responds to the church's request for reconciliation [14]

3. The FDRE Constitution and Regional Constitutions

3.1 The FDRE Constitution

Based on a survey of world constitutions, Cuskelly stated that "the highest level of recognition of customary law is found in African constitutions, both in terms of the number of countries with relevant provisions and the breadth of aspects of customary law covered."[15] Of the 52 African constitutions studied, 33 referred to customary law in some form. Almost all of the constitutions have provisions relating to the protection of culture or tradition extending to the duty of the state to protect and promote them. On the institutional aspect, the recognition ranges from a broad recognition of customary authorities or chiefs, a guarantee of non-abolition of such authorities, to more specific arrangements providing for a specific body with specific functions concerning customary law.

On a similar pattern, Articles 39 and 91 of the 1995 Ethiopian Constitution affirm the promotion of cultures of nations, nationalities and peoples of the country. Three provisions are useful with regard to the recognition of

[13] Alemu Kassaye (2011), Reconciliation (irq) in Blalo Mama Midir Wereda North Shoa (Amharic), in Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center, p.166

[14] Seyoum Yohanes, Customary dispute resolution in Irob, in Gebre Yinteso, Fekade Azeze & Assefa Fisseha (2012), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 2, Ethiopian Arbitration and Conciliation Center, p.168

[15] Katrina Cuskelly (2011), *Customs and Constitutions*: *State recognition* of *customary law around the world*, IUCN, p.6.

traditional institutions. The first provision directly linked to the subject matter is Article 34(5) which makes direct reference to adjudication of disputes relating to personal and family matters in accordance with customary laws, with the consent of the parties to the dispute. It provides:

> 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.

Regarding civil matters going beyond family and personal issues, the Constitution does not clearly prohibit or endorse the operation of traditional systems or laws. Although this could potentially provide the space for the involvement of traditional systems in other legal domains, the fact that traditional institution or laws are mentioned in the context of family and personal law without reference to other legal areas creates the impression that justice rendered by traditional institutions is or should be restricted to family or personal law.

Under Chapter Nine of the Constitution that deals with the judiciary, Article 78(5) makes reference to religious and customary courts:

> 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.[16]

The Constitution accords official recognition to religious and customary courts in three ways: (i) direct establishment of religious and customary courts by law-making organs at the federal and state levels –which involves the process of establishing new religious and customary justice systems based on long-standing religious and customary beliefs; (ii) recognition of religious and customary courts –that were operating as *de facto* informal justice systems– by the federal and state law-making organs; and iii) automatic recognition of religious and customary courts, which were functioning *on the basis of official recognition* before the promulgation of the FDRE Constitution. However, the establishment of these institutions is limited to personal and family matters.

[16] The Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazetta*, 1st Year, No. 1, Article 78(5)

The statement "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" may be interpreted as recognition of traditional institutions serving the society prior to the Constitution as long as they do not contravene the basic tenants of the constitution.

Another pertinent provision is Article 37(1) of the Constitution, which states that "everyone has the right to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power." It places more emphasis on the right to bring a justiciable matter to judicial or quasi-judicial bodies. Despite the practice of traditional institutions in criminal matters, the Ethiopian constitution appears to restrict the practice at the grassroots.

A cumulative observation of these three constitutional provisions signifies a limited legislative recognition to a non-state justice system that is not accorded exclusive jurisdiction and coercive powers which can be clearly observed from the consent clause embodied in the FDRE Constitution. Although the Constitution appears to confine the jurisdiction of traditional institutions to family and personal problems, prior research demonstrates that customary justice systems exercise jurisdiction over all types of conflicts, including civil and criminal cases.[17] Thus, the reality has always been that most conflicts, from trivial to complex, are settled through customary systems in various parts of Ethiopia.[18]

Proponents of the state law want the customary legal forum to give way to the modern unitary legal forum than traditional institutions. They, *inter alia*, argue that traditional institutions may reflect societal structures and represent dominant interests, usually men who may pass judgments that are against the interests of women, children, and minorities. On the other hand, advocates of customary laws argue that the state-centered unitary approach must give way to different alternative paradigms to create a hybrid brand that contains elements of the formal and the informal laws.[19]

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[17] Meron Zeleke, *supra* note 5*; see* also Gebre Yenteso, Assefa Fesseha, Fekede Azeze, (2012), *Customary Dispute Resolution Mechanisms in Ethiopia*,Volume 2, Ethiopian Arbitration and Conciliation Center;

[18] Alula and Getachew, *supra* note 3

[19] Alula Pankhrust & Getachew Assefa (2008), *supra* note 3; *see* also *Gebre Yntiso* (2020), "Understanding customary laws in the context of legal pluralism", in Susanne Epple and Getachew Assefa (editors), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions,* Transcript Verlag.

Those who hold a middle ground on the issue argue that the phrase 'particulars shall be determined by law' in Article 37(5) of the Constitution and the phrase 'religious and customary courts –that had functioned prior to the adoption of the Constitution' in Article 78(5)– may imply that the Constitution does not prohibit customary laws or traditional institutions, but rather leaves this to be determined by a specific law to be enacted, or the courts should have been functional before the adoption of the Constitution. Based on this argument, traditional institutions that have been functional before 1995, and customary laws that are considered to be applicable by future laws are recognized to function accordingly. This argument is substantiated by the legal, institutional as well as policy frameworks, discussed below.

