

# Effect of Formalization of Rural Women's Land Rights in a Plural Justice System: The Case of the Sidama Regional State

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Anchinesh Shiferaw Mulu \*

## Abstract

Joint land registration and certification program has been introduced in Ethiopia to secure rural women's land rights through a joint titling of a husband and wife. This article examines the effect of this program in the protection of women's land rights in the context of the plural justice system and the process of women's choice-making among the various justice systems that exist in the Sidama regional state. The findings demonstrate that the land registration and titling process contributed to bring change in the type and frequency of cases brought before courts and in its decision by raising women's consciousness of their land rights. It has also contributed to bringing change in some of the applicable norms in the customary justice system towards women's inheritance rights. Rural women alternate between the formal and informal justice systems by choosing the one that best serves their interests while taking into account various factors that affect their land rights. However, the practice of polygamy, informal land transactions and the entrenched social norms that discriminate against women have made the contribution of the land certification program to be minimal and has limited the enforcement of women's land rights in the plural justice setting.

## Key terms:

Women's land rights · Land registration and certification program · Plural justice systems · Sidama regional state · Joint land titling

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\* Anchinesh Shiferaw Mulu: LLM (Pretoria University), LLB (Addis Ababa University); PhD candidate and a Lecturer at the Center for Human Rights of Addis Ababa University.

Email: [anchinesh.s@gmail.com](mailto:anchinesh.s@gmail.com)

ORCID: <https://orcid.org/0000-0002-2190-8283>

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## 1. Introduction

Land holds an important place in the life of individuals, communities, the state and private sector actors in many overlapping ways. It is a valuable asset that serves as a source of livelihood and a determining factor of the social status of individuals as it "often provide[s] not only a means of existence, but also status and power".<sup>1</sup> It also constitutes cultural identity of communities, and it is an important capital asset that gives people power within a society.<sup>2</sup> It is a determining factor of individuals' economic, political, social and cultural positions in a society.

The protection of land rights for women creates a conducive atmosphere for their overall wellbeing by creating greater bargaining power at household and community levels and resulting in lower levels of gender-based violence.<sup>3</sup> Marginalisation of individuals from accessing, controlling and administrating

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<sup>1</sup> Nadia Steinzor (2003), *Women's Property and Inheritance Rights: Improving Lives in a Changing Time; Development Alternatives, Inc.* p.22. See also Brightman

Gebremichael Ganta (2019), "Access to Rural Land Rights in Post-1991 Ethiopia: Unconstitutional Policy Shift", *Journal of Land and Rural Studies*, Vol. 7 (1), pp. 2 , 4.

<sup>2</sup> Maxim Mancino and Srinjoy Bose (2021). "Land Rights in Peacebuilding Discourse: Domination and Resistance in Timor-Leste's Ita Nia Rai program", *Australian Journal of International Affairs*, Vol. 75 (5), p. 563.

<sup>3</sup> The Gender Gap in Land Rights, FAO Information Brief available at <https://www.fao.org/3/I8796EN/i8796en.pdf>

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land has far-reaching consequences in their lives. Agrarian society is dependent on access to land as it is the precondition for the protection of other correlated rights such as the right to food, the right to housing, the right to culture, the right to participate in public life etc.<sup>4</sup>

Among the various members of the society, rural women are significantly affected by the lack of access to land and its productive resources. Rural women's access to land is limited for various reasons including power relationship in the society, gender norms and unequal access to resources;<sup>5</sup> it is affected by socio-cultural institutions, market economy and the state.<sup>6</sup> The gender dimensions of land ownership indicate that women are significantly disadvantaged relative to men with regard to their land ownership, management, transfer and economic rights.<sup>7</sup>

Rural women's access to land is very limited in Ethiopia. To change this situation, a joint land certification program in the name of a husband and a wife was introduced since 1998 with the financial support from international institutions such as the World Bank, Department for International Development (DFID) and U.S. Agency for International Development (USAID).<sup>8</sup> The certification program involves joint titling of land rights of spouses and individual titling. It started with a pilot program and later expanded to four regional states in the country.<sup>9</sup> According to the FDRE

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<sup>4</sup> Smita Narula (2013), "The Global Land Rush: Markets, Rights, and the Politics of Food", *Stanford Journal of International Law*, Vol. 49, p. 132. Access to land gives people the chance to exercise their cultural life freely. Denial of access to land through expropriation prevents agrarian society from exercising their right to land. Land rights are also important to capacitate and empower agrarian society to contribute in public life and local governance. Ganta, *supra* note 1, p. 4-5.

<sup>5</sup> Naadira Nadasen (2012). Rural Women's Access to Land in Sub-Saharan African and Implications for Meeting the Millennium Development Goals, *Agenda: Empowering Women for Gender Equity*, Vol. 26, No. 1 (91), p. 23.

<sup>6</sup> Lastarria-Cornhiel, S. and Garcia-Frias, Z. (2005). 'Gender and Land Rights: Findings and Lessons from Country Studies' in *Gender and Land Compendium of Country Studies*, Gender and Natural Resources Management, FAO5.

<sup>7</sup> Ibid.

<sup>8</sup> Dessalegn Rahmato (2009), "Land Rights and Tenure Security: Rural Land Registration in Ethiopia" in J. Ubink, A. Hoekema, and W. Assies (eds), *Legalizing Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia, and Latin America*, Leiden University Press: Dordrecht, The Netherlands, p. 59.

<sup>9</sup> The land certification program has gone through two levels in Amhara, Tigray, Oromia and SNNP regional States. The first level certification involved the use of local materials to measure and demarcates land. The second level land certification used a modern technology such as GPS, satellite images or orthography to demarcate and register land

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national report on the implementation of the Beijing Declaration and Platform for Action, female landholding increased from 19% in 2008 to 60% in 2011 with the large-scale land certification effort which covered 6.3 million households in Amhara, Oromia, Tigray and Southern Nations, Nationalities, and Peoples (SNNP) regional states.<sup>10</sup>

One of the consequences of formalisation of rural women's land rights through joint land registration and titling is an increase in rural women's awareness of their rights to use, administer and control land.<sup>11</sup> This awareness and recognition of their land rights has improved their bargaining power at the household level and participation in decisions related to land and its products.<sup>12</sup> Some prior studies have demonstrated that the joint land certification and registration has improved equitable division of property during divorce and increased rural women's income during land rental.<sup>13</sup>

There are plenty of studies that demonstrate the effect of land titling on land productivity and women's empowerment.<sup>14</sup> These studies show that land productivity has increased after land certification and female-headed households were able to rent out land and sharecrop with a higher price after

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and computerize registration. 3.7 households have been certified with the second level land certificate as of 2020/21. Proportion of total adult population with secure tenure rights to land and with legally recognized documentation based on the second level land certification is 16% in 2020/21. See FDRE Ministry of Planning and development (2022), Ethiopia Voluntary National Review 2022, p. 136.

<sup>10</sup> FDRE (2015), *FDRE National Report on the Implementation of the Beijing Declaration and Platform for Action (1995) and the Outcome of the 23th Special Session of the United Nation General Assembly*, p. 9.

<sup>11</sup> Monterroso I, Enokenwa O and Paez-Valencia AM (2021), "Women's Land Rights in Ethiopia: Socio-legal review. Securing Women's Resource Rights through Gender Transformative Approaches", *Project Brief*. Bogor, Indonesia and Nairobi, Kenya: CIFOR-ICRAF and International Fund for Agricultural Development (IFAD), p. 11.

<sup>12</sup> Dessalegn Rahmato, *supra* note 8, pp. 82 & 85.

<sup>13</sup> See, for example, E. Adgo, E. *et al* (2014), "Impact of Land Certification on Sustainable Land Resource Management in the Amhara Region, Ethiopia", *DCG Report No. 7*, p. 43-44; H. Girma & R. Giovarelli (2013), 'Lesson 2: The Gender Implications of Joint Titling in Ethiopia' in *Focus on Land in Africa Brief*, <https://gatesopenresearch.org/documents/3-1018> (accessed on 28 July 2022), p. 6; UN Women (2019), *Women's Land Rights and Tenure Security in the Context of the SDGs Situation Analysis Report Ethiopia* (final draft), p. 4.

