

Women's Rights to Access to Justice: Challenges and Opportunities at the Grassroots Level in Oromia Regional State

Sisay Kinfé ⁸⁶

Abstract

Women face barriers to access justice that emanate from the absence, inadequacy or manipulation of evidence presented to formal courts, as well as limited participation and representation in the customary justice system and concomitant discriminatory customary laws and practices. This article examines the legislative mechanisms of addressing barriers to women's access to customary justice and its implementation at the grassroots level in the Oromia regional state of Ethiopia. Using a qualitative research approach, the study explored the gender sensitivity of the legislative mechanisms designed to enhance access to customary justice at the grassroots level and their implementation. Legislation on customary court enacted by the Oromia regional state, empirical data collected using observation, interviews, and reports from Gelan, Handode districts and the Gelan sub-city of Sheger City, are the data sources. The study uses a human rights-based approach to access to justice and the principles of gender-sensitive legislation as the theoretical framework. Gaps in using gender sensitive language in framing legislation on customary courts is one factor that inhibits women's equitable representation and participation in the customary justice system during the implementation of the legislation. The paper argues that gender-sensitive approach in making legislation on customary courts contributes to gender sensitive implementation addressing barriers to women's access to justice.

Key Words: Women, Access to justice, Customary Court, Gender sensitive legislation

⁸⁶ Sisay Kinfé Gebrewold (PhD) is an assistant Professor at the Center for Federalism and Governance Studies of Addis Ababa University. She can be reached at sisay.kinf@aaau.edu.et. The author would like to give the highest gratitude to Ato Mekonen Regasa who assisted in the collection of data .

Introduction

Women face barriers to access justice both in the formal and customary justice system in legally pluralistic society where state and non-state legal system co-exists (Harper, 2011; Harper, Wojkowska, and Cunningham, 2011). The barriers to access justice emanate from the absence, inadequacy, or manipulation of evidence presented to formal courts, and limited participation and representation in the customary justice system and concomitant discriminatory customary laws and practices. Though customary justice system is accessible and preferred at grassroots level, absence or limited regulation of customary justice system contributes for perpetuation of barriers for women's effective access to customary justice. This is due to limited participation and representation of women in customary courts, discriminatory customary laws, weak procedural safeguards and enforcement of decision of customary courts, absence of accountability mechanism, and lack of monitoring and support mechanisms (Wojkowska, 2006; Harper, 2011; Harper, Wojkowska, and Cunningham, 2011; Assefa, 2012; Jemaneh, 2014; Ahmad and Wangenheim, 2021).

To address barriers to access justice, states adopt different strategies in the administration of non-state justice that link the customary/non-state justice system with the formal justice system, depending on the mode of existence of legal pluralism.⁸⁷ These strategies includes repression, bridging, harmonization, subsidization and incorporation (Swenson, 2018). Except the strategy of repression which is aimed at eliminating customary justice system, the other strategies directly and indirectly accommodate customary justice system at various degree.

⁸⁷ The mode of existence or operation of legal pluralism in a state can be combative (the normative systems are hostile to each other), competitive (informal actors retain substantial autonomy but the states autonomy is not challenged), cooperative (there is no major clashes between the different normative system), and complementary (the informal system is structured and subordinated by the formal system). See, Swenson (2018: 442-445).

Prior to the 1990s, customary justice institutions in Ethiopia had limited state recognition in a context in which the formal justice system was not accessible to the majority of people of the country who lived in rural areas. There was an attempt to replace customary laws with the 'modern' state law in civil and criminal matters (repressive strategy), which reached its climax in the 1950s and early 1960s with the adoption of the Ethiopian Penal Code and Civil Code respectively (Assefa, 2012: 12). In spite of the attempts made by the State to centralize the legal system, customary justice remains the most accessible and relevant institution to resolve disputes at grassroots level both in civil and criminal matters (Assefa, 2012; Fiseha, 2014; Assefa, 2020).

With the change of regime in 1991, the customary justice system has been given State recognition. Particularly, the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution gave recognition to customary laws and courts to operate along with the State's legal system in the areas of family and personal matters. In this regard, the FDRE Constitution Article 34/5 states that "[t]his Constitution shall not preclude the adjudication of disputes relating to the personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute." In addition, Article 78/5 of the FDRE Constitution states that "[p]ursuant 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."

Though there are amateur advocates of women's rights in Ethiopia who consider the constitutional recognition of customary justice institutions to resolve personal and family disputes as insensitive to women's situation and rights, there are many scholars who argue for better recognition of the customary justice system, including in broader areas of civil matters and on some criminal issues.

Proponents of better recognition, taking into account the federal dispensation and the Constitutional recognition of customary dispute

resolution mechanisms, focus on how gaps seen in the formal justice system in the provision of justice such as inaccessibility, case overload and limited legitimacy can be filled by customary justice system by having legislation on customary courts to ensure observance of human rights standards including women's rights in the customary justice system (Assefa, 2012; Fisseha, 2014; Assefa, 2020). They argued that having legislation for formal recognition and establishment of customary courts either at the federal or regional level contributes to addressing barriers to women's access to justice. However, neither the federal parliament nor any regional states that have the power to enact laws for the recognition and establishment of customary courts did so until recently. Following the 2018 political reform, Oromia regional State enacted legislation that recognizes and establishes customary courts at the grassroots level in the region (Oromia regional state Customary Courts Proclamation No. 240/21; hereafter Proclamation No. 240/21).

This contribution engages with the question: Was the legislation for the recognition and establishment of customary courts in Oromia regional state framed and implemented in gender sensitive manner to address barriers to women's access to justice? The purpose of the study is to explore to what extent the Oromia regional state's legislation on customary courts is framed and implemented to address barriers to women's access to justice. A qualitative research approach is used to collect and analyze data.