3.2 Regional Constitutions

With the exception of the Somali and Afar Regional states constitutions, all regional states constitutions have the same dispensation as the Federal Constitution regarding customary laws and courts. Article 56 of the Somali Regional State Constitution states that "the State Council shall form elders and clan leaders Council." Similarly, the Afar Regional State Constitution provides that "the State Council may establish Councils of Elders at various hierarchies as may be necessary." Other regional constitutions are silent in this regard. The table below compares the FDRE Constitution and Regional Constitutions.

Constitutions	Religious or Customary Laws on Personal and Family Disputes	Elders Council	Customary and Religious Courts Prior to the Constitution Recognized
FDRE Constitution[20]	Article 34(5)	-	Article 78(5)
Tigray Regional State constitution[21]	Article 35(5)		Article 60
Afar Regional State constitution[22]	Article 33(5)	Article 63	Article 65

[20] Constitution, *supra* note 16.
[21] Tigray Regional State Constitution, 1994
[22] The 2002 Revised Constitution of the Afar Regional State

Amhara Regional State Constitution[23]	Article 34(5)	-	Article 65[24]
Oromia Regional State Constitution[25]	Article 34(5)	-	Article 62
Benshangul Gumuz Regional State Constitution[26]	Article 35(5)	-	Article 66
Gambella Regional state Constitution[27]	Article 35(5)	-	Article 67
Somali Regional State Constitution[28]	Article 34(5)	Article 56	Article 66
Harari Regional State Constitution [29]	Article 34(5)	-	Article 68
Southern Nation, Nationalities and Peoples[30]	Article 34(5)	-	Article 73

[23] Proclamation Issued to Provide for the Approval of the 2001-Revised Constitution of Amhara Regional State No.59/2001 Constitution.

[24] Ibid. The Amhara regional state preferred 'Tribunal' over 'courts'

[25] A Proclamation Issued to Provide an Approval of the 2001 Constitution of Oromia Regional State No.4/2001.

Concerning customary courts, the Oromia Regional Government has come up with a new law of establishing customary courts, a new of its kind in Ethiopia. The regional state issued a proclamation called 'A Proclamation to Provide for the Establishment and Recognition of Oromia Region Customary Courts, No. 240/2021'. A regulation -A Regulation to Implement the Oromia Region Customary Courts Regulation No. 10/2021- is issued to enforce the basic principles enumerated in the Proclamation. The law provides detailed rules on the selection of elders, jurisdiction of customary courts and working procedures of customary courts. Upon the consent of the parties, customary courts are empowered to entertain cases of civil or criminal nature. The Proclamation limits the power of customary courts to receive and deal with a matter pending before a customary court with the consent of the parties saving over appeals. (Article 8 of the Proclamation)

[26] A proclamation Issued to Provide an Approval of the 2002 Benshangul Gumuz Constitution No--2002

[27] A Proclamation issued to Provide an Approval of the 2002 Gambella Regional State Constitution No.27/2002

[28] Revised Constitution of the Regional State of Somali 2002

[29] Revised Constitution of the Regional State of Harari, 2005

[30] Revised Constitution of the Southern Nations, Nationalities and Peoples Regional State Proclamation No.35/2001.

4. The Civil Code and Civil Procedure Code

4.1 The Civil Code

Codification in African countries that have adopted the civil law tradition (which includes Ethiopia) has pursued the path of making of a new, unified and systematic law. To accomplish this goal, various methods have been used. In some states, codification was preceded by a lengthy investigation of local customary laws while in others codification was initiated without a full prior study of the local, and very diverse, customary laws.[31]

From the late 1950s to the mid-1960s, six codes of law were enacted in Ethiopia.[32] Emperor Haile Selassie I, who pioneered the 'modernization efforts' and codification of Ethiopian laws in the 1950s and 1960s, appears to have been torn between modernizing the laws and his desire to include the country's rich legal and cultural tradition. The Emperor's preface to the Ethiopian Civil Code supports this view:

> The rules contained in this Code are in harmony with the well-established legal traditions in our Empire … as well, upon the best systems of law in the world. No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relation can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice"[33]

Despite this intention, the codes adopted at the time were highly dependent on international experience; less detailed in the content and breadth of the issues they covered; not adequately consistent with the conflict management styles of the various ethnic and religious groups; insensitive to the people's communal ideologies, lifestyles, and demands; incongruent with the multiplicity and diversity of people's adjudicative activities and procedures; and new to both.[34] These rules have a distinctly Western flavor and appear to bear little resemblance to Ethiopia's traditional patterns of life.

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[31] The codification in Madagascar falls in the first category whereas the Ethiopia and Cote d'Ivoire case meets the second approach. *See* Max Gluckman, Editor (1966), *Ideas and Procedures in African Customary Law*, Studies Presented and Discussed at the Eighth International African Seminar at the Haile Sellassie I University*, Addis Ababa, January 1966*, Routledge, 2018. p.32.

[32] These are: the Penal Code, Civil Code, Commercial Code, Maritime Code, Criminal Procedure Code, and Civil Procedure Code.

[33] Civil Code of [] Ethiopia Proclamation No. 165 OF 1960, preface

[34] Gebre *et al*, *supra* note 2, p. 3.

The objective for enacting the codes was to have a national unifying force as well as a guide to the Ethiopian people's progressive growth. However, if a code of law is incompatible with prevalent social ideals, it may go largely unenforced, undermining the very objectives that are sought. As a result, the question of how the codes of law missed customary rules and institutions of the time have become subject to discourse.

