

1-22-2021

## Multiple Legal Orders in Ethiopia: An Impediment on the Enforcement of Women Rights

Daniel E. Alemayehu  
amlakedan@gmail.com

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njihr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Daniel E. Alemayehu, *Multiple Legal Orders in Ethiopia: An Impediment on the Enforcement of Women Rights*, 19 NW. J. HUM. RTS. 38 (2021).

<https://scholarlycommons.law.northwestern.edu/njihr/vol19/iss1/4>

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Human Rights by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

MULTIPLE LEGAL ORDERS IN ETHIOPIA: AN  
IMPEDIMENT ON THE ENFORCEMENT OF  
WOMEN RIGHTS

*Daniel E. Alemayehu*<sup>\*1</sup>

---

<sup>1</sup> Lecturer, Haramaya University College of Law, LL.B, LL.M in Tax and Investment Laws and Policies

## TABLE OF CONTENTS

I. INTRODUCTION .....	39
II. MULTIPLE LEGAL ORDERS UNDER FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION .....	41
A. <i>Recognition of Customary and Religious Laws</i> .....	41
B. <i>Subject Matter, and Personal Jurisdiction of Customary         and Religious Laws</i> .....	42
III. MULTIPLE LEGAL ORDERS AND CHALLENGES ON THE ENFORCEMENT OF WOMEN’S RIGHTS .....	43
C. <i>Lack of crystalized laws in customary and religious laws</i> .....	43
D. <i>Forum shopping to the forum that prejudice women’s         rights</i> .....	44
E. <i>Absence of customary and religious laws and decisions         review mechanisms</i> .....	44
F. <i>The myth of consent</i> .....	45
G. <i>Lack of Capacity to recourse to a review of sharia court         decisions</i> .....	48
H. <i>Denial of access to justice in all forums</i> .....	48
I. <i>Reluctance or fear of courts to invoke constitutional         provisions in their decision</i> .....	49
IV. CONCLUSION.....	50

## I. INTRODUCTION

For the first time, the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) gives recognition to customary and religious dispute resolution mechanisms.<sup>2</sup> The recognition of these mechanisms is significant as they are usually the most accessible form of dispute resolution for most women, particularly in rural areas. This is because the formal laws and enforcing institutions are outside the reach of the majority due to their high cost, remoteness, rigorous procedures, and unfamiliarity of laws, among other barriers.<sup>3</sup> In addition, pressures from family, religious leaders, or elders force them not to recourse to regular courts.<sup>4</sup>

---

<sup>2</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 34(5).

<sup>3</sup> See Ayalew Getachew Assefa, *CUSTOMARY LAWS IN ETHIOPIA: A NEED FOR BETTER RECOGNITION?*, THE DANISH INST. FOR HUMAN RTS., 30 (2012).

<sup>4</sup> *Id.*

It should be noted that use of traditional and religious laws and dispute resolution mechanisms are subject to some important limitations. Article 9(1) of the FDRE Constitution provides that any law, including customary and religious laws, that contravenes the FDRE Constitution shall have no effect.<sup>5</sup> Among others, this includes customary and religious laws that are contrary to fundamental human rights recognised under Chapter Three of the FDRE Constitution. In addition to such constitutional limitations, international human rights instruments adopted by Ethiopia have also imposed a duty on the country to eliminate customary and religious laws that violate human rights, particularly discriminatory laws against women.<sup>6</sup> These limitations on customary and religious laws are important for women, as women often face discrimination and marginalization in these forums. Subjecting the operations of these mechanisms to the principles of human rights is especially important as it means that these mechanisms cannot be used in a discriminatory manner or in a manner that offends the principles of gender equality and equity.<sup>7</sup>

However, there are no sufficient legal and institutional frameworks that regulate the complex operation of multiple legal orders and their interaction

---

<sup>5</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 9(1).

