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ADMINISTRATION OF JUSTICE IN CUSTOMARY COURTS IN OROMIA

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Abstract

One of the values of federalism is its convenience in dealing with a plurality of laws and institutions. Ethiopia's federalism exhibits this feature, among others, by envisaging the possibility of establishing Customary Courts in addition to formal state courts. Accordingly, Oromia Regional State established Customary Courts by law. This paper examines how the Courts administer justice in the State. The establishing laws, Customary Courts' cases, statistical data obtained mainly from the Oromia Supreme Court, documentary films, secondary sources, and interviews conducted with elders, judges, Abba Gadaas, Haadha Siinqees, and cultural experts were used as sources of information. Within a time less than two years, Oromia Customary Courts decided 209, 270 cases out of the 260, 382 total cases presented to the First Instance Level; and 8,800 cases out of the 12,051 total cases presented to the Appellate Level. The paper finds that the courts, through cases they decide, are promoting both access to justice, and Oromo cultures and values. However, they are suffering from a lack of budget to employ necessary human resources (especially, secretaries), train their elders, furnish office infrastructures, and mobilize information flow. Moreover, their criminal jurisdiction is not traceable in both federal and Oromia constitutions unlike the establishing laws and prevailing practices. The paper suggests making interventions in these areas by way of mobilizing all budget sources of Customary Courts and amending the constitution to make the courts more vibrant institutions from where other Regional States of Ethiopia emulate the experience.

Keywords: Customary Courts, Elders, Legal pluralism, Justice Administration

I. INTRODUCTION

Legal pluralism is a fact of life. It is a situation whereby two or more legal systems coexist in the same social field.[1] It is a situation where ''more than one legal systems operate in a single

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[1] Swenson, G., *'Legal Pluralism in Theory and Practice'* (2018), 20 INTERNATIONAL STUDIES REVIEW, at 438-462.

political unit''.[2] The mode of coexistence or operation may be combative (overtly hostile to one another), competitive (states' autonomy is not challenged but non-state actors retain substantial autonomy), cooperative (cooperation exists on predominant norms with less frequent major clashes) or complementary (non-state is subordinated and structured by the state).[3] Plurality exists everywhere ranging from the lowest local level to the most expansive global level.[4] However, the cause of plurality may differ. For example, unlike in most African countries where colonization was a factor for plurality,[5] the 19th-century forceful subjugation by Emperor Menelik II, the 20th century voluntary transplantation of laws, and the 1995 constitutionally declared ethnic federalism were the main factors for plurality.[6]

A difficult question in every country is how to approach the plurality. Broadly speaking, there are five main strategies for approaching it: bridging (allocation of power between state and non-state systems based on state law, participants' preferences, and venue appropriateness), harmonization (attempting to ensure the consistency of the outputs of the non-state justice system with the state system's core values), incorporation (eliminating the distinction between state and non-state justice at least from the state's perspective), subsidization (supporting non-state systems in different ways notably legislative reform, capacity building, establishing physical infrastructure, supporting symbolic representation, and promoting public engagement), and repression (complete outlawing of non-state systems).[7] These strategies are by no means mutually exclusive or hermetically sealed, but they are, nevertheless, conceptually and functionally distinct.[8] The choice of appropriate strategy depends upon the type of coexistence, i.e., plurality environment. For example, while bridging is a useful approach in competitive and cooperative legal pluralistic environments, it offers little utility in the context of a combative environment.[9] Similarly, harmonization is more successful in competitive—and especially cooperative—legal pluralism environments.[10]

Ethiopia, being a land of plurality,[11] cannot be outside of the above broader modes of coexistence and approaching strategies. Formal and informal justice systems have been operating side by side. They have been approached differently at different times, too. Pre-1991, under imperial and military rule, the country opted for a repressive strategy thereby forcing members of the non-dominant groups to entirely or partially give up their identities.[12] After 1991, especially following the adoption of the 1995 FDRE Constitution, the strategy completely shifted toward

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[2] BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 89 (2nd ed. 2002).

[3] For detail explanation of these relationships-combative, competitive, cooperative and complementary see Swenson, G., *Supra* note 1, at 443-445.

[4] Brian Z Tamanaha, *'Understanding Legal Pluralism: Past to Present, Local to Global'* (2007), 30 SYDNEY LAW REVIEW, 375

[5] Tsehai Wada, '*Coexistence between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects'* (2012), 5 AFRICAN JOURNAL OF LEGAL STUDIES*, 269*

[6] Zelalem Tesfaye and Moti Mosisa, *Legal Pluralism and Its Implication on Human Right in Ethiopia: A Look for Policy Framework' in Human Rights and Legal Pluralism in Ethiopia,* ETHIOPIAN HUMAN RIGHTS LAW SERIES, VOL.7, AAU, CLG, SCHOOL OF LAW, at 74-76).

[7] Swenson, G, *supra* note 1, at 446-448.

[8] Swenson, G, *supra* note 1, at 446.

[9] Swenson, G, *supra* note 1, at 447.

[10] *Id.*

[11] Studies have revealed that there are multiple informal justice systems co-existing and operating in parallel with the formal justice system (Aberra Degefa, Human Rights Implications of Legal Pluralism: Reflection on the Practices among Borana Oromo in Human Rights and Legal Pluralism in Ethiopia, *supra* note 6, at 6).

[12] Zelalem and Moti, *supra* note 6, at 79.

accommodation of plurality of multiple types. The right to self-determination of Nations, Nationalities, and Peoples of Ethiopia guaranteed by the Constitution has broader implications on legal plurality, including recognition of customary values.[13] Each ethnic group has been given the space to promote its own culture and language, and legal pluralism is officially recognized.[14] Specifically, the Constitution provided the possibility of establishing or recognizing customary and religious courts operating based on customary and religious laws.[15] The Oromia Constitution envisaged a similar thing.[16] Because of this, the strategy followed to approach plurality may take more than one form: bridging, incorporation, or subsidization as the case may be, but it is no longer repressive.

Customary courts have not been formally established by law for years in the country in general and in Oromia in particular. The 2018 change that happened in the country can be taken as a triggering factor for their establishment. Following the change, many government organs existing both at federal and regional levels took different reform initiatives. As part of this, Oromia courts reorganized their structure by Proclamation No.216/2019. One of the major changes introduced by the proclamation was the decentralization of judicial jurisdiction. Accordingly, civil matters regarding movable property where the matter involved does not exceed ETB one million and immovable property where the amount involved does not exceed ETB three million, application for Habeas Corpus, criminal matters whose maximum punishment does not exceed fifteen years of imprisonment became the jurisdiction of District Court.[17] This time, District Courts are loaded with many tasks and the Oromia Supreme Court envisaged its possible implication on judicial accessibility. At the same time, the Supreme Court had already known through research findings that Kebele Social Courts were not accessible to the local community because of several factors such as lack of public trust, lack of capacity to enforce their judgments, and lack of sense of professionalism and ethics with the judges.[18]

Because of this, the idea of establishing Customary Courts was suggested, and researching how to go about was taken up by the Oromia Legal Training and Research Institute. The Institute started conducting the research in 2019, finalized and presented it in 2020 at different meetings on which various stakeholders, including leaders of justice sectors professionals, *Abba Gadaas*, university lecturers, and leaders of the Oromia Cultural Bureau. Again, the meeting was continued in the presence of some members of *Caffee* Oromia, including the Speaker of *Caffee.* The research has critically analyzed the opportunities and the challenges related to the establishment of a Customary Court in Ethiopia. However, it indicated that the opportunities will outweigh the challenges mainly because of the potential accessibility the courts will afford. After a series of serious discussions made on the research, drafting the proclamation proceeded based on the findings. After multiple deliberations were made on the draft proclamation with all concerned, the Oromia Regional Government established and recognized Customary Courts across Oromia by Proclamation No.240/2021 *(hereinafter shortly referred to as, Oromia*

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[13] CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION, Art.39 (1-2). See also Zelalem and Moti, *supra* note 6, at 81.

[14] Susanne Epple & Getachew Assefa (eds.), Legal Pluralism in Ethiopia: Actors, Challenges and Solutions, 2020, p11; available at < https://library.oapen.org/handle/20.500.12657/41792 >. Accessed on 7th of January, 2023.

[15] FDRE Constitution, Art.34 (5) cum.78 (5).

[16] The 2001 Revised Oromia Constitution, Art. 34 (4- 5) and 62 (1-2)

[17] *A Proclamation to Redefine the Structure, Powers and Functions of the Oromia Regional State Courts* Proclamation No. 216/2018, MAGALATA OROMIYA Finfine, 8th of October 2018 (hereafter, Oromia Customary Courts Proclamation), Art.31.

[18] For details of these problems, see Azene Endalemma and Abdi Tesfa, *The Effectiveness of Oromia Kebele Social Courts*, OROMIA LAW JOURNAL, Vol.9, No.1, 2020, pp167-181 (Published in Afan Oromo).

