Proceedings of the National Conference

on

Law and Development:
Legal Pluralism, Traditional Justice Systems and the Role of Legal Actors in Ethiopia

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The National Conference on *Law and Development: Legal Pluralism, Traditional Justice Systems and the Role of Legal Actors* (the Conference) commenced on 15 November 2012 in Addis Ababa. The Conference began with a welcoming note by W/t Maereg Gebregziabher who introduced the Guest of Honor H. E. Ato Neway Gebre-ab, Chief Economic Advisor to the Prime Minster, Executive Director of the Ethiopian Research and Development Institute [ERDI], and the distinguished persons giving the opening remarks; namely Dr. Menberetsehai Tadesse, Director General of the Justice and Legal Systems Research Institute and Mr. Bashirou Jahumpa (Program Coordinator, UNDP).
Justice and Legal Systems Research Institute (Addis Ababa, November 2012)

Dr. Menberetsehai Tadesse welcomed the distinguished guests and participants to the Conference, which is the first of its type in Ethiopia. Indicating that such conferences will be conducted annually, having themes of their own, he stated that, the theme of the conference, that is, “Legal Pluralism, Traditional Justice and the Role of Legal Actors in Ethiopia” is a theme which is worth exploring given Ethiopia’s pluralistic nature that affects the attainment of development objectives. Thus, the intent of the Conference was to deliberate on the impact of these issues on the attainment of various development aspirations set out in the Constitution, legal instruments, policies and reform programs.

While the presenters share their works, Dr. Menberetsehai hoped that it would not be a one way street but an exchange of experience and reflections on the achievements so far and to identify problems which need further intervention. He also expressed his gratitude to UNDP for the generous financial support, to all presenters who responded to the call for papers and to his colleagues at the JLSRI for a job well done in preparing the Conference.
Mr. Bashirou Jahumpa, Program Coordinator, UNDP Ethiopia, representative of Ms. Alessandra Tisot gave the second opening remark of the Conference. Mr. Bashirou Jahumpa first expressed his pleasure to be at the Conference and highlighted that UNDP believes that initiatives like this can contribute to Ethiopia’s efforts to consolidate democratic governance and ensure sustainable development. He stated that the theme of the Conference is in line with UNDP’s mandate that includes giving support to legal and justice reform and strengthening democratic governance, ensuring protection of human rights and attainment of national development goals. UNDP also works, he added, to promote the rule of law and improve access to justice worldwide. The rule of law is the foundation of justice and security. Moreover, the rule of law as a development objective is central not only to economic development but also to development goals including democratic governance and protection of human rights. He also expressed UNDP’s commitment to work with the Justice and Legal Systems Research Institute in the future and wished the success of the Conference.

The guest of honor, His Excellency Ato Neway Gebreab noted that the issue the Conference would address is an issue very close to him and that he personally deems it to be very vital. He pointed out that, although it could be regarded from various
perspectives, he would like to focus on two issues. One is the resolution of contractual agreements and the security of property rights are in need of reform. He stated that while enactments that deal with the issue of rights is the task of legislators, the protection of these rights is the task of those who are administering justice. Legal actors have a big role in the economic pursuits of the country. He added that not only economists are responsible for the economic growth of the country but also those who administer justice and possibly those who do research.

“… [W]hile enactments that deal with the issue of rights is the task of legislators, the protection of these rights is the task of those who are administering justice.”

Neway Gebreab

“… [I]t would not be a one way street but an exchange of experience and reflections on the achievements so far and to identify problems which need further intervention”.

Menberetsehai Tadesse

“… [I]nitiatives like this can contribute to Ethiopia’s efforts to consolidate democratic governance and ensure sustainable development.”

Bashirou Jahumpa
LAW AND DEVELOPMENT PARADIGM

Fana Hagos, Lecturer, Mekelle University, PhD Candidate, University of Warwick

*Moderator:* Ato Mehari Redae (Assistant Professor of Law at Addis Ababa University, School of Law)

W/ro Fana Hagos began her presentation by highlighting the outline of her paper. It included the nature and history of law and development, the developmental state, the role of law in development and a concluding remark. In explaining the nature of law and development, Fana stated that it has been characterized differently and that it is difficult to pin down the concept to a single and specific taxonomy. It has been regarded as a field of study, a program, a movement and also a funding device. Still, many suggest that law and development must be perceived as a combination of all these aspects where each aspect must be well connected to the other. She further explained the historical dimension of law and development by pointing out that lawyers were latecomers to the discourse of law and development which was traditionally dominated by economists.

W/ro Fana recalled the law and development movement of the United States of America in the 1960s which was supported by the USAID, Ford Foundation and other US donors. The movement was an ambitious effort to reform the judicial systems and substantive laws of countries by engaging academics in leading American law schools. It generated hundreds of reports on the contribution of law reform to economic development. In doing so, the movement mainly aimed at promoting legal and institutional reforms in developing countries, based on American models that would facilitate economic development in the developing world.

W/ro Fana explained what the guiding assumptions of the initiative were. These assumptions were the following: -

- Law is an instrument that could be used to reform society.
- Lawyers and judges could serve as social engineers.
- Law reform could lead to social change.
- Law is central to the development process.
- Legal professionals were, or could be, representatives of the public interest
Having these assumptions, the initiative had two major areas of focus: professional legal education and judicial reform. Yet, after little more than a decade, both key academic participants and a former Ford Foundation official declared the program a failure, and support quickly evaporated because of factors such as lack of theory regarding the impact of law on development, little participation by the lawyers in the target country and the focus limited only on formal laws. She stated the arguments raised by some who disagreed with the idea that the movement has failed by arguing that it takes years for legal reforms to bear fruit.

Currently, with the new development agenda—law is required to ‘facilitate development by being sensitive to social and human rights, with the “rule of law” as a new and central objective. Studies also show that high quality democratic law-making institutions impact in significant and positive ways on various dimensions of development beyond simple per capita growth rates or income levels.

Then she passed onto the second part of her presentation that deals with the developmental state. By definition, a developmental state is a state that puts economic development as the top priority of governmental policy and is able to design effective instruments to promote this goal. Although there is no single model of the developmental state, it has reemerged as an alternative model for development for many African nations. Its basic characteristics include planned development process, non-reliance on market forces to determine the optimal allocation of resources, protection of local industries, export led growth, state-led investment in infrastructure and industrialization, human resource development, autonomy from particularistic interest groups (rent-seeking groups), and pragmatism and flexibility in policies.

In the third part of her presentation, she dealt with the role of law in development. She acknowledged the existence of skeptical views but noted that the law can play both instrumental and responsive roles for the realization of development. This, according to Fana, can be attributed to the renewed intellectual interests in law and development that indicates that law is vital to national growth to the extent that it creates incentives for people to behave in a growth enhancing manner. In this regard, enacting laws must be identified as having the higher objective of facilitating development. She further underlined that emerging empirical evidence is indicating that well developed laws are important determinants of growth. Some of the areas of laws and institutional issues she mentioned were property rights and development, commercial law, the protection of investors, formal contract law, effective civil court system, efficient tax system and tax administration, criminal law and its enforcement, family law, environmental law and human
rights. W/ro Fana then stated that the economic reform and transformation in China was marked by a conscious recognition from the beginning, and she noted the new and important role that law plays in the process, in effect, calling for its conscious and diligent use to help bring about development.

**Plenary discussion**

After a brief summary of the presentation by the moderator, the following issues were raised:
- In a situation where the government is an active participant in the economy and where private actors are also there, what exactly should be the role of legal institutions? Is the law merely an instrument or does it also restrain power and regulate public behavior as well?
- Given the kind of civil service we have and given the kind of civil service a developmental state presupposes, how are the issues of competence and autonomy addressed?
- A developmental state gives priority to development, how could this approach be reconciled with the need to give priority to the protection of human rights? Development and human rights go side by side but the recent threat is that more emphasis is given to development at the expense of human rights. So, is it possible to have a developmental state in a country whose constitution highly resembles the constitutions of countries that adhere to liberal democracy? Is the developmental state
theory a policy or a concept that must have legal basis in the fundamental laws of a country?

- What was the impact of the initiative of the 1960s in the Ethiopian Legal System? As it clearly had an impact on the legal system of the country, what was the implication or change brought about by the adoption of the paradigm?

- Even if laws would have contribution to development, should it not be noted that it is when the laws are implemented that the developmental aspirations could be achieved? So, how do we ensure the implementation and effective administration of these laws?

- As the issue of law and development has both political and economical dimensions, it is important to touch upon these aspects. In the current government’s stance, it should be recognized that both developmental and democratic approaches are taken.

- Does law and development really have the intention to protect human rights, especially socio-economic rights?

- What exactly was the conclusion of the paper?

After these questions and comments were forwarded, W/ro Fana in her response indicated that she is not in a position to give clear cut and final answers to all the debates in the academic discourse and that the scope of her paper does not incorporate all the matters raised. She indicated that the Asian powers, who were authoritarians, could be said to have sacrificed human rights for development. Under the existing market systems, she stated that it has become a challenge for African countries to find their way out of poverty, and in effect, more and more African states are opting for the concept of the developmental state. W/ro Fana stated that we are no more in the 1970s and 1980s where violations were looked over, and posited that it is unlikely that they would be tolerated in the name of development. There is also a growing consciousness and understanding that development in itself is a human right. So the alternative concept of the democratic developmental state could be the middle ground. However, she added that even this was debatable. We also do not have a fully successful democratic developmental state.

She noted the need to address issues relating to the competence of the Ethiopian Civil Service, and that it should be addressed both at the political and academic levels. In her concluding remarks, she stated that the law has a significant role in development and that we have to diligently and consciously design and implement our laws in a way they would assist in achieving the level of development the country needs.
LAW AND DEVELOPMENT:

PUBLIC POLICY AND LEGAL EMPOWERMENT OF THE POOR TO ACCESS JUSTICE

Costantinos BT Costantinos (PhD), School of Graduate Studies (AAU)

Moderator: Ato Million Assefa (parliamentarian and member of Legal Standing Committee of the House of Peoples’ Representatives)

Dr. Costantinos began by stating that law and development is not dead. He stated that his presentation is based on a research conducted in 2006 under the auspices of the United Nations Commission on Legal Empowerment of the Poor. The project was undertaken under personalities like Hernando de Soto, who was one of the co-chairs of the commission along with Madelyn Albright. He was part of the research that focused on the great horn of Africa. In the research, they tried to see the basic issues of the rights as defined by Hernando de Soto who argued that access to justice is the
fundamental basis for development. Every human being has the capacity to change his/her life and develop if the justice system is fair and equitable to everybody. The research focused on four basic areas: access to justice, property rights, labor rights and entrepreneurship rights. These four components of rights determine the level of the socio-economic rights, the political rights and the economic rights of human beings to come out of poverty.

In this regard, Costantinos raised the legal-anthropological nexus which evokes the issue whether “the rule of law orthodoxy matters to the poor”. This mainly relates to the aspects of law that should be governing the poverty reduction processes. Here, the laws under scrutiny are those that were imported or those that were duplicated. In any legal philosophy laws should be based on the articulation and needs of the human beings that the law is meant to serve. These laws were mainly inspired by the European Renaissance, and it is problematic for the same laws (in their unchanged forms) to land in the African realities. He inquired whether the Ethiopian pastoralists in the Borana and Somali regions, for instance, can understand the Ethiopian formal laws while they have their own systems. He indicated that these local systems like the Gada system usually prevail over the formal system especially in conflict resolution matters.

Thus the main purpose was to look into the idea of rule of law in relation to policy and legal empowerment of the poor. To do so, the research raised various research questions. The first question was what reforms are necessary to develop transparent legal and institutional arrangements in which the poor have confidence, can access justice, and which will generally contribute to a culture of fairness, equity and rule of law? Dr. Costantinos noted that this is a very important question because in order to have the rule of law, we need to have citizens and civil society’s organizations that understand the law. There must also be a political culture that underlies the development of the legal regimes of the country. The second research question was the manner in which citizens can successfully participate in a transparent reform process. The third question was as to how their priorities, needs and concerns can be heard and incorporated into actions using various tools of participatory governance, for instance, in public forums/hearings, surveys, citizen report cards and the like.

The fourth issue relates to the role of dispute resolution mechanisms in supporting poor people’s access rights in affordable and locally appropriate ways. In this regard, the issue of alternative conflict management has come to the picture. Alternative conflict management is currently growing very fast especially in those areas where people have no access to the formal justice system. The conflict management mechanisms in the Karamoja
clusters of pastoralist societies are good examples for this, and how to institutionalize these systems is an issue.

The fifth question raised in the 2006 study was about the special considerations that should be given to indigenous peoples’ issues, including their customary norms, traditions and legal structures. Indigenous people would need to have addresses, ID cards, collaterals in terms of what they would bring to the court as affidavits to support their cases. There were also inquiries regarding barriers that preclude them from accessing the formal or national legal and judicial structures, such as linguistic or geographic barriers. The sixth question was whether the government issues indigenous peoples with the necessary documents, or recognizes the local equivalents to ensure their access to legal and judicial institutions.

The seventh question raised by the research was how improved public administration can contribute to transparency and accountability and increase public trust in the formal economic system. Dr. Costantinos then mentioned that these and other questions were addressed in the 2006 research including what conditions (enabling environment) should be addressed to ensure success. One issue that could be raised as an example is the issue of corruption.

After highlighting the research themes in the 2006 research, Costantinos explained the difference between legal empowerment and the rule of law orthodoxy. In legal empowerment, attorneys or the legal professionals support the poor as partners and they would not dominate the poor by labeling themselves as ‘experts’. The poor would also play a role in setting priorities rather than officials dictating the agenda. He also stated that addressing these priorities frequently involves non-judicial strategies that transcend narrow notions of legal systems, justice sectors and institution building. Even more broadly, the use of law is often just part of integrated strategies that include other development activities.

He recalled that this issue has been addressed in the first presentation, where it should be the law which citizens accept as minimum standard. Yet in dealing with development, it should be recognized that it has wider areas in which people are made part of the law making process through their representatives in the parliament, in the interpretation of the law and in realizing the rule of law and justice and make sure that it is not abused by the elite.

With regard to the issue of law and development, Dr. Costantinos listed the following as the research’s findings on the impediments:
- Access to justice, public information and media;
- A taxation system that is perceived as excessive and subjective;
- Lack of access to land and premises;
- Lack of co-ordination among business development services;
- Limited response by financial institutions; and
- Easy entry and easy exit from informal sector.

He stated examples to these impediments that show the magnitude of their impact in the pursuits of development. With regard to the issue of advancing entrepreneurial innovation and creativity, he stated the conclusion of the study that the government should come up with more friendly laws that would support the poor. This, according to Dr. Costantinos, is not only about safety nets which have replaced food aid. Nor is it about giving money to the poor so that it keeps the poor where they are and about microfinance institutions which have been found functional.

The recommendations forwarded by Dr. Costantinos included the need for a link between the formal and informal institutions as the state cannot handle it all by itself. In dealing with the essence of a developmental state, he raised three main questions. First, do we need a developmental state? Second, can it be replicated from the tiger economies? And third are the African governments ready for the rule of law regimes that the developmental states had? He also reminded the participants that the issue of a democratic developmental state must be discussed by them thoroughly as they are the ones who should give it a sensible definition and advise the government on what kind of trajectory should be taken. With this, he shared the following discussion points:

a) Reforming the justice system for the poor;

b) Principles for a paradigm shift:-
   - Prioritizing the needs and concerns of the disadvantaged;
   - Designing symmetry in rule of law and legal empowerment;
   - Reaching the poorest of the poor;
   - The rights-based approach to development;
   - A combined legal-anthropological study into law making and participation of vibrant civil society;
   - The macro finance and the legal regime.

Finally, he reminded participants to have an open and intellectual discussion without losing focus and ending up being legalistic.
Plenary discussion

The issues raised after the presentation are the following:-

- It was stated that we should involve the poor and reflect their aspirations. But how do we make sure that this is done as it is being noticed time and again that the formal systems are not penetrating into many rural systems in addition to the Karamoja Clusters?

- It was stated that the role that attorneys play should be changed to bring about legal empowerment. However, is it the type of attorney roles that constitutes the problem or the sheer absence of the attorneys that is standing as a problem?

- Lack of information is one of the problems faced by the poor. According to a research conducted by the JLSRI, however, this problem is also shared by the rich and particularly women.

In response to these comments, Dr. Costantinos recognized lack of attorneys as a serious problem. He then mentioned the experiences he had, where alternative conflict management mechanisms were put in place. In these systems, representations were not needed and we may have to work on strengthening these systems. However, some of them may need to be improved specially in matters concerning human rights and this requires further research by the concerned experts.

In addition to attorneys, the role of other professionals, activists and leaders must be taken into consideration. He also stated that no state or system is perfect. No one has clean society. But we have to make efforts to make use of what we have and make changes when needed. For instance, revision of the proclamation on the charities is pertinent and timely as the issue of human rights should be the issue of everybody. Participation of the poor is also ensured through civil societies. The role of think tanks, such as the JLSRI, is also very important and there should be more of them. The law making process has to be more informative and participatory though public debates and such forums; especially on those laws that affect the poor directly. The problem of corruption, the need for dissemination of information and the steady enhancement of the legal profession are also areas that need more attention.
Dr. Zewdineh began his presentation by giving a general overview of law and development paradigms. He stated that the historical relationship of law and development in Ethiopia is highly influenced by the law and development paradigms of the Western world. He explained that law and development as a discipline strives to study and figure out the role of law and its impact on development pursuits.

He noted the different views in the academia regarding the articulation of law and its role in development. Various law and development scholars...
incline to focus on the relationship between law and economic development, while others are interested in the role that law plays in bringing social progress including respect for human rights, gender equality and more generally distributive justice. Dr. Zewdineh further elaborated that the different role given to law by various law and development scholars is mainly due to the lack of universal consensus concerning the meaning of development through time. However, the original law and development movements basically conceived development in terms of economic growth.