In support of the codification process, which he considered as the revolutionary approach, René David, expert drafter of the Ethiopian Civil Code, stated the following:

> The development and modernization of Ethiopia necessitate the adoption of a 'ready-made' system. We [Europeans] observe the stability of our private law, and we believe with difficulty in the efficiency of laws which pretend to impose on private individuals another mode of conduct than that practiced by them…. This position is not that of Ethiopians while safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structures completely, even to the way of life of her people. Consequently, Ethiopians do not expect the new code to a work of consolidation…. 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 is set out new rules appropriated for the society they wish to create."[35]

The rationale given at the time was that Ethiopian law was not systemized and was often difficult to find, was quite diverse and lacked a case reporting system.[36] Krzeczunowicz also noted the practical non-existence of customary rules on certain matters, as well as the fact that most customs are uncertain or vary from place to place, group to group, and time to time, making it inconceivable even to consider the idea of a simple legislative consolidation of all customary rules as found to be followed in practice. The proponents of these views claim that customary laws that were available and consistent with the contemporary understanding of law were incorporated into the new laws or otherwise allowed to operate. Krzeczunowicz, for example, contended that the Civil Code has integrated customs by direct reference, filling a legal gap

[35] René David (1963), "A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries", *Tulane Law Review*, Volume 37, p.193.

[36] René David (1967), "Source of Ethiopian Civil Code", *Journal of Ethiopian Law*, Vol. 4, No. 2, p. 342.

in the Code that is employed in judicial interpretation, and that there are paralegal outlets for customs.[37]

However, the manner and magnitude of the incorporation cannot be regarded as a realistic and adequate representation of the country's customary law, on three grounds. The *first* ground relates to the methods of incorporation that were adopted because they could not possibly represent and accommodate the diverse customary laws in Ethiopia. *Second*, the so-called 'incorporation of general custom' was established in limited areas and does not correspond to the body of customary laws, which contain a veritable mass of rules in all areas of civil and criminal law. *Third*, Ethiopia's modern legal system made little room for the customary institutions that exist in various areas of society. Article 3347 of the Civil Code confirms this reality, and it reads: "Unless otherwise expressly provided all rules whether written or customary [that were] previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

The repeal provision of the Civil Code did not only aim at those customary rules that were inconsistent with the provisions of the Code but rather customary rules concerning matters provided for in the Code, whether they are consistent with the Civil Code or not. This is an *abolitionist* approach because the state recognizes non-state justice institutions only by legislation that explicitly delimits broad areas in which the non-state norms may not be applied any longer, or it expressly prohibits the institution in its entirety; this represses or ignores the existence of customary laws or institutions.[38]

In spite of the pledge to provide uniform and modern legal regime for the socio-economic development of the country and effective nation-building, customary laws and institutions are still active and vibrant in Ethiopia half a century after the enactment of the codes.[39] The abolitionist approach that disregards these institutions thus requires rethinking and revision. Regardless of the form of government and method of legal transplantation and criticism against traditional institutions, the fact on the ground shows that sustainable legal system demands consideration of the deep-rooted traditional systems.

It is, however, to be noted that the Civil Code should be commended because some concepts of traditional institutions are incorporated. For

[37] George Krzeczunowicz (1963), "The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability" *Journal of African Law*, Volume 7 No. 3, pp. 172–177.

[38] *Connolly*, Brynna (2005) "Non-State Justice Systems and the State: Proposal for a Recognition Typology" *Connecticut Law Review*, Vol. 38, 239–294.

[39] Alula and Getachew, *supra* note 3 and *see* also Meron *supra* note 5.

example, the provisions under Title XX of the Civil Code recognize reconciliation *(Irq),* where parties to a dispute entrust a third party with the objective of bringing them together for reconciliation and if possible negotiating a settlement between them.

4.2 The Civil Procedure Code

In the domain of the state-enacted law, courts are among the means of social control towards maintaining peace and harmony among members of a community despite opposing interests. In western legal procedure this function is largely in the hands of a highly specialized class of professional lawyers in courts. Litigation is frequently treated as a game, with the judge acting as umpire awarding the victor.

On the contrary, the proceedings in the traditional justice system are transparent since cases are frequently processed in public. The participation of community members as spectators, witnesses, and comment providers render the final rulings widely acknowledged and respected. The procedures in the traditional justice system are embedded in local values and beliefs. Gebre explains the participatory procedures used by traditional institutions:

> First, the involvement of community members as observers, witnesses, and commentators increases the credibility and transparency of customary laws. Second, non-confidential proceedings help to put public pressure on parties to honor and respect agreements. Non-compliance to decisions is rare, mainly because nonconformity is likely to be interpreted as a rebellion against community values and interests. Finally, since decisions are passed in the presence of community observers, the possibility for corruption and prejudiced judgment is limited.[40]

The preface of Civil Procedure Code incorporates abolitionist provision which reads "all rules [procedural rules], whether written or customary, previously in force concerning matters provided for in the Civil Procedure Code of 1965 shall be replaced by this Code and are hereby repealed."[41] This indicates that if an issue of procedural law is covered by the Code, any other rule dealing with the matter is repealed, even if the rule is not inconsistent with the Code. Yet, there are instances where the Civil Procedure Code incorporates ceremonial provisions such as the traditional practice of 'beat of

[40] Gebre, *supra* note 19, p. 84
[41] Civil Procedure Code of [] Ethiopia (1965), Decree No. 52 of 1965.

a drum' which is of lower likelihood and importance with regard to 'execution'.[42]

Nevertheless, as a matter of substantive law, the Code permits that the parties may by compromise terminate a dispute before any suit has been filed. If a dispute gets into court, parties may enter into compromise agreement or withdraw the case thereby resorting to compromise. On the making of compromise agreement, Article 275 provides the following:

(1) A compromise agreement may at any time be made by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them.