Customary Courts Proclamation), proclamation implementing Regulation No.10/2021 *(hereinafter referred as, Oromia Customary Courts Regulation)* and the regulation implementing directive No.15/2021. These customary courts are newly established or recognized existing ones to adjudicate disputes based on customary courts.[19] By so doing, after three decades of delay, the Oromia Regional State converted the constitutional provisions of customary courts into a reality for the first time in the country. Now, customary courts are functioning in Oromia. This is good as it increases certainty by defining the relationship between customary systems and formal state courts. For example, it substantially resolves the challenges customary systems were facing which, *inter alia*, include abuse and exploitation by disputants who strategically engage in forum shopping, i.e., those who move back and forth between the customary and formal state courts.[20]

However, how the courts are operating in their actual practice of administering justice has not been studied. Although the establishment of the courts is very recent, they need to be studied at their earliest possible given that they are 'new' systems at least in Ethiopia. Research-based interventions are highly encouraged. This paper is a preliminary attempt toward that effort by focusing on objectives, jurisdiction, applicable laws, independence and accountability, judgments of the customary courts, and their relationships with other formal state courts as core points of discussion. In the interest of space and time, the paper did not cover issues related to the execution of judgments such as the extent, the mechanism, and the challenges of the same.

The paper primarily employed a qualitative research approach although quantitative data were used in some cases. Accordingly, the establishing laws, decided cases of Oromia Customary Courts, statistical data mainly obtained from Oromia Supreme Court, documentary films prepared by Oromia Broadcasting Corporation in collaboration with Oromia Supreme Court, and interviews conducted with elders, judges, *Abba Gadaas*, *Haadha Siinqees,* and cultural experts were used as sources of information. The establishing laws (Oromia Customary Courts Proclamation and Regulation) served as a starting point for discussion on almost all issues. This approach was followed to lay a fertile ground to understand the justice administration dimension of the courts given that the laws themselves are relatively recent. Moreover, philosophical explanations existing behind the laws and theories of legal pluralism are included in analyzing some issues. Qualitative data such as decided cases, interviews, and documentary films; and quantitative data such as the number of decided cases were used to show how courts are functioning in light of their mandate and then to examine the implications they have on the very objectives of the courts: access to justice and promotion of Oromo culture and values. Furthermore, secondary sources such as journal articles and book chapters were used to show views and substantiate arguments.

Following this introduction, section two provides the objectives of Oromia Customary Courts. Section three is about the structure into which the courts are organized to attain their objective. Section four deals with their jurisdiction and the laws they apply. Section five focuses on the independence and accountability of the courts. Section six is about the judgments. Section seven addresses the relationship between Oromia Customary Courts and formal state courts. Finally, section eight provides conclusions. In all sections, an attempt is made to emphasize the justice administration aspect of the courts.

[19] A definition for customary courts is provided under Art. 2 (7) of the Oromia Customary Courts Proclamation.

[20] Susanne Epple & Getachew Assefa (eds.), *supra* note 14, at 55.

II. OBJECTIVES OF OROMIA CUSTOMARY COURTS

Cumulative reading of the Preamble and Art.6 of the Oromia Customary Courts Proclamation depicts two core objectives of establishing the courts: promoting Oromo culture and values and ensuring accessibility of justice without violating the supremacy of the constitution. It was believed that the objectives are attained if the law itself substantively and procedurally reflects *Gadaa* values, principles and institutions.[21] At this particular time, it may be difficult to adequately examine to what extent Oromia Customary Courts realized the objectives as they were established and entered into operation only recently. However, it is possible to reflect to what extent they are working toward these objectives based on the immediate results they are achieving.

A. Promoting Oromo Culture and Value

As is the case in any other organized society, Oromo people have their way of viewing the world, i.e., the Oromo worldview, which is reflected in all affairs of life.[22] In Oromo's world view, there is the concept of *'safuu'*. It provides the moral and ethical code according to which events, whether at a personal, social, or cosmic level take place.[23] For example, protecting the environment is appropriate, and arbitrary deforestation is wrong. Accordingly, the Oromo have cultural norms to decide what trees to cut and not to cut; when to cut and not to cut.[24] Similarly, disowning one's child is not appropriate. These all are dictated by *'safuu'*. Oromia customary courts also reflect such values while administering justice (deciding real cases). Let us see the following cases[25] as illustrative. In the Bale Zone of Oromia, a group of people settled in the protected forest by constructing a shelter/house there. Oda Kebele Administration, the Kebele where the forest is found, brought a suit against them before the customary court and the court decided to leave the forest. In its reasoning, the court explained that the occupied forest by the defendants belongs to all the people of the Kebele, serves as a shade for Oromo people, and needs protection. In the Arsi Zone too, a group of individuals occupied a protected forest, and the case was brought to customary court. The elders of the court, by convincing the occupiers that Oromo have special respect for forest protection, made them leave the forest willingly.

In paternal-proof family cases, Oromia customary courts also reflect Oromo culture and values. This happens when men deny paternity after giving birth to women. That is, in cases of children born out of wedlock. From the perspective of the interest of the child, this is not good at least for two reasons. First, it makes the child to be half-parented. The child knows only his/her mother; not father. Second, it is difficult to fix and order maintenance duty as the father is not known at least until paternity is proved. When such cases are brought before customary courts, the elders influence the person who denies paternity to admit according to customary laws. They do this, for example, by narrating the dangerous consequences of denying one's child – that it is

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[21] The author knows this as he organized and participated in series of deliberations on the draft proclamation made at Adama and Bishoftu in 2020.

[22] Asefa Jalata, *Gada (Oromo Democracy): 'An Example of Classical African Civilization'* (2012), 5 THE JOURNAL OF PAN AFRICAN STUDIES, 140.

[23] Gemetchu Megersa, *Knowledge, Identity and the Colonizing Structure, The Case of the Oromo in East and North East Africa*, (PHD DISSERTATION, SUBMITTED TO THE DEPARTMENT OF ANTHROPOLOGY UNIVERSITY OF LONDON, SCHOOL OF ORIENTAL AND AFRICAN STUDIES,1993), p261.

[24] Oromia Supreme Court, *Gadisa* Bulletin, *especial issue*, November 2022, at 10.

[25] These cases are taken from *Gadisa* bulletin, *Id*., at 10-11 (translated into English by the author).

against Oromo's '*safuu'* bearing merciless curse - which is also substantiated by a strong oath administered as per Art. 29 of Oromia Customary Courts Proclamation.

The oath plays a significant role in disclosing the truth in the justice administration of customary courts in Oromia. The tools (items) used and messages attached to them while administering oath are very much instrumental in influencing a person (a party to a dispute or a witness) to speak the truth. The items are many and include barley (considered an essential of cereals), bone, bullet, sword, knife, kil (buqqee duudaa), ash, chain, fire, Bible, water, and food. The items are presented in a series of orders to provide subsequent meaning. They are believed to define the corresponding words used in the oath as indicated in the following table:

Items used	**In Afan Oromo**	**English translation**
	Yoon sobe,	If I speak lie,
Barley	*sanyiin facaafadhu naaf hin margiin; ilmoon naaf hin dhalatiin; dhalatu hin guddatiin; guddatu hin dubbatiin;*	let the seed I sow will not be planted; let the offspring will not be born to me; if born to me, let him/her not grow up; if grew up, let him not speak up;
Bone	*akka lafee kanaatti qullaatti naa hambisu;*	let me remain bare like this bone;
Bullet	*rasaasi kun ibiddaa, ibiddi kun naan hin dhabiin;*	this bullet is a fire; let it gets me;
Sword	*rasaasi yoo na dhabe, waraanni kun naan hin dhabiin;*	if the bullet did not get me, let this sword will not loss me;
Knife	*lubbuufi foon kiyyaa aaduu kanaan gargar haa ba'u;*	let my flesh and spirit dissociated from each other with this knife;
Kil (buqqee duudaa)	*dhalli koo duudaa haa ta'u; keessi isaa sanyii qaba-sanyii naan haa dhowwu; keessi isaa hadhaawaa nama biratti naa hadheessu;*	let my offspring remain deaf; its internal has seed; let me remain seedless; its internal is sour, let me remain sour with other people;
Ash	*qabeenyi ani horadhe (kan baankii, mana, lafaa fi kiisii jiru) bin jedhee akka daaraa kanaa na harkaa haa badu*	let my asset/property existing with bank, at home, on land and in the pocket be destroyed like this ash;
Chain	*akka saree maraatuu sansalatni kun morma koo irraa hin bu'iin;*	let me be chained with this chain like a mad dog;
Fire	*ibiddi kun qabatee narraa hin dhaamiin; qaama fi qabeenya kiyyaatti ibiddi haa nammu;*	let the fire comes to me; let it will not be extinguished from my body and property;
Bible	*haagillee ta'u haagi naaf hin ta'iin; gaabbullee naaf hin gaabbiin; amantaan beekuun dhugaan waaqayyoo naa haa ga'u;*	let me not be forgiven, let me not get mercy; let the truth of God on whom I believe reaches on me
Water & food	*Dhuma irratti, waanti ani jedhu kun dhiigaafi foon koo keessaa hin ba'iin jechuun bishaaniin hunatee midhaan liqimsa*	Finally, a person swallows a food with water saying that let what I said so far remains in my blood and flesh

Source: *synthesized from the short documentary film prepared by the Oromia Supreme Court based on the practice of the First Instance Customary Court of Dukem Town, Dec. 2022*

At this juncture, one may ask a question as to what makes the oath conducted in customary courts different from the one conducted in formal state courts. Oath is indeed administered in both courts. But it seems that the oath administered in customary courts is deeper and more powerful in content to disclose the truth. *Gebre Yntiso* generally provides two reasons for this: practical and religious.[26] On the practical side, the social life of people in communities is built around mutual trust.[27] Many relations are made based on trusts with no written records and witnesses.[28] Untrustworthy individuals risk being dishonored and disgraced among their own families and communities.[29] On the religious aspect, telling a lie while under oath is associated with a betrayal of faith that might have supernatural consequences.[30] There are also practical instances whereby many lost their life after falsely undertaking oath.[31] Because of this, the elders of customary courts even restrain from administering the oath and they go to that process as a last resort.[32] In short, even if factors like education, secularity, and urban lifestyle contribute not to taking the oath seriously as aptly argued by *Tsehai*,[33] because of social and religious pressure existing in oath administration, Oromia Customary Courts can better disclose the truth than formal state courts. In short, the oath system is the single most important to search for truth which is one of the core values Oromo people –truth is the son of God (*dhugaan ilmoo waaqaati*). This, in turn, indicates that Oromia Customary Courts are contributing their share in promoting Oromo cultures and values through cases they decide.

