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Mana Murtii Aadaa: Consent, Individual Autonomy and Self-determination

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Abstract

The purpose of this paper is to critically engage the consent requirement and its implications in legitimizing the recently established Mana Murtii Aadaa (Customary Courts) in Oromia Regional State of Ethiopia. The paper explored the liberal and communitarian perspectives on consent and shed light on the paradox of absolute individual autonomy and the rights of self-determination. The consensual customary judicial jurisdiction enshrined in the Federal Democratic Republic of Ethiopia (FDRE) Constitution contradicts the relational/communitarian perspective the constitution is built on. This paper utilized primary data sources generated through Key Informants Interviews (KIIs) with eight customary court elders, three senior judges of Oromia Supreme Court and three Focus Group Discussions (FGDs) consisting of four members each, totaling twenty-three research participants. Moreover, analyzing primary authorities such as the FDRE Constitution, Oromia Customary Court Establishment Proclamation 240/2021, Oromia Customary Court Regulation 10/2021, and the Federal Customary Court Draft Model Law. This paper finds that the implementation of the requirement of consent in the aftermath of the establishment of Mana Murtii Aadaa has become a challenging enterprise. Part of the problem is the lack of comprehensive understanding among the customary law scholars and practitioners. Accordingly, this paper comprehensively laid a ground on how the notion of consent shall be understood in customary court context. Lastly, it calls for further studies and revisiting the constitutions and relevant laws to balance parties' autonomy and the principle of self-determination.

Keywords: Consent, Communitarianism, Customary Court, Liberalism, Oromia

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Mana Murtii Aadaa: Fedhii, Nama Dhuunfaafi Hiree Ofii Ofiin Murteeffachuu

Axareeraa

Kaayyoon ijoo barruu kanaa yaadrimee ulaagaa fedhii maamiltootaafi aangoo murteessummaa Manneen Murtii Aadaa Oromiyaa qaaccessuudha. Barruun kun yaadota wal-danqan lamaan: ilaalcha qeenxeefi ilaalcha waloo leellisan lamaan qaaccessuun yaadamni fedhii dhuunfaa mirga hiree ofii ofiin murteeffachuu sabaafi sablammiitiin akka waldhiitu agarsiiseera. Akka Heerri Mootummaa Federaalaa Itoophiyaa (HMFI) ibsutti, aangoon murteessummaa Mana Murtii Aadaa fedhii maamiltootaa irraa madda. Ka'umsi qajeeltoo kanaas, yaadama mirga namoomaa warra lixaa irraa kan maddeedha. Qorannoon kunis ragaalee jalqabaa karaa af-gaaffii jaarsolii Mana Murtii Aadaa namoota saddeet, abbotii seeraa Mana Murtii Walii galaa Oromiyaa namoota sadiifi gartuu marii xiyyeeffataa sadii kan namoota afur-afur of jalatti qabu, walumaa galatti namoota digdami-sadii hirmaachissuun barruu dhihaateedha. Dabalataanis, seerota akka Heera Mootummaa Federaalaa Itoophiyaa, Heera Naannoo Oromiyaa, Labsii Lakk. 240/2021 Mana Murtii Aadaa Murteessuuf bahe, Dambii Lakk. 10/2021 Mana Murtii Aadaa bulchuu bahe, Wixinee Mana Murtii Aadaa Itoophiyaa walsimsiisuuf wixiname qorannoo kana keessatti xiinxalamaniiru. Argannoon qorannoo kanaas, yaadamni "fedhii" jedhu gadi fageenyaan kan hin xiinxalamne ta'uufi Manneen Murtii Aadaa erga Oromiyaa keessatti hundeeffamees hojii irra oolmaa isaa irratti xiinxalli rogaa hintaasifamne. Hojiirra oolmaa ulaagaa "fedhii maamiltootaa" dhimma isaanii Mana Murtii Aadaatti dhiheeffatan ilaalchisees hubannoo hunda-galeessi akka hanqatuufi kunis rakkoo akka ta'e qorannoon kun ni'agarsiisa. Dhumarratti, qorannoo geggeessuun, keewwanni heera mootummaa Itoophiyaafi seeronni dhimma kanaan walqabatanii bahan fedhii maamilaa mirga hiree ofii ofiin murteessuu haala madaaluun irradeebiin sakatta'amuu akka qabu barruun kun ni'akeeka.