<sup>6</sup> See, e.g., U.N. Charter art. 55(c) (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 72 (Dec. 10, 1948) (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 2(1) (Dec. 16, 1966) [hereinafter *ICCPR*] (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social, and Cultural Rights, art. 2(2) (Dec. 16, 1966) [hereinafter *ICESCR*] (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); see also African Charter on Human and Peoples’ Rights art. 18(3), *adopted* June 1, 1981, 1520 U.N.T.S. 245 (entered into force Oct. 21, 1986) [hereinafter *ACHPR*] (“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”); G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 2 (Dec. 18, 1979) [hereinafter *CEDAW*] (“States Parties condemn discrimination against women in all its forms . . .”).

<sup>7</sup> *CEDAW*, *supra* note 5, at art. 5(a) (requiring States “to modify the social and cultural patterns of conduct of men and women, with a view to achieve 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.”).

with formal laws and institutions. Women often face difficulties in the enforcement of constitutional rights due to unregulated competing and conflicting legal orders. From limited cases entertained and interviews made there are a number of problems identified that hamper the enforcement of women's rights, including recognition of customary and religious laws without examining their substantive content, absence of judgement review mechanism between the legal orders, forum shopping mechanisms, and related problems.

## II. MULTIPLE LEGAL ORDERS UNDER FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION

### A. *Recognition of Customary and Religious Laws*

The FDRE Constitution is a crucial instrument for the recognition, legitimacy, and operation of customary and religious laws in parallel with formal laws. Besides recognition, it is a primary document in the determination of the scope of informal legal orders, and the interaction with state and formal legal orders and other principles of the constitution including the observance of human rights. Recognition of informal legal orders requires serious regulation or control regarding the substantive content of such legal orders, adjudicating bodies, and the execution of decisions.<sup>8</sup> The recognition made under the federal constitution is a simple one, which is not backed by crucial legislative instruments. Twenty-five years have passed since the FDRE Constitution promised the enactment of particular laws that govern customary and religious laws, and yet none have been made, except for the Federal Courts of Sharia Consolidation Proclamation (Sharia Court Proclamation) enacted in 1999.<sup>9</sup> The Sharia Court Proclamation tried to regulate jurisdiction, applicable law, appointment of judges, consent of the disputing parties, and more.<sup>10</sup>

The FDRE Constitution recognised customary and religious laws and limited their jurisdiction to personal and family matters and consent of the disputing parties.<sup>11</sup> Additionally, the FDRE Constitution permitted a marriage concluded in accordance with customary and religious laws.<sup>12</sup> Accordingly, the Revised Family Code has come up with some provisions

---

<sup>8</sup> See Assefa, *supra* note 2, at 27.

<sup>9</sup> Assefa, *supra* note 2, at 29.

<sup>10</sup> FEDERAL COURTS OF SHARIA CONSOLIDATION PROCLAMATION NO. 188/1999 [SHARIA COURT PROCLAMATION] arts. 4-6, 17 (Eth.).

<sup>11</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 34(5).

<sup>12</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 34(4).

that give effect to religious and customary marriage, subject to essential conditions prescribed under the same law.<sup>13</sup>

*B. Subject Matter, and Personal Jurisdiction of Customary and Religious Laws*

The FDRE Constitution is the primary instrument that determines one aspect of customary and religious laws and institutions' jurisdiction (i.e. subject matter). However, the FDRE Constitution is limited to subject matters that fall within the ambit of these laws promised to be determined by other laws.<sup>14</sup> The Sharia Court Proclamation is the only law enacted to regulate application of Islamic law and Sharia courts in accordance with such constitutional direction.<sup>15</sup>

*1. Sharia law: Jurisdiction and Applicable Law*

**Subject matter jurisdiction:** Personal and family matters include inheritance, marriage, divorce, maintenance, and child custody, among others.<sup>16</sup> In addition to such constitutional allocation of jurisdiction, Article 4(1) of the Sharia Court Proclamation specifies similar subject matter jurisdiction of Sharia courts.<sup>17</sup>

**Personal jurisdiction:** Sharia courts will have personal jurisdiction if the aforementioned disputes arise out of a marriage concluded in accordance with Islamic law, or the parties consented to the jurisdiction of the court.<sup>18</sup> Whereas, in case of inheritance, the court would have jurisdiction if the deceased is Muslim at the time of his death or if the endower is Muslim in case of gift.<sup>19</sup>

---

<sup>13</sup> THE REVISED FAMILY CODE PROCLAMATION NO. 213/2000 [REVISED FAMILY CODE], arts. 26, 27 (Eth.).