The primary sources of data are regional legal documents, observation, interviews, and reports of customary courts. The Oromia regional state Customary Courts Proclamation No. 240/21 is the main legal document critically analyzed, adopting a gender perspective on the matter. Observation of *Gaaddisa* (place where customary courts discharge their official duty), including materials used to find the truth in customary courts, was held in Gelan and Adonde districts, and the Gelan sub-city of Sheger city. Interviews were held with secretaries and elders of customary courts, focal person of customary courts in the formal court of Gelan sub-city and its ex-president, Culture and

Tourism Office officials, and clients of customary courts. Hence, a total of sixteen persons, eight women and eight men, were interviewed for the study leading to this publication.

The paper is organized into five sections including the introduction. Section two is a literature review on the rights to access to justice and a human rights-based approach to women's rights to access to justice in a legally pluralistic society, as well as the meaning and duty to enact gender sensitive legislation in human rights instruments. Section three presents an overview of the purpose and main contents of Oromia regional State's legislation on customary courts, and identifies mechanisms set in the legislation to address barriers to women's access to justice, and the extent of its gender sensitivity. Section four analyses the practical opportunities brought by the legislation on customary courts to access to justice, and unaddressed challenges to women's access to justice at the grassroots level in Gelan sub-city of Sheger city which will be followed by a concluding section.

2. Women's Access to Justice in Legally Pluralistic Society: Conceptual and Theoretical Framework

2.1. The Rights to Access to Justice and the Human Rights-based Approach

Guarantee of the rights to access to justice for all emanates from the virtue of provisions guaranteeing the right to equality before the law, a right to fair hearing, the right to liberty and security of the person, and the right to an effective remedy, which are recognized in various international human rights instruments.⁸⁸ Access to justice as a process

⁸⁸ The right to equality before the law is guaranteed in Articles 7, 8, and 10 of the Universal Declaration of Human Rights; and Articles 14/1 and 26 of the ICCPR. The right to fair hearing is guaranteed in Article 14 of ICCPR, Article 12 and 40 of the Convention on the Rights of the Child; Article 5/a of the Convention on the Elimination of All Forms of Racial Discrimination; Article 15/2 of the CEDAW; and Article 13 of the Convention on the Rights of Persons with Disabilities. The right to liberty and security of the person is guaranteed in Article 5/b of the Convention on the Elimination of All Forms of Racial Discrimination;

of getting remedies for grievances based on the rule of law can be conceptualized based on its more formalistic use and based on substantive consideration of getting just and equitable remedies to ensure social justice (Wojkowska, 2006; Jemaneh, 2014). Formally, access to justice is a right that refers to judicial remedies to violations of rights and/or resolution of disputes which includes procedural elements such as access to courts, the right to fair hearing, access to legal services, adequate redress, and timely resolution of disputes. Substantively, access to justice is a comprehensive/broader conception of justice that aims at achieving overall social justice, i.e., just and equitable justice for all. Encompassing both the formal and substantive approaches, access to justice can be defined as “the ability of people to seek and obtain a remedy through formal and informal institutions of justice, and in conformity with human rights standards” (Wojkowska, 2006).

In a human rights-based approach, human rights determine the relationship between individual and groups with valid claims (right-holders) and states with correlative obligations (duty-bearers). The legal and normative character of rights enables and empowers individuals to claim their rights (Jemaneh, 2014: 30). justice is about fairness, and human rights standards are the parameters of fairness from three dimensions of justice: normative, procedural and structural (Jemaneh, 2014; Ubink and Rooji, 2011).

The normative aspect requires that the substantive set of rules protect the needs and concerns of all sections of the society, in particular the poor and vulnerable. The procedural dimension requires that disputes be adjudicated by independent and impartial bodies in a transparent and fair process. The structural aspect of justice requires effective public participation in and accountability of the justice system: the

Article 37/d of the Convention on the Rights of the Child; and Articles 12/4 and 14 of the Convention on the Rights of Persons with Disabilities. The rights to effective remedy is guaranteed in Article 3 of the ICCPR; Article 5/b of the Convention on the Elimination of All Forms of Racial Discrimination; and Articles 12-14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

justice system should not directly or indirectly reinforce existing discrimination or marginalization of disadvantaged groups such as women (Jemaneh, 2014: 33).

In the human rights-based approach to access to justice, the availability of the option of a justice system (informal/customary and formal) that respects human rights standards creates an opportunity for customary legal empowerment, and contributes to addressing the barriers for women's access to justice (Harper, Wojkowska and Cunningham, 2011: 174-182). Customary legal empowerment is a "processes that: i) enhance the operation of customary justice systems by improving the representation and participation of marginalized community members, and by integrating safeguards aimed at protecting the rights and security of marginalized community members; and/or ii) improve the ability of marginalized community members to make use of customary justice systems to uphold their rights and obtain outcomes that are fair and equitable" (Ubink and Rooij, 2011:17).

In Ethiopia, both formal and substantive notions of access to justice are embedded in the FDRE Constitution (Jemaneh, 2014: 41). The narrow and formalistic approach to access to justice is provided under the title of the rights to access to justice in Article 37/1 of the FDRE Constitution. This provision states that "[e]veryone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power." As per this provision, only justiciable matters get remedies through judicial and quasi-judicial bodies, which is not considerate of the situations of the poor and disadvantaged groups. However, there are also parameters in the Constitution that lay the foundation for substantive justice, which include the overall framing of the Constitution that establishes a political society based on the rule of law (FDRE Constitution, Preamble para 1).