(2) The court may, on the application of the parties, indicate to them the lines on which a compromise agreement may be made.

The provisions of the Code, therefore, are designed to encourage the parties to compromise whenever possible. The court may take the initiative in attempting to effect a compromise and upon application of the parties may indicate the lines on which a compromise agreement could be made. However, the court may not record a compromise decree where the terms are not 'contrary to law or morals.'

The Code's reference to 'morals' seems to refer to the standards setup by the judges themselves, not the custom, tradition or practice of the societies. There is no recognition to customary procedure or traditional institutions. The procedure and the trial processes adopted in the Civil Procedure Code are taken from the 'modern' legal systems including the Indian Code of Civil Procedure. As the drafter stated "there was little emphasis on procedures in Ethiopia."[43] However, the inadequacy in the recognition of traditional systems in the Civil Procedure Code, cannot be interpreted as absolute lack of compromise because judges are empowered to refer cases to compromise at any stage of the trial.

Even though Arbitration and Conciliation Working Procedure Proclamation is promulgated in 2021, it regulates contract-based arbitration or conciliation and does not provide room to the procedures of traditional institutions. The Proclamation mentions 'customary practice' only under two provisions, i.e. Article 61(2) that requires the conciliator to consider the

[42] Article 402(2) of the Civil Procedure Code.

[43] Robert Allen Sedler (1968), *Ethiopian Civil Procedure*, Faculty of Law, Haile Selassie I University; See Also Robert Allen Sedler (1972) "Law Without Precedent" The *American Journal of Comparative Law*, Volume 20, Issue 2, 343–347

customary practice surrounding the dispute and Article 78(3) which states the inapplicability of customary practices inconsistent with the Proclamation.[44]

5. The Criminal Law and Procedure

5.1 The Criminal Code

Researches indicated that much of the justice system that is delivered in Ethiopia using traditional institutions have a restorative capacity, participatory procedures, predictable process and outcomes, enforceable community-based sanctions, avoidance of coercive measures and building community cohesion.[45] The preamble of the 2004 Criminal Code states that the main objective of punishment is to "protect society by preventing the commission of crimes."[46] The Code states that the aim of crime prevention can be attained by giving notice of the crimes and the penalties, and if this is ineffective punishing criminals is meant to deter them or others from committing crimes.

Contrary to the practice of customary laws and institutions which consider crime as a violation of the relationship between individuals and the community at large, the criminal law views a criminal act (in the form of either act or omission) primarily as a violation of the state's criminal laws that are enacted to protect the public. The Ethiopian criminal law focuses on the offender's crime and takes punishment as its primary purpose. Victims of the crime are not at the center of the Ethiopian criminal justice system. The law only recognizes the victim, and does not give due attention to his/her families, his/her relatives, or any other part of the community. Unlike the traditional justice system or traditional procedures, the Ethiopian criminal justice system excludes the community from participation.

In the criminal law, the amount of money collected in the form of fine, as well as confiscated or forfeited property, goes to the public coffer and not to the victim of the crime. The victim can only be compensated if s/he brings a civil suit before the court. In this regard, Article 101 of the Criminal Code provides:

> Where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be

[44] Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021, *Federal* Negarit *Gazetta*, 27th Year No 21, Article 61(2) and 78(3).

[45] Alula and Getachew, *supra* note 3, introduction.

[46] The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414/2004, preamble.

> ordered to make good the damage or to make restitution or to pay damages by way of compensation. To this end they may join their civil claim with the criminal suit.[47]

This is the only remedy for compensation embodied in the Criminal Code as a solution to the victim. As Endalew Lijalem notes that "it is not common for Ethiopian criminal courts, in practice, to entertain the issue of compensation simultaneously with criminal proceedings" because "the victims are not aware of this right or the public prosecutors [may not]… lodge the claim for compensation as part of the criminal proceedings under the pretext of [avoiding] delay to criminal proceeding."[48]

With regard to repentance and reparation, as well as victim reconciliation, the Criminal Code –in exceptional instances– recognizes some basic features of the traditional justice system. The first instance relates to extenuating circumstances to mitigate the penalty where remorse and repairing the victim's damage are invoked by the accused. The Criminal Code enables the court to mitigate the penalty if the accused shows genuine repentance for his actions after the crime by providing assistance to his victim and admitting his fault by mending the damage caused by the crime. The second situation is conditional release which gives due attention to reform of the prisoner after conviction if the offender has served two-thirds of his sentence. In this case, the condition that must be fulfilled by the offender is that "he has repaired, as far as he could reasonably be expected to do, the damage found by the Court or agreed with the aggrieved party."[49]

Moreover, the Pardon Proclamation that aims at re-integrating offenders into the community, provides the conditions that the granting body should take into account which include "the petitioner's confession and repentance, his effort to reconcile with the victim or his family and compensate them, or his ability and willingness to settle the compensation decided against him." Where it is possible to contact them, the opinion of the victim or his family on the petition for pardon are among the factors that are considered in the pardon process.[50] Although the law is unclear on how the amount and mode

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[47] Id., Article 101.

[48] Endalew Lijalem Enyew (2014) "The Space for Restorative Justice in the Ethiopian Criminal Justice System" *Bergen Journal of Criminal Law & Criminal Justice*, Volume 2 No. 2, p. 235.