Jechoota Ijoo: Fedhii, Mana Murtii Aadaa, Komunitarinizimii, Liiberalizimii, Oromiyaa

1. Introduction

This paper critically engages three areas in relation to the jurisdiction of customary courts in Ethiopia: consent, individual autonomy and self-determination. The work approaches the concept of consent from philosophical and empirical point of view and argues that the inculcation of "consent-requirement" in legitimizing customary courts in Ethiopian constitutional system is simplistic, problematic and insensitive to the complex socio-political dynamics in which the customary courts operate. To be specific, the idea of "consent-based customary court" was introduced into the 1995 Constitution in the name of protecting the rights of women. However, it is problematic because it attempts to advance liberal and transactional relationality among local communities that values egalitarian, communitarian and restorative sense of justice.

Ethiopia's option of consent-based judicial customary and religious judicial jurisdiction is established on party autonomy that is an individual not a customary court that decides the jurisdiction over a matter. Article 35(4) stipulates 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. (Article 34(5) of FDRE Constitution).

Here, the FDRE Constitution does not detail what consent means or how consent has to be given and when it becomes valid. Instead, it is stated under the same provision that "particulars

shall be determined by the law" (Article 34(5) of FDRE Constitution). The recently enacted Proclamation 240/2021 to establish customary courts in Oromia has also failed to address questions surrounding the notion of consent.

Understandably, the underlying rationale for the inclusion of the concept of 'consent' has been to safeguard the rights of women against the traditional justice system which in liberal sense if patriarchal, "violent" and thus should be subjected to the autonomy of the parties to a case (The Minute of FDRE Constitution, 1993). In a way, it is an ambivalent position, i.e., on the one hand, the FDRE constitution appears that it recognizes the role of customary courts in Ethiopia, and on the other hand, it demands the consent of parties, be it woman or man. This in turn contradicts the self-determination of the "nations, nationalities and peoples" principle which the FDRE constitution seeks to promote (Article 39(2) of the FDRE constitution).

The problem is not only the implication of consent in political and constitutional sense, but the concept also lacks a comprehensive definition and detailed operational guideline. There are scant literatures on this subject matter partly because consent is often linked to contractual, transactional and business relations and hence consent paved a way for "forum shopping" (Amsalu, 2020). Recent studies on Mana Murtii Aadaa also focused more on customary court administration than specific issues such as consent (Ayana, 2024; Indaalammaa et al., 2020; Indaalammaa and Abdi, 2021). Therefore, this paper tries to problematize the idea of consent beyond liberal human and women rights discourses and analyzed it also from indigenous, relational and communitarian notions of justice.

Thus, the purpose of this paper is to engage in the idea of consent and analyze it from a normative perspective and at the same time bring empirical analysis to shed light on the complexity of the matter. Accordingly, it aims to discuss the notion of consent; when a party is said to have a consent; and why the FDRE constitution favors individual autonomy over customary courts' authority. This paper tries to analyze these questions relying on primary data collected through seventeen key informant interviews conducted in October 2024; five focus group discussions conducted in August 2024; review of primary authorities such as constitution, proclamations and regulations; and review of relevant secondary data sources.

Following this introduction, the rest of this paper is divided into four sections. The first section provides the context and methodological approach adopted in this paper. The second section discusses the conceptual and theoretical underpinnings of consent. Under this section, the notion of consent or 'informed consent' in liberal and communitarian senses is discussed. The third section provides the results and discussions of the paper. This section addressed the nature of consent based customary court jurisdiction; whether consent is a matter of one-shot event or a processual matter, and also indicated that over emphasizing parties' autonomy opens a space where parties evade justice in the name or "consent" and ultimately undermining the relevance of customary courts and the rights of the self-determination principle enshrined in the FDRE constitution. The last section concludes that the implementation of consent requirement in Mana Murtii Aadaa remains challenging and also calls for revisiting the constitutional requirement in a way that balances the individual and communitarian perspectives.

2. The Context

Although the FDRE Constitution promised that details regulating customary judicial jurisdiction will be enacted, no detailed national laws regulating customary and religious customary institutions are enacted (Article 34(5) of the FDRE Constitution). The Oromia Regional State, one of the twelve regional states of Ethiopia, has broken the silence with the enactment of the Establishment and Recognition of Oromia Regional State Customary Courts, Proclamation No. 240/2021. The Proclamation no. 240/2021 is supported by Regulation No. 10/2021 and directive enacted by the Oromia supreme court. The Proclamation no. 240/2021 is supported by Regulation No. 10/2021 and directive enacted by the Oromia Supreme Court.
The term Mana Murtii Aadaa means Customary Court in Afaan Oromoo. Throughout this paper the term *Mana Murtii Aadaa* and Customary Court are used interchangeably. The judicial power of Mana Murtii Aadaa is limited to family and civil matters, petty offenses and crimes punishable upon complaints and other matters as may be authorized by other laws (Article 8 of Proclamation No. 240/2021). Moreover, the Mana Murtii Aadaa assumes judicial authority over the cases based on the consent of the parties to the case. This is analogous to the FDRE constitution as well as the Oromia Regional state constitution.

