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Original Article

The Need to Expand the Space of the Ethiopian Legal System to Accommodate Non-state Law: Exemplifying Non-state Law through the Gada System

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Abstract

This article aims to examine the space of the Ethiopian legal system to accommodate non-state law in general and the Gada system in particular. It is an accepted truism that the development method of a given state law determines its space to accommodate non-state law and its efficiency. The development of non-state law, like law in the Gada system, is evolutionary, while Ethiopia's legal system has developed through a revolutionary method. Moreover, a state law that provides good space for non-state law and is developed through an evolutionary method is an efficient than one without fair space for non-state law and developed through a revolutionary method. Scrutinizing the space of the Ethiopian legal system to accommodate non-state law reveals that it has not yet provided justifiable space for non-state law to date. As a result, the researcher, by employing a doctrinal research method, argues that the Ethiopian legal system must be revised in a way that allows state and non-state law will be implemented in a way that complements each other for efficient and effective protection of a common good.

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1. Introduction

Darling states that if you wish to control mosquitoes, you will learn to think like mosquitoes.[1] In the context of the theme under discussion, the Darling statement could be construed as exploring how indigenous knowledge helps to know and resolve social problems. Given this, it is an accepted fact that the development method of a given state law determines its space to accommodate non-state law and its efficiency. As will be discussed, the development of non-state law, like law in the Gada system, is evolutionary, while the development of the Ethiopian legal system is revolutionary. Moreover, a state law that provides good space for non-state law and is developed through an evolutionary method is simply and efficiently implemented than one without fair space for non-state law and developed through a revolutionary method.

Scrutinizing the space of the Ethiopian legal system to accommodate non-state law reveals that, even though there is a difference of degree in (dis)harmony in different periods, the Ethiopian legal system does not provide justifiable space for non-state law to date. As a result, the researcher argues that the Ethiopian legal system must be revised in a way that allows state and non-state law will be implemented in a way that complements each other for efficient and effective protection of a common good. As well, the Ethiopian laws, including the FDRE constitution, must be amended in a manner that allows the applicability of non-state laws by state courts.

To do so, the rest of this article is divided into five sections. The next section makes a brief discussion on the concept of state and non-state laws in general to lay it preludes for the ensuing sections. In section three, the article attempts to articulate the conceptual framework of state and non-state law in the Ethiopian legal system's context. It addresses these laws' development method and their basic concepts. Section four examines and attempts to contextualize the nexus between the state and the Gada system in the Ethiopian legal system. The final section provides the highlights of the concepts and arguments raised in the article, and ends by forwarding some recommendations.

2. State Vis – A – Vis Non-state Law

It is generally accepted that the Gada system is treated as one continuum of indigenous knowledge, while it is broadly argued that it is the ancient democratic system of the sub-Saharan African societies, particularly that of the Oromo people. This is congruent with Hinz's observation that there is no African country that is free of African traditions or free of at least some elements that belong to Western modernity.[2] Needless to state, the Gada system is one spectrum of indigenous knowledge which has elements of present Western Democracy and defines Oromo people in different perspectives.[3]

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[1]Samuel Darling as quoted in Benjamin Paul, Health, Culture and Community: Case Studies of Public Reactions to Health Programs, New York: Russel Sage Foundations, 1995, p. 1

[2] Manfred O Hinz, Traditional governance and African customary law: Comparative observations from a Namibian perspective, p. 61 <https://www.semanticscholar.org/paper/Traditional-governance-and-African-customary-law-%3A-Hinz/cad249ee6eb777ff90be5c0fa21d58862d6ed116> accessed on 23August 2021

[3] It is argued that Gada system is a very critical and complex system that shows the totality of the Oromo civilization since the ancient time. It encompasses the overall cultural, historical, political, legal, philosophical, religious, linguistic, and geographical foundations of the Oromo society. See Solomon Emiru, Resurrecting the Tenets of Rule of Law in the Classical Gadaa Democracy

Regarding its definition, it is seldom possible to get a common and internationally accepted definition of indigenous knowledge. All the same, some define it as it denotes a complex set of knowledge and technologies existing and developed around specific circumstances of populations and communities indigenous to a particular geographic locality.[4] Furthermore, it is also defined as it signifies local knowledge that is unique to a given culture or society.[5] More broadly, Battiste defines it as a special kind of wisdom that has been tested and proven for centuries to solve problems that are beyond the capacity of the so-called First Nations' education and knowledge system.[6]

Regarding its development, some scholars maintain that indigenous knowledge is developed through a process of acculturation and through kinship relationships that social groups form and are handed down to posterity through oral tradition and cultural practices such as rituals and rites.[7] Similarly, the Gada system, as it is one continuum of indigenous knowledge, could be described as the indigenous knowledge of Oromo that was innovated and renovated based on Oromo's ethos by Oromo people to govern their relationship as well as to solve their socio – legal and socio – political problems that they have been facing.

On the other hand, the concept of the Ethiopian law, also known as the state law, refers to all treaties signed and ratified by Ethiopia, and all primary, secondary, and tertiary laws issued by the pertinent Ethiopian government authorities for the protection of Ethiopia's and Ethiopians' interest.[8] It also includes the jurisprudence of the Federal Supreme Court cassation division's and House of Federation's decisions.[9]

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in the Ethiopian Federation, Jimma University Journal of Law, Vol. 14 , 2022, p. 7

[4] Parrotta, JA andTrosper RL, Traditional Forest-related Knowledge: Sustaining Communities, Ecosystems and Bio cultural Diversity. London: Springer, 2012, < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjWgpqt9JONAxWAVqQEHXrYKGsQFnoECBQQAQ&url=https%3A%2F%2Fwww.researchgate.net%2Fpublication%2F307749488_Parrotta_JA_and_Ronald_L_Trosper_eds_2012_Traditional_Forest-Related_Knowledge_Sustaining_Communities_Ecosystems_and_Biocultural_Diversity_New_York_Springer&usg=AOvVaw054bmrUQfRKBko7RcND48q&opi=89978449 > accessed on 20 September 2023

[5] Visit <http://www.sedac.cisen.columbia.edu> last visited on 20 August 2021

[6] See Marie Battiste, Indigenous knowledge and pedagogy in first nations education: A literature review with recommendations Indian and Northern Affairs Canada, Ottawa, October 31, 2002, < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjs0ujz9ZONAxUaU6QEHcWpDsQQFnoECBYQAQ&url=https%3A%2F%2Fwww.nvit.ca%2Fdocs%2Findigenous%2520knowledge%2520and%2520pedagogy%2520in%2520first%2520nations%2520education%2520a%2520literature%2520review%2520with%2520recommendations723103024.pdf&usg=AOvVaw0q5mH89yogkqnVNFTwORmF&opi=89978449> accessed on 25 August 2022

[7] Chikaire J. et al., Indigenous knowledge system: The need for reform and the way forward. Glob. Adv. Res. J. Agric. Sci. 1(8): (2012), p. 201.

[8] In Ethiopia, all powers, including legislative power, emanate from FDRE constitution. Pursuant to this constitution, all government organs except the judiciary have Legislative Power. In principle, per article 55(1) of this constitution, the function of enacting laws is the primary function of the parliament – House of People Representatives (HPR) while that of executive organ, pursuant to article 72, 74 and 77 of the constitution, is to execute the law enacted by HPR. Nonetheless, constitutionally executive organ has been empowered to enact secondary laws either when it declares state of emergency or when it is empowered to do so by HPR. Thus, one could conclude that, in Ethiopia, both parliament and executive organ has been empowered to enact laws. Besides, treaty signed and ratified by HPR, per article 9(4) of the constitution, is considered as one of Ethiopian laws.

[9] With the adoption of FDRE constitution, a precedent system was introduced as one spectrum of Ethiopian law. Accordingly, House of Federation's (HoF) decision on

As well, all indigenous knowledge of the Oromo people in general and the Gada system in particular is linked to the life of Oromo people and it mainly passes down orally from generation to generation. This characteristic of indigenous knowledge was succinctly appreciated in the Alexkor Ltd et al. v. Richtersveld case by the South African Constitutional Court.

In its assessment, this court held that;

> *It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature, it evolves as the people who live by its norms change their patterns of life. [. . .] unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that has its values and norms. Throughout its history, it has evolved and developed to meet the changing needs of the community.*[10]

A close look of this decision ascertains that law is not only state law but also non-state law. Besides, it indicates that the traditional laws of a given community cannot move ahead of prevailing traditional – not necessarily contemporary – structures, values and beliefs; and it places a relatively greater emphasis on the past [community] relationships[11]. Consequently, since the Gada system shares the characteristics of indigenous knowledge, the South African court's account of indigenous knowledge's characteristics, *mutatis mutandis,* is applies to the Gada system.