The Constitution also guarantees international human rights that are interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, international covenants on human

rights, and human rights instruments adopted by Ethiopia (FDRE Constitution, Article 13/2). These are the foundations for effective access to justice. In addition to these, the specific provisions of the Constitution that underpin the substantive justice are the extension of protection for disadvantaged groups such as women (FDRE Constitution, Article 35) and the recognition of the need for the regulation of customary and religious forms of dispute resolution mechanisms.⁸⁹ Particularly, the constitutional recognition of the use of customary laws and courts based on the consent of disputing parties empowers individuals to choose a justice system and influence the functioning of the customary justice system to operate respecting procedural and substantive safeguards for the observance of human rights standards.

2.2.Measures Required to Ensure Access to Justice for Women

In a legally pluralistic society that accommodates a customary justice system, access to justice for women, unlike access to justice for men, requires the prohibition of all forms of discriminatory norms, customs, and practices against women, as well as a gender-sensitive approach in legislation that states enact for the realization of human rights principles and standards. The following section discusses the required measures prescribed in international human rights instruments to address barriers to women's access to justice .

⁸⁹ See FDRE Constitution, Article 34/5, and 78/5 as well as the 2001 Revised Oromia regional State Constitution Article 34/5 and 62. Other FDRE constitutional provisions that underpin substantive justice as extension of protection of disadvantaged groups include the guarantee of public participation in the crafting of government policies (Article 43/2), the guarantee of fair trial (Article 20), the establishment of independent judiciary (Article 78), the right to be represented by legal counsel of one's own choice or to be provided with legal representation at the state's expense (Article 20/5) and the recognition of the right to equality before the law (Article 25).

2.2.1. Elimination of Direct/Indirect Discrimination and Accommodation of Customary Justice

The international human rights instruments, particularly the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), put an obligation on state parties to eliminate discriminatory norms, customs, and practices that inhibit women from the enjoyment of their human rights. The CEDAW prohibits both direct and indirect discriminations against women via its definition of discrimination against women in its Article -1 as “...any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

A similar definition of discrimination against women is put forth in the Protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the Rights of Women in Africa (Maputo Protocol).

Regarding specific measures required, the CEDAW in its Article -2 states that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end [.....] take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

Article- 5 of CEDAW also requires States parties to take all appropriate measures “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Moreover, the 2015 CEDAW General Recommendation No. 33 on women’s access to justice noted about the importance of plural justice systems, stating “a range of models [exist]

through which practices embedded in plural justice systems can be harmonized with the Convention in order to [...] guarantee that women have access to justice” (para. 63). Similarly, Protocol to the ACHPR on the Rights of Women in Africa recognizes the importance of tradition and customs as far as they do not contravene women’s rights (IDLO, 2020: 08). The human rights instruments make clear that the obligation of the State is not only in recognizing customary justice system but also in terms of taking measures including legislation that guide the State to uphold human rights standards. To this end, legally pluralistic states use different strategies to bring just legal order, which include bridging, harmonization, incorporation, subsidization, and repression (Swenson, 2018).

In the bridging strategy, legal jurisdictions are allocated to formal and customary justice systems by law based on the appropriateness of the venue and participants’ preference. Often, non-violent and small claims are left to the customary justice system. Bridging strategy functions well when there is increased demand for formal justice and the formal justice system is inaccessible, as well as when actors in the customary justice system are willing to accept and facilitate referral to the formal justice system (Swenson, 2018: 446). Harmonization strategy, on the other hand, attempts to make the output of the customary justice system consistent with the values of the formal justice system by incorporating and legitimizing the customary justice system to some extent (Ibid).

Using an incorporation strategy, the state eliminates the distinction between the informal and customary justice systems. As per this strategy, customary justice system’s decisions are incorporated and regulated by the formal justice system. The regulation of customary justice system is expressed by explicitly establishing customary courts through the state’s law, and the formal courts serve as first instance or a venue for appeal from the customary justice system (Swenson, 2018: 447).

In the subsidization approach, the customary justice system is often

left alone and restricted, but the formal justice system receives assistance from the customary justice system to enhance its capacity, performance, and public engagement and legitimacy (Ibid: 448). Repression is a destructive engagement that basically targets to eliminate the customary justice system in a relatively peaceful environment as a manifestation of the supremacy of the formal justice system (Ibid).

The Ethiopian State has adopted a repressive strategy prior to 1991. However, since 1991, the accommodation approach is adopted, which is a mixture of the remaining four strategies (bridging, harmonization, incorporation, and subsidization) with the intent of bringing a just legal order at various degrees and became no longer repressive (Ayana, 2023). Moreover, the FDRE Constitution as well as the 2001 Oromia Regional State Revised Constitution prohibits the application of discriminatory norms, customs and practices.⁹⁰

These Constitutions underline the significance of having detailed legislation for the operation of the customary justice system in Article 34/5 and Article 78/5 of the FDRE Constitution as well as Article 34/5 of Revised Oromia Regional State Constitution. In this regard, Article 62/1 of the Revised Oromia Regional State Constitution states that “[p]ursuant to Sub-Article 5 of Article 34 of this Constitution, religious and customary courts may be established or recognition be given to them.” Accordingly, the Oromia Regional State Council (Caffee Oromia) enacted a law that recognizes and establishes customary courts in the region in 2021 with the overall objective of addressing barriers to access justice, including barriers to women’s access to justice, as discussed below in section three. To address barriers to women’s access to justice, the legislation shall be gender sensitive, as can be inferred from international women’s human rights instruments.