<sup>14</sup> *Ibid.* Mequanint B. Melesse, Adane Dabissa & Erwin Bulte (2018). "Joint Land Certification Programmes and Women's Empowerment: Evidence from Ethiopia", *The Journal of Development Studies*, vol. 54, No. 10, p. 1756-1774.

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the certification.<sup>15</sup> Others have discussed how land certification contributed towards decreasing land related disputes.<sup>16</sup> The land certification programs have an impact of changing women's positions at the household level by increasing their bargaining power in the intra-household resource allocation.<sup>17</sup>

There is dearth of studies regarding the effect of land registration and titling on the delivery of justice by the formal and informal justice systems (in plural legal setting).<sup>18</sup> This article examines the contribution of the land certification and registration program in the adjudication of rural women's land rights before the formal and informal justice systems. It critically reflects on various roles of land registration and titling in the adjudication of these cases. Moreover, it examines the effects of the plural legal system on the protection of rural women's land rights.

In this study, doctrinal and qualitative methodology is employed, and both primary and secondary source of data were used to collect, analyse, and triangulate data. Data collected from May 2-16, 2022, and July 18- Aug. 1, 2022 for the author's PhD study have been used with a view to navigate through the lived experiences of rural women to access justice in case of land disputes. The key informant interviews were conducted in the Sidama Regional State which is a new regional State established following a referendum on 18 June 2020. The research site was selected because of the land certification program has been implemented in the area in the context of

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<sup>15</sup> S. Holden, K. Deininger and H. Ghebru (2009), "Impacts of Low-Cost Land Certification on Investment and Productivity", *American Journal of Agricultural Economics*, vol. 91(2), 2009, p. 370; K. Deininger, D. Ali and T. Alemu (2011), "Impacts of Land Certification on Tenure Security Investment, and Land Market Participation", *Land Economics*, Vol. 87, 2011, p. 312–334; S. Holden and H. Ghebru (2013), "Welfare Impacts of Land Certification in Tigray, Ethiopia" in S. Holden, K. Otsuka, and K. Deininger (eds.) *Land Tenure Reform in Asia and Africa: Assessing Impacts on Poverty and Natural Resource Management*, Palgrave Macmillan, London, p. 137.

<sup>16</sup> Dessalegn Rahmato (2009), "Land Rights and Tenure Security: Rural Land Registration in Ethiopia" in J. Ubink, A. Hoekema, and W. Assies (eds), *Legalizing Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia, and Latin America*, Leiden University Press: Dordrecht, The Netherlands, p. 17.

<sup>17</sup> Mequanent B. Melesse *et al*, *supra* note 14, p. 1756.

<sup>18</sup> The only study that has tried to look into the land related violence against women is the study by Mekonen, W. *et al* (2020) entitled as *Strategy for Preventing and Mitigating Land Certification Related Violence against Women and Vulnerable Groups*. However, this study did not look into the effect of the land certification on the plural justice system.

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the preexisting gender norms and local socio-political conditions. The researcher had also prior information that land related disputes are widespread in the area from the legal aid offices of the Center for Human Rights in Hawassa and its surroundings rural areas.

Interviews were made with 51 key informants out of which 14 were rural women who have passed through the justice system as litigants. The remaining 37 informants were officials and experts from regional Bureaus and Woreda offices, judges, elders, staff of Ethiopian Human Rights Commission (EHRC) and Ethiopian Institute of Ombudsman (EIO) of Hawassa branch offices, NGOs, members of women's association and Land Committees). Two focus group discussions with kebele officials and members of Land Administrative Committees (LACs) were conducted. Federal and regional legislations on land rights are analysed using doctrinal method. Secondary data from books, articles, reports etc on the gender impact of land certification and women's land rights complimented the data gathering and analysis of this study.

The next section provides a brief overview of the notion of legal pluralism. The third section discusses the intersection between formalisation of land rights and women's land rights which is followed by the fourth section that examines the normative plurality on women's land rights in Ethiopia. Section 5 deals with judicial plurality in the settlement of rural women's land rights disputes. The last section before the conclusion looks into the relationship between the formal and the informal justice systems.

## **2. The Concepts of Legal Pluralism, Legal Centralism and Hybridity: An Overview**

Legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field'.<sup>19</sup> In other words, it permits the operation of two or more legal systems simultaneously. Plurality of legal orders and competing ideas of right and wrong are created because the existence of cultural difference brings different legal adjudication and enforcement mechanisms.

The recent definition of *legal pluralism* considers it as "a situation in which people could choose from among more than one co-existing set of rules" while *legal plurality* refers to "co-existence of multiple (sub-)legal systems within one state, to cater to different categories of persons who had no option to

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<sup>19</sup> Sally Merry (1988). "Legal Pluralism", *Law and Society Review*, Vol. 22, No. 5, p. 870.

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choose from among these bodies of law".<sup>20</sup> The first definition also relates to forum shopping which is the practice of choosing among courts or laws that will give a favourable decision to the case at hand.<sup>21</sup>

Legal pluralism is created when there are customary or informal legal systems that exist in parallel with the state/formal legal system. It is important to take note of the distinct features of legal pluralism in contrast with legal centralism and the hybridity of laws and implementation. According to the concept of legal centralism:

law is an exclusive, systematic and hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending on a sovereign command or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm . . . It is the factual power of the state, which is the keystone of an otherwise normative system, which affords the empirical condition for the actual existence of 'law'.<sup>22</sup>

According to this theory, "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."<sup>23</sup> Any other normative order other than the state is considered to be subordinate to the state law. Laws that emanate from religious institutions, community, economic organizations, or from any other entity is expected to be a lesser normative order and should be hierarchically subordinate to the state law.<sup>24</sup> This conceptualization underlines that there is '[a] necessary connection between the conception of law as a single, unified, and exclusive hierarchical normative ordering and the conception of the state as the fundamental unit of political organization.'<sup>25</sup>

However, the empirical evidence and the reality on the ground have shown that law is not monolithic, it is rather plural, and it is not only public but private one as well.<sup>26</sup> The ideals of legal centralism are considered as idealistic claims which do not reflect the reality on the ground. Legal pluralism has been

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<sup>20</sup> Keebet von Benda-Beckmann & Bertram Turner (2018). "Legal Pluralism, Social Theory, and the State", *The Journal of Legal Pluralism and Unofficial Law*, vol. 50 (3), p. 262.

<sup>21</sup> Note (1990). "Forum Shopping Reconsidered", *Harvard Law Review*, Vol. 103, No. 7, p. 1677.

<sup>22</sup> John Griffiths (1986). "What Is Legal Pluralism?" *Journal of Legal Pluralism*, p. 3.

<sup>23</sup> Griffiths, id., p. 3.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Id., p. 4.

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a factual phenomenon. This is more pronounced in countries with a history of colonialism or legal transplantation from outside. Since there is pre-colonial legal system that pre-existed the colonial law, the imposition of the later creates the existence of plural legal systems.<sup>27</sup>

Scholars who took the middle ground between legal centralism and legal pluralism argue that a law other than the state can be considered as law if only state law recognizes it as such. This came to be understood as “normative legal pluralism”. However, this idea was challenged as there were non-state laws such as religious laws that are considered as laws even though the state has not recognized them as such. This brought the idea that various laws or legal systems can co-exist on equal footing with the state legal system. This idea considers legal pluralism as the coexistence of the various legal systems independently of each other with their own legitimacy and validity.<sup>28</sup>

However, recent scholarships indicate the interaction among the various legal systems. This conceptualization is known as *hybridity*. Accordingly, the intersection of different legal systems leads to their transformation in such a manner that the past will continue to exist in its transformed form.<sup>29</sup> This requires a constant process of negotiation and renegotiation. In hybrid system, the various legal systems overlap without one displacing the other. The various legal systems supplement each other rather than replacing one another.<sup>30</sup>

Legal pluralism does not only result in plurality of legal norms but also judicial plurality/institutional legal plurality. The sections below discuss the effects of the normative plurality and the judicial/institutional legal plurality on women’s land rights after discussing the relationship between formalization of land rights and women’s land rights.

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<sup>27</sup> Merry, *supra* note 19, p. 869.

<sup>28</sup> Benda-Beckmann & Turner, *supra* note 20, p. 263.