Following the footstep of Oromia, after three decades, in 2024, the Federal Draft Proclamation on the Requirement and Recognition of Customary Courts in Ethiopia (hereafter, the Draft Model Law) attempted to elucidate the material jurisdiction of customary courts. The Draft Model Law stated that the Customary Courts shall exercise judicial jurisdiction on: "family and personal matters; petty offenses and crimes punishable only upon complaint (Article 19 of the Draft Model Law, 2024)." And yet, the Draft Model Law has not defined/detailed the consent requirement and also remained a mere draft. The recognition and establishment of customary courts in Ethiopia is constitutionally supported. It is believed that the recognition of customary court increases access to justice, it is pro cultural development of the society, and it is also considered as the expression of the self-determination of the people (Article 34(5), Article 78(5) and Article 39 of the FDRE Constitution).

However, this study shows that the liberal notion of consent-based judicial jurisdiction is not welcomed by the Mana Murtii Aadaa elders. We also argue that it lacks sensitivity to customary practices; advances monolithic/universalism in the land of legal and normative plurality. It reduced society-custom relations into "transactions" where parties can choose or leave customary courts. In contractual logic, the customary or religious courts are offerors, and the parties are the offeree – parties willful submission constitutes the jurisdiction of customary courts. Clearly, the FDRE constitution weighed parties' autonomy over the authority of religious and customary courts.

The proclamation no. 240/2021 and regulation no. 10/2021 has made clear that it is the duty of the Mana Murtii Aadaa to confirm the consent of the defendant, i.e. "whether he desires his case be adjudicated by a Customary Court before letting him present his statement of defense" (Article 25(2) of Proclamation No. 240/2021). It also provides that "a plaintiff or a defendant

who gave his consent to the jurisdiction of the Customary Court may not revoke it" (Article 25(3) of Proclamation No. 240/2021).

As indicated above, the consensual customary judicial jurisdiction suffers from conceptual as well as practical limitations. For instance, what could have been stated in the FDRE provision as "informed consent" is simply crafted as "consent of the parties." The intention of the drafters of the FDRE constitution simply indicates the "decision" of the parties (The Minutes of FDRE Constitution, 1993). The drafters of the FDRE Constitution also seems to have suspicion that if customary courts are given compulsory jurisdiction, the rights and freedoms of individuals might be violated. The FDRE Constitutional Commission Minute also reiterated that:

> If the consent clause is omitted, then all the guarantees and protection accorded to women will also be vanished. Parties shall shave option to present his/her matter either to customary court or religious court. If they think the customary or religious institution could not protect their right, the constitution shall remain open and promote their rights. Thus, the consent clause shall be preserved. (The Minutes of FDRE Constitution, 1993: 10)

The Draft Model Law capitalizes on the fact that customary courts as simply 'consent-based alternatives' and almost equivalent to any alternative dispute resolution mechanism such as mediation or arbitration – where their existence and function wholly depend on the consent of the parties. For instance, Article 5(1) (i) of the Draft Model Law stipulates that "Customary courts function alongside the regular courts as alternative avenues of dispute resolution." As such, it warns that "no person shall be compelled to the jurisdiction of customary courts" (Article 5(1) (ii) of the Draft Model Law). However, the elders of customary courts in Oromia vehemently resist such legal sanction.

2.1. Methodology

This paper followed a qualitative legal research methodology (Creswell, 2016; Silverman, 2021). Primary data were collected through in-depth interviews with key informants, stakeholders, and Mana Murtii Aadaa/Customary Court elders. In total, twenty-three research participants were engaged in this study. Moreover, fieldworks were conducted in the Sululta sub-City in January, May and September of 2025. During these fieldworks, the researcher has observed four customary courts: Mana Abichu Customary Court, Abba Gadaa Customary Court, Wasarbi Customary Court and Sululta Appellate Customary Court. Furthermore, interviews were conducted with these customary court elders, and Oromia Supreme Court judges who were instrumental in supporting the establishment of customary courts across Oromia.

This paper also draws on rich primary data collected through KIIs and FGDs. The KIIs were conducted with three senior Oromia Supreme Court judges and eight Mana Murtii Aadaa elders, and three FGDs consisting of four members in four study areas were conducted. The main topics of the discussion were: (1) what are the judicial jurisdiction of customary courts in Ethiopia? (2) What does consent-based judicial jurisdiction mean to them? (3) Without written customary laws, how legal determinacy and certainty of decisions be expected? (4) How are

customary court decisions being enforced? (5) How do they evaluate customary courts and role of women in Mana Murtii Aadaa? However, for the purpose of this paper, the focus is mainly given to the second question, the issue of consent, and analyzed under the result and discussion section of this paper.