In general, the two major paradigms that had dominated the field of law and development until the 1970s were called modernization and dependency theories. Modernization theorists argued and advised that for developing countries to show economic growth and reach the level of development achieved by developed countries they have to evolve from traditionalism to modernity analogous to western countries. This theory was doomed to failure due to its inability to take into account the real conditions of developing countries. Its proponents, however, argued that developing countries lacked the proper political or civic culture necessary to the successful maintenance of western institutions. On the other hand, the supporters of the dependency theory argued that the sources of underdevelopment were rooted in the history and structure of the global capitalist system. The demise of this theory was followed by the emergence of the neo-liberal thinking and the hegemony of the neo-liberal perspectives which gave law a different role in development.

Dr. Zewdineh further explained the relation between law and development in Ethiopia’s past by citing Melaku Geboye and Rene David who argued that lack of a formal legal system before Ethiopia’s codes coupled with the existence of scattered and various traditional, customary and religious laws has contributed little to support the country’s economic development. However, he stated that the importance of customary laws in development and in governing the daily lives of the Ethiopian societies cannot be ignored. For instance, the Fetha Negest has served as an important source of legal principles and it was a major source of law for the imperial courts and also for the modern laws of the country.

He stated that the codification project of 1950s and 60s aimed at modernization of the laws in Ethiopia is highly influenced by the first law and development movement. Unfortunately the legal transplantation was not as successful as it was originally planned. The grounds which were responsible for the failure were the incompatibility between the situations in the western countries and the realities on the ground. Moreover, the preparation of the codes was not supported with adequate capacity building and necessary training at the local level. There were also difficulties in
creating legal institutions that could synthesize foreign laws and the Ethiopian context based on the social, political, economic, cultural and legal setting of the country. In spite of express repeal of customary laws by the 1960 Civil Code, the application of customary laws did not cease even after the promulgation of the modern laws.

In 1974, the Derg came to power with the development thinking inspired by Marxist dependency ideology. After the end of communism and socialist based economic policies in most parts of the world, various policies heralded the hegemony of the neo-liberal economic perspectives whereby the primary function of law reform was to dismantle command economic policies or authoritarian institutions and protect private rights against state intervention. Accordingly, Zewdineh explained that the current government has made many changes by introducing market based economic system and there seems to be a conscious and clear recognition that legal and judicial reforms have the capacity to promote economic growth and alleviate poverty. He further stated that positive results are being registered as revealed by empirical studies regarding the impact of the launch of the judicial reform program.

He noted that this evokes the question whether the reform efforts in Ethiopia is giving due emphasis to informal and customary legal systems. He also stated that the current government inclines to support the developmental state approach that acknowledges the role of market and the private sector in economic development but rejects the neo-liberal thinking of minimal state intervention. This approach recognizes that developing countries require the state to enable markets to grow. Dr. Zewdineh, remarked that legislators will, in effect, face difficulty in striking a balance while enacting laws that give flexibility for the state to pursue its policy objectives and at the same time limit state interference commensurate with the need to create a predictable and stable legal regime that facilitates investment.

Finally, he gave a brief summary and concluded his presentation.

**Plenary Discussion**

The issues raised in this session were the following: -

- What is the impact of the fact that customary and religious laws have constitutional recognition on economic development while the Civil Code repeals them?
- Is it not time to see Ethiopia’s legal history from a different perspective and change our dimension from regarding the Feteha Negest as the starting point of Ethiopia’s legal history, as its impact beyond the palace
is not known precisely? What about the other legal systems in the
country that existed during or before Feteha Negest?

- How do you see the enactment of different laws with the influence of the
WTO? Do you think this falls under the modernization theory or the
dependency theory?

- The foreign scholars, like Rene David concluded that the customary laws
are scattered. But are they really so? Should we not look into them
ourselves so that we can have a proper understanding of our systems and
our past?

- It is more complicated than saying we should go with both ways because
we have to make choices. The modernization theory should be
questioned in as much as the customary systems should be explored?

- We should not say the Feteha Negest had no or little significance
without actually conducting an in depth research on what its relevance
and impact was. The Civil Code did not also abolish all customary laws.
We can notice the principle taken from the customary laws and the
exception enshrined in the Civil Code. We should also evaluate why we
are inclining towards customary systems. Is it because customary
systems are ours or is it because they would contribute to development?

- When we talk about law and development, we should clearly demarcate
and clarify what we mean by development. This is so because there are
‘developments’ that are considered bad. So which type of development
are we referring to? We can use law as an instrument of development
provided that development is defined in our terms and that it is the kind
of development the society would benefit from.

- Development should not be understood only in material terms. It is has
mental, social, political aspects as well. In all the needs of the society,
we should recognize that there are areas the law cannot reach. We should
find out what the underlying problems are. There are also issues related
with lack of implementation and awareness. We should recognize and
utilize our customary systems. More awareness creation should be done
in order enhance the complimentary aspects of the customary and the
formal systems.

- In finding a middle way between the modernization theory and the
customary systems, we should address the issues of ‘why’ and ‘how’.
The modernization theory has encountered challenges, while there are
also issues of concern in the customary systems as well. So we should be
careful not to go steps backwards.

- The law and development movement focused on law. However, after the
1980s there is a shift towards focusing on institutions which was
basically led by economists. How do we see the shift from law to the institution focused approach?

Dr. Zewdineh stated that he agrees with the questions and comments. With regard to the constitutional recognition of customary laws, he replied that as the supreme law, the Ethiopian Constitution has an impact on the role of customary laws in Ethiopia’s legal system. There could be a tension to some extent between the Constitution and other laws of lower hierarchy. This is a phenomenon that exists in all legal systems. This could be a result of the transplantation of laws from foreign laws. In such cases, the principle of hierarchy of law and the existing realities of the society would determine the outcome, and revision of laws could help in relaxing the tension. But we should also remember that creating a harmonized legal system with a pluralistic nature is a process. In explaining this he stressed that diversity could be one means of preserving a society and that we should slowly find ways to accommodate our differences.

Dr. Zewdineh endorsed the comments raised concerning the legal history of Ethiopia and stated that the contribution of the Feteha Negest must be researched from different perspectives. He explained that Ethiopia could not avoid the modernization theory given the historical and current facts. He believes that the modernization theory might prevail especially in areas related to commerce, and at the same time we should find our own ways in other areas of the law that do not cross borders. Dr. Zewdineh underlined that Ethiopia should be able to avoid extremist approaches and accommodate both systems. He also added that he concurs with most of the comments forwarded.
GENDER JUSTICE AND ITS PLACE IN DEVELOPMENT

Rakeb Messele, Gender and Human Rights Consultant

Moderator: W/ro Maeza Ashenafi (Women’s Rights Adviser to the UNECA)

W/ro Rakeb explained what gender justice means by first defining gender injustice. Gender injustice occurs when there is law that is discriminatory, the processes of law and adjudication that do not deliver equal outcomes for women and men and/or outcomes or decisions by courts that privilege men and subordinate women. Such inadequate formal justice structure and services prevent most women from accessing justice. The legal and judicial services also entail costs that women cannot afford who are usually the poorest of the poor. She explained that those who get to the institutions of justice are unlikely to be treated equally and that the law itself may be against their interests. For instance, the rules of evidence are not friendly to women. The formal justice system is usually outdated and urban based. The majority of women living in rural areas rely on the councils of elders and/or
religious and traditional chiefs to file complaints and have wrongs redressed. She explained that, the power to decide at this level lies with male elders where women often have few chances of getting a fair hearing. On the other hand, women have a greater chance of being socially ostracized for complaining about ill-treatment by husbands, family and community elders.

Against these, gender justice entails ending the inequalities between women and men that are produced and reproduced in the family, the community, the market and the state. It requires that mainstream institutions – from justice to economic policymaking – are accountable for tackling the injustice and discrimination that keep too many women poor and excluded.

W/ro Rakeb mentioned the good practices and achievements made so far. These included the incorporation of gender equality and women’s rights in the FDRE Constitution, the number of discriminatory laws that were amended in the Revised Family Code and the 2004 Criminal Code, the criminalization of domestic violence, the greater economic empowerment for women through progressive legislation prohibiting discriminatory practices, guaranteeing equal pay, providing maternity leave and protection from violence, the establishment of family courts and the establishment of victim-friendly courts with CCTV and referral system for complementary services for victims of violence.

However, she stressed that the law alone will not guarantee lower bias and lessened discrimination. Inadequate laws and loopholes in legislative frameworks, poor enforcements and vast implementation gaps have made these guarantees hollow promises. Women continue to be deprived of economic resources and access to public services. They are also denied of control over their bodies, denied a voice in decision-making and they are denied protection from violence.

Women remain in vulnerable employments, trapped in insecure jobs, often outside the purview of labour legislation. A significant number of girls are still married before the age of 18 missing out on education and exposed to the risks of early pregnancy and HIV AIDS. Even the victim-friendly court is still not institutionalized. This pervasive discrimination against women in turn creates major hurdles to achieving rights and hinders progress on the Millennium Development Goals (MDGs).

W/ro Rakeb noted that gender and access to justice is more than about the law. Achieving gender equal outcomes requires struggles in broader societal arenas and decision-making institutions. With regard to women’s practical needs and strategic interests, Rakeb states that the system usually falls short of what is expected of it. Women may get justice in their favour in cases where they perform their traditional roles. However, where women
find themselves living outside their typical roles, they generally fail to achieve justice in courts. Thus, in achieving formal and substantive equality, designing rights-based strategies address the re-distribution of resources. She further suggested that women should be depicted as rights-holders and agents, making choices as independent beings. It must be well appreciated that women are not a homogenous group there can be variation in the realms of specific interests. This calls for various strategies across different levels, sectors and national contexts.

Before forwarding her recommendations, she raised the issue of negotiating gender equality issues and customary laws. She first acknowledged that in most African states, customary law and institutions are closer to people and their decisions are more binding on community members and that the FDRE Constitution recognizes customary and religious laws, which have consensual jurisdiction over family and personal matters. However, she stated that judgements are not gender sensitive and are with little or no recognition of human rights principles. Moreover, reforming customary and religious laws is not easy as it is believed that religious law is divine and thus unchangeable, and because customary laws come down from ancestors.

According to Rakeb, the subordination of customary laws to state law and making decisions by traditional courts appealable in state courts does not by itself result in gender equal outcomes. In resolving this predicament, she raised the argument that codification and harmonization of customary and religious laws may be the solution for the problems. In going about the process of harmonization and codification, she stated, a consultation of traditional leaders, women and other people in the communities may help in understanding the challenges and gaps. The process of codification has to be made answerable to standards of gender equality in the Constitution and international conventions as well. The process of consultation should then continue to mitigate conflicts arising during implementation. With this remark, she forwarded the following recommendations toward the prevalence of gendered justice:-

- Laws and justice systems that provide accountability, control abuse of power and create new norms about what is acceptable;
- Effective implementation of laws and constitutional guarantee to make the rule of law a reality for women;
- Well-functioning and institutionalized justice systems that provide a vital mechanism for women to achieve their rights;
- Gender sensitive courts for individual women to claim their rights, and in rare cases, to bring about wider change for women through strategic litigation;
- Public services that are women-friendly and that take into account the barriers that women face;
- Guaranteeing women’s control over resources;
- Increasing women’s voice in decision-making to ensure active participation in the private and public spheres;
- Ending violence against women and girls through an integrated and multi-sectoral approach;
- Building knowledge on gender and access to justice generating knowledge (i) about meanings and definitions affecting legal practice and advocacy, and (ii) on how to engage communities and dialogue with traditional leaders;
- Improving practice to shift gendered outcomes through (i) Legal activism, and (ii) Strategic litigation that may be used to demand justice for individuals, to achieve board social change, and to raise issues publicly and cheaply;
- Working with pluralism in ways that benefit women and promote equality.

W/hr Rakeb stated that integrated efforts should be made to fight the multi-sectoral problem with a view to bringing about attitudinal change. Then the stage was opened for discussion after a brief summary by the moderator who suggested that the discussion should focus more on the issues that relate to customary justice systems in light of women’s rights.

**Plenary Discussion**

The comments and questions raised in this session are as follows:

- It was raised in the introduction that women are facing discrimination in the procedural laws. Is this really so? Isn’t the problem attributable to the longstanding gender bias in the implementation of the laws? This, then, calls for a stronger awareness creation efforts.
- The physical inaccessibility of courts and the difficulties encountered by women in this regard is severe. So, can’t the customary systems and alternative dispute resolution mechanisms come as a solution for this problem?
- We have laws, although they still may need revision. Are our strategies really sufficient and effective for women? Women need more awareness regarding the judiciary and the systems that are already available. There
are different initiatives and projects but are they participatory and responsive to the immediate needs of women?

- In relation to domestic violence and crimes that can hardly be supported with evidence, how are such issues handled in light of the principle of ‘beyond reasonable doubt’?

- To what extent does the discourse on human rights recognize communal settings? Most of the discussions revolve around the individualistic approach and this does not reflect the African nature of communities. So, should we not contextualize in dealing with human rights from group’s rights perspective?

- Regarding economic empowerment, and other aspects of women’s conditions, we should see different groups of people. The Harari and Somali women are, for example, economically more empowered. So we should not base our conclusions on old findings and we should do more research with different perspectives and take lessons from each system.

- The value that Article 37 (2) of the Constitution could add should not be ignored. The idea of class action is something that can contribute to the procedural remedies in rectifying the difficulties women face in judicial processes.

- Lack of a registration system is a problem that should be noted. Although the family law has recognized equality and other rights, they cannot be enforced because of the lack of a registration system. Beyond dealing with legal frameworks, should we not focus more on the implementation?

- Regarding the customary laws, a balance sheet must be prepared and let us see the pros and cons of both systems. This will help us to have the facts and make an informed approach.

- Regarding the problem related with trafficking and the hardships encountered by women going abroad why aren’t there steps taken by the Ethiopian government?

- How are the global realities and contemporary international issues affecting women within Ethiopia and the country’s legal system?

- How do we go about the issues of women in relation to development? Shouldn’t we take socio-economic rights into consideration as well? In dealing with the laws? Do we consider implementation and those special needs of women as well?

In her response to the questions raised, W/ro Rakeb said that, there is discrimination both in the law and its implementation. Where the barriers and conditions of women are not taken into consideration in designing the
laws, the outcomes end up being discriminatory. The principle of ‘beyond reasonable doubt’ is one scenario. In some systems, this problem is alleviated by shifting the burden of proof to the accused. In relation to the reforms and initiatives taken, she concurred with the idea that more should be done in creating awareness and counseling. However, as it was mentioned by Dr. Costantinos, the proclamation on the charities has become an impediment for the civil society to work on this area. In the strategies already put in place, as stated earlier, it has to be more participatory through consultations in order to secure effectiveness. However, enough has not been done. The projects and initiatives should also be more integrated.

Regarding the accessibility and other benefits of the customary justice systems, though they may have such advantages, it has to be made sure that they are in line with international standards and it goes without saying that more research should be done on its benefit and cost. The harmonization and codification process could also be supported by this.

The lack of registration is, of course, a problem and calls for an even stronger effort from the government. More is also expected from the government to deal with the trafficking problem. There are a number of provisions in the Criminal Code but there are few prosecutions and convictions of traffickers. The main problem here, she stated, is the fact that most of the evidence is in the destination countries which is very difficult to access. So, having more bilateral agreements regarding labor and human trafficking with destination countries is one thing the government should work on. It is commendable that Ethiopia has acceded to the UN Convention on Human Trafficking. Rakeb then stated that she totally concurs with the suggestion that we should take socio-economic rights into consideration in dealing with women’s rights.

The moderator, W/ro Maeza, also shared some of her ideas on the matter. In her opinion, the participation of women in decision making processes has increased considerably in Africa and in Ethiopia as well. In the debate whether we should opt for the formal laws or customary laws, we should make sure that international standards which are also enshrined in the FDRE Constitution are the center of the argument. Both the formal and customary systems should fulfill the international standards and the final check point. She also stated that, the issue of customary laws makes her uncomfortable when it comes to women’s rights, as it is her area of focus. Most of the customary laws do not favor women and more research must be done to determine which ones are good and which ones are not before opting for them.
LEgal pluralism in multiculturAl setting:

An appraisal of the current Ethiopian criminal justice system

Aberra Degefa
Assistant Professor, AAU, School of Law, PhD Candidate

Moderator: Ato Wubishet Shiferaw, President of the Federal High Court

The presenter indicated that his presentation has five parts: an introduction, a part dealing with the meaning and significance of legal pluralism followed by a discussion on the need for legal pluralism under the Ethiopian criminal justice system and legal pluralism and development.

Ato Aberra stated that we all live in a world of diversity. Whether or not a society has colonial past, legal pluralism is one feature of this diversity. Ethiopia, he continued, is a pluralistic society with diverse people having their own diverse customary laws and institutions that co-exist with the formal justice system. Thus, one would expect multiple norms corresponding to the nature of the society. However, in the area of criminal justice, the Ethiopian justice system does not reflect the plurality of the society. The criminal justice system is characterized by its extreme centralist approach with lack of cultural sensitivity and relevance. He further stressed that the formal legal climate in Ethiopia seems to be unwelcoming to the existing customary justice systems.

This long established Ethiopian centralist approach is based on the belief that, law is and should be the law of the State, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. In this regard, the centralist approach has ruled out the possibility of promoting legal pluralism in the area of criminal justice and it opted for the imposition of an alien justice system. This, then, has delegitimized the indigenous customary justice systems and disempowered the people. In opting for alien laws, the centralist ideology also seems to disregard the wisdom of solving local problems with local knowledge.