[49] Criminal Code 2004, *supra* note 46, Article 82

[50] *Procedure of Granting and Executing Pardon Proclamation No. 840/2014*, Federal Negarit Gazeeta, 20th Year No. 68, 2014, Article 20(7).

of compensation are determined, an interview with federal high court judges revealed that the process of reconciliation and the mode and amount of compensation are usually settled according to the customary laws of the locality and the traditional institutions entrusted to settle them.[51]

5.2 The Criminal Procedure Code

There are gaps and limitations that are frequently alleged against the traditional procedure systems. They include simplicity and lack of formality; reliance on 'irrational modes' of proof and decision; complex or multiplex relations outside the court-forum among the parties (often the judges too), relations which existed before and continue after the actual appearance in court, and which largely determine the form that judicial hearing takes; common sense as opposed to a legitimate approach to problem solving; the underlying desire to promote the reconciliation of the contesting parties, rather than focus on the overt dispute which they have brought to court.[52]

Total disregard to traditional systems cannot be justified on the basis of such limitations which can be addressed. On the contrary, however, the Criminal Procedure Code has no room for traditional institutions or customary laws. There is no room for private prosecution (other than offences that can be initiated upon complaint), where the victim will bring an action, in lieu of the public persecutor. According to the drafter of the Criminal Code, the primary purpose of criminal prosecution is to vindicate the interest of society rather than the interest of the private complainant (Jean Graven, 1965**).** Few spaces are left to private prosecution.[53]

Unlike the Civil Code, which expressly makes a sweeping repeal of customary law, the Criminal Procedure Code contains no repeal provision. Article 1(2) of the Criminal Procedure Code states that the provisions of the Code "shall apply to all matters coming within the jurisdiction of the courts, the prosecution and police authorities." Although the status of practices – which are not inconsistent with any provision of the Code– are not settled down, the Code impliedly repeals inconsistent statutory and customary rules. But the Criminal Procedure Code does not specifically repeal customary law. Nor does it accommodate customary practices, either directly or by reference. In contrast to the customary procedure, most cases are brought by a public prosecutor, rather than the injured party, and payment of 'blood money' (to

[51] Judge Fantahun, Federal Supreme court, personal communication, July 15, 2020)
[52] Gluckman, *supra* note 31.
[53] Allen Sedler (1967), "The Development of Legal systems: the Ethiopian Experience" *Iowa Law Review* Volume *53*, p.562–635

which victims are entitled in various customary practices) will not generally insulate the accused from criminal liability.

Elders, whose participation formed a vital part of the traditional criminal process, have no role in the trial process inquiries. Traditional practices have not been entirely rejected in the new law; a kind of lip-service has been made.[54] The 1961 Criminal Procedure Code had maintained the traditional institution known as, the '*atbia dagnias*' (local judges), which were established in 1947 as local judges to hear very minor civil and criminal cases. Under Article 223(1) of the Criminal Procedure Code, the *atbia dagnia* is empowered to settle –by compromise– offenses of insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed *Birr* 5 (Five). Other than these exceptions, there is no space for traditional procedures, traditional institutions and traditional mechanisms of settlings conflicts.

The justification anticipated by the codifiers for the exclusion of tradition-based procedures ranges from the denial that customary procedures really existed in Ethiopia, to negative comments on its changeability, lack of uniformity, incompleteness, obscurity, and low status.[55] Experts on the Ethiopian criminal procedure law, such as Fisher, however, disclosed that before the Italian invasion of Ethiopia in 1935, there was a working indigenous system of criminal procedure. There were a variety of striking features marking the scheme. Some are common to many African customary systems, such as ordeal, oath-taking, and the position of elders: others may be more specific to Ethiopia, such as guarantors and wagers. The traditional system of criminal proceedings was very deeply rooted in the religious culture and highly stratified society of Ethiopia and relied on the social background of the close-knit rural community for its effectiveness.[56]

5.3 The Draft Criminal Procedure Code

A major policy shift is made in the *Draft Criminal Procedure Code*, which has assigned a chapter for alternative solutions. The first part establishes the principles, effect and procedures of reconciliation. The basic assumption behind the incorporation of reconciliation is to prevent conflicts so as to bring

[54] Stanley Z Fisher (1971), Traditional Criminal Procedure in Ethiopia, *The American Journal of Comparative Law,* Vol. 19, No. 4, p. 709.
[55] David, *supra* note 36, and Krzeczunowicz *supra* note 37.
[56] Fisher *supra* note 54.

sustainable peace within the society.[57] Reconciliation (*irq*) can be made if the crime is simple or chargeable upon private prosecution, and if the accused and the victim agree upon for reconciliation. The reconciliation process can be initiated by the accused, the victim, community leaders, the police, the public prosecutor or the court.

The State recognizes the traditional justice system to exercise jurisdiction and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system. The justification for the recognition is founded on the basic assumption that traditional solutions will promote sustainable peace in the community by facilitating community based solution to the crime committed. As long as the consent of the accused in detention is guaranteed, the victim might be consulted. The exercise of jurisdiction in the Draft Code is exclusive and a case addressed by one system cannot be taken afresh to the other system. Moreover, a person may not appeal from the non-state justice system to the state courts and the decision given by a traditional institution is final.[58] The consent of the accused and the victim seems to be the reason that is considered as justification to limit the constitutionally guaranteed appeal right of the parties.

