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DOLORES A. DONOVAN
GETACHEW ASSEFA

Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism

INTRODUCTION

This is a paper about human rights, federalism and legal pluralism in Ethiopia. It is a deeply practical paper, in many ways a paper about the responsibilities and limits of state power. The topic is how the Ethiopian state can maintain the level of protection of human rights necessary to protect its standing in the international community while at the same time respecting and incorporating within its formal legal system the multiple customary law systems existing within its borders. The conclusion is that the key to success is adoption of a maximally flexible system of legislative federalism.

Ethiopia enjoys a rich heritage of customary law systems. There are more than sixty such legal systems in Ethiopia, some of them operating quite independently of the formal state legal system. There are two reasons for the relative autonomy of Ethiopia's customary law systems. First is that the state's resources are insufficient to extend the state legal system to every corner of its empire. Second is that the Ethiopian government has a real, though as yet unstructured, commitment to the preservation of the customary law systems within its boundaries.

The Ethiopian government also has a commitment to establishment of the rule of law in Ethiopia, in the conventional nineteenth-century European meaning of the term. A central attribute of that nineteenth-century European rule-of-law model is the notion of a unitary legal system generating uniform legal rules from a central state

DOLORES A. DONOVAN is Professor of Law at the University of San Francisco School of Law.

GETACHEW ASSEFA is Dean of the Faculty of Law of the Ethiopian Civil Service College (E.C.S.C.) in Addis Ababa.

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authority. Another attribute of that sort of rule of law is the guarantee of protection for individual rights, today better-known as human rights.

Tension exists between the Ethiopian government's commitment to the concept of uniform legal rules throughout its territory, including rules protecting human rights, and its commitment to preservation of the Ethiopian customary law systems. The Ethiopian Federal Constitution of 1994 guarantees protection for a broad range of human rights, incorporating by reference the major international human rights covenants signed and ratified by the Ethiopian government and repeating, verbatim, the language of the most important rights. The state constitutions — now in the process of adoption throughout Ethiopia — tend, on the whole, to mimic the federal constitution in this regard. The customary law systems, however, deviate in at least some ways from the norms set up by the federal and state constitutions.

The tension between the customary law systems and the statutory and constitutional norms of the Ethiopian government is most clearly seen in the rules and practices relating to the crime of homicide. The federal Penal Code, written in 1957 and still in force, purports to establish rules uniformly applicable throughout the geographic confines of the Ethiopian state.[1] Yet many, if not most, cases of homicide are dealt with by the sixty Ethiopian customary law systems.

In such a situation, the classical European goal of total certainty in the law, especially the criminal law, must necessarily be reconsidered. The nineteenth-century model of uniform legal rules, expressed by code and uniformly applied throughout the country, is not viable in large multicultural nations such as Ethiopia. The federal constitution adopted by Ethiopia in 1994 is the first legislative recognition of that fact. The second legislative recognition of that fact should be enactment of a flexible federal statutory framework conferring a high degree of legislative autonomy on the Ethiopian regions. Once federalism is decided upon, flexibility and local autonomy come into com-

1. The Ethiopian Penal Code of 1957 is in the process of revision. However, the premise for revision is the preservation of uniform rules of criminal law uniformly applied throughout Ethiopia. Early reports indicate that the revisions will be minor in impact and character.

The Gregorian Calendar, not the Ethiopian Calendar, is used for dating in this article. The Gregorian Calendar is seven years ahead of the Ethiopian Calendar, except for the period 1 January to 9 September, when it is eight years ahead. Thus, the Ethiopian Penal Code was written in 1957 under the Gregorian Calendar but in 1950 under the Ethiopian Calendar.

Federalism was a topic very much on the minds of the Ethiopian legal community as Ethiopia approached the fifth anniversary of its 1994 Constitution. Lectures were given and seminars held at both F.C.S.C. and Addis Ababa University. This article, co-authored by Getachew and Donovan, both teachers of constitutional law, grew out of that period of intellectual ferment.

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petition with certainty as desirable values informing the law(s). Even more flexibility, to allow for local variations in the law, is required when a federal government embraces, as has the Ethiopian government, the principle of preservation of its multiple customary law systems.

The Ethiopian government's commitment to establish the rule of law while protecting its customary law systems confronts it with three immediate tasks: 1) creating a federal framework of statutory law flexible enough to allow the nine Ethiopian state governments to enact their own statutory frameworks, in turn flexible enough to accommodate the customary law systems within their borders; 2) inventorying the more than sixty Ethiopian customary law systems, most of which have never been studied by legal anthropologists, to evaluate their procedures and practices and determine which are and which are not in conformance with the international human rights guarantees contained in the Ethiopian constitution; and 3) devising techniques to monitor the performance of the customary law regimes for compliance with minimal standards of human rights protection, and to upgrade their performance in that regard. Completion of these tasks requires reconciling competing pairs of values: rule of law and preservation of customary law, protection of human rights and protection of custom, certainty in the law and flexibility, uniformity in the law and local autonomy.

The crime of homicide has been chosen for a case study because it presents these tensions in their most extreme and hence most clear form. The substantive rules of law governing homicide are generally the same in both customary and modern legal systems. Unprovoked killings are wrong; self-defense is an excuse, and so on. Because of this high level of consensus, the variances, when they occur, are startling and crystal-clear. An example of such a variance, found not just in Ethiopia but also in many other parts of the world, is condonation at customary law of the killing of a witch or of revenge killings.

Where a variance such as that relating to witchcraft or revenge killing occurs, one is confronted with the situation of a nation-state tolerating the existence within its borders of a competing legal authority endorsing radically different norms relating to the taking of human life. On the one hand, tolerance of these radically different customary law norms is arguably the duty of a government that purports to be representative, for the customary law systems are more closely linked to and reflective of the traditions and expectations of the local peoples they serve than are the rules enacted by the nation-state. On the other hand, tolerance of these norms calls into question the sincerity of the formal government's constitutionally-expressed commitment to protection of the fundamental and universal human right to life and to equal protection of the laws. In the end, or so it is

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argued, the impact of multiple variances between the norms of the customary law systems and those of the modern nation-state can call into question the legitimacy of the formal, modern, legal system and eventually that of the modern nation-state itself.

Less is at stake when it comes to procedure. The procedures utilized by a society for dealing with killings are not so reflective of core social values as are the norms of conduct governing the killing of one human being by another. Nonetheless, even with respect to rules of procedure rather than those of substance, the legitimacy of the formal legal system can be cast into doubt when the people it purports to serve prefer and utilize the dispute resolution procedures familiar to them through their customary law rather than those set up by the modern state.

Such a situation exists in Ethiopia. Ethiopia is a vast and multiethnic nation. The modern European-style legal apparatus of the state, established in the mid-20th century, has only recently been extended to the more distant regions of the country. In those regions, the norms of behavior that govern the taking of human life, and the procedures that surround its sanctioning, are not those established by the Ethiopian Penal Code and the Ethiopian Criminal Procedure Code, but rather the norms and procedures of the ancient customary law systems of the Ethiopian peoples. Even in regions that for more than two thousand years have formed the nucleus of the Ethiopian state, loyalty to customary law norms and procedures continues to frustrate enforcement of the modern criminal law and to fuel dissatisfaction with the government's system of criminal justice.

A few generalizations about the customary law of homicide in Ethiopia are in order. First, the typical outcome of customary law homicide procedure is that the slayer is freed by the payment of compensation to the families of the victim. In other words the slayer does not encounter any loss of liberty as a penalty. Once the amount of compensation is paid out in full, the offender can engage himself in day-to-day activity as though nothing has happened. He is not to be put behind the bars as is the case where the written national laws apply. Second, there are variations as to the amount and mode of payment from one group (culture) to another. The slayer may be required to pay in compensation as many as a couple of hundreds heads of animal beginning with camels down the line to cattle, sheep and goats. Third, since the amount of compensation to be paid is extremely high, the slayer cannot pay it all by himself. It, therefore, is one of the principles of the law of homicide that the offender will be assisted by his clan, the members of which will contribute as much as they can to the full amount of the compensation fixed as payable. Responsibility for homicide is thus familial rather than individual. Fourth, the amount of compensation to be paid sometimes differs in

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the event of the homicide of a woman and that of a man. Among peoples adhering to this principle, the life of a woman is compensable with approximately fifty per cent fewer heads of animals than the life of a man.

This paper examines customary law practices relating to homicide among three ethnic groups: the Showa Amhara of the Amhara Regional State; the Gumuz people in the Beneshangul and Gumuz Regional State; and the Somali people in the Somali Regional State of Ethiopia. The Amharas are the people most closely identified with the ancient and the modern Ethiopian State. The material on the Amharas focuses on the interaction between the state legal system and the Amhara customary law system in cases involving revenge killings. The Gumuz people are among the most removed from modern civilization of all Ethiopian ethnic groups. The section on the Gumuz considers sorcery and status (adventure) killings. The Somalis, who are nomadic pastoralists, are the people least assimilated into the modern Ethiopian State. The section on the Somali focuses on cases involving the killing of women and the related sentencing practices that discriminate against and devalue the lives of women. These three groups have been selected for study because each manifests a very different dimension of the problem of human rights, federalism and legal pluralism that confronts the Ethiopian State.

Part I of this paper describes the modern Ethiopian State, the ethnic composition of the Ethiopian people, with particular reference to the Amhara, Gumuz and Somali peoples, and the geography of their lands. Part II examines the treatment of homicide within the customary law systems of the Amhara, Gumuz and Somali peoples. At issue are the right to life, the protection of female children against exploitation, and the right of women not to be discriminated against on the basis of their gender. Part III, the heart of the paper, examines the interplay between these customary law systems, modern notions of human rights, federalism and legal pluralism. Part Three also considers procedural mechanisms useful for reconciling the formal Ethiopian legal system and the informal Ethiopian customary law systems. Part IV, the conclusion of the article, proposes a plan of action for the Ethiopian government that will respect and preserve the customary law systems while modifying them to effectuate the universal human rights norms contained in the Ethiopian constitution.

Confrontation and competition between a nation's formal legal system and its customary law systems is not inevitable. The tension between the two can be mediated by legislation artfully designed to promote the interests of both systems. The central vision of the proposed plan is the introduction of flexibility into Ethiopia's federal and

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state penal and criminal procedural law so as to permit co-existence and cooperation between the customary law systems and the state criminal justice system, subject to the authority of the human rights provisions of the state and federal constitutions. These new, flexible, legal norms would then be extended, in combination with or preceded by a campaign of community education, to those customary law systems heretofore untouched by or resistant to the legal authority of the state.

I. Ethiopia

Ethiopia has existed as a state for thousands of years, growing, shrinking, transforming and reinventing itself as the centuries passed by. At present, Ethiopia is a country of more than 60 million people, with an area of about 1.2 million square kilometers, or 500,000 square miles. It is larger than most European nations. In 1994 Ethiopia's form of government became federal, a radical departure from the tradition of unitary central administration that has characterized the Ethiopian government from its earliest moments. With the brief exception of the Ethio-Eritrean Federation from 1952-1961, Ethiopia has been a kingdom, an empire or a dictatorship throughout its three thousand years of history. This has been so despite the fact that the country which calls itself Ethiopia in fact is a mosaic composed of more than 60 different ethno-linguistic groups.[2]

The federal government of Ethiopia now in place was created by the 1994 Constitution. The Constitution provides for ethnically-based federalism by which the nation is organized into nine by-and-large ethnically based states. The Constitution also provides for a federal legal system and nine state legal systems. The federal legal system is a reality, but many of the state legal systems are still under construction. The nine states are not inhabited only by the people(s)the names of which they respectively bear. There are a minimum of three and a maximum of fifty different ethnic-linguistic groups in each of the federating units, known as states. Most, if not all, of these groups have their own customary law system. Thus, in

2 The official record has to-date 63 different nations, nationalities and peoples. These are Tigrai, Saho and Kunama (in Tigrai State); Afar (in Afar State); Ambara, Agew-Kamirgina, Agew-Awongigna (in the Amhara State), Oromo (in Oromia State); Somali (in Somali State); Gumuz, Koma, Berta, North Mao, Shinasha, (in Beneshangul/Gumuz State); Gurage, Hadiya kembata, Alaba, Tembaro, Yem, Sidama, Gedio, Burji, Amaro (Kore) Gidicho, Welaita, Dawuro, Konta, Aydi, Gewada, Melon, Gofa, Zoyisse, Gobez, Bussa, Konssa, Gamo, Gidole, Basketo Mursi, Ari, Hamer, Arbore, Dassenech, Gnangatom, Tsemai, Maley, Dimme, Bodi, Kefficho, Nao, Dizo, Surma, Zelmam, Shekocho (Mocha), Minit, Chara, Bench, Sheko, (in the Southern Nations, Nationalities and Peoples Satate); Agnuwak, Nuwer, Mejenjir (in Gambela Peoples State) and the Hararі People in the Hararі State. Source: Proc. 2/1992, A Proclamation Providing for the Establishment of National/Regional Self-Governments, Negarit Gazetta, 2:51.

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terms of legal system, Ethiopia typifies the many African and other countries where there is jurisdictional conflict between what is known as the modern legal system of the state and the indigenous rules of the different peoples living within it.

The modern legal system of Ethiopia has a largely continental European origin. The exceptions are the Criminal Procedure Code and the Civil Procedure Code, which reveal a strong British influence. The six codes of the country covering the largest part of the legal system were enacted in the period between the late 1950's and the mid-1960's.[3]

The modes of life of the various Ethiopian peoples are influenced by the geography of the lands which they inhabit. Those who live on the high mountain plateaus of the country in the North, West, Southwest, South-Central and North-west are settled agriculturalists engaging in some amount of animal herding from time immemorial. Customary law still, to a large extent, governs the lives of these settled farmers, especially those living in the far corners of the highland states. They are predominantly the Amharas, the Tigreans (Tigray), the majority of Oromos, and many others such as the Gurage, Sidama, Kembata, and Wolayta,[4] living in the Southern Nations, Nationalities and Peoples Regional State, one of the federating units of Ethiopia.