<sup>29</sup> N. Fairclough (1992). *Discourse and Social Change*, pp. 64-65.

<sup>30</sup> S. MuÈller-Mall (2013). *Legal Spaces: Towards a Topological Thinking of Law*, Springer Science & Business Media, pp. 12-13.

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### 3. The Intersection between Formalisation of Land Rights and Women's Land Rights

Formalization of land rights is the recognition of specific rights through official and written documents. It is associated to “a shift from ‘informal’ to ‘formal’ norms, from oral to written, from extra-legal to legal or from unofficial to official.”<sup>31</sup> It involves “giving written and legal form to undocumented land rights”.<sup>32</sup> It implies state recognition of property rights that would be accorded protection from the legal system.<sup>33</sup>

Formalisation of land rights has many advantages. It can change assets which are not fixed with a marketable value into capital which has economic and social recognition in the formal property system.<sup>34</sup> Hernando de Soto argues that informal transactions have extra-legal effects and causes insecurity of transaction.<sup>35</sup> De Soto's view is similar with the views that are held by “the Property Rights School” and “the Evolutionary Theory of Land Rights”. Both theories underline that title deeds to land are “a logical and painless culmination to the relentless process of increasing land scarcity, increasing land conflicts, and increasing individualisation that eventually flow from growing populations and agricultural commercialization”.<sup>36</sup>

A host of benefits are embodied in formalisation of land rights such as “increased investment demand, increased credit supply, and efficient redistribution of property, [...] consolidation of scattered holdings, efficient input and output choices, and an increased tax base”.<sup>37</sup> De Soto emphasized

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<sup>31</sup> However, such dichotomy between formal and informal norms has been criticized since it does not reflect the complex and dynamic intersection and interaction between state laws and local norms and practices. See I. Ikdahl *et al* (2005), *Human Rights, Formalisation and Women's Land Rights in Southern and Eastern Africa*, p. 4.

<sup>32</sup> ‘Land Tenure and Development’ Technical Committee (2015). *Formalising Land Rights in Developing Countries: Moving from Past Controversies to Future Strategies*, Paris, Ministère des Affaires étrangères et du Développement international (Maedi), Agence française de développement (AFD), p. 11.

<sup>33</sup> H. Stein and S. Cunningham (2015). “Land Grabbing and Formalization in Africa: A Critical Inquiry”, *ASC Working Paper* 124/2015, p. 3.

<sup>34</sup> Hernando de Soto (2000). *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books, p. 47.

<sup>35</sup> De Soto, Id. cited in Stein and Cunningham, *supra* note 33.

<sup>36</sup> E. Sjaastad and B. Cousins (2008). “Formalisation of Land Rights in the South: An Overview”, *Land Use Policy*, Vol. 26, p. 2.

<sup>37</sup> Jean-Philippe Platteau (1996). “The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment,” *Development and Change*, International

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the formalization of ‘already existing rights’ rather than introducing new private holdings through titling. He underlined the need to register the formal property representation. The State is assumed to have a greater role in the provision of titles.<sup>38</sup>

The formalisation of women land rights by the state has the advantage of protecting rural women from land alienation by investors, local elites and private individuals. It brings both social and economic benefits to women. Women’s access to land is essential to ensure their social inclusion and to facilitate their access to agricultural inputs. It is also an important factor to sustain cultural and collective identity.<sup>39</sup> Furthermore, the formalization of land rights through land certificates can play an important role in the judicial enforcement of women’s land rights by serving as important evidence in the adjudication process.

Women’s land tenure security requires not only recognizing women’s rights to land but also securing tenure and judiciary enforcing their rights.<sup>40</sup> In this sense, tenure security has multiple dimensions. The first refers to completeness of the bundle of rights.<sup>41</sup> In bundle of rights, land can be “held by one individual or group or the rights be distributed among different individuals or groups”.<sup>42</sup> There are multiple rights individuals or groups hold under the concept of bundle of rights.<sup>43</sup> These rights include the right to access to land, the right of withdrawal or the right to take the fruit of the land, the right to management, the right of exclusion and transfer rights.<sup>44</sup>

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Institute of Social Studies, vol. 27(1), pages 29-86 cited in E. Sjaastad and B. Cousins (2008), “Formalisation of Land Rights in the South: An Overview”, *Land Use Policy*, Vol. 26, p. 2.

<sup>38</sup> Sjaastad and Cousins, *Ibid.*

<sup>39</sup> Jennifer C. Franco (2008). *A Framework for Analyzing the Question of Pro-Poor Policy Reforms and Governance in State/Public Lands: A Critical Civil Society Perspective*, FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy, p. 5.

<sup>40</sup> W. Mekonen *et al* (2020). *Strategy for Preventing and Mitigating Land Certification Related Violence against Women and Vulnerable Groups*, The World Bank-Washington DC, March 16-20, p. 12.

<sup>41</sup> C. Doss and R. Meinzen-Dick (2018). *Women’s Land Tenure Security: A Conceptual Framework*, Seattle, WA: Research Consortium, p. 4, available on <https://consortium.resourceequity.org/conceptual-framework>.

<sup>42</sup> Doss and Meinzen-Dick, *Id.*, p. 2.

<sup>43</sup> *Id.*, p.12.

<sup>44</sup> E. Schlager and E. Ostrom (1992). “Property-Rights Regims and Natural Resources: A Conceptual Analysis”, *Land Economics*, Vol. 68, No. 3, University of Wisconsin Press, pp. 250-252.

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The second component is duration of the right. The longer the person holds the land, the more secure his/her rights on the land are. The third component is robustness, which refers to the social and legal enforceability of the rights on the land. The enforceability of the rights depends on the legal, social, or institutional systems. Rights that are “legally and culturally legitimate are more robust than those that are contested by laws or social norms”.<sup>45</sup> The fourth component refers to individual and shared rights. This is particularly important to women's land tenure security. The individual and joint ownership of the land and the relationship among shareholders affect how much the tenure is secured.<sup>46</sup> Mostly women's rights to land depend on their relations to a man who might be their father, husband, brother or son. Their social status or family relations determines their shared rights. The unequal power relations between men and women have a negative effect during land rights negotiation process within a family.<sup>47</sup>

Ethiopia has introduced a land registration and certification program in the late 1990s. Previously, land registration was limited in some parts of the country and did not include joint ownership. In the Southern part of the country, for example, the land tenure system was characterized by patrilineal inheritance and virilocal residence.<sup>48</sup> While this was the widespread phenomenon in the country, the FDRE Constitution guarantees gender equality in all its aspects. It is hence the proper enforcement of the constitutional provisions that guarantees women's equal rights with men to use, transfer, administer, and control land under Article 35(7) that necessitated the land registration program. The program promoted women's rights through joint rural land titling in the name of a husband and wife. It has empowered women to rent out their land.

Women are now demanding their rights related to the land within family and in the community. For example, in one study it was found out that the joint-titled women are more informed about their land rights and have improved lobbying capacities than untitled women.<sup>49</sup> While there are anecdotal examples about the increase in the level of awareness, one may not aptly say that the right holders are fully aware of their rights. Even if the law

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<sup>45</sup> Doss and Meinzen-Dick, *supra* note 41, p. 5.

<sup>46</sup> *Id.*

<sup>47</sup> Ikdahl et al, *supra* note 31, p. 11.

<sup>48</sup> United Nations Human Settlements Programme (UN-HABITAT) (2008). *Land Registration in Ethiopia: Early Impacts on Women*, Summary Report.

<sup>49</sup> Adane Dabissa (2013). *Impacts of Joint Land Rights Titling on Women Empowerment: Evidence from Ethiopia*, Master Thesis, University of Wageningen, p. 36.

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prohibits a husband from entering into any transaction on the land without the consent of his wife,<sup>50</sup> there is plenty of evidence which shows the existing practice does not adequately respect this rule. Accordingly, most of the land transactions are made without the wife's consent through informal transactions.<sup>51</sup> Although these kinds of transactions can be made null and void if the wife files a complaint within two years of the conclusion of the contract,<sup>52</sup> most rural women do not bring cases because of either lack of awareness or not taking their rights seriously.