However, customary solutions are not applicable on crimes related to human rights, human dignity, and crimes that endanger national security. When the public prosecutor decides to settle the case in a traditional manner, it shall make sure that there is evidence that makes the suspect guilty. When a decision is made by the traditional institutions, it shall be made in a language spoken in the locality and should be presented to the local district court translated in the working language of the local court where the solution is implemented and the language of the local authority court shall be translated and written in a local district court.[59]

These provisions of the Draft Criminal Procedure Code are indeed positive steps toward enabling the traditional institutions exercise judicial powers throughout the country. Implicitly, this draft law recognizes the procedural and substantive laws that have been practiced by the traditional institutions. However, the questions on the legality of the draft law *vis-à-vis* the constitutional prohibition on jurisdictions of traditional institutions persist.

Moreover, there are issues that remain unanswered in the draft law. These issues include the procedure and means of communication between the Public

[57] *Federal Democratic Republic of Ethiopia Draft Criminal Procedure Code* (Amharic), 2020, Article 164.
[58] Id., Article 168 and 197
[59] Id., Article 176.

Prosecutor and the traditional institution empowered to entertain the case, the mechanisms of enforcing the order of the traditional institutions (such as social disapproval), and the financial or any other support of the state to these institutions. According to officials at the Ministry of Justice, the details on these issues will be addressed by the working manual and directives to be issued after the law is enacted.

6. Policy Frameworks

6.1 Criminal Justice Policy

Ethiopia has introduced a new Criminal Justice Policy in 2011 with the aim of, *inter alia*, rectifying the existing problems and to introduce new legal thinking, practice and procedures into, the Ethiopian criminal justice system.[60] The policy focuses on (i) preventing reasons for criminal offenses and (ii) finding proper and lasting solutions through the standard criminal justice system and other alternatives so as to bring public satisfaction.

The Criminal Justice Policy implies the recognition of the traditional justice system as an integral part of the country's criminal justice system. The *first* setting is when the Attorney General (currently Ministry of Justice) has the opinion that settlement of the dispute through traditional institutions and customary laws brings about the restoration of lasting harmony and peace among the victim and the wrongdoer rather than resolving the case by the state formal justice system. The crime could be serious punishable offence with rigorous imprisonment, or it may be simple crime punishable with simple imprisonment. The *second* situation where investigation or prosecution can be interrupted is in case of crimes punishable with simple imprisonment or upon complaint and if the disputing parties have settled their differences through reconciliation and upon the initiation or request of the parties.

However, the policy does not specify the kind of relationship, the means and manner of communication between the Attorney General or courts and traditional institutions when the Attorney General decides to leave a case to the traditional justice system under these two specific conditions. The practice simply shows that this is a policy document that shows the willingness of the state to give a chance to the traditional institutions to settle cases and restore peace within the society. This element of the policy has not yet been accompanied by implementation at the grassroots in a manner that can clarify

[60] *FDRE Criminal Justice Policy* (Amharic, 2011)

the ways of communications and the concurrent management of issues by the Attorney General and the traditional institutional concerned.[61]

The Criminal Justice Policy creates a procedure for the use of out-of-court mechanisms so as to provide a fair and sustainable solution to a crime. Yet this is too general and lacks clarity. These principles are impliedly assumed to address the gaps in the state-backed criminal justice system, and the policy aspires to attain an effective, fair, impartial, accessible, timely, predictable and transparent criminal justice system. These broad goals cannot be achieved without the traditional institutions in the country.

The policy states two basic principles that deal with (i) reconciling the perpetrator and the victim and requiring the accused to pay compensation to the victim and (ii) the condition that the interests of the public and the victims are better protected by the use of out-of-court mechanisms than the regular court system. Certain conditions are required to be fulfilled to enable the system functional. Accordingly, the type of crime, the character of the accused, and the circumstances of the commission of the crime need to be considered.[62]

The policy states that "certain criminal cases may be referred to the out-of-court mechanism at any stage of the criminal justice process upon the request of the public prosecutor or the accused, or upon a motion of the court" so as to make the criminal justice system speedy and accessible.[63] The Criminal Justice Policy also provides *three* specific conditions which must be fulfilled to refer the criminal case to out-of-court mechanisms. *First*, the accused person must willfully admit to all elements of the crime and sincerely express his repentance in writing after receiving sufficient legal advice to that effect. *Second*, the accused must present an apology to the victim and express his readiness to repair or compensate for the damage caused. *Thirdly*, the accused should be informed, in advance, that he has the right to refuse the referral of the case to the out-of-court mechanism. These are indeed basic elements in the ideals of restorative justice.

[61] Interview with officials at the Ministry of Justice, Oct 20, 2021. The Ministry has issued a directive on criminal cases reconciliation (*irq*) process. The directive provides conditions for reconciliation, venue and time for reconciliation and principles of reconciliation. However, the procedure of case referral to traditional institutions is not addressed in the directive. *See* Directive on Criminal Affairs Reconciliation No. 1/2020, Ministry of Justice.

[62] Criminal Justice Policy, *supra* note 60, p. 39.

[63] Id, p.37.

Guided by these general principles and specific conditions, the police, prosecutors and judges are given discretionary power to refer certain criminal cases –which are punishable by simple imprisonment or only upon private compliant– to out-of-court mechanisms. The Criminal Justice Policy, therefore, provides a general framework to alternative mechanisms that possibly are referring to the traditional justice systems practiced in Ethiopia. The problem, however, is that the policy is not a legislative proposal, but rather a document showing the government's policy objectives. Its implementation thus requires a specific law that clearly defines the alternative mechanisms, aspirations and principles of the policy. No law is yet promulgated to create a space for alternative mechanisms stated in the Criminal Justice Policy save the draft Criminal Procedure Code. Even though the policy implies a framework towards embracing traditional justice systems, more concrete legislative reforms need to be taken.