Unlike other indigenous knowledge, however, the Gada System embraces four basic indigenous governance institutions; viz., Age-sets, Gada Council, Gada General Assembly, and the religious institution.[12] The Gada General Assembly is the legislative body of the Gada system.[13] As Asmarom noted, one of the most interesting Oromo traditions (Gada system) is that laws are treated as products of human deliberation but not a gift of God; and Oromo legislative tradition is an uncommon phenomenon in African traditions.[14] He also adds that in the Gada system, law and custom are distinguished, and the law can be changed or altered by the 'Gumii or caffee'.[15] Continuing his appreciation, he inscribed that [in] the Gada system, people view laws as being their own, not something imposed on them by divine force, by venerated patriarchal

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the interpretation of the constitution and federal supreme court cassation division's decision, per article 62(1) and 80(3)(A) of the constitution respectively, are considered as a law. Thus, what is considered as Ethiopian laws, more or less, is what is enacted by these HPR and executive organ, cases decided by Federal Supreme Court cassation division, and constitutional disputes interpreted by HoF.

[10] Alexkor Ltd and another v. Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) < https://www.google.com/search?client=opera&q=Alexkor+Ltd+and+another+v.+Richtersveld+Community+and+Others+(CCT19%2F03)+%5B2003%5D+ZACC+18%3B+2004+(5)+SA+460+(CC)%3B+2003+(12)+BCLR+1301+(CC)+(14+October+2003)&sourceid=opera&ie=UTF-8&oe=UTF-8 > accessed on 25 October 2023

[11] Paul Brietzke, Private Law In Ethiopia, J.A.L, Vol. 18, No. 2, 1974, P.155

[12] Zelalem Tesfaye, Old Wine In New Bottles: Bridging The Peripheral Gadaa Rule To The Mainstream Constitutional Order Of The 21st C. Ethiopia, Oromia Law Journal, Vol.4, No.1, P.15

[13] Id p.17

[14] Asmarom Legesse, Oromo Democracy: An Indigenous African Political System, 1st Edition, The Red Sea Press, Asmara, Eretria, 2000, P.208

[15] Gumii or Caffee means legislative organ

lawgivers, by the superior learned men, or by tradition in a generic sense.[16] Thus, a law in the Gada system denotes a law that has been issued by the Gumii for the protection of mankind as well as flora and fauna.

3. Conceptual Framework of Non-State and State Laws in Ethiopia: the Gada System in Focus

Dworkin states,

> *'. . . we live in and by the law. It makes us what we are. [. . .] are forced to forfeit penalties or are enclosed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. [. . .] we are subjects of law's empire, liegemen to its methods and ideals bound in spirit while we debate what we must therefore do.'*[17]

This observation, Doworkin's statement about law, describes the significance of law for the survival of human beings. Nonetheless, what does the term law denote in general and in the Ethiopian legal system in particular? Since one could not come up with and dry and internationally accepted definition of law, defining the term 'Law' is not an easy task. All the same, different authorities have tried to define it. Besides, sometimes the inquiry for the dentition of law is labeled as questioning the concept of proposition of law.

Thus, the phrase 'proposition of law' refers the various statements lawyers make in reporting what the law in question is to other.[18] More precisely, Boshno defines the term 'proposition of law' as an obligatory decree, expressed as a power-holding order governing public relations that has the feature of normativity, systemic, general obligatoriness, formal distinctness and representative-binding nature which distinguishes it from other social rule.[19] This indicates, according to Boshno, that to label one as a law it must not be a social rule but it must be a sovereign act.

With the same token, law, for legal positivists, is what is enacted by lawmakers.[20] Positivists capitalize only on positive laws. Positive law is the law in books, the law declared in the clear statements of statutes and court decisions.[21] Similarly, some take positive laws as those rules issued by the sovereign[22] while some also describe positivism as accepting law as it is in lieu of accepting law as it ought to be.[23]

For Austin, like Boshno, law is a general command, and the command is the expression of wish backed by threat to inflict an evil on case of the wish is not fulfilled.[24] Some scholars, however, simply understood law as it is the prophecy of what the courts will do in fact, and nothing more pretentious, are what someone means by the law.[25] Besides, Law Dictionary[26] also defines law as an aggregate of

[16] Asmarom Legesse, Supra Note 14, p.208 – 209

[17] Ronald Dworkin, Law's Empire, The Beknap Press of Harvard University Press, Cambridge, Massachusetts, Landon, England, 1986, P. Vii

[18] Ronald Dworkin, Law as Interpretation, Taxes Law Review, Vol. 60, P.527.

[19] Svetlana Boshno, Proposition Of Law: Its Concept, Properties, Classification and Structure, Law and Modern States 4/2015, P.71

[20] Dworkin, Supra Note 17, p. 528.

[21] Ronald Dworkin, Law's Ambitions For Itself, Virginia Law Review, Vol.71, P.176

[22] Scott J. Shapiro, Legality, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2011, p. 53.

[23] William Twining, General Jurisprudence: Understanding Law from a Global Perspective, Cambridge University Press, 2009, p.126

[24] Shapiro, Supra Note 22, p.53.

[25] Simeneh Kiros, Sharing Thought: What Is The Jail Man Doing?, Mizan Law Review, Vol. 12, No.1, September 2018, P. 226

[26] Black Law Dictionary, 9th edition, P. 962

legislations, judicial precedents and accepted legal principles. The upshot of this discussion indicates that the term of 'Law' is commonly understood as it excludes all non-state (indigenous) laws, like the Gada system's law, from the domain of the definition of law.

Against this line of argument, however, Seidman noted that people within societies engage in repetitive patterns of behaviour and this behaviour constitutes the institutions of the society. [. . .] repetitive patterns of behaviour are defined by rules or norms. [. . . thus] laws are norms. They state how people are supposed to behave on pain of sanction.[27]

Twining, on his part, opined that cosmopolitan discipline of law needs to encompass all levels of legal ordering, relations between these levels, and all-important forms of law including supra – state, viz.; international, regional and non-state law and various forms of 'soft law' and legal orders.[28]

Consequently, against forgoing argument, fairly approaching Seidman's and Twining's definition of law points out that the term 'Law' embraces not only state law but also non-state law. Thus, to these scholars' definition of law, indigenous laws, like laws under the umbrella of the Gada system, fall within the domain of the definition of law. However, as examined previously, assessing the definition of law in the Ethiopian legal system's context demonstrates that what is considered as law officially in Ethiopia is half of what is considered as a law by Seidman and Twining.

As is well known, in the Ethiopian legal system, a legislative act to be a law, it ought to be published in the official law Gazette, which may be either the Negarit Gazette for the Federal Laws[29] or the Megeleta Oromia for laws of Oromia Regional state[30] and *mutatis mutandis* to all other Regional States of Ethiopia. The rationale behind the publication of laws seems to implement the principle of ignorance of the law has no excuse by giving prior warning. Besides, in the words of Bentham, publicity [of law] is the most important security against misrule.[31]

In the case of Ethiopia, strictly focusing on the black letter of this Official Law Gazette Establishing Law, it takes us to argue that in Ethiopia publication of law is a mandatory condition precedent for all legislations to be a law. This could be extrapolated from this Federal Official Law Negarit Gazette's designs and spirits. The pertinent provision of this Gazette states,

> *All Laws of the Federal Government shall be published in the Federal Negarit Gazette, and all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazette.*[32]

[27]Robert Seidman, Law and Stagnation In Africa, p. 271, <http://saipar.org/wp-content/uploads/2013/10/chp_12_law_in_zambia.pdf> accessed on August 28, 2021

[28] Twining, Supra Note 23, p. 275

[29]Federal Negarit Gazeta Establishment Proclamation, 1995, Art. 2(2), Proclamation No.3, Fed. Neg. Gaz., Year 1, No.3. This article states 'all Laws of the Federal Government shall be published in the Federal Negarit Gazette'.

[30]Reestablishment Proclamation of the Megeleta Oromia News Paper, 2014, Art.3 (1), Proclamation No.186, Megeleta Oromia, Year 22, No.11. Similar to Federal, this article states, Proclamation, Regulations enacted, agreement entered by the Regional Government of Oromia and ratified by 'Caffee' and any law of the Region shall be published on Megeleta Oromia.

[31] Twining, Supra Note 23, p.332

[32] Proclamation No.3, Supra Note 29, article 2(3). All Regional States official law Gazettes were enacted with the same loaded fashion.

This suggests that the act of publication serves as a minimum requirement for legislation to be a law in the Ethiopian legal system. All the same, the House of people representative (HPR) proclamation defines laws narrowly than definition of Official Law Gazette Establishing Proclamation's definition of law when it states the laws that need publication are only proclamations, regulations or directives come into force upon their approval by the HPR and subsequent publication on the Federal Negarit Gazette under the signature of the President.[33]

Reading this proclamation in tandem with the Official Law Gazette Establishing Proclamation reveals that the HPR proclamation blindly excluded all legislations except that of the HPR laws from the ambit of the Ethiopian laws. However, this seems a fallacy since it fails to acknowledge the constitutional power of the Executive Organ to enact secondary laws at the Federal level on Federal matters[34] *mutatis mutandis* to Regional States' Legislative organs and Administrative Councils' lawmaking power on regional matters.