B. Access to Justice

There is little agreement about the meaning of access to justice.[34] However, it is recognized in different international and national instruments.[35] In many legal systems, the notion is built from such explicit and implicit recognition of rights like access to courts; trial by competent, independent, and impartial tribunals; fair and public proceedings, effective redress, and legal assistance and legal aid.[36] The General Comments on human rights also explain that access to justice encompasses issues like removal of physical and non-physical barriers or at least keeping

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[26] GEBRE YNTISO, UNDERSTANDING CUSTOMARY LAWS IN THE CONTEXT OF LEGAL PLURALISM, FOURTH CHAPTER IN SUSANNE EPPLE & GETACHEW ASSEFA (EDS.), LEGAL PLURALISM IN ETHIOPIA: ACTORS, CHALLENGES AND SOLUTIONS, 2020. See also, *supra* note 14, at 83.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] A narration by elder of First Instance Customary Court of Dukem town on the documentary film prepared by Oromia Supreme Court, December 2022 (available with the author).

[32] A narration by elder of First Instance Customary Court of Dukem town, *Id.*

[33] Tsehai, *supra* note 5, pp. 284.

[34] Mizanie Abate, Alebachew Birhanu, Mihret Alemayehu, *Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities*, 11 (1) MIZAN LAW REVIEW, 1, 2 (2017).

[35] See, for example, Art. 8 of the Universal Declaration of Human Rights, Arts. 2, 3(a), 7(1 (a) (c) and (d), 9(4), 14 (1), 14(3) (c) of the ICCPR,

[36] Mizanie Abate and *et al*, *supra* note 35, at 6.

them at a minimum[37], affordable court fees to obtain redress[38], easiness of the procedures to access courts and tribunals for all sections of the society,[39] and disciplined and trained; independent and impartial court personnel.[40] From this, one can easily understand that access to justice is a very wide concept.

Oromia Customary Courts apply the customary laws of the people found in the specific locality.[41] The only care the courts need to make is ensuring the compatibility of these laws with the Constitution, public morality, and natural justice.[42] They serve free of charge, i.e., users do not pay court fees. They are also culturally relevant to the society. They use Afan Oromo as the working language. They are constituted at Kebele level if they are First Instance Courts and at district and town levels as may be necessary if they are Appellate Customary Courts.[43] These courts are also deciding many cases. Until April 2023, First Instance Customary Courts processed a total of 260,382 cases and disposed of 209,270 cases.[44] Similarly, Appellate Customary Courts processed 12,051 cases and disposed of 8, 800 cases.[45] This is within a short time (less than two years) as the courts completed preparations and started the actual operation of handling cases at the beginning of 2022 although they were established by law in 2021. From the perspective of accessibility, these figures may explain the following things.

First, many cases are coming to Customary Courts. This implies that users are interested in resolving their cases by the courts. Users are not interested unless the courts are accessible to them. Similarly, the figures indicate how fast the courts are in handling the cases which is also another aspect of accessibility. Celerity of decision is an essential feature of informal justice systems. It is one of the most important reasons why the system is needed. Because of the proximity of the system to the users, the absence of service costs or the affordability of service costs, popularity and respectfulness of local practitioners, and easy and simple procedures that are embedded and legitimated in local values and beliefs, they are quicker than the formal justice systems in deciding cases.[46] Oromia Customary Courts cannot be different from this general trend. However, it should be noted that unless the system is strengthened from time to time, celerity may decline as the number of cases increases through time.[47]

Second, the number of cases flowing to formal state courts has been reducing from year to year since Customary Courts started functioning. This can also be verified by the number of cases presented to formal state courts in the last three years as depicted by the following table:

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[37] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, available at: https://www. Refworld.org/ docid /478b2b2f2.html [accessed 16 January 2024]

[38] *Id.*

[39] International Convention on Civil and Political Rights, Art.14 (1).

[40] Human Rights Committee General Comment 32, para. 18-20; 32, para. 18-20

[41] Oromia Customary Court Proclamation No.240/2021, Art. 26 (13).

[42] *Ibid.*, Art. 26 (13).

[43] *Id., at* Art.7 (2-3). It is also good to note that a First Instance Customary Court can serve two or more kebeles.

[44] Oromia Supreme Court Telegram Channel: https://t.me/MMWO2020 (posted in April 2023).

[45] *Id.*

[46] Susanne Epple & Getachew Assefa, *supra* note 14, at 20.

[47] Tsehai Wada, *supra* note 5, at 284.

No	Year	Number of cases presented to Oromia regular courts after Oromia Customary Courts start functioning	
1	2013E.C /2020/21	662,000	**Change (difference)**
2	2014 E.C/2021/22	651,000	662,000-651,000=11,000
3	2015 E.C/2022/23	590,000	651,000-590,000=61,000

Source: *Oromia Supreme Court Annual Reports of Three Years, 2020/21, 2021/22, 2022/23*

In the history of Oromia regular courts, the number of cases presented to state courts had been increasing from year to year. However, as one can read from the above table, they started to decrease progressively following the establishment of Customary Courts by 11,000 cases and 61,000 cases respectively in the year 2021/2022 and 2022/2023. One can imagine that other factors such as the security problems that have been happening in different parts of Oromia since recent years may contribute to the decline in the number of cases presented to formal state courts. However, *ceteris paribus,* it is reasonable to think that the role of customary courts for such a decline of the number of cases is significant. Moreover, the practice reveals that cases initiated at Customary Courts are being resolved there without coming to formal state courts.

This obviously has its own implication on the efficiency and accessibility of both formal state courts and Customary Courts. From the perspective of formal state courts, it helps the judges to be focused and dispense a quality judgement which in itself is an aspect of accessibility. From the perspective of Customary Courts, it shows that the users are being satisfied to the decisions of the courts by voluntarily submitting themselves to the jurisdiction of the courts which in turn implies their accessibility.

Access to justice of Oromia Customary Courts can also be explained in terms of the nature of cases they are disposing. Some cases, if taken to formal state courts, cannot be resolved by doing justice to the disputing parties. Typical of these cases are contract of loan cases. Article 2472 of the Ethiopian Civil Code demands documentary evidence to prove a loan contract the amount of which is greater than 500 birr. In practice, however, there are so many cases whereby more than 500-ETBloan is made based on mutual trust without reducing it into written contract. When such cases are brought to formal state courts, the courts cannot make justice as there is no admissible written evidence as required by loan contract law. As Oromia Customary Courts follow their own customary law and procedure, other than what formal state courts follow, they are doing better justice in this regard. Practical examples are the return of 5,000 ETB in Arsi Zone, Tijjo Woreda; 15,560 ETB in East Wollega Zone, Nekemte town; and 20, 000 ETB again in East Wollega, Mana Sibu Woreda to the lenders.[48]

In short, considering their proximity to the people, the language they use, the laws they apply, the service they deliver free of cost, and the number of cases they decide and the implications one draws from them, Oromia Customary Courts reflect attributes of access to justice.

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[48] *Gaddisa* Bulletin, *supra* note 25, p10.

III. STRUCTURE/ORGANIZATION OF CUSTOMARY COURTS

To achieve their objectives, Customary Courts operating in Oromia are organized into two structures: First Instance Customary Courts and Appellate Customary Courts.[49] The former ones are constituted at the Kebele level although a First Instance Court can serve more than two or more kebeles.[50] The latter ones are constituted at all district and town levels as may be necessary.[51] Both levels of courts are constituted either as newly established ones or recognized prior functioning customary/social institutions.[52]

Detail criteria and procedures for recognizing Customary Courts are provided under the Oromia Customary Courts Regulation.[53] Accordingly, if a customary or social institution works in resolving disputes based on Oromo customary rules and values on a regular basis, such service is effective and does not make discrimination based on religion, sex, economic or other personal status, and the institution is willing to be recognized, it can be recognized as First Instance Customary Court.[54] These criteria are also applicable to recognize a customary institution as an Appellate Customary court although having experience of appellate jurisdiction is a plus requirement in this case.[55]

About the procedure for recognition, the President of Woreda Court or Head of Woreda Cultural and Tourism Office may directly invite and encourage institutions known for their dispute resolution and mediation practices, to develop the desire to be recognized as a Customary Court.[56] The Woreda Court President and Head of the Woreda Cultural and Tourism Office may also cause an assessment to be conducted for the identification of a customary institution that can be recognized and serve as a Customary Court.[57] Before giving recognition, the name by which the institution is known, the address and boundary within which the institution operates, the names of elders, sources of income it uses to cover its costs, and acceptance, and approval of residents to be known by conducting meetings should be verified.[58] The District Court shall provide the customary institution given recognition as either a First Instance or an Appellate Customary Court, with a letter that indicates such recognition.[59]

Accordingly, except in areas where peace and security problems exist or the position is taken that a single court can serve more than one Kebeles[60], both First Instance Courts and Appellate Customary Courts are established, or recognized. Each First Instance Customary Court or Appellate Customary Court has five elders including the chairperson.[61] Of the five, at least one has to be female[62] and this may indicate the gender sensitivity of the law. Making the

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[49] Oromia Customary Court Proclamation, Art.7 (1) (a-b).

