THE CUSTOMARY COURTS OF OROMIA AS A "QUASI-CUSTOMARY" JUSTICE INSTITUTION IN ETHIOPIA: ENLIGHTENING THEORY, JURISPRUDENCE, AND PRACTICES*

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In Ethiopia, the Oromia regional state is a pioneer in establishing and recognizing customary courts to administer justice. Following the adoption of laws in 2021, within less than one year, over six thousand customary courts started as alternative dispute resolution forums. Against this backdrop, this paper examines the theory, jurisprudence and practices of customary courts of Oromia utilizing data obtained from the enabling laws, decided cases, the annual report of the Supreme Court, and interviews of elders, judges, Aba Gadas, and cultural experts through the theoretical lens developed by Swenson. As the findings of the study have revealed, within less than a year, at first instance and appellate levels, Oromia Customary Courts have processed 162,174 cases, of which they disposed of 123,408 cases. This figure is greater than the total number of cases (137,332) processed by Oromia state courts in the same year. In this sense, the customary courts of Oromia play a significant role in promoting culture, ensuring accessibility of justice, reducing the caseload of state courts, and maintaining peaceful co-existence within the society. Despite this, because of ambiguity in the way it is approached, the customary courts are facing unique structural problems which need further investigation and readjustment to maximize the role they play.

Keywords
customary courts, justice, legal pluralism, state courts

Introduction

Legal pluralism wherein two or more justice systems co-exist is one defining feature of post-colonial Africa (Aberra 2015; Pimentelt 2011). What makes Ethiopia unique is that the country imports foreign laws voluntarily (Wourji 2012). Despite its low penetration and limited effect on the life of the occupied people, coerced transplantation of indigenous laws – mainly those of Christian highlanders – was practised in Ethiopia. Legal pluralism presupposes the existence of multiple legal systems or norms of different origins within the confines of a state where the diverse legal systems are superimposed, interpenetrated and mixed (Aberra 2015). In a country where legal pluralism prevails, justice systems can be broadly classified as formal and informal justice systems, in which the former type is state-administered while the latter is not (Aberra 2015; Harper 2011; Quane 2013).

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The plurality in Ethiopia is attributed to the independence of the country which allowed its people to maintain its diverse tradition, post-1990s pro-diversity federal settings, and the voluntary transplantation of foreign laws (Epple & Assefa 2020; Ige 2015; Wourji 2012). In case two or more legal systems operate in the same arena, the relationship between informal and formal justice systems may take combative, complementary, competitive, or cooperative forms (Swenson 2018). Swenson posits five main strategies used by actors in attempts to influence the relationship between state and non-state justice systems: bridging, harmonization, incorporation, subsidization, and repression (Swenson 2018). From these strategies, based on its context, a country may adopt one or more approaches.

As a closer inquiry into Ethiopian legislative history reveals, the strategies adopted in approaching legal pluralism differ throughout time (Aberra 2015; Epple & Assefa 2020). With the belief that having a single identity ensures unity, the pre-1991 regimes commonly opted for mainly repressive strategies against the informal justice system. At the same time, the regimes took a limited accommodative stance towards the laws of Christian highlanders, as they had tried to incorporate some of their value into the formal system. The oppressive approach was mainly used against the justice system of ethnic groups forcefully subjugated. Especially, during the reign of Menelik II, the culture and values of Amhara were imposed on the subjugated ethnic groups to give up their identities. Hence, justice was mainly planned to be administered by and per the culture of Christian highlanders. Despite this, the attempt to destroy the culture and value of subjugated Ethiopia was not successful as planned. During the regime of Haile Selassie, the revolutionary stand of the emperor to modernize the legal system through the transplantation of foreign law was repressive to almost all customary laws and justice. For instance, the 1960 Civil Code made clear that all customary laws which are not incorporated under the Civil Code to regulate civil affairs are repealed (Wourji 2012). The examination of the civil code provisions also reveals the minimal place given to the customary laws and justices. The socialist Mengistu regime followed the footsteps of his predecessors and embarked on the project of unifying Ethiopia without accommodating diversity and legal pluralism.

The failure of Mengistu and his predecessors to accommodate pluralism led to the formation of various liberation fronts which finally resulted in the demise of the unitary system and the adoption of the federal system in the 1990s. Despite constitutional recognition, studies show that evolving developments such as urbanization and globalization and more particularly, rural-urban migration have seriously threatened the legitimacy and relevance of the informal system (Wourji 2012). The collapse of the unitary system was the starting point for the rebirth of legal pluralism. Following the adoption of the Federal Democratic Republic of Ethiopia (FDRE) Constitution, the strategy has shifted toward the accommodation of diverse customary justice systems. The right to self-determination guaranteed by the Constitution has also given space for each ethnic group to promote its native justice system. The constitution not only gives recognition for existing customary courts but also enshrines the possibility to establish or recognize new customary courts operating per customary laws. Mandated by the federal and state constitution, in 2021, the Oromia regional state became a pioneer in establishing and recognizing Customary Courts. Since then, customary courts have been administering justice in Oromia.

The customary court of Oromia is newly established and recognized to entertain any civil matter, petty offences, and crimes upon compliant with local customary laws. The customary courts officially started operation in 2022 and hence, neither the text nor the context of their rulings is currently well-researched. Against this backdrop, this article aims to explore the place of the customary courts of Oromia in the justice system by enlightening their notion, policy rationale, institutional setting, performance, relationship with other judicial actors, challenges, and implications on access to justice, caseload, and custom promotion. To this end, the article uses a combination of normative and empirical research methods. The study used a normative approach to theoretically analyse policy, laws, cases, and contemporary literature concerning the notion, policy rationale, institutional setting, relationship with other judicial actors, and implication on access to justice, caseload, and custom promotion.

The empirical approach is employed to examine the performance of customary courts, the challenges facing the institution, and the implication of customary courts on access to justice and caseload. Within the empirical method, the qualitative method is used to analyse data collected using semi-structured interviews with elders of customary courts, judges of state courts, drafters, Abba Gadas, and relevant officials and experts in the relevant government offices. The sample was taken using a purposive sampling technique which allowed the researcher to purposely select individuals with reach and relevant information. At the point of saturation, interviews were conducted with twenty-five elders of customary courts, seven judges of state courts, three members of the drafting committee, five Abba Gadas, and six cultural experts. In total, the interview was conducted with forty-six individuals. In addition, a qualitative approach is employed to analyse cases decided by customary courts. To quantitatively show the work done by customary courts to ensure access to justice and reduce the workload of state courts, statistical data was mainly obtained from the report of the Oromia Supreme Court. The descriptive approach is used to analyse and report the statistical data obtained from the annual report of the Supreme Court.

This article is divided into five sections. The first section briefly presents the history and current state of legal pluralism and the justice system in Ethiopia followed by the second section which offers a theoretical framework within which the issues can be addressed. The third section normatively dives into the notion, rationale, and institutional settings of the customary courts of Oromia. The fourth section examines the performance of customary courts and the challenges facing them. The final section provides a concluding remark based on the discussion and findings of the study.