Other proclamation[35], proclamation to consolidate House of Federation, defines law as Proclamations issued by the Federal or State legislative organs, and regulations and directives issued by the Federal and States government institutions, and as it shall also include treaties that have been ratified by Ethiopia. To some extent, this legislation tries to fill the lacuna created by hereinabove mentioned proclamation when it tries to show the existence of legislative federalism and legislative power of executive organ, but in its definition, the mandatory publication precondition of legislations to be a law is either latent or absent.

Doubtlessly, the assessment of the definition of the term 'law' under these proclamations divulges that under the Ethiopian legal system, what is considered as a law is only a sovereign command. Put differently, it is only what is enacted by an appropriate government organ can be considered as a law. Following this line of argument takes one to conclude that, in the Ethiopian legal system, law constitutes only a sovereign command but not a non-state law.

This conclusion fits the command theory of law. Under this theory, law is the command of the state, backed by force, as an accurate or even a helpful characterization of a law.[36] Thus, non-state laws, like laws in the Gada system, are ousted from the definition of law under the Ethiopian legal system. This makes known that the Ethiopian legal system follows legal centralism, which entails that law should be the law of the state, uniform for all persons, exclusive of all other laws, and administrated by a single set of state institutions.[37]

Beyond state and non-state laws discourse, in the Ethiopian legal system, scholars argue that it is hardly possible to understand what

[33]House of Peoples' Representative Procedure Proclamation, 1995, Art. 2(1), Proclamation No.14, Federal. Neg. Gaz., Year 2, No.2.

[34] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, art. 77(13), Proclamation No.1, year 1, No.1.

[35] Council of Constitutional Inquiry Proclamation, 2001, art.2 (5), Proclamation No.250, Year 7, No.40.

[36] Andrew Stumpff Morrison, Law is The Command Of The Sovereign: H.L.A. Hart Reconsidered, P.1 <https://onlinelibrary.wiley.com/doi/abs/10.1111/raju.12133> accessed on 28 August 2021

[37] Ayalewu Getachaw, Customary Law in Ethiopia: A Need for Better Recognition, Danish Institute for Human Right, 2012, P. 14 < https://menneskeret.dk/files/media/dokumenter/udgivelser/ayalew_report_ok.pdf. > accessed on 22 September 2023

constitutes state [Ethiopian] law. Wording it differently, scholars bestow the illusion of proposition of law in Ethiopia. Assefa, for example, dubbed proclamations No.250/2001 (repealed)[38] and 251/2001(repealed)[39] as *mother of all confusion to* about set the proposition of law in Ethiopia, particularly, in determining the scope of judicial review in Ethiopia[40].

On top of that the jungle of proposition of law in Ethiopia swells much when strictly assessed by juxtaposing these laws with judicial practices. FDRE Supreme Court's Cassation division, which has been empowered to assist the uniform application of law in Ethiopia, in the Ethiopian Revenues and Custom Authority *v.* Daniel Mokonin case, held that laws required to be published on Negarit Gazette are only those enacted by the HPR.[41] Put otherwise, the division held that only those laws enacted by the legislative organ but not those of the executive organ or agencies are required to be published in the Negarit Gazette to be a law.

However, even though this is an act of undermining the purpose of publication of laws, some authors also hold the same position with the decision of this division. In his comment, for example, Getachew argued that publication of law is required only for an evidentiary purpose.[42] Nonetheless, this division's decision and the author's standing inspire criticism when valued from cassation's division establishment aspiration and rational behind publication of laws perspectives. These include, *inter alia*, this division examined only the HPR's proclamation by excluding the Official Law Gazette Establishment Proclamation that has special preference about publication and House of Federation's Proclamation to provide a comprehensive definition of law in the Ethiopian legal system. Moreover, it limits itself to giving recognition to the existing practice without valuing publication from the right of the governed to be accessible to legislation and the duty of the governor to make its laws accessible to citizens to appreciate and defend their rights. From this scenario, it is arguable that the publication of laws has a constitutional base. FDRE Constitution[43], in the Ethiopian context, empowers the Ethiopian citizens to know all activities of the Ethiopian government whilst it obliges its government to make their activities transparent to their citizens.

As well, the division fails to appeal to all laws to appreciate them holistically to make all laws meaningful without making them self-contradictory in which some legislations'

[38] Council of Constitutional Inquiry Proclamation, 2013, art. 34, Proclamation No. 798, Fed. Neg. Gazette, Year 19th, No. 65. Just the same, even though this proclamation repealed its predecessor proclamation No. 250/2001, it does not come with new approach regarding the point under discussion.

[39] A Proclamation to Define the Powers and Functions of House of Federation, 2021, art. 84, proclamation No. 1261, Fed. Neg. Gazette, Year 27th, No. 43. All the same, even though this proclamation repealed its predecessor proclamation No. 250/2001, it does not come with new approach regarding the point under discussion.

[40] Asefa Fiseha, The Concept of Separation of Power and Its Impact on the Role of Judiciary in Ethiopia, Ethiopian constitutional series, Faculty Of Law, AAU press, vol. III, p. 14-16. Since the proclamations those replaced the previous proclamations those was dubbed mother of confusion has not yet come with different approach, thus this author's argument is still alive.

[41] Ethiopian Revenues and Custom Authority V. Dani'el Mokonin, (Federal Supreme Court Cassation Bench, Addis Ababa, 2010, Criminal Case File No. 43181), FDRE Cassation Division Decision Book, Vol.10, P. 345.

[42] Getachew Asefa, Is Publication Of Ratified Treaty Requirement For Its Enforcement In Ethiopia? Journal of Ethiopian Law, Vol. XXIII, No.2, 2009, P.168.

[43] FDRE constitution of 1995, Article 12(1). This article reads as 'The conduct of affairs of government shall be transparent'.

provision defeat the others' purpose. This like interpretation of laws conclusion is a fallacy. Unfortunately, this demonstrates, the FDRE Cassation division lost the opportunity to soundly nail down the discourse on the status of unpublished laws in the Ethiopian legal system.

From this discussion, one could synthesize two important points. In one hand, in Ethiopia legal system the issue of proposition of laws, particularly, the definition of law is the unsettled issue. On the other hand, scholars' inquiry to set the proposition of law in the Ethiopian legal system is limited to the old command theory of law. Thus, the status of non-state laws, including the Gada system, by the definition of law is excluded from the realm of the Ethiopian legal system.

At this juncture, another point worth discussion is the legislative system in the Gada system and the Ethiopian legal system. Fundamentally, as was shown earlier, Gada is an age-grade system that divides the stages of life of individuals, from childhood to old age, into a series of formal steps.[44] On the other hand, the Gada system is a system of generational classes that succeed each other at eight-years in intervals assuming political, military, judicial, legislative and ritual responsibilities.[45] Moreover, as was discussed, the Gada System embraces four basic indigenous governance institutions; viz. Age sets, the Gada Council, the Gada General Assembly, and the religious institution.[46]

The Gada General Assembly is the legislative body of the Gada government.[47] As was discussed, it is noted that one of the most interesting Oromo traditions is that laws are treated as products of human deliberation, but not a gift of God; and Oromo legislative tradition is an uncommon phenomenon in African tradition.[48] He adds that in Oromo tradition, law and custom are distinguished, and the law can be changed or altered by 'Gumii or caffee'. Continuing his admiration, Asmarom inscribed that in Oromo cultural tradition, people view laws as being their own, not something imposed on them by divine force, by venerated patriarchal lawgivers, by the superior learned men, or by tradition in a generic sense.[49] As a result, it is argued that, since in the Gada system the law is more valuable than one's own child, the Oromo people are committed enough to sacrifice their children for the observance of the rule of law.[50] This demonstrates that the understanding of law in the Gada system fits the notion that law is one ultimate expression of the community. Marvelously, this understanding of law in the Gada system took it is root at the time when the Western community thought that the King was ordained by God to be the expression of the complete community, as well as the King held the constituent power.[51]

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[44]Taddesse Berisso, Chapter V: The Riddles Of The Number Nine In Guji-Oromo Culture, In Bekele Gutema and Charles C. Verharen (eds.), African Philosophy In Ethiopia, Cultural Heritage And Contemporary Change Series II. Africa, Volume 15, 2013, P.54

[45] Ibrahim Ame, The Roles Of Traditional Institutions Among The Borena Oromo, Southern Ethiopia, *[without Year and Place of Publication]*, P.17

[46]Zelalem Supra Note 12, P.15

[47] id p.17

[48]Asmarom, Supra Note 14, P.208

[49] Id, p.208 – 209

[50] Dirribi Demissie, Oromo Wisdom in Black Civilization, Finfine Printing & Publishing S.C., April 2011, Ethiopia, p. 278 cited in Solomon Emiru, Resurrecting the Tenets of Rule of Law in the Classical Gadaa Democracy in the Ethiopian Federation, Jimma University Journal of Law, Vol. 14 , 2022, p. 4

[51]This is the power to enforce laws, the power to claim legitimate authority of government over the governed. In many ancient and medieval societies this was said to come from God and be embodied in the authority of the

This suggests the presence of a deep-rooted understanding and practice of the rule of law in the Gada system. In legal jurisprudence, the term the rule of law could simply mean that government officials and citizens are restricted by and generally abide by the law.[52] Put it simply, the rule of law refers to the supremacy of law over all mankind.