3. Consent: Theoretical and Conceptual Understandings

Consent may be perceived as an agreement, approval, or permission as to some acts or purposes, especially given voluntarily by a competent person; legally effective assent (Raz, 1981; White and Seery, 2009). In academic discourse, 'informed consent' became an issue back in the 18th century *Slater* v. *Baker and Stapleton* (1767) where the violation of informed consent constitutes medical malpractice (Faden and Beauchamp, 1986). Although medical centers are different from customary court services, the consent requirement also makes customary court comparable.

The term 'consent' is derived from the Latin word *consentire*, which means 'to feel or sense with' (Markwell, 2001). Consent is "an enactment of personal autonomy or means of self-governance" (O'Regan, 2019: 47); it is "a doctrine, device, defense, excuse, justification, process, signifier, capacity, and even a form of 'moral magic' (Feinberg, 1971; O'Regan, 2019: 3); or "a protean concept that takes diverse and shifting shapes depending upon the context" (Westen, 2017); "a joker card" (O'Regan, 2019: 8); it is rationality and voluntariness, i.e., the absence of coercion, undue influence, and mistake (Jackson, 2013). Voluntariness (in its association with autonomy) is 'the most frequently mentioned moral principle in the literature on informed consent" (Faden and Beauchmap, 1986).

Consent establishes family, as well as the state. John Stuart Mill's work entitled *On Liberty*, positioned consent as a tool for balancing the competing interests of the state and its individuals (Mill, 1962; O'Neill, 2003; O'Regan, 2019; Rousseau, 1962). One can also observe the theory of social contract, Rousseau argued that the "will of the people" determines the legitimacy of the state; here, the will is the consent of the masses. Nonetheless, between the individual and the state, there is society. State-society relations codified in constitutions reflect the social contract proper. In this logic, as it is discussed under results and discussions, sanctioning customary court, which mirrors the society, makes such state incoherent and divisive.

To unpack a little further, "consent" on its own right has no meaning, and it is often reframed as "informed consent." The concept of "consent" or "informed consent" signifies "the importance of dignity, individualism, respect for autonomy, and beneficence" (Osuji, 2014). For example, for the informed consent to be valid five elements need to be met: a) disclosure b) comprehension c) voluntariness d) competence and e) consent. In this respect, consent is a subset of informed consent, one of the elements of informed consent. Hence, consent is the final stage – an expression of volition which ultimately allows or disallows the customary court to proceed with the case or not to proceed. In this regard, "informed consent must be an authorization that is intentional, substantially non-controlled, and based on substantial understanding" (Faden and Beauchamp, 1986: 298). The five elements of informed consent can be reformulated in the context of customary court as follows:

Table 1: Informed Consent Process

Customary Court	**A Party ("X")**
Subpoena letter issuance	"X" receives a disclosure from a customary court
Disclose customary court jurisdiction	"X" comprehends the disclosure
Receive parties' response	"X" acts voluntarily in Customary Court
Check if the party accepts	"X" is capable to decide/perform
Accepts the consent	"X" consents to Customary Court

Source: Adopted from the Faden and Beachamp (1986: 275).

For "X" to finally decide or consent to the customary court, "X" shall receive disclosure from the customary court, and the latter shall explain how it will handle the case. It is only when the customary court discloses its mandate and function that "X" could comprehend, voluntarily act in customary court, competent to perform and finally decide or autonomously authorize the customary court to dispose of the case. In other words, customary court becomes an agent; an authorized and disputing party becomes authorizer(s) or principal. By consenting to the customary court, disputing parties authorize the latter.

For customary courts, however, this is nothing but 'estrangement', alienation and disempowering. We have observed in the FGDs and informal discussions with the customary elders, the elders express that the consent requirement often abused to evade reconciliation and local justice. Observing the matter of consent from liberal point of view may not be a problem; however, from a communitarian perspective, it is simply an attempt of turning the host into guest. We know for fact that the universal human rights values do not pay attention to complex historical, traditional, and ethnic and other factors that created and sustain the society (KII-P-07). Where the customary courts violate rights of women, there are mechanisms to challenge decisions of customary courts; and yet consent-requirement is set for all, male or female, rural or urban dweller, literate or illiterate. Thus, a critical observer can raise a question that consent-requirement is not meant for the protection of a section of the society, but to weaken the customary or religious judicial system altogether. After all, individual autonomy is not an absolute right where state atomizes individual rights against community (Ashworth, 2006). There are circumstances where public interests override individual autonomy, and its limitation might be regarded as advisable for social welfare or the 'common good' to an assessment of individual.