[50] *Id., at* Art.7 (2-3).

[51] *Id.*, at Art.7 (4).

[52] *Id.*, at Art.5 (2).

[53] Oromia Customary Court Regulation, Art.10/2021, Art.6 (1-3) & 7.

[54] *Id.*, at Art.6 (1) (a-d)).

[55] *Id.*, at Art. 6 (3).

[56] *Id.*, at Art.7 (1).

[57] *Id.*, at Art.7 (2).

[58] *Id.*, at Art.7 (3-4).

[59] *Id.*, at Art.7 (5).

[60] Oromia Supreme Court's Assessment Report on Performance of Customary Courts, December 2022.

[61] Oromia Customary Court Proclamation, Art.10 (1-2). The proclamation also envisaged the possibility of considering persons who have the role, according to the customary law, to adjudicate specific cases like Gumaa as elders of the customary courts under Art.10 (3). Hence, there is a possibility of making the number of elders greater than five.

[62] *Id.*, at Art.10 (3).

number of elders five has an explanation in the Gadaa system- '*yaayyaa shanan'* (the five fundamentals; laying foundations) which represents Oromo traditional knowledge of how things are divided into five.[63] For example, there are five Gadas, five 'Odas', five sections of houses– etc. The elders are elected by residents of the people where the court is located.[64] The election is led, and controlled, and coordinated by the committee established by the Woreda Court for this purpose.[65] The committee is composed of three members (a chairperson represented by the Woreda Court President, a person represented by the Woreda Cultural Bureau and Tourism Office, and the Kebele manager where the court is situated).[66]

Oromia customary court proclamation provides a long list of criteria for the selection of elders which include, among others, minimum and maximum age (between 40 and 72), familiarity with and respect for customary norms of the place, social acceptance, and competence and experience in rendering traditional justice, fluency of Afan Oromo, willingness to serve, economic independence in the community where he resides, non-employee of government or any other organ, non-member to political party, mental and physical capability to discharge obligation and non-conviction of serious crimes.[67] Elders elected for the Customary Court shall be made to take an oath by the '*Abbaa Gadaa', 'Qaalluu', 'Hayyuu', 'Wayyuu'*, or elder of the community in accordance with the custom of the place where the Customary Court operates upon the announcement of the election result.[68]

In short, Customary Courts in Oromia are organized into two hierarchical levels. The elders in both levels: First Instance and Appellate are selected based on the above criteria and procedures. Having First Instance Customary Courts at the Kebele level is important as it contributes to geographical accessibility. Accessibility, as indicated under section two, is one of the objectives for which the courts were established. Moreover, having Appellate Customary Courts in Woreda and towns is also essential as it enables the system to check and correct itself. Hence, one can see wisdom in designing the structure of the courts.

IV. JURISDICTION OF CUSTOMARY COURTS AND APPLICABLE LAWS

A. Jurisdiction of Customary Courts

Oromia Customary Courts assume jurisdiction only if the disputing parties give their consent, i.e., they will have consent-based jurisdictions.[69] Consent is presumed if the person files his/her case to the courts.[70] A defendant is said to have given his/her consent if appeared, asked, and verified before letting him/her present his statement of defense.[71] In practice, there are also instances when defendants as of right refuse to consent to the jurisdiction of Customary Courts. Consent, once given before the Customary Courts having jurisdiction, cannot be revoked.[72] Making such restrictions is important to avoid unnecessary wastage of courts' resources. Information gap with the people on what and how Customary Courts work is one of the

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[63] Gemetchu Megersa, *supra* note 24.

[64] Oromia Customary Court Regulation, Art. 12 (1).

[65] *Id.*, at Art.13 (1) (For detail roles, responsibilities and working procedure of the committee, see the Regulation, Arts. 12-17).

[66] *Id.*, at Art.12 (2).

[67] *Id.*, at Art.9 (1) (a-k).

[68] Oromia Customary Court Proclamation, Art.12.

[69] *Id.*, at Art.8 (2).

[70] *Id.*, at Art.25 (1).

[71] *Id.*, at Art.25 (2).

[72] *Id.*, at Art.25 (3).

challenges in this regard.[73] There is a lack of awareness as to what Customary Courts do, how they function, who runs them, who finances them, and who brings cases before them.[74] Understandably, this partly emanates from the newness of the courts and calls for intervention to further promote them.

Moreover, the birth or residence of at least one of the disputant parties, or location of the immovable property subject to the dispute, or the initiation or finalization of the case leading to the dispute in the local administrative unit of Customary Courts are other requirements to assume jurisdiction.[75] Accordingly, the courts have civil, family, and criminal jurisdictions.[76] There is no pecuniary limitation as far as civil and family matters are concerned. With regard to criminal matters, the jurisdiction of Customary Courts is limited to petty offenses and crimes punishable upon complaints.[77] Moreover, regarding criminal matters instituted by the public prosecutor, the courts have powers to reconcile parties having a stake in the dispute, to determine 'Gumaa' and effecting it, and to determine compensation to be paid, and to ensure the payment of costs.[78]

The key question here is the constitutionality of allowing Customary Courts to entertain criminal matters given that the Constitution empowered them to adjudicate personal and family matters.[79] There are two divergent views on this. The first one is the purpose of Art. 34 in general and Arts. 34 (5) and 78 (5) in particular is not to list the types of disputes to be entertained by customary or religious courts, i.e., not to determine the jurisdiction of customary or religious courts. It is rather to give alternative protection to marriage and family as social values and institutions; and to individuals (spouses and children) covered in these institutions.[80] According to this line of argument, it is up to the law-making body (in this context, *Caffee*) to expand or restrict matters falling within the jurisdiction of Customary Courts.[81] The second one is criminal matters are under the monopoly of the formal state courts and the constitution leaves no space for informal justice institutions to handle.[82]

For the present writer, considering the exact terms of Arts. 34 (5) and 78 (5) of the FDRE Constitution, and Arts. 34 (5) and 62 of the Oromia Constitution, it is difficult to trace from the provisions that the jurisdiction of Customary Courts extends to criminal matters. However, other factors necessitate the courts to exercise criminal jurisdictions. Firstly, there is the trend of extending the jurisdiction of Customary Courts to include criminal matters over less serious

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[73] Oromia Supreme Court's Assessment, *supra* note 66.

[74] *Id*; some people, for example, wrongly believe that only *'waaqeffataa'* religion followers bring their cases before Oromia Customary Courts.

[75] Oromia Customary Court Proclamation, Art.8 (3) (a-c).

[76] *Id.*, at Art. 8 (1) (a-b).

[77] *Id.*, at Art.8 (1) (b).

[78] *Id.*, at Art. 8 (4) (a-d)

[79] The relevant provisions of the FDRE CONSTITUTION are Arts. 34 (5) and 78 (5) read as follows: Art. 34 (5): This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law. Art.78 (5): Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.

[80] Azane Indalama, Abdi Tasfa and Askale Terfa, '*Establishment of Customary Courts'* (2021), *10* OROMIA LAW JOURNAL, 197 (Written in Afan Oromo and translated into English by the author).

[81] Azene, Abdi and Askale, *Id.*, at 199.

[82] Aberra Degefa, *supra* note 11, pp. 12; Zelalem Tesfaye and Moti Mosisa, *supra* note 6, pp. 82; Getachew Assefa, Constitutional Space for Customary Justice Systems in Ethiopia, A chapter in a book Susanne Epple and Getachew Assefa (eds.), supra note 14, at 52.

crimes in addition to personal and family ones.[83] Such is the case in Zimbabwe, South Africa, and Nigeria, too.[84] Secondly, soft national instruments such as the Federal Democratic Republic of Ethiopian Criminal Policy[85] provide for the possibility of resolving criminal cases by informal justice systems rather than formal ones. Thirdly, in actual practice, informal justice systems are handling cases coming to them without making a differentiation between civil and criminal matters. Documented empirical evidence also shows the existence of dissatisfaction among elders about their exclusion from the criminal justice system by the formal state system.[86]

Because of all these reasons, the valid tendency is bringing the Constitution, by way of amendment, to the prevailing local, national, and international practice. Viewed from this vantage point, Oromia customary court law has solid ground in extending the jurisdiction of customary courts to criminal matters as it reflects the reality on the ground. In the future, it is possible even to utilize the courts to entertain large-scale criminal offenses like mass killings by way of restoring justice. This is because, by their very nature, informal justice systems foster social trust and community reintegration in the aftermath of mass violence.[87] They stress more on restoration of interpersonal and intercommunal relationships than retribution.[88] They also combine different forms of justice: retributive, restorative, or reparative, unlike the formal Western system which allows only one of these forms.[89] This holistic approach is also substantiated by utilization of rituals, rites, and symbols.[90] Because of these attributes, Oromia Customary Courts can be utilized in transitional justices[91] simultaneously with other institutions such as prosecution offices. Because of this, it is not possible to deny the courts the mandate of entertaining criminal matters. However, it would have been logical if the relevant articles of the constitution had been amended first to the effect of extending the jurisdiction of Customary Courts to criminal matters.