The lowlands of Ethiopia are inhabited by peoples the significant majority of whom are nomadic pastoralists. These predominantly are the Somalis, the Afar, some part of Oromo, Agnuwak, Nuer, Gumuz, and some groups in the Southern Ethiopian State. They live in the Eastern, Western, Southern, Southwestern and Northwestern peripheries of the country. The nomadic pastoralists are, on the whole, only loosely linked to the Ethiopian state and their lives are governed by their traditional systems of customary law.[5]

Although a small percentage of rural ethnic groups, most notably, for purposes of this paper, the Gumuz, number both settled farmers and nomads among their ranks, the division of the Ethiopian people into highlander sedentary farmers and lowlander nomadic pastoralists persists into the present. Together, they comprise the eighty-five per cent (85%) of the people of the country who are engaged in some form of agriculture. The other fifteen per cent (15%) of

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3. Pen. Code (1957); Civ. & Com. Code (1960); Crim. Proc. Code (1961); Mar. Code (1960); and Civ. Proc. Code (1965).

4. The term "highlanders" is generally used to refer only to the Amharas, despite the fact that many other ethnic groups also live in the high mountain plateaus

5. See generally, Gufo Oba, "Shifting Identities Along Resource Borders: Becoming and Continuing To Be Boorana Oromo;" Johann Helland, "The Political Viability of Boorana Pastoralism: A Discussion of Some Features of the Political System of the Borana Pastoralists of Southern Ethiopia"; and Marco Bassi, "Power's Ambiguity or the Political Significance of Gada," in P.T.W. Baxter, J. Hultin & A. Triulzi, *Being and Becoming Oromo: Historical and Anthropological Enquiries* (Red Sea Press 1996).

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Ethiopians are to be found in the towns and cities to which they or their grandparents moved starting in the early 20th century. These townspeople serve in the government bureaucracy as civil servants, engage in trade and commerce, and work as laborers in the manufacturing industries. The modern state legal system governs the lives of the townspeople and those of the highlander farmers who live close enough to urban centers to fall under the influence of urban mores.

General descriptions of the three ethnic groupings, also known as "peoples" or, to the Ethiopians, "nationalities" or "nations," which are the subjects of this paper follow. These descriptions are not based upon personal observations by the authors of this paper, neither of whom are anthropologists. The anthropological information for this paper was taken primarily from fourth-year theses written by law students at two of Ethiopia's leading institutions. In all cases save that of the Gumuz, the authors of these theses are themselves members of the ethnic groups about which they have written. The material on the Gumuz was obtained by personal interviews with members of the Gumuz people studying law at the Ethiopian Civil Service College, an interview with a prosecutor who handles Gumuz cases in the Beneshangul-Gumuz region, an interview with a judge of the State Supreme Court of the Gumuz-Beneshangul region, and a fourth-year thesis about the Shanquilla-Gumuz written by an Ethiopian law student who grew up in the area immediately adjacent to the Gumuz territory and spent two years among the Gumuz as a teacher in the 1980's.

The intention of this paper is not to present a definitive description of the three customary law systems at issue, but rather, by painting with a broad brush, to stimulate interest in these systems and in the Ethiopian customary law systems as a whole. The goal is to galvanize the Ethiopian government and the international community of legal anthropologists into doing the field work necessary to lay the factual and theoretical bases for construction of an improved Ethiopian criminal justice system incorporating the concept of legal pluralism.

The Amhara

The Amhara people of Ethiopia occupy the north central and northwestern part of the present day Ethiopia.[6] Their region includes Gondar, Gojjam, Wollo, and the northern part of Showa. Like almost all other peoples of Ethiopia, the Amharas are predominantly agriculturalists. They are largely landowners, farmers and settled owners of herds of livestock.

6. The Amhara State is one of the nine member states of the Federal Ethiopian State. Art. 47, Eth. Constitution. 1994.

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The Amharas are mostly followers of Orthodox Christianity and therefore are associated with the historical and cultural foundation of the religion and the Ethiopian State. They, with the Tigreans who live in the north of Ethiopia around the ancient capital of Axum, have been the center from which the rulers of Ethiopia have come since the early times. Ethiopia was under a monarchical administration until 1974 and the bulk of its rulers, arguably, for more than two thousand years, belonged to the Amhara national group. The Ethiopian dynasty which terminated with the assassination of Emperor Haile Selassie in 1974 is said to have been founded in the 10th Century B.C. by Menelik I, by legend the son of King Solomon of Israel and Queen Sheba of Ethiopia.[7]

Almost three thousand years later, between 1889 and 1910, A.D., Menelik II brought the outlying lands that are now included in modern Ethiopia under his unified central administration.[8] He was followed by Haile Selassie I, believed to be an Amhara,[9] who became the Regent of Ethiopia in 1916 and its Emperor on the 2nd of November 1930. Haile Selassie is generally credited with bringing Ethiopia onto an equal footing with other members of the modern community of nations. The Amharas have thus played a significant role, both as a people and as players in the social, political and religious fields, in the formation of ancient and modern Ethiopia.

Haile Selassie I was deposed in 1974 by a group of junior army officers led by Mengistu Hailemariam. Although the political leanings of this junta were initially unclear, it eventually led Ethiopia into a Marxist-Leninist form of government. The junta, known as the

7. The central religious legitimating legend of Ethiopia, used to buttress the claim to the throne of all Ethiopian monarchs until the overthrow of the monarchy in 1974, involves a liaison between King Solomon of Israel and Queen Sheba of Ethiopia that occurred during a visit by the Queen of Sheba to Jerusalem. Together they produced a son, David, whose throne name was Menelik I. These are the origins on which the monarchs of Ethiopia have traditionally based their claim to be the Elect of God. Thus, the founder of the Solomonic Dynasty in Ethiopia in the 10th Century, B.C., was Menelik I, an Amhara. An interesting sidebar to this ancient legend is that Menelik I is said to have brought the Ark of the Covenant to Ethiopia. See, H.G. Marcus, *A History of Ethiopia* 17-18 (1994).

8. For two radically different views of Menelik II's empire-building process, compare C. Prouty, *Empress Taytu and Menilek II* with B.H. Holcomb and Sisai Ibssa, *The Invention of Ethiopia: The Making of a Dependent Colonial State in Northeast Africa* (Red Sea Press 1990). Menelik II and his strong-minded consort, Queen Taitu, reigned from 1889 through the first decade of the 20th Century. It was he who opened Ethiopia to the outside world, entering into diplomatic relations with the European powers. It was also Menelik II who defeated the invading Italian army in 1896 at the battle of Adwa. Ethiopia is the only state of sub-Saharan Africa never to have been colonized. Before becoming emperor of Ethiopia, Menelik II was the king of Showa, the center of what is now the Amhara region, as a throne-successor to his father, King Sahulesilassie. Emperor Menilik II succeeded emperor Yohannes IV who died in 1889 in the Ethio-Sudanese conflict. Emperor Yohannes IV was Tigrean in origin.

9. Haile Selassie is officially considered to be Amhara. See generally, H.G. Marcus, *A History of Ethiopia*, (1994); Holcomb & Ibssa, id.

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Military Government or Derg, was overthrown in 1991 by a coalition led by Tigreans. That coalition, which is in the process of broadening its base, rules Ethiopia today.

Under the aegis of Haile Selassie, the six modern Ethiopian codes were written in the mid-twentieth century by continental European experts, of whom Rene David, the French comparatist and the lead author of the Ethiopian Civil Code, is the most well-known. However, long before Haile Selassie's importation of European law, the Amharas had a well-developed legal system, both customary and written. Their customary law system of dispute resolution is described in Part II of this article. In addition, there existed both written decrees by kings and emperors and a canonical law known as the *Fetha Neghest* (a term that literally means "the justice of the kings"). The *Fetha Neghest* was used both as religious law and secular law governing civil as well as criminal behavior in the society. There is no consensus among historians as to the origin of the Fetha Neghest.[10] However, it is strongly believed to have been written in the 13th century A.D. by an Egyptian[11] and translated into Ge'ez, the high language of the Ethiopian Orthodox Church, in about the 15th century A.D.[12]

Because of the long-standing close relationship of the Amharas to the Ethiopian government, the Amharas were among the first of the Ethiopian peoples to whom the legal apparatus of the modern state was extended, in the mid-20th century. Consequently homicides in almost every part of the Amhara region are generally prosecuted by the state. Nonetheless, the complex and deeply rooted Amhara customary law system continues to play a major role in reconciliation of the families and clans affected by homicide. In some ways, the Amhara customary law system is more effective than the state's criminal process.

The Gumuz[13]

The Gumuz, also known as the Shanquilla, the Shakra and the Beja, live on the northwestern part of the Ethio-Sudanese border. In

10. See, Krzeczunowicz, "Code and Custom in Ethiopia," 2 *J. Eth. L.* 2 (Haile Selassie I University, Faculty of Law 1965) (on the history of the *Fetha Neghest*).

11. There has historically been a very close relationship between the Ethiopian Orthodox Church and the Egyptian Coptic Church. Until the mid-1950's, the religious head of the Ethiopian Church, the Abouna, (the Patriarch) came from the Coptic Christian Church in Egypt, appointed by the latter. Id.

12. Krzeczunowicz, supra at n. 9; M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Clarendon Press, Oxford 1975), pp.392-93.

13. The information concerning the Gumuz people is based upon a senior thesis, Aysheshim Merifu, "Crime and Custom, with Specific Reference to Shanquilla Nationality" (1987)(unpublished snr. thesis, on file with Addis Ababa University law library) ("AShanquilla" is another name for the Gumuz!—and on five interviews: 1) Interview by Tsegaye Regassa, Lecturer in Law, Ethiopian Civil Service College with twenty-five-year-old Gumuz law student, Eth. Civil Service College (Sept. 2000); 2)

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terms of numbers, they are one of the smaller ethnic groupings within Ethiopia. In terms of education and awareness of the modern world, they are among the most underdeveloped of the Ethiopian peoples. Under the current federal government, they are part of the Beneshangul/Gumuz Regional State. The Gumuz live on the Ethio-Sudanese border, largely in places known as Gubba and Wonbera. Other peoples who live in the same Regional State include Beneshangul, Agew, Shinasha and Oromo. Of these, the Gumuz are the most disconnected from the Ethiopian State.

The Gumuz live in scattered villages in huts organized according to the degree of relationships of the settlers.[14] Their homes are not well-built, partly because they are mobile in nature. The Gumuz people, like many other Ethiopian peoples, are organized into families, clans, and sub-clans. In isolated areas they still adhere to traditional customs of not wearing clothing and daubing their bodies with mud. Their faces are permanently scarred in several different places; the purpose of the scars is to designate the different clans of the society so that their members can be identified easily for whatever purposes may be desired.[15] Their economy is based on a mixture of hunting and gathering, nomadic and settled agriculture, and base-line pastoralism.

The Gumuz originally were neither Muslims nor Christians. However, due to contacts with their Sudanese neighbors, those living on the Sudan border have been converted to Islam and similarly those living closer to the Christians in Gojjam have become converts to Christianity. Nonetheless, a good number of the Gumuz still maintain their monolithic faith in a god, which is known to them as Musa.[16]

During the 17th century the Gumuz became victims of the slave trade. Numerous expeditions resulting in the displacement and dispersion of the Gumuz people were made by other Ethiopian and African peoples.[17] Probably influenced by the history of the slave trade

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Interview by Getachew Assefa, Instructor in Law, Ethiopian Civil Service College, Assosaa, Beneshangul/Gumuz State, Ethiopia with Tsehay Teso, prosecutor, Bureau of Justice, Police and Prosecution of the Beneshangul/Gumuz Regional State (Apr. 20, 2000); 3) Interview by Getachew Assefa, Instructor in Law, Ethiopian Civil Service College, Assosaa, Beneshangul/Gumuz State, Eth. With Kumasa Mekonen, judge, Beneshangul-Gumuz State Supreme Court (Apr. 20, 2000); 4) Interview by Dolores A. Donovan with twenty-five-year-old Gumuz law student, Eth. Civil Service College (Dec. 5, 2000); 5) Interview by Dolores A. Donovan with forty-year-old Gumuz law student, Eth. Civil Service College (Dec. 8, 2000). (The names of the students have been withheld to protect confidentiality.)

14. Aysheshim, supra n. 12, at 5.

15. Aysheshim, supra n. 12, at 3

16. Aysheshim, supra n. 12, at 8 .

17. R. Pankhurst, *State and Land in Ethiopian History*. Monographs in Ethiopian Land Tenure 3. (Addis Ababa: Faculty of Law, Haile Selassie I University in association with Oxford University Press.) The ebony skinned Gumuz traditionally differentiated themselves and other more light-skinned Ethiopians by referring to the

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and their battles against the slave traders to save themselves and their families, tales of which have been handed down from generation to generation as oral folk lore, the Gumuz have come to consider any non-Gumuz person (*Shuna*) as an enemy.[18] Thus, when any Gumuz is attacked by an outsider, the tradition has been that thereafter strangers from the village or region of the outsider will be attacked by the Gumuz, for the Gumuz believe that all non-Gumuz persons are one and the same: *shuna mitan* as they say.[19] It is also alleged that the Gumuz may kill other *shuna* even for adventure or to increase social status.[20]

The Ethiopian government has in theory extended its legal system to the areas inhabited by the Gumuz. Persons familiar with the criminal justice system in the region, and even the Gumuz people themselves, give radically conflicting reports as to whether it is the Gumuz customary law system or the State criminal justice that handles most criminal cases.