However, the definition and perception of the rule of law in the Gada system is a little bit broader than the modern rule of law. Some researchers have found that according to the Gada system, the rule of law signifies not only the liability of individuals rather it also that everything and all beings have rules. That is, the law stands not only for the benefit of individuals or to the discipline of officials but it also extends to animals.[53] In this sense, the Borana, for instance, say '*seerri muummee, seera saree'*; which means a law for a minister is also a law for a dog.[54] According to Asmarom and Zelalem, this principle carries two deep-rooted concepts. On one hand, it refers that law is not designed only for the discipline of the highest[55] and it also protects the lowliest whilst, on the other hand, it suggests law is perceived not only as the law is superior to any person but it also extends to natural world – fauna and flora.[56] As well, the Tulama also say, *'huuru dheeroo akka seeri, huuru gabaabo akka seeri'*, referring Dog and Cat. Hence, taming or having a dog is a right for anyone, but if you have a dog protecting and feeding is mandatory.[57] Consequently, unlike conventional state laws, in the Gada system laws are issued not only for the wellbeing and governance of mankind but also for fauna and flora.

Needless to state, Gada laws are non-state laws. In the Gada system, law is issued by 'Gumii' which means assembly, while broadly it is one of Gada's institutions with the highest authority in the Gada system.[58] Asmarom succinctly described Gumii as it is made up of all the Gada assemblies of Oromo, who meet, once every eight years, to review the law, to proclaim the new laws, to evaluate the men in power, and to resolve major conflict that could not be resolved at the lower level of their judicial organization.[59]

Thus, in the vernacular of modern democracy, Gumii stands for the parliament. Nonetheless, while Gumii could be equated with the parliament of modern democracy, all parliament of modern democracy couldn't be equated with Gumii. This is because to equate a given parliament with Gumii, that parliament must be the result of the utmost fairest electoral law, accompanied by free, fair, and all-inclusive elections.[60]

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monarchy. But gradually the democratic idea continued to emerge within human history. In the West this idea began to find a clear articulation in 17th century thinkers. Glen T. Martin, The I, the WE, the IT and the Third Estate, Academia Letters, Article 4333, 2021, p.2

[52] Brian Z. Tamanaha, Th e Rule of Law and Legal Pluralism in Development, Hague Journal on the Rule of Law, Vol. 3, 2011, p. 2

[53] Zelama, Supra Note 12, p. 20

[54] Asmarom, Supra Note 14, p.201

[55] ibid

[56] Zelama, Supra Note 12, p. 20

[57] Dirribi Demissie Bokku, Oromo Wisdom in Black Civilization, Finfine Printing & Publishing S.C., April 2011, Ethiopia, p. 278 cited in Solomon Emiru, Assessing The Law-Making process, Lawmakers and the value of laws in Gadaa Democracy, Haramaya Law Review, Vol. 10, 2022, P. 106

[58] Ibraahim, Supra Note 45, p.20

[59] Asmarom, Supra Note 14, p.100

[60] Scholars argue that in the Gadaa System all types of basic law-making process legislation will become a law only if it declared and accepted by people at large. According to the Gadaa making of law procedures, anybody can oppose the drafted law by saying "*damman*

The nomenclature of Gumii across Oromo land was derived their names from the names of the places where the assembly is regularly held. To name some of them, for example, the '*Gujii's Gumii Bokkoo*' is the Congress of the Gujii confederacy held every eight years at a place called '*Me'ee Bokkoo'*.[61] Similarly, the '*Borana's Gumii Gaayoo'* is named after the name of a water well called Gaayoo, while that of the central Oromo is called Caffee since the general assembly used to take place under a highly respected Tree known as Odaa (sycamore) on the edge of prairie grass (Caffee).[62]

Nonetheless, this approach took place after the breakup of the Central Gumii into regional assemblies. In the words of Taddese, Gumii broke up into regional assemblies during the great Oromo migration of the 16th Century, and assemblies were held by different splinter communities in different places.[63] It is from such meeting places that the term Caffee is given to the assembly. Moreover, this conclusion demonstrates that the Gada system was in a better position than today in the pre- and post-medieval period. This is because, by the general convention, the medieval period covers about 1000 years, commencing with the 5th century collapse of the Roman Empire and coming to a close with the 15th century Renaissance.[64]

4. Contextualizing the Nexus between State and Gada System in the Ethiopian Legal System

Emphatically, scholars argue that, owing to their eclectic/synthetic origin from a multitude of donors, the modern Ethiopian legal system was orphaned from the moment of its birth.[65] This is owing to the fact that Ethiopian legal transplantation of the late 1950s and early 1960s went against the old perception of diffusion of laws which was bipolar – single exporter to single importer.[66]

To easily assess the evolution of the modern legal system in Ethiopia, it is better to classify it into different phases. Given that the first phase, pre-1434 period, is an era when the Ethiopian Empire had not attempted to a written law and no codified law that can be applied nationwide while the second period, the period between 1434 and 1930, is a time when the first attempt was undertaken to have a written law in the legal history of Ethiopia. The third period, the period from 1931 to the present, is considered as the era of the modern Ethiopian legal system.[67] On the other hand, some also divide the relationship between State and Customary law into three but into different

qabe; kormaan qabe;fardaan qabe; tuni, tuni sirrii miti"; which means, this law is not correct. In this opposing the declared law, no one would be silenced but they are expected to talk based on the seniority of age. see Solomon Emiru, Supra Note 3, p. 6

[61] Dhaddacha Gololcha, The Politico – Legal System of The Guji Society of Ethiopia, 2006, p. 69;

[62] see Zelalem, Supra Note 12, p.17

[63] Taddese Lencho, Chapter VII: The Spirit Of Rousseau and Borana Political Traditions: An Exercise In Understanding 'In Bekele Gutema and Charles C. Verharen (eds.)', African Philosophy In Ethiopia, Cultural Heritage and Contemporary Change Series II. Africa, Volume 15, 2013, P.97

[64] Brian Z Tamanaha, Understanding Legal Pluralism: Past To Present, Local To Global, Sydney Law Review, Vol. 30, 2008, P.377

[65] Peter H Sand, Roman law in Ethiopia: traces of a seventeenth century transplant, Comparative Legal History Vol. 8, No. 2, 2020, p. 143

[66] See generally William Twining, Diffusion Of Law: A Global Perspective, Journal Of Legal Pluralism, Nr. 49, 2004

[67] Law and Religion in Ethiopia: The Evolution of a Complex Interaction, <https://dokumen.tips/documents/law-and-religion-in-ethiopia-the-evolution-of-a-complex-interaction.html> accessed on 2 September 2021

era, viz., the imperial imported sacred tradition in the pre-modern era, the modern secular imported nation-building period under Emperor Haile Sellassie and the Derg, and the Federal System period under the FDRE Constitution.[68]

All the same, regarding the source of Ethiopian laws, there is no consensus among the scholars. Some group opined that the source of the Ethiopian legal system comprised of the *Fetha Negust* (Law of Kings), the *Kibre Negust* (Glory of the Kings), codes enacted in [late]1950s and [early] 1960s[69], whilst others argued that as there are four sources of the modern Ethiopian legal system; viz. the *Fetha Negust* (Law of Kings), the *Kibre Negust* (Glory of the Kings), codes enacted in [late]1950s and [early] 1960s, and customary laws.[70] Simply put, some assume Ethiopian customary laws as one source of the modern Ethiopian laws while for some group customary law had not been recognized as a source of the Ethiopian legal system. As a result, at this juncture, in spite of this difference, this article centers only on the issue surrounding the *Fetha Negust* and customary law as a source of the modern Ethiopian legal system.