⁹⁰ See, the FDRE Constitution Article 9/1, the Revised Oromia Regional State Constitution Article 9/1

2.2.2. Gender Sensitive Legislation

Gender-sensitive legislation gives effect to States' international obligations on women's rights and promotes gender equality (Suteu, Draji and Klibi, 2020: 24). In this regard, international human rights instruments define the role of legislation for the realization of rights. For example, ICCPR Article 2/2 stipulates the duty of the States "to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant." Similarly, ICESCR under its Article 2/1 mentions the duty of the state to realize rights in the Convention progressively using specific mechanisms such as legislative measures.

More explicitly, CEDAW leaves the obligation on member states to eliminate all forms of discrimination against women and guarantee women's equality rights with men by taking legislative measures in its Articles 2 and 3. The underlying assumption of gender sensitive legislation emanate from the abstract form of rights in human rights instruments and the national constitution with the details to be elaborated through legislations.

Legislation are tools to implement constitutionally guaranteed rights to equality and non-discrimination. Since the constitutional principles are more general, they need detailed legislation for their implementation. "States' constitutions still need to rely on legislation for the practical implementation of their principles" (Suteu, Draji and Klibi, 2020: 22). Constitutional guarantees of rights to equality and non-discrimination are implemented or limited in accordance with detailed laws/legislation. In addition, women have different interests than men related to their nature and reproductive rights. In this context, explicitly addressing women's rights requires gender sensitive legislation that identifies, takes seriously, and addresses women's specific needs (Ibid, 21).

The other important factor why gender sensitive legislations matter is to redress and correct historic and ongoing discriminations against

women (Suteu, Draji and Klibi, 2020: 17). Historically women have been systematically excluded from decision making, access to opportunities and resources, and the law is complicit to these discriminations either by being overtly discriminatory or being silent on women's plights to end discrimination or by not providing explicit protection (Ibid, 18).

The ongoing discrimination against women can be direct or indirect discrimination. Indirect discrimination occurs when the law seems neutral, but is affected by pre-existing inequalities and is practically discriminatory. If the law fails to recognize structural and historical patterns of discrimination, indirect discrimination exacerbates existing inequalities (Ibid). Hence, gender sensitive legislation is a means to redress both direct (*de jure*) and indirect (practical) discrimination. Moreover, it is stated that [g]ender-sensitive laws can play an important role in addressing discriminatory customs rooted in culture, religion, or tradition. Such customary practices may have a strong pull on the population and appear immutable. Law, however, can and should act as a tool for progress and push the equality agenda forward, even where this agenda might clash with pre-established customs (Suteu, Draji and Klibi, 2020: 19). In sum, gender-sensitive legislation/law is a powerful tool for addressing historic and ongoing discrimination against women entrenched in the name of custom.

3. Access to Justice in the Oromia Regional State Legislation on Customary Courts

The council/parliament of the Oromia Regional State (Caffee Oromia) enacted legislation recognizing and establishing customary courts in the region under Proclamation No. 240/2021. Resolution of disputes based on parties' consent to the dispute using customary laws and values, and enhancing effective access to justice. Justice is one of the primary purposes of the legislation. The customary courts of Oromia region are described as "accessible, effective in fact finding and dispensation of justice, follow simple and flexible procedures, and capable of strengthening social relationships" (Preamble of

Proclamation No. 240/2021).

Contributing to the observance of human rights and rule of law is also part of the objectives of the legislation on customary courts (Article 6/3 & 4). Apart from the provision of accessible and effective justice at the grassroots level, developing the culture of the Oromo people along with the modern justice system and democratic governance is envisioned in the legislation. This is why the legislation is not limited to recognition and establishment of customary courts but also contains mechanism that contributes for addressing barriers to the rights to access to justice for disadvantaged groups, though whether the mechanisms is adequate enough or not to address barriers to women's access to justice is part of the research question of this study.

The legislation on customary courts in the Oromia regional state contains five main parts. The first part of the legislation deals with, inter alia, the scope of application of the legislation. Basically, the legislation applies to any person living in the region who consents to recognized customary courts by the legislation (Proclamation no. 240/21, Article 4).

Part two of the legislation deals with the establishment, recognition, objectives, structure, and jurisdiction of customary courts (Proclamation No. 240/2021, Article 5-8). Social institutions that settle disputes based on customary laws get recognition as customary courts by the district (formal) court of the region, which is given the power to do so by the legislation.⁹¹ The legislation structures customary courts as the first instance customary court, and the appellate customary courts. The third part of the legislation contain provision about actors (elders) of customary courts (criteria about their selection, number of elders of a customary court, procedure of selection, oath of elders, term of office, removal, resignation and replacement, functional independence, duty and power of customary court staffs, and accountability) (Proclamation No. 240/21, Article 9-22).

⁹¹ See, Oromia region customary court Proclamation No. 240/21, Article 37/2

Part four of the legislation explains the *Gaaddisa* (where customary courts conduct their official duty) and mechanisms of safeguarding human rights standards. It specifically deals with time and place of conducting *Gaddisa*, working language, proof of consent, applicable law, applicable procedure, hearing of witness, oath, ascertaining of cases by observation, procedure of giving judgement, type of judgment, appeal, executing judgement or order given by the customary court (Proclamation No. 240/21, Article 23-34). The last part of the legislation, part five, contain miscellaneous provisions such as source of income of customary court, utilization of income, obligations and role of district and supreme court of Oromia region, about the role of the *Kebele* administration and Culture and Tourism Bureau of the region, duty to give support, plenum of customary courts, penalties, power to issue regulation and directives, inapplicable laws and effective date (Proclamation no. 240/21, Article 35-45). In sum, the legislation on customary courts in Oromia regional state regulates the customary justice system in the region, and links it with the formal legal system of the state.