1. Synopsis of Legal Pluralism and Justice System

Ethiopia is one of the oldest independent nations in Africa with a population of over 100 million people. It is home to over eighty distinct ethnic groups which profess Orthodox Christianity, Protestantism, Islam, Catholicism, Judaism and indigenous religious beliefs (Wourji 2012). Despite the disagreement over ancient history, the formation of contemporary Ethiopia dates to the late 19th century. The legal pluralism archetype that was set in motion by Menelik II and his successors, in which Northern values and religion were superimposed on the occupied peoples took another turn wherein

European values were introduced through major laws introduced between the mid-1950s and 1995 (Wourji 2012).

Throughout this period, the face of legal pluralism in Ethiopia was different (Abdo & Abegaz 2009; Epple & Assefa 2020; Wourji 2012). Informally, multiple normative legal orders existed even before the introduction of state laws. Though little is known about the pre-codification period, the religious and customary justice system and competition or conflict thereof to dominate or regulate was significant. The state law starts to emerge following the introduction of Fewese Menfesawi or „Canonical Penance" and Fetha Nagast (The Law of the Kings) with the aim to replace amorphous customary laws (Sedler 1967). These two laws not only predate modern Ethiopia but also, strictly speaking, both are not state laws as the former is prepared by church scholars while the latter is imported from Egypt. Also, in terms of their source and the subject matter they deal with, both laws are primarily religious and secondarily secular. The history indicates the abstract dominance of religious legislation and the inclination of rulers towards it. Despite this, neither Fewese Menfesawi nor Fetha Nagast was hardly known or used by those living in the periphery (Wourji 2012).

Legal pluralism starts to take a new path following the coronation of Emperor Haile Selassie I. He was the reformer of the Ethiopian legal system with the promulgation of two important legislations in the 1930s (the 1931 Constitution and 1930 Penal Code), the revision of the constitution in 1955, and the accomplishment of a legal codification mega-project (Vibhute 2012; Wourji 2012). Since then, despite its low success rate, at the textual level, there was a hegemony of state law till the 1990s which promised to revive customary and religious legal systems. As the closer investigation of constitutions and six basic codes[2] enacted during the regime reveals, the aim of the codification project was modernizing and unifying Ethiopian norms and institutions through the transplantation of Western laws and incorporating consistent customary laws which fit the country's development. Despite the legal centralism stance of the emperor, informal legal pluralism continued to persist (Abdo & Abegaz 2009). The short-lived Mengistu regime was also legal centralist in its stance, though informal normative legislation endured to co-exist with formal one, especially in rural areas and among conquered peoples.

The 1995 Constitution is the first basic law to formally recognize the need to recognize and tolerate the co-existence of diverse normative legislation at the same time in the same field. The pro-pluralist stance of the constitution can be inferred, inter alia from the federal state setting which allows the existence of diverse formal laws, recognition of dispute settlement under customary and religious systems, and place given for international laws (Abdo 2011). Ethiopia exhibits a typical legal pluralist feature wherein the formal (state) legal system functions alongside a multitude of non-formal (non-state) legal systems (Assefa 2020). To surmise, either with formal recognition or without, the customary, religious, and state norms and institutions co-existed in Ethiopia for a long time even when the government's stance was anti-pluralistic. In developing countries, non-state justice systems handle an estimated 80 to

[2] The codes drafted during the regime are: (i) the Penal Code of 1957, (ii) the Civil Code of 1960, (iii) the Maritime Code of 1960, (iv) the Commercial Code of 1960, (v) the Criminal Procedure Code of 1961, and the Civil Procedure Code of 1965. Despite their subsequent revisions they constitute the core laws of Ethiopia.

90 percent of disputes (Albrecht & Kyed 2010; Swenson 2018), this substantially holds true for Ethiopia.

Ethiopia has witnessed different judicial systems since the imperial regime (Aberra 1966). The role of customary, religious, and formal laws and institutions in the administration of justice differ throughout the period. Notwithstanding the stance of the regimes, for long periods of its history, the administration of justice in Ethiopia was dominated by informal or traditional rules and institutions which refer to local customs and institutions (elders) as well as religious norms and fathers. During the Menelik regime, the judiciary (not in the strict sense of the term) was mixed with the executive and acted per the Fetha Negast (Vibhute 2015). Fetha Negast is an ecclesiastical code compiled by the Coptic Egyptian Christians in the 13th century from apostolic writings and Byzantine codes of laws and later on translated into Ge'ez in the 15th century and expanded upon with numerous local laws (Sedler 1967). Emperor Haile Selassie was the first who inject the idea of independence of the judiciary into the 1931 constitution and later formalized the structure of courts through subsequent proclamations (Vibhute 2015). At the same time, the King's Court, Majesty's Zufan chilot in which the emperor presided remained at the apex of the Ethiopian judicial system until 1974 dispense justice. The military junta made the judicial system more centralized, crippled, and amenable to the executive (Vibhute 2015). During the previous regimes, despite controversy over their legal status, religious and customary systems played a significant role in the administration of justice.

The 1995 Constitution (Art 78-84) established the three-tier independent federal and state regular courts of which the Supreme Court is vested with supreme judicial authority. The 1995 Constitution has also recognized and permitted religious courts and customary courts to play their role in ensuring access to justice (Abdo 2011; Assefa 2020; Vibhute 2012, 2015). Opposite to regular courts which are empowered to handle all civil and criminal matters which fall within their legitimate jurisdiction, the jurisdiction of a religious and customary court is highly limited. They are empowered to deal with only personal and family matters. Despite the constitutional limit on the scope of religious and customary legislations, the non-state justice system is still dominant even in the area reserved for the formal justice system. The 1995 constitution provides two approaches to recognition for religious and customary courts. The first approach is the direct recognition of religious and customary courts which had state recognition even before the constitution. In this sense, the pre-existing customary and religious courts like Sharia courts are expressly and directly recognized by the constitution itself to operate alongside the formal justice system (Abdo 2011). Subsequently, the federal and regional governments enacted Sharia court proclamations.3 In addition to direct recognition for pre-existing ones, the constitution has empowered the federal and state

[3] See also Federal Courts of Sharia Consolidation Proclamation No.188/1999, and The Revised Gambella National Regional State Constitution (2003), Art.67; 2; The Revised Afar Regional State Constitution (2002); The Revised Amhara National Regional Constitution (2001);The Revised Benishangul Gumuz Regional State Constitution (2003), Art.66;The Revised Harari National Regional State Constitution (2002), Art.68;The Revised Oromia Regional State Constitution (2002), Art.62; The Revised Tigray Regional State Constitution; The Somali National Regional State Constitution (2002), Art.66; The Revised Constitution of the Southern Nation, Nationalities, and People Regional State (2001), Art.73.

legislatures to establish or give official recognition for religious and customary courts. The best example is the Oromia Customary Court.