<sup>14</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 34(4–5).

<sup>15</sup> SHARIA COURT PROCLAMATION pmb. (Eth.). Particulars regarding the application of customary and religious laws other than Sharia law are still not enacted.

<sup>16</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 34(1); NARENDRA SUBRAMANIAN, NATION AND FAMILY: PERSONAL LAW, CULTURAL PLURALISM, AND GENDERED CITIZENSHIP IN INDIA 4 (Stanford University Press, 2014).

<sup>17</sup> SHARIA COURT PROCLAMATION, art. 4(1) (“Federal Courts of Sharia shall have common jurisdiction over the following matters: (a) any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law; (b) any question regarding Wakf, gift/Hiba/, succession of wills; provided that the endower or donor is a [M]uslim or the deceased was a [M]uslim at the time of his death; (c) any question regarding payment of costs incurred in any suit relating to the aforementioned matters.”).

<sup>18</sup> *Id.* at art. 4(1)(a).

<sup>19</sup> *Id.* at art. 4(1)(b).

In addition, the Sharia Court Proclamation has stipulated personal jurisdiction shall be established if the parties to the dispute have consented to adjudicate the matter to Sharia courts.<sup>20</sup> However, according to the Sharia court proclamation the consent of the parties could be made expressly or impliedly<sup>21</sup>, Contrary to the constitutional stipulation of express consent under Article 34 (5). Parties may give their express consent by filling the form attached in the proclamation, or implied consent may be established when one of the parties failed to object to the jurisdiction of the court as stated under Article 5(2) of the Sharia Court Proclamation.

**Applicable law:** These courts adjudicate disputes in accordance with Islamic substantive law, and evidence, disposal of cases, and execution of judgements are made in accordance with the formal civil procedure of the country.<sup>22</sup>

## 2. *Other religious and customary laws*

Unlike Sharia law, customary and other religious laws are not backed by essential legal instruments that establish tribunals and regulate the adjudication process.<sup>23</sup> However, the absence of particular laws that regulate operation has not, up to this point, hindered the informal legal orders to settle disputes. Hence, these customary and religious courts entertain cases of any subject matter including criminal matters, and without ascertaining the consent of the disputing parties.<sup>24</sup>

### III. MULTIPLE LEGAL ORDERS AND CHALLENGES ON THE ENFORCEMENT OF WOMEN'S RIGHTS

Although there are adequate policy and legal frameworks to promote gender equality and women's empowerment,<sup>25</sup> the features and interplay between customary, religious, and formal laws hamper their full realization. Particularly, the research has identified the following problems.

#### C. *Lack of crystalized laws in customary and religious laws*

In the case of customary and most religious laws, women's human rights are violated by the absence of a clear and crystallised legal regime that guides them through the dispute settlement processes and

---

<sup>20</sup> *Id.* at arts. 4(1)(a), 4(2).

<sup>21</sup> *Id.* at arts. 5(2).

<sup>22</sup> *Id.* at art. 6(1–2).

<sup>23</sup> Assefa, *supra* note 2, at 29.

<sup>24</sup> *Id.* 64

<sup>25</sup> *See, e.g.*, CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION No. 1/1995 Aug. 21, 1995, art. 25; and REVISED FAMILY CODE No. 213/2000 [REVISED FAMILY CODE] pml. (Eth.); CEDAW, *supra* note 5 at art. 2.

specifies the remedies available to them.<sup>26</sup> Regarding Sharia courts, the Sharia courts establishment proclamation stated that the courts apply Islamic law on matters stated in the FDRE Constitution and particulars in the same proclamation<sup>27</sup>. However, there are no uniform guiding substantive laws due to different sects and thoughts within the religion. Hence, substantive application of law varies depending on the judge's background of thought, and this causes inconsistency of decisions.