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[83] Tsehai, *supra* note 5, p273.

[84] African countries are chosen to illustrate the case as most African constitutions recognize customary laws. In a comparative analysis of 190 constitutions worldwide, it is found that African constitutions offer the highest level of recognition of customary law: of 52 African constitutions, 33 referred to customary law in some form, with good recognition of traditional and customary institutions and customary law in the courts and relating to land issues (See Susanne Epple and Getachew Assefa, *supra* note 14, p17). Zimbabwe, South Africa, Nigeria, partly Zambia are reputed for having well-functioning customary courts side by side with formal state courts. They have also detail provisions regulating the operation of customary courts in their constitutions.

[85]The 2003 Federal Democratic Republic of Ethiopia Criminal Justice Policy, Section 3.12 (c). The policy provides that Alternative Dispute Resolution may be appropriate where there is sufficient evidence that the accused or suspected persons has committed the crime; treating the matter through this procedure is advantageous both for the offender and the public at large; the suspect/offender has fully admitted that he has committed the offense and regret it; the suspect/offender has been given proper legal counsel before he confess; and the suspect/offender has been informed that he has the right to object that he has the power to object the matter not to be referred to alternative dispute resolution.

[86] Aberra, *supra* note 11, p18.

[87]Peace Building Initiative- Traditional & Informal Justice & Peacebuilding Processes,, available at: www. peacebuildinginitiative.org/index8f33.html?pageld=1777 (Accessed on 19th of December 2023).

[88] Informal Justice in Ethiopia: Role in justice delivery and potential for game-changing community justice services (2021), *available at*: https://dashboard.hiil.org/publications/informal-justice-in-ethiopia (Accessed on 12th December 2023).

[89] Peace Building Initiative, *supra* note 87.

[90] *Id.*

[91] Transitional justice is generally thought to help prevent recurrence of violent conflict and foster sustainable peace by: establishing an historical record and countering denial; ensuring accountability and ending impunity; fostering reconciliation and socio-political reconstruction. These functions are based on a number of key mechanisms which are detailed: criminal prosecutions, amnesties, truth commissions, reparation programs, and vetting processes (see Peace Building Initiative, *supra* note 87).

B. Applicable Laws

Applicable law refers to both substantive and procedural laws Customary Courts apply while dispensing justices. In this regard, Oromia's customary court proclamation is explicit in that the courts apply customary law of the place where it carries out its function.[92] Customary law, as defined under the proclamation and its enforcing regulation, means ‘‘ a customary law of the Oromo People found in the specific locality where the customary court is situated that is compatible with the constitution, public morality, and natural justice’’.[93] The whole process, including proving the existence of a cause of action and vested interest[94], determining the number of elders[95], securing the appearance of summoned persons (both party and witness)[96], giving orders following admissions of defendants[97], taking oaths[98], executing judgments/ orders is guided by customary laws.[99] This implies that the elders as well as the parties are not bound by the strict state procedural or evidentiary rules. For example, a party can present the suit or application or the defense in writing, or orally based on the interest of the party presenting the case.[100] The oral option is not available in formal state proceedings. Elders must also act impartially and be directed solely by customary law and the public moral while discharging their duties.[101]

This is also the case in other countries like Nigeria where Area and Customary Courts are to apply native law and custom prevailing within their judicial districts in both civil and criminal matters, but punishments given by them should not be repugnant to natural justice, equity, and good conscience.[102] However, it is good to note that this test is subjective and open to interpretation. For example, the concept of natural justice meant many things to many writers, lawyers, and systems of law.[103] It is used interchangeably with Divine law although it is a changing concept.[104] But, its basic essence is not to be a judge on own case and the right to be heard.[105] Equity denotes a system of fairness and justice.[106] It defines a set of legal principles used to supplement the strict rule of law where it would operate too severely to achieving natural justice.[107] Good conscience refers to a faculty or principle that determines whether a particular

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[92] Oromia Customary Court Proclamation, Art. 26 (1).

[93] *Id.*, Art.2 (13) and Oromia Customary Court Regulation, Art.2 (18)

[94] Oromia Customary Court Proclamation, Art.27 (4).

[95] *Id.*, at Art. 27 (2).

[96] *Id.*, at Arts. 27 (7) and Art. 28.

[97] *Id.*, at Art. 27 (10).

[98] *Id.*, at Art.29.

[99] For example, when property is unavailable or insufficient for execution, an appropriate measure shall be taken based on the customary law (see Oromia Customary Court Regulation, Art.44 (1)). Similarly, customary administration structure may be mobilized or ordered to execute judgements (see the Regulation, Art.45 (3)).

[100] Oromia Customary Court Proclamation, Art.27 (14).

[101] Oromia Customary Court Regulation, Art.24 (4).

[102] Udosen Jacob Idem, The Judiciary and the Role of Customary Courts in Nigeria (2017), 5 Global Journal of Politics and Law Research, p41; Area courts in North; Customary Courts in southern part of Nigeria (see Udosen Jacob Idem, p35).

[103] National Institute of Open Schooling, 6 Principles of Natural Justice, 338_ Introduction_ To_Law_ Eng_ L6.pdf, *available at*: https://nios.ac.i/media/documents/SrSec338New/338_ introduction_ To_Law_Eng_ L6.pdf (Accessed on 19th of December 2023)

[104] *Id.*

[105] *Id.*, at 79-80.

[106] Doctrine of equity justice and good conscience and its impact on the development of law in India,Available at: https://www.studocu.com/ (Accessed on 13th of December 2023)

[107] *Id.*

action is lawful or unlawful by approving or condemning it.[108] In the 16th and 17th centuries, English lawyers perceived the concept as a collection of universal principles gifted to mankind by the Almighty to apply the same by reason.[109] In short, although natural justice, equity, and good conscience are related concepts, they are subjective and open to different interpretations. In any case, customary laws which Oromia Customary Courts apply should not be against them.

V. INDEPENDENCE AND ACCOUNTABILITY

A. Independence

‘‘Customary Courts exercise their function based on Oromo values and customary law guided only by a sense of justice independently of pressures coming from politics, religion, personal outlook, and any organ.’’[110] Elders of the Customary Courts discharge their obligations independently and are guided solely by their conscience, customary law, and the values of the society.[111] They are also immune and are not subject to civil or criminal liability for the decision or order they make falling within their jurisdictions.[112] Moreover, they have tenure security and cannot be removed from their duty before the term lapse except for capacity and ethical issues.[113] Furthermore, they are not members of any political party. [114] They may also summarily[115] punish a person who insults, holds up to ridicule, threatens the elder, a secretary, a worker, or a customer of the Customary Court or witnesses or disturbs or attempts to disturb, in any manner, the activities of the Customary Court.[116] This implies that the law guaranteed the functional independence of the courts as institutions and the elders as individuals.

However, one may ask whether the independence of Customary Courts is of equal degree of strength to the independence of formal state courts we have in the constitution. In the writer’s view, they do not have an equal degree of strength at least considering the sources of and manner of administering their budget. Customary Courts do not have their budget allocated to them by the government as is the case in formal state courts. Their sources of budget are contributions collected from the local community, fines imposed and collected, and ‘*gumaata*’ to be collected from different bodies.[117] Income collected from these sources shall be distributed to Customary Courts (First Instance and Appellate Courts) by consultation among the President of the District Court, Chairperson of the Appellate Customary Court and Head of the District Cultural and

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[108] *Id*.

[109] *Id*.

[110] Oromia Customary Court Proclamation, Art. 16 (1). See also Oromia Customary Court Regulation, Art. 24 (3-4).

[111] *Id*., at Art.16 (2). See also Oromia Customary Court Regulation, Art. 23 (1) & 24 (3)

[112] *Id*., at Art.16 (3). See also Oromia Customary Court Regulation, Art.23 (3).

[113] Oromia Customary Court Proclamation, Art.16 (4). See also Oromia Customary Court Regulation, Art.23 (2); this is of course without neglecting other grounds listed under Art. 14 of the proclamation: own will, death, health issue leading to inability to discharge obligations, change of residence which creates him inconvenience to discharge obligations, failure to meet election criteria.

[114] Oromia Customary Court Proclamation, Art.9 (1) (i).

[115] The term ‘‘summarily’’ implies that customary courts can penalize the person immediately on the file pending before it with no need of having other separate file.

[116] Oromia Customary Court Regulation, Art.38 (1) (b) and 38 (2) stipulates that persons who fail to appear before Customary Court after duly served; or to obey the order of the Customary Court, interferes in its activities and unduly pressurizes it, or fail to cooperate without sufficient cause may face similar penalty with similar procedure (see Oromia Customary Court Regulation, Art. 38 (1) (a & c) cum.38 (2).

[117] *Id*., at Art. 35 (1) (a - c).

Tourism Office.[118] In many areas, necessary conditions for collecting income from sources like printing receipts are not facilitated.[119] Because of this, institutionally, at present, Customary Courts are not independent.