The Somali

The Somali people of Ethiopia are nomadic pastoralists who live in the Eastern part of the country adjoining the Somali Republic and the republic of Djibouti. Somali people also live in the Somali Republic, Djibouti and Kenya. Despite the existence of the international boundaries that divide the lands traditionally used by the Somali, they consider themselves to be one and the same people. Their unity, and also their movements, transcend the barrier of international boundaries. All Somali people, whether they live in Ethiopia, Somalia, Kenya or Djibouti, claim solidarity and unity under shared norms of culture and self-governance.[21] The primary allegiance of the nomads is to their kinship group. Their norms of behavior, including those governing the taking of human life, are determined by their customary laws, and their disputes, including those arising from homicide, are settled by the procedures of their customary law

latter as *shuna*, which roughly translated, means red-skinned. Interview by Dolores Donovan, with assistance of Solomun Negus, Assistant Dean and Lecturer in Law, Eth. Civil Service College with forty year-old Gumuz law student, Eth. Civil Service College, Addis Ababa (Dec. 5, 2000).

18. Tadesse, Tumirat (Professor of History at Addis Ababa University), Early Trends of the Feudal Imposition on the Gumuz Society in Gojam, a paper presented at a Symposium on History and Ethnography, Addis Ababa, Eth. (1982).

19. Aysheshim, supra n. 12, at 17. The literal translation of *shuna mitan* is *man is one and the same*. See, id.

20. Aysheshim, supra n. 12, at 52-53; prosecutor interview.

21. During the imperial times, which in some regions date back to Menelik II, the Somali people of Ethiopia were under the Hararghe administrative region. During the 1987 territorial re-division by the Military Government, Ogaden, the largest part of the present day Somali Regional State, was renamed as an autonomous administrative region. At present, the Somali State is one of the nine federating units of the Ethiopian Federal Government.

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systems. Some of the nomads are not even aware of the existence of the states that call them their citizens.

The subsistence-level economy of the Somalis, like that of several other Ethiopian peoples, is based on pastoralism, the herding of livestock. The Somali people have very strong clan ties in such a way that their settlements and grazing patterns are determined by kinship. Many of the conflicts between the different clans and tribes of the Somali are triggered by trespass on the grazing lands of one group by another. Camels are the most prized possessions of the people. They also rear such animals as cattle, sheep and goats. Over the last few years limited crop production has been introduced by virtue of new irrigation systems taken mainly from the Wabishebele River that flows through the Somali Region of Ethiopia into the ex-Somali Republic. These efforts at crop production are having the effect of settling, or relocating the movement of, the people to some extent.[22]

The Somali people are included among the several ethnic groups who have lived detached from the Ethiopian national government in terms of administration and legal system. Such peoples are Ethiopian citizens in name only. Among this group, the Somalis stand out by virtue of their very well-developed system of self-governance, which relies heavily on the equally well-developed Somali customary law system. In anthropological parlance, the Somalis are a segmentary society composed of several structurally similar clans capable of dividing or combining at various levels as circumstances demand. The clan is the basis for all forms of social cooperation. The clan is also the guarantor of individual security.[23]

Nomadic pastoralism is characterized by conflict, be it a conflict within a single group or inter-group conflict. This is so because of the scarcity of the basic resources of food and water needed to sustain life. Pastoralists move throughout their extensive lands on a seasonal basis, as dictated by grazing conditions and the availability of water. Conflict over grazing land and, especially, access to wells seems to be inherent in their life-style. Whether generated ultimately by economics or by culture, loss of life in the course of these conflicts is an established part of Ethiopian nomadic pastoralism. The pastoralist economy still in existence in large parts of Ethiopia, the powerful, close-knit and impenetrable character of the cultures of the pastoralists, the huge size of the country, the non-existence of reliable means of communications, and the limited resources of the central government, taken together, explain, at least partly, why

22. See generally, Fratkin, "Pastoralism: Governance and Development Issues," 26 *Annu. Rev. Anthropol.* 235-61 (1997).

23. Jemal Derie Kalif, "The Customary Resolution of Homicide Case in Ethiopian Somalis [sic.] and its Impact on the Regional Justice Administration" 1-59 (May 1999) (unpublished snr. Thesis on file at Addis Ababa University Law Library).

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homicide among pastoralists in Ethiopia is still in many instances dealt with by the customary law.

The Somalis are no exception to the rule. With the exception of the areas in and around the few large towns in the Somali Region, the modern state legal system has not penetrated[24] the Somali legal culture. The Somali legal culture is hundreds of years old. The European-style legal system of the formal Ethiopian state arrived on the scene only thirty or so years ago.

II. Three Systems of Customary Law: Homicide in Ethiopia

This section of the article presents the customary law systems of the Amharas, the Gumuz and the Somalis as they relate to homicide. The behavioral norms of the Amhara people resulting in revenge killings, those of the Gumuz resulting in sorcery and status killings, and those of the Somalis resulting in the forced marriage of female children and the systematic devaluation of the lives of women are examined, as are the responses of the respective customary law systems to these practices.

Revenge Killings Among the Showa Amhara

Many ethnic groups in Ethiopia follow the practice of revenge killing. All three of the groups described in this article—the Amharas, the Gumuz and the Somalis—do so. The Amhara have been chosen for a study of this issue because their customary law system is the one which is most closely intertwined with that of the Ethiopian state. A comparison of the response of the Amhara customary law system and that of the Ethiopian state legal system to revenge killings provides the opportunity to study the interaction of a recently-arrived modern state legal system with an ancient and deeply-rooted customary law system.

Traditionally, a homicide by one Amhara against another was to be revenged by the victim's family, not by local authorities and certainly not by the distant royal government. The revenge killing by a male relative of the victim (the blood avenger, or dem-mellash) was, more often than not, directed not against the perpetrator, who had fled to the woods or mountains, but against a member of the perpetrator's family who had nothing to do with the original killing. A

24. The term "legal penetration" refers to the extent to which a legal system actually penetrates and controls social life. Legal penetration is to be contrasted with legal extension. The term legal extension refers to the degree to which a legal system seeks to penetrate and control social life. See generally, John Henry Merryman, *The Civil Law Tradition* 656-709 (2nd ed., 1985) See also John Henry Merryman, David S. Clark, & John U. Haley, *The Civil Law Tradition: Europe, Latin America and East Asia* 51 (1994). The formal Ethiopian legal system is extended to the Somali Region in the sense that it seeks to control Somali social life. The Ethiopian legal system has not, however, penetrated the Somali legal culture it does not control Somali social life.

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male relative of the new victim would then be expected to avenge that victim's death, and a blood feud lasting many years would follow. The man who avenged his family, a blood avenger, was seen as fulfilling a moral and social obligation and was honored by his family and by the society in which he lived. These norms of conduct are still adhered to by Amharas in rural settings.[25]

The only exits from this vicious cycle were, and at times still are, the conciliation procedures known as *erq* and *shemgelena*. *Erq*, meaning conciliation, and *shemgelena*, meaning either conciliation or mediation, are terms often used interchangeably to denote settlement of a dispute between families. The goal of these processes is an end to blood-letting and restoration of peace to the community. Technically speaking, the term *erq* should be used only when a settlement process is commenced under the authority of the Ethiopian Orthodox Church. *Erq* commences when an offender who has been in hiding in the forest or in a far-away village decides, for whatever reason, to return to his community to engage in mediation with the family of his victim. Such a return may occur shortly after the initial homicide, or only after many lives have been taken in a blood feud involving all adult male members of the extended families of the victim and the offender. In *erq* the offender seeks sanctuary in a church and rings the church bell to announce his presence. Clergy and senior members of the church community respond to the sound of the bell by going to the church. The offender then asks their intervention and seeks their services as conciliators. The next step is the commencement of the *erq* or *shemgelena* conciliation process.

It should be noted that it is the offender, his family, or the family of the victim that must initiate the process. Unlike modern State criminal justice systems, customary law systems are generally not self-initiating. They must be triggered by the individuals or the families involved.

Shemgelena and *erq* merge with the selection of three to five well-respected members of the community to act as conciliators. These persons, known as *shemagles*, convene a hearing in a public place, take testimony and hand down a judgment. If a case is brought to *shemgelena* immediately after the initial wrongful killing occurs, the multiple homicides of family feuds can be averted. Even after family warfare gets underway, it can be brought to a halt by *shemgelena*. The *shemagles* are usually elderly men, though younger men and even occasionally a woman have been known to fill this position. A *shemgelena* proceeding terminates in an order for compensation (*guma*) to be paid by the offender's family to the family of the

25. Gotachew Hailu (Ethiopian Civil Service College), "Conflict Resolution Mechanisms in Ethiopia: Comparison Between Law and Tradition" (1999) (unpublished paper on file at the Ethiopian Civil Service College Library).

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victim. The purpose of *shemgelena* is to restore peace and order to the community, not necessarily to punish the individual who perpetrated the crime. The applicable Amharic saying is "Blood dries up through reconciliation." In pre-modern times, the *shemagles* could authorize the family of the original victim to kill the perpetrator themselves if the perpetrator could not pay the blood money ordered by the *shemagles*. Nowadays the only remedy which the *shemagles* are authorized to impose is the blood money.

Examining the *shemgelena* proceeding from the perspective of modern criminal justice norms, it appears at first glance that the customary law processes are defective. Achievement of the purposes of the criminal sanction, as they are understood in modern western legal systems, is almost wholly absent. A human being has been killed and yet the only response of the customary law is to order the offender's family to pay financial compensation to the victim's family. The family of the killer pays blood money to the victim's family, and the killer walks free. A life has been arbitrarily taken, in violation of the applicable universal human rights norm, and yet the killer is not punished, at least not insofar as the term "punishment" is understood among jurists trained in the civil law and common law traditions. Where the killing has been a revenge killing, not only does the slayer go free, but he is honored by his family and community for the killing he has committed.

Arguably, a criminal sanction in the form of a fine has been imposed, but it has been imposed on the family of the offender(s), not on the individual offender. The deterrent effect of the fine on the specific offender and on the members of the general community is minimal to non-existent.[26] The same minimal to non-existent impact holds true for two other purposes of the criminal sanction: incapacitation and rehabilitation. The precise dispute that was before the *shemagles* may have been settled, but the killer(s) will kill again, the next time that their Amhara sense of family honor dictates that blood revenge is required. The same is true of other members of the general community whose sense of honor may in the future militate in favor of homicide.

26. An alternate view espoused by at least one Ethiopian legal academic is that the customary law processes do have a deterrent impact in addition to their peace-restoring function. First, the results of customary law proceedings are highly visible and known to the offenders' communities, unlike the results of the state criminal justice system, which occur in remote places and generally without the attendance or knowledge of the affected community. Second, the fact that the offender's family, presumably composed of persons he loves and cares deeply about, must pay compensation for his act, often at great personal sacrifice and cost, in fact does have both a specific and general deterrent effect. Third, the necessity of resort to the community elders for settlement in and of itself indicates that a blood feud is a terrible thing that should be avoided. Thus the settlement processes do have a deterrent function. For example, little children who quarrel say "let's not make a blood feud out of it." Tsegaye Regasse, Lecturer in Law, Eth. Civil Service College (Dec. 2000).

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The only function of the criminal sanction that has arguably been served by the customary law settlement proceedings is that of retribution, assuming that the victim's family feels avenged by the receipt of compensation. From the perspective of modern Western criminal law, the Amhara customary law system does not carry its burden of preventing its people from arbitrarily taking each other's lives. The result of this customary law proceeding did not and does not satisfy the applicable human rights norms. From the perspective of modern international human rights law, the Ethiopian state that tolerates this system is not carrying its burden of protecting the internationally-recognized right to life of its people.[27]

At the end of the first quarter of the 20th century, the modern Ethiopian state began to prosecute homicide in state courts. First in the Ethiopian capital city of Addis Ababa, then in a few regional capitals, criminal prosecutions were brought against the *dem-melash*, the blood avengers. Blood avengers were convicted and sentenced to imprisonment under the 1957 Ethiopian Penal Code.[28] At first, this state intervention proved ineffective in bringing blood feuds to a halt. The relatives of victims on both sides of the fence did not feel that imprisonment of the killer relieved them from their traditional duty to seek vengeance through homicide. Only the payment of compensation by the killer's family could relieve them of their duty to exact revenge. Thus, for many years the state's imposition of the criminal sanction lacked deterrent effect.

In recent times, however, progress has been made in many Amhara regions: consistent prosecution and punishment of killers on both sides of blood feuds have increasingly proved to be capable of deterring follow-up revenge killings. However, in outlying rural areas, the ethos of private revenge still holds sway. At times the state is still unable to prosecute. At other times, it prosecutes and convicts, but imposition of the criminal sanction proves ineffective to halt the deadly cycle of revenge. Because the relatives of the victim are neither compensated nor reconciled, through *shemgelena* and *erq*, with the killer's family, the male relatives of the victim are not freed from their moral and social duty of exacting revenge. Thus, the offender, who in modern terms has paid his debt to society by serving time in jail, is still, on his release, a target for homicidal vengeance at the hands of the relatives of his victim. The blood feud continues.

The Ethiopian state should be applauded for its efforts to bring its people into compliance with modern norms relating to respect for the right to life, but faulted for an overly simplistic approach to the

27. See infra text at n. for further discussion of this point.

28. The 1957 Penal Code had been preceded by the 1930 Penal Code, which was based on the *Fetha Negast*. The 1930 Code, although containing some borrowings from European Codes, purported to be in essence a clarification of the *Fetha Negast* Holcomb and Ibssa, supra n. 8.

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problem. Individual prosecutions and punishment are indeed necessary to achieve the specific and general deterrence of homicide required by international human rights norms and the provisions of the Ethiopian Constitution of 1994. On the other hand, the zeal to modernize has resulted in the destruction of traditional practices that were highly effective in their own way. The traditional Amhara *eri* and *shemgelena* proceedings were, and probably still are, far more successful than State proceedings in restoring peace to the community as a whole. A culturally sensitive approach to the undesirable Amhara custom of revenge killings, one that preserved the traditional customary law processes, might have saved many lives. It still could.