*D. Forum shopping to the forum that prejudice women's rights*

Forum-shopping refers to “*The practice of choosing the most favourable jurisdiction or court in which a claim might be heard.*”<sup>28</sup> Forum shopping is one of the most common problems in the plural system of Ethiopia. Parties easily switch from one system to the other before or after the decision is rendered by a formal court.<sup>29</sup> There is a wide range of difference between different legal orders in terms of their outcome.<sup>30</sup> From the perspective of the disputing parties depending on the subject matter in question one forum could be more favourable than others. For example, in case of inheritance law of daughters, entitlements from a deceased parent varies in Sharia law and formal civil law. Under the formal civil inheritance law, a child of a deceased person is entitled to equal share irrespective of their sex, whereas in the case of Sharia law: “To the male, a portion equal to that of [two females]; [i]f (there are) only [daughters], two or more, their share is [two-thirds] of the inheritance; [i]f only one, her share is [half].”<sup>31</sup> In such instances, women are more vulnerable when adjudicating their case before a forum, which is not favourable to them.

*E. Absence of customary and religious laws and decisions review mechanisms*

There is no mechanism for formal courts to examine the substantive validity of customary and religious laws. In relation to various customary

---

<sup>26</sup> Parties are also often uncertain of which legal framework is applicable in a given situation. Another form of knowledge uncertainty arising from multiple and overlapping legal frameworks is the inability to know or predict how other people or institutions will act. This is exacerbated by the fact that customary law itself is constantly evolving, thus making it difficult to ascertain its content at any moment, and making such content the subject of contestation and negotiation.

<sup>27</sup> SHARIA COURT PROCLAMATION art. 4(1).

<sup>28</sup> BLACK'S LAW DICTIONARY 1937 (8th ed. 2004).

<sup>29</sup> Meron Zeleke, Tadesse Kassa Woldetsadik & Berhanu Mosissa, *Women's Property Rights and Claims in Customary Justice Systems: A Case Study of Ambo and Hawassa Zones*, 3 ETH. J. OF HUM. RTS. 5 (2018).

<sup>30</sup> *Id.*

<sup>31</sup> *Inheritance According to Islamic Sharia Law*, PUNJAB JUDICIAL ACADEMY, <http://www.pja.gov.pk/system/files/Inheritance.pdf> (lasted visited June 22, 2020).

laws, elders have no written records to any proceeding of the dispute, hence in addition to the legal gap there is also a technical barrier to appeal before any forum.<sup>32</sup> Regarding Sharia court decisions, nothing is provided under the Sharia Court Proclamation, which enables regular courts to review them. Article 80 (3) of the FDRE Constitution gives the Federal Supreme Court a cassation power over any final court decision alleged of a fundamental error of law.<sup>33</sup> However, the term ‘any final court decision’ is debatable whether it includes the final decision of Sharia and customary forums.<sup>34</sup> Finally, the Federal Supreme Court has decided in the case of *Giato Yasin Shibeshi and Hassen Mohammed* that it has no cassation power to reverse the decision of Sharia courts by examining the validity of substantive laws.<sup>35</sup>

The absence of clear linkages and referral mechanisms between the two systems creates a gap that is likely to escalate existing gender biases and inequalities especially where complainants have no choice in determining where and how far to take complaints.

#### F. *The myth of consent*

One of the important conditions attached by the FDRE Constitution for the application of customary and religious laws courts is the consent of the disputing parties.<sup>36</sup> However, the FDRE Constitution is not specific regarding the form of declaring consent by one of the disputing parties. Also, no provision or system is established that could ensure the free whim and caprice of women while they give their consent.

For instance, the Sharia Court Proclamation has stated that Sharia courts can have jurisdiction on a dispute so far the parties gave their consent expressly.<sup>37</sup> For that purpose, the Sharia Court Proclamation has annexed a form for the declaration of consent.<sup>38</sup>

---

<sup>32</sup> Tsegaye Beru & Kirk W. Junker, *Constitutional Review of Administrative and Customary Dispute Resolution by the People in the Ethiopian Legal System*, 43 N.C. J. OF INT’L L. 43, 54 (2018).

<sup>33</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 80(3)(a).

<sup>34</sup> Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN L. REV. 72, 91 (2011).

<sup>35</sup> Federal Supreme Court Cassation Division File No. 93779 Dec. 30, 2006, in 15 FEDERAL SUPREME COURT CASSATION COURT DECISIONS 247, 248 (Eth.).