Interview conducted on the actual administration in this regard is narrated as follows:

> *The way the executive views Customary Courts has a problem from the perspective of independence. Under the pretext of supporting the courts, the executive goes to the extreme in some cases. For example, it is the regional President Office that designed logo for the courts. The office of the courts is also situated in Woreda and Kebele Administration offices. The elders are also invited to attend almost all executive meetings. They also attend accordingly. Overall, although the supportive role by the formal state courts is more blatant legally, in actual practice, there is tendency of executive dominancy which does not give good impression from the perspective of independence.*[120]

Supporting Customary Courts has no problem. Institutions like Courts, Cultural and Tourism Offices, and Kebele Administrations are even legally imposed to support Customary Courts in multiple ways.[121] Moreover, any concerned body must give support to them which includes upholding their decisions.[122] This is mainly needed and important in this early period of their establishment. The commitment of regional executive to establish and strengthen the courts is also worth mentioning.[123] These kinds of relationships can also be considered as cooperative aspects of legal pluralism as explained in the introductory part of this article. However, excessive support of the executive if continued for a long time, as aptly feared by the above interviewee, may erode the independence of individual elders and the functional independence of Customary Courts as institutions in the long run.

Moreover, in some cases, contrary to what the law provides, Kebele Administrations intervene in the works of Customary Courts by assigning elders directly through written letter; the elders are also affiliated to political parties of either the incumbent or opposition contrary to what the law provides.[124] There are also discontents from some Abba Gadaas on selection mechanisms of elders, especially in towns. *Abbaa Seeraa* (father of the law) in the context of the Gada system, they argue, is the one who marched to one of the respective Odaas (Nabe, Roba, Bissil, Buluk, Bultum) to learn (train) in customary law in the eve of the year of coming to power.[125] Without marching there, it is difficult to assume he knows the laws and respects the *'safuu'* (a norm guiding what is right and wrong, good and bad, correct and incorrect, etc. in

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[118] Oromia Customary Court Regulation, Art. 50 (1).

[119] Oromia Supreme Court's Assessment, *supra* note 60.

[120] Interview conducted with an Expert at Oromia Supreme Court who was coordinating the works of customary court and preferred to remain anonymous, December 26, 2022.

[121] Oromia Customary Court Proclamation, Arts. 37-39.

[122] *Id.,* at Art.40 (1-2).

[123] This can be deduced from how the regional president was explaining the importance of establishing customary courts to members of Caffee Oromia at the time of passing the proclamation. He emphasized the significance of establishing the courts in promoting cultural values of Oromo people embedded in the Gadaa System (It is possible to listen the explanation of regional president on the 14th Regular Meeting, 6th Year of the 5th term of Caffee Oromia held at Galma Caffee, from July 16-17,2021) (available at: https://www. facebook.com /OBNAfanoromo/videos/2047029225653886). After the law was passed and the courts started to be established the president also mobilized his cabinets existing at different levels to support the courts

[124] Oromia Supreme Court's Assessment, *supra* note 60.

[125] Lama Tumsa, *Abbootii Gadaa (*Gada fathers*)* Council Chairperson, East Shoa Zone, January 17, 2023.

Oromo people).[126] Now, especially in towns, a person who is an orator/eloquent and is in good relationship with local administrators has the chance to be elected as an elder.[127] This may run the risk of not knowing the organic law without which it is difficult to maintain independence.

Here, there is a difference between what the law provides and the thought of *Abba Gadaas*. The law thinks in terms of *jaarsa biyyaa* (community elders); *Abba Gadaas* think in terms of genuine *Abbaa Seeraa (father of laws)* in the context of *Gadaa* System. This difference of thinking emanates from the difficulties of regulating legal pluralism. One of the challenges associated with this issue is that when the states over-regulate plurality, there is a risk of diluting the organic customary law. In this particular issue too, the law over-regulated the definition of elders which is not consistent with the organic definition of *abbaa seeraa* (father of law) in the *Gadaa* System.

A good question to ask here is whether or not the law-making body of Oromia, *Caffee* is ignorant of this difference while passing the law. In the writer's view, the answer is negative. This is because so many *Abba Gadaas* and *Haadha sinqees* were participating and addressing their needs and priorities in multiple deliberations on the draft law. Reasonably, one expects they raised such types of concerns when the law was on the table. But, if marching to respective Gadaa Centre to train in law becomes a mandatory requirement, it may be difficult to get elders for more than 7000 kebeles in Oromia. The *Caffee* might have predicted difficulty of this type. The good way is to look for genuine elders who are committed to the truth within the existing legal framework. In addition to this, *Abbootii seeraa* (fathers of laws) in the context of the Gadaa system are not precluded from becoming elders even by the existing law.

B. Accountability

Both Oromia customary court proclamation and regulation provide lists of duties and accountabilities of elders. Accordingly, they must respect the code of conduct, refrain from discrimination based on gender, religion, race, age, economic status, political attitude and any other ground, be free from working for personal gain, possess exemplary behaviour, and a personal life that builds the good will of the customary court, keep confidentiality, refrain from becoming a member of any political party, withdraw from *'Gaaddisa'* where there is conflict of interest and take all decisions of the customary court as that of his own.[128] Elders who fail to discharge these duties will be removed from their duties on grounds of breach of disciplinary rules or incompetence.[129] A detailed procedure for taking such measures is provided in the customary court proclamation and enforcement regulation.[130] Broadly speaking, however, since the appointment of elders is made by participation of Kebele residents, their removal needs to follow the same procedure with full awareness of the Woreda Court President.

Once elected, the elders serve for eight years although their ethics and capacity will be commented on by the residents of the Kebele within four years.[131] If an elder fails to receive the support of Kebele residents because of ethical or capacity problems, s/he will be removed from the duty.[132] Moreover, even without waiting for the lapse of four years, if a complaint or

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[126] *Id.*

[127] *Id.*

[128] Cumulative reading of Arts.17 and 21 of Oromia Customary Court Proclamation No. 240/2021; and Arts.24 and 26 of Regulation 10/2021.

[129] Oromia Customary Court Regulation No.10/2021, Art.33 (1-2).

[130] *Id.*, at Arts 33 (3-10)

[131] Oromia Customary Court Proclamation, Art.13 (1-2)

[132] *Id.*, at Art. 13 (3)

accusation is made against the elder regarding his/her ethics or capacity and this is attested by the meeting of residents, the elder will be removed.[133] The practical implementation of these removal provisions is not tested as the time is not due yet. However, it is good to note that they have explanations in the broader Gadaa system of exercising power. In the Gadaa system, *Abba Gadaa* normally leads for a term of eight years. However, this is with the mandatory requirement of checking the *Abba Gadaa* in power in the middle of his term of office.[134] Gadaa leaders who engage in malpractices such as miscarriage of justice and do not discharge their obligation properly will be removed from office through the rule known as uprooting (*mura harkaa fuuchu* or *Buqqisu*).[135]

Generally, offering adequate training to improve the awareness of elders is very much crucial to ensure their independence and accountability. It is difficult to expect elders to be independent and accountable without properly training them on their roles and responsibilities. For instance, there are cases when elders wrongly say to a party willing to take an appeal that they will not give a copy of the judgment before the judgment they rendered is executed.[136] This emanates from a lack of awareness and can easily be fixed through training. Oromia Supreme Court is mandated to give training or cause the training to be given for elders on human rights, ethical values, and other necessary matters.[137] To some extent, the Supreme Court is offering such training to the elders. However, the training is not adequate compared to the needs of the elders mainly because of budget constraints.[138]

C. Judgments

Broadly speaking, decisions of informal justice systems are well accepted and supported by the community with the ultimate effect of restoration of social order.[139] The approaches and procedures they follow to make decisions largely contribute to this. Oromia Customary Courts exert efforts to settle the dispute by compromise agreement which is to be recorded and executed accordingly.[140] Where the case is not settled by the agreement, the elders will give mediated judgment[141] or order by explaining the reason on which they relied to reach on such judgment or order.[142] Accordingly, advising and giving admonition to the person at fault; compensation, returning property, deciding the value or amount of the property, upholding any request concerning damage to economic rights; awarding *'Gumaa'*; making the person sued do or refrain

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[133] *Id.*, at Art.13 (4).

[134] Zelalem Tesfaye, '*Old Wine in New Bottle: Bridging the Peripheral Gada Rule to Mainstream Constitutional Order of the 21st C. Ethiopia'* (2015), 4(1) OROMIA LAW JOURNAL, 22

[135] *Id*, at26.

[136] Oromia Supreme Court's Assessment, *supra* note 60.

[137] Oromia Customary Court Proclamation, Art.37(1) (c)

[138] Oromia Supreme Court's Assessment, *supra* note 60.

[139] Susanne Apple & Getachew Assefa (eds.), *supra* note 14, at 20. It is good to note that informality of the systems in this sense refers they apply non-state methods of conflict resolution; it does not refer whether or not they are recognized by laws. Nonetheless, they may be obliged to adhere to state law, and they can even be formally incorporated into the state court system (see Tilmann J. Röder, Informal Justice Systems: Challenges and Perspectives, p58; available at: informal_justice_systems_roder.pdf (worldjusticeproject.org).

[140] Oromia Customary Court Proclamation No. 240/2021, Art.31 (1-3).