The Constitution has also given recognition to alternative dispute resolution forums, and other institutions with judicial power like administrative tribunals to play their role in the administration of justice (Vibhute 2015). Just like customary and religious courts, the power of this institution is highly limited. For example, alternative dispute settlement forums such as conciliation, mediation, negotiation, and arbitration may not handle criminal matters because of public interest. Moreover, their jurisdiction is subject to the consent of parties to the disputes. In Ethiopia, in recent decades, different administrative tribunals like the Tax Appeal Tribunal, Civil Servant Tribunal, Labour Relation Board, and others were established to entertain disputes like labour, tax, unfair and anti-competition issues. In addition to this, despite controversies about their constitutional foundation, city courts and social courts are other actors in the administration of justice in Ethiopia. City courts adjudicate city matters while social courts handle minor matters with petty pecuniary value in both urban and rural areas. Addis Ababa was the pioneer in establishing City Courts to handle "municipal matters" followed by the Oromia, Amhara, Benishangul Gumuz, and Tigray regions. Though they lack basis under the federal constitution, social Courts are established by all regional constitutions as the judicial wing of the lowest administrative division (Kebele or sub-district).

2. Theoretical Lense

As formulated by Swenson, the typology of the relationship between state and non-state justice systems can be classified as combative, competitive, cooperative, and complementary, in which actors use five main strategies, namely: bridging, harmonization, incorporation, subsidization, and repression to deal with the relationship between the two justice systems (Swenson 2018). In Ethiopia in general, and Oromia in particular, diverse justice systems (including customary, religious and state justice systems) have existed and operated alongside each other for many centuries. Despite the attempt of the monarchs of unitary Ethiopia to impose their local customs and imported foreign laws, an indigenous customary justice system influenced by the Gada system remains predominant till the present time (Abdella & Amenew 2008; Berisso 2018; Legesse 2011).

Even religious justice based on imported religion is not as strong as customary justice. In Oromia, a multitude of justice systems have been co-existing, sometimes conflicting, cooperating, complementing, or competing. This aligns with the claim that legal pluralism exists everywhere including at the lowest local level like Oromia (Swenson 2018; Tamanaha 2007). Following the footsteps of the 1995 Constitution, the Oromia state constitution has recognized the right to entertain personal and family matters in line with customary laws and institutions. However, the customary laws and institutions should be consistent with federal and regional constitutions as well as fundamental human rights instruments. The Oromia customary court was established in 2021 based on this constitutional foundation. Following the establishment of the customary court, except for brief and ancillary inquiry by Teferi (Teferi 2023), the nature of interaction that exists between the customary justice system and the state

justice system, and the approach followed by state actors in dealing with the interaction of the two justice systems has not been extensively examined so far. In this section, models of legal pluralism and approaches addressing the interaction between state and non-state justice systems as developed by Swenson are utilized in this section to assess the case of Oromia (Swenson 2018).

2.1. Legal Pluralism Model

The archetype of the relationship that exists between customary and state justice may be combative, competitive, cooperative or complementary (Swenson 2018). This model of the relationship between the two justice systems is not static, rather, it may change over time because of various factors. In the combative archetype, state and non-state justice are overtly hostile to one another, hence they seek explicitly to undermine, reject, discredit, supplant, and destroy the other (Swenson 2018). In Oromia, despite the existence of an active insurgency group which either directly or indirectly attempts to use the nonstate justice system, the explicit hostile relationship between the customary court and state judicial system is hardly evident. Hence, the combative model is not descriptive of the relationship between customary courts and state courts. In the second model named competitive, the state's overarching authority is not challenged or subjected to nonstate actors' effort to entirely supplant, but significant, often deep tensions prevail between the two because of the substantial autonomy of nonstate actors which allows them possibly to maintain diverging normative orders (Swenson 2018).

In Oromia, the same matters may fall under the jurisdiction of both state and customary courts, this makes competition inevitable. However, for different policy reasons, the state encourages the settlement of disputes under the roof of customary courts which leads to the absence of a significant and deep tension featuring a competitive model in the case of Oromia. In addition, despite statutory declarations of independence, it is hardly possible for customary courts which are established or recognized by the state and also joined with the state system in different ways to retain substantial autonomy as required in a competitive model. However, it is not uncommon for traditional or indigenous customary judicial actors (different from customary courts officially established by the state) to entertain substantial matters like serious crimes, legally reserved for the state courts. Usually, this arises from eagerness to settle disputes and lack of awareness about their jurisdictional limits, and likely not from the desire to compete with or supplant the state judicial system.

In the third model described as cooperative, the nonstate justice system retains significant autonomy, however, largely accepts the state's legitimacy and works toward shared goals, which makes major clashes less frequent (Swenson 2018). In the case of Oromia, the customary courts' acceptance of the state's normative legitimacy and willingness to work toward shared goals is less questionable, but their ability to retain significant autonomy and authority to maintain orders without being dictated by the state is questionable. The entitlement of the customary court to decide per customary law which is not dictated by the state reflects its relative autonomy, but as a closer investigation of enabling laws and subsequent legislations shows, the state not only prescribes the detailed procedure followed by the customary court but also structures it under the state justice system. This detailed procedural dedication and structural set-up

not only affects the original essence of customary justice but also calls into question its existing and future cooperative relationship with the state justice system.

In the fourth, complementary model of legal pluralism posited by Swenson, the nonstate is subordinated and structured by the state as the state enjoys both the legitimacy and capacity to enforce its mandates. In this model, nonstate justice actors operate under the umbrella of state authority and without substantial autonomy to reject state decisions. This model mainly features in the legal pluralism of countries with advanced state justice systems. At this point, it is good to make clear the existence of two kinds of customary justice systems in Oromia. Before the establishment of the customary courts, there was only an informal indigenous customary justice system which functioned per the customs of the society. But, after that, there are customary courts (which are quasi-customary) and an informal customary dispute settlement system locally named Jaarssumma. The relationship of these two customary justice systems with the state justice system is different in certain aspects. The one established or recognized by the state which I call a quasi-customary court has more of a complementary relationship while the indigenous one has more of a competitive relationship. The competitive feature of the relationship may be possibly inferred from the people's strong sentiment and preference for Jaarssumma, and the entertainment of matters even beyond the authority of Jaarssumma. However, the tension between the two is not as significant and deep enough as required to fall under the model of competitive legal pluralism.

On the other side, the relationship between quasi-customary courts and state justice seems to fall under the complementary model. This is because, in terms of establishment, finance, appointment and removal of elders, accountability framework, human resource management, review of decisions, applicable procedural laws and reporting, the customary court is structured without substantial autonomy by the state under its umbrella as a complementary justice actor. The active role of the state in the process of enforcement and execution of judgements of customary courts, and the plan of the regional government to codify the customary law of Oromia are also an indication that the customary court is a recognized or established judicial wing which complements the formal justice system.