3.1. Consent: Liberal vs Communitarian Values

Respect for autonomy is rooted in liberal political and legal theory (Miller, 2010). "Autonomy, in the liberal tradition, is generally understood as self-determination: the freedom to pursue one's conception of a good life, just as long as it does not impinge upon another's identical freedom" (Atkins, 2000: 74). In other words, to do something because it is the custom is to

make no choice (Mill, 1962). For a liberalist, "a society that encourages respect for individuals as autonomous agents will be a more progressive and, on balance, a happier society because the citizens will possess opportunities to foster their capacities in order to act as rational, responsible moral agents" (Hill, 1989). He also maintains that blindly following one's parents' wishes, peer pressures, traditional norms, religious authorities, for example, is regarded in this psychological notion of autonomy as lack of autonomy (Hill, 1989). Being under moral obligation (at all) "presupposes autonomy as a universal condition of moral agency" and "not as the special achievement of the few" (Hill, 1989).

Communitarians reject the idea of individual autonomy on the ground that "it makes autonomy inconsistent with other important values" (McLean, 2009). Mere ability to make decisions is not what counts; rather, the autonomous person is one who recognizes his or her inter-relationship with the society of which s/he is a part" (Beauchamp, 2011). Communitarian/relational autonomy value communal ties which signify individuals as interdependent beings. The absolutization of autonomy reduces the rightness or wrongness of choice to a single factor; i.e., the individual's choice; consequently, morality has been impoverished, hence creating a moral vacuum (Ojusi, 2014: 139; McCormick, 1999).

In African context, individual decisions are influenced by the family, relatives, and kinsmen—because one's wellbeing is intertwined with the wellbeing of the community. Communitarian consensual paradigm implies that "individuals advance their interests in a way that is constantly respectful and mindful of fostering the good of the community and, therefore, the good of all, reflecting the objective concept of the common good" (Osuji, 2018: 138). Osuji rightly argued that:

> From the African point of view, communal values require that the good of all determines the good of the individual. That is, the welfare of the individual is dependent on the welfare of all – of the community. Individuals ought to work for the good of the community – which also includes the individual's good. The success and meaning of the life of individuals rest on identifying with the community (Osuji, 2014: 139).

In other words, individual autonomy is respected within the wider societal value. Individual autonomy that promotes social cohesion, justice and wellbeing of society is the one that African communitarianism often promotes. Thus, it is not only the individual rights that matter but also "the solidarity, justice, cooperation, compassion, and reciprocity" (Osuji, 2014: 139); persons not as independent of one another and more as interdependent of one another" (Kamwangamalu, 1999).

In our case, parties to a case are not forced to produce their case to be disposed of by the customary courts. However, when justice demands, they cannot evade it in the name of 'respect for individual autonomy.' In other words, it is important to note that there is no absolute right in a strict sense. For example, informed consent principle in medical health can be exceptionally ignored on the following grounds: "the public health emergency, the medical emergency, the

incompetent patient, the therapeutic privilege, and the patient waiver" (Faden and Beauchamp, 1986: 35). Article 20 (1) of the Ethiopian Civil Code also clearly illustrates that:

> A person may at any time refuse to submit himself to a medical or surgical examination or treatment. Nothing in this Article shall affect the provisions of laws or regulations providing for a physical examination of persons or their compulsory vaccination or other similar measures in the public interest (Article 20(1 and 2) of the Ethiopian Civil Code, 1960).

Here, the Civil Code attempted to balance private autonomy against public interest. Our argument is that the individual is not always right; customary courts are also not enemies of the individual. To set consent-requirement is to estrange customary courts, which is counterproductive and negates social cohesion that customary courts are meant to promote. This requires serious revision of the FDRE constitution, and also to enact detailed laws that provide, if consent-requirement is maintained, when consent has to be honored and when to be dishonored. In other words, a coherent and sustainable system is the one that balances party autonomy/liberal thought and customary and communitarian approaches.

4. Results and Discussions

4.1. Consent-based Customary Court: Tacit or Express?

In consent-based judicial jurisdiction, the customary courts had to secure the parties' consent to exercise jurisdiction over a case. If the plaintiff sues a defendant at the customary court, it can be assumed that the plaintiff had consented to the judicial power of the customary court, and the defendant had to consent. However, a question may arise if the consent has not been given expressly (written or orally) or a defendant may impliedly accept (by conduct) the judicial power of customary courts, and the problem of proof may arise if the defendant denies the fact at appellate stage, for instance. O'Neil and O'Regan (2007: 12) observe that "implied consent can be replaced by explicit consent in some, but not all, cases." However, implicit or tacit consent is difficult to prove whether a person has impliedly consented it or not. The Ethiopan Sharia courts have forms in which the parties express their consent, similarly the Ethiopian Mana Murtii Aadaa may need to develop a consent form, to fill the gap.