[141] Mediated judgment refers a judgment given by Oromia Customary Courts based on customary laws as per Art. 31 (4) of customary Court Proclamation in case disputing parties fail to settle their dispute by compromise agreement as per Art. 31 (1) of the same proclamation.

[142] *Id.*, at Art. 31 (4-5).

from doing a specific act, pay costs, pay fine, and perform compulsory labor are the types of judgements or orders Customary Courts render.[143]

A party dissatisfied with the judgment or order is guaranteed the right to appeal.[144] Accordingly, a person who is aggrieved by the decision of the First Instance Customary Court may take an appeal to the Customary Court of Appeal.[145] Similarly, a person who is aggrieved by the decision of the Customary Court of Appeal may take his appeal to the District Court.[146] However, the grounds of appeal to District Courts are limited and possible only if the grievance is related to applying customary law which undermines the right to equality of disputing parties; or overlooks the rights to be heard or important evidence presented by a disputing party; or applying customary law or practice which violates human rights and basic freedoms recognized under the Constitution and international human rights instruments ratified by our country.[147] The appellate customary court may summon the defendant when it believes that there is an issue to be clarified and may go *ex-parte* when the defendant fails to appear after duly summoned.[148] Finally, it is possible to appeal the decision of the District State Court to a court having jurisdiction.[149]

With regard to the time of appeal, the appellant is expected to take a copy of the decision within 15 days; the requested court has to give the copy within 15 days, and the appeal has to be filed within 30 days.[150] However, the deadline for giving a copy of the decision or accepting an application could be extended more than what is provided when it is ascertained that good cause exists.[151]

The critical challenge Customary Courts are facing about judgement is reducing the judgments into writing. There are cases where elders declare their judgments orally alone, or in written form which is difficult to read and understand.[152] The law does not encourage oral judgment and it is even difficult to consider it as a judgment. One may also easily imagine the possible implications of oral judgment or unreadable judgement on the protection of human rights. For example, how can appellate-level courts rule on the appeal forwarded to them? How can executives properly execute the judgements? How can the judgments be documented for future uses? The law envisaged that an expert known as ‘‘secretary’’ would be assigned based on competition to assist the elders of Customary Courts.[153] The recruitment and selection of the secretary of a customary court shall be conducted under procedures for the recruitment and selection of the administrative staff of the District Court.[154] The ‘secretary’ of the customary

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[143] *Id.*, at Art. 32 (1) (a-g); as the list of judgements/orders is not exhaustive, the courts can render any other order acceptable under customary laws of the place at which the customary courts carryout their functions (Art.32 (1) (h) of Proc. No 240/2021).

[144] *Id.*, at Art. 31 (6).

[145] *Id.*, at Art.33 (1).

[146] *Id.*, at Art. 33 (2).

[147] *Id.*, at Art. 33 (2) (a-c).

[148] *Id.*, at Art. 33 (7-8).

[149] *Id.*, at Art. 33(11).

[150] *Id.*, at Art. 33 (3-5).

[151] *Id.*, at Art. 33 (6); for detail recruitment, selection and assignment of secretary see Arts.18 & 19 of the Regulation.

[152] Oromia Supreme Court’s Assessment, *supra* note 60.

[153] Oromia Customary Court Proclamation and Oromia Customary Court Regulation, Art.2 (1); Oromia Customary Court Proclamation, Art.19 (3).

[154] Oromia Customary Court Regulation No. 240/2021, Art.18 (1).

court will have so many functions and duties.[155] One of these functions is to be present on *'Gaaddisa'* and record applications and defenses given orally, oral litigation, testimony of the witnesses, judgments and orders to be given.[156] However, because of a lack of budget, the secretary is not assigned as planned.[157] For example, in East Shoa Zone, 23 First Instance Customary Courts do not have secretaries at all, and 250 of them have secretaries who simply give voluntary service (support) to the elders without being assigned as the law demanded.[158]

VI. RELATIONSHIP WITH FORMAL COURTS

The other big deal with Customary Courts is to establish what type of relationship they need to have with formal courts. Oromia Customary Courts and formal state courts are two independent institutions established by different laws enacted by *Caffee*. However, this does not mean that they do not have any relationship. Their relationship can be explained in two ways: a review of decisions, and a supportive role.

A. Review of Decisions

In legal pluralism, there is no presupposed hierarchy between different normative orders interacting in the same social field.[159] This means that state law is not necessarily or automatically dominant over other normative orders, and other social arrangements can be stronger in determining individuals' actions.[160] Hence, in the normal course of things, no appeal lies to formal state courts from the decisions of the informal system.[161] However, the trend shows that decisions of Customary Courts are reviewable by formal state courts although it is on limited grounds. For example, in Zambia, the awards of a Small Claims Court are final although an appeal can be allowed to the state High Court on points of law only, not questions of facts.[162] Tsehai also suggests following a similar approach is good for Ethiopia to close the door to opportunistic forum shopping.[163]

Coming to the issue at hand, decisions of Oromia Customary Courts are not filed as a fresh suit to formal state courts. Accordingly, decisions of First Instance Customary Courts are appealable to Appellate Customary Courts.[164] The decisions of Appellate Customary Courts are final and appealable to state District Courts if they are related to one of the following:

(a) Applying customary law which undermines the right to equality of disputing parties;
(b) Overlooking the rights to be heard or important evidence presented by a disputing party;

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[155] See Oromia Customary Court Proclamation, Art.20.
[156] *Id.*, at Art. 20 (1) (a).
[157] Oromia Supreme Court's Assessment, *supra* note 60
[158] The 12 Appellate Customary Courts secretaries also have mere supportive secretaries who are not employed in a similar fashion to support staff of regular courts (See East Shoa Cultural and Tourism Office Report, December 2022). The interviewed elders are also raising lack of secretaries as one of the critical problems they are facing (Rata Ya'i, First Instance Customary Court Chairperson & Aba Gada, Qobo Kebele, January17, 2023).
[159] Susanne Epple & Getachew Assefa (eds.), *supra* note 14, p13
[160] Susanne Epple & Getachew Assefa (eds.), *Id.*
[161] Tsehai, *supra* note 5, p292.
[162] The Judiciary of Zambia, Small Claim Courts, Simplified Court Processes and Procedures (Transparency International Zambia & Anti- Corruption Commission), p10; available at < https://www. judiciaryzambia. com/ wp-content/uploads/2019/08/here-.pdf >.
[163] Tsehai, *supra* note 5, at 292.
[164] Oromia Customary Court Proclamation, Art.33 (1).

> *(c) Applying customary laws or practices which violates human rights and basic freedoms recognized under the Constitution and international human rights instruments ratified by our country.*[165]

Similar to the trend elsewhere, formal state courts review decisions of Customary Courts on limited grounds. This is good at least for two reasons. First, it is in line with Oromo's idea of reviewing decisions. For example, in Borana Oromo, a case is initially decided by '*Olla'*; then reviewed by *Hayyuu*; again, by *Abba Gada,* and finally by *Gumii Gaayoo.* Moreover, allowing revision on limited ground is good as expanding grounds may dilute the organic nature of traditional norms. Second, it gives due attention to the protection of human rights by making formal state courts the ultimate guardian thereby aligning to the dominant and usual view: formal justice systems are more trusted than traditional justice systems as far as protection of human rights is concerned. Informal justice systems are usually blamed for marginalizing the rights of women and minority groups.[166] For example, *Asmarom* argues that the single most important deficit in Oromo democracy, i.e., the Gada System is the exclusion of women from formal political participation and leadership.[167]

However, it is good to note that the idea that trusting the formal justice system rather than the informal justice system as far as the protection of human rights is concerned is not without debate. The use of the indigenous justice system by itself cannot necessarily be considered incompatible with human rights standards as a matter of principle.[168] The argument is that the informal justice system, by providing an alternative forum for justice delivery, increases accessibility and accessibility is all about the protection of human rights.[169] Moreover, although the Oromia customary court proclamation prohibits the application of discriminatory customary laws as a matter of principle, exceptionally, it allows the application of customary laws and practices which *may favor* the rights of women, children, people with disability, and other vulnerable segments of the society.[170] In addition to this, of the five elders of Customary Courts, a female must be a member of the elders.[171] This is in line with some international human rights instruments like 'Convention on the Elimination of all Forms of Discrimination against Women' (CEDAW) adopted by the UN General Assembly in 1975, which gave a clear priority to women's rights over the protection of cultural diversity.[172] These all are indicators for the human rights sensitivity of the law. This is good as human rights standards have become a kind of benchmark for the quality of governments, especially in the developing world.[173]

A related issue worth considering here is to what extent female members are equally vocal with male elders in influencing the decisions of the elders. Are female members actively participating in the process of making decisions or are they simply sitting with elders at *Gaaddisaa* (Bench)? How is the patriarchal system affecting them in this regard? The author of

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[165] *Id.,* at Art.33 (2).

[166] Susanne Epple & Getachew Assefa (eds.), *supra* note 14, at 14; Tsehai, *supra* note 5, at 279.

[167] Asmarom Legesse, Oromo Democracy: An Indigenous African Political System, 2006, at 256.

[168] Aberra, *supra* note 11, at 22.

[169] *Id.*

[170] Oromia Customary Court Proclamation, Art.26 (3).

[171] *Ibid.*, Art.10 (3).