It is argued that the first attempts to codify Ethiopian law were made by Emperor Zera Yaikob (1434-1468).[71] It is transcribed that he endeavored to make his empire to be governed by written criminal and civil law [. . .]. Consequently, he ordered scholars of the Ethiopian Orthodox Church to prepare an authoritative written code of laws. [. . .] the clergy by strongly supporting the Emperor's idea of centralized power, it drafted the law known as '*Fawse Manfasawi'* and submitted it around 1450 the law which had 62 articles – mainly on criminal matters.[72] Thus, the period from 1434 to 1930 was a period when the first attempt had been undertaken to have a written law in the legal history of Ethiopia by codifying *Fawse Manfasawi* (spiritual remedy or canonical Penance) and the *Fetha Negust* (the law of the kings).[73] Even though, chronologically, *Fawse Manfasawi* is considered as the first Ethiopian written law, some scholars argue that the first written Ethiopian law is the *Fetha Negust.*[74] This may be due to the fact that the former was mainly spiritual rather than secular in its nature.[75]

Regarding customary laws in the Ethiopian legal system, in David's testimony, in many respects, Ethiopia differs from the countries of Western Europe. Thus, no rule of any foreign law whatsoever went into the Ethiopian Civil Code without their asking whether it was suitable for Ethiopia. [. . .] he also added that the Ethiopian civil Code is a product of French legal science, but in terms of the contents of the rule in, it is no more French than Greek, Swiss, and Egyptian or English, necessarily it is an

[68] Muradu Abdo and Gebreyesus Abegaz, Customary law: Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p.111

[69]Ayalew, Supra Note 37, p. 7 – 8

[70]Assefa Fiseha, 'Improving Access to Justice through Harmonization of Formal and Customary Dispute Resolution Mechanisms' in Pietro S. Toggia et al. (Eds.) Access to Justice In Ethiopia: Towards an Inventory of Issues, Center for Human Rights, Addis Ababa University, May 2014, P. 105 – 7

[71]Zuzanna Augustyniak, The Genesis of the Contemporary Ethiopian Legal System, Studies of the Department of African Languages and Cultures, No 46, 2012, P. 102

[72] ibid

[73] Law and Religion in Ethiopia, Supra Note 67

[74] Norman J. Singer, The Ethiopian Civil Code and The Recognition Of Customary Law, Houston Law Review, Vol. 19, 1972, P.467

[75]Augustyniak, Supra Note 71, p.102

Ethiopian code from end to end.[76] From this statement one could infer that as far as it was possible, the drafter of the Ethiopian civil code attempted to make Ethiopian customary law one source of the modern Ethiopian law.

Nonetheless, the question awaiting reasonable response is that since Ethiopia has been a multi – ethnic country, which ethnic group's customary law was consulted to be made a source of the code or incorporated in the modern Ethiopian law. Regarding this issue, Singer pointed out that the customary laws that are said to have been incorporated in the Ethiopian law belonged to the dominant Christian – *Amhara* – whose representatives also formed the Law Revision Committee and no one represented the values of the diverse minority groups at the time.[77] If so, since single ethnic group's customary laws were consulted, could we say that the Ethiopian customary laws were made the source of the modern Ethiopian laws?

As a result, from David's and Singer's view of the inclusion of the Ethiopian customary law into the modern Ethiopian law, one could baldly understand and argue that there is no consensus on whether Ethiopian customary laws were taken as source of the modern Ethiopian laws. Thus, this is the beginning of state *vis – a – vis* non-state law disharmony, including the Gada system, in the modern Ethiopian legal system.

Linked to this evolutionary *vis – a – vis* revolutionary debates on the development of the Ethiopian Legal System is the unsettled issue to date. Sand argued that ultimately Ethiopia embarked on a gradual modernization of its entire legal system *'from above'* in the 20th century, starting with the Penal Code in 1930 and followed by the comprehensive series of six other sectoral codes in the [late] 1950s and [early] 1960s.[78] Given this scholar, the development of the so-called the modern Ethiopian law is evolutionary and also started in 1930. Then, the proper issue will be whether the development of the modern Ethiopian legal system had been evolutionary and also commenced in 1930.

The argument of the gradual development of the Modern Ethiopian law takes one to say that the development of the Ethiopian legal system had been based on the philosophy of law is mainly an outgrowth of local society, values, and traditions[79] that was started in 1930. However, appraising from the approach Ethiopia adopted its modern laws in late 1950s and early 1960s suggests Sand's argument does not seem a water holding argument. On this issue, Rene David, the drafter of the Ethiopian civil code, stated that,

> *Ethiopia was only with two options; viz., either to adopt alien's law or to waits for 300 or 500 years to have modern laws. He also added that the development and modernization of Ethiopia necessitated the adoption of a ready-made system […] while safeguarding certain traditional values to which she remains profoundly attached. Continuing the discussion, he*

[76] Rene David, Administrative Contract In The Ethiopian Civil Code, Journal Of Ethiopian Law, Vol. IV, No.1, P.145 – 6

[77] Norman J. Singer, A Traditional Legal Institution In A Modern Legal Setting: The Atbia Dagna Of Ethiopia (1970–1971) 18 UCLA Law Review 308 as cited in Tsehai Wada, Coexistence between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects, African Journal of Legal Studies 5 (2012), P. 276

[78] Sand, Supra Note 65, p.137;

[79] Twining, Supra Note 23, p. 287.

> *wrote that Ethiopia wished to modify her structures completely, even the way of life of the people.*[80]

This drafter's statement indicates that the development of the modern Ethiopian legal system started in the late 1950s and early 1960s in a revolutionary method. Taking this truth into consideration, Twinning argued that like Japan and Turkey, Ethiopia is one of the few 'exceptional' 20th century cases of what he called 'diffusion of law.[81]

Unlike this revolutionary approach, the evolutionary development legal system is based on the principle that what is law ought to be what is society and *vice versa,* which means law ought to come out by mirroring socio-political values of the society it governs. Here, the term society is sensed as a pillar of all societal endowment which among others includes non-state laws like laws that flourished under the umbrella of the Gada system. So, it is a generally accepted veracity that non-state laws serve as governing law before state law and sometimes parallel it. Thus, at this juncture, it's logical to argue that the Gada system's laws should have been one source of the modern Ethiopian legal system – the state laws.

All the same, there is no consensus among the scholars on the extent of evolutionary method of legal development. In one extreme, some argue that the tenets of laws primarily from custom through an organic non-deliberate process seem valid only for private law, and only in circumstances of relative stability.[82] As to this scholar, non-state laws to be source of state laws, it ought to have stability and the state law also ought to be non-public laws.

Furthermore, regarding custom – non-state law in the context of the issue under discussion – as a source of law, there is a difference between the Historical and the Analytical School of Law.[83] As to the Historical School of Law, custom in *per se* serves as an authoritative source of law, whereas to Analytical School of Law, custom is not an authoritative source of law at all until incorporated in decision for common law legal system and legislation in continental legal system. Thus, according to the Historical School of Law, the Gada system's law serves as if it is a law, whereas as to Analytical School of Law, it serves as a law only if it is recognized and incorporated in state laws. Nonetheless, the problem with the latter school of law is not whether custom is an authoritative source or not rather whether custom is recognized as law either as judge made law or legislative act to be a law.

On the other extreme, some argue that as most of us conform to law because of more complex social and psychological processes, obedience to law lies in the idea of some inner psychological inclination whereby we accept the legitimacy or authority of the source of law.[84] This suggests that even compliance or non-compliance to law, though it may not

[80]Rene David, A Civil Code For Ethiopia: Considerations On The Codification Of The Civil Law In African Countries, Tulane Law Review, Vol. XXXVII, P.188-189.

[81]According to Twining, diffusionism represented a reaction against the prevailing nineteenth- century view that there were natural laws of evolution governing human progress. See Twining, Supra Note 23, P. 273-274.

[82] George Krzeczunowiczi, The Ethiopian Civil Code: Its Usefulness, Relation To Custom and Applicability, J.A.L, Vol. 7. No- 3, Pp.174.

[83]Tesfaye Abate, Introduction To Law and The Ethiopian Legal System Teaching Material, Prepared Under The Sponsorship of The Justice And Legal System Research Institute, 2009, p.40 seq.

[84] Phil Harris, an Introduction to Law, 7th edition, Cambridge University Press, p.7.

always be, is based on whether the source is alien or non-alien (non-state law) of a given law. It is for this reason that some opined that in Ethiopia some nations, nationalities and peoples' customary law processes have proven resistance to the incursion of modern Ethiopian state law.[85] This resistance to Ethiopian state law that was developed through revolutionary methods fortifies the assertion that law should mirror the society it governs.

Besides, this assertion is highly conjugated with the so-called Mirror Theory. This theory provides that legal systems do not float in some cultural void, free of space and time and social context rather it necessarily reflects what is happening on their societies.[86] In a nutshell, this theory states,

> *The very fact that law mirrors society, it is often said, is what makes law effective and legitimate in functioning to maintain social order. Because law reflects and bolsters prevailing social norms, the bulk of behavior conforms to these norms without the need for legal sanction, allowing law to conserve resources and maintain efficacy […] The citizenry view the norms enforced by law as their products, reflecting their way of life, manifesting their consent. Law, in turn, claims that citizens owe it obedience because it is doing their work, preserving their norms, constituting their way of life, keeping their order and allowing them to pursue their projects and enjoy life in safety and security.*[87]

Consequently, this theory conveys the message that the law is not effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs as well as custom and natural justice.[88] Moreover, under this theory, it is arguable that the development of the legal system is owed to be in an evolutionary approach.