3.1. Mechanism to Address Barriers to Women's Access to Justice

As indicated in the introduction section, the barriers to women's access to justice include limited participation and representation of women in customary courts, discriminatory customary laws, weak procedural safeguards, and the enforcement of rights. Mechanisms set to address these barriers to women's access to justice in the Oromia regional state legislation for establishing and recognizing customary courts (Proclamation No. 240/21) are discussed below.

Participation and Representation of Women in Customary Courts

The legislation that establishing customary courts in Oromia regional state contains provisions that contribute to addressing the limited participation and representation of women in the customary justice system. These mechanisms are first, as stated in the gender reference provision of the legislation, "any expression in the masculine gender

includes the feminine” (Proc. No. 240.21, Article 3). Secondly, elders of customary courts are selected following a democratic process based on detailed eligibility criteria for capacity and ethical competency, which have the potential to participate women in the process (Proclamation no. 240/21, Article 9-11). Thirdly, the legislation declares that at least one of the elected elders of customary courts shall be women (Proclamation no. 240/21, Article 10/3); and encourages the inclusion of Hadhe Sinqe⁹² among the nominees of elders for customary courts (Ibid, Article 11/4). Fourth, the legislation clearly states ethical problems and capacity limitations as the main grounds for the removal of customary court elders at any time when the case is proven (Ibid, Article 13/2-4); and refraining from gender-based discrimination is one of the duties of customary court elders (Ibid, Article 17/2).

Applicable Customary Laws

The legislation on customary courts in Oromia defines customary laws and contains provisions that determine applicable customary laws in customary courts. Article 2/13 of the Proclamation no. 240/21 defines customary law as “a customary law of the Oromo People found in the specific locality where the customary court is situated that is not incompatible with the Constitution [Oromia Regional State Constitution], public morality and natural justice.” Similarly, Article 26/1 of the Proclamation states that “[t]he laws which the Customary Court ought to apply shall be the customary law of the place where it carries out its function.” This provision recognizes the diversity (plurality) of customary laws, which may vary from place to place, and all types of customary laws are recognized and allowed to function.

However, as per Article 26/2 “[.....] the customary law shall not be applicable where it has anyone of the following shortcomings: (a) Where it contravenes natural justice; or (b) Where it doesn’t respect equity of human justice; or (c) Where it negates moral and morality; or (d) Where it discriminates between people based on religion, sex,

⁹² Hadhe Sinqe is women only customary institution of the Oromia people. See, Kassahun, 2021.

appearance, age, disability, race, political attitude, wealth, or any other grounds; or (e) Where it violates any human rights.” Hence, customary laws that contravene natural justice, negate moral and morality, undermine equity of human Justice, discriminate between people, and violate human rights shall not be applicable. But as per Article 26/3 of Proclamation, customary laws and practices that favour the rights of women, children, people with disability, and other vulnerable segments of society are applicable in customary courts. The provision on applicable customary laws gives recognition for the plurality of customary laws in the region.

Procedural Safeguards for the Enforcement of the Right to Access to Justice

The procedural safeguards for enforcing the rights to access to justice include the right to choice the justice system and the right to appeal to higher courts. The rights to choose a justice system is provided under Article 4/1 and 8/2 of Proclamation no. 240/2021, which stipulate that the jurisdiction of customary courts is limited to individuals who have given their consent to be tried by such courts. The plaintiff's consent is guaranteed when he/she presents his/her case to the customary court.

At the same time, the defendant is asked their consent before presenting his/her defense (Proclamation No. 240/21, Article 25/1-2). After giving consent to the jurisdiction of the customary court, the disputing party aggrieved by the decision of the first instance customary courts may appeal to the Appellate customary court (Ibid, Article 33/1). And disputing party dissatisfied by the decision of the appellate customary court may appeal to formal courts if the case is related with undermining the rights to equality, overlooking the rights to be heard or essential evidence, or the application of customary laws that violate human rights. In this regard, Article 33/2 states the following.

A person who is aggrieved by the decision of the Customary Court of Appeal may take his appeal to district Court if his grievance is 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; (c) 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 [.....].

This provision makes clear that the process of access to justice and the justice outcome shall be in line with human rights standards. In addition to this, Article 33/11 of Proclamation No. 240/21 states that ; “[a]ny person aggrieved by the decision or order of the District Court given [.....] may file his complaint to a Court having jurisdiction.”

Aggrieved parties’ right to appeal to formal courts is not restricted to the first instance/district court, instead it may go to higher hierarchies of formal courts.

3.2. Is the Framing of the legislation on Customary Courts Gender Sensitive?

Gender sensitivity of legislation on customary courts can be analysed based on the extent of prohibition of direct and indirect discrimination against women, in terms of its language use, participation and representation of women in customary courts, applicable customary laws, and enforcement of procedural safeguards. From the language use perspective, throughout the legislation on customary courts of Oromia regional state, the masculine gender is used rather than referring to both genders: men and women. Though there is a provision in the legislation that declares “any expression in the masculine gender includes the feminine” (Proclamation No. 240/21: Article 3), these needs to be reflected in the legislation itself either by using noun and pronoun that indicates both gender or gender neutral language (if any) rather than using only masculine noun and pronoun throughout the text of the legislation.

Given the history of customary courts, which men exclusively constituted, the use of only the masculine gender in the text of the proclamation constitutes an indirect discrimination that inhibits the realization of women's rights to equality by denying attention to the promotion of women's rights. Inadequate attention to the use of gender sensitive language is an indicator of inadequate attention given to a gender-sensitive approach in the framing of the legislation on customary courts.