2.2. Approaches for Addressing Customary Justice

Countries may use bridging, harmonization, incorporation, subsidization or repression approaches in dealing with the interaction between state and nonstate justice (Swenson 2018). These approaches are neither mutually exclusive nor hermetically sealed, but conceptually distinct. With the exception of repression, which works in a combative relationship, all strategies may work in cooperative and competitive environments. With a bridging strategy, the state attempts to ensure that cases are allocated between the two based on state law, parties' choice, and venue suitability. In this sense, the nonstate justice system is used as a bridge to address demands left unmet by the state justice. Sideline with this, awareness creation, training, and legal aid are undertaken to promote understanding of and access to the state justice system. In this sense, in those countries which opt for a bridging strategy, the non-state justice system is considered a gap-filling

system to handle demands unmet by the state justice system. So, whenever and wherever

Among those who opt for a harmonization approach, attempts are made to ensure that the nonstate justice actors act in a manner consistent with the state law (Forsyth 2007; Swenson 2018). At the same time, nonstate justice is incorporated and legitimatized to some extent, and it retains autonomy which makes divergence possible. Under the incorporation approach, the distinction between the two justice systems is eliminated as nonstate justice becomes state justice, and their decisions are endorsed and regulated by the state (Swenson 2018). Incorporation involves the establishment of religious or customary courts with state support and regulation and offering an avenue for appeal from nonstate venues to state courts. At its extreme, the entire nonstate justice system could be brought under the umbrella of the state justice system. Incorporation is a bold move of a state to control or assert authority over nonstate actors by limiting their independence (Swenson 2018). The state considers itself as the principal actor, and nonstate justice actors as its agents. After incorporating, states may further seek to regulate "customary" nonstate law by codifying it. In a subsidization approach, the focus is on improving the performance and legitimacy of the state justice system through various strategies including legal reforms, building necessary infrastructure, promoting public engagement and confidence, and capacity building through short and long-term training (Swenson 2018). Nonstate justice is not regarded as a primary target of government actions. This approach is a common strategy in post-conflict justice reforms. In a repression strategy, the state seeks to undermine, eliminate and, at its extreme, outlaw nonstate justice (Swenson 2018).

Against this backdrop, further inquiry is needed to discover which strategy is used in dealing with the interactions between customary courts and state courts of Oromia. Answering this question poses a formidable challenge. Reading single provisions or even the whole proclamation and regulation may not give a spot-on answer unless the whole context is examined. Generally, repression has not been a strategy for handling legal pluralism in Ethiopia after the adoption of the 1995 constitution which is a pro-pluralistic legal environment relative to its predecessor. So, the question is whether the strategy opted for is bridging, harmonization, incorporation or subsidization. Despite the constitutional clause which opened the room for recognizing and establishing nonstate justice systems, the government didn't take bold measures except for Sharia courts which is a continuation of the previous regime (Abdo 2020). A distinct law setting up Sharia courts, based on constitutional provisions, was enacted in 1999 at the federal level and successively in all regions except Gambella (Abdo 2020).

In addition, Ethiopia enacted a law on arbitration and conciliation working procedures in 2020 with the aim of widening access to justice. Since the adoption of the constitution, for the last three decades, the focus both at the federal and regional levels was on reforming and supporting the state justice system which makes the customary justice system out of target. In this sense, during the three decades of the post-1995 era, the stance of Ethiopia inclined towards the subsidization approach which is considered the default rule in a post-conflict setting (Swenson 2018). This default strategy seems to have changed following the enactment of the law creating a framework for the establishment and recognition of customary courts in the Oromia region in 2021.

The official establishment of customary courts of Oromia posed the issue of whether the approach followed was bridging, harmonization, or incorporation. Expressed differently, the issue is whether the policy rationale behind the establishment or recognition of customary courts is bridging gaps left unmet by state justice, harmonizing the decisions of customary justice with the core of state law, or incorporating customary justice under the state justice system. Textually, the objectives of customary courts are enabling the resolution of disputes based on customary laws, enabling access to accessible justice (in terms of time, cost, and procedure), contributing to the observance of human rights and the rule of law, and creating a legal and justice system that contributes to the customs, values and language of the Oromo people (see OCC Pro. 2021). Here, the aim is not limited to the use of customary courts as a bridge to promote state justice or harmonizing customary justice with the core values of state laws (like constitutional supremacy and human rights), rather, it goes beyond to the extent of integrating the customary justice with the state justice system.

Besides the objectives, customary courts are structurally and functionally connected to the state system, and this may put their distinctiveness and autonomy under question. In this sense, despite the strong sentiment of promoting the values and customs of the Oromo people, the strategy followed in the process of dealing with the interaction between courts seems to follow more of an incorporation strategy. In the writer's view, the customary court recognized or established by the state of Oromia is not a customary court per se w. Rather, it is a replication of customary court by the government. This is because, instead of recognizing the existing customary court of the people as it is, the establishment law allows the traditional system to continue operating while at the same it devised the state archetype customary court i.e., quasi-customary court. Though its customary nature is dominant, the customary court of Oromia has also features of a state court which makes a kind of hybrid. Within this theoretical lens, the normative jurisprudence of Oromia customary courts is assessed in the next section.

2.3. Relationship with State Courts

The nature of the relationship that the customary courts of Oromia have with state courts has an impact on the overall effectiveness of justice it tries to entail (Forsyth 2007; Swenson 2018). Clarity in relationships is necessary to balance independence and accountability. Setting the frame for the co-existence of various normative legal orders is one challenging aspect of managing legal pluralism (Griffiths 1986; Swenson 2018; Tamanaha 2007; Twining 2009). Though both are independent justice institutions established by the law, they have a relationship which can be explained in terms of review of decisions, enforcement of judgment, and supportive role (Teferi 2023).

In principle, there is no hierarchical (vertical) relationship between the two as they apply different laws. Rather, both exist and operate side-by-side in the same space, concerning cases relating to family matters, civil matters, petty offences and crimes upon complaint. In such cases, it is up to the parties to opt for the forum, and once the forum is chosen, the chosen forum assumes exclusive jurisdiction over the case. Concerning crime upon accusation, when the state court seizing the matter believes that the case should be resolved by the Customary Court, or there is a law requiring so, it may refer the case to the Customary Court for its resolution based on the consent of the

parties. Beyond that, there is no matter which exclusively falls under the authority of customary courts. Because of the absence of a vertical relationship, in the normal course of things, no appeal lies to state courts from the decisions of customary courts (Wourji 2012). However, the decisions of customary courts may be reviewed by state courts on limited grounds. As stated under Art 33(1) of the customary court proclamation, decisions of Oromia customary courts are not filed as a fresh suit to formal state courts. The decisions of Appellate Customary Courts are final and appealable to state District Courts on the grounds of applying customary law which undermines the right to human rights and freedom of parties including the right to equality or overlooking the rights to be heard or important evidence. The grounds for appeal to the state court are limited matters relating to human rights with the debatable belief that the state court is the ultimate guardian of human rights.

Upon appeal, the District Court may decide after considering it in accordance with human rights principles incorporated in the Constitution and international human rights instruments accepted by the Country. As it did in its normal function, the district court does not interpret and apply specific state law in dealing with cases appealed to it from the customary court. Rather, the appellate role is limited to checking the compliance of the decision with the core of the constitution and human rights instruments. Following this, any person aggrieved by the decision or order of the district court may file his complaint to a court having jurisdiction. What the court before whom the decision of the district court is appealed does has great implications on the nature of the relationship between the customary and state justice systems. If the appellate court entertains the case as a fresh case (as if it has not been seen by customary courts), this negates the overall relevancy and independence of the customary court. However, if the appellate court is limited to only reviewing the legitimacy of the district court decision to review appellate customary court decisions, that may be logically sound.

To eliminate old-fashioned criticism against the Gada system for discriminating against women, customary courts of Oromia are exceptionally entitled to positively discriminate against women, children, people with disability and other vulnerable segments of society (OCC Pro. 2021). In addition to this, of the five elders of customary courts, a female must be a member of the elders. Practically, the scope-limited grounds of appeal may be ambiguous. Its practical application is not well known so far.