4.2. Consent: An Event or Process?

Is consenting to customary court a matter of a single event or a process? If consent is regarded as a discrete event, then parties would not have a chance to vary it; however, if it is considered a process, then there would be possibilities to review it. Thus, "the event model conforms well to the legal requirements for informed consent" (Osuji, 2014). It seems that the Proclamation No. 240/2021 adoptes the event model: "a plaintiff or a defendant who gave his consent to the jurisdiction of the Customary Court may not revoke it" (Article 25(3) of Proclamation No. 240/2021). However, one can also argue in favor of a process model. That is, it must become less an empty ritual and more meaningful social practice (Berg, 2001).

Furthermore, once parties freely and validly consent to the Mana Murtii Aadaa by default it is assumed that the parties have accepted the latter will apply customary law and customary procedures. Thus, once consent is given and a case is proceeding, a party cannot revoke it save

it to other grounds such as coercion. In cases where parties consent to customary courts under coercion or duress, they shall have the right to invalidate it. For example, a contract remains valid when the consent of the parties is free from vices such as duress, fraud and mistakes. In such circumstances, invalidation of a contract where parties prove the existence of defects is legally supported (See Articles 1690 to 1710 of Ethiopian Civil Code). One can rightly argue that consent given to customary court remains valid unless proven otherwise.

4.3. Vices to Consent: Coercion, Manipulation and Persuasion?

In an interview with key informants, it has become clear that Mana Murtii Aadaa elders persuade the parties to consent. From the side of Mana Murtii Aadaa, persuasion takes two forms: subtle influence and pressure. Subtle influence exists where "some element of coercion" is present in many transactions in which the elders ask clients to proceed with the court processes (FGD-P-011).

Mana Murtii Aadaa elders lately understood that FDRE Constitution and Proclamation 240/2021 provided the legal requirement of consent, and most of the informants consider this requirement absurd, and created a sense of that made their contribution 'insignificant' (KII-P-04; KII-07). Where the customary court elders are unhappy with such legal requirements, then it is difficult to imagine that informed consent principal implementation would not be smooth. Besides, there is a lack of understanding among the elders how Mana Murtii Aadaa should handle the clients. For example, there are elders who consider themselves as judges and try to coerce parties to submit to their jurisdiction (KII-P-03).

In extreme cases, there are circumstances where Mana Murtii Aadaa exerts undue influence on the parties to the extent that a party (especially the defendant) is unable to resist acting to avoid it. It is often heard that parties refuse to appear before the Customary Court under the wrong perception of Mana Murtii Aadaa cannot summon a party. Sometimes, summoned defendants refuse to go to customary court (KII-P-3). Such is the counterproductive nature of introducing unregulated and uncritical principle of "consent-requirement." Parties need to know also that mere appearance before Mana Murtii Aadaa does not automatically constitute informed consent to Mana Murtii Aadaa. Without appearance it is impossible to know if the party consented or not; likewise mere appearance shall not constitute consent unless the party impliedly consent (KII-P-5).

Other than coercion, Mana Murtii Aadaa elders may sometimes opt to use persuasion. And the question may arise whether persuasion is vice against consent. Here "persuasion" could be rational persuasion, i.e. "an intentional and successful attempt to induce a person, through appeals to reason, to freely accept—as his or her own—the beliefs, attitudes, values, intentions, or actions advocated by the persuader" (Faden and Beauchamp, 1986). Where there is "forceful persuasion" it is no more persuasion but manipulation. There are instances where elders use their own wisdom and persuade the parties to accept their authority (FGD-1.

Noting the prevalence of persuasion in human interaction, one could rightly state that when is consent free? In medical treatment, physicians "would be morally blameworthy if they did not

attempt to persuade their patients consent to interventions that are medically necessitated" (Faden and Beauchamp, 1986). Similarly, the customary court judges may attempt to persuade the clients to accept their authority and attempt to reconcile the dispute amicably. Nonetheless, in our case, customary court elders are not entitled in the legal sense and yet may exercise their moral authority to persuade the parties to submit their cases to the customary court.

4.4. Consent: Liberalism in the Communitarian Constitution?

The FDRE constitution recognizes the rights of "nations, nationalities and peoples" self-determination up to secession (Article 39 of the FDRE Constitution). In principle, the establishment of regional states in Ethiopia is the expression of self-determination of "nations, nationalities and peoples" of Ethiopia. The constitution also promotes the cultural, language and history of the people that lives in Ethiopia. As a result, some scholars often regard the constitution as 'neo-Marxist' ideology wrapped in constitutional garment (Habtu, 2005; Abebe, 2020). However, the close examination of the constitution, especially in a relation to 'consent-based' customary or religious institution, does not appeal much to communitarian values; rather it is fundamentally liberal, pro-liberal and transactional in essence.