Given the number of women in the community, which is not less than fifty percent, the guarantee of women's representation in the customary court of elders is ensured by the phrase "at least one of the elders of customary court shall be women"⁹³ out of five elders of the customary court inhibits the promotion of gender equality. A gender-sensitive approach addresses direct historic discrimination against women and promotes gender equality using different strategies such as gender quota (Suteu, Draji and Klibi, 2020). The legislation on customary courts of the Oromia regional state also does not contain a provision that guarantees participation and representation of women in institutions that monitor and support the operation of the customary justice system.⁹⁴

In this regard, for example, having a provision that requires the inclusion of women in a committee established by the district court for the coordination and selection of elders of customary courts⁹⁵ or making women's and children's affairs offices part of the institutions that monitor and support customary courts enhances women's participation and representation. It contributes to addressing barriers to women's access to justice by allowing the perspectives of women to be heard. However, there is no provision in the proclamation that highlights the significance of inclusion of women in the committees or

⁹³ See, Proclamation No. 240/21, Article 10/3

⁹⁴ The institution who has been given power to recognizes, monitor and support customary justice system in the region are formal courts, *Kebele* Administration and Culture and Tourism Office. See Proclamation 240/21, Article 37-39

⁹⁵ See, proclamation no. 240/21, Article 11/1

institutions that monitor and support the proper operation of customary justice system. This is another indicator of inadequate emphasis given to a gender-sensitive approach in the framing of the legislation on customary courts.

The encouragement of the applicability of customary laws that favour women and other disadvantaged groups,⁹⁶ the guarantee of the rights to choice of justice system,⁹⁷ and the establishment of appellate customary courts as well as rights to appeal to formal courts hierarchically enhances women 's access to justice;⁹⁸ and manifestations of gender sensitive provisions in the legislation on customary courts that contribute for improving women's access to justice.

4. Opportunities and Challenges to Women's Access to Justice in the Districts of Gelan Sub-city of Sheger City

The data for this section is collected using observation, interview, and reports from the first instance customary courts of Gelan and Andode districts, the appellate customary court of the districts of Gelan sub-city, women clients of customary courts, the first instance district (formal) court, and the Culture and Tourism offices of Gelan sub-city of Sheger city. The interviewed individuals includes elders of customary courts, secretary of customary courts, first instance district court focal person for customary courts, and ex-President of the court, official of Culture and Tourism Office of the Gelan sub-city, and women clients of customary courts of Andode and Gelan districts. The total number of persons interviewed was sixteen, eight men and eight women. The collected data were translated and transcribed from Afaan Oromo into English, and reflectively analyzed as opportunities to access to justice and barriers to women's effective access to justice.

⁹⁶ See, Proclamation 240/21, Article 26/3

⁹⁷ Ibid, Article 25

⁹⁸ Ibid, Article 33/1-2

The formal establishment and recognition of customary courts by legislation in Oromia regional state strengthened the opportunities and hope for the community to find the truth and resolving disputes where there is no or limited evidence or in situations of manipulate of evidences.⁹⁹ To find the truth and resolve disputes procedurally, the existence of consent among disputing parties on the jurisdiction of the customary court is ensured. Elders of the customary court ask the defendant whether he/she accept or reject the suit brought against him/her by the plaintiff. If he/she accepts the suit, then they enter into resolving the dispute accordingly by negotiation, consensus, and reconciliation; if he/she rejects the suit, the defendant is taken to the process of oath (*Kaakuu*). The process of Oath (*Kaakuu*) is the main mechanism of finding the truth of the disputing parties.¹⁰⁰

The oath takes place based on materials/things that represent curses and blessings in human life as per the culture of the Oromo in the locality where customary courts are established. The materials/things used for the oath include stone, gourd/calabash, bone, ash, barley, and holy books. Ash and calabash represent a curse that would happen to the defendant and his/her family if he/she falsely testifies, while barley signaling loss of blessings in life.

Before making the oath, the defendant is duly informed about the curses, the oath believed to bring against him/her and his/her families/ clans; and he/she also told to inform and call all significant members of his/her families/clan such as his/her wife/husband, child/ren, brother, sister, clan leader etc. And the families of the defendant advise the defendant to tell the truth (if there is a truth they also know) and not to enter into Oath and bring curse to the families/clan. As per my informants, after being duly informed about the problem that they believed resulted from the oath, with limited exception, the defendant prefers to speak the truth rather than make the oath.

⁹⁹ Interview with elders of appellate customary court of districts of Gelen sub-city, 28 July 2025, Gelan

¹⁰⁰ Ibid

After speaking the truth, the elders of the customary court resolve the dispute through negotiation, consensus, and reconciliation, and often the defendant pays what he/she borrowed, returns what he/she took unfairly, or pays reparations or compensation if the case requires that.¹⁰¹ There are also clients of the customary court who come only to make the truths known, rebuild broken family relations between husband and wife, expectant mother and a father, a child and father, etc. Most of these kinds of cases are brought to the customary court by a woman, and they are effectively resolved by the customary courts without the need to enter into the oath or take a paternity test.¹⁰²

Our informants concur that the oaths entered before customary courts are believed to bring curses if done in lies, than the oath using holy books (Bible or Quran) in formal courts. And this is why customary courts are more respected by the community than formal courts. In this regard, one of my informants stated that “formal courts are feared but not respected, unlike customary courts.”¹⁰³

Moreover, our informants concur that the halves manipulate evidences in the formal courts, and there is high probability of giving justice based on fabricated evidence. As a result, there are clients of customary courts who bring their suit to customary courts after they get a final decision from the formal courts based on limited or manipulated evidence.¹⁰⁴ They bring the suit to the customary court to find the truth and get justice based on the truth. In this regard, we found three women whose cases were decided by formal courts, but came to customary courts to make their truth be known and get justice

¹⁰¹ Interview with Elders of appellate customary courts of districts of Gelan sub-city, 28 July 2028, Gelan

¹⁰² Interview with elders of first instant customary court of Gelan district, 07 August 2025, Gelan