Sorcery Killings and Adventure Killings Among the Gumuz[29]

Although the Gumuz lands are said to have been part of Ethiopia since recorded human memory, the administrative apparatus of the state was extended to the Gumuz only in the late 19th century, in the time of Menelik II.[30] The Ethiopian state administration was strengthened under Haile Selassie for purposes of collecting tribute and revenue, but not for purposes of settling disputes among the people. Use of the state courts by some of the Gumuz first began in the mid-1970's under the Derg (the military government that deposed Haile Selassie). In 1991, use of the state courts by the Gumuz increased dramatically, for members of the Gumuz ethnic group were hired to act as administrators and interpreters and thus, for the first time, the Gumuz could use their own language.[31]

Still, however, the state courts are used only as a last resort, when settlement under the customary law has failed.[32] Both the

29. The following information is based upon Ayshesahim Medfu, "Crime and Custom, with Specific Reference to Shanquilla Nationality" (AAU, 1987) (unpublished sen. thesis on file with the Addis Ababa University Law Library) and on five interviews: 1) Interview by Tsegaye Regasse, Instructor in Law, Ethiopian Civil Service College with twenty-five year old member of the Gumuz people studying law at the Ethiopian Civil Service College (Sept. 2000); 2) Interview by Getachew Assefa, Instructor in Law, Eth.Civ. Service College with Tschay Tesso, prosecutor, member of the Shinasha people, has lived with the Gumuz for most of his life, and is now head of the Crime Prevention and Control Department of the Justice Police and Prosecution Bureau, Beneshangul Region (Apr.20 2000); 3) Interview by Getashew Assefa, Instructor in law, Ethiopian Civil Service College with Kumssa Mekonnen, judge, State Supreme Court, Beneshangul/Gumuz Regional state (Apr. 20, 2000); 4) Interview by Dolores D Donovan with twenty-five-year old Gumuz law student, Ethiopian Civil Service College (Dec. 5, 2000); 5) Interview by Dolores A. Donovan with forty-year-old Gumuz law student, Ethiopian Civil Service College (Dec. 8, 2000).

30. Interview by Dolores A. Donovan with forty-year old Gumuz studying law at the Ethiopian Civil Service College, (Dec. 8, 2000). "The Gumuz lands had been part of Ethiopia for one thousand years," which, in light of Ethiopia's three-thousand-year history, is entirely believable.

31. See, id. The interviewee, a Gumuz, was an official of the current Ethiopian government, which took power in 1991.

32. See supra n. 28.

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Gumuz people and the state administrators prefer that a case should be settled at customary law if possible, for settlements at customary law bring peace, whereas judgments in the state court do not.[33] Further, the Gumuz people present special problems of legal integration because their behavioral norms regarding homicide diverge radically from those of the rest of Ethiopian society. Perhaps it is also for this reason, as well as out of a preference for amicable settlement, that the representatives of the Ethiopian state have tended to cede jurisdiction over these cases to the Gumuz customary law system.

The information about Gumuz behavioral norms relating to homicide and the correlative customary law processes of the Gumuz people is conflicting and unclear. Central issues as to which there is a lack of clarity are Gumuz behavioral norms relating to sorcery killings, the procedures employed by Gumuz elders to deal with homicide, and the distinction drawn under Gumuz customary law between killing non-Gumuz people (traditionally permissible) and killing Gumuz people (in general impermissible). Extensive field work by legal anthropologists is required before any informed attempt to incorporate the little-known Gumuz customary law system into Ethiopia's formal legal system can be begun. With these caveats, the information in our possession concerning Gumuz behavioral norms relating to homicide is set forth immediately below.

There are three major types of homicide in Gumuz society: 1) the standard lethal altercations which are found in every society; 2) status or "adventure" killings; and 3) sorcery killings. Status or adventure killings are directed by the Gumuz against non-Gumuz strangers to their community.[34] These killings seem to be a cross between revenge killings pursuant to a very ancient blood feud and killings for purposes of improving social status. Adventure killings of non-Gumuz men are not penalized nor dealt with in any way by the Gumuz customary law system.[35] In fact, such killings are tacitly encouraged as proof of manhood and status as a warrior.

Sorcery killings occur when a group's *Gafia*, who is a sort of priest, healer and witch doctor combined, identifies a person as a witch who has caused the death of one of his patients. The male mem-

33. Id. Judgments by state courts in homicide cases do not bring peace because they do not provide for compensation. Therefore, the relatives of the victim must kill a member of the murderer's family in order to obtain revenge. Even when compensation was paid before the state courts got involved, there is no peace because if the murderer is jailed by the state, his relatives will demand the return of the compensation. If the family of the victim returns the compensation to the killer's family, then the victim's family must exact revenge by killing. If the victim's family refuses to return compensation, then the killer's family will exact revenge by killing. Therefore, in order to preserve the peace, the representatives of the state prefer that criminal cases, including homicide, be resolved amicably through the customary law.

34. Aysheshim *supra* n. 12, at 52.

35. Aysheshim, *supra* n. 12, at 53-54.

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bers of the deceased's family are then expected to kill the witch.[36] All homicides except sorcery killings can trigger revenge killings and a subsequent blood feud between the families or clans involved. Sorcery killings do not trigger revenge killings because they are accepted as justified even by the family of the murdered "witch."

Settlement of intra-Gumuz family feuds generated by homicide is done by elected or appointed "go-betweens" or conciliators who arrange a settlement and then pronounce it before the assembled male members of the families or clans involved.[37] The settlement procedure is commenced at the request of one of the families involved. As in the case of the Amhara, the elders of the community do not themselves initiate proceedings. They wait for a request for intervention from a member of the families involved. The procedure for settlement varies according to the social or relational distance between the killer and his victim. If the killer and his victim are members of the same family, the matter will generally be dropped. No request will be made to the elders for initiation of settlement proceedings. Statements from Gumuz informants are in conflict as to procedures where the killer and his victim are from different families. One version, probably the most reliable, has it that compensation must be arranged.[38] Non-Gumuz sources of information have stated that if the killer and his victim are from different families, the conciliators will arrange a payment of compensation in the form of cattle and the banishment of the killer for five years. If a cycle of revenge killing has commenced and the number of deaths is unequal, the go-betweens will usually arrange for the side with the fewer deaths to give a young girl and three cattle to the other family. It is not clear whether the girl is intended for marriage, thereby serving to conciliate the warring families, whether she is viewed merely as an item of valuable property, or both.[39]

The weight of authority among our sources indicates that the Gumuz customary law mechanisms for dealing with intentional homicide are similar to those of the Showa Amhara. As in the Amhara system, compensation is paid by the family or clan of the offender to the family or clan of the victim. Thus, criminal

36. Aysheshim, supra n. 12, at 54.

37. Aysheshim, supra n. 12, at 33.

38. Interview with 40-year-old Gumuz law student (Dec. 8, 2000). Another version is that the family of the killer has the duty to bring him before a public assembly, where he will be hanged by members of the victim's family. This version was supplied by a Gumuz man in his early twenties who was also a student at the Ethiopian Civil Service College. By his own admission, this young man was not as well-informed on Gumuz customary law as his older colleague.

39. Aysheshim, supra n. 12, at 30, 34. Some of our informants stated that the young girl is of marriageable age and is included for the purpose of conciliating the warring families by intermarriage. Others say that she is very young and is not intended for marriage.

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responsibility is seen as collective rather than individual. The offender, as in the Amhara system, goes free.[40] If the Gumuz procedure is indeed similar to the Amhara procedure in these respects, the Ethiopian representatives of the modern state would do well to learn from the Amhara experience. Substitution of a state legal process designed to impose criminal punishment on the individual offender will not necessarily end the cycle of revenge killings.

To conclude, a great deal of thought and a great deal of investigation is needed before any further attempt to apply the formal Ethiopian criminal justice system to the Gumuz people is made. Investigation by legal anthropologists of the nature of the Gumuz customary law processes and incorporation of their findings into a government plan of action would assist in ensuring an effective, rather than a counter-productive, merger of the Gumuz customary law system and the Ethiopian state legal system.

Sentencing Practices Among the Somali

Although the homicide settlement proceedings of the Somalis are highly developed and give rise to many of the same issues as those of the Amharas, it is the sentencing process that we have chosen to address. Discrimination against women is built into the structure of Somali culture and Somali criminal sentencing. The Somalis are, on the whole, Muslims, and themselves attribute certain of the discriminatory aspects of their legal system to their Islamic religion.

The Somali people live in the Eastern outlying regions of Ethiopia. They are, by tradition, nomadic pastoralists. Their traditional legal system is very highly developed. The degree of penetration of modern Ethiopian written state legal norms into Somali legal culture is minimal. Although the central Ethiopian government purports to apply its laws, including the Penal Code of 1957, to the Somali Region, and has provided the Somali region with a regional government, regional courts, and regional police, the courts are few and far between, the police stations exist only in regional centers, inaccessible to all but the wealthy few, and both the courts and the police are woefully understaffed. Further, a significant percentage of the civil servants who staff these institutions are not of ethnic Somali origin. The traditional Somali customary law system, in contrast to the formal legal system of the modern Ethiopian state, is fully staffed, by Somalis, and easily accessible to all. In short, the Somali people see no reason to replace their own sophisticated customary law system with the, to them, dysfunctional legal system of the modern Ethiopian state. The stark contrast between the efficiency, accessibility,

40. Except in the case where he is punished by banishment, which constitutes a major restraint on freedom of movement. When applied to a person not having the skills to survive in any society but his own, banishment is a very harsh punishment.

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and staffing of the two systems and the relative satisfaction of the Somali people with their own customary law has in no small part contributed to the current delegitimation of the national and regional state legal systems.

The sophistication of Somali customary law is seen in its two-tiered system and its clearly articulated subject-matter divisions. The elaborate customary law of the Somalis, known as *xeer*, is categorized as *Xeer Donimo* and *Xeer Dulnimo*. Xeer Donimo regulates the rights and responsibilities of particularized subsets, such as clans of the Somali people, governs relationships within the clan, and regulates quasi-contractual relationships between neighboring clans on such matters as allocation of shared natural resources.[41] *Xeer Donimo* binds only that group of persons which has created it.[42] *Xeer Donimo* is said to be dynamic and changing from time to time.

Xeer Dulnimo, on the other hand, consists of the rules that apply to the whole Somali people. Thus, the rules applicable to homicide (*dil*), moral injury (*dalliil*) and bodily injury (*qoon*) are to be found in *Xeer Dulnimo*.[43] And the corresponding compensations or blood money payments, respectively, are *mag* (or the arabic loan-word "*diya*"), *qoomaal* and *haal*. The compensation scheme, which is the sentencing for the crime, is not a compensation paid to the victim per se but to the whole of the group on the side of the victim, which includes a kinship network far greater than the nuclear family. In the final analysis the victim's nuclear family gets only a third of the blood money (*mug*) that is paid.[44] This is because the Somalis, being a highly communal society, view crime, even homicide, as their communal responsibility.

As previously stated, the Somali people are, on the whole, Muslim. Whether rightly or wrongly, most believe that their sentencing practices derive from Islam in general and the Shari'a in particular, modified by the Somali customary law, known as xeer (pronounced heer). Some of these sentencing practices are predicated on the premise that the value of a woman's life is less than that of a man.[45]

41. The Somali conceptualize their law as fundamentally contractual in nature. The "contracts" are analogous to bilateral or multilateral international treaties, entered into by two or more clans, through their clan elders. These contracts survive the passage of entire generations and are accepted as a legacy or obligation by the descendants of those who initially negotiated them. The contracts may also be modified, through negotiations between elders, at any time. See I.M. Lewis, *Pastoral Democracy* 161 (Oxford University Press, 1967).

42. Jemal Derie Kalif, supra. at n.

43. L.V. Casanelli, *The Shaping of Somali Society: Reconstructing the History of a Pastoral People, 1600-1900* (1982), p. 9, in Jemal Derie Kalif, at p. 16.

44. Interview by Dolores Donovan with Samuel Alemayehu, former judge of the Somali Supreme Court, now Registrar of the Council of Constitutional Inquiry, at Addis Ababa, Ethiopia (Dec. 14, 2000)

45. Laitin and Samater (a Somali) claim that such discrimination in the assessment of the amount of compensation is in accordance with Islamic law in addition to

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Whether due to religious indoctrination or to the socio-economic conditions of nomadic pastoralism, the de-valuation of the lives of women is endemic in Somali culture. For example, the unwritten rule establishing the relative values of male and female lives is that the murder of a man is compensated by one hundred camels; the murder of a woman by fifty camels.[46] The lower value and status of women is seen in compensation practices that view women as a form of property. For example, in cases where a confessed or convicted killer does not have enough livestock to pay the compensation ordered, one of his sisters or daughters may be taken from his family and given as wife to a victim's family.[47] In many cases the rate of payment is governed by contracts between clans. Thus, the rate of payment stated above does not apply across the board. According to I. M. Lewis, in the case of homicide between a male member of the Gadabuursi (a clan that lives in Northern Somalia and Ethiopia) and a member of the Iisse (a clan that also lives in North ex-Somalia, Ethiopia and Djibouti), the compensation to be paid, agreed upon by *xeer* between them, is 10 female camels, 100 sheep and goats and one nubile girl fitted out for marriage with all her household equipment.[48] This practice has the dual benefit of transferring an item of value (the woman) and uniting the warring families by marriage, thereby hopefully minimizing the likelihood of a recurrence of conflict.

Three questions arise concerning the devaluation of women's lives that is built into the Somali sentencing practice. The first is whether replacement of the Somali customary law processes by the state legal system, with its statutorily non-discriminatory Ethiopian Penal Code, Criminal Procedure Code, and Constitution, is even possible. The second question is whether, pending or failing replacement of Somali customary law by the state legal system, the Somalis can be

being part of Somali compensation law. See David D. Laitin & S. Samater, *Somalia: A Nation in Search of State* 24 (Westview Press, 1987). See also I.M. Lewis, supra n. 39, at 3.