The customary courts and the state courts also have a supportive relationship. The state court supports the operation of customary courts in different scenarios. State courts support customary courts ranging from establishing or recognizing up to evaluating and reporting the performance of customary courts. The support takes different forms like technical, financial, and administrative. Such a cooperative relationship between customary courts and formal state courts is positive as far as it does not intrude on the independence of customary courts. In the long term, there is a plan to make customary courts fully operate autonomously and have ultimate accountability to Gumii Abbootii Gadaa (Council of Gada Fathers) as that is the apex structure in the Gada System (Teferi 2023). But, since ‘Gumii Abbootii Gadaa’ by itself is not as strong as it was in the 16th century, making customary courts responsible for it may not be advisable, at least at present (Teferi 2023). That is why formal state courts are preferred to support them though the supportive role is a short-term plan.

2.4. Locating Oromia's Customary Court

The place of customary courts in the justice system is not clearly defined and known. The existence of different organisations which function within the same space creates confusion about the exact place of customary courts in the justice system. At the regional level, next to the first instance courts, social courts are established as a judicial organ at the Kebele level with the power to entertain petty civil and criminal matters. Even if the social court is part of the state judicial structure, those who work as judges are elders of the community who are not trained in laws. So, even if the establishment law requires the social court to function per the state law, practically, the judges of the social court mainly work per the customary laws. This triggers the issue of whether the customary court is a replica of social courts or something different. It seems to be a duplication of resources as both are established at the Kebele level and function per the customary laws. The only difference is that the customary courts have broader jurisdiction relative to social courts whose jurisdiction is limited to petty affairs.

There is also confusion about the place of the customary court relative to the traditional dispute resolution mechanism of the Oromo people called Jaarssumma. The expectation was that the establishment of a customary court would institutionalize and replace the customary dispute resolution system practised within the Oromo society. However, following the formal establishment or recognition of customary courts, traditional dispute resolution institutions are not prohibited from resolving disputes. Rather, the indigenous customary dispute resolution forum continues to exist and operate alongside the customary courts and state courts. This widens the room for forum shopping. It also poses confusion as to whether the customary court is a duplication of the traditional dispute settlement at the state level or something different. Instead of recognizing the customary dispute settlement with its organic flavour, the law tried to design a state-model customary justice system or quasi-customary court which is problematic in the writer's view.

The other confusion regarding the place of customary courts arises from the nature of the function undertaken by the court. Closer investigations of the law reveal that persons settling disputes under the roof of the customary court are known as elders. They are not judges. In addition, the elders must try and help the parties to settle their disputes through compromise agreements. This shows the conciliatory role of the courts. However, finally, if the attempt to settle the dispute through compromise fails, the courts will pass a final binding decision. This shows that the customary court is not a pure adjudicative body like the state court, rather, it is a kind of institutionalized traditional arbitration in which elders resolve disputes in the society.

2.5. Customary Court of "Oromo" or "Oromia"?

Oromia is the biggest region which is the home of all ethnic groups in Ethiopia. This makes the existence of diverse customary laws and justice systems inevitable, though the values and cultures of the Oromo people – who are declared by the state constitution as the owners of the region – are dominant. In this sense, the Oromo are one, but not the only ethnic group residing in the region. Because of this, it seems that naming the court under consideration as the customary court of the Oromo or Oromia may have big

implications and differences. On closer examination, the law adopted by the Caffee Oromia aims to establish the "Oromia" Customary Court which works per the customary laws of the Oromo people. In this sense, the customary court belongs to the Oromo people and functions according to their culture and values. However, this cannot exclude other ethnic groups which live in the region from settling their case in the customary court of Oromia. In addition, they can continue to exercise their customary system of dispute resolution even if it is not recognized as a customary court.

To conclude, even if the name "Oromia Customary Courts" seems broader to cover the customary systems of all ethnic groups residing in the region, according to the cumulative reading of the Oromia constitution and the proclamation of establishment, there is no real difference between the names "Oromo" and "Oromia" Customary Court. The question of whether other ethnic groups in the region also have the right to get the same recognition and support for their customary justice systems is a sensitive political question which is beyond the scope of this paper.

3. Normative of Oromia's Customary Court

3.1. Structure of Courts

Customary courts of Oromia are organized at first instance and appellate levels (OCC Pro. 2021). The former ones are constituted at the Kebele (locality) level to serve two or more kebeles whereas the latter ones are constituted at all district and town levels as may be necessary (OCC Pro. 2021). The courts may be constituted by establishing new or recognizing existing customary institutions. Existing customary institutions regularly resolving disputes based on Oromo customary laws can be recognized as first-instance customary courts where their service is effective, does not discriminate based on unjustified grounds, and the institution is willing to be recognized. To be recognized as an appellate customary court, in addition to these criteria, experience of appellate jurisdiction is required. The detailed procedures for recognition are set by the law. Within less than a year, 6, 326 First Instance and 291 Appellate Customary Courts are operating across Oromia (Teferi 2023). In areas where security problems exist, a single court may serve more than one Kebele (Oromia Supreme Court 2022; Teferi 2023). Each Court has five elders of which at least one must be female. The elders are elected by residents of the people where the court is located. The law has set age (40-72), familiarity with and respect for local custom, social acceptance, experience in rendering traditional justice, fluency of Afan Oromo, willingness to serve, financial independence, non-employee of anybody, non-partisan, mental and physical capability to discharge obligation, and non-conviction of serious crimes as competency criteria to be elected as the judge of a customary court. Hence, unlike the judges of state courts, elders of customary courts are not appointees, but popularly elected.

3.2. Jurisdiction

The jurisdiction of the Oromia customary court is limited to the territory of Oromia. Oromia customary courts lack compulsory jurisdiction, and hence, they assume jurisdiction based on the consent of disputing parties. The consent of the plaintiff can be

presumed from filing a case while consent of a defendant must be explicitly given before the court. Once given, consent is irrevocable. The customary courts have material jurisdiction over civil and criminal matters. The court has jurisdiction over any family and civil matter without pecuniary limitation. In this sense, the court may assume jurisdiction over any civil matters including contract, succession, labour, tort, property, and family. Even if it may be argumentative, as far as there is no constitutional limitation, the writer believes that customary courts have jurisdiction over divorce as it is a civil and family matter.

However, to reduce controversies and confusion, it would be good if the law was made clear in this respect. Unlike civil jurisdiction, regarding criminal matters, its jurisdiction is limited to petty offences and crimes punishable upon complaints. In this sense, the power to entertain serious crime or crime punishable upon accusation is reserved for the state court. Without prejudice to this limitation, concerning crimes upon accusation, the courts have powers to reconcile parties to the dispute, determine, and effect Gumaa, determine compensation, and ensure the payment of costs. The law is not clear whether such reconciliation of parties or determination of Gumaa before the customary court has the effect of terminating a case pending before the state court. Finally, the customary courts also have jurisdiction over "other matters" as may be authorized under existing or future laws.