<sup>36</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 34(5).

<sup>37</sup> SHARIA COURT PROCLAMATION, arts. 4(2), 5(1).

<sup>38</sup> *Id.* at art. 5(1) (“I confirm, under my signature hereof, that pursuant to Sub Article (5) of Article 34 of the Constitution of the Federal Democratic Republic of Ethiopia, and Sub Article (1) of Article 5 of the Federal Courts of Sharia Consolidation Proclamation No. 188/1999, I consent/object to the

This consent confirmation note is intended to ensure the consent of a disputing party. However, the form by itself does not ensure a woman's consent. First, the form does not inform the parties that they have the option to take their case before regular courts.<sup>39</sup> Secondly, almost all women in rural areas are illiterate and cannot read and understand the essence of the confirmation note.<sup>40</sup>

Despite the aforementioned requirement of express consent of the parties, the proclamation has also recognised the jurisdiction of Sharia courts by tacit consent of the parties. Accordingly, Sharia courts can proceed to hear a case, *ex parte*, if the defendant who has been duly served with the summons fails to appear at the first hearing of a suit.<sup>41</sup> This provision defeats the whole purpose of the Constitution that requires consent of the disputing parties by treating absence of one of the parties as acceptance. In an interview made with a legal aid officer, most of the time Sharia courts entertain and decide on a dispute *ex parte* without the knowledge and consent of the other party.<sup>42</sup> Then the absent party finally receives a judgement execution as a surprise. The problem here is that the absent party could not recourse to regular courts due to the procedural impediments enshrined under the civil procedure code of Ethiopia. According to Articles 244 and 245 of the Civil Procedure Code, once the dispute was settled in any other forum it could be a ground for a preliminary objection against her.<sup>43</sup>

Due to the complexity regarding the consent of one of the disputing parties before Sharia court some cases were brought before federal cassation court. For example, in the case *Abdurahman Ali et al Vs Hajji Kassim Mohammed and Zenit Ali* the issue of consent entertained went as follows:

Marriage was concluded before a sharia court judge in the presence of two witnesses. Zenit's two brothers and her uncle filed an objection to the marriage before the First Instance Sharia Court alleging that there was no consent of her Parents and relatives to the marriage. Zenit's relatives argued that under Islamic law parents and relatives must consent to the marriage. They claimed that they were never consulted and that the spouses did not invite them to attend the process before a judge. The spouses did not appear

---

adjudication of the case, brought before this Court, under Civil Case File No. \_\_\_\_\_, in accordance with the laws of my religion.”)

<sup>39</sup> *Id.*

<sup>40</sup> Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN L. REV. 72 (2011).

<sup>41</sup> SHARIA COURT PROCLAMATION, art. 5(2).

<sup>42</sup> Interview with Miss Adashe Girma, Former Legal Aid Officer at Access to Justice and Legal Aid project (AJLA), (Feb. 14, 2020); Interview with Mahir Abdusemed, Harari Supreme Court President, (Feb. 17, 2020).

<sup>43</sup> THE CIVIL PROCEDURE CODE DECREE art. 244(2)(c), 245(2) (1965) (Eth.).

and express their consent to the jurisdiction of the First Instance Sharia Court. Nevertheless, the court has decided to annul the marriage.<sup>44</sup>

One of the problems in Sharia courts has been to assume jurisdiction without asking the express consent of the disputing parties to its jurisdiction.<sup>45</sup> This may be due to the legal lacuna existing under Sharia Court Proclamation, which enables them to establish jurisdiction in the absence of objection parties to a dispute. Likewise, the case of *Rania Ahemed* was brought before the House of Federation on the ground of vitiation of consent to the jurisdiction of Sharia court.<sup>46</sup>

These cases show that the mere existence of law is not sufficient to ensure the consent of one of the disputing parties to religious or customary laws. Hence, it is important to put in place a government organ that ascertains the consent of women to such laws aware of its consequences. In addition, women are reluctant to object to the jurisdiction of the religious and customary forums due to various reasons including the fear of condemnation.<sup>47</sup> Social pressure is placed on women not to utilize other systems of justice. In other words, refusal to adjudicate their case by a religious or customary law amounts as disrespect and an act contrary to the faith or society.<sup>48</sup> Mohamed Abdo explained the fear and social pressure perspective in the following statement:

[Some] parties . . . do not usually express their explicit rejection of the jurisdiction of [S]haria courts for fear of negative perception and reaction from the Muslim community. Or they may feel that such an express objection will be considered as an affront to one's religion. In effect, they may be put

---

<sup>44</sup> *Federal Supreme Court Cassation Hearing from Women Rights and Benefits as well as Women's Participation in Advocacy Selected for the Legal Interpretation of their Status*, NET. OF ETH. PPL. ASS'N., <https://chilot.me/wp-content/uploads/2017/11/cassation-on-women.pdf> (last visited Oct. 26, 2020).

<sup>45</sup> See, e.g., Ayalew Getachew Assefa, *CUSTOMARY LAWS IN ETHIOPIA: A NEED FOR BETTER RECOGNITION?*, THE DANISH INST. FOR HUMAN RTS., 28 (2012). (“[T]he judges who sit at the customary/religious courts harbour a lot of sentiments towards their own courts and laws. In this very case, they simply bypassed a very clear constitutional provision, which states that the consent of a disputant is the only way from which a religious court gets its jurisdiction on a case. In defiance, the judge of the first instance Sharia court in Kedija Beshir went on to incarcerate an objecting party for court contempt.”).

<sup>46</sup> Council of Constitutional Inquiry May 6, 2007, *Rania Ahemed Ibrahim vs. Ibrahim Ahemed* File No. 1352/07 in CONSTITUTIONAL JOURNAL, 112-14 (Eth.) (In this case, the respondent started a divorce proceeding before Sharia court after he sent the applicant (his wife) abroad for a vacation. Due to this reason, the applicant was not in a position to receive summons of the court, however, the court established jurisdiction without ascertaining whether the summons were properly served).

<sup>47</sup> See *Social Institutions and Gender Index*, ORG. FOR ECON. CORP. & DEV., <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/ET.pdf> (last visited Oct. 21, 2020).

<sup>48</sup> Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN L. REV. 72, 89 (2011).

under social pressure not to demonstrate opposition to the jurisdiction of [S]haria courts.<sup>49</sup>

*G. Lack of Capacity to recourse to a review of sharia court decisions*

There are few cases brought before the Federal Supreme Court against the decision of Sharia court. Among others, financial capacities, lack of awareness, and fear of condemnation are the main restraints that impede women from taking their cases before such a forum. In one rare case, *Kedija Kedir*, the Ethiopian Women Lawyers' Association brought the case to the House of Federation, the final arbiter of constitutional cases, by alleging that the adjudication of the case by the Sharia Courts against Kedir's express objection violated the FDRE Constitution.<sup>50</sup> This case passed through a number of costly proceedings starting from the 3rd Naiba court, which continued to entertain the case and gave a decision by rejecting the appellant's objection.<sup>51</sup> Although the case was appealed to the Federal Sharia High Court, Supreme Sharia Court, and Federal Sharia Supreme Court, all the courts affirmed the decision by the 3rd Naiba court by rejecting the appeal.<sup>52</sup> Such expensive proceedings are very difficult to pass through for ordinary citizens that struggle with extreme poverty, and the problem is worse in relation to women.

*H. Denial of access to justice in all forums*

Access to justice is a right recognised under the FDRE Constitution<sup>53</sup> and various international human rights instruments ratified by the country.<sup>54</sup> However, the interplay between multiple different legal orders impedes the enforcement of such rights due to lack of crucial regulatory instruments. Contrary to the jurisdiction competition that we have seen in the previous

---

<sup>49</sup> *Id.*

<sup>50</sup> Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN L. REV. 88-89 (2011).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, art. 37(1).