46. Jemal Derie Kalif, supra n. 41, at 31, citing I.M. Lewis, *Islam in Tropical Africa* 47 (Oxford University Press, 1966). Camels are the primary form of wealth and hence currency in traditional Somali culture. Thus the rule stating the relative value of male and female lives is stated in terms of camels. However, the contract-based Somali customary law permits group contracts between clans modifying compensation rules to allow for payment in terms of less valuable livestock, such as sheep or goats or cattle. In times of economic hardship, the inter-clan contracts can be modified to adjust compensation sums downwards.

47. 47 Getachew Haile, supra. n. , at 19-21, 54; I.M. Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa* 141 (Oxford University Press, 1967). The Somali people of Ethiopia are, on the whole, Islamic and therefore permitted to take more than one wife. It is interesting to note the parallel development in the ex-Somali Republic that in 1975, the socialist oriented government of Mohammed Siyaad Barre struck down by decree the inequality in male and female homicide compensation and in so doing provoked a religious uprising in which ten prominent mullahs were executed. Laitin & Samater, supra n. 43, at 24.

48. I.M. Lewis, supra at 164.

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educated into eliminating discrimination against women from their sentencing practices. The third question is whether transitional mechanisms can be created to provide a remedy in the state legal system for the most abusive cases of gender discrimination in the customary law processes. The second and third questions are dealt with in Part III of this article.

As to the first question, it is not likely that the Ethiopian state legal system will replace the Somali customary law system in the near or even not-so-near future. This is not for lack of effort on the part of the Ethiopian state. The Regional Government of the (Ethiopian) Somali Region is at present doing its best to create and extend the regional legal system in a form identical to that of the federal legal system. The fact that the few and far-between courts in the Regional Somali State apply the national laws of Ethiopia without concession to the Somali customary law speaks loudly to this effect. Nor has the Regional Government's recent ratification of a regional constitution which, on the fundamental points, is a replica of the Ethiopian Federal Constitution of 1994 done anything to solve the underlying policy problems in the area. To the contrary, these efforts by the Ethiopian state to enforce legal uniformity under the authority of the central government may actually have widened the schism between the two legal systems.

With respect to resistance to State legal authority, functionaries in both the state and traditional customary legal systems in the Somali Region have reported that the vast majority of crimes, including homicide, are dealt with by the customary law systems.[49] Most of these cases never reach the formal court system. One observer has even reported that after arrest by the state of a suspected killer, the Somali traditional authorities proceed to settlement of the homicide by traditional customary law processes, order payment of compensation as determined by traditional processes, then contact the local state courts and suggest the dismissal of charges against the arrested suspected killer on the grounds that the case has been settled.[50] It has been further reported that in at least some such cases that had been settled at customary law, the formal state charges were dropped by the Ethiopian courts.[51] Likewise, reports have been received that

49. Interviews by Dolores A. Donovan and Tsegaye Regassa, with the assistance of Abdullahi Sundhol with eight clan elders, two judges and two prosecutors of the Dollo Ado and Dollo Bay woreda courts, Somali Region, Ethiopia (June 2001).

50. Jemal Derie Kalif, supra n. 44, at 40-41.

51. Id. Interview by Dolores Donovan with Samuel Alemayehu, former judge of the Somali Supreme Court at Addis Ababa, Ethiopia (Dec. 14, 2000). More recently, the judges and prosecutors of two *woreda* courts (these courts are equivalent to U.S. municipal courts and do not have homicide jurisdiction) denied that any persons arrested for homicide were ever released at the request of the customary law authorities. Rather, they stated, the customary law authorities generally settle the homicide cases without recourse to the courts. Thus the police seldom have occasion to arrest

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even after a Somali man has been tried, convicted and sentenced to prison, his family and that of the victim do not view the matter as settled. Their expectation is that the customary law authorities must investigate the case and order the payment of blood money (mag), otherwise the cycle of revenge killings will commence and spiral into clan warfare.[52]

It is well-established that Somali society and its customary law processes have proven resistant to the incursions of the modern Ethiopian state in the criminal justice arena. In fact, Somali society everywhere in the Horn of Africa has proven resistant to establishment of central governmental authority of any sort, not just to that of a state legal system. In view of this state of affairs, it seems likely that any serious attempt by the Ethiopian state, at this point in time, to require the Somali people to use the State legal process, thereby preempting the Somali customary law system, would fail. The more likely result would be the de-legitimation of the modern Ethiopian legal system and consequent deterioration of the already tenuous relations between the Somali people and the Ethiopian State.

* * *

The foregoing section on Customary Law has described revenge killings among the Amhara, sorcery and adventure (status) killings among the Gumuz, and sentencing practices that de-value the lives of women and the persons of female children among the Somali. These three groups were chosen as subjects for case studies not because they are unique, but because they are typical. Revenge killing is common among many, if not most ethnic groups in Ethiopia, and around the world.[53] Sorcery killings, though rare, are found among many peoples in Asia and Latin America, as well as in Africa.[54] Sentencing practices that de-value the lives of women are found in many countries that embrace Islamic law.

The question is whether a nation-state may tolerate customary law systems that condone such practices without running afoul of international law. As we have seen, the Amhara customary law system has traditionally turned a blind eye to the taking of life by private

homicide suspects and the clan elders therefore have no need to ask courts to release arrested homicide suspects. In the rare situation when the police do arrest a homicide suspect, he will absolutely not be released until he has been brought to trial and sentenced. Interviews by Dolores A. Donovan and Tsegaye Regasse (Abdullahi Sandbol, interpreter) with the judges and prosecutors of the Dollo Ado and Dollo Bay woreda courts, Somali Region (June 2001).

52. Jemul Derie Kalif, supra n. 44, at 27-30.

53. For a fictionalized illustration of the tradition of revenge killing in the United States, see Mark Twain, *Huckleberry Finn* 132-35 (1981).

54. *Miguirucama Celimo*, 13 C.J. 303 (S.C. Columbia, 1970) in Merryman, Haley & Clark, *The Civil Law Tradition* 658-64 (1994); See also, Dinnen, "Sentencing, Custom and the Rule of Law in Papua New Guinea," 1988 *J. of Legal Pluralism* 19-31.

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persons for the purpose of revenge—a purpose that a modern criminal justice system would deem illegitimate. The Gumuz customary law system turns a blind eye to sorcery killings and also occasionally even to killings done to achieve status or manhood. The Somali customary law system endorses sentencing practices based on the institutional de-valuation of the lives of women and the personhood of female children.

In the case of revenge killings, the relevant Amhara customary law system does not seek to halt revenge killings, but rather responds, on request, to petitions for intervention from the affected families. The purposes and goals of the response are different from those of a modern criminal justice system. The customary law purpose is to achieve settlement by payment of compensation between feuding families or clans. The customary law goal is restoration of peace to the community by effectuation of a reconciliation between the warring families or, where only one death has occurred, between the family of the victim and that of the offender. In the case of sorcery and adventure killings, the Gumuz customary law system does not respond at all, for such killings are viewed as justified. In the case of sentencing practices that de-value the lives and human dignity of women and children, the Somali customary law system incorporates and affirmatively endorses the offending practices.

The failure of the Amhara and Gumuz customary law systems to prosecute, respectively, revenge killings and sorcery and adventure killings places at risk the right to life of Ethiopian citizens. The use of compensation rather than incarceration also arguably places at risk the right to life of Ethiopian citizens. The sentencing practices endorsed by the Somali customary law systems violate the right of Ethiopian women to equal treatment under the law, and the right of Ethiopian female children not to be forced into marriage. All of these rights are protected by the Ethiopian Constitution and international human rights law.

III. Human Rights, Legal Pluralism and Federalism

This section of the article examines the Ethiopian constitutional law protecting the human rights of Ethiopian citizens. The tension between universalist conceptions of human rights and the particularism of cultural relativism as it relates to customary law systems is described. Legal pluralism and federalism are explored as structural forms capable of mediating that tension. The section concludes with a discussion of legislative mechanisms for implementing legal pluralism at the local level.

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Human Rights

Criminal justice systems are the proving ground for the strength of a nation-state's commitment to implement in real life the paper promises of human rights protection made in its constitution and the international treaties which it signs and ratifies. The Ethiopian Constitution of 1994 guarantees protection for virtually all human rights recognized under international law. In many cases the constitutional language is almost identical to the international human rights instruments to which Ethiopia is a signatory. Paramount among the many international human rights treaties Ethiopia has signed is the International Covenant of Civil and Political Rights (hereinafter, "ICCPR").[55]

The ICCPR provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life. (Emphasis supplied.)[56]

The ICCPR also prohibits discrimination on the basis of sex.

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . . .sex. . . (Emphasis supplied).[57]

Further, the right to marry is predicated on the attainment of "marriageable age" and shall be entered into "only with the free and full consent of the intending spouses."[58] Although explicit prohibition of the forced marriage of children is not found in the ICCPR, the covenant does impose on the State a duty of protection of children.[59]

With respect to the right to life, the Ethiopian Constitution adopts, almost verbatim, the above-quoted language from the ICCPR. Article 14 of the Ethiopian Constitution provides that "Every person has the inviolable and inalienable right to life. . ." Article 15 states that "Every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence estab-

55. ICCPR RES2200A(XXI) (Dec.1966).

56. ICCPR, Art. 6(1). The right to life is also guaranteed by the Universal Declaration of Human Rights, Article 3, which states that "[e]veryone has the right to life, liberty and the security of person."

57. ICCPR, Art. 26.

58. ICCPR, Art. 23(2) and 23(3). See also the Universal Declaration of Human Rights, Arts. 16 (1) and 16(2).

59. Every child shall have, without any discrimination as to . . . .sex. . .,the right to such measures of protection as are required by his status as a minor, *on the part of the State* ICCPR, Art 24(1) (Emphasis supplied.)

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lished by law."[60] Article 15, which is fashioned after Article 6 of the International Covenant on Civil and Political Rights, has more or less the same content as the ICCPR provision. Thus, both as a matter of international and of Ethiopian law, the taking of a human life for any purpose other than punishment for a criminal offense is prohibited. Presumably, then, the Ethiopian state should not let homicide go unpunished.

With respect to equal protection, the Ethiopian Constitution not only adopts the principle of non-discrimination on the basis of gender but also addresses the problem of discriminatory customary law norms. The constitution states, in no uncertain terms, that customary law norms in conflict with the rights of women are not to be tolerated. The Constitution specifically provides that "[l]aws, customs and practices that oppress or cause bodily or mental harm to women are prohibited."[61] Presumably, then, the Ethiopian state should not tolerate such practices.

The same is true of the protection of children. The Ethiopian Constitution forbids the exploitation of children[62] and trafficking in human beings.[63] Freedom of choice in marriage is guaranteed, presumably to both adults and children.[64] Again, it would seem to follow that the Ethiopian state should not permit the exploitation of children.

Ethiopian law is not lacking in protection for the human rights of its citizens. Nor is it lacking in clarity as to the duty of all Ethiopians, especially those holding positions of responsibility in their communities, to ensure observance of the Constitution. "All citizens, organs of state, political associations and other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it."[65] By any interpretation of these words, the administrators of legal systems, whether state or customary, are prominent among those persons upon whom the duty of ensuring observance of the Constitution falls.

The question then is three-fold: 1) why the excellent Ethiopian law on the books is not followed by the local authorities who administer customary law systems; 2) whether the modern Ethiopian state

60. Art. 15, Constitution of the Federal Democratic Republic of Ethiopia (1994).

61. Art. 35(4), Constitution of the Federal Democratic Republic of Ethiopia (1994). Although this clause of the constitution was written expressly to protect women, it is a fair inference that the same prohibition applies where customs and practices cause bodily or mental harm to men.

62. Id., Article 36(1)(d).

63. Id., Article 18(1).

64. Id., Article 34(2). The equal protection of the law is guaranteed, as is equality before the law. Id., Art. 25. Discrimination on the basis of sex is prohibited. Id.

65. Id., Art. 9(2). A narrower duty, to enforce the human rights provisions of the Constitution, is lodged in the hands of "[a]ll Federal and State legislative, executive and judicial organs at all levels. . ." Id. Art. 13(1).

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has the duty to correct the faulty human rights practices of the customary law systems within its borders; and 3) if so, how. As to the first question, the answers are multiple. First, many community elders are illiterate and hence unaware of the contents of the Constitution.[66] Even the existence of the Constitution is no doubt unknown to many of them. Second, some of the community elders, especially in the Somali Region, are at best indifferent to the Ethiopian state and at worst opposed to it. Even were such local authorities to know of the existence of an Ethiopian Constitution imposing on them a duty to protect the notions of human rights contained therein, they would feel no obligation to obey it. Their primary loyalty is to their own people -- the Somalis. Third, many of these community and clan elders, rather like the Ethiopian state itself, are suffering from divided loyalties. On the one hand they are loyal to the modern Ethiopian state, but on the other they are loyal to the traditions of their people. In practice these divided loyalties often mean implementation of their own systems of familiar and local customary law rather than the abstract legal principles of the distant Ethiopian state. Fourth and finally, the customary law authorities, were the matter to be fully explained to them, might well take the position that the concept of human rights is a Western invention that has no place in and is destructive of the culture of which they are a part.

The tension between universalist conceptions of human rights and the particularist doctrine of cultural relativism complicates the melding of modern and traditional legal systems the world over. Cultural relativism is the doctrine that holds that moral rules and social institutions evidence a high degree of cultural and historical viability and that "(at least some) such variations are exempt from legitimate criticism by outsiders."[67] The extreme statement of the culturally relativist position is that culture is the sole source of the validity of a moral right or rule. The radically universalist position is that culture is irrelevant to the validity of moral rights and rules, which are universally valid.[68]

Legal scholars of international human rights law tend to fall into the universalist camp; cultural anthropologists into the relativist camp. Government officials of modernizing nations such as Ethiopia typically eschew the luxury of either sort of extremism, opting instead for pragmatism. Charged with implementing the legal system of their country in a way that at once commands the respect of the international community and the allegiance of the traditionalist ele-

66. The vast majority of the clan elders encountered by one of the authors of this article in the remote Dollo area of the Somali region in June 2001, were illiterate.