In the study area, the landholding certificate program has contributed to bring change in the views of some of the members of the society who have now started to challenge the social norms that perpetuated the view that land belongs to the husband's clan only and land inheritance should only be through the male lineage by denying daughters' inheriting from their natal family.<sup>53</sup> This is evidenced in the shift of land inheritance practice which only promoted patrilineal inheritance. The land inheritance practice in some places is now shifting through father's initiative to leave a testament inheriting some of their property including land to their daughter/s.<sup>54</sup>

There is also change in the view that a woman cannot own land. One informant stated that:

I am a third wife and the two before me have land in their own names. My husband has land in his own name too. When a husband has more than one wife, he gives a share of the land to each wife so that upon his death there won't be any land related dispute among his wives.<sup>55</sup>

Most of the key informants also confirmed that the land certification and registration has increased women's confidence and decision-making power at

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<sup>50</sup> Article 8(2) of SNNP Rural Land Use and Administration Proclamation No. 110/2007 and Article 8(1(a)) of Rural Land Administration and use regulation No. 66/2007.

<sup>51</sup> Interview with Director of Ensuring women, Children and Youth inclusion and benefit Directorate at Sidama Regional States Women, Youth and Social Affairs Bureau on 04 May 2022 at Hawassa.

<sup>52</sup> Article 68(1(a)) cum. Article 69(2) of the federal revised family law. Interview with a judge and registrar at Hawassa Area High Court on 04 May 2022 at Hawassa.

<sup>53</sup> *Supra* note 51.

<sup>54</sup> Interview with Sidama Regional State Agriculture and natural Resources Development Bureau on 09 May 2022 at Hawassa.

<sup>55</sup> Interview with key informant 01 conducted on July 19, 2022 at Sheberdina Woreda. This was also collaborated by a judge.

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the household level.<sup>56</sup> The participation of women has improved in decisions that are related to the type of crops to harvest, land management, decision regarding the income from the sale of crops, when and how to harvest, and similar issues. For example, the findings of a study undertaken in Southern Ethiopia using data from 600 households show that women's intra-household bargaining power and awareness of their rights to land increased after the joint land registration and certification.<sup>57</sup>

In spite of the positive changes that the land certification program has brought (in increasing women's confidence and participation in land related decisions at the household level), women's access to justice has not steadily improved. The subsequent section discusses the role of the formalization of rural women's land rights in the administration of justice in a plural legal setting in the Sidama Regional State.

#### **4. Normative Legal Plurality on Women's Land Rights in Ethiopia**

The normative systems that are applicable at different levels of legal orders at international, regional and national levels overlap in most cases. At the international level, there is the international legal order that plays a role in human rights norm and standard setting. These norms complement each other although there are instances of distinctiveness.<sup>58</sup> Since the institutional framework for the enforcement of rights in the various international conventions is weak at the international level, it is left for the domestic legal system to enforce these rights through domestic laws, institutions, and practices.

The international and regional human rights framework has recognised women's equal rights to access, control and use land with men in binding conventions.<sup>59</sup> The jurisprudence assures women's land rights regardless of

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<sup>56</sup> Interview with Director of Ensuring women, Children and Youth inclusion and benefit Directorate at Sidama Regional States Women, Youth and Social Affairs Bureau on 04 May 2022 at Hawassa. Interview with key informant 2 conducted on 19 July 2022 at Shebedino.

<sup>57</sup> Stein T. Holden and Sosina Bezu (2014). *Joint Land Certification, Gendered Preferences, and Land-related Decisions: Are Wives Getting More Involved?*, 1.

<sup>58</sup> Frans Viljoen (2011). "Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness", *South African Journal of International Affairs*, Vol 18, No. 2

<sup>59</sup> Article 14 of CEDAW and Article 19(C) of Maputo Protocol are the binding instruments that protect women's land rights. In addition, there are non-binding soft

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conditions that the land tenure is based on statutory or customary, individual or communal ownership. In particular, it protects women from losing their rights to land merely because they do not have a formal title to it. These protections are based on substantive equality considerations.<sup>60</sup> The existing framework also ensures women's participation in land reform initiatives, the recognition of informal/customary rights during formalization of land rights, application of non-discrimination principle in land redistribution process, making the justice system accessible to women, ensuring land institutions' transparency, representativeness, and accountability, and creating awareness on women's land rights.<sup>61</sup> These principles and frameworks are applicable in Ethiopia based on the FDRE Constitution which makes ratified instruments part and parcel of the law of the land.<sup>62</sup>

At national level, women's land rights are protected by the FDRE Constitution and subsequent laws.<sup>63</sup> The Federal Rural Land Administration and Use Proc. No. 456/2005 (Proclamation No. 456/2005) has provision regarding women's equal access to such critical resources. According to Article 5(1)(c) of Proclamation No. 456/2005, a woman who wants to engage in farming can access and use rural land. It also upholds that rural land that is held jointly by a husband and wife should be registered in the name of both.<sup>64</sup>

The SNNP regional state's Land Administrative Law provides that rural women who are above the age of 18 and interested to engage in agricultural activities have the right to access and use agricultural land.<sup>65</sup> In its preamble,

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laws that protect women's rights to land. There are para. 165 (e) of Beijing Platform for Action (1995), the Habitat Agenda (2003), Goal 5 of the Sustainable Development Goals (SDG) (2015) and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT).

<sup>60</sup> Substantive (*de facto*) equality requires taking measures to address inequalities created because of the imbalance in the socio-economic positions of men and women in the society. It requires going beyond formal (*de jure*) equality which are provided in the law.

<sup>61</sup> See the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.

<sup>62</sup> Article 9(4) of the FDRE constitution. Ethiopia has ratified CEDAW and Maputo Protocol.

<sup>63</sup> Article 35(7) of the FDRE Constitution and regional land Administration Proclamations.

<sup>64</sup> Article 6(4) of the Federal Rural land administration and Use proclamation 456/2005.

<sup>65</sup> Article 5(2)(3) of Proclamation No. 110/2007 of Southern Nations, Nationalities and Peoples (SNNP) Rural Land Use and Administration Proclamation. This proclamation is currently applicable in the Sidama Regional State pending the adoption of a new

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the Proclamation recognizes that protection of women's land-holding rights ensures agricultural productivity and environmental development. The proclamation protects female heads of household to use their land rights.<sup>66</sup> Women are entitled to obtain land holding certificate in their own name.<sup>67</sup> It also protects a woman whose husband is away to use the rural land and obtain land certificate in her own name.<sup>68</sup> It furthermore provides that a husband and wife are entitled to a joint holding certificate.<sup>69</sup> Accordingly, a jointly owned rural land can only be leased or exchanged upon the consent of both the husband and wife.<sup>70</sup> If the consent of one of these parties is missing, the lease or exchange contract is void.

This national legal system does not accommodate customary rules in the broad sense of the term. The main reason for this is that the modernization process of the Ethiopian state in the early 20<sup>th</sup> century opened the gate for modern laws to be transplanted from other foreign legal systems. The modern laws in Ethiopia are characterized by codification of laws based on the western legal system i.e., predominantly the civil law legal system. The Civil Code explicitly made any customary rules which were applicable in the country null and void save for those which are expressly recognized under the Code.<sup>71</sup> However, it attempted to incorporate some customary rules in family, successions and property laws.<sup>72</sup>

Similarly, the customary laws in Ethiopia have not been subjected to much interference or influence by foreign systems or the state system until recently. The lack of history of colonialism and the Ethiopian state's approach towards customary justice system that did not profoundly allow for any relationship to blossom can be considered as an explanation for the customary system to maintain its originality.<sup>73</sup> However, in recent years, it is observed that the

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legislation for the new region in accordance with Proc. 8/2020 of Sidama Regional State.

<sup>66</sup> Article 5(6) of Proc. No. 110/2007.

<sup>67</sup> Id., Article 6(5).

<sup>68</sup> Id., Article 5(7) and 6(6).

<sup>69</sup> Id., Article 6(4).

<sup>70</sup> Id., Article 8(2); and Article 8(1(a)) of Reg. No. 66/2007.

<sup>71</sup> Article 3347 of the Civil Code.

<sup>72</sup> Vanderlinden 1966–67:259 cited in Getachew Assefa (2020), "Towards widening the constitutional space for customary justice systems in Ethiopia" in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*.

<sup>73</sup> Getachew Assefa, id., p. 56.