Ato Aberra defined pluralism as a normative concept referring to a system that recognizes other norms emanating outside state institutions along with state-ordained system of norms. The term describes a situation in
which two or more distinct normative systems exist within the same political community and legal pluralism, as explained by Griffiths, presupposes the existence of value pluralism where diverse and conflicting values co-exist in a given society in the same social field. Ato Aberra then stated that multiculturalism necessitates that the law and the legal system be reflective of the diverse values and norms in the society. In the context of multicultural societies, legal pluralism will help in the protection of distinctive and differentiated cultural rights. Most importantly, each human person or group has the right to be judged within the normative system pertaining to the culture to which he/she belongs. He then quoted McNamara who argued that a legal system has to be congruent with cultural diversity which it is supposed to serve and which requires that a given law in multicultural society reflects the cultural diversity to the extent possible. Otherwise, the law would be alien to the society. And this, according to Abera, is the case in Ethiopia.

The issue of legal pluralism also has to deal with power relations. In a federal context, powers are divided among the governments and this gives them the right to self-determination that extends to their rights to practice their customary laws that are now in conflict with existing laws and international standards. This is, however, an area that needs more exploration. When the customary and the formal systems co-exist there may be various challenges. The first is forum shopping. However, Ato Aberra argued, this should be left to the individual.
With regard to the issue of whether we should give recognition to the legal pluralism or to the customary justice systems at the official level, Ato Aberra stated that according to research findings, almost all rural areas in Ethiopia are making use of customary laws and justice institutions. If that is a fact, then we would only have to deal with the extent to which we accommodate these customary systems. In this regard, he stated that he is of the opinion that some degree of recognition of the customary laws and institutions can be introduced in Ethiopia.

After the adoption of the 1995 FDRE Constitution, he notes some level recognition of customary justice systems. However, the centralist approach of the criminal justice system has remained unchanged because it still does not give room for the systems. This creates a problem whereby the people resist the introduction of new laws in the top-down approach. Ato Aberra’s suggestions include, enabling the legal system to bring the people and the institution on board rather than throwing out the baby with the bath water. He remarked that customary justice systems should be explored and not be regarded as harmful and incompatible with gender justice. He further argued that, these systems might have the potential to bring solutions to problems at hand. Moreover, these laws are the peoples’ laws and we should not be the ones telling them what is good for them. In criticizing the centralistic approach, Ato Aberra does not envisage the transfer of all cases from formal courts to customary systems, but argues that that certain categories of cases could be handled by the latter.

He noted that the problems in the Ethiopian legal system should be addressed in order to actively foster a society in which cultural pluralism in the context of political symmetry can fully flourish. The customary systems are recognized only in private matters, such as family matters and the like.

He then mentioned the existence of various studies which show that customary systems are working well in various Ethiopian rural communities and some of the major advantages thereof. First, the formal criminal justice system has been performing poorly while the customary justice systems, in terms of procedural outcomes, have demonstrated attractive results. These systems are more accessible geographically and linguistically. The people are also familiar with the norms in addition to their cheaper financial cost. The people like them because of their flexibility and participatory nature in determination of the outcome of the process.

In terms of outcome, it is observed that traditional systems are restorative whereby the offender is reintegrated to the society. The victim is also compensated and he/she participates in the process. However, the formal justice system has not been found victim-friendly. In spite of these
shortcomings, adequate attention has not been made to explore the potential in the customary systems, by the government, scholars and in legal education as well. So, he underlined the need to bring stakeholders on board and come up with some sort of compromise.

Some of the weaknesses of the customary justice system as pointed by Aberra include: possible variations in decisions – unpredictability; possible discrimination; lack of fixed accountability mechanism; difficulty in appeals; insufficient monitoring and supervision; and vulnerability to capture by a strong group. He also mentioned the possible challenges of the customary justice system. These were: possible forum shopping; weak linkage of the customary justice system with the judiciary and other relevant formal institutions; lack of effective enforcement mechanism; lack of resource; lack of inclusiveness, particularly on the basis of gender and conflict with human rights.

In discussing the link between legal pluralism and development, he first quoted Amartya Sen who defined development as a process of expanding the real freedoms that people enjoy. By concurring with this, he stated that, in his view the right to development is a collective right linked to the right of self-determination. So, as right holders, the people have the right to determine whether to make use of this right. He then asserted that this is what could make development sustainable. Moreover, the process of finding the middle ground should follow both bottom-up and top-down approaches. That is, institution building should incorporate the groups the institutions are meant to serve. In recognizing these customary justice systems, he added, we are making justice accessible to the people.

Finally, in his conclusion, he stated that multiculturalism requires that the law and the legal system in a given society be reflective of the diverse values and norms in the society. Ethiopia should have opted for a juridical plural legal structure that accommodates or reflects the pluralistic character of regions/communities making up the federation. But in the area of criminal justice, Ethiopia still has highly centralized criminal justice system, though there few exceptions in the 2004 Criminal Code. Moreover, the formal criminal justice system claims full control of prosecuting and punishing offenders even though victims are excluded from the criminal justice process and the retributive approach considers incarceration of offenders as the only option to deter crime and rehabilitate offenders.

He also added that in view of the fact that customary justice systems are widely accepted and used in several parts of rural Ethiopia, the importance of customary justice systems cannot easily be dismissed. In the Ethiopian multicultural setting, legal pluralism will be a way of recognizing customary
Practices. It will also be a means of realizing the people’s collective right to use their own legal system. The application of customary justice systems along with formal justice system would make justice accessible to the people. In his view, he continued, access to justice is much more than simple access to formal courts. For the different communities in Ethiopia having their own justice systems, it includes access to justice of their own choice. When the majority of Ethiopian people are actually making use of their own customary justice system and want to continue using it, depriving them of this right or denying them the right to use their customary justice systems would amount to losing development partners.

Plenary Discussion

The issues raised in the plenary discussion are the following:-
- What does securing legal pluralism to the extent possible mean? How far can we go?
- Age and sex are two challenging demographics. So, how would the opinions differ if we ask young people and old people about legal pluralism?
- As urbanization is expanding and as the formal system seems to be more dominant in the cities, how would those in the cities react to the idea of legal pluralism?
- We usually go against customary laws or go the other extreme. But do we really have the options? Are there really customary laws that can handle our problems and cultural systems that do not violate human rights? Should we not first explore and show if we really have the options before we argue that customary systems are good for us?
- Though customary justice systems may have valuable aspects, we should be cautious when it comes to the criminal legal system. Because, the state has very strong interest and stake in it and the customary systems do not have the necessary infrastructure like prison to handle issues of crime.
- A more progressive understanding of culture can ease the nervousness we feel toward customary systems. Culture is dynamic and should not be understood as static that would always be against human right values.

In response to the questions, Ato Aberra said that it all depends on the choice of the group. One of the systems, the formal or the customary, may prevail over the other gradually. But the main point is the idea of accommodating both systems neither of which should be rejected. The extent of their embodiment cannot be stated with precision. Regarding age and gender, Aberra noted that there is not much variation in the age category. However,
there is variation in opinions regarding legal pluralism depending on the gender of respondents. There are some systems that are unfavorable to women and these are being changed from time to time. As it has been mentioned, culture is not static and like any other law, people are also changing their systems. He stated that not all cultural systems have equal importance.

Regarding the criminal system, Aberra noted that the government could not have more interest than ensuring harmony in the society, enabling the societies to solve their problems their own way. If the customary systems are doing that in the criminal systems, which they are already doing, there is no need for extra caution. He also recognized that there are more complicated matters that come and should come to the formal justice system. Regarding the urbanization, there are customary values that could be taken to urban areas as well. For instance, the restorative justice aspect is growing in many systems instead of the retributive one.

The presenter concurred with the opinion that we should explore the systems more, and he stated that what he is basically saying is that we have not done enough so far.

With this, the moderator gave a brief summary of the session and the first day of the conference was concluded.
Day Two

Address:

**State Law versus People’s law: Focus on Restorative Justice (RJ)**

Tekalegn Fanta, Director of Governance and Human Rights at Justice for All Prison Fellowship Ethiopia (JAPF)

Ato Tekalegn briefly presented some practical attributes of case studies conducted on restorative justice (RJ) in Amhara, Oromia and Afar national regional states. Ato Tekalegn mentioned that RJ is common in Ethiopia and Africa in general; it is not something that is imported from developed countries. For example, traditional mechanisms such as ‘Shemglena’, ‘Jarsuma’ and the like have long existed in Ethiopia. The main objective of the study conducted by Justice for All Prison Fellowship Ethiopia (JAPFE) was to explore the potentials for the implementation of restorative justice in the community and also to identify community institutions and the practices that exist in the country. Another objective of the survey was to identify areas and modalities of intervention within the existing systems.

Major activities carried out by JAPFE include phase by phase study as well as consultative and discussion forums in the form of seminars and related methods for elders and leaders in the community. It also tried to bring elders and justice actors together and create a forum to work together in developing and enriching the RJ in the local communities of the country. Tekalegn mentioned that theoretically we have a formal legal system and its machineries but in practice communities in Ethiopia have wide traditional practices on RJ. He also stated that the challenge in RJ is the rejection of the formal one to enter into the traditional system. Ato Tekalegn also noted the areas that need intervention and focus such as investigation, prosecution and hearing/court stages.

The study conducted also gave a long list of recommendations which focus on stakeholders such as law and policy makers, academicians, local justice actors, community leaders and civil society actors. Ato Tekalegn asserted that legal professionals need an overall change of ideas and thinking. Finally, he remarked that the important lesson that can be drawn from these studies was that in the areas of rehabilitation and RJ there is the need to acknowledge already existing practices.
Dr. Yonatan spoke about legal pluralism from the perspective of the South African experience. The presentation has the objectives of showing the practical and theoretical aspects of legal pluralism especially by situating the issue in the context of a case brought before a South African Court and focusing on the role and place of customary law in the South African constitution. Dr. Yonatan began his presentation by stating that most African countries are countries of minorities because there is no single ethnic group that accounts for the majority in these nations. These communities in turn have developed their own norms, rules and practices to govern every aspect
of their lives. The diversity evident in African communities is not only cultural diversity but also legal diversity. It is with this background that colonial powers introduced what we call the formal legal system and made it the dominant one.

Dr. Yonatan stated that the colonial powers did not totally disregard the customary laws but instead used them to advance their colonial ambitions which were to subjugate the local communities. In South Africa, such incorporation has gone even further to transform the customary laws into western codes i.e. reducing customary rules into written form. Dr. Yonatan indicated that this has in a way frustrated the relationship between traditional authorities and their subjects because once the traditional authorities became part of the colonial administration, they did not have to look for their subject’s approval or endorsement as their exercise of power is now fully supported by the colonial powers.

He noted that much has not changed in post-colonial Africa in terms of the place of customary law in the legal system. Most African states adopted the colonial legal framework wholesale, and as such customary law continued to be inferior and was not applied in areas where colonial laws applied. Despite the fact that most colonized African states tried to elevate the formal legal system, customary law systems did not disappear; they rather developed and continue to play a central role in the lives of many African communities. Dr. Yonatan indicated that although this could partly be attributed to international development (which in a way promoted the right to culture and self-determination which receives support from a number of instruments), African states have started to realize that customary law is there to stay. This acknowledgment is evident in the fact that many African countries have constitutions that recognize customary law as equal source of law which has to be applied wherever is appropriate.

The South African constitution recognizes its cultural diversities in a number of provisions. However, section 211 is very relevant to the issues of legal pluralism, which imposes an obligation on the South African courts to apply customary law. Yonatan indicated that such recognition of customary law in the constitution enables traditional leaders and those who defend cultural practices to present their claims. The evolution of customary law as a constitutional right creates a tension between right to culture and a number of other fundamental rights. He indicated that at the center of this constitutional dilemma is the nature of multiculturalism; the policy of multiculturalism that a state is implementing and the constitution follows.

Dr. Yonatan compared two opposing views of culture; the autonomous view which considers culture as a closed and separate space that should be
free from external influence. This dominant call here is preservation of tradition for example traditional gender roles. The second view of culture considers culture as a more fluid, contested and porous conception. This view asserts that the content of culture and cultural identify can be shaped by social, economic and political processes.

The implications of these varying views about culture, according to Dr. Yonatan, are reflected in a case brought before South African courts: Shilubana and others v. Nwamitiwa in 2008 which is about the appointment and succession to chieftaincy with the Valoyi community. Both the High Court and the Supreme Court of Appeal held that a female successor could not become chief in terms of the customs and traditions of the Tsonga/Shangann and Valoyi custom. Dr. Yontatan stated that these South African courts have a static view of culture denying the standard-setting power of the constitution. The constitutional court on the other hand remarked that courts should be circumspect in striking down the efforts of communities to develop customary law in line with the constitution and found that the Valoyi royal family had the authority to develop its own customary law of succession. Important parameters regarding the integration of customary law into the rest of the south African law; first, customary law forms an integral part of south African law, deriving its validity from the constitution, second, customary law must be interpreted to be ‘living customary law’ and not the codified version built on colonial and apartheid precedents’.

Dr. Yonatan also discussed the South African traditional court bill. He noted that, this bill provides no recognition of decision-making authority and dispute resolution at family, village or headman levels, but recognizes only courts at the apex of the tribe. Traditional courts have the authority to order far reaching sanctions. The person need not even be a party to a dispute before the court. According to Yonatan, there are a few concerns in relation to the traditional courts bill: it does not provide for a right to opt out of traditional courts. This bill is generally orchestrated by those that seem to have a bounded view of culture which insulates it from any external influence.

**Plenary discussion**

The following issues were raised during the plenary session:

- Issues concerning customary law and gender were raised in light of the suspicion that some may have. From this angle, it was commented that adopting western laws is considered a better idea than customary laws when it comes to gender issues. If we think customary law as a living law which is taken as the living experiences of the community and
which changes in accordance with the living standards of people, then we can go to our laws to solve our issues thereby contributing to our development. The South African experience was considered a good example as it allows us to take the matter into debate and hence, forward.

- In relation to section 211 which requires formal courts in South Africa to apply customary laws, a participant asked about what it means to apply customary law. In relation to the varying views of culture that exist in South Africa and the case which was discussed in the presentation, it was stated that the particular community should have been left to decide the matter instead of courts including the constitutional court to do so.

- Another participant stated that the discussions from day one show that customary law is a living law which we cannot ignore. But we should give consideration to the methods of integrating and making it operational in conformity with the bill of rights or the constitution. The South African experience was considered to be innovative in integrating customary laws in the formal legal system. In light of the Ethiopian experience, it was mentioned that the FDRE Constitution as well as the constitutions of the Afar and Somalia National Regional States for example, give recognition to customary laws but the means of integrating them and hence making them operational is an important question. On a different note, questions such as who is to adjudicate the cases and by whose standards are the judgments to be rendered were also raised.

- The experience of the Erob community from the Tigray National Regional State was mentioned as another positive experience which should be used to disregard the somehow prevailing attitude that customary laws are inferior. This community has had peace and stability for more than 17 years without any courts, police or other formal governmental organs. This is mainly attributable to the strength of the customary law within this community. In this society, the inhabitants choose to settle their criminal and civil disputes through elders rather than going to formal courts because the traditional system is more effective in solving their issues. This commentator concurred with the view that culture is to some extent dynamic because there are reasons which force it to change from time to time. However, when we impose laws for example from Europe in communities such as Afar, Somalia and Erob, it becomes difficult to bring any substantive difference.

- Another question raised was whether the consent of parties was taken into consideration when applying customary law as per Section 211 of the South African Constitution. The participant affirmed that it is
important for legal professionals to realize the relevance of customary laws in everyday lives of communities and should consider them as living laws and not as backward and inferior ones.

- Other questions raised by participants among other things focused on how the South African constitution and the courts settle conflicts between cultural rights and other fundamental rights. The position of the courts in this regard was also inquired. This raises the questions whether the constitution provides the means and whether a difference in legal systems matter when it comes to applying customary law.

In response to the comments and questions, Yonatan stated that customary law should be applied where it is appropriate, and this gives a choice of the appropriate law based on the transaction involved, parties involved, the nature of the case and the courts. He noted that one of the clear lessons or implications of the South African experience is that customary law is not necessarily retrogressive. He added that customary law evolves and is evolving to develop what is relevant for the prevailing realities. Given that nature, it has the capacity to progress as seen in South African communities.

With regard to the constitutional means of reconciling the conflicts between cultural rights and other fundamental rights, Yonatan stated that, the standard setting power of the South African constitution is very clear. In other words, the customary law should be interpreted to promote the Bill of Rights. In relation to the difference between legal systems and application of customary law, Yonatan remarked that there might be no such difference. However, the South African courts might have the advantage because they have a rich source of codified customary laws and precedents decided by courts during the Apartheid regime as well as the colonial period though there might be a need to revisit the values of these precedents.

In relation to the case brought before the court and the question that the community should have decided instead of courts, Dr. Yonatan stated that the decision was not something imposed on the communities by the court or the royal family but it was discussed by the royal family and endorsed by the community. So it was an act of the community’s effort in developing its customary law.

The aim of Dr. Assefa’s presentation was to look at customary law and rule of law from historical perspectives and then identify areas of convergence and divergence. Hence, it focused on highlighting the key features of customary law and rule of law. The first point mentioned was that in the customary dispute settlement systems, elders and institutions not only settle the case but they go further than that in terms of ensuring community peace. This feature is prevalent in all areas, religions or customs in Ethiopia. This is because a specific case between two individual parties is considered part of a bigger community issue. Hence, in the process of resolving the case, the elders try to settle the root cause of the conflict; they try to heal the wounds affected because of the commission of the crime.

Dr. Assefa stated that such dispute settlement mode, if one uses the modern language in international conflict resolution is what is called conflict transformation. He noted that this is very important in terms of the conception of justice in applying the formal law and the conception of justice when applying customary conflict resolution mechanisms. This is also an indicator of one of the areas of convergence. In the courses of ensuring peace, the elders not only engage the parties to a single dispute but also the entire community and clan of both sides to make peace. Dr. Assefa stated that the entire family of an adversary will be there to repent what has been done whereas the other family is there to forgive the entire community of the offender. The entire purpose of such rituals is to restore the peace which has been disturbed.