67. Donnelly, "Cultural Relativism and Universal Human Rights," 6 *Hum. Rts. Q.* 400-19, at 400 (1982).

68. Id.

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ments of their populations, they must strike a balance between the two extremes.

In the past few decades, increasing awareness of significant cultural variations in notions of rights has emerged among scholars in both the legal and anthropological fields. Efforts have been made to find functional analogues to western notions of rights in the incontrovertible fact that all cultures, including those without an indigenous concept of rights, have conceptions of morality, justice and human dignity that in practice work to achieve much the same social goals as does the concept of rights in the west.[69] Further efforts have been undertaken to fuse such culturally diverse notions of human dignity with those of rights to establish a new grounding for claims of universalism.[70] A related group of scholars has focused on the role of the state in those societies in which indigenous, customary-law-based notions of rights are absent. This latter group warns of the danger of self-serving state reliance on the absence of rights in a traditional culture both to justify state repression of the citizens of the culture in issue and also to legitimate the arbitrary exercise of state power.[71]

Generalizations regarding traditional Ethiopian notions of rights are risky in view of the extreme ethnic, religious and linguistic diversity of the country. Reasoning by analogy from other African cultures is even more fraught with peril due to Ethiopia's unique stature as the oldest continuing nation in sub-Saharan Africa and the only nation never successfully colonized. Nonetheless, it is probably safe to conclude that the following broad generalizations by African scholars apply to the traditional Amhara, Gumuz and Somali social and legal systems described above. The first of these generalizations is that traditional African values include universalistic concepts such as humanity, respect and dignity.[72] The second is that concrete expression of these values is usually found in and circumscribed by the extended family and tribal or clan affiliations.[73] A third is that equal rights for all have not existed; rather rights and obligations were defined in interpersonal terms contingent on one's position within the kinship and tribal system. "The person was not a rational atomized individual in pursuit of his self-interest as in the West, but one enmeshed in multiple cross-linking, interpersonal relationships overladen by the

69. Allison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (1990); in Pollis, "Cultural Relativism Revisited: Through a State Prism," 18 *Hum. Rts. Q.* 316-44, at 320 (1996).

70. Id. at 319.

71. Id. at 320.

72. Id at 340, citing to Zvogbo, "A Third World View," in *Hum. Rts. & Am. Foreign Policy* 90 (Donald P. Kommers & G.D. Loescher, eds., 1979). Kwasi Wiredu, "An Akan Perspective on Human Rights," in *Hum. Rts Afr. Cross- Cultural Perspectives* 244 (Abdullahi Ahmed An-Na'im & Francis M. Deng, eds., 1990) (arguing the intrinsic value of all humans, dignity and respect as fundamental values).

73. Id.

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spirit of his ancestors."[74] These traditional African values, though different in emphasis, have much in common with the values articulated in modern African constitutions, including that of Ethiopia.

On the theoretical level, linking traditional notions of human dignity with the modern Ethiopian constitutional provisions relating to the right to life does not pose a problem. The problems arise when deeply-entrenched customs based on the older communitarian concept of the individual having no meaningful existence apart from his or her community are rejected or by-passed by the state in favor of modern practices based on the western notion of the atomized individual. This conflict is seen in the current relationship between the customary law's manner of dealing with homicide through familial compensation and reconciliation and the modern state's insistence on individual culpability, responsibility and punishment. The two legal systems are ships passing in the night. The customary law norms of familial reconciliation and compensation are deeply entrenched in the hearts and souls of a large percentage of Ethiopia's people. The modern state's attempt to substitute an ethic of individual culpability and individualized punishment for the more group-oriented procedures of traditional Ethiopian culture cannot succeed unless these older norms are accommodated.[75]

Problems also arise when the attempt is made to reconcile traditional values relating to women and female children with the provisions of the modern Ethiopian constitution. In Ethiopia, as in many different parts of the world, there is continuing resistance to international human rights provisions relating to the rights of women. Today, more than half a century after the adoption of the Universal Declaration of Human Rights,[76] the entire Declaration has still not achieved the status of binding international customary law, and the primary reason is resistance to the provisions relating to women.[77] The provisions relating to the personal and family lives of individuals have failed to achieve universal acceptance because these matters have traditionally been covered by religious law and still are in many countries,[78] including, as we have seen, in the Somali Region of Ethiopia. Although a lively debate rages on the world stage as to whether

74 Id. at 341.

75. See generally, Adamantia Pollis, "Cultural Relativism Revisited: Through a State Prism," 18 *Hum. Rts. Q.* 316-44, at 341 (1996); Compare generally, Jones, "Human Rights, Group Rights, and People's Rights," 21 *Hum. Rts. Q.* 80-107, at 90-91 (1999) (conceptualizing collectively the rights of religious, racial or ethnic groups).

76. Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3rd Sess., at 71, U.N. Doc A/8110 (1948) (hereinafter Universal Declaration).

77. See Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts," 16 *Hum. Rts. Q.* 740-52, at 746 (1994).

78. Id.

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Islam mandates that women be viewed as the inferiors of men,[79] that debate has not yet reached remote corners of the earth such as the Somali Region. Whatever the correct theological position may be, in the Somali Region it is firmly believed that, for purposes of payment of compensation for homicide, Islam mandates that the lives of women be valued as less than those of men.[80]

The verdict on the battle between the human rights universalists and the cultural relativists is not yet in. At this point, the most that can be said is that achieving global acceptance of international human rights norms is a work in progress. Different rights occupy different places on the continuum of acceptance. Fundamental, nonderogable rights such as the right to life, the right against torture, and the right not to be enslaved have achieved almost universal acceptance.[81] The rights of women and children have not.

It is against this contentious backdrop that the second question articulated above must be asked: does the Ethiopian state have the duty of correcting the faulty human rights practices of the customary law systems within its borders? The answer to this second question is far more difficult to come at than was the answer to the first.

A threshold question is whether the language and theory of human rights is properly applied to the question of whether the state has a duty to act to prevent situations such as revenge killings among the Amharas or sorcery and status killings among the Gumuz. Classic nineteenth-century western liberal democratic theory, of the sort still prevalent in the United States and the United Kingdom, would have it that the human rights theory has no place in such scenarios, for it is not the state that is arbitrarily taking the lives of its citizens. From this point of view, human rights are "negative," in the sense that rights can be realized only as claims against state action that infringes them. If it is not the state that is engaging in revenge killings or exploiting children, then no human rights have been violated.

A more modern perspective would have it that human rights are positive in the sense that a state bears the burden of creating conditions that enable its citizens to realize their human rights.[82] The drafters of the International Covenant on Civil and Political Rights have taken the more modern position. ". . .[E]ach State Party to the present Covenant undertakes to take the necessary steps, in accor-

79. On the relationship between Islamic law and human rights, see generally Abdul Aziz Said, "Precepts and Practice of Human Rights in Islam," 1 *Universal Hum. Rts.* 63-79 (1979).

80. See text at supra nn. 45-48.

81. Cerna, supra n. 74 at 744-45.

82. Kommers, "German Constitutionalism: A Prolegomenon," 40 *Emory L.J.* 837 (1991), "Luth Boycott Case," 7 *BverGE* 198 (1950), "Free Speech and Private Law in German Constitutional Theory," 48 *Md. L. Rev.* 247 (1989). See also, Merryman, Clark & Haley, "The Civil Law Tradition: Europe, Latin America and East Asia," in *The German Federal Constitutional Court* 771-73 ( ).

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dance with its constitutional processes and with the provisions of the present Covenant. to adopt such measures as may be necessary to give effect to the rights recognized in the present Covenant."[83] Further, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[84]

The plain language of the ICCPR is reinforced by the commentaries on the drafts of the relevant articles. According to these commentaries, the right to life, as guaranteed in article, 6(1), should not be understood as a claim to forbearance by the state, but rather as a provision requiring States Parties to protect life on the horizontal level (between citizens) as well as on the vertical (between citizen and state).[85] For example, if a country were to grant impunity from prosecution for the crimes of murder and manslaughter, this would be a manifest violation of the state duty of protection pursuant to Art. 6(1).[86]

Acknowledgment of the right of minority groups to cultural self-determination is necessary at this point. Although there is no need to deal with the complicated question of whether the Amharas, or the Gumuz, or the Somalis of Ethiopia constitute a "people" under international law,[87] each of them surely have a right to preservation of their culture. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, cultural and social development.[88] However, in this the 21st Century, cultural preservation and development is not, anywhere in the world, understood to justify the arbitrary taking of human life. Unfortunately, the same cannot be said of forced marriage of children or systematic de-valuation of the lives of women, although these latter practices are also increasingly falling

83. ICCPR, Art. 2(2).

84. ICCPR, Art. 2(1).

85. Manfred Nowak, U.N. Covenant on Civil and Political Rights, ICCPR Commentary (N.P. Engel, publisher, Strasbourg, 1993) at 105. This analysis applies not only to the right to life guaranteed in Art. 6(1) but also to several other rights, such as check this cite security of the person, Art. 9(1), and privacy, Art 17(2).

86. Id. at 106. Interestingly, the commentary suggests that the scope of a state's duty of protection of the right to life includes protection against other threats to human life such as malnutrition, life-threatening illnesses, nuclear energy or armed conflict. Id. See also D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (interpreting Art. 2(1) of the E.C.H.R as requiring that States Parties establish adequate provision in their law for the protection of the right to life.

87. It appears that, under the Ethiopian Constitution, Art. 39(5), they do have such status

88. ICCPR, Art. 1(1).

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into ill-repute among the community of nations. Whether the reasons for this increasing governmental acceptance of international human rights norms be a desire to better the human condition or a desire to obtain foreign aid, the outcome is the same—the concepts of human rights contained in the standard international human rights covenants and treaties are everywhere increasingly accepted or given lip service.

The state duty to protect the right to life of its citizens is not just a matter of legal interpretation of international human rights covenants. It is also a matter of realpolitik. To maintain its standing in the international community of nations, a modern state is not well-advised to tolerate the existence within its borders of customary law norms endorsing the arbitrary taking of life.[89] The same is true, to a lesser extent, of tolerance of customary law norms endorsing the forced marriage of children and systematic de-valuation of the lives of women.[90] These propositions have particular force where the state in question has, like Ethiopia, signed international protocols outlawing the arbitrary taking of life, discrimination on the basis of sex and the exploitation of children.

The question addressed immediately above—whether the state has the duty to correct the faulty human rights practices of the customary law systems within its borders—is not the legalistic one of whether the state can be held legally responsible for gender-based discrimination carried out by customary law systems within its borders. Nor is it the question of whether the state can be held legally responsible for arbitrary deprivations of life resulting from its tolerance of customary law systems within its borders. Rather the question is normative in nature: *should* a state attempt to correct the faulty human rights practices of the customary law systems within its borders. Where the state in question has publicly and formally subscribed to or guaranteed the protection of the human rights in question, the answer must be yes. This is so even when a state is, like Ethiopia, officially committed to protection of its customary law systems and to legal pluralism, thus adjusting the values expressed by these rights.

89. The claim made here is not that the State is violating the human rights of its citizens by not preventing revenge killings between private citizens. Rather the claim is that the minimal expectation of the international community of nations is that States Party to the ICCPR will not endorse revenge and other arbitrary killings and will take reasonable steps to prevent them.

90. Likewise, the claim made is not that the State is legally responsible for gender-based discrimination by one private citizen against another, but rather that States Party to the ICCPR and CEDAW should not endorse and should seek to prevent gender-based discrimination by quasi-official organizations such as customary law systems.

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Legal Pluralism: Strategies for Ethnic Federalism

Ethiopia's adoption of a system of ethnic federalism requires resolution of two related matters. The first is whether the duty of the federal and state governments to establish and maintain the rule of law, including but not limited to the human rights guarantees contained within the federal constitution,[91] mandates the elimination of all customary law systems existing within the state's boundaries. The second is whether adjusting the state's formal legal structure so as to accommodate the well-established and influential customary law systems found throughout Ethiopia will be detrimental to the establishment and consolidation of state power.

With respect to the first matter, the answer is no—the rule of law does not necessarily mean the elimination of customary law systems. In Ethiopia the customary law systems currently share with the state legal system the duty to protect the lives and property of Ethiopian citizens. So long as the customary systems conform to minimum standards of human rights protection, there is no reason in law, domestic or international, to complain of the sharing of law enforcement responsibility and jurisdiction between the state and the customary law system. The present sharing of responsibility evolved historically and currently is done in an ad hoc manner. If the State does reach a considered decision formally to share jurisdiction with the customary law systems "within its borders and subject to its jurisdiction"[92] then it must likewise develop considered techniques for monitoring the performance of the customary law systems to ensure that they are providing adequate protection for the human rights of Ethiopian citizens.[93] The minimal standard for adequate protection of the human rights of Ethiopian citizens would be protection for those rights contained in the international human rights covenants to which Ethiopia is signatory. If it comes to the State's attention that one or more of the customary law systems with which shares jurisdiction is performing in such a way as to violate one or more provisions of those covenants, then the State must take steps to cure the defect(s).

The treatment of homicide in the Amhara, Gumuz and Somali customary law systems is no secret. Nor is it a secret that these systems are not, with respect to certain types of homicides, providing adequate protection for the human rights of Ethiopian citizens. The men and women who comprise the Ethiopian state are well aware of these facts. The Ethiopian state is therefore responsible for upgrading these systems to provide the necessary human rights protection. However, the limited resources of the Ethiopian state are such that

91. The states are still in the process of enacting their state constitutions.
92. The quoted language is taken from the ICCPR, Art. 2(1)
93. Id.

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an aggressive and well-financed nationwide campaign to eliminate all human rights abuses from the customary law systems is not possible. Selective strategies for gradual alteration of abusive practices are required, as is an ordering of priorities.