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relationship between the actors of the customary system and the state has been changing. The state is using the elders of customary system to resolve various communal conflicts by admitting the limits of formal mechanisms in terms of reach, legitimacy, and capacity.<sup>74</sup> This relationship has also been observed to be political with a view to get political allegiance.

Departing from the previous approaches, the FDRE Constitution recognizes the role of the customary and religious institutions in the adjudication of family matters, and it states that the particulars shall be determined by subsidiary laws.<sup>75</sup> However, it does not allow criminal matters to be adjudicated by customary or religious justice system. A Proclamation has been adopted in relation to sharia courts providing its jurisdiction.<sup>76</sup> Until recently there is no subsidiary law that specifically authorizes the customary justice system to adjudicate cases in a general manner. A specific law on the scope of their jurisdiction, the rules that should be applied by these institutions which include both substantive and procedural laws and their relation with formal justice system has not been introduced except in Oromia regional state.<sup>77</sup> The lack of such law that recognizes customary justice system has allowed forum shopping by going back and forth between the formal justice system and the customary justice system.<sup>78</sup>

Although the existing subsidiary laws have not incorporated much from customary laws, there is an exception in the case of rural land administration and use proclamations. Most of the regional land administration proclamations

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<sup>74</sup> Gebre Yntiso (2020). "Understanding Customary Laws in the Context of Legal Pluralism", in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, p. 82.

<sup>75</sup> FDRE Constitution allows customary and religious laws to be applied on personal and family matter based on the consent of parties (art. 34 (5)). It also gives recognition of customary courts under Article 78(5).

<sup>76</sup> The Federal Courts of Shari'a Consolidation Proclamation No. 188/1999.

<sup>77</sup> Assefa, *supra* note 72, p. 55. Oromia Regional State has adopted a proclamation to establish and recognize the Oromia Regional Customary Courts (Proc. No. 240/2021). It has also issued a Regulation to implement the Oromia Region Customary Courts, (Regulation No. 10/2021). These laws provide for a procedure for giving recognition and establishing customary courts that resolve disputes and reconcile in accordance with customary laws, their responsibilities, and the manner of revocation of the recognition given to them etc.

<sup>78</sup> Desalegn Amsalu (2020). "Use and abuse of 'the right to consent' Forum shopping between shimgilinna and state courts among the Amhara of Ankober, North-central Ethiopia" in Susanne Epple, Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*.

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mandate elders to settle land disputes.<sup>79</sup> According to Article 12(1) of Rural Land Use and Administration Proclamation No. 110/2007 of SNNPR, whenever parties to land disputes cannot resolve the dispute amicably, they can take their case to Kebele level Land Administration and Use Committee (LAC). LAC should facilitate the dispute to be resolved by local elders through negotiation and arbitration. It is only when the elders cannot resolve the case that it is submitted to Woreda court.<sup>80</sup>

This can be taken as *legal hybridity* which allows an accommodation of the affiliation of individuals to two or more institutions or legal systems whereby elders can play their roles in the customary system and at the same time become members of LAC (a state institution) to adjudicate land disputes.<sup>81</sup> This recognition by the law is a form of deference given to the roles of elders in the settlement disputes related to rural land holding rights. However, the Proclamation and current practice demonstrate that the parties to land disputes are required to take the case first to LAC before submitting it to courts. If parties in dispute submit cases directly to courts, they are referred to settle the land dispute through LAC. This approach contradicts the constitutional provision which requires that parties should give their consent when they take cases to alternative dispute resolution mechanisms.<sup>82</sup>

Normative compatibility is very fundamental for human rights protection although normative distinctiveness is tolerable in liberal democracy. In the study area, there are customary norms that are not only distinctive from state law but are also incompatible with the state law. Some of these gendered social norms and customary laws discriminate women from inheriting land. According to the views of elders who were interviewed at one of the research sites: “women are excluded from inheritance because upon marriage they are considered to belong to their husbands’ clan and that they will get land when they move to their husbands’ residence”.<sup>83</sup>

Thus, daughters’ inheritance of land is prohibited by the customary system because of this patrilocal nature of marital residence. Furthermore, the customary system does not prohibit polygamous marriage which is

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<sup>79</sup> Article 29 of the Revised Amhara Regional State Rural Land Administration and Use Determination Proclamation No. 133/2006, and Article 16 Oromia Rural Land Use and Administration Proclamation No. 130/2007.

<sup>80</sup> Article 12(2) of Proc. 130/2007.

<sup>81</sup> P.S. Berman (2010). “Towards a Jurisprudence of Hybridity”, *Utah Law Rev.*, Vol. 1, p. 11.

<sup>82</sup> Article 34(5) of the FDRE Constitution.

<sup>83</sup> Interview with elders on 11 May 2022 at Dore Bafano Woreda.

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widespread in the study area although it is declining through time because of religious condemnation and the economic pressure that accompanies polygamous marriage.<sup>84</sup>

This normative incompatibility between the two systems in relation to the practice of polygamy has brought the development of new rules by the formal normative system in order to address the effect of polygamous practices on women's land rights. The regional land certification and registration program has tried to deal with the negative effect of the practice on women's land rights by issuing a joint land certificate to the wives in such marriages even though the family law of the region (SNNP) prohibits bigamous marriage. Although the FDRE Constitution recognizes normative and judicial pluralism; it is not a *carte blanche* recognition.<sup>85</sup> In fact, the FDRE Constitution clearly stipulates that the obligation of the state relates to 'the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution'.<sup>86</sup>

Furthermore, the FDRE Constitution requires all organs of the government to enforce the human rights provisions of the Constitution including the provisions on women's rights.<sup>87</sup> It further declares that the FDRE Constitution is the supreme law of the land and any law including customary law that contravenes the constitution is null and void.<sup>88</sup> Thus, the normative plurality that is permissible under the Constitution is subject to the supremacy clause of the Constitution.<sup>89</sup> In light of this, it is important to inquire the constitutionality of the practice of joint land titling of a husband and wives in polygamous marriage. In this regard, it is argued that the practice of issuing a joint certificate for wives in polygamous marriage entail *de facto* recognition of polygamous marriage which is prohibited under the family codes of both

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<sup>84</sup> Interview with Director of Land Administration and Use Directorate of the Sidama Regional State Agriculture and Natural Resources Development Bureau on 09 May 2022. Protestant religion which condemns polygamous marriage is dominant in the Sidama region.

<sup>85</sup> Girmachew Alemu Aneme (2018). "The Coupling of State and Sharia Justice Systems in a Secular State: The Case of Ethiopia", *SFB- Governance Working Paper Series*, No. 75, p. 19.

<sup>86</sup> Article 91 of the FDRE Constitution.

<sup>87</sup> *Id.*, Article 13(1).

<sup>88</sup> *Id.*, Article 9(1).

<sup>89</sup> Girmachew, *supra* note 85, p. 20.

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the federal and the regional state and this might inadvertently encourage polygamy.<sup>90</sup>

The author of this article argues that law should not ignore the effects of polygamous marriage and its negative effects on women, and it needs to regulate the effect of such act on women. Thus, joint certification of wives' rights should not be taken as *de jure* recognition of polygamous marriage (especially its personal effects), but it should be understood as the response of the law recognizing the *land related effect* of such forms of marriages.

The FDRE Constitution's approach to legal pluralism has allowed normative and judicial plurality in the operations of the state and customary/religious systems. However, the co-existence of the two systems has also created a various complex outcomes in the settlement of land disputes as discussed in the section below.

## **5. Judicial Plurality in the Settlement of Rural Women's Land Rights**

### **5.1 Nature of land disputes involving rural women**

Dispute or competing claims over land is a fact of life. It emanates from the struggle among various social groups or individuals to have effective access and control over land and its productive resources. These disputes are settled by a third-party umpire to determine who has rights, what these rights are and for how long these rights can be exercised.<sup>91</sup>

As the analysis of the empirical data from the field shows, the types of land disputes in the study area can be categorized as disputes over land boundaries, demarcations, land transactions (rentals and disguised sales), and those that arise within family relations such as in relation to inheritance and divorce. Disputes related to state acquisition of local land is rare in the rural area as it happens mostly in the peri-urban areas and its resolution mostly involves only men except in case of a female headed household.<sup>92</sup> Most of land right

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<sup>90</sup> Belachew Mekuria Fikre (2013). "Bigamy and Women's Land Rights: The Case of Oromia and SNNP National Regional States", *Ethiopian Journal of Human Rights*, Vol. 1, p. 106 and 107.