¹⁰³ Interview with ex-president of districts of Gelan sub-city, 01 August 2025, Gelan

¹⁰⁴ Interview with secretary and clients of first instant customary court of Andode district, 29 July 2029, Andode.

accordingly.¹⁰⁵

However, in these kinds of suits, the defendant may not appear in the first summons of the customary courts,¹⁰⁶ or even if he appears, he will not consent to the jurisdiction of the customary courts. With regard to defendants who refuse to consent to the jurisdiction of the customary court, there is a situation in which he/she is advised to consent, which emanates from the zeal of finding the truth of the plaintiff as well as respecting the culture of the community.¹⁰⁷

Appreciating the method used to find the truth among disputing parties in customary courts, first instance district (formal) courts of Gelan sub-city started to request witnesses in the court to make oath using the customary material used in customary courts in addition to the holy books (Bible or Quran).¹⁰⁸ Among others, the customary materials used for making oath in the district court include roasted barley stone, coal, bone, and bullet/cartridge. The literary meanings for roasted barley is to let my family lose its life s, let me be like a stone, coal and bone, not a human being, and let me die by a bullet, not a natural death. However, the oath using customary objects in formal courts is performed based on the witness's consent, unlike the oath using the holy books (Bible or Quran).¹⁰⁹

In sum, the methods used for fact findings and resolving disputes in

¹⁰⁵ Interview with the women in Andode district customary court 29 July 2025, Andode.

¹⁰⁶ As per the legislation on customary courts if a defendant did not appear in the first summon of the customary court, he/she will be second time, and other appropriate measures will be taken if he fails to appear following the second summon according to the custom of the locality which include notifying the district (formal) court to execute the order of the customary court. See, Proclamation No. 240/21, Article 27/5-7, and Article 37/2h.

¹⁰⁷ Interview with elders of Appellate Customary court of districts of Gelan sub-city, 28 July, 2025, Gelan

¹⁰⁸ Interview with Customary Court Focal person and ex-President of Gelan districts courts of Gelan sub-city of Sheger city. Gelan, 1 August 2025.

¹⁰⁹ Interview with ex-president of districts of Gelan sub-city court, 01 August 2025, Gelan

customary courts contributed to enhancing opportunities for access to Justice at grassroots levels. However, stereotypes and prejudices against women and abuse of power, particularly on issues related to land and inheritance, are raised by our informants as a barrier for women's access to justice. The stereotype and prejudice against women are expressed either in terms of getting the defendant appear in customary courts or elongation and abuse of the process of justice. In this regard, a woman plaintiff in the Andode customary court states, "the customary court sent a summons to the defendant to appear to the court for the third time, so far I came twice and he did not appear, and I returned wasting my time."¹¹⁰

The author found the informant waiting for the appearance of the defendant for the third time. And if the defendant did not appear, the plaintiff requests that the customary court write a letter for the formal court.¹¹¹ Abuse of power in a context in which the defendant is a member of a customary court elder is also raised as one of the barriers to access to customary justice. In this regard, one of my female informants from the former *Dawarre Dhino Kebele* states that "my brother is the elder of the customary court, and he is the one who is hindering me from getting justice by protracting the process at the village level as well as electing his friends as elders at the village level."¹¹² In this regard, one of our informants states that, though elders of customary courts are directly elected by the people and believed to have good manners, there is a possibility of electing customary court elders who have behavioral problems. In this situation, when there is a complaint against a customary court elder, he/she will be dismissed/removed, and a new one will be elected

¹¹⁰ Interview with women client of first instant customary court of Andode District, 29 July 2025, Andode

¹¹¹ Interview with customer of first instant customary court who come from Echu Kebele of Andode district, 29 July 2025

¹¹² Interview with client of Andode district first instant customer court, 29 July 2025, Andode.

before the end of the term of office of the elder.¹¹³

The author also found limited attention given to women's rights to representation among the elders of customary courts. In this regard, one of our informants in the Gelan district first instance customary court states that "since the law (legislation on customary courts) says one of the elders of the customary court shall be a woman, only one *Hadhe sinqe* is elected in our district."¹¹⁴ In the Andode district first instance customary court, all (five) elders of the customary court were male. Lack of experience and will to serve as an elder of customary courts among women due to responsibilities at home are raised as reasons for the absence of women's representation among customary court elders.¹¹⁵ In the appellate customary court of the districts of Gelan sub-city, the elected women (*Hadhe sinqe*) often did not appear in the days of the *Gaaddisa* (the place where the customary court conducts its official duty), and due to this, she was replaced with a new one.¹¹⁶ Of the four customary courts in Gelan sub-city, the secretaries of three of the customary courts are women.¹¹⁷ However, the confusion seen about the number of women representatives, even among members of customary courts, and the limited representation of women in customary courts, are indicative of the significance of a gender-sensitive approach that promotes equality between men and women in framing legislation for the operation of the customary justice system.

¹¹³ Interview with Ex-President of districts of Gelan sub-city court and Focal person regarding customary courts in the districts of Gelan sub-city court, 01 August 2025, Gelan

¹¹⁴ Interview with Gelan district first instant customary court elder, 07 August 2025, Gelan

¹¹⁵ Interview with Andode district first instant customary court secretary, 29 July, 2025, Andode

¹¹⁶ Interview with elders of Appellate Customary court of Gelan sub-city Districts of Shegar city, 28 July, 2025, Gelan

¹¹⁷ Interview with districts of Gelan sub-city court Focal person for customary courts, 29 July 2025, Gelan

5. Conclusion

In legally pluralistic society that accommodates a customary justice system, having legislation for the recognition and establishment of customary courts contributes for the observance of human rights standards, the rule of law, and addressing specific challenges to women's access to justice. Given long-lived societal bias, prejudice, and stereotype against women, addressing challenges to women's access to justice requires, among other things, gender sensitive framing of legislation for the operation of the customary justice system that prohibits not only direct discrimination but also indirect (practical) discrimination, and shall promote gender equality.