Nonetheless, as will be discussed later, the development of the Ethiopian legal system had not been in line with mirror theory. As is well known, Ethiopia is one of those jurisdictions that voluntarily transplanted Western laws without being colonized by the West. In the words of Brietzke, however, the approach in which the law was transplanted in Ethiopia was similar to that found in colonial legal thinking, namely, good law in one place is good law at any place else, since there is no need to consider interactions between law and social values and structures.[89] With this thinking, Ethiopia repealed all its customary rules that were serving as a law before modernizing its legal system with the promulgation of the civil code[90] in 1960. All the same, in a country with a diversified indigenous law like the Gada system, repealing all customary law is

[85] for detail on this point, see Dolores A. Donovan and Getacho Assefa, Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism, the American Journal Of Comparative Law, vol.15, 2003

[86] Mulugeta Getu, Departure of Ethiopian Family Laws: The Need To Redefine The Place Of Societal Norms In Family Matter, Haramaya Law Review, Vol.4.1, Pp.83-84.

[87] Brian Z. Tamanaha, Law and Society, St. John's University School Of Law, Legal Studies Research Paper Series, < http://ssrn.com/sol3/papers.cfm?abstract-id=1345204> accessed on April 15, 2021.

[88] Krzeczunowiczi, Supra Note 82, p.174.

[89] Brietzke, Supra Note 11, P. 150-151

[90] Civil Code of the Empire Of Ethiopia, 1960, Art. 3347 (1), Proclamation No.165, Negarit Gazeta, 19th Year No 2, Addis Ababa, 5th May 1960.

equivalent to the Ostrich's act of putting its head in the sand.

5. Setting the Nexus between State and Non-State Law through Hinz's and Forsyth's Observations

To point out the point under discussion succinctly, setting the nexus between state and non-state law through scholars' observations is worthwhile. In this regard, it is bearable to discuss Hinz's[91] and the Forsyths[92] models of state and non-state law relationship.

To begin with, the issue of the nexus between state and non-state laws is mainly the issue of legal pluralism in a broader sense. Scholars of the area argue that legal pluralism is everywhere[93], particularly in Africa. The Ethiopian situation is not different from that of many African countries while, unlike other African countries, it imported foreign laws voluntarily. One of the challenges of legal pluralism is the competition – conflict or peaceful coexistence – between state and non – state laws[94] which is *mutatis mutandis* applies to state and the Gada system in Ethiopia.

As was pointed out, Hinz and Forsyth are among those top scholars who tried to analysize the nexus between state *vis-a-vis* non-state law by developing their own models to identify the categories of state and non-state law relationship. Reasonably, Hinz and Forsyth had tried to locate the relationship between these two legal systems in their version in 2008 and 2007, respectively. While Hinz identified five models to appraise their relationship[95], Forsyth came out with seven models to assess the relationship of these two laws.[96] Nonetheless, the close scrutinizing of Hinz's models reveals that his models are the contraction of Forsyth's models. Be that as it may be, these scholars' models are summarized and briefed as follow one after the other.

As was alluded earlier, Hinz developed five models to assess the relationship between state and non-state law.[97] His first model is the model of Strong Modern Monism.[98] In jurisdictions with this model situation, he

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[91] Prof. Manfred Hinz, who published widely in legal and political anthropology, is attempted to set the nexus between state and non-state succinctly in his article entitled 'Traditional governance and African customary law: Comparative observations from a Namibian perspective'. < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwig_rH5vY-NAxXezgIHHRTEE6EQFnoECC8QAQ&url=https%3A%2F%2Fconstructor.university%2Ffaculty-member%2Fmanfred-hinz&usg=AOvVaw09yhapWpXHFjq0m-sKZLJU&opi=89978449> accessed on 4 May 2023 Consequently, the researcher employed Hinz's work to set the nexus between these two laws in Ethiopian legal system's context.

[92] Prof. Miranda Forsyth's scholarship is how people's diverse justice needs can best be met in contexts of multiple legal and normative orders. In search for an answer to her central analytical question, she wrote one of her interesting intellectual works that entitled 'the relationships between state and customary justice'. < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiUpPu9xI-NAxWMcaQEHdpUKloQFnoECDIQAQ&url=https%3A%2F%2Fresearchportalplus.anu.edu.au%2Fen%2Fpersons%2Fmiranda-forsyth&usg=AOvVaw2O68jhj4DwYDdz_jVoSRCA&opi=89978449 > accessed on 4 May 2023 Owing to this, the researcher also used her work to assess the relationship between state and non-state law in Ethiopian legal system's context.

[93] Tamanaha, Supra Note 87

[94]Tsahay, Supra Note 77, p.276

[95] Hinz, Supra Note 2, p. 61 – 63

[96] Miranda Forsyth, A Typology of Relationships Between State and Non-State Justice Systems, Journal of Legal Pluralism, 2007, Nr. 56, p. 69 – 107

[97] Hinz, Supra Note 2, pp. 62 -3

[98] Id 62

argues that, non-state law would not be accepted as law in the sense of law defined by the constitution of those jurisdictions. It is a situation of jurisdiction which recognizes only sovereign command as law.

The Hinz's second model is the model of Unregulated Dualism.[99] It is a model that describes a situation that the state ignores, either explicitly or implicitly, the existence of traditional governance and non – state law, but tolerates both without formally confirming or recognizing their existence, performance and acceptance. Put otherwise, it is a situation of a jurisdiction that neither acknowledges nor rejects non-state laws.

The third model of Hinz is the model of Regulated (Weak or Strong) Dualism.[100] In jurisdictions with this model, the state confirms traditional governance and non – state law. Both enjoy their own places apart from the authority structures of state government and the law of the state. In other words, it is plural system with the state-run system on the one side and a plurality of traditional systems on the other. In the context of this model, plural systems are systems in which traditional governance and non-state law represent officially recognized semi-autonomous social fields as defined in the theory of legal pluralism while weak or strong will depend on the degree of autonomy the state accepts to grant to those semi-autonomous social fields.

His fourth model is the model of Weak Modern Monism.[101] It is model that describes a situation of the jurisdiction that takes note of the existence of traditional governance and non-state law, but does not acknowledge their existence by giving them a semi-autonomous status as in the case called the model of regulated dualism. Instead, the state provides for a set of rules that integrate traditional authority and non-state law into the overall state system. As well, according to this model, non-state law would be law of the state as any other state law.

His last model is the model of Strong Traditional Monism.[102] It demonstrates the character of the jurisdictions that have the form of traditional authority and the law in the state would be non-state law.

On the other hand, Forsyth developed seven models to assess the relationship between state and non-state law.[103] Her first model is Repression of a Non-State Justice System by the State System.[104] Conceptually, this model involves a situation in which the state actively repressing a non-state justice system by making it illegal for it to deal with cases. She argued that, if this model is entrenched in a given legal system, the non-state justice system is completely dysfunctional and abuses of human rights will be pervasive. The aim of this model is to develop homogenous legal system with no competing systems.

Forsyth's second model is the formal independence between the systems but tacit acceptance by the state of a non-state justice system.[105] In this model, while the state does not actively suppress the non-state justice system, neither does it support it. It is a situation where there is no formal recognition given to a non-state justice system, but the state turns a 'blind eye' to the fact that the non-state justice system processes the vast majority of

[99] Ibid
[100] Id 63
[101] Ibid
[102] Ibid
[103] Forsyth, Supra Note 96, 73 -107
[104] Id 73ff
[105] Id 75ff

disputes and state actors often unofficially encourage reliance on the non-state justice system. It is a situation in which the society would get the service of both systems.

Her third model is no formal recognition but active encouragement of a non-state justice system by the state.[106] This model involves the state fostering and supporting a non-state justice system at an informal level, but stopping short of endorsing its exercise of adjudicative power.

Her fourth model is limited formal recognition by the state of the exercise of jurisdiction by a non-state justice system.[107] This model involves the state's giving limited legislative recognition to a non-state justice system, but no exclusive jurisdiction, no coercive powers and very little in the way of state resources and support. An important feature of this model is that the non-state justice system is also able to make rules or by-laws for the communities it governs, although this may be limited by the requirement that such laws must be in accordance with custom and usage.

Forsyth's fifth model is a formal recognition of exclusive jurisdiction in a defined area.[108] According to this model, the state recognizes the legitimacy of the non-state system exercising exclusive jurisdiction within a defined area. This area may either be a specific geographical location, such as a village or a reserve, or a specific type of subject matter, such as family law or minor criminal matters. What is crucial in this model is that the non-state justice system makes the final decision in a particular case.