In this regard, lessons may be learned from the experience of other nations. In Latin America, a strategy of ranking human rights, designed to mediate the tension between international human rights norms and customary law proceedings, has been developed. This view takes issue with the position that all internationally recognized human rights must be upheld without reservation. Instead, the claim is that the need for protection of cultural minorities and local self-rule renders such across-the-board enforcement impossible. The better view, say the advocates of this position, is to focus enforcement efforts on the most fundamental rights, such as the right to life, the right against torture and the right not to be enslaved, and relegate enforcement of other rights to the back burner.[94] Such an approach is arguably consistent with the ranking of human rights implied by the concept of derogation contained in the International Covenant of Political and Civil Rights.[95]

Applied to Ethiopia, the ranking of rights would have more to do with operational strategy than procedural reform. The Ethiopian government has declared a state policy of establishing the rule of law, including the protection of human rights, in all corners of its country. The problem for the government is two-fold: lack of resources, human and financial, necessary to implement that state policy and the quandary posed by the need to maintain and extend state power while affording maximum autonomy, in the interests of political stability, to marginally assimilated ethnic groups. The ranking of rights would permit the Ethiopian government to develop a coherent plan of enforcement, directing its scarce prosecutorial and judicial resources where they are most needed.

Although reasonable persons may disagree as to the proper ordering of priorities, it seems likely that the Ethiopian government would conclude that governmental initiatives designed to protect the right to life of Ethiopian citizens in the Amhara, Gumuz and Somali regions should receive a higher priority than initiatives designed to eradicate discrimination against women.[96] Under this scenario, state prosecutions of revenge, sorcery and adventure killers would receive

94. See A. Hockema, "Aspects of Legal Pluralism in the Federal Set-up of the Ethiopian State," 1998 (unpublished paper on file in the law library of the Ethiopian Civil Service College). See also, Assies, Willen, Gemma van der Haar, Andre Hockema (eds.), *The Challenge of Diversity: Indigenous Peoples and the Reform of the State in Latin America* (Thela Thesis Publishers, Amsterdam). The Colombian Supreme Court has adopted this position.

95. ICCPR, Art. 4.

96. It can be argued that the widespread social damage resulting from tolerance of the practice of treating young female human beings as chattels on a par with live-

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a higher priority than prosecution of persons involved in ordering and implementing inclusion of young girls in settlement packages (a form of kidnap or false imprisonment violating international and Ethiopian constitutional prohibitions against involuntary servitude). The Somali practice of valuing a woman's life as less than that of a man in homicide sentencing would be the last to receive state attention.

This practice of valuing women's lives as less than that of men is perhaps best reached by a state educational campaign rather than through the criminal justice system. Without further field work, it is difficult to know how deeply these sentencing practices that discriminate against women are embedded in Somali culture and consequently how amenable Somali elders may be to change at the behest of the modern state. On the one hand, a change in sentencing practices to eliminate discrimination against women would seem to be a minor procedural adjustment, easily accomplished. On the other hand, matters relating to the status of women relative to men are at the heart of the social structure of any society and thus not usually easily altered. Further, in the Somali case, local beliefs as to the dictates of Islam are no doubt at least partially responsible for the lower status of women. As has been seen in other Islamic societies such as Iran and Afghanistan, Islam can be twisted into a potent force for the oppression of women. The influence of Islam in general and the Sharia in particular on the customary law traditions of the Muslim peoples of Ethiopia is a field ripe for investigation.

The second matter articulated at the beginning of this section on legal pluralism was whether the establishment and consolidation of state power would be impeded by adjusting the state's formal legal structure to accommodate the well-established and influential customary law systems found throughout Ethiopia. The question is not academic. Ethiopia is still in the early stages of re-constituting itself as a federation of states. One of its regions, Eritrea, has already seceded.

The traditional European political and legal view is that state power and coercion may be exercised only through a unitary formal legal system. The underlying premise is that permitting to any other system the use of authoritative coercion flies in the face of the concept of the nation-state and is destructive of state power. According to this view, it would be an act of folly for a state such as Ethiopia, still struggling to establish its authority over its outlying regions, to permit its citizens to recognize any source of authority other than that of the centralized government.

The thesis of this article is to the contrary. This article advocates a vigorous federal system with significant autonomy and power, both

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stock is arguably greater than the damage done by allowing a relatively small group of persons, such as the Gumuz, occasionally to engage in sorcery killings.

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executive, legislative and judicial, at the local level. Authority at the local level would be exercised both by the representatives of the state (regional) governments and by the representatives of the customary law systems present in the region. The underlying premise is that, in a multi-ethnic and multi-cultural society, provision of significant autonomy at the local level is not only necessary to prevent dissatisfaction with the central government but actually strengthens the government in the eyes of its citizens. The 1994 Constitution of the Federal Democratic Republic of Ethiopia provides the framework for such a system; what is missing is the necessary enabling legislation.

A helpful distinction is that between formal, official legal pluralism and empirical, anthropological legal pluralism. Ethiopia has both. Formal legal pluralism in Ethiopia is, at least at present, limited to certain subject matters such as family law. Formal legal pluralism "is a legal concept referring to the inclusion within the legal order of a principle of recognizing 'other' law. Legal pluralism in another (i.e., the anthropological or empirical) sense, however, covers any situation in which within the jurisdiction of a more encompassing entity (e.g., a state) a variety of differently organized systems of norms and patterns of enforcement effectively and legitimately control the behavior of specific parts of the population."[97]

In favor of formal state recognition of customary law systems is the argument that statutory recognition of legal pluralism, if done correctly, can strengthen rather than weaken state power.[98] The Ethiopian customary law systems are real and their power over the behavior of Ethiopian citizens is a fact of life in Ethiopia. To ignore these facts is the equivalent of the ostrich's putting its head in the sand. Statutory legal pluralism in Ethiopia could actually advance the establishment and consolidation of state power because recognition and incorporation of the ancient and widely-accepted sources of authority that are the customary law systems legitimates the new federal state and its formal legal system. The state can eliminate challenges to its authority by entering into statutory arrangements making operation of the customary law systems conditional on its permission and approval.

Two basic models for official legal pluralism have emerged. Each uses a statutory framework to combine a formal criminal justice sys-

97. Andre Hoekema, "Aspects of Legal Pluralism in the Federal Set-up of the Ethiopian State"(1998) (unpublished paper on file in the law library of the Ethiopian Civil Service College). The seminal works in legal pluralism are Griffiths, "What is Legal Pluralism?," 24 *J. of Leg. Plur.* 1 (1986) and M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Classical Laws* (1975).

98. For a discussion of the inter-relationships of formal (state) and informal (customary, indigenous) law, see Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," 19 *J. of Leg. Plur.* 1, 23-27 (1981) ("[T]he official system is frequently used to induce compliance with a decision in an indigenous forum." Id. at p. 24.)

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tem with an informal customary law criminal justice system. The first model is transfer of jurisdiction to the customary law authorities. The second model is incorporation of the customary law's informal premises and procedures into the state's statutory models of substance and procedure.[99] Either of these models might be based on an operational strategy premised on a ranking of human rights. Such a strategy would alleviate, at least temporarily, the tension between universal human rights norms and customary law systems.[100] A legislative package combining elements of each of these three approaches might prove effective in Ethiopia.

The first model, transfer of jurisdiction, is generally limited to civil matters and minor criminal offenses. Ethiopia has already started down this road by virtue of Articles 34(5) and 78(5) of its 1994 constitution. These provisions recognize the legitimacy of customary laws and courts for adjudication of "personal and family laws." As to major crimes, transfer of jurisdiction is generally not allowed, the state being unwilling to relinquish its grasp on state power to the extent of transferring jurisdiction over offenses seriously disruptive of law and order to informally-constituted authorities, no matter how well-respected they might be.[101] Homicide is not a minor offense. The Ethiopian state, conforming to global norms of state conduct, has shown that it intends to retain jurisdiction over homicide. The fact that customary law systems still deal with homicide in Ethiopia is the result of lack of state resources, not lack of state resolve. Therefore, no further time will be spent on the notion of transferring homicide jurisdiction to the customary law systems.

The second model, incorporation of customary law into statutory law, is a flexible one offering the possibility of many different permutations and combinations. The most frequently utilized approach in the criminal arena is to apply customary law concepts to sentencing only. The question of criminal responsibility for an act is determined according to the provisions of a modern state penal code. The sentence is determined according to a mixture of the norms and procedures of modern law and customary law. Sentencing concepts and

99. See generally, Clairmont, "Alternative Justice Issues for Aboriginal Justice," 36 *J. of Legal Pluralism* 125-157 (1996); Crnkovich, "A Sentencing Circle," 36 *J. of Legal Pluralism* 159-81 (1996); Dinnen, "Sentencing, Custom and the Rule of Law in Papua New Guinea," 1988 *J. of Legal Pluralism* 19-31.

100. See, e.g., Aasies, Willen, Gemma van der Haar, Andre Hoekama (eds.), *The Challenge of Diversity: Indigenous Peoples and the Reform of the State in Latin America* (Thela Thesis Publishers, Amsterdam)

101. Several nations with substantial percentages of minority ethnic groups having little contact with, or alienated from, the state's criminal justice process have established community-based programs administered by traditional local authorities. See, e.g., Clairmont, supra, at n.; Crnkovich, M. supra. at n. _; Ethiopia may want to consider such programs for minor offenses. However, query whether these programs, which stress collective responsibility and alternative community-based sentencing, are appropriate for homicide.

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procedures can either be mandated by statute or introduced through the exercise of judicial discretion.[102] For example, the Ethiopian Penal Code provisions dealing with sentencing procedure could be amended to provide for formalized input from victims and their families into the sentencing process, to accommodate the collective, victim-and-community-oriented procedural norms of the customary law.

A more radical form of incorporation is to incorporate customary law norms of behavior not into sentencing procedure but into the substantive criminal law. An extreme example of this approach would be to enact a statute providing that a person who kills a man or woman who has been determined to be a witch responsible for the death of others lacks the necessary mens rea to be found criminally responsible by the state legal system.[103] In practice, such a statute would apply only to the Gumuz people. The effect would be similar to a verdict of not guilty by reason of insanity, but without commitment to a mental hospital.[104] The downside of such a proposal is obvious: it has the potential to lead to an increase in the number of sorcery killings. Another option would be a statutory declaration that a belief in sorcery is a form of diminished capacity, reducing a homicide from murder to manslaughter. The jurisprudential underpinnings of any one of these approaches are worthy of a article of their own.

A variation on the incorporation theme that preserves the institutional power of customary law systems, rather than weakening them by assimilating them into the state system, is to enact a statute authorizing parallel and co-ordinated state and customary proceedings. A state-sponsored formal court proceeding focused on individual culpability and responsibility would proceed parallel to a statutorily-authorized customary law proceeding focused on familial and/or clan reconciliation and responsibility. Both proceedings would be mandatory for the accused, his family and the family of the victim: the state to deal with individual responsibility and the customary to deal with familial and communal responsibility and reconciliation. Such an approach has promise for the Amhara and Somali regions.[105]

Which of these modes of incorporation is utilized will depend on the relationship between the state regional government and the customary law systems within its boundaries. For example, in the Am-

102. See, e.g., Dinnen, "Sentencing, Custom and the Rule of Law in Papua New Guinea," 27 *J. of Legal Pluralism* 51 (1988).

103. For a fascinating discussion of a non-statutorily authorized attempt by a sitting judge to incorporate customary law concepts of criminal responsibility into the criminal justice processes of the modern state, see Dinnen, supra at n. 98.

104. Compare the opinion of the Colombian Supreme Court in the case of Celimo Miquirucama, discussed in "Miquirucama Celimo," 13 *G.J.* 303 (S.C. Columbia, 1970) in Merryman, Haley & Clark, *The Civil Law Tradition* 658-64 (1994).

105. Cf. Parnell, "Village or State? Competitive Legal System in a Mexican Judicial District," in L. Nader & H. F. Todd Jr. (eds.), *The Disputing Process- Law in Ten Societies*.

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hara region, where neither the people nor their customary law system are alienated from the state, the notion of communal reconciliation and collective responsibility by the killer' family for the welfare of the family of the victim could be incorporated directly into the state sentencing proceedings, especially in urban settings. In the cities, orchestrated community participation in court-room sentencing procedures is possible.[106] In the more isolated corners of the Amhara region, far from the urban centers where courts are located, customary law compensation and reconciliation proceedings in the village where the families reside would be preferable due to the difficulty of traveling to the far-away court. These local proceedings would be timed to proceed immediately subsequent to state-court criminal proceedings.[107]

In the Somali region, where the people and their customary law systems are more alienated from the Ethiopian state, a more flexible and accommodating approach by state representatives is called for. The representatives of the Ethiopian state could work with Somali authorities to persuade them to pair customary law proceedings with their corollary state criminal prosecutions. Questions of the degree of tolerance and accommodation to be demonstrated by state prosecutors and judges will have to be worked out in the field. Where such pairing is achieved, participation in both processes, from beginning to end, would be required.[108] The present occasional practice of dropping state criminal charges against a homicide suspect because his family has paid blood money to the victim's family pursuant to a customary law decision would be formally outlawed. Permitting such practices shirks the governmental duty to implement the right to life provisions of the Ethiopian constitution and the international human rights covenants to which Ethiopia is party.

In conclusion, a few words on non-homicide crimes are in order. Although transfer of jurisdiction over homicide and other major crimes is inappropriate in that it would have negative repercussions for the maintenance of Ethiopian state power, transfer of jurisdiction

106. See Crnkovich, "A Sentencing Circle," 36 *J. of Legal Pluralism and Unofficial Justice* 59-81(1996)(describing a courtroom sentencing procedure that incorporated the families of the offender and his victim into the process).