<sup>91</sup> Franco, *supra* note 39, p. 5.

<sup>92</sup> Interview with Dr. Addiswork Tilahun, Assistant Professor at Hawassa University on 12 May 2022.

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disputes involving women arise in relation to divorce cases, inheritance cases and in case of bigamous/polygamous marriage.<sup>93</sup>

In the study area, land boundary related disputes are not court-centered. These disputes are settled by Land Administrative Committee (LAC), which is established by the regional Bureau of Agriculture and Rural Development with the mandate, *inter alia*, to settle land related disputes between neighbors.<sup>94</sup> The method of dispute resolution before LAC is based on the customary form of mediation whereby the members of LAC attempt to resolve the dispute in a reconciliatory manner to keep the peace and tranquility of the community. LAC has five to seven members elected by the community, and usually includes members from the community/elders. They try to identify the proper demarcation of land whenever there are boundary disputes through testimonies from neighbors. If a dispute arises over land among family members including among married couples, they try to mediate the parties with the view to maintaining family relations.<sup>95</sup>

The study further finds that court centered land disputes that relate to transfer/rental, marital property division during divorce, petitory action, trespass action and inheritance. These land disputes are submitted before the formal justice institutions and the informal institutions including the customary organs. It is rare for women to be involved in expropriation cases and compensation claims relating to land expropriation because the field research shows that it is mostly the husband who brings such cases representing the household.<sup>96</sup>

## **5.2 Avenues to resolve land related disputes involving rural women**

To be meaningful, land rights need to be legally recognized; and should be socially and judiciary enforceable.<sup>97</sup> There are three avenues to resolve land related disputes involving women, namely: - administrative organs, the formal justice system, and the informal justice system.

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<sup>93</sup> Interview with judges conducted on 06 and 10 May 2022 at Hawassa Area High Court and Hawyela Tula First Instance Court. Most of the cases submitted to the legal aid centers at Hawassa also demonstrate this reality.

<sup>94</sup> Article 12 of Proc. No. 110/2007 of SNNE Rural Land Administration and Use Proclamation.

<sup>95</sup> FGD conducted on 26 July 2022 at Alawa Ano Kebele.

<sup>96</sup> *Supra* note 92.

<sup>97</sup> Workwoha Mekonen *et al* (2020). *Strategy for Preventing and Mitigating Land Certification Related Violence against Women and Vulnerable Groups*, The World Bank- Washington DC, March 16-20, p. 12.

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### 5.2.1 Administrative organs

One of the formal avenues to resolve land disputes related to land boundary is before the administrative organs. As some studies demonstrated, land is perceived to be a political issue which is mostly resolved by political office as an administrative matter rather than as a legal case that should be resolved by courts.<sup>98</sup> This is especially true to the kind of land disputes involving demarcation of land, grazing lands and dispute over uncultivated land. This kind of land disputes are handled by district level peasant associations and district administrative organs rather than by a judicial organ.<sup>99</sup>

The main purpose of these administrative organs is to resolve the dispute as peaceful as possible and at the same time maintain the social cohesion. The administrative organs decide such disputes relying on eyewitness testimonies and documents presented before them.<sup>100</sup> Since the decisions of these organs are the main evidence considered by courts, parties to the dispute are reluctant to take their cases to courts as a first instance unless the disputes continue despite the decisions of the administrative organs.

The administrative organs that are involved in settling the disputes include LAC. Most of the members of LAC are village elders.<sup>101</sup> The elders tend to apply customary rules rather than state law. This has a negative implication on women's rights as some of the customary rules on inheritance are not compatible with state laws as discussed above. Furthermore, if the customary rules are applied, the disputants should give their consent to be adjudicated by the customary system. However, as the law and the practice demonstrate, they are not given a chance to give consent since LAC is the first instant body to entertain land disputes under the law.

The other main challenge is that women's participation in the decision-making process by the administrative organs is very limited. According to informants, women are not part of the core membership in LACs except a representative of the kebele's women association who has the privilege to be

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<sup>98</sup> Mamo Hebo (2005). Land Disputes Settlement in a Plural 'Institutional' Setting: The Case of Arsii Oromo of Kokossa District, Southern Ethiopia, *African Study Monographs*, Suppl. 29, p. 127

<sup>99</sup> Id., p. 128 and 130.

<sup>100</sup> FGD conducted with LAC members on 26 July 2022 at Alawa Ano Kebele.

<sup>101</sup> Interview conducted with Dore Bafano Land Administration and Use expert on 11 May 2022 at Dore Bafano.

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a member by virtue of her nomination from the association.<sup>102</sup> The absence of voice representing women to defend their interest, preferences and needs has a negative implication on the decisions. The ‘politics of presence’ theory argues that the inclusion of women in any decision-making process at the public sphere is necessary for a legitimate, democratic, responsive, inclusive, and effective outcome of the decisions.<sup>103</sup> The current thinking is that women’s participation and inclusion should not be considered as a favor done for women, but it should be taken as part of their human rights.

The various international human rights instruments and their jurisprudence require states to ensure women’s participation in decision-making processes.<sup>104</sup> The State is not only required to refrain from any action that undermines women’s participation, but is also required to take a positive action which can be in the form of gender quota. Gender quota can serve as an effective tool to bring women on board in decision-making processes especially in contexts where systemic and structural gender inequalities exist.

It should also be noted that the inclusion of women in decision-making process should be sought with a view to including women from diverse socio-economic backgrounds. Gender quotas should be implemented by ensuring the inclusion of women from diverse class, ethnicity, religion, urban/rural residency, disability, and other diversity.<sup>105</sup> Unlike other regional proclamations,<sup>106</sup> the SNNP Rural Land Use and Administration Proclamation does not provide quota for women participation in LACs while the laws of

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<sup>102</sup> Interview conducted with Dore Bafano Land Administration and Use expert on 11 May 2022 at Dore Bafano.

<sup>103</sup> Institute for Democracy and Electoral Assistance (IDEA) (2019), *Women Constitutional-Makers: Comparative Experiences with Representation, Participation and Influence: First Annual Women Constitution-Makers’ Dialogue*, Edinburgh, 2019, p. 9.

<sup>104</sup> One of the 12 objectives of the Beijing Platform for Action, adopted at the Fourth World Conference for Women in 1995, was ‘women’s equal access to and full participation in power structures and decision making’.

<sup>105</sup> Meskerem Geset and Tayechalem G. Moges (2020), “Counting Absence in Political Equality: A preliminary Gender Analysis of the Electoral Law Reform in Ethiopia” in Meron Zeleke and Meskerem Geset (eds.), *Gender, Development and Women’s Rights: Ethiopian Perspective*, p. 66.

<sup>106</sup> Article 5(4) of Proclamation 239/2014 of Tigray Regional States Proclamation requires a minimum of two members of LAC out of five to be women. Article 26 of the Proclamation No. 133/2006 of the Amhara Regional States Rural Land Administration and Use requires the LAC to have at least one-woman member.

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other regional states such as the Tigray and Amhara regional states' proclamations provide quota for women's representation in LACs.<sup>107</sup>

Thus, the lack of women's participation in the decision-making process on land related disputes before the administrative organs puts women's rights in a precarious situation. This discourages women from taking their cases to the administrative organs. According to many of the informants, it is men who bring land disputes before LAC in most of land related disputes. This relates to existing gender norms which requires men to represent the family in bringing cases against third parties.

### 5.2.2 Formal Justice System

The formal justice system comprises of courts as recognized under the FDRE Constitution. The law recognizes parallel or dual court systems that are established at the federal and regional levels.<sup>108</sup> The court system is established at the regional level having three tiers, i.e., Woreda Court, Zonal Court, Regional High Court, and Supreme Court (with regional cassation power to adjudicate matters arising from regional laws or in their delegated power over federal matters). Disputants can have access to these regional courts on matters that arise based on regional laws. They have one additional opportunity to bring their case (cassation petition) to a Federal Cassation Division of the Federal Supreme Court when there is basic error of law.<sup>109</sup> In addition to these mechanisms, the parties can bring a case before CCI and HoF if the case involves a constitutional matter.<sup>110</sup>

For women to be able to use the formal justice system, it is important that they are aware of their legal rights. Furthermore, there should be support from

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<sup>107</sup> Article 5(4) of Proclamation 239/2014 of Tigray Regional States proclamation requires a minimum of two members of LAC out of five to be women. Article 26 of the Proclamation No. 133/2006 of the Amhara Regional States Rural Land Administration and Use requires the LAC to have at least one-woman member.