The sixth model of Forsyth is a formal recognition and the giving of state coercive powers to a non-state justice system.[109] In this model the state recognizes the right of a non-state justice system to exercise jurisdiction, and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system. The exercise of jurisdiction is exclusive in that a person who has been dealt with by one system cannot go afresh to the other system. However, it is not exclusive in that a person may appeal from the non-state justice system to the state.

Forsyth's last model is a complete incorporation of the non-state justice system by the state.[110] This model involves incorporating the non-state justice system entirely into the state system by bureaucratizing and civilizing, and embracing it as the lowest tier in the family of courts under the Constitution.

6. Modeling the Nexus between State and Non-State Law in the Ethiopian Legal System through Hinz's and Forsyth's Models

Examining the space of the Ethiopian legal system to accommodate non-state law employing Hinz's and Forsyth's models, to get a clear picture of the nexus between state and non-state law in the Ethiopian legal system's context, is worthwhile. Thus, scrutinizing the Ethiopian legal system ensuing these scholars' models of the traditional versus the modern, or the modern in the traditional and the traditional in the modern, or the relationship between state and non-state laws, one could broadly categorize it into three periods, namely; the pre-modern legal system, the modern legal

[106] Id 79ff
[107] Id 84ff
[108] Id 89ff
[109] Id 95ff
[110] Id 102ff

system of late 1950s to 1995 and the post 1995 Ethiopian legal system.

6.1 The Nexus between State and Non-State Law in the Pre-Modern Ethiopian Legal System

Whilst some scholars argue that the era of the modern Ethiopian legal system started in 1930[111]It is more justifiable to argue that the modern Ethiopian legal system started in the late 1950s. This is because the late 1950s and early 1960s were a period during which Ethiopia adopted six systematically codified public and private codes with the help of foreign legal comparatists.[112] Owing to this, in historizing the Ethiopian legal system, the pre-1950s era is categorized into the era of the pre-modern Ethiopian legal system. Needless to state, in this era, Ethiopians were governed without comprehensive and systematized laws. Thus, in an era of the pre-modern Ethiopian legal system, Ethiopians were resolving their differences by employing their indigenous law, like the law embraced under the umbrella of the Gada system. Nonetheless, it is seldom possible to locate the relationship between state and non-state laws that was in the era of the pre-modern Ethiopian legal system in a single Hinz's and Forsyth's model.

Albeit there are so many reasons for this difficulty, the main reason is the Northern and the Southern Block scenario of the Ethiopian political system. The North Block, the area that covers most of the present Amhara and Tigray regions, started to be governed by semi-written laws like '*Fawse Manfasawi'* that was written based on Holly Bible around 1450[113] and '*Fetha Negast'* – a non-indigenous law – which is the ancient and most probably the first foreign law that was transplanted to Ethiopia.[114]

As a result, in the pre-modern legal system of Ethiopia, the Northern Block was trying to make their tradition a Christian-based and bureaucratically assisted to impose on the Southern Block of the country. On the other side, the Southern Block, unlike the Northern, was administering themselves with their pure indigenous laws. Put it otherwise, in the pre-modern legal system of Ethiopia, the Northern Block had state-assisted tradition while Southern Block was out of the reach, neither for

[111]The argument that modernization of the Ethiopian legal system had started in 1930 bases on the promulgation of the first written constitution of 1931. Nonetheless, in one side the constitution of 1931 didn't have constitutional value, and, the other side, the period from 1930 to early 1950 were a period in which public and private matters were ungoverned by systematically designed state laws. Thus, taking 1930 as the era of the beginning of modern Ethiopian legal system is not plausible.

[112] These codes are Penal Code, Commercial Code, Maritime Code, Civil Code, Criminal Procedure Code, and Civil Procedure Code. Among these codes some of them promulgated on the same day, viz. commercial code, civil code, and maritime code promulgated on 5th day of May, 1960.

[113] Augustyniak, Supra Note 71, P. 102

[114]Sand, Supra Note 65, p.116-143. The origin and how *'Fetha Negast'* was transplanted to Ethiopia is transcribed succinctly as follows. *'[...] one day a certain Petros Abda Sayd, an Egyptian by origin, found the Emperor in a sad mood. When Petros asked the emperor what the cause of his sadness was, the latter replied that he was displeased that the justice in his empire was still administered based on the Old Testament although he and his people lived in the era of the New Testament. Then Petros informed the emperor that there was a book of laws that had been compiled by the 318 Fathers of the Council of Nicaea, and was then promulgated as law by the Emperor Constantine. The book [...] has been translated into Arabic and could be found in Alexandria; why not send somebody and fetch a copy of it? Zar'a Ya'qob responded, You know the language of this country and that country. Go and bring me the book, and gave Petros 30 weqets [28 grams] of gold. Petros brought the book and subsequently translated it into Ge'ez'*. Augustyniak, Supra Note 71, p. 103

assistance nor influence, of the Northern Block's approach.[115]

Taking this truth to the Hinz's and Forsyth's models of state and non-state law relationship, the Northern Block was mainly characterized by the weak modern monism model of Henz and formal independence between the systems but tacit acceptance by the state of a non-state justice system model of Forsyth whilst the Southern Block was mainly characterized by strong traditional monism model of Henz and no formal recognition but active encouragement of a non-state justice system by the state model of Forsyth.

Consequently, in the pre-modern Ethiopian legal system the relationship between law under the Gada system and Ethiopian (state) law was the era in which the former law had strong influences and implementation than the latter. Nonetheless, the situation was happened not because the latter formally recognized the former rather because it was by the chance that the former was out of the reach of the latter law's influence.

6.2 The Nexus between State and Non-State Law in the Ethiopian Legal System from the Late 1950s to 1995

By and large, the period from the late 950s to 1995 was a period when non-state law and state law relationship hostility reached a pressing stage. As well, it could also be dubbed as the period of '*the tyranny of state laws over non-state laws*. As it was discussed, the so-called modernization of the Ethiopian legal system was launched in full-fledged form in the late 1950s with the promulgation of codes. Nonetheless, to appraise the nexus between state and non-state law in the modern Ethiopian legal system from the late 1950s to 1995, this article focuses on the pertinent provisions of the civil code.[116]

There is consensus among scholars that the modernization of the Ethiopian legal system was undertaken with the flavor of *Fetha Negest.*[117] As a result, some described the Ethiopian civil code as a '*new form of Fetha Negust, or Europeanized Fetha Negust'*[118] taking the emperor's preface of the code. As it was indicated, *Fetha Negust* was imported and adapted to the Northern Block traditional sentiment.

On the other side, the emperor in the preface of the code stated something paradoxical when it is assessed from the origin and design of *Fetha Negust.* He stated that;

> *No law which is designed to define the rights and duties of our people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs, and natural justice. In preparing the Civil Code, the Codification Commission convened by us and whose work we have directed has constantly borne in mind the special requirements of our empire and of our beloved subjects and has been inspired in its labours by the genius of Ethiopian legal*

[115] See generally Hailegebriel G. Fayisa, The Ethiopian Civil Code Project: Reading A 'Landmark' Legal Transfer Case Differently, PhD Dissertation, November 2017, P.95, 103

[116] Civil Code Proclamation, 1960, Proclamation No. 165, Negarit Gazeta Gazette Extraordinary, Year 19th, No.2

[117] Sand, Supra Note 65, P.138

[118] Hailegebriel, Supra Note 115, P.95, 103

> *traditions and institutions as revealed by the ancient and venerable Fetha Negust.*[119]

This quote, in the one hand, suggests that law is ineffective unless it mirrors the traditions and social life of the people it governs. For this reason, the codification process of the civil code took *Fetha Negust* as its bedrock. On the other hand, it suggests that *Fetha Negust* had been reflecting the culture and tradition of all nations, nationalities, and people of Ethiopia. Moreover, the worst sentiment of this preface is that the tradition and culture of the Northern Block is also that of the Southern Block which is completely wrong. Nonetheless, it seems as it was not done inadvertently but rather advertently to impose the Northern Block's culture and tradition on the Southern Block. As a result, scholars argue that the codification of the code was done with dual purposes; viz., anti-semi colonial (externally) and imperial (internally)[120] to impose Northern Block's tradition on the Southern Block. To explain the inappropriateness of this purpose of the code, in 1974 Brietzke wrote that this disregard of the traditions of *non-Amhara* cultural groups will create problems if the code norms seriously impinge upon traditional laws in the future.[121]

About the point under discussion, this paradox has taken the end of the nexus between state and non-state law to the unwarranted destination. Taking *Fetha Negust* as it was the reflection of all Ethiopian traditions and bedrock of the source of the code, it comes with sweepingly repealing provision of the code which states,

> '. . . *unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed.*[122]

Thus, Article 3347 of the Civil Code is the provision that governs the nexus between state and non-state laws in the modern era of the Ethiopian legal system that ranges from the late1950s to 1995. Taking Ethiopian situation of this era to the Hinz's and Forsyth's models of the relationship between state and non-state law, it falls in the strong modern monism model of Hinz and the repression of a non-state justice system by the state system model of Forsyth. Consequently, the modern era of the Ethiopian legal system from late 1950s to 1995 was an era in which the nexus between law in the Gada system and state law was unfriendly.