Dr. Assefa remarked that these cultures of restoration, repentance and forgiveness give an interesting perception of justice. When an individual commits a crime and is sent to jail for 2 years by the formal justice system, when he comes out after completing his sentence, as far as the community is
concerned justice is not served. Justice is done as per the conception of the customary justice system, when compensation is paid and the communities are at peace with each other. Hence, he must go through the traditional mechanisms to be integrated into the society. Dr. Assefa stated that the understanding of justice in the customary law is partly inspired by the society’s sense of morality, it is not exactly morality or religion but it is inspired by values which emanate from religion, custom and moral norms. There is the assumption that the customary law is a good law, it is a just law in the communities’ perspective, one may not agree but from their perspective there is an assumption that their customary law is good and just.

In the formal legal systems, there is no consensus among authors as to when the rule of law seems just. The law is not necessarily a just or good one. Dr. Assefa mentioned that sometimes the rule of law goes down to a mere kind of law for exploitation or whatever goals the state wants to achieve. For example the apartheid system qualifies its legal regime as a rule of law according to its definition. But with respect to customary law, he stated that there is the assumption that the law is good because they consider it their own law which has developed over generations. Here, people respect their laws not necessarily because they are afraid of the police or the military; they rather voluntarily enforce and obey the customary laws. There are penalties when there are deviations but these are largely exceptions.
The traditional system determines the way the institutions are established and how the elders are selected. The elders know the norms of the society, are impartial and have a wealth of experience. They also hold fair public hearing and make decision as a last resort. First the elders call upon the participation of the public, wise people and elders not necessarily from those who chaired the meeting to gather opinion before they resort to deciding the case. They use this participation to make their decision, this largely follows certain phases to find out the true, or just law. The customary laws emphasize on collective values and collective responsibility; the family of the person who caused the harm has to participate in the collection of the compensation; the family of the adversary may also bear some responsibly which is different from the formal legal system which focuses on single responsibility. Yet, customary laws are not free from difficulties and challenges from gender, human rights and other perspectives.

Dr. Assefa stated that the concept of Rule of Law is one of the most ambiguous concepts in law in terms of what it means and what it does not mean. There is no consensus as to what it means and whether it is a means to an end or an end by itself. In this regard, Assefa emphasized that there is a serious disagreement as to what it means. The rule of law starts with the medieval period and the notion has been there for long. He discussed the long history of rule of law and the possible issues in relation to how it began.

He noted the need to find something into the content of the law in order for it to qualify as rule of law. Otherwise, laws which were adopted by Apartheid in South Africa or Hitler in Germany can be considered as rule of law. Letting the law prevail is not enough by itself to qualify as a rule of law. Dr. Assefa stated that the positivist understanding of rule of law i.e. presence of a positive law, its prevalence and enforcement is not sufficient for rule of law. There are some things that the sovereign cannot do because the rule of law also contains human rights and other fundamental issues which must be incorporated within it. It means equality of all including the poor and illiterate and the concept of equality is inherent to the concept of rule of law. He noted that the concept of rule of law has changed through time and across countries.

Dr Assefa stated that rule of law assumes due process but this is rather a procedural issue rather than a matter of value. There is due process in customary law with regard to the way the elders are elected: it is lower in formal legal systems than in customary law. This is because; it is just a procedural guarantee in the formal legal system than in customary dispute resolution mechanisms. He noted that in customary dispute resolution mechanisms, due process has substantive effects as well. Assefa stated that customary dispute resolution mechanisms and the values and institutions that
are associated with it are only consistent with the thick conceptions of rule of law and not with the thin conception of rule of law. Rule of law embodies some values, customary law complies with that. However, if it [the rule of law] is [conceived to mean] just procedural, then there is some [divergence between the two].

Dr. Assefa indicated the problem in the sense of justice in customary law with regard to the rights of women and other marginalized groups of the society. Whether they have access to this traditional dispute resolution system is an issue as a large part of the society may have been excluded from accessing this justice system. This may need intervention. Customary law is consistent and applicable in terms of rule of law if we see it as a substance. Finally, Assefa mentioned that the rule of law assumes, though debatable, the autonomy of the individual whereas the customary dispute resolution is largely communitarian. There is an interesting divergence in this regard. He also noted that rule of law is not necessarily libertarian as in the case of China and African countries; it [the notion of the rule of law thus] is far from being agreed upon.

Plenary discussion

- One of the participants indicated that two theories can be formulated in relation to why and how people find customary law just than the formal legal system; they find it fair and better than the formal system; that is why they relate fairness to it. It is more accessible, it is out there; it is working, it is functional and more than something that is just hypothetical.

- Another question raised was that the main conflict in any legal system, customary or formal, is the conflict between individual and community interest. When we talk of custom, we are talking about the custom of a society, a group or individual, normally the customary justice system. CDRMs are better in bringing about peace in the community because the individual is obliged to sacrifice his interests for the wellbeing of the community, if this is accepted should we be liberalists or socialists in evaluating the advantages and disadvantages of the customary dispute resolution mechanisms over the formal system? Another question is related to the source of the rule itself. In jurisprudence one of the fundamental questions revolves around the source of law; some say custom is the source of law, others say it relates to the reality or thinking of the community, politics, moral systems, etc. By emphasizing customary laws and CDRMs, are we trying to limit the material sources of law only to custom? What about the purpose of law itself? Jurisprudentially speaking, the ends of the law are elsewhere beyond the domains of the law.
itself. Should the purpose and ends of the law be limited to the service it renders to custom? And how can we relate it with our theme on law and development?

- No one here undermines customary law, but the problem lies in its application. In other words, suppose if you take the customary laws of nations and nationalities in Ethiopia, what if some customary practices are in contradiction with the Constitution? How can we resolve the issues of the people who choose to go to customary law if there are problems with customary law?

- One participant stressed that it is important not to undermine the qualities and good sides of the formal justice system particularly in assuring that rule of law is served. It is a highly structured system to allow both parties equal access to justice. Hence a question was raised to Dr. Assefa in terms of his assessment that rule of law is better in the customary law than in the formal legal system. The participant inquired whether the presenter was saying that the informal justice system is better than the formal justice system in ensuring rule of law. With regard to accountability, the formal system is relatively better as compared to the informal justice system as there is sometimes lack of accountability related to Shemagles.

- Another question raised relates to areas such as Borona where there is a clear conflict between the formal and informal legal systems, regarding the means of reconciling them.

While reflecting on the questions and comments, Dr. Assefa affirmed that he is not advocating for the abandonment of the formal legal system. However, he emphasized the need to integrate customary law and make use of it thereby improving the legitimacy of our institutions and the question of justice in general. Especially in areas such as personal and family matters the Constitution recognizes the applicability of customary laws. Dr. Assefa noted that consent is a requirement for customary law to be applicable and that people have trust in customary law. In regions such as Somali and Afar these customary laws are not the alternative dispute settlement mechanisms, and it is rather the formal system that is the alternative. In various cases including serious crimes such as homicide, people in these regions are adjudicating and solving their conflicts using customary laws. Hence, Dr Assefa noted that, the core theme of his presentation is on how this living law which is playing a central role in the lives of the people can be integrated with our formal legal system.

With regard to accessibility, Assefa remarked that customary laws and their institutions are accessible because our formal legal machineries are only accessible as far as Woredas. However, he underscored that accessibility
is only one advantage, and people believe that the laws are their laws because they have been transferred from generation to generation either orally or sometimes written and hence have trust in them. Therefore, one must try to reflect the wishes and aspirations of the people when making formal laws. In relation to the possible conflict between customary law and the formal laws mainly; human rights, the Constitution, international instruments, etc. Dr. Assefa stated that through hard work and dialogue, there is still a way to solve this conflict.
Ato Yedenekachew’s presentation focused on the positive aspects of customary law in Ethiopia based on studies carried out by Federal Justice and Legal Systems Research Institute. Ato Yedenekachew noted that social pluralism is the base for the existence of legal pluralism and explained that most rural communities in Ethiopia use customary law. He stated that the 1995 FDRE Constitution gives due recognition to customary laws and cited Articles 9, 40, 34(5), 37, 39(2) and 78(5) of the Constitution to illustrate the due recognition given to customary laws and customary institutions of nations, nationalities and peoples of the country under the Constitution. The
presentation focused on the following good practices in seven customary laws.

a) Gereb

The ‘Gereb’ is the customary conflict resolution mechanism of the people of Wajirat, living in the southern part of the National Regional State of Tigray. It is used to settle disputes with their neighbors particularly that of the Afar people. These neighboring people have agreements through their elders on security, religious freedom and economic and social issues. Yedenekachew stated that these customary institutions help in avoiding religious or ethnic conflicts that may arise between the people of Afar and Wajirat. ‘Gereb’ allows for the peaceful settlement of disputes should they arise. Hence, the ‘Gereb’ practice is a good example against the assumption that customary laws encourage tribal or ethnic conflicts.

b) Mora

It is the customary law and environmental protection mechanism of the Konso People. In the Konso society, there are customary benches called ‘Mora’ in every sub-village. Because the geography of the Konso area is not suitable for agriculture which is very labor intensive, it is not possible to carry out a family’s farming activities by its members alone. The Konso people have thus a customary practice which creates rights and obligations between neighbors in the course of carrying out farming and related activities for one another. These customary agreements are named ‘Fedeta’, ‘Perka and Merpera’ (sharing labors group) and ‘Kenta’ (Neighborhood). According to the customary systems of the Konso people, these customary agreements are made orally which create rights and obligations. Accordingly, the individual farm activities will be carried out jointly with neighbors. Where one fails to undertake the obligation imposed, he/she will be held responsible after the case is brought in front of elders in accordance with the customary law.

c) Med’a

In the traditional justice system of the Afar people called ‘Med’a’, the justice institutions and their powers/duties are divided among family, close neighbors, sub-clan group and clan groups. Under the Med’a customary laws, tort liabilities arise among other things by fault (either by omission or commission), which may be divided into easy and difficult liabilities. Under this customary practice, liability may only be evaded in certain circumstances, for example, where the offender is mentally ill. This customary justice system also deals with cases where the offender may be held responsible and pay damages equivalent to the act. The other type of tortuous liability under
the Med’a system is liability without fault, including damage caused because of water wells or animals. The third tortuous responsibility recognized under Afar customary justice system is liability for the act of another including harm caused by minors. Yednekachew stated that the predictability of compensation usually paid in goats is one of the features which are peculiar to Afar customary justice system.

d) Chaqo

The fourth customary practice presented was ethnic conflict resolution mechanism of the Wolayeta people. Ato Yedenekachew mentioned the three different customary dispute settlement mechanisms used by the Wolayeta people, Chemeta, Chucha Checha and Chaqo, to settle conflicts among themselves. Among these, Yedenekachew focused on Chaqo which is a customary dispute settlement body organized to entertain and decide conflicts between two different ethnic groups involving uses of natural resources such as grazing land, border crossing, cattle looting, water use over rivers and other conflicts. Chaqo is composed of 12 elders who are selected from two conflicting ethnic groups. Under the Chaqo system, the interests of an individual are represented by the elders from his/her tribe who knowingly takes responsibility for the damage caused by the individual and solve their conflicts.

e) Nimo

The succession practice of the Boro-Shenasha is known as ‘Nimo’. According to this customary practice there are two types of succession: testate and intestate, each with their own particular characteristics. Ato Yedenekachew stated that the deceased may make the will orally or in writing. Where the will is made orally, it must have been made in the presence of three elders who are expected to assure three things; (1) he has not lost his mind, (2) can speak and (3) that the will is given with his full consent. Yedenekachew noted that under the Boro-Shenasha customary law, the deceased cannot leave his property/belongings to anyone else if he has children. The only ground that can justify the exclusion of a child from the will is where the child has not supported and cared for the deceased parent while the latter was alive. In case of intestate succession, under the Boro-Shenasha customary law, the children of the deceased will be the heirs and property will be divided equally among them. Ato Yedenekachew remarked that under this customary law no one will request for the division of the land or household property while the wife is alive which shows the special attention given to women in Boro-Shenasha. Moreover, he noted that any member of the family who is dissatisfied with the partition of property or who contests the authenticity of the will may bring the issues to the leader of
the ethnic group and the case will be settled by the family assembly. The decision given by the family assembly and approved by the leader of the ethnic group will be final and non-appealable.

f) Mezenger

Ato Yedenekachew stated that under the *Mezenger* customary law contract can only be made between matured individuals who have reached working age. Where one of the contracting parties fails to fulfill his responsibility, the guarantor will fulfill the contractual obligation and hold the contracting party responsible later on. Hence, one aspect of the Mezenger customary system is the practice in which the guarantor may not refuse to pay the creditor where the debtor fails to discharge his obligations. Where the debtor has failed to fulfill his duties without good cause, he will be made to work on the creditor’s farm until he carries out his obligation under the contract.

g) Gudimale

The Sidama people have their own peculiar customary judicial and conflict resolution procedure called ‘*Gudimale*’. Under this customary practice, Ato Yedenekachew noted that offender(s) who have committed murder either individually or in group will be sheltered by the leader of the ethnic group and elders will ask the victim’s family for reconciliation. This type of reconciliation will begin with a truth finding procedure called *Kora* which involves the society and the interested parties to the conflict. Under this system, it is not only the offender but his entire clan that will be held responsible for the damage done or crime committed.

Yedenekachew forwarded some recommendations as to how customary laws and their practices should be treated in Ethiopia. He stated that this study does not suggest the adjudication of all criminal or all other cases by customary law and their institutions. However, he suggests that (1) the legislature should enact detailed laws about customary laws and customary institutions which prevail in the country; (2) customary laws and their institutions should be given due attention as they can have a role in solving conflicts in relation to ethnicity or religion, murder, family and succession matters, border issues, land use, grazing land, water use and other natural resources based conflicts.

Ato Yedenekachew also raised the issue of what kinds of research needs to be done in this regard and how these issues will relate to the Constitution, which institution and customary laws are useful and others. Moreover, he recommended for a national forum to be organized to bring together elders with skills and experience in customary law and other professionals in fields
such as law, political science, history and anthropology so that opinions can be shared on the matter.

**Plenary discussion**

The following are among the issues and questions raised following the presentation:

- One participant inquired whether the JLSRI has conducted comparative studies (at least in terms of an ongoing effort) to show the similarities and differences which exist between these customary dispute settlement mechanisms and others within the country. It was recommended that the studies conducted by researchers on customary law should not just be descriptive institutional analysis but should move forward and be thematic comparative studies. It is essential to identify the true positive aspect of such customary law by analyzing the gaps that they fill in our modern legal systems, and this goes beyond a mere journalistic story telling.

- In relation to tortuous acts and collective responsibility imposed upon communities, a participant asked if such responsibilities within some of the customary practices encourage an offender to continue offending or whether such collective responsibility is used as a means to prevent the offender from committing such act.

- Another participant stated that customary laws have far reaching implications even in inter-country cases. He mentioned how customary laws are used to bring back missing cattle around Ethio-Eritrean borders because, customary laws are in place and working in these areas. Therefore, it was suggested that the JLSRI should study other areas of the country to include such positive experiences.

- In relation to determining penalties beforehand like the case of the Afar customary dispute resolution mechanism, it was remarked that such pre-determined amounts of compensation resemble taxation than punishment. It was asked if collective responsibility may be considered by some as insurance to stay in the customary life rather than being a penalty to prevent the offender from committing similar acts in the future. Hence, it was inquired as to how this issue translates with the need to go forward with law especially in the light of the general theme of the conference: law and development.

- A question was also raised in relation with the meaning of law or its equivalence in the various customary dispute resolution mechanisms
studied by the JLSRI and how to select what needs to be related with the different areas of the law.

Ato Yedenekachew stated that firstly, collective responsibility does not encourage the offenders to continue committing offenses because, as the experience in Afar indicates, repeated commission of offences can lead to expulsion from the tribe and the tribe will not take the responsibility for any damage caused by such person. The same holds true in Shinasha where they have mechanisms to prevent repeated offenses by making the offender leave his residence should he commit such acts over and over again.

In response to the question about predetermined penalties, Ato Yedenekachew stated that one should not compare the notion of justice in the formal and informal legal systems. He noted that, where continuous comparison between such notions is made, one might not be able to have a system in which the two can work as complementary systems. For example, the fact that the damages are already set in Afar is an essential part of the notion of justice for these people because predictability is considered very essential.

He also emphasized that collective responsibility should not be considered as insurance to commit further offenses because, members of a tribe from which the offender comes are not only going to contribute for the compensation to be paid but also have to take responsibility for the damage done. He noted that, environmental protection mechanisms employed by the customary laws, may be one way of asserting the applicability of these laws in relation to their complementing development. Yedenekachew mentioned that there are possible conflicts between the informal and formal justice systems, and this can lead to witness boycotts or false accounts of what happened.
Address:

Teaching Law in a Plural Legal System

Abdulmalik Abubeker, Haramaya University, Former Dean of the Faculty of Law, PhD Candidate

Ato Abdulmalik briefly discussed the history and development of law schools and legal education in Ethiopia from the establishment of the first Faculty of Law at the now Addis Ababa University to the many private and public schools of laws after the downfall of the Derge. Ato Abdulmalik mentioned that when the FDRE Government launched an overall legal reform, one element of this reform was legal education and training which resulted in a comprehensive legal education reform document in 2006. This document, Abdulmalik noted, was used to make curriculum revisions and preparation of course materials with the participation of law instructors and students.