[172] The Convention is very clear about its aims to eradicate all practices discriminating against women, even if that means changing cultural values, and even if women belonging to a specific culture do not perceive them as harmful (www.un.org/womenwatch/daw/cedaw) (see Susanne Epple and Getachew Assefa (eds.), *supra* note 14, p14).

[173] Susanne Epple and Getachew Assefa (eds.), *Id*.

this article believes that giving a conclusive answer to this question needs large representative empirical data so to speak at the level of Oromia Regional State. However, limited interviews conducted with *Haadha Siinqees'* (female members of elders) and other male members of both First Instance and Appellate Customary Courts reveal that they are making meaningful participation.[174] Their participation is even more vivid when cases presented to the courts involve females, i.e. when parties to cases are either both females or one of them is a female. *Haadha Siinqee* Gadise Getachew, who is serving as an elder at Goro Kebele First Instance Customary Courts in Adama town at present, shared her experience as follows:

> *In a case, a woman was serving as a domestic worker for three years. Because of the disagreement with her employer, she was fired without collecting any payment for the service she was giving for three years. Gadise, a female elder knew this fact as her residential house is near to the house of the family who employed the domestic worker. She [Gadise] contacted the fired domestic worker and encouraged to bring her case before Gaaddisa. She brought her case as suggested and Gaddisaa of customary court settled the issue by compromise agreement of the disputing parties as per Art.31 of Customary Court Proclamation. Following the compromise agreement, the domestic worker was paid 26,900 ETB for the service she was rending for three years.*[175]

The above narration reveals that because of the active participation and concern of Gadise, a female elder of the Customary Court, a compromise was reached and the domestic worker abled to collect the money for the service she rendered. The participation, in this case, even goes beyond *Gaddisa* as it extends to a residential area which is out of the Court. *Haadha Siinqee* Belaynesh Lemma, who is a Presiding Elder at Lugo Sub-city Appellate Customary Court in Adama town has a similar view to Gadise and confirms that all female members of elders in her Sub-city are actively participating in the whole process of *Gaddisa*. Presiding over the case by female members by itself is an indicator of participation to the highest degree. Male members also affirm that female members are equally participating with them.[176] This shows that female members of elders are making genuine participation which is good as that was what the law intended to achieve.

Coming to the practical application of reviewing decisions of Customary Courts by District Courts on the listed grounds is not well known so far. However, the determination of issues regarding when to say the applications of customary laws violate the rights of equality, fair trial, and other constitutional rights are all left to the discretion of the courts. At present, cases initiated at Customary Courts are not coming to formal state courts. They are disposed of either at First Instance Customary Courts or at Appellate Customary Courts. For example, in Adama Rural Woreda, Customary Ccourts processed 1,600 cases until December 2022. Of this total number,

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[174] Interviews conducted with Abba Gadaa Tullu, Elder at Bate Bora Kebele First Instance Customary Court, December 18,2023; Abdulkadir, Presiding Elder at Goro Kebele First Instance Customary Court in Adama Town, December 19,2023; Haadha Siinqee Belaynesh Lemma, Presiding Elder at Lugo Sub-city Appellate Customary Court in Adama town, December 19,2023 and Haadha Siinqee Gadise Getachew, Female elder at Goro Kebele First Instance Customary Court in Adama Town, December 19,2023.

[175] Haadha Siinqee Gadise Getachew, Female elder at Goro Kebele First Instance Customary Court in Adama Town, December 19,2023.

[176] Interviews conducted with Abba Gadaa Tullu, Elder at Bate Bora Kebele First Instance Customary Court, December 18,2023; Abdulkadir, Presiding Elder at Goro Kebele First Instance Customary Court in Adama Town, December 19,2023.

1020 cases were disposed and 510 cases were pending; 20 cases were taken to the customary court of appeal of which 10 were disposed and 10 were pending.[177]

B. Supportive Role

The other way that explains the relationship between Oromia Customary Courts and formal state courts is the supportive role of the latter. Accordingly, regular courts support Customary Courts by realizing the establishment or recognition of courts [178], organizing committee that facilitates election of elders of Customary Courts, [179] assigning secretaries (experts) who are supposed to assist elders of Customary Courts, [180] providing logistics and human resources,[181] giving trainings or causing the trainings to be given for elders of Customary Courts,[182] hearing, evaluating and reporting the works of Customary Courts to *Caffee* [183], collecting and administering *'gumaata'* (donation in kind or in cash) contributed to Customary Courts from different bodies, [184] ordering collection of contributions from heads of families by its employee[185], determining the amount of contribution together with cultural bureaus and appellate Customary Courts,[186] keeping the records of the individual employee files in a modern way,[187] receiving and deciding on disciplinary complaints lodged against elders of Customary Courts,[188] creating account for depositing contributions, gumaata and fines[189], taking responsibility for the administration of finance and procurement of goods based on the distributed income [190] and executing judgements or orders of Customary Courts when requested.[191]

The lists of supportive roles are many and include technical, financial, logistics, administrative, human resource, etc. thereby indicating the existence of a cooperative relationship between Customary Courts and formal state courts. Again, by default, it makes the accountability of customary courts to formal state courts. However, it is good to note that the long-term plan is to make customary courts fully operate autonomously and have ultimate accountability to *Gumii Abbootii Gadaa* (Council of *Gadaa* Fathers) as that is the apex structure in the Gada System.[192]

One may question how the courts will come to such autonomy given that they are not funded by the state. Why other strategies of income sources, other than state funds, were

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[177] Adama Woreda Customary Court Performance Report organized by Woreda Court, December 2022.

[178] Oromia Customary Court Proclamation, Art.37 (2).

[179] Oromia Customary Court Regulation, Art. 12 (1).

[180] Oromia Customary Court Proclamation, Art.19 (3); Secretaries are selected to support the elders must complete at least grade 10; age wise must be between 18 and 60; must be familiar with and respect for customary law where the court operates; listen, speak, write and read Afaan Oromoo appropriately; have mental or physical fitness to perform his duties; produce a certificate from the administration of the Kebele where he resides that he is of high ethics; and be free from different addictions (see Oromia Customary Court Regulation, Art.19).

[181] Oromia Customary Court Proclamation, Art.37 (1) (b).

[182] *Id.,* at Art. 37 (1) (c).

[183] *Id.,* at 37 (1) (d).

[184] Oromia Customary Court Regulation, Art. 48 (3), 48 (6), and 48 (7).

[185] *Id., at* Art.47 (5).

[186] *Id.,* at Art. 47 (6).

[187] *Id.*, at Art. 52 (1).

[188] Oromia Customary Court Proclamation, Art.37 (2) (e).

[189] Oromia Customary Court Regulation, Art.49 (2).

[190] *Id.*, at Art.50 (3).

[191] Oromia Customary Court Proclamation, Arts.34 (5) and 37 (2) (h).

[192] The author knows this while participating in the process of series of deliberations on the draft proclamation for establishing the courts.

suggested for the courts? This issue was raised at the time of deliberating on the establishment draft proclamation. The analysis of the time was that although state funding would make the courts more autonomous, it would consume a substantial budget and be less feasible given that the courts would have a presence in each Kebele, Woreda, and Town of Oromia.[193] At the time, the idea was convincing partly because the government set as a direction that any structure that the government designs/establishes should focus on reducing expenditure and increasing revenue. If Customary Courts are funded by the state, obviously they increase government expenditure. Nonetheless, Customary Courts are proving their relevance within a short time even without state funds. This implies that even in the absence of state funds, the writer believes, the long-term plan of making them autonomous and accountable to *Gumii Abbootii Gadaa* will be attainable.

VII. CONCLUSION

One of the values of federalism is its convenience in dealing with a plurality of laws and institutions. Ethiopia's federalism exhibits this, *inter alia,* by envisaging the possibility of establishing Customary Courts in addition to formal state courts. Against this backdrop, Oromia Regional State established Customary Courts. This paper examined how these courts administer justice by considering the objectives, jurisdiction and applicable laws, independence and accountability, judgment, and their relationships with other formal state courts as core points of analysis. In all areas, the administration of justice by the courts is progressive. They are contributing to access to justice and the promotion of Oromo culture and values – core objectives of their establishment through the cases they decide. This can be taken as a good start and other states may emulate Oromia's experience. However, the courts are operating under many challenges. Human resources, especially secretaries are not fully employed to them. No adequate training is offered to elders. The logistics necessary to run the courts are not adequately furnished. Awareness creation about courts' purpose, their *'modus operandi',* and their relationship with formal state courts are not made up to the desired level. Budget constraints can be considered as the mother of all these challenges. Moreover, unlike the establishing laws and prevailing practice, the constitution lacks clarity about their criminal jurisdiction. These affect the proper justice administration of the courts. Therefore, the following interventions are suggested:

- To fully mobilize and utilize all strategies designed by law to generate income of Customary Courts. This helps the courts to cover costs for training their elders, employing secretaries, furnishing office infrastructure, and creating awareness among the public.
- To amend both federal and Oromia constitutions to expand the jurisdiction of Customary Courts by clearly embracing criminal matters in addition to personal and family matters.
- To plan to make customary courts more autonomous and accountable to *Gumii Abbootii Gadaa* in the long run. For this, all concerned stakeholders, mainly the Oromia Supreme Court, Oromia Cultural Bureau, think tanks, and other relevant non-governmental organizations need to work hand in hand.

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[193] The author knows this as he organized and participated in series of deliberations on the draft proclamation made at Adama and Bishoftu in 2020.