In our case, parties to a case are constitutionally guaranteed to freely and responsibly consent to the jurisdiction of the religious and customary court jurisdictions (Art. 34(5) of the FDRE Constitution). It is their free and full decision that allows the customary court to dispose of the case. In other words, "to respect an autonomous agent is to recognize with due appreciation that person's capacities and perspective, including his or her right to hold certain views, to make certain choices, and to take certain actions based on personal values and beliefs" (Faden and Beauchamp, 1986: 8). Here, parties have the autonomy to choose either the regular court or the customary court.

Once again, it is important to problematize the notion of contractual nature of customary judicial function. After all, customary courts are not private judicial ventures such as Arbitration Centers. Rather, they are "public" entities and dispose cases based on customary laws of the community they serve. In that sense, the relationship between customary courts and the disputing parties cannot be reduced to contractual matters. It is important to note that the establishment of customary courts in Ethiopia, especially, in the case of Oromia Regional State it is generally perceived as the expression of cultural self-determination of the Oromo people. It is part and parcel of collective cultural development endeavors – constitutional promises given birth after a quarter of a century. Hence, it is wholly absurd to regard Mana Murtii Aadaa as a private mediation center where parties can simply ignore it. In other words, one must put collective self-determination and individual autonomy on a scale based on case-by-case analysis. In summary, individual autonomy has no precedence as long as it negates the common good.

4.5. Individual Autonomy or Self-Determination?

Why does the FDRE Constitution opt for parties' autonomy over the compulsory customary court authority? It is understandable that Art. 34(5) was inserted to promote the rights of women - for the drafters of the FDRE constitution had the understanding that women are victims in traditional and religious dispute resolution mechanisms (The Minutes of FDRE

Constitution, 1993). The argument was that women's decision making shall be protected when it comes to the jurisdiction of customary courts authority over their matter, say for example in the case of succession, divorce and other related cases. The right to consent is considered as "an emancipatory aim that has often been one of the few defenses available to women, particularly marginalized women, to resist pressures to override their own decision-making authority" (Kalbian, 2005).

Nonetheless, customary courts are an expression of the cultural practices of the nations and nationalities of Ethiopia. Article 39(2) of the FDRE constitution is one of the provisions that are not made subject to amendment, and yet Article 34(5) limits its absoluteness. One can argue that the spirit of Article 34(5) of the FDRE stipulated contradictory principle which defeats the very objective of self-determination of its people. One may argue that if regular courts are functioning, then the demise of customary courts would not be a problem. However, one has to be cautious that the nature of justice that the regular courts provide has never been restorative and reconciliatory.

Moreover, subjecting customary courts to the decision of individual parties emanates from the belief that customary laws offend fundamental freedoms and human rights, and the state shall oversee if such customary practices deviate from the international standards and so on. It has to be noted that cultural or group rights should respect individual rights and freedom of choice; at the same time individual autonomy should respect common rights as well (Kymlicka, 2007). For example, any person may refuse his case to be disposed of by the Mana Murtii Aadaa. In other words, parties' constitutional right to consent has to be accompanied by justifications. Because the consent requirement should not be used as a means to evade reconciliatory and restorative justice.

This paper advances the view that both individualistic autonomy and communitarian relationality are not antithetical to one another. Rather, both are inextricably linked concepts; 'either or' approach is simply red herring. Because "relational autonomy does not seek to deny the importance of decisional freedom that is so dear to the heart of individualistic autonomy" (McLean, 2009: 28). If a party rejects the jurisdiction of the customary court, the court shall ask the reasons and give an order such as refer the case to regular court provided that it found the justification convincing. Where the Mana Murtii Aadaa finds opting out of customary court jurisdiction is mainly to evade restorative justice, it shall indicate this fact and proceed with the case in the interest of truth and justice.

It is important to rethink the liberal notion which treats 'traditional' dispute resolution mechanism with eyes of suspicion, as incapable and susceptible to human rights violations. It is important to note that indigenous courts served the society long before the formation of a modern state. So, the question, why should such an institution – which continued to exist irrespective of the state's capability, assume jurisdiction based on the consent of the parties? One could argue that the requirement of consent is rooted in the colonial legacy (Yakubu, 2005). Thus, such argument may not strictly apply in for Ethiopia's legal history for Ethiopia was never colonized and yet willfully transplanted western legal principles under the

modernization process (Abdo, 2022). In turn, this puts Ethiopia in a position to be pragmatic and adopt dynamic legal plurality where customary, religious and other informal legal orders play their respective role in co-creating resilient individuals without undermining social cohesion.