As Ethiopia is a country of cultural and religious diversity, Abdulmalik mentioned that it is important to ask whether the legal education in Ethiopia actually reflects the diversity. Looking at the curricula and courses given at the various law facilities, Abdulmalik argued that our legal education has not been reflecting legal pluralism and cultural diversity that prevails in Ethiopia. Abdulmalik stated that this was firstly because, law schools in Ethiopia have been teaching law as defined by jurists. For example, Austin defines law as a rule laid down for the guidance of an intelligent being by another intelligent being having power over him. In another definition given by Salmond, law is the body of principles organized and applied by the state in the administration of justice. According to Salmond’s definition, law depends on enforcement, i.e., without courts there is no law. But it all depends on how we understand courts. Ato Abdulmalik stated that where courts are understood as special premises where a judge in dark robes disposposes justice then those societies without such institutions do not have law. However, if a court is any setting where disputes are settled and the social equilibrium of a community is restored by its accredited functionaries then the law encompasses a wider institutional horizon.

Ato Abdulmalik also looked at the anthropological definition of law focusing mainly on the one given by the distinguished anthropologist, Malinowski, to show that scholars differ on what law is. This definition portrays law as a given social norm whose legal entity is enforced by direct, organized and definite social sanctions. Ato Abdulmalik stated that, law
schools have been teaching law as defined by jurists; they have not taught law as has been defined by anthropologies or in other disciplines.

Secondly, Abdulmalik mentioned issues revolving around the question why societies obey the law. In this regard, emphasis has been given by law schools on courses which teach compulsory as sanction. He noted that, there are psychological as well as sociological sanctions. Ato Abdulmalik remarked that law schools in Ethiopia should widen their understanding of law as well as why it is obeyed and teach law with a new perspective.

He also asserted that, law in Ethiopia should be dated as far back as the Axumite Empire and should not be confined to Feteha Negest. In order to do this, he suggested that it is essential to introduce courses such as anthropology, psychology, and history and histology to our curriculum. This is because, these courses actually inform our students on diversity in legal pluralism. Ato Abdulmalik concluded his address by stating that with the widening of the sphere of legal pluralism and the emerging of globalization and different transnational dimensions of laws which brought new actors in the sphere of legal pluralism, it is advisable that courses which expose our students to these phenomena be introduced into our curriculum.
RETHINKING THE NATURAL RESOURCE CURSE:

THE POLITICAL ECONOMY OF SOVEREIGN MAXIMIZATION

Chrysantus Ayangfac
Advisor, DAG Technical Working Group

Moderator- Dr. Samuel Bwalya (UNDP)

Mr. Chrysantus stated that so far discussions on natural resources in Africa focused on expenditure or downstream issues which focused only on how governments are spending the money they get from natural resources. But Africans gave little attention to resource appropriation and rent capture. Issues surrounding expenditure are focused on revenue accountability and transparency; governments need to be transparent on how they spend this money and transnational corporations need to be transparent as to what they are giving to governments.

Such discussions have led to many initiatives such as the Kimberley process which recently led to the enactment of the Dodd-Frank Act. In the United States, the government has passed a law that multilaterals and oil corporations working in Africa must publish what they are putting. Mr. Chrysantus stated most importantly that there is a proliferation of criticism on China who is not democratic and does not really bring much to Africa. He stated that the discussion is now shifting and focusing on taxation because of this cliché that taxation equals representation. However, the discussions on natural resources in Africa are not yet focusing on what is really important, i.e., what our governments are getting.

Having this as a background, Chrysantus’s presentation had a central question; why are African governments knowingly and constantly entering into bad contracts with our natural resources? One explanation is that we do not have good lawyers who know about negotiations on oil exploitation, extraction of the natural resources and land issues. Mr. Chrysantus argued that this might have been true 50 years back, but noted that it might still hold true in some cases; the point should be that Africans should look beyond those technical issues and look at the wider political context within which
we are operating. He remarked that the manner in which our political institutions are configured is going to determine whether we are going to get good or bad contracts. If we leave our governments to make discretionary decisions on what kind of contracts we are getting, it is highly likely that we will get bad contracts down the road. Mr. Chrysantus noted that until we broaden institutions around these negotiations and check and balance mechanisms on governments, it will be difficult to get good contracts.

Mr. Chrysantus noted the importance of putting things in context and the context here being that Africa is moving forward but still facing many challenges. He stated that the most important question here will be how these natural resources are inputs to our wider developmental strategies. In this regard one should ask why good contracts are important. According to Chrysantus, they are important first and foremost because Africa is well endowed and leading in many natural resources. Therefore, it is our sovereign right to control these natural resources. Mr. Chrysantus noted that these contracts are important in terms of asserting our sovereign rights in controlling our natural resources. Most importantly, these contracts are imperative in delimiting the responsibilities, privileges and the entitlements of the parties involved and in assessing the framework of interlinking with one’s wider economy. In other words, these contracts are important not only in terms of getting the money from multilateral corporations but also in terms of how to use their investment to impact a wider development strategy. From a political point of view, these contracts may be as important as an election if, for example, a nation gets 80% of its revenue from natural resources.

Mr. Chrysantus underlined that Africa is getting a raw deal. He explained the evolution of policies on natural resources in Africa owing to the philosophical evolution of its orientation to development. He discussed the involvement of the state as a regulator in such cases and how such involvement has progressed through time. The discussion touched upon the policy trends in the 1980s where deregulation and privatization of processes were deemed necessary to opening up the sector and attract Foreign Direct Investment (FDI). This trend declined in the 1990s because we needed to protect our environment and our laws were reformed to capture these orientations. Thereafter, Africans needed to democratize and this called for the state to play a crucial role. According to Chrysantus, legal frameworks are changing reflecting our evolving philosophical orientation to development. But still, we are getting bad contracts, even if our laws are meant to facilitate our developmental pursuits.

In clarifying what may constitute a bad contract (bad deal), Chrysantus stated the symptoms related to bad contracts, which include exemption from
export or import taxes, low Corporate Income Tax (CIT) rates, low royalty rates (as low as 3%), land grabbing, limited employment, discontent, weak development of regulatory institutions and enforcement and policy incoherence as well as the race to the bottom among African countries. Moreover, issues relating to the interests of indigenous people can be raised when talking about bad/good contracts. Hence, equalizing the rights of indigenous people and that sense of integrated consideration with other factors is essential. In the name of attracting FDI, African countries are in a bidding war and because of that we are having continuous low contracts. Generally speaking, however, Africa is striking improved deals but there are still challenges which ought to be tackled.

Mr. Chrysantus raised the issue of why we are knowingly getting bad contracts specifically on oil. The technical answer that has been put forward by scholars is that Africans do not have the technical capacity to extract oil from the ground. However, this logic might not work when one looks at what individual countries are getting from such contracts. Chrysantus argued that people in Africa need to look at the quality of their respective governments. Such a look will mean talking about accountability and the portion of citizens involved in the making of such contracts. This requires analysis whether citizens check how their government makes such contracts or whether parliaments or judiciaries play a role in the making of these contracts.

He also noted that when one looks at the governance indicators, there is a positive correlation between the rule of law, public participation, and accountability with the amount of money that a country gets from contracts/deals in investments. This seems to suggest that, where there are strong checks and balances against discretionary powers in oil resource extraction negotiations, a country tends to get more. But where, on the contrary, the negotiations and contracts become a one man show (as in some countries), a country tends to get less.

Chrysantus indicated that political constraints and political institutions are supposed to have a strong impact on how much a country aspires to get from its natural resources. He also stated that political constraints and political institutions are considered to have a strong impact on the strategies whereas architecture around resource capture is designed to provide leaders with sufficient resources on the one hand which sustains the cleavage structure that offers their main base of support, and on the other hand, to placate or overpower rival cleavages that pose a challenge to their rule.

As a conclusion, Mr. Chrysantus stated that where the benefits of a good contract outweigh political cost, certainly African politicians will be more
amenable to strike good deals. If they calculate that a bad contract is a good politics, then they will certainly go for the bad contracts. He added that politicians in African countries will go for short terms because of the nature of the politics that prevails; hence we lack rules and regulations. He affirmed that poor resource contracts are the result of domestic politics, and strong laws and institutions are essential. Chrysantus concluded his presentation with the following questions: what is the role of the judiciary in strengthening our negotiators in terms of strengthening how we maximize our contracts? What is the role of the parliament? Should we develop strong laws which restrict the way our governments negotiate on our natural resources? In the case of Ethiopia, should we start now or wait until we discover natural resources such as oil?

**Plenary discussion**

- One participant recommended a look at Denmark’s experience. This is because; in Denmark they have strong discussions between the parliaments and the negotiators who go to the EU. There is real power behind the parliament. It was stated that unless there is a threat or something like that behind such negotiation, there will be a problem despite having all the laws. That is, there are many occasions where there are good and strong laws but the real deal is actually finding clever ways to use them.
- From the presentation, it is noticeable that the role of the public at large in negotiating and concluding such contracts is almost insignificant. Hence, lawyers and the judiciary should handle such matters with proper care. It was suggested that it is time to consider a kind of framework legislation to structure concessions contracts for developing countries such as Ethiopia because these contracts are highly technical and most likely concluded outside the reach of the public or sometimes outside the reach of the technocrats themselves. To avoid such imposed contracts, we should use regional leverage and existing regional structures. The concept, the study and development of the framework could, for example, come from UNECA or it the NEPAD. We can also consider regional institutions in Africa such as ECOWAS, SADC and COMESA. It was mentioned that where the wakeup call is not ringing something to us, Homer Dickson’s causality chart will apply, whereby Africa will end up being environmentally degraded with a spillover effect that can ultimately threaten the very existence of that government.

- The connection between political instability, lack of good governance and poor infrastructural development and compromised negotiations power of countries was also raised.

- A participant asked whether one can regard the agreement concluded between Egypt and the Sudan on the utilization of the Abay (the Nile) in 1929 a bad contract although it was not made between one country and a multilateral corporation, as long as it still makes one contracting party more beneficiary than the other.

- Another participant stated that issues of bad contracts are more than technical and are symptoms or results of bad governance. If you have a representative government that is accountable, the likelihood that you will have a bad contract is lower. In relation to this, it was asked whether resources have been cures in a democratic, representative and accountable government or in a society where there is a democratic government. In a way the correlation between bad contracts and bad governments is always there. Because if the government is accountable it will see to it that any negotiation it makes or any contract that it enters into is going to be compatible with the need of the people it represents.

- Additionally, it was inquired if it was time for Ethiopia to worry about bad contracts rather than enhancing its image as a best investment destination in Africa.

While reflecting on the issues of political instability and contracts, Mr. Chrysantus stated that there is a positive correlation between the two and he mentioned the case of Congo Brazzaville as an example. This is where the
international contract issues come into play because such positive correlation might not always be the case. In this regard he mentioned Saudi Arabia and other Gulf countries that are not good with good governance or democracy, but are unlike various African countries in terms of managing their natural resources and their human development index. He stated that there is a need for a nuance analysis of how we look at the positive correlation. Moreover, he stated that even if we know that there is foreign influence, we need to look at ourselves and ask what we are doing.

He further stated that we need governments that are responsive to the needs of the people. Law does not exist in a vacuum; it should be a living document that captures the realities of the moment but does not seek to entrench predated dominance by one party over the other. We need to have an indigenous conversation but we need to understand domestic politics before even beginning to translate international commitments. Mr. Chrysantus in responding to the question of timing in relation to Ethiopia stated that the issue is not a matter of the chicken or the egg. He pointed out that Foreign Direct Investment in Africa is not going to countries such as South Africa or Mauritius who have strong democracies but to places such as Equatorial Guinea. Hence, the logic is that one should use one’s natural resources as a bargaining chip since there is an increase in oil prices, increase in commodity prices and we stand a better chance to get what is rightly ours.
Ato Mohammed posited that globalization may be an advanced or emerging form of post-cold-war capitalism. But the discussion is not on how to destroy it, but rather on how to coexist with it in more equitable and acceptable terms. The course of action that our lawmakers locally, internationally, or regionally might have taken in the future maybe institutionalization of our response to the needs created by globalization. Ato Mohammed noted that in terms of age, law is older than globalization. But both of them are assumed to be defiant of definition. No one so far claims to have a conclusive statement on what the definition of law is and what the definition of globalization is. However, Mohammed mentioned that, if not theoretically, if not in a comprehensive and exhaustive form, we all know what law does in society. The same goes for the emerging faces of globalization and also for its potential threats and promises. Ato Mohammed mentioned that, globalization can at least be felt and perceived, but difficult to conceptualize.

He noted that it is also a discussion about the future of the law or the law of the future. The future is not yet born, but it has started to be born. Therefore, the law that regulates the future will be born either alongside the future itself or following it or it may also be a nurse that will deliver the new future. Ato Mohammed stated that one may not need to come after the other depending on what we identify to be law in its various forms. So, it is more theoretical and philosophical which involves the challenges in unpacking or uncovering all these conceptualizations.

With reference to what globalization has come to be, he looked at practical and more noticeable sources. He cited Joseph Stiglitz who argued that globalization is not necessarily bad; it could be good. But the argument is that even though it could be good, it has not been good so far. The challenge is to make it good in the future. So it has become an institutionalization of an insensitive relationship between the powerful and
the powerless and the ‘haves and have not’. Therefore, it seems to say there has not been adequate equity and adequate accommodation to the needs of those who may need to be accommodated.

Mohammed gave evidence from Africa, which is the most vulnerable region in the world. Here, he stated that in relation to globalization, the impression at NEPAD is as follows: ‘....in the absence of fair and just global rules, globalization has increased the ability of the strong to advance their interest to the determinant of the weak especially in the areas of trade, finance and technology’. Thirdly, he discussed the situational or circumstantial evidence to show globalization in relation to Africa. There is evidence showing that Africa’s share of international trade in the 1980s was about 5% by the year 2000. Two decades later, however, Africa’s share of the global trade falls to 2%. Actually in the year 2000, Africa’s total share of FDI was only about 1% of the total. Africa is the most populous continents next to Asia and probably the richest in terms of raw materials, accessible labor and market.

Ato Mohammed cited one of the famous critiques of globalization, Stiglitz, and mentioned that globalization could still grow towards being much better as negotiation is not complete and there is room for improvement. He noted that globalization can be a force for good. For example, the globalization of ideas about democracy and civil societies has changed so far the way people think about them. There is the movement of ideas, movement of technology and the like. Mohammed stated that for globalization to be more equitable, especially to the vulnerable areas of the world, the way globalization has been managed including the international trade agreements that play a large role in removing trade barriers and the policies that have been made, need to be rethought, reconsidered probably adjusted.

In other words, the rules of the game need to be revised in the way that each can be accepted to the powerful and the powerless to the poor and to the rich; to the global south in as much as it is accessible to the north. The impacts on the laws are very clear should such shift happen in globalization. There will be more equitable multilateral agreements and countries are then expected to adjust their domestic laws to more acceptable, more accommodating international standards. In such a situation, legislation or judicial reviews will not encounter a bottleneck to choose between perishing or accepting any rule imposed on them. That is, they would have a say in determining it. This is in a nutshell the expectation from the potentially or actually vulnerable parts of the world.
Mohammed stated that there is also a legitimate expectation from the developing world especially Africa and Asia with regard to the need to appreciate the job which needs to be done on their part. The expectation should be bi-dimensional. They should not only expect but also accept that the so called haves should claim some sort of adjustment on their part. Ato Mohammed mentioned the arguments held during the Cold War and presently about FDI in Africa. He mentioned that back then the issue at hand was preventing outsiders from taking advantage of the natural resources abundant in Africa and to establish full-fledged public control.

Now the issue is that Africa being marginalized probably because the situation has not been attractive for those who like to invest their capital. Mohammed noted that investment needs sustainable security. Therefore, international capital, investment that Africa needs badly deserves to see that the African situation is dependable. Hence, laws for example from African Union should not only be sensitive to the problems at home but also sensitive to expectations of others.

Mohammed noted that one of the things that ensure sustainable peace and security is democratization and good governance. Democracy should be then local interest, simply because one needs it for development as well as to endow one’s nation with sustainable peace, rule of law and everything good that could be aspired. Sometimes it should be appreciated that it is not only shifting the blame to others, even if others should be blamed for not having sensitive terms of negotiation. But it is also necessary to take the sensitivity towards oneself.

Mohammed affirmed that laws currently governing globalization should be adjusted in such a way that it should be adequately sensitive to the rest of the world. Meanwhile, those who need that equitability should also adjust themselves including laws locally, regionally and continentally to ensure that the situation is dependable for whatever one would like to get from globalization. The product of this, he added, will be a set of more equitable laws, more accommodating laws from both corners of the world.
Plenary Discussion

The following were among the issues, comments and questions discussed:

- In relation to exploitation and Africa’s being marginalized, a participant inquired how the East Europeans who have been promoting the idea are now integrated with EU and how this relates to our circumstances. Also, it was asked if this could relate to the relationship that we have with China.

- Talking about globalization and law which are two different things/entities, the importance of looking at the goals of these two entities was emphasized. The purpose of law might be to protect life, liberty and property whereas globalization may have the purpose of creating a new world order. Hence, looking at their respective purposes and relating them is important; the question raised the issue on how this might be translated to the case of Ethiopia or Africa since one of the effects of globalization on law is harmonization as seen with the European Union.

- Globalization has made its way all the way to the local customary law. Hence, the need to look at negotiation and settlement issues between the global and local forces when studying customary laws was stressed, as there are some global actors involved somehow.

- It was asked whether the shrinking of the globe into a closer community of nations is an opportunity rather than a threat.
Ato Mohammed dealt with the issue of China and globalization. He stated that the world has become indeed a global village; there is less intense ideological rivalry currently unlike the Cold War period. But China is economically powerful but it is difficult to be sure about the non-economic aspects of China. However, countries such as Japan for example are economically very powerful as well as relatively democratic in the political sphere. Mohammed stated that globalization has no single king that makes laws for it; law makers are everywhere hence, as the sum total of our world. The rules of the game are not determined by any single actor.