6.2 Crime Prevention Strategy

The Crime Prevention Policy has employed a definition embodied in the UN Guidelines for the Prevention of Crime which states that "crime prevention comprises strategies and measures that seek to reduce the risk of crimes occurring, and their potential of harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes."[64] A broad definition of conflict prevention is adopted which, *inter alia*, does not limit prevention to 'preventing from reemergence', and which instead enables it to include measures of reducing crimes.

The strategic principle of the policy is to undertake appropriate criminal prevention activities by avoiding suitable conditions for crimes and establishing mechanisms that can establish a system to ensure the implementation and follow up of effective criminal prevention activities by formulating the duties and responsibilities of stakeholders and partners in criminal prevention.[65] The Four approaches of conflict prevention are included in the policy document: *developmental prevention* refers to interventions designed to prevent the development of criminal potential in individuals; *community based prevention* approach is designed to change the social conditions and institutions that influence offending in residential communities; *Situational prevention* is structured to prevent the occurrence of crimes by reducing opportunities and increasing the risk and difficulty of offending; *Criminal justice prevention* or *law enforcement approaches* –

[64] Guidelines for the Prevention of Crime ECOSOC Resolution 2002/13, Annex
[65] *National Comprehensive Conflict Prevention Strategy* (Amharic), 2020, p.2

including deterrence, incapacitation, rehabilitation and reintegration– are conducted by law enforcement and criminal justice system organs broadly by giving due attention to the perception of crime in the society.[66]

Under the section that deals with community prevention, the policy document includes community leaders, institutions and organizations, community members, governmental and non-government bodies who provide economic and social services or other governmental and non-government bodies who work on the development of social and economic infrastructures as major players. The Crime Prevention Policy enumerates ten crimes with lists of responsible bodies and activities in charge of their prevention. The major role of crime prevention is entrusted to governmental institutions while nongovernmental organizations, religious institutions, elders and clan leaders are mentioned as responsible stakeholders in the policy. To be specific, clan leaders, elders, and religious institutions are part of the enforcement process on crimes against women, crimes against the child and crimes against the peace and security of the society (usually communal conflicts).

The Ministry of Peace is entrusted with the prevention of crimes against the peace and security of the society that relate to communal conflicts. The policy requires the Ministry to make consultations with concerned bodies, relevant government bodies, religious institutions and other organs to promote peace and mutual respect among nations, nationalities and followers of various religions and beliefs in the course of working towards the prevention of conflicts.

The literature of crime prevention shows the significance of a collaborative, multiagency, multi-sectoral approach that is a key scheme in many crime prevention strategies and programs. This approach enables all relevant stakeholders to work as a team in a coordinated fashion. It shows that the most successful interventions "are those which combine multiple approaches and emphasize multi-agency involvement as no single government or organization is equipped to deal with crime and violence or the underlying causes thereof in their totality."[67] Thus, collaborative approach must be taken at policy making, program development, program implementation, and program evaluation at all levels. The importance of this approach is that "collaboration and coordination permeate other prevention-based approaches to crime, including community policing, the defining characteristic of which is

[66] Id, pp.14-27; see also Brandon Welsh and David Farrington(2009), *Making Public Places Safer Surveillance and Crime Prevention,* Oxford University press, 2009

[67] Stephen Schneider (2015) *Crime Prevention: Theory and Practice* (2nd ed.), Taylor & Francis Group, p.21.

partnerships between the police and the communities they serve."[68] Against this background, the Crime Prevention Policy has failed to mention traditional institutions as key stakeholders of crime prevention.

6.3 Draft Ethiopian Peace Policy Implementation Strategy

Criticizing the peace building policy of the West owing to its inability to bring peace or make a positive contribution to nation-building, the draft strategy enumerates policy drivers, tools and actors of implementation.[69] It adopts the 'Negative and Positive Peace' definition of John Galtung.[70] It recognizes the importance of indigenous knowledge and institutions and states the need for legal, policy and operational support that makes use of their constructive role in ensuring lasting peace.[71] Conflict prevention gets special attention in the policy strategy. The document further acknowledges the need for integrating the deep-rooted community based means of conflict prevention with modern means of conflict prevention.

The Policy is founded on the ultimate goal of creating a society that has moved from conflict and violence to peace and development measured by preventing conflict and a lasting solution to conflicts. It gives due attention to the 'deep-rooted' socio-cultural values of the Ethiopian people and notes their utility for sustainable peace. Moreover, it strives to strengthen traditional conflict resolution institutions and to integrate them with modern conflict resolution systems. With all these positive development, however, it confines traditional institutions to conflict resolution and does not give due attention to the aspects of prevention. Moreover, in spite of its aspirations for the inclusion of community based values and institutions, it does not address the legal, institutional and policy frameworks of integrating traditional institutions in the state systems.

7. Institutional Frameworks

In the realm of institutional arrangements, there are constitutions in Africa that range from a broad recognition of customary authorities or chiefs to more specific arrangements providing for a specific body with specific functions

[68] Ibid.
[69] *Draft Ethiopian Peace Policy Implementation Strategy (Amharic),* Ministry of Peace, 2022.
[70] John Galtung (1964), An Editorial, *Journal of Peace Research*, volume 1 number 1, 1964, pp. 1-4.
[71] Id, p.13

concerning customary law[72]. The examples in this regard include: (i) National House of Chiefs and Regional Houses of Chiefs in Ghana's constitution (ii) Council of Traditional Leaders-empowered to advise the President in Namibia's constitution; (iii) Council of Chiefs-responsible for advising the King on customary issues in the Swazi constitution; (iv) the Botswana constitution that provides for a House of Chiefs which submits resolutions to the National Assembly on Bills affecting customary issues; and (v) Madagascar's constitution that recognizes a customary dispute resolution body called the 'Circle for the Preservation of Fihavanana.'[73]

Kenya's constitutions allows representation in established government institutions, Somalia's charter allows the involvement of traditional leaders when appointing members of parliament and requires the government to work with traditional elders in restoring peace, Angola provides local government should include traditional authorities. In Ethiopia, at the federal level, there is no institutional framework to back up traditional institutions to have wider recognition and perform their functions accordingly.