Consequently, the Ethiopian legal system that had existed from the late 1950s to 1995 is characterized by its extreme centralist approach as well as its lack cultural sensitivity and relevance. As described earlier, the centralist ideology pursued in Ethiopia was based on the belief that law is and should be the law of the state, uniform for all persons, exclusive of all other laws, and administered by a single set of state institutions.[123] This was because during that period, all non-state laws,

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[119] Paragraph two of the preface of the civil code

[120]Hailegebriel, Supra Note 115, p.96

[121]Brieztke, Supra Note 11, P.155

[122]Article 3347 of the Civil Code; regarding this approach of Ethiopian legal system reforming, Muradu states that in 1950s to 1960s Ethiopia were striving to replace its customary laws with western laws while other African countries were exploring and contesting on how to implement their modern and customary law in harmony. See Muradu Abdo, Major Themes in the Study of Ethiopian Customary Laws (Amharic), Vol. 16, No. 2, Mizan Law Review, p. 423 – 454

[123]Aberra Degefa, Legal Pluralism in Multicultural Setting: Legal Appraisal of Ethiopia's Monist Criminal Justice System 'in Elias N. Stebek and Muradu Abdo (Editors), Law and Development, and Legal Pluralism in Ethiopia', Justice and Legal Systems Research Institute, Addis Ababa, 2013, P.142

including laws under the umbrella of the Gada system, were denied any role in almost all spheres of societal relationships.[124]

6.3 The Nexus between State and Non-State Law in Post-1995 The Ethiopian Legal System

As it is well known, 1995 was the year in which the constitution of the Federal Democratic Republic of Ethiopia (FDRE) was adopted with a new approach in the nexus between state and non-state law arena. Even though the constitution was adopted with so many departures from its predecessor constitutions, here the focus of this article will be only on its provisions about the nexus between state and non-state laws. Given the fact that all previous Ethiopian rulers have pursued a complete assimilationist and unitarist policy in the realm of legal and political arrangements, this constitutional departure deserves great commendation. One of the reasons for this praise is the recognition it gives for multiculturalism and legal pluralism are the main ones.[125]

Just the same, generally, there is a consensus among the scholars that the FDRE Constitution recognizes non-state laws and non-state institutions of nations, nationalities, and peoples in Ethiopia.[126] To argue so, scholars base, *inter alia*, articles 9, 40, 34(5), 37, 39(2), and 78(5) of the FDRE Constitution. Simply put, per these provisions, the constitution recognizes indigenous laws and institutions. Moreover, unlike its predecessor, it is claimed that as far as the Constitution has given space to the possible adjudication of disputes relating to personal and family laws based on religious or customary laws and it has provided for the possible establishment or recognition of religious and customary courts, the constitution has attempted to accommodate legal pluralism.[127]

Here the term '*legal pluralism'* is used to describe the co-existence of two or more legal systems within the same geographical space or jurisdiction.[128] It is argued that in almost all parts of the world, legal pluralism is a reality that includes the formal justice system – national law and international law – and informal justice systems – customary law, religious law, and other normative orders.[129]

Consequently, one could argue that the FDRE constitution shares some characteristics of what Henz called the *'new African constitutionalism'*. On the one side, the concept of new African constitutionalism, per Henz, is characterized by the notion of constitutional supremacy and the binding force of human rights and freedoms and, on the other side, by the confirmation of traditional governance and African customary law.[130]

Taking this stand of the FDRE constitution to the Henz's and Forsyth's models of the nexus between state and non-state law, the post 1995

[124]Tsahay, Supra Note 77, p.276

[125]Aberra, Supra Note 123, p. 145

[126] See, as an instance, Yidnekachew Kebede et al., Case Study on Seven Customary Laws in Ethiopia, in Elias N. Stebek and Muradu Abdo (Editors), Law and Development, and Legal Pluralism in Ethiopia', Justice and Legal Systems Research Institute, Addis Ababa, 2013, p.195,

[127]Aberra, Supra Note 123, p. 146

[128] William Twinning, Normative and legal pluralism: A global perspective, Duke Journal of Comparative and International Law 20, 2010, 473–517

[129]Aberra Degefa, When Parallel Justice Systems Lack Mutual Recognition: Negative Impacts On The Resolution Of Criminal Cases Among The Borana Oromo, P. 312, <https://www.degruyter.com/document/doi/10.14361/9783839450215-015/html> last visited on august 25, 2021

[130]Hinz, Supra Note 1, p.86,

Ethiopian legal system shares some characteristic of the strongly regulated dualism model of Henz while limited formal recognition by the state of the exercise of jurisdiction by a non-state justice system model Forsyth. Consequently, assessing the relationship between state and non-state law perspectives, the post-1995 Ethiopian legal system is better than its predecessors in providing space for non-state law.

However, a scrutiny of the FDRE constitution reveals that the non-state law has not yet been fairly recognized in the post-1995 Ethiopian legal system. This is mainly because the recognition does not encompass all areas of law, but rather only a limited area of private law. Nonetheless, the recognition should have been to the extent of non-state laws' applicability by state courts, which *mutatis mutandis* concerns the applicability of law in the Gada system by state courts in Oromia Regional State.

From this discussion, one could simply synthesize that the earlier assumption that law is the monopoly of the state and the consolidation of lawmaking power in the hands of the state was an essential aspect of the state-building process[131] is still deeply rooted in the Ethiopian legal system. Moreover, taking this assumption to the relationship between state and non-state law discourses in the present Ethiopian legal system reveals that state courts in Ethiopia have a responsibility to apply only state law, but not non-state law, like laws under the umbrella of the Gada system, to resolve disputes. As well, non-state law can be employed to solve a limited private law-related matters. Consequently, as all things stand now, the Ethiopian legal system has limited space for non-state law.

7. Conclusion and Recommendations

In this article, the discourse on the relationship between state law and non-state law, particularly the Gada system, is appraised. It revealed that the relationship between these two laws, albeit there is a degree of hostility in different periods, has co-existed in disharmony since the modern law incubation in Ethiopia. The main reason for their hostile relationship is the distorted political minds behind the Ethiopian modern legal system that did not envisage the role of non-state law in general and laws in the Gada system in particular in maintaining social tranquility. Due to this distortion, the development of the Modern Ethiopian legal system commenced with the importation of *Fetha Negest* in the 16th century and ended up with the *Europeanized Fetha Negest* in the 20th century. *Fetha Negust* was imported and processed in the Northern Block mentality and then imposed on the Southern Block. In this process, integrating non-state law in the modern Ethiopian legal system in general and that of the Southern Block, including law in the Gada system, in particular, was neglected. This completely makes non-state laws, including the Gada system, a superfluous one.

As recommendations, the following point is forwarded as a way out.

- Even though non-state law, particularly law in the Gada system, has so many unique features and far-reaching benefits in protecting the common good of Ethiopians, it has not received a fair focus in all periods of the modern Ethiopian legal system. Nonetheless,

[131] Tamanaha, Supra Note 52, p.380

now it is mandatory to curb the past tendency by seriously working on non-state law. Thus, governmental institutions and Higher Education institutions must ensure that the non-state laws are documented and preserved for future generations as well as for research purposes.

- As was discussed, a legal system of a given jurisdiction can be effective and simply implemented only if it is a reflection of the character of the society it governs. Against this truth, however, the political mind behind the Ethiopian modern legal system did not recognize the role of non-state law in general and the Gada system in particular could play in preserving social tranquility. Even though the deep-rooted hostility between state and non-state law in the pre-1995 Ethiopian legal system was softened by the FDRE constitution in post-1995, it still needs to expand the space for non-state law. That is to say, the space should be to the extent of non-state laws' applicability by state courts, which *mutatis mutandis* concerns the applicability of law in the Gada system by state courts in Oromia Regional State.
- As it was shown, in Ethiopia, the relationship between state and non-state laws is not mutually supportive and cooperative. This applies *mutatis mutandis* to the relationship between the state and the Gada system's laws. This suggests the need to reform the relationship between the state and the non-state law to maximize the chances of these laws to support and cooperate in performing the tasks for which they are best suited to their fullest potential, and complement each other's weaknesses with their strengths. Consequently, the Ethiopian legal system should be revised in a way that gives chances for non-state laws to maintain the common good of the nation.