As some commentators are suggesting, for globalization to be in the best interest of everybody in our world which embraces community of people and community of states, it needs to be more equitable in terms of the regulatory frameworks that define our relationship. Therefore, it is not a question of defining law separate from life, neither regional, national nor international and it is there to regulate whether we recognize it as an explicit law or that it exists de facto just like customary law. Mohammed when talking about the harmonization process that has been going on in Europe remarked that this may be the future of Africa; either we are going towards harmonization as a way to respond to globalization so that we will matter more where we are unified and integrated. Africans should have a hand in setting international standards, with that our custom could be kindly adjusted to the international standard. Customary law is very important especially in Africa, there custom matters more. Therefore, it is a question of mutual accommodation which is the underlying message of this presentation.
Dr. Muller commenced his presentation by noting that in the present world, there are all kinds of network forms of governance emerging. These network forms of governance are addressing all kinds of global issues from child labor to the internet to aviation, mineral extraction, water management and other issues. Hence, the core question ought to be faced will be defining rule of law in such a setting. Dr. Muller asserted that Rule of law is a forum built in the context of the state. Therefore, there is a need to give a place for rule of law from the ongoing network forms of governances.

The presentation was intended to give a reflection on the future of law and of legal institutions. Thinking about the future of law and legal
Institutions, is in a way thinking about rule of law. However, Dr. Muller emphasized that the difficulty about this is that the future is unknown. Hence, there was a need to think strategically about the law taking into account the future. In other words, this method allows one to see things from different angles and also be a little more strategic, proactive and innovative in making laws that help the future; laws for stability, prosperity and a good way of living together. Muller asserted that lawyers can no longer just let law happen and allow legal systems to develop bit by bit as it goes.

In the world of globalization where everything is connected, thinking much more proactively not just about own country’s laws but about one’s laws in relation with other laws is essential. Dr. Muller stated the problem with letting law develop on its own because at the end of the day there is a risk of losing stability and having law not fulfill its functions. Therefore, the important thing will be to try and work with the law of the future. One way to look at it will be through the global future method with techniques that are taken from business, the military and economists. Dr. Muller indicated that the more stakeholders are involved the more successful this activity will be. It is also focused on actual social issues that need to be solved. The future method can in short be defined as find, understand, tunnel, unify, redo and execute.

Dr. Muller explained what the Hague Institute of Internationalization of Law (HiiL) has done in relation to the global legal environment and scenario building method for the future. To work with this method, it is important to identify the high impacts and high uncertainty factors that one will face. Muller indicated that when talking about the law of the future, you would mainly ask four questions: What is the main kind of ordering going to be, who is going to make it, how is it going to be made/who is going to enforce them and how are they going to be settled?

Dr. Muller said that, at HiiL, over hundred and fifty interviews were conducted with various legal scholars/experts/lawyers requesting them to write in four thousand words about the law and the future. About 20 workshops in many different places with different people were undertaken to identify the key high impact and high uncertainty factors when thinking about the global legal environment. The two selected were internationalization and privatization. Internationalization, as explained by Dr. Muller, is the sphere where more and more things are happening outside the context of the state in every single area of law.

The question here involved the status of internationalization of law in the future; i.e. whether it will continue or diminish. In the past 20, 30 years, it has witnessed high proliferation. But this does not mean that it will continue
to do so in the future. Dr. Muller also stated that privatization is the case where rules are being made outside the context of state in various aspects of law. For example, human rights standards are being applied by private companies. Likewise, there are various initiatives by private parties or strange networks on mineral extractions. The question therefore will be on public rule regimes versus mixed or private legal regime; is it going to continue or will the state take control like what happened in relation to the recent financial crisis in many countries?

Taking these two variables into account and asking the question whether they are bound to continue or diminish, Muller stated that we can come up with four scenarios which will show the different aspects of the future by the 2030s. These scenarios are given different names, which should not be taken literally as they were given just as a way to remember the stories underlined within each theme:

a) **Global Constitution:**

This scenario exhibits continued growth of international law and international legal institutions. Hence, rules and institutions can have a predominantly public nature. For example, the EU, under this scenario, can be expected to develop slowly but surely into a federal entity which is firmly based in law and public authority can be the future. Here, the UN becomes more powerful, and slowly the global legal environment will be where treaties and formal international agreements will be very important. International criminal court can become stronger. People are going to stay as they are now but if one has a serious multilateral issue, it will have to be settled through a treaty. Slow convergence of rule of law as we know it now which will be growing towards the new world. For example, the UN Security Council probably will be expanded to 20 or so members, an economic council than the informal G-20.

b) **Legal Borders:**

Under this scenario legal borders thicken and domination of state-made law within borders increases. Regional organizations emerge as a key part of developing legal borders. The UN becomes more and more irrelevant – universality as we know it and wish for will disappear. Different definitions of human rights for example in EU, in the Arab world and in some parts of Africa will prevail.

c) **Legal Tribes:**

The core features of this scenario involve localization along with the growing importance of private legal and governance regimes. The state loses
power; a very fragmented world emerges with different areas in which private regimes of compliance standards prevail despite a very weak state. According to this scenario, the world probably would be the most insecure because there would not be an overarching institutional setting. Some areas will probably work really well but some areas will be very problematic because there really aren’t coherent rules. Under the setting, there will be lots of plurality, no universality; and communities and the local will be very important. There probably will be no international trade and no multilateral companies; trade will be local.

d) Legal Internet:
This scenario demonstrates the growth of international rules and institutions, hand in hand with a growing dominance of public-private or even private governance mechanisms. Internalization continues and there is lots of room for private regulation. The state will still be functional but works together well with non-state entities. Parliaments can be less relevant; and accountability, under this scenario, might be regulated through a number of informal regulation and social media such as Facebook. Coalition of enterprises and civil society organizations will come together and adopt standards. For example, online consumer dispute resolution mechanisms which can likely materialize under this scenario might seem farfetched, but eBay even now for example solves around 6 million disputes online in a year. State courts are not needed for these issues. A justice client constantly looks for something that works, it is chaotic. In this world, one can shop for the best regime and also if justice clients do not like the regime, they can just get together and form new regimes. Under this scenario, there is less of universality.

Having demonstrated the scenarios, Dr. Muller stated that if rule of law is one’s strategy, the scenario toward ‘Legal Tribes’ should be avoided at all costs. He also observed that the ‘Global Constitution’ scenario is not something to be counted on whereas; one needs to be very creative in dealing with the ‘Legal Internet’ future scenario because we have to also consider whether or not we can do without the roles of judges or the parliaments. In relation to the scenario of ‘Legal Borders’, Dr. Muller raised the issues about UN and regional legal regimes.

He stressed that there is a need for good multilateral agreements on how to exploit natural resources in Africa. If these scenarios are true, is it then wise as a state or a civil society organization to count on the fact that one will forever have strong multilateral instruments as a way to deal or anchor some issues. This is because we need to know what would unfold in the ‘Legal Internet’ world. Putting all the eggs in one basket is not thus
recommended. If these are the four possible futures we may encounter, a state is not expected to pursue a strategy of a placing everything in the UN and expect the latter to solve most of the problems. If one considers the ‘Global Constitution’ as a strategy then, one needs to be very much aware that there are other things happening as well in ‘Legal Internet’ and also should devise legal strategies. Hence, Dr. Muller concluded that this is how one can start playing with these strategies for a better future.

Plenary discussion

The following questions and comments were raised after the presentation:

- Most participants remarked that scenario building and futuristic approach to the issues are very interesting approaches especially taking into account the relevance of the peculiarities of these strategies which are related to the characteristics of a country’s legal regime. One participant asked which scenario is a good one. A question was also forwarded as to what kinds of legal professionals are suitable for each scenario.

- Another question raised was whether these are the only scenarios and whether there can be tentative proposals toward dealing with these scenarios. It was also raised as an issue if we are going to make some policy choices in favor of one of the scenarios.

- The rationale in the timeframe of the scenarios, i.e., 2030 was asked as it is too short to envision the scenarios; and currently a consultation that is underway under the UN about post 2015 i.e. post MDG. In this regard, the participant asked whether the scenario builders have linked these scenarios with that consultation and whether they relate these scenarios with the ongoing consultations at the global level regarding the future we want.

- A participant pointed out that such scenario building exercises and their implementation thereof sound very expensive from an administrative law point of view. Moreover, the implications of these scenarios in terms of capacity building and organizational structure were raised.

- In relation to the applicability of these scenarios in the global south, it was asked whether it is fair and valid to treat them under the same scenario thresholds with the global north. It was asked whether it would be possible to foresee common scenarios for these two categories of countries which are at different stages of legal development and whether it is valid to try to forward tentative predictions on the trends of their journey.

While reflecting on these questions and comments, Dr. Muller noted that African countries can deal with the effects of globalization because they always found a way to live with all the different types of laws. The ability to
deal with different languages, customs and regimes is much more common here than in the western European world which does not have a diverse legal system but a very structured Roman law. Dealing with globalization will be chaotic in Europe.

With regard to the question whether these scenarios are the only ones, Muller replied that the tentative list of the four scenarios is not exhaustive. Dr. Muller stated that they have explored many future scenarios mostly from the US security agencies that make joint global strategy scenarios every year. One scenario, for example can tell us that by 2030 almost two third of the world population would live in cities; this will have a huge impact on law. Dr. Muller stated that the European laws as we know them started to emerge within the Roman City States. He stated that, when people started to live in cities, they needed more formal arrangements because they will borrow money or deal with each other in other settings; hence they need to have a more institutionalized system.

Dr. Muller stated that Privatization and internationalization were selected in the attempt to try and see scenarios that are directly related to law i.e. to single out things that really relate to the way the law works. Dr. Muller remarked that scenarios they help us in understanding the context in which we will be operating, and based on that one can take the desired decisions in light of the objectives that are needed to be achieved. It is a very systematic way of dealing with one’s context. He remarked that one should not choose a single scenario nor like or dislike a particular one. It rather involves writing down without judgment and trying to tell a story of what will happen if certain things unfold or otherwise, and leaving facts out will be untrue to the method. Preferences among the scenarios will be something that comes later also when encountering a bad scenario; one will now be able to come up with a strategy to prevent it from happening.

In relation to the question raised about capacity building and scenarios, Dr. Muller stated that there is a need to write up new scenarios with the relevant high uncertainty and high impact factors. Finally, when commenting on the applicability of these scenarios for developing countries, he suggested that one can take the circumstances of a ‘highly backward ’state for one’s advantage by looking at what went wrong in ‘the highly advanced’ states and change them. That is, when building a scenario for the future in underdeveloped countries, it is easy to take lessons from the mistakes of the developed legal systems; however, one has to systematically work through these scenarios.
Day 3

Address

**Law for Sustainable Development**

Rasmus Wandall (PhD)

Senior Advisor to the Director of Public Prosecutions in Denmark, and Associate Research Fellow at the University of Lund

Dr. Wandall started his presentation by pointing out that law really exists to the extent that there is a society and social behavior. Law presumes that there is a sustainable relationship between law and the people or the will of the people. Even where the will of the people does not dictate law, the law nevertheless has to respond to the will of the people somehow, in one way or another. If it does not, it will not be. This is a very classic position which can be found in all the enlighteners and philosophers. He emphasized that when the law becomes more distant from the people or parts of its people, it is challenged and it needs to respond somehow. The formal justice systems have to accept and invite the presence of alternative normative systems. This is why we talk about legal pluralism. It is because one of the legal systems is challenged, the State’s legal system is challenged. You can see this in every
country in the western world. And this is also why we talk about customary law, because the formal law has proved incapable or unwilling to replace it. But the law and its practitioners nevertheless want to include the public under its realm, its protections and its governance.

So everything we talk about, he asserted, is basically a tension between legal governance and the will of the people. It involves balancing between the public need for diverse response and the central law which needs issues to be solved by government. Wandall noted that we cannot find any principled solutions because the two perspectives are in many ways defined in face of each other and a principled solution cannot bring consolidation. He suggested that we will have to look on how practitioners handle cases, disputes and rule making to see how this balancing is negotiated on the ground and how solutions are found. He opined that between customary legal systems and other legal systems we are indeed looking for bridges or hybrids not just between customary laws and formal law, but between the many different structures of law that this country or any other country has. That’s what I would turn to now.

Dr. Wandall recalled that the title he was given to speak on is “laws for a sustainable development”. He inquired into what each component in the title means, i.e., “laws”, “for a sustainable” and “development”. Beginning with the word “development”, he asked a series of questions in an attempt to inquire the meaning of the word. Are we talking about economic development? Is it human rights? In which case what kinds of rights? Is it overall social prosperity? Or is it sheer governance or the will to decide power? What kind of development are we talking about and for whom? Is it national growth? Are we talking about small remote communities? Are we talking about men? Are we talking about women? Are we talking about Oromia, Tigray, Amhara, Afar or Gambela? He concluded by noting that it is a very big word and thus it is very easy to lose sight of the actual development we are talking about. This is a great uncertainty as to what development we are talking about, and that represents in his opinion a problem.

The same way, he looked at the words like “for” and “sustainable” in the title. He recalled that much has been talked about economic development, human rights and what kinds of law can sustain the extraordinarily important economic development of this nation. But if we look at the history of the last, let’s say 200 years, many different versions of law have been advanced in the name of economic progress and in the names of the rights of people; all the way from socialist models to capitalist models. If we did know what kind of law worked best in a particular society, he noted that there are still two problems that we must overcome. The first is that law has many
legitimate functions that have nothing to do with development; particularly economic development, while the second is that law is by no means the only social force that we have at our hands. Indeed in Western Europe and North America it has become quite customary to refer to the 19th century as the legal century and the 20th century as the economic century. And now, Wandall thinks it is too early to assign a name for the 21st century. He pointed out that this is not at all disregarding the law and development movement.

He thinks the law does not have to prove itself to any kind of development to pass the test of being relevant in any country today. We should simply be asking what kind of role law actually plays for various kinds of development, for various groups of people. So it is the link between law and development that should guide our questioning rather than a search for a good tool for development. What he means to say, he explained, is that the overly legal optimistic development agendas of the 1950s is simply too much. And on the other hand, the very pessimistic legal schools we found in much of legal anthropology and much of the law and society development that basically says that law is a myth and what we should look for is reality is also too much. Law is not just a social practice, it has a normative force. While we can use it for various ends, there are also many other things that we can use. So it is a balanced view so to speak. And this was really a big mistake in the law and society movement in the 1960s and 1970s that many went on board and clearly forgot that law is part of reality. They constructed it as something different from reality.

Dr. Wandall went on to talk about the last word which is in the title; “law”. He noted the positivistic or formalistic notion that law is the product of the legal process of law making. He contrasted this view with the legal anthropological view and stated an example given by Bachmann, one of the greatest anthropologists, who says that law is a body of legal rules and regulations perceived of as a totality and represented as a bounded symbolic universe by social actors and for which often, but not necessarily, a claim of internal systematization and coherence is met. Dr Wandall emphasized that the legal anthropological formulation is what makes it possible for him to accept that customary legal systems in Ethiopia are indeed legal systems. However we define law, he thinks it is very interesting to look at the functional attributes of law that all relate to a modern and formal conception of law like certainty, predictability, transparency, legal accountability, individual rights, solving conflicts, among others. He asserted that there are many of these things which we can certainly see in customary systems, but these are key attributes to traditional ways of looking at formal law.
There is a good old fashioned modern conception of law in a modern legal system which argues that law asserts to reduce complexity in society. It will increase certainty, social action and predictability in social behavior. Moreover it will carry the fundamental adherence to individualistic notion of uniformity and rights and be ultimately bound to the nation’s state, either by way of courts or law maker or legislator. Law is presumed to have a king. So whether we like it or not, these functional attributes are strongly formal and attached to western legal and political traditions, characteristic of the nation building that took place from the 16th to the 18th century. And from that follows a number of problems in his view in how we deal with this formal law and how we talk about law.

Dr. Wandall reminded the participants that he is not trashing formal law at all, but pointing to some problems in the way that we imported, in the way that we use it and hopefully opening our eyes to other things that we should also be aware of. The first problem, he noted, which is well described by many western legal scholars is that the formal modern law today gives indications of failure in many of its assumed functions. In common law jurisdictions, realistically there is very little access to adjudication; adjudication being the foremost part of any common law tradition. The same is with civil law countries. The backlogs are just rising again in any European country. People, in his opinion, do not know that they cannot take their cases to court for practical and economical reasons. So the very same countries take disputes to private arbitration to resolve them, and thus avoid state based law. Dr. Wandall pointed out that this is what creates a more or less autonomous domestic and international arbitration order, and as Patrick Glen, a comparative theorist, wrote “why any of these formal institutional forms should be exported to developing nations is not evident. They both appear radically unsuitable for any program of justice for the poor”.

The second problem he stated is that formal law is widely shown, but not necessarily, to provide predictability. He gave as an example titling laws around the world. Indonesia for example, actually created more legal pluralism than there was before. A third problem he raised in the use of formal law is that it is not the only alternative for dispute resolution. Private solutions, trans-national, international institutions are eating away the central status of the state in legal regulation. Yet another point taken from the book “The Idea of Justice” is that modern formal law projects entail a disconnect with the people. At first the focus on many of these formal modern legal projects is to get institutions right, rather than making sure that justice perceptions of the public are enhanced. So that creates a disconnect. Dr. Wandall also added that formal law presumes a very particular kind of public acceptance and public trust.
It is claimed, according to Wandall, that people trust these institutions because they are rule bound and that they are impartial or/and because they apply rules that are made and not because they know the judge. It is called rule-based trust. On the other hand, and very characteristic of Ethiopia, at least in rural areas, and characteristic of many other countries in Africa is that rule-based trust is not the dominant kind of trust. So he asked how we go about implementing formal legal structures in a setting where the construction of trust is radically different. It is a very realistic and honest challenge. He argued that it is troublesome to talk about formal law with these attributes. He asserted that this model is failing somehow in western jurisdictions and the alternative normative systems are emerging all over, eating away the state based version of formal law. It looks like formal law anyways, and strives from underlying traditions which comparatively are not present in Ethiopia and many other African countries.