The constitutionality of allowing customary courts to entertain criminal matters is highly controversial (Teferi 2023). This arises mainly from the ambiguity of the constitution with respect to the criminal jurisdiction of the nonstate justice system. The constitution is clear only with respect to the jurisdiction of customary courts on personal and family matters. Because of this, there are two divergent views among scholars on this issue. The first view is the claim that the aim of constitutional clauses (Art. 34 and 78)4 is not to determine the jurisdiction of customary courts, but rather to give alternative dispute resolution mechanisms (Indaalammaa et al. 2021). Hence, it is up to the legislature to fix the jurisdiction of customary courts (Indaalammaa et al. 2021). In this sense, as far as the legislature allows, the criminal jurisdiction of customary courts is legitimate. The second view is that criminal matters are under the exclusive jurisdiction of state courts and hence customary courts have no criminal jurisdiction (Aberra 2015; Teferi 2023). In the writer's view, the second view is more convincing.

Art 34(5) of the 1995 Constitution states that *„this Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute..."* Per this clause, what is not precluded or prohibited is adjudicating disputes related to personal and family laws per customary or religious laws based on the consent of the parties. Though it may be debatable, based on contrary reasoning, all matters other than personal and family matters are excluded from the jurisdiction of the nonstate justice

[4] Art 34(5) of the 1995 Constitution state that *„this Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law."* Art 78(5) on the same time state that *„Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution."*

system. The law enacted by the legislature shall also be within this constitutional framework, otherwise it will be void. In addition, criminal matters, especially serious crimes, involve public interest issues which are beyond the interest and consent of victim and offender. Moreover, extending customary court jurisdiction to criminal matters may raise the same question from the religious courts and thereby make uniform criminal justice, which is the basis for the unity and peaceful co-existence of a diverse community, difficult.

Despite the clear unconstitutionality of the criminal jurisdiction of customary courts, in recent years, there is an international trend of extending the jurisdiction of customary courts to include criminal matters (Wourji 2012). The Ethiopian Criminal Policy also provides for the possibility of resolving criminal cases by informal justice systems. In addition to this, in actual practice, informal justice systems are handling cases coming to them without making a differentiation between civil and criminal matters. Finally, there is dissatisfaction among elders and people about the absence of an alternative criminal justice system (Aberra 2015; Nagawo 2015). In these senses, it would be legitimate to amend the constitution to align with the prevailing social context and international experiences.

Fulfilment of the requirements of consent and subject matter alone is not enough for the court to assume jurisdiction, rather, in addition to consent, the birth or residence of at least one of the disputant parties, or situs of the immovable property subject to the dispute, or initiation or finalization of the case leading to the dispute must be within the locality where the customary court is situated (OCC Pro. 2021). Here the law does not require the parties to the disputes to be from the Oromo ethnic group. Hence, even settlers are entitled to settle their disputes under the roof of customary courts of Oromia per the customary law of the Oromo people.

3.3. Applicable Laws

Oromia customary courts apply the customary law of the Oromo people of the place where they carry out their functions. In this sense, the substantive and procedural customary laws applied may differ based on the culture and values of the society in which the court is located. However, the court applies only customary law that is non-discriminatory based on unjustified grounds, and not incompatible with the constitution, morality, equity, human rights, and natural justice. It seems that the whole process ranging from instituting suits to the execution of judgements is guided by customary laws. This implies that the elders as well as the parties are not bound by the strict state laws. However, some issues are murky and need to be clarified.

The first very important question is that if the applicable substantive and procedural laws are part of customary law, what is the deal with all the detailed provisions in the proclamations, regulations and directives of state law on Oromia customary courts? Why are these detailed provisions of state law establishing and regulating customary courts needed? Why don't they leave the space for the customary law to function and flourish? Is it not enough to declare the establishment or recognition of a court and regulate a few basic structural issues? Is the government designing its own model of customary courts which is different from the indigenous or traditional customary dispute resolution mechanism? These are philosophical questions which require deep

inquiry. However, it seems that such detailed state laws establishing and regulating various affairs of customary courts have a negative impact on customary courts, causing them to lose their organic flavour and making them a kind of subsidiary to the branches of government or a quasi-customary court. Beyond this, it negates the role of the customary court in promoting the culture and value of the Oromo people by reducing the freedom and innovativeness of the customary court in solving disputes.

The second very important question is what the content of the "customary laws of Oromo" is that is expected to be applied by the customary court in the processing of entertaining disputes. Is it something posited or known in advance? Do the parties to disputes in advance know laws that apply to their case? In case the customary laws are incompatible with the constitution, human rights and public morality, which law will be applicable? Here the substance of customary laws to be applied in civil and criminal matters handled by the customary court is not clearly known. It is amorphous and may be inferred from the life or practices of the society. If there are no established customs or practices with respect to the issues at hand, it will be up to the elders to do justice based on the principles of equity or through borrowing appropriate laws from the state laws. The dynamic nature of society accompanied by the enigmatic content of applicable law may render the decision of court and justice unexpectable (Teferi 2023). Though it is challenging to codify the customary law of the Oromo people by forming diverse expert groups (which contain at least lawyers, anthropologists, sociologists, elders, abba gadda, hadha siqee and others as necessary), there is a demand for it. At the same time, the codification process of customary laws shall be protected from the hegemony of the state which not only subordinates and eliminates customary justice but also affects its future development.

The other issue that is worth discussing in relation to the applicable law is the issue of principle rule of law and legal certainty and its place in the operation of customary courts of Oromia. For instance, in European legal systems and beyond, the principle of equality before the law and the principle of the rule of law and legal certainty requires that the law be homogenous and consistent, and the same law must be applied in the same cases. Usually, customary law is not stated in precise and clear language, rather it can be inferred from the daily life of the society which may differ across time, locality, and belief. Because of the divergence of the customary laws, the homogeneity and consistency of the law applied may be limited. However, at the same time, the principles of equity, morality and natural justice which guide the elders of customary court decision-making may at least help them work toward a good end.

3.4. Independence

Customary courts exercise their function based on Oromo customary law guided only by a sense of justice, independently of pressure coming from politics, religion, personal outlook and any state organ. Elders of the courts also discharge their obligations independently and are guided solely by their own conscience, customary law and the values of the society. They are immune and not subject to liability for the decision or order they make regarding matters falling within their jurisdictions. Moreover, they have tenure security and cannot be removed from their duty before the term lapse except for competence and ethical problems. Furthermore, they are not expected to be members

of any political party. This implies that the law guarantees them personal, institutional and functional independence. Despite this, customary courts lack a budget allocated by the government and this may limit the degree of independence. They rely on income from contributions and fines. Interviews conducted in this regard reveal the existence of a situation in which executive support impacts the independence of the court. Supporting customary courts is not a problem per se.

The excessive intervention of the executive and state courts in the affairs of the court under the disguise of support is the problem (Teferi 2023). Moreover, in some cases, contrary to what the law provides, Kebele Administrations intervene in the works of customary courts by assigning elders directly through written letters; some elders are also affiliated with political parties. Aba Gadas believe that Abbaa Seeraa (father of the law), that is, persons trained in law, who know and respect the Oromo code of ethics in the context of the Gada system must be appointed as elders. Usually, especially in towns, a person who is eloquent and is in good relationship with local administrators has the chance to be elected as an elder. This may run the risk of not knowing the organic law without which it is difficult to maintain independence. Regarding the person who needs to be elected as an elder, there is a difference between what the law provides and the thought of Aba Gadas. The law thinks in terms of jaarsa biyyaa (community elders) while Aba Gadas think in terms of genuine Abbaa Seeraa in the context of the Gada System (Teferi 2023). This is why the author argues Oromia customary courts are not customary courts per se, but quasi-customary courts modelled by the government for its own policy ends. At the same time, it is good to make clear that training in law at Gada Centre is a mandatory requirement for elders, and that it may be difficult in the short run to get a sufficient number of elders (Teferi 2023).