<sup>54</sup> *See, e.g.*, ICCPR, *supra* note 5, at art. 2(3)(a) ("Each State Party to the Covenant undertakes [t]o ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy."); *see also* ICESCR, *supra* note 5, at art. 2; G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearance, pmb. (Feb. 6, 2007); G.A. Res. 44/25, Convention on the Rights of the Child, art. 37(d) (Nov. 20, 1989); CEDAW, *supra* note 5, at art. 2(c); G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13 (Feb. 4, 1985); G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 13(1) (Mar. 30, 2007); ACHPR, *supra* note 5, art. 7(1); African Charter on the Rights and Welfare of the Child art. 4(2), July 11, 1990, OAU Doc. CAB/LEG/24.9/49; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 25, July 11, 2003, OAU/AU.

section, there are instances by which legal orders surrender jurisdiction on various grounds. In this regard, the case between *Kyria Yahiya vs Haji Jihad Umer* before the Federal Supreme Court, Cassation Division, is important to show the complexity.

The applicant brought a claim for the dissolution of her marriage before Jimma Woreda Sharia court, and the court pronounced a decision approving the divorce and referring her to take the case before the competent regular court that had jurisdiction to decide on the effect of divorce.<sup>55</sup> Accordingly, she took the case before the regular court. However, all state courts (the Woreda First Instance, High Court, and Supreme Court) declined jurisdiction.<sup>56</sup> The State High Court and Supreme Court sustained the ruling of the First Instance court, which stated the Sharia court that approved the divorce shall also decide on the effect too, invoking Article 245 and Article 5 of the Civil Procedure Code.<sup>57</sup> However, the Sharia court has not been willing to entertain the case, insisting the subject matter is not within its jurisdiction. The applicant then took her case to the Federal Supreme Court, Cassation Bench, alleging fundamental error of law that breached her constitutional right to access to justice.<sup>58</sup> Such refusal of forum by both formal and informal orders violates the right of women for access to justice enshrined under the FDRE Constitution and international human rights in which Ethiopia is a signatory state.

#### *I. Reluctance or fear of courts to invoke constitutional provisions in their decision*

The FDRE Constitution established three layers of courts both at federal and regional level, and judicial power is vested in them. However, as clearly stipulated under the FDRE Constitution, these courts do not have mandates in the interpretation of the FDRE Constitution.<sup>59</sup> This prohibition causes uncertainty regarding their role in the enforcement of the fundamental rights of citizens. According to some scholars, the judicial organ cannot enforce rights under the FDRE Constitution unless it has the power to interpret them.<sup>60</sup> Though the argument is debatable, it has put judges in doubt

---

<sup>55</sup> Federal Supreme Court Cassation Division File No. 72420 Apr. 22, 2004, in 13 FEDERAL SUPREME COURT CASSATION COURT DECISIONS 148, 150 (Eth.).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, arts. 62(1), 83(1-2) (giving the power to constitutional interpretation to only the House of Federation).

<sup>60</sup> Yonatan Tesfaye Fisseha, Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review 17 (Nov. 1, 2004) (LLM Dissertation,

regarding their power, and they are often reluctant to enforce provisions of the FDRE Constitution.<sup>61</sup> Particularly, the enforcement of constitutional rights violated by a religious or customary court that have equal constitutional recognition could be more contentious. Due to these reasons, they do not have clear legitimacy to examine the constitutionality of laws and the decision of other governmental and non-governmental institutions.<sup>62</sup>

#### IV. CONCLUSION

The Federal Democratic Republic of Ethiopia has recognised customary and religious laws to regulate personal and family matters in parallel with formal laws. However, the lack of legal and institutional instruments that regulate interplay between such multiple laws is significantly affecting the property, personal, and marital rights of women. Discriminatory religious and customary laws, forum shopping, financial constraints, and lack of legal awareness across the legal orders are the main problems that hamper women's rights enforcement. These problems are aggravated by the absence of judicial review on the decision rendered by the religious and customary courts. Therefore, besides the constitutional recognition of such systems, the government must work towards a strong legal and institutional framework that supports and controls the interplay between the institutions.

---

University of Western Cape) (citing Assefa Fisseha, *Constitutional Interpretation: The Respective Role of Courts and the House of Federation*).

<sup>61</sup> *Id.* at 46.

<sup>62</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, arts. 62(1), 83(1) (giving the power to constitutional interpretation to only the House of Federation). Though Ethiopian courts have a room for application of constitutional rights they are reluctant to enforce them due to the wrong perception of the aforementioned provision.