According to Wandall, first, we must accept that the formal version of law based in the state in isolation has very little to bring about the changes that we are talking about during the conference. He believes that state law is here to stay for the foreseeable future and there will certainly be kings and queens of law for the future. But state law is comparatively weakened in western countries and presumes social conditions which are often not present.

Secondly, he remarked that the contrast between customary and modern formal law is a misleading dichotomy; a very misleading pair, because the formal law is injured and it has been sided by so many other normative and legal structures not based in the state, equally competing for the will and the response of the people like environment, criminal justice or any other area of law that we know. It is not balancing between two legal orders but probably between many more orders and in an increasing number of different situations.

So law should rather be laws because there are certainly many of them. It seems neither to be a problem or a solution, this condition of many laws, but it seems to be the very condition that we must work from. So Wandall believes that we are not faced with a dichotomy as we have discussed it. The same questions are raised in other countries around the world, developed or not, of finding institutional forms of rule making and conflict resolution that accept the condition of a plurality of legal orders as well as legal orders that are not limited by the nation state. In this plurality we need to find solutions that are responsive to the will of the people while maintaining, not legal unity, but any kind of legal unity.
The Future of Law and Legal Institutions in Ethiopia

Tameru Wondim Agegnehu, Advocate and Consultant at Law

Moderator- Ato Mebratu Gebeyehu, Consultant

Ato Tameru began his presentation by pointing out that the future course of law and legal institutions in Ethiopia as well as those who devote their lives in the service of the law only need the courage and wisdom with no fear in connection with their services. He noted that Ethiopia’s exposure to the glare of international attention seems to have been enhanced following the brilliant victory of the Ethiopian forces against the invading Italian army in 1896. It was after that historic event that foreign powers started sending resident diplomatic agents that started putting demands on Ethiopia in terms of meeting standards that were expected of the so called civilized nations.

As a sequel of that pressure, Menilik II of Ethiopia, signed the capitulatory Treaty of 1908 with the French Ambassador thus formally accepting the plague of consular jurisdiction that have served as harbingers of colonialism in many parts of the world. The treaty clearly stated that the arrangements provided therein shall continue to apply jusqu’a ce que l’empire d’ ethiopie soit en concordance avec les legislations d’Europe (i.e. until Ethiopia is in concordance with the laws of Europe). Ato Tameru stated that this clause in the treaty opened a Pandora box enabling all resident diplomatic missions in Ethiopia to take advantage of it through the most favoured nation treatment clause which was in those days a common feature in most diplomatic agreements.

This cumbersome legacy bequeathed to Menelik’s successors, as Tameru put it, was sternly resisted by Emperor Haile Selassie upon his victorious return in 1942. To allay the stiff objections of foreign powers and also to meet the standard laid for civilized nations, as the term was used in those days, Ethiopia embarked on a mission of adopting modern laws in pursuance of the prevailing governance theory of the 1960s, which, echoed the legal realists and social pragmatist concern of social engineering. The four codes on substantive laws and the two procedural codes, he asserted, are the products of internal resistance not to give a new lease of life to the
capitulatory treaty of 1908 and a stiff demand by the foreign powers to continue with the status quo ante. Most of these laws, like the Maritime Code, the Commercial Code, laws on obligations, laws on financial institutions, company law, a good part of the criminal law, and the laws on procedures, etc were laws that were adopted from outside lock stock and barrel.

Ato Tameru opined that some of the novelties sponsored by the policy of social engineering and pragmatism included concepts that are still waiting for the fullness of time to be applicable. Accordingly, the section on stock exchange in the Commercial Code, a good part of the law on bankruptcy, and the section on civil status in the Civil Code are good examples of such novelty.

The above notwithstanding, he noted, law reform to the rule of law is still a constant and pressing issue raised by donor societies against developing nations. Donor priorities in the legal domain have shifted from an early emphasis on legal education and legal reform to the general concept of the rule of law. As an example he mentioned that the World Bank, in its 1997 World Development Report recognized that the minimal state functions included providing public goods, such as law and order and property rights. The rule of law was put as an imperative and essential for establishing a stable, predictable environment conforming to formal rules rather than patronage, with the judiciary acting as a check on arbitrary state action.
With the advent of the Federal Constitution of 1995, Tameru continued, the Federal Democratic Republic of Ethiopia has taken strides towards relaxing the centrist policy of the former regimes thus devolving powers on the nine states compositing the federation. As a consenting member of the federation these states are invested with legislative, executive and judicial powers in the running of their internal affairs.

He emphasized that whether Ethiopian laws and legal institutions are capable of dealing with global problems is a very crucial issue because, we are not only living as states but also within systems of states. Globalization is narrowing the gap that used to exist thanks to advancements in technology, trade relations, diplomatic and similar factors. So he noted that sometimes matters that take place outside Ethiopia may result in an impact that the Ethiopian laws may be called upon to address.

He gave as an example, a case which was disposed of by a British court in 2010 and which involves the posting on the internet of racially inflammatory material by two British citizens; the content was threatening, abusive and insulting towards various racial groups. Even if the server of the website was found in California and the material was available for any internet user in the world, the two men were convicted on multiple counts of possessing, publishing and distributing racially inflammatory material under British law. On appeal, the two men contested the jurisdiction of the British court because the material on the internet site was in California and that none of the materials contravened any law of the United States. But the appellate court upheld the decision of the lower court by stating that the activities constituting the crime took place in England and the material was written, edited and uploaded in England and part of it was targeted specifically at the leadership in the United Kingdom. Ato Tameru suggested that as this is a typical case that could also happen in Ethiopia, our courts must have the ability and dexterity to interpret our laws without requiring additional law or legislative acts by parliament to handle such cases. Hence, he concluded, Ethiopian law must be ready to handle matters and it must keep itself abreast with judicial treaties to which Ethiopia is a party, such as, the COMESA treaty.

Ethiopia’s legal system has gone through a major overhaul during the past 20 years, he recalled. One of the major results of that overhaul has been the Federal Constitution of 1995 which stipulated for the formation of the federal system of governance, empowering nations and nationalities to administer themselves. But he opined that more needs to be done in terms of strengthening the judiciary and the legal system in terms of creating an environment that fosters positive development for the growth of jurisprudence in Ethiopia. To that end, he added, it is important that the
Ethiopian legal system forge a working relationship with the neighboring countries within the context of COMESA, and other bilateral and multilateral treaties.

As he noted, the world is, so to say, shrinking from within and without by the day: from within, where national interests enlivened by common interest and common culture calls for harmonization of national laws, and from without, where political and economic relations between states move in a direction of economic and political integration. The FDRE Constitution envisages a composite legal system co-existing together within the federation in such a way as to be responsive to the needs and aspirations of respective nations and nationalities. But, he continued, more needs to be done to promote common factors to ward off tendencies that work against this trend. One solid panacea for strengthening national cohesion, he recommended, is to intensify the legal penetration which goes hand in hand with the availability of basic infrastructures such as road, electricity, clean water etc. Ethiopia fares poorly on this score, although the government is making efforts and working with donor organizations to make life better.

Tameru recalled that traditionally the role of the legislature (parliament) consists of passing of laws, examining and challenging the work of the government (scrutiny), enabling the government to raise taxes, and declaration of war and/or state of emergency. These roles are reflected under Art 55 of the FDRE Constitution. The implementation of laws and policies adopted by parliament falls within the executive and judicial organs of state power and each actor is expected to discharge its duties independently of the other within the sphere of its authority. As a result, the direct role of parliament in the implementation of laws and policies is legally curtailed. But as he noted, recent trends in global developments have challenged the traditional seclusion of parliament in certain areas and have called for parliamentary active role in matters relating to poverty alleviation and the attainment of the MDGs. This direction seems to be consonant with Article 55(10) of the federal constitution and accordingly there is room for the federal parliament to play active role in matters relating to development strategies to effect parliamentary oversight of state policies on foreign aid as resolved by the International Parliamentary Union at its 17th Assembly in Geneva, in October 2007 within the context of the Paris Declaration of 2005.

One of the major landmarks of the federal constitution of 1995 is the creation of a composite state structure with nine states composing the federation. The FDRE Constitution defines the powers of the federal and composite states, in terms of the legislative, executive and judicial powers reserved for each. The Constitution states that all sovereign power resides in the nation and nationalities and peoples of Ethiopia and the Constitution is
an expression of this sovereign. Implicit in the above is the truism that the FDRE Constitution itself leans towards harmonization encompassing legal and economic matters. But according to Tameru, laws or institutions alone are not sufficient to either effect or maintain harmonization much less guarantee the good life. Law is not an ultimate end *per se* but is of an instrumental value. The human factor is equally important. Good laws alone are not sufficient to bring about the rule of law either. The rule of law is often subject to external assault and abuse. He recalled a remark that the rule of law bakes no bread, it is unable to distribute loaves or fish as it has none. Nor can it protect itself against external assault, yet, it remains the most civilized and least burdensome conception of a state yet to be devised.

Ato Tameru concluded by stressing that it is one thing to enact good laws, quite another to apply them and that the commitment to enact good laws must be matched by the commitment to resolutely apply them, and to do that all hurdles purposeful and disguised must be removed. He wished or hoped that is where we are heading.

**Plenary discussion**

- A participant said that some of the novelties which were part of the modernization process are not implemented yet, like the law of bankruptcy, stock exchange and few more others. That by implication means that we are fine with all the other modernization process, which the participant mentioned has few reservations on. In his opinion the research that is emerging seems to indicate that a big part of the modernization process did not work and could not be implemented. As an example, he mentioned that Oromiya has its own adoption schemes (*gudifecha*).

- The formalities, process, essence and purpose are completely different from what the Civil Code stipulates about adoption. John Beckstrom and his colleagues did a small survey about 10 years after the adoption of the Civil Code and found out that the implementation remains.

- The presentations the day before by Ato Aberra indicated that many of the nationalities in Ethiopia are still handling criminal cases based on their traditional understanding of criminal justice. With regard to law of successions, Benishangul has a different legal system and people do not seem to use the rules in the Civil Code or the Commercial Code. If we go to Merkato, for example, people are administered by traditional rules; if there are conflicts there are traditional mechanisms which will step in. Hence a question was raised whether we are not having a problem in the implementation of a big part of that legislation. Secondly, the presenter mentioned that we should intensify legal penetration through construction.
of roads and other infrastructure. Of course which we need to have them to attain development; but, the participant questioned if construction of roads, schools and so on would ensure penetration of those legislations. He stated that he believes there is a fundamental rift in the understanding of many people who seem to think that the values in the civil codes, the values in the procedural codes and so on are alien to them. And he asked the presenter whether he thinks constructing roads is the only way out or if we should look for fundamental solutions for this problem?

- A participant pointed out that the presenter seems to suggest that laws are to be applied, but he asked why laws have not been applied. He added that laws are usually reflective of the needs of a society. If appropriate institutions are put in place, the likelihood is that the law is going to be applicable. But when we come to the issue of the existence of conflicting demands, international and local, he asked how we go about reconciling the two and at the same time make our laws responsive to the needs of the people?

- Another participant recalled the presenter’s discussion on the future of law in Ethiopia from international perspective or global developments, and asked about the presenter’s views regarding the place that customary laws should be given in the future of Ethiopia? It was recalled that the presenter has said Ethiopian judges, in the future, need to use existing laws in order to resolve cases similar to the British case. He asked if the presenter thinks that internet, as a different form of media, is something the normal rules under the Civil Code or under the Civil Procedure Code could govern appropriately. Looking into conflict of laws, the participant asked if the existing laws in Ethiopia would give us enough answer and he thinks adopting new or additional laws would be important.

- It was also asked as to how we can make the existing laws compatible with the pace of fast global development, especially technological development, if we are to depend on existing laws only.

In response to the questions and comments, Ato Tameru stated the need to take very important landmarks into consideration when we look at the laws that we have today and the laws that we think should be applicable. He indicated the questions that should serve as starting points to address these issues by asking questions like: what were the agents? What were the philosophical backgrounds? What were the political considerations that led to the enactment of the laws that we have today?

He recalled that the 19th century was a period where nations were supposed to adhere to certain standards, whether they liked it or not. It was a period of extra territorial treaties. Treaties that imposed on the so-called uncivilized nations to adhere to standards that were consistent with the
principles of ‘civilized nations’. He recalled the textbook of international law by Oppenheim that was published in the 1920s, where it was stated that countries like Ethiopia, Persia, Thailand and China were non-sovereign states because these countries were subjected or pressured to accept a treaty that was known on those days as capitulatory; meaning a treaty that admits consular jurisdiction, a right for consuls to apply their domestic laws in matters affecting their subjects or citizens.

According to Tameru this was attempted in Ethiopia as far back as 1849 when the British government using Plowden as a consul drafted a law and sent a person to persuade Ras Ali and then Emperor Tewodros to accept a treaty that gave judicial ability to a British consul that was not residing in Ethiopia. The king resisted accepting the treaty and various factors led to the famous battle of Meqdela; and the draft treaty was not signed. Then came the battle of Adwa and the Italians were crushed. Ethiopia captured the attention the west and they started sending diplomatic agents one after the other. They also put up their own demands by saying that the country lacks laws that are up to standard for civilized nations hence they should be able to apply their own laws in matters relating to their citizens or subjects.

Emperor Menilik agreed to establish a modern system of government, like the Ministerial structure in 1908, but that was not enough. He went one step ahead and said that the Fetha Negest would be applicable, but the Fetha Negest was limited in scope and that was not enough either. They said that he has to agree to accept the application of modern civilized laws, and he agreed. Tameru compared this with a Pandora’s Box; which means every diplomatic agent and diplomatic treaty signed during the period contained a very contagious clause which stipulated that an advantage or a right given to a certain diplomatic power will apply mutatis mutandis for a non signatory diplomatic power; and that was the so called most favoured nation clause.

These were the results, as Tameru put it, that pushed countries like Ethiopia to agree to a sweeping modernization of their legal system. This continued until 1942 and in the 1960s. He thinks it is easy to make judgments in retrospect disregarding all these factors, but the factors were that you will have to either accept or agree to extraterritorial treaty. He added that there are so many examples to push this point further. In Latin American history, he continued, the famous Calvo clause was something that was wisely crafted to resist US request to apply its laws within the internal affairs of Argentina or Chile. Hence he noted there were reasons to adopt those laws.

According to Ato Tameru even if these laws may not fit the standard that most nations find themselves in, the fact that some of these laws have
been very useful cannot be disregarded. For instance, laws on contract are almost applicable universally everywhere; laws on commercial organizations are being applied, although imperfectly and laws on criminal law, by and large. He reminded the participants that these standards or facets were very important for a country to be considered as ‘civilized’. He agrees that there are certain impositions, but the conceding nations did not have the alternative at that time other than to adopt modern laws.

With regard to the future direction, he stated that if we overstate the role of customary laws in total disregard of international realities, it means that we are heading towards an isolationist policy and that may not be good for our development. Definitely, the world is moving to one direction. We have steadily growing inter-connections, and there is the need to find some form of compromise. He acknowledged that it is not going to be easy to find a quick answer for all that, but he noted that a balance should be struck.

In response to the comment raised on legal penetration, he stated that there are close to 2000 (two thousand) lawyers in the total population of 85 million. Despite that however, he added that our young lawyers are still looking for jobs and we may perhaps need to revise our legal education policy. He expressed his belief that this can be attributable to the role of the government as the biggest employer in Ethiopia, rather than the private sector playing the leading role in this regard. According to Ato Tameru, this requires factors such as infrastructure which can intensify legal penetration and may even deeply impact issues pertaining to customary law.

Ato Tameru noted that the rift between the national and international is definitely very important. He thinks we cannot live in isolation and we live not only as states but within systems of states and there are international interactions going on continuously and when we enact laws these laws will also have extraterritorial applications; and definitely the harmonization process, internal and external, is a reality which we cannot afford to neglect.

While reflecting on the internet case, he stated that the law, according to some, has elasticity. And the ability to stretch that elasticity is dependent on the ability of the judges to apply the law. We can limit it by narrow interpretation, or we can take it to its limit, subject to the caveat that there is a limit to it, i.e., not to break it. He thinks the case he read is a case that is likely to happen in Ethiopia and that there is a legal basis for our judges to arrive at the same conclusion as the British judges. To do that, he emphasized, our judges must have the exposure to international realities.
Dr. Menberetsehai’s presentation, as he put it, was a continuation of the presentations made during the previous sessions. He stated that his presentation will only focus on some aspects of law and development which he believed are central to the understanding of the role of law, institutions and actors in the process. He outlined three different but interrelated perspectives, namely; the past, the present and the future against which the subject matter can be addressed.

As a prelude, Dr. Menberetsehai made four preliminary remarks:

- Discussion about law in a pluralist society like Ethiopia is bound to invite controversies about the definition of law, legal institutions and other related issues.

- Our approach towards definitions enhances or narrows the understanding of our roles which are supposed to be played in the community which we are supposed to serve.

- The approach we have adopted so far is the positivist one which, he believed, has constrained discourse about the overall picture of the environment under which we operate.

- This constraint is reflected both in the past and the present, and is likely to continue in the future in spite of overwhelming evidence that it should not.

