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INSTITUTIONALIZING NON-STATE JUSTICE SYSTEM IN
THE SOMALI REGION

By: Mihiret Dereje Tiruneh

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List of Acronyms

| | |
|-------|---------------------------------------------------|
| EPRDF | Ethiopian People’s Revolutionary Democratic Front |
| FDRE | Federal Democratic Republic of Ethiopia |
| NSJS | Non-State Justice System |
| ONLF | Ogaden National Liberation Front |
| WSLF | West Somali Liberation Front |

Abstract

This paper conducted with the objective of examining institutionalizing non-state justice system in the Somali region. As such it is aimed to examine the nature, process, and function of the non-state justice system among the Somali people and explore alternatives to institutionalize the non-state justice system in-to the state-led system. To do so, the researcher employed qualitative research methodology. Interview, case study and document analysis used as a source of data. The findings of the study show that, the home-grown legitimacy of the Somali non-state justice system, the historical and political background of the region made the Somali non-state justice system preferable conflict resolution system than the state justice system. Moreover, the research revealed that the adjudicative power of the elders beyond legally recognized jurisdiction and its effectiveness to ensure peace and security of the region. However, even though the Somali non-state justice system plays a pivotal role to settle conflicts, it has limitations which would constrain to effectively ascertain justice in the region. The first limitation is legislative restriction of jurisdiction. The second limitation is lack of compelling power to enforce the decisions of the non-state justice system. Finally, its discriminatory aspect in terms of human rights. Therefore, the findings of the study suggest that, to overcome the limitations and maximize its effectiveness; first the non-state justice system of Somali region should have to get formal legislative recognition over criminal cases and intraclan conflicts. Secondly the state should provide the necessary finance and capacity building trainings and create a conducive environment to exercise their power according to the cultural context.

Keywords:- State Justice System, Non-State justice system, Institutionalizing , Somali Region

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Conflicts have existed in all cultures, religions, and societies since time immemorial. There can be conflict at any societal level. It is endemic to human society among individuals and groups. It is also unavoidable, and it continues to occur. Thus, for the sake of the conflicting parties in particular, and the country at large, conflicts must be resolved aptly, otherwise it will result in economic, political, and social demolitions (Yideg,2014).

From a legal perspective, the mechanism of conflict resolution includes two types: litigation through the state justice system and the non-state justice system (Yanming,2010). Both types of conflict resolution mechanisms are common in Ethiopia. Specifically, the non-state justice system in Ethiopia is as old as memory can tell. Furthermore, both conflict resolution mechanisms are primarily about rendering quality justice to all sections of society indiscriminately.

As a body of African history, Ethiopia had practiced the non-state justice system. Similar to other ancient societies, in Ethiopia before the establishment of the state justice system local chiefs having different titles like clan leader, elders and village heads used to settle disputes using customary laws, religious laws and their own conscious of right and wrong (Abyssinia Law, 2022). Prior to mid fourteenth century the non-state justice system was significantly applicable. In the Christian community the Old Testament laws, the Islamic community its religious laws and in other cultural societies the respective cultural norms were used to settle disputes of individuals as well as groups (assefaa,2020).

It was during the reign of Zera Yaikob the first attempt of codifying laws was made; with the intention of ruling the country with written laws than unwritten customary laws (Augustyniak,2012). Unlike the codification of Zera Yaikob, emperor Hailessilase introduced the codification of laws in late 1950's and 1960's with the intention of modernizing the legal system, bringing uniformity and enabling citizens to be certain about their rights and duties (Beru,2013). Emperor Hailessilase's codification of laws was conducted by transplanting various laws from different European countries caused the non-state justice system leave the room for the state-led justice system (Augustyniak,2012). The *Dereg* also followed the pattern of the preceding governments and outlawed the non-state justice systems (Assefa, 2020). Nevertheless, the application of these laws faced implied resistance from the people

(Abdo, 2007). The fall of the *Derge* regime and the enactment of the 1995 FDRE constitution promised a new era for the non-state justice system.