4.6. Consent Requirement Implementation Challenges

One of the practical challenges often observed in the Oromia Customary Courts is that courts do not write in the files whether such a party has consented or not (KII-P-08). For instance, an aggrieved party may appeal to the regular court stating that the customary court entertained a case without his/her consent. Thus, "to avoid complexity and promote efficacy, there shall be a form upon which both parties express their consent" (FGD-1).

> Consent is a constitutional requirement. It is very important, and the constitution also sanctions the Customary Courts to assume cases contrary to the law but based on the consent of the parties to the case. The rational background of this requirement is to give protection to the parties. The matters allowed to be entertained are personal and family matters. On such matters, parties shall not be coerced to go through Customary Courts. If they are coerced to observe Customary Courts, then their right may be violated. So, voluntariness is one requirement. Since the purpose of the Customary Court is mainly concerned with amicable solutions, restorative and reconciliatory by their nature, the parties shall not be coerced or manipulated. Justice from Customary Courts shall come by parties' choice not by force (KII-P-02).

In practice, there are instances where defendants evade justice under the pretext of consent-based jurisdiction. Hence, some customary court elders indicated that, in the interest of justice, defendants have to follow the orders of the customary court (KII-P-06). The elders of the customary courts are of the opinion that it is not the Oromo custom to coerce anyone to submit his case to the latter; nonetheless the constitutional requirement of consent could be abused in a way that pave the way for parties to evade justice.

It is also observed that where a defendant objects to the jurisdiction of the customary court, elders attempt to persuade him/her using various traditional methods and that they close the case only if it is impossible to convince the accused (KII-P-07). The findings of this study also indicate that customary courts hear cases without the consent of the dependent. Some Customary Court elders also mentioned that if the accused refuses to appear or is absent, customary court will continue to hear the case in absentia, which indicates that the Customary Courts are establishing jurisdiction without the consent of the accused (KII-P-09). Furthermore, there are cases where Customary Courts send subpoena to the accused/defendant stating, "If you do not appear on the date of the hearing, we will hear the case in your absence." (FGD-3).

It is also evident from the readings of the case files that it is difficult to distinguish whether customary courts have ascertained the consent of the defendant. Often parties appeal to ordinary court on the ground that she/he has not consented, and sometimes courts summon the elders of the Customary Court to confirm whether a defendant has consented or not (KII-P-09). Proclamation No. 240/2024 has also failed to stipulate the procedure of ascertaining the consent of the parties. This calls for amendment of the proclamation to stipulate the requirement of ascertaining the consent of parties in writing before commencing the hearing.

Customary Courts hear cases without ascertaining the consent, which is partly related to the elders' lack of knowledge (KII-P-09). That is, the elders perceive that a dishonest one does not want to give consent to customary courts; an offender or guilty person does not give his consent; requesting the consent of a defendant undermines the plaintiff's access to justice (KII-P-08 & KII-P-10). Although some of the attitudes or fears expressed by the elders of the Customary Court are understandable, they are not always true. A defendant who is not interested in the authority of the customary court's elders may be pressured through social acts such as ostracization or unfavorable decisions (Abdo, 2011; Abdo, 2022; Alemu, 2013; Aneme, 2018).

5. Concluding Remarks

Throughout this paper, attempt has been made to discuss the nature and application of consent based customary judicial system. The FDRE constitution provides that religious and customary courts can entertain personal and family matters based on the parties' consent. This paper attempted to answer what consent mean, why the FDRE constitution favoured individual autonomy over the customary authority and shed light on the paradox of individual autonomy and self-determination.

This paper argued that the notion of consent in liberal sense failed to consider the relational and communitarian aspect of consent and thus it cannot address the moral vacuum that result from absolutization of personal autonomy. On the other hand, the communitarian consent which recognizes individual autonomy without negating common good has significance in African traditional justice system. Thus, we have tried to argue that African traditional system in general and the practice of Mana Murtii Aadaa respects the decisions of the parties to a case, and yet when justice demands parties' autonomy can be limited. The paper also argued that de-absolutization (flexible and contextual exercise of autonomy) of individual right to consent helps to fill the moral vacuum that absolutization of individual autonomy creates.

The paper also indicated that the implementation of the requirement of consent in Mana Murtii Aadaa judicial practice is met with several challenges. Among other things, the customary court elder's perception of parties right to consent his often met with opposition. Moreover, Mana Murtii Aadaa elders do not ask if the parties' consent to the jurisdiction of the court or otherwise. Furthermore, there is no consent form that customary court expected to fill, and it has been difficult to proof if the parties has consented or not. Lastly, but not least, we argue that upholding individual autonomy and giving prime importance to individual rights only negates the rights of the self-determination of the people. Therefore, this calls for balancing, based on case-by-case and context-oriented, individual autonomy against the common good through the provision of detailed framework on the scope, nature and observance of consent.

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