3.5. Judgment and Execution

Oromia customary courts exert efforts to settle the dispute by compromise to be recorded and executed accordingly. Where there is an effort to settle the agreement, the elders will give a reasoned judgment or order. A party dissatisfied with the judgement has the right to appeal to the Customary Court of Appeal. Similarly, a person who is aggrieved by the decision of the Customary Court of Appeal may take his appeal to the District Court. However, the grounds of appeal are limited and possible only if the grievance is related to applying customary law which undermines human rights and freedom (including the right to equality) or overlooking the rights to be heard or important evidence presented. Moreover, it is possible to “appeal” the decision of the District State Court to a court having jurisdiction. Here, if the state court of appeal entertains the matter as de novo, it not only delays justice but also degrades the contribution of the customary court.

The critical challenge customary courts face regarding judgement is reducing the judgements into writing (Teferi 2023). There are cases where elders declare their judgements orally alone, or in written form which is difficult to read and understand. One may easily imagine the possible implications of oral or illegible judgment. How can appellate-level courts rule on the appeal forwarded to them? How can executives properly execute the judgements? How can the judgements be documented for future uses? The law envisaged that a secretary would be assigned to record the judgement.

However, practically, either there is no secretary or there is one who provides voluntary services (Teferi 2023).

Customary courts are mandated to execute their orders or decisions per the customary law. In the majority of cases, the court's orders or judgements are respected and fully implemented. In case of non-compliance because of the dysfunction of the Gada structure like Follle and the failure of the Kebele Administration to cooperate, the court may call and warn the non-complying party, impose sanctions using the structure of the Gada system, or order the local executive to execute the judgment. Where these fail, the customary court shall notify District Courts to execute the order or judgment. The reason why the District Court can execute the decision of the customary court is not clear. Such linkage with state courts not only reduces the confidence of customary courts to execute their judgment but also reduces the public confidence in the capacity of customary courts to administer justice. Here, it is good to empower and encourage customary courts to execute their decisions using participatory approaches in line with the core values of the Gada system. The actual practices of customary courts so far also substantiate the effectiveness of the participatory approach in the execution of judgements. The participatory system which allows the local community to participate in the process is good not only to ensure effective execution but also to restore lasting peace, create a sense of ownership, and boost public confidence and transparency.

4. Performance Analysis

The customary courts of Oromia were established formally with a law adopted in 2021 and started actual operation in 2022. Within these few years, the courts have accomplished a lot, accompanied by challenges. As the preamble and relevant provisions of the enabling laws show, promoting the culture and values of the Oromo people and ensuring accessibility of justice are the two prime objectives of establishing the Oromia customary court.

4.1. Promoting Custom and Values

The Oromo people have their own way of viewing the world which is reflected in all affairs of life (Jalata 2012). In the Oromo worldview, there is a concept called 'safu'. Safu is the Oromo inherent code of ethics which dictates what is good or bad, right or wrong, appropriate or inappropriate, ethical or unethical, moral or immoral in every aspect of life (Jalata 2012; Teferi 2023). The legitimacy of any act at individual or social levels can be seen in light of this code. This code of ethics is not something codified or existing in written format, rather it is something inferred from the life of the people. The decision of Oromia customary courts is expected to reflect safu Oromo. The decision of customary courts so far reflects the same and this has a great impact on promoting the culture and values of the Oromo people. Apart from the decision passed, the oath administered by the court plays a significant role in promoting the ethical value of Oromo and disclosing the truth. The tools used (like bone, bullet, sword, bullet, knife, ash, chain, water, food and Bible) as a symbolic representation and the messages attached thereof while administering the oath are very much instrumental to influencing

disputants or witnesses to speak the truth. As the practices reveal, the oath taken by parties to disputes and witnesses is as follows:

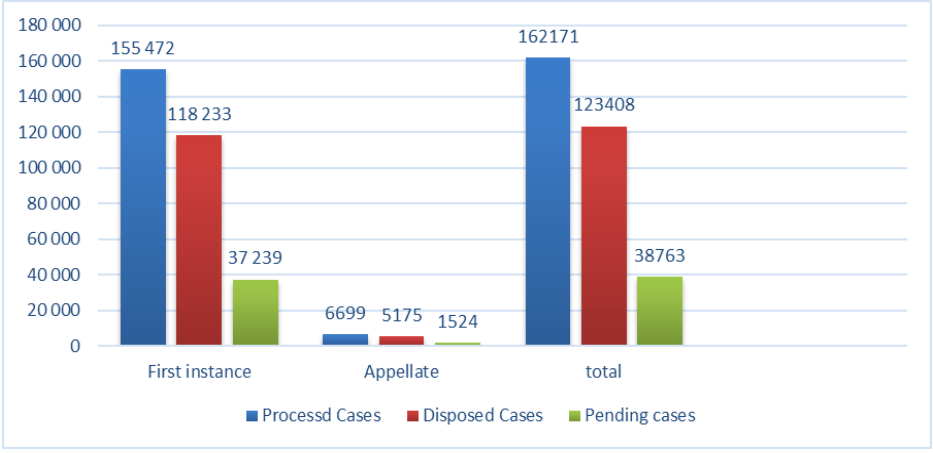
> *„If I speak lie: let the seed I sow not grow for me; let the children not be born to me; if born to me, let the child not grow up; if grew up, let child be mute; let me remain bare like bone; let bullet gets me; if the bullet missed me, let this sword will not miss me; let my flesh and spirit separate from each other with knife; let my children remain deaf; let me remain seedless! let me sour to other people; let my asset be destroyed like ash; let me be chained like a mad dog; let the endless fire catch me and my property; let me not be forgiven, let me not get mercy; let the truth of God catches me; finally, a person swallows' food with water and say let these curses remain in my blood and flesh."*[5]

The oath administered in customary courts is deeper and more powerful to disclose the truth and this truth is called the son of God (dhugaan ilmoo waaqaati) in the Oromo culture. This, in turn, indicates how Oromia customary courts are promoting Oromo cultures and values through the cases they decide and the oath they administer.

4.2. Ensuring Access to Justice

Ensuring access to justice is the second core objective of customary courts. As the operation so far reveals, the customary courts are playing a significant role in ensuring access to justice in the region. Customary courts are geographically accessible, financially cost-effective, time-wise speedy, procedurally simplified, and employ laws and language familiar to disputants. The only care the courts need to take is to ensure their compatibility with the Constitution, public morality and natural justice. Based on data obtained from the Supreme Court of Oromia, the number of cases handled by the customary courts of Oromia within less than one year since the commencement of their operation in 2022 is depicted as follows.

Figure 1: Performance Chart



Source: author's compilation

[5] Taken and adopted from Teferi 2023.