<sup>108</sup> Article 78 of the FDRE Constitution.

<sup>109</sup> Article 80(3) of the FDRE Constitution. Cassation over cassation has been controversial subject and its constitutionality is challenged. See Muradu Abdo (2014), *The Cassation Question in Ethiopia*, School of Law of Addis Ababa University. However, this is put to rest with the adoption of a new proclamation that clearly support cassation over cassation in circumstances when the decision by the State cassation division involves constitutional matters, misinterpret the law or apply wrong law in a way that it affects public interest and have a national importance and when it fails to apply the binding decisions of the Federal Supreme Court Cassation Division. See Article 10(1(c & d)) of the Federal Courts Proclamation No. 1234/2021.

<sup>110</sup> Article 83(1) of the FDRE Constitution.

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the justice system to ensure access to justice by requiring the formal system to support a disputant when women bring a case and during the litigation of a case. Thus, the provision of legal assistance is fundamental. In the study area, legal assistant is accessible to women who live in the surroundings of Hawassa. In the remote rural areas, legal aid service is not available.<sup>111</sup>

The prosecutor office has started to provide legal support in civil cases. However, these services are not publicized well, and it is only a few individuals who are benefiting from this service. According to informants, the prosecutor offices have very limited human resources to represent indigent members of society. Thus, they have not yet publicized the service to avoid being overwhelmed with the demand for such services.<sup>112</sup> According to most informants, they often do not get support from informal networks such as family members and elders to take the case to the formal justice system due to the deep entrenched societal view that such cases should be settled privately or by the customary system.<sup>113</sup>

When cases are taken to the formal justice system, the land title deed serves as evidence since courts do not use the certificate as *prima facie* evidence. According to judges, there are some irregularities during the issuance of certificates they have observed from the cases brought to them. Accordingly, in some instances, it was found that the same certificate on the same land is issued for more than one family. There are also fraudulent acts committed by husbands by registering a female relative instead of the wife to deprive the wife from sharing the land.

Corruption and disappearance of documents have also been reasons for courts to hesitate to take the land certificate as the sole evidence to prove holding rights. The available literature and jurisprudence at the international level is also against using land certificate as the sole evidence to prove land rights. Accordingly, land titling may “further reinforce the inequality to access land especially in countries which have a justice system that require certification as evidence in formal claims. The commodification of land mostly benefits elites and those with access to capital and credit rather productive producers.”<sup>114</sup>

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<sup>111</sup> Interview with Directors of EWLA Hawassa branch and Mizan Youth Lawyers Center on May 12 and 04, 2022 at Hawassa.

<sup>112</sup> Interview with prosecutor at Sidama Regional State Attorney General on 20 July 2022 and prosecutors at Hawyela Tula Justice Office, on 10 May 2022.

<sup>113</sup> Interview with key informant 14 on 23 July 2022 at Moricho town.

<sup>114</sup> Narula, *supra* note 4, p. 146.

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In *COHRE v. Sudan*<sup>115</sup>, the African Commission on Human and peoples' Rights has dealt with whether legal title to land is a necessary condition for the protection of property rights.<sup>116</sup> The Commission held that “[i]t doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14.”<sup>117</sup> Here, the Commission considered traditional usage as a means to property rights rather than land titling.

According to informants, even though courts can promote women's rights by applying the law and treating men and women equally during divorce and inheritance, the expenses involved to bring cases before courts and the time it takes to get final decisions are very discouraging for rural women. In addition to costs related to legal services, most women who come to Woreda courts or a high court in Hawassa, incur transportation and accommodation costs. An informant, remarked:

I spent 10,000 Birr to take my case to court including the expenses I have incurred for the transportation and accommodation of witnesses. However, when I took my case to elders, I incurred 1,200 Birr for six sessions of the elders meeting, 200 Birr for each session.<sup>118</sup>

The other challenge is that the decision of the formal justice system may not be easily socially enforced on issues that involve customary norms of gender-bias thereby causing lack of social legitimacy. Even when a court decides for women to share land from her husband upon divorce or from her family during inheritance, such decisions are not socially enforced. She is pressured (by her ex-husband and his family) to 'sell' or rent out the land and leave the area in case of divorce; or she can face similar pressure from her relatives who are co-heirs and got a reduced share from inheritance because of the decision.<sup>119</sup> Thus, these factors are mostly discouraging women from taking cases to the formal justice system.

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<sup>115</sup> African Commission on Human and peoples' Rights: *Center on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 296/2005 (29 July 2010).

<sup>116</sup> OHCHR (2015). *Land and Human Rights: Annotated Compilation of Case Law*, p. 28.

<sup>117</sup> *Ibid.*

<sup>118</sup> Interview conducted with Key informant 03 on 19 July 2022 at Shebedino Woreda.

<sup>119</sup> *Supra* note 51.

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### 5.2.3 Informal Justice System

The constitutional recognition of the customary justice system did not only bring normative plurality but also it resulted in judicial plurality. According to Girmachew, “[n]ormative plurality emerges from the coexistence of different sources of order and leads to judicial plurality through the development and expansion of institutions which serve the various sources of order”.<sup>120</sup>

Though a subsidiary law has not yet given official recognition to customary law and its institutions, they are the legitimate *modus operandi* in the study area to settle land related cases that are brought by the parties to a case. According to the study informants, *afini* system is one of the customary systems that exist in the study area. *Afini* –meaning ‘hear me’– is very respected phrase and “when the elders (“chamesa”) use [this] word, no one moves or speaks out. Everybody listens to when the elder says *afinia* and respects their decision.”<sup>121</sup>

The elders hear cases in public and in a transparent manner. The hearing involves 5-7 elders based on the level of the customary court. The different clans (*Gosa*) in Sidama have their own *Afini* system. The highest decision maker is the *Moti* or the king of each clan.<sup>122</sup> These elders get the responsibility to mediate through their lineage. All of these elders are senior males. The services by elders are rendered without any monetary remuneration. The place of adjudication is not permanent except for the highest tier where the *Muti*/clan’s king resides. Sometimes the elders go to the claimant’s house to adjudicate the case or hear the case where the parties have agreed to go. Customary systems are generally perceived to be free from favoritism and stand for the truth. However, this is eroding through time. Some women informants raised the issues that some elders favor men for the mere fact that they socialize with them outside of adjudication.<sup>123</sup>

Eyewitnesses are the main sources of evidence in the customary system. It is believed that oath is a means to find the truth. The system has its own rules regarding punishment. Anyone who is not respecting the customary rules is socially ostracized. According to informants, “he/she is outcasted by the local community. They will not be allowed to attend funerals or weddings when

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<sup>120</sup> Girmachew, *supra* note 85, p. 5.

<sup>121</sup> *Supra* note 83.

<sup>122</sup> Interview with elders on 22 July 2022 at Yergalem.

<sup>123</sup> Interview with key informant 13 on 21 July 2022 at Dori Bafano Woreda.

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they are found to be at fault.”<sup>124</sup> This kind of punishment is not time bound. It is only when the violator agrees to respect the customary rules and gives deference to the system that the punishments cease. The final decisions of elders are respected and enforced by the community.<sup>125</sup>

The customary justice system reaches the wider population, and it is considered legitimate and cost effective to deliver speedy justice on a win-win basis. Its proximity to the disputants and efficiency to deliver speedy justice has enabled them to be the primary preferences by disputants. The decisions of the customary justice system are respected without having any police officer that enforces the decision.<sup>126</sup> Moreover, the customary system focuses on reconciliation and it has a flexible procedure that makes it preferable by justice seekers.<sup>127</sup>

However, the customary system does not allow women to participate as elders or litigants. The elders are appointed either because of their ancestral lineage or because of their ability to mediate and their social acceptance.<sup>128</sup> This is confirmed as a common trend in most of the customary systems at various parts of Ethiopia.<sup>129</sup> In customary systems, women are expected to bring cases through their male family members. This has denied them from representing their cases and interests and renders them to become *persona non grata*. The lack of power to bring a case in their own name –*locus standio in judicio*– has diminished their legal capacity and personality.<sup>130</sup>

Though the rule is that a woman can access the customary justice system through her male relatives, there is now an exception to it. It has become

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<sup>124</sup> Interview with a Judge at Social court conducted on 19 July 2022 at Shebedino Woreda.