Dr. Menberetsehai noted that our understanding of the past has been severely limited to analysis of only the formal aspects of our legal system. He admitted that this is not bad, but he thinks understanding Ethiopian legal history also demands understanding the other aspects of our legal history, because every part of our legal history is not necessarily written. And unless rectified, that understanding of our history will definitely affect our present, and if we are wrong in understanding the present then we will definitely make a mistake in analyzing the future. He stated that the Ethiopian history usually travels up to the incorporation of the much referred Fetha Negest,
highlights the achievements of Menilik, the modernization efforts of Haile Selassie and the few pseudo-socialist additions/subtractions of the Dergue. With some exceptions, other aspects of the Ethiopian legal system are rarely discussed and are actually excluded as non-legal and as irrelevant to the analysis of Ethiopian legal history.

He indicated that traditional institutions, customary institutions, norms, processes legal actors are usually either not mentioned or mentioned in passing. They are not usually the central theme of discussion on legal institutions. He thinks this analysis of our legal history affects our past, our present and is likely to affect our future. He noted that there are many people who think that discussing customary law is more of anthropological interest than a legal one despite the fact that much of the Ethiopian population is regulated and disputes are resolved by these institutions. This gives the impression that the history of law and legal institutions of Ethiopia and its peoples begins much more recently than its overall history, which spans over many centuries.

According to Dr. Menberetsehai, our tendency to look only for written laws has made us ignore the bulk of the system under which the Ethiopian body politic has been governed for centuries. Some have even asserted that Ethiopia had no laws, legal institutions, concepts of justice etc before the adoption of the instruments, most of which were importations from outside. However, one needs to ask how Ethiopia was governed in terms of things
like inheritance, trade, royal successions, marriages, crime etc., without law and legal institutions. Menberetsehai noted that we always had relatively very well developed systems even before the adoption of our legislations in the 1960s, but the problem he sees is our attitude towards what law means. The modernization process of the 1950-60s was anchored on an attempt to create a unified system out of a pluralist one, and was supported by search for a readymade legal system, rather than an organic growth from within. Instead of giving some thought about the prevailing circumstances in Ethiopia, the modernization process in the country ignored the reality on the ground, because of the philosophy that was followed then that Africa will only develop if it adopts readymade laws from the west.

He conceded that there were some attempts to incorporate customary laws into the formal one, but noted that many of the traditional or informal laws and institutions were outlawed by the Civil Code and Civil Procedure Code, because the primary interest was to introduce formal modern institutions and expect everyone to come to these institutions to resolve their disputes. Menberetsehai stated that this inclination to pick a readymade law to transform the society added another layer to the already existing legal framework of the country. The expectation was that once these laws and legal institutions were transplanted, Ethiopia and its people will be transformed; which turned out to be wishful thinking. He explained that Ethiopia always had a legal framework at the bottom which could not be erased by legal engineering, hence the modernization process in the 1950s and 60s succeeded in only adding another layer to the already existing layer, a scenario which continues even today.

At the present, he recalled, Ethiopia has a federal constitution that has features of its own, but shares the basic values of modern constitutions and sets out minimum standards to what we can do. That affects many of our exercises that should affect many of what we plan to do in the future. The fact that we have a federal constitution also affects law, legal institutions, legal actors, it should also affect on how we think about these things. The Constitution has as its aspiration the achievement of a steady level of growth to meet long overdue economic and other demands of its peoples, in addition to respecting the diversity of its peoples while attaining their common destiny at the same time. It has adopted a different approach towards customary law, good governance, grassroots participation, the protection and enforcement of human rights as well as the promotion of the rule of law and ensuring access to justice.

He noted that the Constitution has given some space for customary law in some cases, although there might be some problem with regard to criminal justice. He argued that justice is part of culture of nations and
nationalities and culture includes dispute resolution, including criminal cases. People should be entitled to handle criminal cases through their traditional institutions. He questioned how else we could ensure grassroots participation by denying the existence of those institutions and traditional values through which the people participate.

He continued by stating that Ethiopia is involved in a number of economic integration schemes which may be much beyond the interest of customary justice. The country has also vowed to become a disciplined member of the globalized world by signing a number of international treaties. Dr. Menberetshai emphasized that all this takes place in a context that has its own nuances as there are different layers of legal systems, norms, institutions, actors in almost all aspects of relationships including criminal law.

Pluralism in Ethiopia is accompanied by a different understanding of some of the basic concepts in the administration of justice, such as justice, liability, remedies, sanction, roles of actors etc., he underscored. He pointed out that there is a kind of competition between the different institutions particularly between the formal and the informal, with each having its own virtues and problems. The informal law and its institutions are resilient, vibrant and perhaps considered more effective by the local communities and may be considered by some as legitimate than the others. In many places people do not even have the other options, as he put it, making the informal system the primary and not the alternative as we call them. Formal laws which do not reflect the values of the community are also being rendered ineffective through a sophisticated boycott system.

Dr. Menberetsehai recalled, this is not peculiar to Ethiopia. Many countries in Africa have done the same to reject that colonial imposition of western values. On the other hand, he claimed that the formal institutions are also vital to achieve many of our development aspirations, although their reach is currently limited. Meanwhile, the rate of legislative enactment and institution building is increasing at an alarming rate.

Given the scenario outlined above, Dr. Menberetsehai stated that we need to ask what we need to do to make law an instrument of development. He thinks this can be viewed from three perspectives: the global, the national and the local; each of which requires a different level of mix of the values from the imported and the indigenous. Both the indigenous and the transplanted laws can be used as instruments of development and in this regard we can take a more realistic approach that tries to shape the future from materials made of imported and local fabric, so to speak.
According to Dr. Menberetsehai, the domain of some laws is affected by extraneous elements; in others the indigenous system may be inadequate. These include areas of law that have to do with our relationship with others, such as trade, banking, insurance, investment, and some aspects of criminal law. The role which law and professionals and institutions play in these areas may be pretty much the same as in the past, but while continuing our current efforts, he opined that we need to be open to better ways of doing business, to improve efficiency, access, trust, etc.

He emphasized that there are however many areas of law where we may need to challenge the current mode of operations, especially since the federal nature of our system is an opportunity to have this in place, as Regional States have fairly wide range of powers in law making and implementation of federal laws. He suggested family law, succession, tort, procedural rules, criminal law, and many other aspects that are part of the people’s culture must be given some space in the administration of justice. This would, however, require that legal professionals take a different view about law, legal institutions, etc. He thinks this would help in easing the tension that currently characterizes our system. It will gain the trust of the people at the grassroots. It can create greater access to justice and make better development partners of the people whose traditions we recognize. This will also give a better opportunity to address those aspects of informal justice that make us nervous. This may be difficult but should be attempted to ensure that law, legal institutions and all other actors fulfill their proper roles in development. Dr. Menberetsehai concluded his presentation by suggesting that law making, law enforcement and legal education should take this into account.

**Plenary Discussion**

Some of the comments include the following:

- A participant recalled that when he was a public prosecutor and used to bring a charge before the judge, members of the community used to come to him and his colleagues to tell them that they have discussed on the case and have solved it based on their customary laws, hence recommending the closure of the case pending before the judge. But he remarked that they did not have the option to accept their request because they had to rely on the formal law. Even when he was a judge, he further recalled a time when elders of the community came and gave him a written document which stated that they have dealt with the case and have solved it themselves. But he remembered that he was not in a position to tell them that they were right. Hence he acknowledged that
giving room for customary law is vital for Ethiopia; not only in civil matters but also in criminal matters as well.

- The participant stated that because of the positivistic mindset of nearly all legal professionals there is resistance to change, and asked what we can do about these professionals whose mindset is still resistant to accommodating the change that we are looking for. Secondly, he asked what we can do in the area of legal education if we are going to have more legal professionals who are going to be helpful in addressing these local demands by accepting the importance of customary laws and institutions.

- The participant asked the presenter to say something on the seeming contradiction between our western adopted laws and our Constitution which recognizes our diversity.

Dr. Menberetsehai started his response by expressing that change of mindset is a beginning of all changes, although it is not something that can be done so easily. Starting to ask questions, in a forum like this, is a beginning. He mentioned that interestingly enough, many more professionals are also emerging in other African countries that think likewise. There is the challenge related with the legal thinking that was implanted in our brains in the 1950s and 1960s. He thinks we need to shade our leaves.

About legal education, he said it should play a central role as that is where we plant the future trees. He admitted that he does not have all the answers, but he thinks a lot more needs to be done with regard to legal education. He underlined that we have to be able to understand our environment and be able to challenge some of the already existing paradigms and theories. He also underscored the need to come up with a theory that suits us or to tailor a costume that fits us most.

Finally, he noted the endeavor to make sure that legislation responds to current demands. In the process of trying to correct certain mistakes, however, he emphasized, we should be very careful not to make other errors in the process. With such cautious pursuits he thinks something can be done.
CONCLUDING OBSERVATIONS

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Dr. Menberetsehai invited the participants to advice the JLSRI on how to proceed further. He recalled that various questions and debates on a number of areas were raised during the Conference and asked how we can push it forward to make it meaningful. He reminded the participants that the conference was not convened as a mere academic curiosity but with a view to contributing towards making a difference and generate ideas in order to influence policies.

Remarks made by participants:

- A participant remarked that legal pluralism is not only an issue raised in rural areas but also in urban centers and by formally trained legal professionals. As an example, he mentioned, legal service providers at the community level, under women’s affairs desks, public prosecution office or child and women protection units at the police stations who mostly resort to alternative dispute resolution mechanisms. He stated that women claim maintenance from husbands or partners, and will come to legal service providers for legal assistance. What normally happens as a matter of normal formal procedure, as he explained it, includes an application written for the complainants so that they can take it to the court for litigation. But that will not bear fruit in most cases and such issues as maintenance are amicably resolved and become effective if they are handled through alternative dispute settlement mechanisms. In urban centers, in civil cases such as maintenance (family matters), formally trained legal professionals and the legal service providers resort to “shimgilina” which is an informal dispute resolution mechanism, he noted. He thinks this as part of the legal pluralism in Ethiopia. Even in criminal issues, he added, there are a number of cases handled outside the system using alternative means. He mentioned a report of the public prosecution and Addis Ababa Police, in which there is a column which states the criminal cases resolved amicably using alternative means. Hence he pointed out that in urban centers some procedures that are found to be effective are used alongside the formal legal regime. He
thinks this should be encouraged; but in order to do that we should carefully study how these things are working; to what extent they re-enforce the formal justice system; and what the role of the different legal actors should be, so that the informal and formal re-enforce each other and bear fruit.

- According to one of the participants, the most important outcome of the workshop regarding customary laws is that, it may help lecturers to make use of customary laws as cross-cutting or mainstream issues in the various courses they teach. The other thing he noted is that we are now in the era of economic integration which is being followed by harmonization of laws, like contract law, commercial laws and others. So, in this scenario, he thinks it is a bit difficult to get back to customary laws to come up with rules that can govern our contract. This era of economic integration is strongly tied with foreign direct investment; and because of this he strongly recommended that we should technically and purposefully choose areas of the law in which we can apply customary rules.

- Within the past three days, a participant recalled, a lot of assignments have been taken by the participants, especially on how to integrate the formal and informal legal system so that we can maintain the real objective of the law and its role in the developmental aspect of our country. But in his view for these objectives to be realized law schools and legal education have a great role in the realization of such kinds of commitments. However, he noted, as the practice clearly indicates, the legal education component is getting highly marginalized and is not currently getting adequate attention in the legal reform program. He thinks law schools are being expected to sit idle, and the tasks that law schools are expected to perform such as preparing national curriculum and textbooks are for reasons he does not understand being given to another institution. Hence he asked how law schools are expected to maintain the ultimate objectives which have been discussed during the previous three days, in the absence of integrating the legal education with that of the legal practice and the whole general legal reform document. So he suggested it would be nice to hear few words regarding the future fate of the legal education and law schools in Ethiopia’s legal system.

- Another participant said that law schools are very important. The second thing he emphasized was that though we have said that we know what is to know about customary systems in Ethiopia, there are two caveats. One is we actually know very little about their interactions and secondly, compared to most western countries, he noted, we actually know very
little about how our formal institutions work in this country on the ground. There is a great deal of empirical work that is needed to feed into, he thinks, effective strategies. Thirdly he remarked we need to ask the people what it is that drives people to trust institutions, to find them legitimate, to find decisions fair and drive them to go to institutions and use them. Recalling that the JLSRI has done so many surveys, he remarked there are still many more that have yet to be done. We actually really know very little about these drivers. So we need to know that. The last thing he mentioned is that there is already an enormously big institutional structure of lawyers, practitioners, prosecutors, police officers etc… and they should begin to look very much towards how individual legal practitioners can be responsive; not just to a legal dogma but to the needs and requirements of the citizens being served. In this regard, the citizen served may be a victim, a defendant, or an offender. He concluded that we would have to look for those kinds of structures of responsiveness.

A number of important things have been discussed, but the point is how do we turn them into action or take it forward, a participant stated. He thinks we need to come up with a list of complete actions that we can take in the years to come. He suggested for example those who came from various universities and research institutes can really take up some of the topics and further research and continue with the discourse. He indicated, when we speak of local demands it is about improving access to justice to the local community. The other point he raised is that we need to continue having these kinds of conferences or workshops at least once a year. He also mentioned that the other important point is how to reach and influence the policy makers on the issues raised during the Conference. If an agreement can be reached on the content of the traditional justice system in view of implementing access to justice, the issue of how to really reconcile these traditional rules with national and international norms is a question, as he put it. So this is really very important, he noted, because the argument against customary laws is always that they are inadequate in terms of meeting these standards. Hence, he concluded, the challenge is how to ensure the consistency of these traditional rules with the international standards that the country is committed to fulfill.

A participant emphasized that the first thing to do is identify our stakeholders. Government and legal professionals have to be aware of the limitations of the formal legal system. And this can be achieved if they hear the limitations from the people who are being served with the formal justice system. Secondly, he noted that the potential value of the
customary justice system should also be heard from the people themselves at the grassroots. Hence, he suggested that we need to have a broader national Conference whereby all these groups are involved and can air out their views as to the formal justice system. He finalized his views by expressing that further research needs to be done.

- A participant said that she in the past few days has been exposed to different ideas. The participant thinks there is a loose consensus that has been reached over the previous few days. The first is none of the speakers or the audience wants to embrace the extreme position of taking only customary law as the legal order that should be in Ethiopia. And the second consensus, in her opinion, is that legal professionals have a major role to play in the pursuits of development. She stated that one of the tools that can be used, in addition to what previous commentators mentioned, is the scenario analysis approach proposed by HiiL. She thinks it is a worthy exercise that we can undertake to see what kind of scenario can unfold in the next few years and which legal scenario will bring development in Ethiopia thereby crafting strategies accordingly.

- A participant noted that customary law is very important, although it is also very important to strike a balance. As to the modern law, he reminded everyone that once we have adopted western laws, it is no longer a western law but the law of the land and we need to take note of that. As to the way forward, he thinks, it is very important to modernize our law. Our economy is growing and if we do not support it by law then there may be a problem. He recalled Ethiopia has no codified evidence law and administrative law. Till now, he mentioned, we have only revised our criminal law and the other laws remain to be revised in order to make them compatible with our constitution and update them. Therefore, organizing these kinds of conferences is very important in order to take best practices from countries that have performed very well, he acknowledged. He also emphasized the importance of bringing customary law to our formal laws, because the problem with customary law is the lack of uniformity. As a multi ethnic country, he noted, a certain custom in a given community may not fit another community; hence there is the need to be selective.

- Another participant thinks that JLSRI should make an arrangement whereby specific research is conducted on different customary practices. Legal education is the most important subject when one talks of the research, formal law or customary law. But he recalled that customary law is only given two credit hours as a course at the Universities. Hence he thinks we need to invest a lot of resource to study specific customs
and we need to have more scholars who research on customary laws. He noted that such research can influence policies.

In his concluding remarks, Dr. Menberetsehai said that suggestions, comments and concerns have emerged in the last session which can be classified into different clusters. He opined the most important thing that has emerged is that a lot more remains to be done on this subject. He recalled a conclusion has not been reached on anything but important points have been raised, which need to be pursued by scholars, policy makers, research institutions and legal education. He emphasized that once we agree on the pursuit, the lines of pursuit can be developed along different lines: proposal of similar conferences can be one; further research in legal education can be another. He believed we have learned a lot and have picked a number of important things and have taken lessons through which we will check our thinking.

Dr. Menberetsehai assured the participants that, as far as the JLSRI was concerned the Conference was just the beginning and not the end of the process. He promised to undertake similar activities in the future. Actually the whole idea, he revealed, was to have a law and development series by picking one theme at a time. He pointed out the need to be more cautious in the future given the constraints of time the papers presented faced, since more time would have given the opportunity to raise more questions. In any case, he continued, encouraging words from the audience give the JLSRI more energy to move faster in this direction. He asserted that there are many colleagues in the room on whom the JLSRI can count on; and the Conference benefited more not because of the JLSRI but because of them, many of whom are not members of the JLSRI. Hence he called for their partnership, friendship and assistance (technical and financial).

With that note he thanked the participants for their active participation. He recalled that every conference usually gets fewer participants towards the end, but this was not the case in this Conference. He thinks that is an indication that everyone was really interested in the subject matter and that it was a fruitful one. He also thanked the paper presenters who in his view presented excellent but different papers. He thinks that is the beauty of such gathering where everybody is given a chance to know that there is a different way of looking at the world. He also thinks no one came to hear the same monotonous views, but to hear about the different views on law and development.

He thanked HiiL for joining the Conference on short notice. He also thanked them for offering to help the JLSRI in the future and assured them that even if they work at many other legal systems, Ethiopia would be where they will have their highest impact. Dr. Menberetsehai also thanked UNDP
for their financial support, technical assistance, and the advice they have provided on how the Conference should be organized. He hoped that the representatives will convey the message that their partnership is also needed in the future. He stated that he knows UNDP’s very important partnership in development endeavors in Ethiopia, and also hoped to see UNDP involved in research and administration of justice as well.

Finally, he pointed out how proud he was of his colleagues at the JLSRI for the excellent job they have done, and declared the session closed.