The legislation on customary courts of Oromia regional state contains provisions that address direct discrimination against women and create an opportunity to access justice in situations where there is no or limited evidence, or in situations where evidences are manipulated. However, there are gaps in relation to the prohibition of indirect discrimination and in having provisions that promote equality between men and women in terms of participation and representation in the customary justice system.

The gaps seen in the legislation on customary courts are empirically reflected in the interpretation of minimum requirements set in the legislation for representation of women in customary courts as law rather than exception aimed at addressing historic injustice, and stereotypes and prejudices some women face in accessing to justice in the study area. Hence, the article argued that women's effective access to justice shall be strengthened by addressing barriers for the observance of human rights standards and rule of law in the legislation on customary courts as well as making the overall framing of legislation gender sensitive that addresses indirect discrimination against women, and promotes gender equality.

References

African Charter on Human and Peoples' Rights 27 June 1981, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ;Banjul.

Ahmad, Jawad & Wangenheim, Georg Von. 2021. "Access to justice: An evaluation of the informal justice systems." *Liberal Arts and Social Sciences International Journal (LASSIJ)*, 5(1): 228-244.

Assefa, Ayalew Getachew. 2012. *Customary Laws in Ethiopia: A Need for Better Recognition? A Women's Rights Perspective*. Danish Institute for Human Rights.

Assefa, Getachew. 2020. "Towards Widening the Constitutional Space for Customary Justice System." In Susanne Epple and Getachew Assefa eds. *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, Transcript Verlag, Bielefeld. 43-62.

Ayana, Tefere Bekele. 2023. "Administration of Justice in Customary Courts in Oromia. *Haramaya Law Review*, 12: 1-24.

Convention on the Elimination of All Forms of Discrimination against Women Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979 .

Convention for the Elimination of Discrimination against Women .1979. *General Recommendation no. 33 on Women's Access to Justice* (2015) <https://treaties.un.org/Pages/ParticipationStatus.aspx> .

Convention for the Elimination of Racial Discrimination .1965. <https://treaties.un.org/Pages/ParticipationStatus.aspx>

Convention on the Rights of the Child .1989. <https://treaties.un.org/Pages/ParticipationStatus.aspx>

Convention on the Rights of Persons with Disabilities.2006. A/RES/61/106 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> .

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment .1984. <https://treaties.un.org/Pages/ParticipationStatus.aspx>.

Fisseha, Assefa. 2014. "Improving Access to Justice through Harmonisation of Formal and Customary Dispute Resolution Mechanisms." In Pietro S. Toggia, Thomas F. Geraghty and Kokebe W. Temaneh ed. *Access to Justice in Ethiopia: Towards An Inventory of Issues*, Human Rights Centers, Addis Ababa University.

Harper, Erica. 2011. *Customary Justice: From Program Design to Impact Evaluation*. IDLO.

Harper, Erica, Ewa Wojkowska and Johanna Cunningham. 2011. "Conclusion: Enhancing Legal Empowerment through Engagement with Customary Justice System." In Erica Harper ed., *Working with Customary Justice Systems: Post-conflict and Fragile states*. IDLO, 71-84.

IDLO. 2020. Issue Brief: Navigating Complex Pathways to Justice: Women and Customary and Informal Justice Systems. www.idlo.int

International Covenant on Civil and Political Rights.1966. available on <https://treaties.un.org/Pages/ParticipationStatus.aspx> . Accessed on 12.12.2024.

International Covenant on Economic, Social and Cultural Rights .1966. Available on <https://treaties.un.org/Pages/ParticipationStatus.aspx>. Accessed on 12.12.2024.

Jemaneh, Kokebe Woldwe. 2014. "Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach." In Pietro S. Toggia, Thomas F. Geraghty and Kokebe W. Jemaneh ed. *Access to*

Justice in Ethiopia: Towards An Inventory of Issues, Human Rights Centers, Addis Ababa University.

Kassahun, Muluken. 2021. *Gadaa System and Women's Rights ; The Role of Oromoo Women's Customary Institutions in Ensuring the Protection of Rights of Women*. Center for the Advancement of Rights and Democracy (CARD), Addis Ababa .

Proclamation No. 240/2021. "Proclamation to Provide for the Establishment and Recognition of Oromia Region Customary Courts." *Megeleta Oromia*.

Proclamation No. 46/2001. "The Revised Constitution of the Oromia National Regional State." *Magaalota Oromia*.

Proclamation No 1/1995. "Proclamation of the Constitution of Federal Democratic Republic of Ethiopia" *Federal Negarit Gazeta*.

Suteu, Silvia, Ibrahim Draji and Sabil Klibi. 2020. *ABC for a Gender Sensitive Legislation*. EuroMed Feminist Initiative.

Swenson, Geoffrey. 2018. "Legal Pluralism in Theory and Practice." *International Studies Review*, 20, 438-462,

Ubink, Janine and Rooij, Benjamin van. 2011. "Towards Customary Legal Empowerment: An Introduction." In Janine Ubink and Thomas McInerney Ed. *Customary Justice: Perspective on Legal Empowerment*, IDLO: 7-28. www.idlo.int

Universal Declaration of Human Rights. 1948. Available on ; <https://treaties.un.org/Pages/ParticipationStatus.aspx>. Accessed on 12.12.2024.

Wojkowska, Ewa. 2006. *Doing Justice: How informal justice systems can contribute*. Oslo, United Nations.