<sup>125</sup> *Supra* note 122 & 123.

<sup>126</sup> *Ibid.*

<sup>127</sup> Meron Zeleke (2010). “*Ye Shakoch Chilot* (the court of the sheikhs): A Traditional Institution of Conflict Resolution in Oomiya Zone of Amhara Regional State”, Ethiopia, *African Journal on Conflict Resolution*, Vol. 10, No. 1, p. 82.

<sup>128</sup> Interview with elders on 22 July 2022 at Yergalem and Dore Bafano.

<sup>129</sup> Meron Zeleke (2015), *Beyond the Exclusion Theses: Women and Customary Courts in Ethiopia*, ILPI, p. 5. Meron in this paper argues that even if women are underrepresented in most customary justice system, there are few customary systems which are inclusive or lead by only women. She mentions *ErfoMereba* in Wallo, *Siinqee* in Arsi and *Ya Shaykoch* Chilot.

<sup>130</sup> Abiola Sunmon (2005). *Gender Inequality, Legal Pluralism & Land Reform in South Africa*, unpublished thesis p. 24 (A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Arts, Department of Law, Carleton University, Ottawa, Canada)

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evident that a woman can access the customary justice system by her own when she does not have close male relative, or a widow can present her case whenever there is no male family member to represent her. Despite the lack of direct access to the customary justice system, women in the study area are active in making choices for what type of cases they use the customary justice system. In most instances, women prefer their cases related to divorce to be adjudicated by the customary system either by privately consulting elders or delegating their male family members to take the case on their behalf. One of the informants said: “Women won’t go to courts because they face ostracization, instead, prefer to go to elders. They also believe that the case will be referred to the elders by courts if they first take the case to court”.<sup>131</sup>

Women’s choice is constrained by the culture which expects them to take the case to elders through male family member. In spite of this challenge, they try to explore and make choice between the court system and customary justice system. This kind of forum shopping takes place in the study area when rural women prefer the customary justice system to adjudicate divorce cases with the belief that the marriage can be saved through the reconciliatory approaches of elders.<sup>132</sup> However, rural women tend to take inheritance cases to the court because of their awareness of the rules of the customary justice system that do not allow women to inherit land from their family because of the patrilineal inheritance system.<sup>133</sup> In these cases, women users of the justice system swing back and forth between these legal systems.

Lack of official recognition of the customary system by subsidiary law has made the enforcement of decisions of the formal organs such as land administrative organs challenging. If elders decide for a share of land to be given to one of the parties in the dispute, the land administration authorities find it difficult to enforce the decision for the lack of a legal framework that officially recognizes the customary justice system. According to one of the informants, in a dispute with her husband to get her share of the crop from their jointly owned land, the elders decided for her to get an equal share of the crop. However, the elders were not able to enforce the decision upon the refusal of her husband to give her share.<sup>134</sup>

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<sup>131</sup> Interview with key informant 1 on 19 July 2022 conducted at Shebedino Woreda.

<sup>132</sup> Interview with key informant 12 on 13 July 2022 conducted at Moricho town.

<sup>133</sup> Interview with judges and prosecutors in Hawassa 06 and 10 May 2022.

<sup>134</sup> Interview with Key Informant 02 on 19 July 2022.

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### **5.3 The relation between the formal and the informal justice systems**

The relationship between two or more co-existing normative/judicial systems is mostly characterised by inconsistencies in most of the available literature.<sup>135</sup> Such inconsistency is peculiarly observed in relation to women's rights.<sup>136</sup> However, it is also important to look beyond such inconsistency and look into where these two systems interact or influence each other to transform themselves.

In the study area, a certain level of cooperation in the form of cross reference between the customary system and formal justice system is observed. This is reflected in the court's tendency to refer a case to elders if the parties to the case agree to a mediation process by elders. This goes against legal centralism which considers law (and the formal legal system) as legitimate, capable of providing solution to all problems and hierarchically above all other normative systems.

Moreover, customary law is adapting to the changing circumstances as a 'living customary law' does. This change is observed in relation to land inheritance. The view that a woman cannot inherit land is eroding through time. The elders now consider a daughter's right to inherit her father's land in case he is not succeeded by a son/s. In previous times, the share of the inheritance was given to male relative such as her uncle or cousins because of the cultural rule that prohibits/excludes women from inheriting land.<sup>137</sup> Because of the growing awareness too, fathers are leaving a will behind for their daughters to inherit land.

Furthermore, land certificate is becoming one of the pieces of evidence on which the customary justice system relies for its adjudication of cases from time to time. Thus, the joint land certificate, which has introduced the idea that a woman can have a right on the land, has contributed in changing some of the customary rules to be more gender sensitive and responsive.

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<sup>135</sup> Susanne Epple (2020). "Introduction" in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, p.12.

<sup>136</sup> Berihun Adugna Gebeye (2013). "Women's Rights and Legal Pluralism: A Case Study of the Ethiopian Somali Regional State", *Women in Society*, Vol. 6, p. 9. See also Epple, id., p. 20.

<sup>137</sup> Interview with a Judge at Social Court conducted on 19-07-2022.

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## 6. Conclusion

The customary and the formal systems have co-existed for many years, and this coexistence is changing towards a complementary synergy one over time. In relation to land rights, there are competing interests between the state and the clans in Sidama Regional State to control or exert power on the administration and management of land. This has led to competition and sometimes complementarity between the state and the customary systems depending on each context.

The customary system has been serving as a means to reduce the backlog that would have been created if all land-related disputes were taken to courts. The customary justice system is better placed to resolve land related communal problems in reconciliatory and peaceful manner than the court system. In such circumstances, the courts should respect the choice of the parties to the case to resolve their dispute through the informal mechanisms as long as the decisions of the customary justice system do not violate constitutionally guaranteed women's rights. However, when there is a collision between the formal and informal rules of the justice system, the constitutionally protected human rights should prevail. Thus, normative complementarity between the formal and the informal justice system becomes appropriate on constitutionally protected rights including women's rights.

The establishment of Land Administrative Committee (LAC) has shown that the state systematically uses elders to address land related disputes. However, the lack of women's participation in this mechanism has been the main challenge that violates women's rights to participate in decision-making processes and in the outcome of decisions. Thus, the state needs to promote women's participation in land dispute settlement and in land governance. To this end, it is, *inter alia*, expected to design programs that aim to increase women's literacy and strengthen the cooperation between the formal and informal justice systems.

The customary system with regard to rules on inheritance is a factor which puts women's rights in a precarious situation when their cases are adjudicated before the customary justice system. The rise in women's awareness of their rights and the related informed choice making between the two systems is a new development that is observed. Women exercise their agency through forum shopping by choosing between the two justice systems based on the extent to which their rights are protected. But for the women to be able to exercise their agency, the state should make sure that the customary system only adjudicates cases when the parties to it gave their free and full consent. If proven otherwise, decisions by the customary justice system should be quashed as unconstitutional. For this to happen, the state should regulate the

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relations between the state justice system and the customary justice system and make the decisions of the customary justice system reviewable.

Although the land registration program has positively contributed in the realm of productivity and in women's decision-making power at the household level, it has little contribution in the justice system as document of evidence. This is because of the prevalence of informalities and irregularities related to land transactions including fraudulent acts, disappearance of documents, corruption, registration of a female relatives rather than the wife. This has minimized the evidentiary role of land certificates before courts of law. Thus, the courts are not taking the landholding certificates as exclusive evidence, and they rather rely on other collaborative evidence such as eyewitness testimonies to prove the holding rights when the certificate is contested. For the certification program to play its role in the justice system, it is important for good governance and rule of law to be maintained in the issuance process of land certificates. An accountability mechanism should also be strengthened. \_\_\_\_\_■

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