107. Ethiopians with whom this proposal has been discussed have raised the question of why would the family of the offender pay compensation after he has been sentenced to prison. The answer is that compensation would be ordered as part of the court's sentence. The precise amount of the compensation would be left by the court to be determined by the customary law authorities

108. Required participation in both proceedings eliminates the occasionally negative consequences of the ability to choose. "The possibility to choose will generally decrease their willingness to accept decisions disadvantageous to them, thereby decreasing the institutions' authority and the efficiency of their decisions." von Benda-Beckmann, "Some Comments on the Problems of Comparing the Relationship between Traditional and State Systems of Administration of Justice in Africa and Indonesia," 19 *J. of Leg. Plur.* 165, 166 (1981).

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over minor crimes may well be positively desirable. Such a transfer would relieve the Ethiopian government of the administrative burden of dealing with such minor offenses while at the same time recognizing and validating the customary law processes. Such a result would be both politically and economically beneficial to the Ethiopian state.

Federalism

Ethiopia's nascent system of federalism is characterized by two striking features: the division of its people on the basis of ethnicity rather than geography and the relative absence of functioning middle-level state institutions. The absence of functioning middle-level state government institutions is due, of course, to the catastrophically low level of state resources in Ethiopia, one of the poorest countries in the world, but it is also due to a dearth of the legislation needed to define a more appropriate balance of power between the central government in Addis Ababa and its far-flung provinces, nowadays called states. The dearth of legislation effectively shifting power to the states is in no small part due to the Ethiopian government's difficulty in freeing itself from the dead hand of the past. The legacy of three thousand years of history as a highly centralized unitary state, first a monarchy, then an empire, then a socialist dictatorship, is not easily escaped.[109]

Serendipitously, the new federal government's delay in setting up functioning mid-level state institutions has, in many locales, gone un-noticed. The centuries-old clan-based customary systems of local governance have continued vigorously to function. Some observers have in fact suggested that the inability of the mid-level state institutions effectively to govern is due to the fact that very effective systems of governance, more acceptable to the local people, are already in place. As described in Part II of this article, one of the functions these deeply-rooted, ethnically-based, customary governance systems has continued to perform is dispute resolution in general, and, of particular concern to this article, the meting out of criminal justice.

Several different considerations militate in favor of giving these customary law systems the legislative and political space they need to continue to do their job. The primary consideration is common sense: if it's not broken, don't fix it. A second consideration is economics: formal courts and the law enforcement apparatus on which they depend are expensive. Third is legitimacy: excessive insistence on an unwilling population's use of the state legal system to the ex-

109. Other factors have also played a part in the slowness of the pace of legislation in the first five years of the Federal Democratic Republic. Among them are the Ethiopian tradition of centralized government, the war with Eritrea, ethnic conflict and political in-fighting.

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clusion of their customary system will have the backlash effect of delegitimating the state courts and, by proxy, the state.[110]

Indeed, in the Somali Region the Ethiopian government has already taken steps in the direction of creating the political space necessary to make use of the authority of traditional clan elders. The Ethiopian government has created a new quasi-governmental institution, the *guurti*, charged with mediating between the Somali people and the Ethiopian state government.[111] At the local levels, the *guurti*'s function of mediating between the state government and the people often consists of mediating violent inter-clan disputes that would otherwise have to be dealt with by the criminal courts.[112] What remains to be done is creation of the statutory framework that will provide legislative legitimation for the reciprocal accommodations of customary and state legal systems that is already underway.

There are many different systems of federalism in the world, each with its own statutory framework. However, with respect to penal law, there exist only three major formats for balance of legislative power between the federal government and its subdivisions. They are as follows: 1) to vest legislative power over criminal matters primarily in the state governments,[113] as the United States and Australia have done;[114] 2) to vest legislative power over criminal matters concurrently in the federal and state governments, as in Germany;[115] and 3) to divide the legislative power by subject matter, as has been done in Canada.[116]

Ethiopia currently seems to fall somewhere between Germany and Canada on the above continuum. The Ethiopian Constitution provides that the federal government, through the House of Peoples' Representatives, "shall enact a penal code."[117] On the other hand, Article 55 of the Constitution provides that "The States may, how-

110. On this point, see text at n. ___, supra.

111 The institution of the *guurti* was pioneered in the Afar Region of Ethiopia, peopled, like the Somali Region, by nomadic pastoralists. After it proved successful in the Afar Region, it was pioneered in the Somali Region. As of this writing the institution of the *guurti* has been in existence for approximately one year in the Somali Region.

112 These observations are based on interviews by Dolores A. Donovan with the members of the *guurti* and the judges and prosecutors of the courts, Dollo Ado and Dollo Bay woredas, Somali Region (June 2001).

113. "States" is the term used in the United States and, at times, Ethiopia, to refer to the administrative units which comprise the federal whole. Other terms are lander (Germany), provinces (Canada) and regions (Ethiopia, used interchangeably with "states").

114. See generally, C. Zelman & L. Zines, *Federal Jurisdiction in Australia* (Melbourne University Press 1978).

115. See generally, W. Ebke & M.W. Finkin, (eds.), *Introduction to German Law* 466 (Kluwer Law International, 1966).

116. Peter W. Hogg, *Constitutional Law of Canada* (3d ed. 1992). Cf. Edwards, "The Advent of English (Not French) Criminal Law and Procedure into Canada," 26 *Crim. L.Q.* 454 (1984). Hogg, Id.

117. Art. 55(5), Constitution of the Federal Democratic Republic of Ethiopia.

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ever, enact penal laws on matters that are not specifically covered by Federal penal legislation."[118] Thus, if the federal Penal Code were to refrain from coverage, each state legislature could, pursuant to Article 55, enact laws designed to cure the worst human rights abuses of the customary law systems within their boundaries while leaving the non-problematic aspects intact.

For example, the legislature of the Amhara region could enact laws providing for statutorily-authorized roughly contemporaneous state law criminal prosecutions and customary law compensation proceedings in cases of homicide. Participation in both proceedings would be required. The former, the state proceeding, would be based on individual culpability and responsibility. The latter, the customary law proceedings, would continue to be based, as they now are, on notions of familial rather than individual responsibility and compensation rather than punishment. The legislature of the Beneshangul/Gumuz Regional State could enact laws creating new mens rea provisions and new penalty provisions appropriate to the peculiarities of adventure and sorcery killings. The legislature of the Somali Regional state could enact laws criminalizing the inclusion of female children in customary law settlement packages and outlawing specific customary law practices that discriminate against women. Support for such a law already exists in the Ethiopian constitution, which provides that "[l]aws, customs and practices that oppress or cause bodily or mental harm to women are prohibited."[119]

The Penal Code currently in force in Ethiopia was written almost fifty years ago, when Ethiopia was still a monarchy. In the style of the time, it purports to provide total coverage for all crimes committed within the borders of the Ethiopian state. Although the Penal Code is in the process of being re-written, the old 1957 Code serves as the model for the new code. The persons responsible for the revision do not appear to have considered the alternative of reducing the coverage of the federal code in order to permit the states the independence they need to write state penal codes providing space for the operation of customary law systems.

The dead hand of the past, not just the Ethiopian legacy of monarchy and dictatorship, but also the European legacy of only one code of law governing all portions of the realm, is reaching out to choke away the local independence and innovation which is at the heart of a successful federal system. State legislative independence, always important in a federal system in order for local government to respond appropriately to local conditions, becomes critical in a system of ethnic federalism such as that of Ethiopia. The drafters of the Constitution foresaw this need and provided for it in Article 55. It remains to

118. Id
119. Art. 35(4), Constitution of the Federal Democratic Republic of Ethiopia.

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be seen whether the drafters of the new Penal Code will have the foresight and the grasp of the dynamics of federalism that characterized their colleagues on the Ethiopian Constitutional Drafting Committee to give the state legislatures the independence and flexibility they need.

IV. Conclusion

What is needed in Ethiopia is a coherent, multi-faceted plan of state action designed to support and preserve the existing customary law systems while modifying them to eliminate the worst human rights abuses. The multi-dimensional plan that follows is only one of the many the government may choose to adapt. It is offered in the hope of stimulating debate on the issues raised in this article. The plan proposed would include at a minimum an inventory of all Ethiopian customary law systems, legislative intervention and reform to allow for accommodation of customary law systems at the local level, resource centers and training programs sponsored by the Ministry of Justice, and educational programs sponsored by the Ministry of Education.

First, an inventory of the Ethiopian customary law systems should be taken, preferably by legal anthropologists, to understand and analyze each of the systems and to identify those features that are in conflict with universal human rights norms. The desired outcome is comprehension of the cultural dynamic that has produced the objectionable features and a determination of how and with what other processes they may be replaced.

Second is the drafting and enactment of federal legislation delegating to the states the duty to prepare and enact state legislation accommodating the local customary law systems. The state legislatures would then enact legislation setting up procedural mechanisms providing, as appropriate, for incorporation of customary law processes into state court proceedings, creation of parallel proceedings, or transfer of jurisdiction over minor offenses to customary law authorities. An alternative, less sensitive to the value of local independence and innovation, but more accommodating of the Ethiopian tradition of central government, would be for the federal government to enact legislation creating a uniform system for accommodation of customary law systems. The goal of these statutory reforms, whether accomplished on the federal or state levels, would be to preserve the structure and procedure of the customary law systems while identifying and prohibiting those particular features, if any, that constitute violations of the human rights treaties to which Ethiopia is a party.

A third element is allocation of governmental expertise and resources to this effort to recognize and utilize the country's customary law systems. Creation of a resource center within the Ministry of

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Justice where information on customary law systems is maintained and made accessible to prosecutorial and judicial personnel in the regions is a beginning. Training programs for judges, prosecutors and law enforcement personnel, designed to sensitize them to the customary law systems in their regions, comes next. Also important is development of a prosecutorial strategy within the Ministry, identifying customary practices that violate human rights and targeting them, in order of priority, for prosecution.

A fourth and critically important element is community education on the need to do eradicate traditional practices that infringe upon or place at risk the human rights of citizens. Such programs have, of course, been ongoing in Ethiopia for many years. Coordination with criminal justice reforms and prosecutions, combined with publicity about whatever campaign is in issue, will serve to revive public interest and highlight the human rights abuses that are the target of the campaign.

The elements of this plan of action are complementary. Statutory reform can be combined with a campaign of targeted prosecutions. Training programs for law enforcement officers can be combined with community education. For example, enactment of a statute criminalizing the inclusion of young girls in settlement packages would be accompanied by a campaign of community education and a program, initiated by the Ministry of Justice and implemented by local judges and prosecutors, of meetings and discussions with clan elders on that topic. A second statute, also to be accompanied by a program of community education and meetings with clan elders, might authorize mandatory state and customary law parallel homicide proceedings in the outlying areas of the Amhara and Somali regions.

With respect to the Gumuz, a tripartite initiative might be mounted against the practice of sorcery killings. It would consist of enactment of a statute providing for mitigation of penalty for a Gumuz (or any Ethiopian) found to have killed in the honest belief that his victim was a witch, followed by a targeted campaign of high visibility prosecutions of persons who commit sorcery killings, in turn combined with an intensive campaign of community education. In the long term, a sustained campaign of education concerning the evils of these practices, combined with an attempt to introduce new measures for achieving whatever community goals have been traditionally thought to be achieved by these practices, will prove, of course, more effective than criminal prosecutions.

With respect to sentencing patterns that discriminate against women, the traditional customary law's reliance on a discriminatory view of women must be supplanted by the modern law's emphasis on equality of men and women. Long-term re-education programs are

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required to change the underlying deep-seated cultural norms. However, the fact that discrimination against women is an entrenched staple of many Ethiopian sub-cultures and that gender equality ranks lower than the right to life in the hierarchy of rights does not mean that the state can indefinitely postpone dealing with customary law practices that abuse women. The state must make all reasonable efforts to redress the inequality.[120]

Finally, it must be recognized that the Ethiopian state, like all multi-ethnic and multi-cultural states, has political problems. Penetration of Ethiopian state legal norms and procedures to all corners of Ethiopia will not be welcomed by at least some of the peoples who are Ethiopian citizens. Most of the Ethiopian ethnic groups are fiercely independent and, on the whole, quite satisfied with their own customary law systems. Since their customary law homicide proceedings seem quite certain to continue, the issue becomes what should be the relationship of the state to those proceedings. For present purpose, it suffices to say that rather than seeking to pre-empt customary law proceedings, the state should seek to establish a mutual expectation of cooperation between the state and customary law authorities. Statutorily-authorized parallel proceedings where participation in both state and customary law proceedings is mandatory offer an opportunity to do just that, and to educate concerning universal human rights norms in the process. Where the high level of cooperation between state and customary law officials that is the prerequisite to parallel proceedings is not possible, the Ethiopian state will have to resort to selected unilateral criminal homicide prosecutions as a means to establish state power. Failure to prosecute homicide is not an option for any state that claims to be operating under the rule of law.

The Ethiopian government's attempt to establish a federal state is off to a good start. Ethnic federalism under the rule of law is an idea whose time has come. However, two ingredients are missing from the Ethiopian governmental formula. The first is legislative im-

120. A nation-state's duty to make all reasonable efforts to achieve realization of the rights guaranteed in the international treaties that it has signed is articulated in Article 2(1) of the International Covenant for Economic, Social and Cultural Rights. "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." International Covenant on Economic, Social and Cultural Rights, G.A. res 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp (No. 16) at 49, U.N. Doc A/6316 (1966), 993 U.N.T.S.3, *entered into force* on 3 January 1976. The I.C.E.S.C.R., like the I.C.C.P.R. and many other international human rights instruments, guarantees to women a right equal to that of men "to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." Art. 3, I.E.S.C.R. Ethiopia has signed most of these instruments and is bound by them.

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plementation of the promise of legal pluralism held out in the 1994 Constitution. The federal penal code must be amended to permit innovative legislation accommodating the customary law systems present in each state. The second is allocation of government resources to programs designed to remedy the human rights abuses endemic in some customary law systems. The goal is preservation of Ethiopia's customary law systems, done in such a way as to eliminate the human rights abuses that threaten Ethiopia's claim to have established the rule of law.

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