As the chart shows, the role played by customary courts in ensuring justice is stupendous. From the total of 162,171 cases processed within less than one fiscal year, over 76% of cases were settled at the first instance level without the need for appeal. In other words, only cases which account for less than 24% (23.95%) are appealed to the appellate customary court. This indicates the incredible public confidence in the decision of the customary court. The figure has a lot to tell us about accessibility. First, as a lot of cases are flowing to customary courts, it implies the existence of interest to dispose of their cases by the courts. The interest is mainly associated with the strong moral sentiment of the people for its culture and values, the geographic accessibility of the court, the cost-effectiveness of the justice system, the simplicity and familiarity of principles and procedures followed by the customary court, and the working language utilized by the courts.

The higher level of ethnic-centred nationalism prevailing in the country is also one contributing factor to an increasing demand to settle disputes under the roof of the customary system. The weakness of the formal justice system including its high litigation cost, negative effect on future relationships, inaccessibility, complicated procedures alien to the disputants, and prolonged decisions may also force people to look for the customary one.

Similarly, the figures also show how fast the courts are in handling the cases which is also another aspect of accessibility. Celerity of decision is an essential feature of informal justice systems. It is one of the most important reasons why the system is needed. Because of the proximity of the system to the users, the absence of unaffordable service costs, the popularity and respectfulness of local practitioners, and easy and simple procedures which are embedded and legitimated in local values and beliefs, they are quicker than formal justice systems in deciding cases (Epple & Assefa 2020). The performance of Oromia customary courts so far also affirms this general trend. If they managed to decide on this number of cases at the initial stage within less than one year, more celerity can be expected from the courts when they start their full-fledged operation, being equipped with the necessary resources and support.

4.3. Performance of Each Level of Customary Court

The above chart also shows the level of performance of each level of customary courts (Oromia Supreme Court 2022). From the total number of cases submitted to them, the number of cases disposed of and pending at the level of the first instance and appellate customary court is as follows. Of the total number of 155,472 cases submitted, the first instance customary courts of Oromia have disposed of 118,233 while 37,239 cases are pending waiting for resolution. In other words, the first instance court has disposed of 76.04% of cases processed while 23.95% are pending. At the appellate level, from the total of 6,699 cases submitted, 77.25% (5,175) of cases are disposed while 22.74% (1,524) of cases are pending. Totally, from the 162,171 cases submitted to customary courts of Oromia, 76.09% (123,408) are disposed while 23.90% (38,763) of cases are pending waiting for disposition. Generally, the performance of customary courts from the perspective of timely case disposition is very good and promising at the first instance and appellate level relative to the prolonged process of the state courts. Despite this, the margin between the first instance court and appellate customary court in terms

of case disposition is insignificant. The appellate courts are relatively and insignificantly better than the first instance court in terms of case disposition and this is mainly because of the low number of cases they processed.

From the total number of cases processed, the issue of how many cases is disposed of and pending at the first instance level and how many cases are disposed of and pending at the appellate court is essential to depict the workload and level of efficiency of each court relative to case flows. As the data illustrated in the above chart shows, from the total number of 162,171 cases processed in the period under study, 95.80% of cases are disposed of at the first instance level while 4.193% are disposed of at the appellate level of customary courts. Of the total of 38,763 cases waiting for judgment, 96.07% is pending at the first instance level whereas 3.93% is pending at the appellate level. In this sense, the caseload is much higher at the first instance level than the appellate level. In addition, the chart depicts the lower flow of cases through the scheme of the appeals system, and this is mainly because parties are usually satisfied with justice rendered by the first instance customary court per customary laws.

4.4. Impact on Regular Court Caseload

In addition to ensuring accessibility of justice while promoting the culture and value of the Oromo people, the engagement of customary courts in rendering justice has an impact on the flow of caseload to regular courts. Based on the data obtained from the annual performance Supreme Court of Oromia, the case flows to regular courts in Oromia before and after the commencement of operation of customary court are depicted as follows (Oromia Supreme Court 2022).

Figure 2: Regular court case flow

Source: author's compilation

As the chart illustrates, the number of cases flowing to formal state courts has been reduced since the commencement of customary courts. The number of cases processed in Oromia regular courts during the first quarter of 2021, i.e. before customary courts started to function was 145,809, but 137,332 at a similar time in the year 2022 (after customary courts started to function) thereby showing a reduction of 8,477 (145,809 – 137,332) cases (Teferi 2023). Here, the impact of customary courts on the case flow to

regular courts seems insignificant, but in truth, the impact is promising relative to the caseload of regular courts which is increasing every year. Moreover, the practice reveals that cases initiated at customary courts are being resolved there without coming to formal state courts. This has implications for the efficiency and accessibility of formal state courts.

4.5. The Extra-ordinary Justice

Access to justice in Oromia customary courts can also be explained in terms of the nature of justice they render. In the state justice system, the court renders justice based on laws, evidence and logic. The judges of state courts are usually depicted as blind and pass decisions only based on evidence even though they know the truth. The allegations which are not substantiated by evidence have no value in the formal justice system. The problem is, sometimes it is not possible to prove allegations when the cause of action happens in a non-public space. Unless one of the parties admits that there is neither documentary evidence nor witness, the state courts cannot do justice to the disputing parties. The most typical of these cases are contracts of loan. According to Article 2472 of the Ethiopian Civil Code, documentary evidence (loan contract in written form) is required to prove the existence and substance of a loan contract the amount of which is greater than 500 Ethiopian dollars.

Because of the social bond in which warranty loans are based on mutual trust, in practice, there are so many cases whereby more than a 500-birr loan is made based on mutual trust without reducing it into written form. When such cases are brought to formal state courts, the courts cannot make justice as there is no admissible written evidence as required by loan contract law. In this case, even a witness is inadmissible as the law requires written evidence. In such scenarios where the state does not render justice, the legitimate party may get justice when the case is settled by the customary court. The reality also proves the same. In its decision, the customary court is not required to follow the state laws in its decision. Rather, it follows laws and procedures rooted within the society where the court is located. This allows the customary court to do better justice. In this regard, there are a lot of practical cases wherein the court decides repayment of a loan over 500 Ethiopian dollars in the absence of a written contract of loan. This all proves the potential of the customary court to render extraordinary justice.

Conclusions

Both federal and regional constitutions have envisaged the possibility of establishing customary courts. Based on this, Oromia took a bold step in establishing and recognizing customary courts in 2021. Currently, more than six thousand customary courts are operating in Oromia, being organized at first instance and appellate levels. Within less than one year, the customary courts processed and disposed of over a hundred thousand cases. The accomplishment of customary courts concerning the promotion of the culture of the people, ensuring accessibility of justice, reducing the caseload of state courts and ensuring peaceful co-existence within the society is promising. Hence, it needs to be taken as a good initiative to expand into other parts of

the country. However, the courts are operating under many challenges facing state courts. Above all, the strategy followed by the state in the process of dealing with the interaction between customary and state justice systems is ambiguous which makes the future of customary courts unpredictable. To address this fundamental structural problem, its establishment as an independent institution with its judicial administration council, defining its relationship with state and non-state actors, the issue of defining and codifying customary laws, as well as codifying precedential decisions of the courts are things which need further policy action and a roadmap.

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