The Ministry of Peace was established in 2018, and it is empowered, under its constitutive proclamation, to "ensure the maintenance of public order; develop strategies, and undertake awareness creation and sensitization activities to ensure the peace… security of the country and its people."[74] With regard to institutional cooperation, the Ministry of Peace is instructed to work "in cooperation with relevant government organs, cultural and religious organizations, and other pertinent bodies to ensure peace and mutual respect among as well as nations, nationalities and peoples."[75] To this end, the Ministry of Peace has established a department that, *inter alia*, undertakes the functions of coordinating and cooperating with traditional institutions in the country. However, no policy or strategy has yet been crafted to create enabling environments for these institutions.

The House of Peoples Representatives (HPR), the highest legislative body in Ethiopia, has a committee called Peace and Security Standing Committee. The committee is empowered to review governmental organs entrusted to work on peace and security. Asked to respond to the concern of accommodating traditional institutions in the legal framework of the country

[72] Cuskelly, *supra* note 15, p.7.
[73] Id, p.7-9.
[74] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1097/2018, *Federal Negarit Gazetta*, 25th Year No.8, Article 13(1) (a).
[75] Id, Article 13(1)(c).

and institutional set-up of the house, the chairperson of the committee replied that "we understand the importance of these institutions in fostering peace in the society but we are short of researches how to accommodate them in the process."[76] Similar responses are forwarded from the House of Federation and Federal Police Crime Prevention Division that there is no institutional set-up to create connections with these institutions with a view to preventing crime or conflict in the process.[77] This far, if conflict occurs or if consultation is needed with the traditional institutions in a specific area, there is no formal channel other than approaching them through informal communications.[78]

8. Conclusion

In the 1960s Ethiopia has passed through an abolitionist approach of legal 'modernization' that excluded customary laws and traditional institutions. The post-1991 reality in Ethiopia shows how religious, customary, indigenous and community-based conflict prevention and resolution mechanisms operate concurrently with state institutions with some overlapping mandates. This article has examined the ambiguity surrounding the recognition of traditional institutions in Ethiopia. The FDRE Constitution limits the judicial power of traditional institutions to family and personal matters. The 1960 Civil Code follows an abolitionist approach by repressing pretexting traditional institutions, laws, norms and practices unless they are incorporated impliedly or expressly in the Code. The repeal provision of the Civil Code did not only aim at those customary rules that were inconsistent with the provisions of the Code, but it also set aside customary rules concerning matters provided in the Code, whether they are consistent with the Civil Code or not.

The 2004 Criminal Code does not give due attention to the social conception of crime practiced by traditional justice mechanisms. Although the legal regime on civil procedure opens up space for traditional ways of compromise it requires the ratification of the court. The criminal procedure court leaves no room for the traditional justice system and areas of private prosecution. Yet, it is to be noted that, the draft Criminal Procedure Code duly

[76] *The Chairperson of the Peace and Security Standing Committee*, House Peoples Representatives, Personal Communication, August, 2020.

[77] (Head of Crime Prevention Division, Ethiopian Federal Police Commission, personal communication, October, 2020) and (Chairwomen of Constitutional issues standing committee of the House of Federation, personal communication, August, 2020).

[78] (Head of Crime Prevention Division cited above, Chairwomen's of the committee cited above at the HPR and HoF, Vice director of the Ministry of Peace, personal communication, cited above)

provides an explicit recognition of traditional institutions with exclusive jurisdiction upon the consent of the accused so that the decision given will become final and unappealable.

With regard to the policies examined above, the Crime Prevention Policy and the Early warning system have failed to incorporate traditional institutions as actors in the enforcement process whereas the Criminal Justice Policy recognizes the importance of the traditional justice system as an integral part of the country's criminal justice system. Regardless of the kind of crime, if the Ministry of Justice (MoJ) believes that the settlement of dispute by customary means brings about the restoration of lasting harmony and peace among the victim and the wrongdoer, it may in consideration of public interest decide not to prosecute such a crime. Likewise, 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.

However, the Criminal Justice Policy does not specify how the formal and customary justice systems should communicate and interact if the Ministry of Justice decides to leave a case to the customary justice system. Moreover, it ignores the role of these institutions in crime prevention. It is indeed commendable that the Draft Ethiopian Peace Policy Implementation Strategy declares the importance of integrating Traditional Institutions with state institutions. Yet if fails to uncover the policy of integration and tools of implementation. The analysis in the document is unidimensional because traditional institutions are only observed through the lens of conflict resolution.

The analysis in the preceding sections of this article thus reveals that no institutional, legal or policy framework is placed to guarantee the continuous and sustainable existence of conflict resolution or prevention traditional institutions that have not been empowered. Although some developments and draft documents show the government's shift of policy towards accommodating traditional institutions, more concrete steps need to be taken to work out the relationship between the two systems. The most effective way to do this would be through policy reform accompanied by legislative reform and enabling institutional setups. ■

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