The Somali regional state is among the constitutionally established regions. Somali region is the second largest region located in the south- eastern part of Ethiopia having Jijiga as a capital of the region. The regions formation dated back to late 1890's by the colonial secret agreement of Britain and (Emmenegger,2021). The region is a host for multi ethnic groups. Simillar to other parts of the country conflict occurs in Somali region as well. The main causes of conflict in Somali region are scarcity of natural resources like water and grazing land, (Boah et Mamo, 2008), livestock raids and revenge tradition (Muluken,2020).

The various conflict resolution mechanisms witness the pluralistic justice systems of the region. The Somali people settle their conflict through the state justice system or the non-state justice system; *xeer* and *sharia* laws. *Xeer* has been predominantly applied by the Somali people before the introduction of the state justice system (Seid et Jotte, 2016). The region as part of the country shares similar legal history specially after 1897. *Xeer* has a significant legitimacy in the region than the state justice system and operates regardless of the legislative limitations.

Accordingly, this paper aims at finding the preferable conflict resolution mechanism in the Somali region, exploring the rationale for opting for the non-state over the state-led. Doing so, it focuses on what the process looks like, evaluates the pros and cons of the Somali non-state justice system and how to address the gaps.

1.2 Statement of the problem

Conflict is as natural as peace and conflict can occur wherever there is incompatibility of interest (Ajayi & Buhari, 2014). Since the existence of conflict is inevitable, it requires to be addressed properly. In Africa, there are different levels of conflict resolution; interpersonal or family level, extended family level, at village or town level (Ajayi & Buhari,2014).

Assuming the inevitability of conflict, the FDRE constitution, under Article 34 (5) gave recognition for religious and customary laws on family and personal laws only up on the consent of the parties. Using the federal constitution as a bench-mark, regional states adopted their constitution by recognizing a non-state justice system. As such, the Somali regional state gave legal recognition for the non-state justice system on family, personal and property matters. Contrary to the state laws, Somali elders adjudicate criminal cases through the non-state system (Hagmann, 2007, Pankhurst et Assefa,2016). Most Somalis revere the non-state

than the state justice system (Hagmann, 2007, Pankhurst et Assefa,2016). The elders have every jurisdiction despite what is stipulated under the state laws. A large number of criminal cases settled through the non-state system, without getting legal recognition (Mohammed et Jotte, 2016). Yet the decision of the elders might be executed by the state law enforcement bodies (Mohammed et Jotte, 2016).

The non-state justice system is the most accustomed means of conflict resolution mechanism in the Somali region. Yet the rationale for co-opting the non-state justice system by the community and the societal perception of justice is not yet scrutinized. This study will examine the role of the non-state justice system in the region, the reasons why the community chose the non-state justice system over the state justice system, and assess the way to institutionalize it in the state justice system.

1.3 Research objectives

1.3.1 General objectives of the research

The study will explore the non-state justice system of Somali region and the need for institutionalizing it.

1.3.2 Specific objectives of the research

The specific objectives of this study are intended to:

- i. examine the nature, process, and function of the non-state justice system among the Somali people and
- ii. explore alternatives to institutionalize the non-state justice system in-to the state-led system.

1.4 Research questions

To attain the above objective, the research aims to answer the following research questions:

1. what is the nature, process, and the function of non-state justice system under the Ethiopian legal system?
2. How do the Somalis in the Somali region describe the state justice system and what are their rationales to opt for a non-state justice system?

1.5 Significance of the study

This study will contribute to the existing knowledge in incorporating the non-state justice system in-to the state justice system of Ethiopia. It will help to duly comprehend the non-state

justice system of Somali people; the process and its pros and cons. It also will help to get a solution for the existing legal gap and how to institutionalize it in the state justice system. It will also serve to fill the existing gap in the study area and as a reference for those who will conduct research on the area. Furthermore, it will help as a policy guidance and direction for policy makers in institutionalizing the non-state justice system to eventually help the residents of the region to enjoy a better justice system in which they can solve their disputes in their own way.

1.6 The scope of the study

Geographically the scope of the study is delimited to the Somali region. It mainly explores the interaction of non-state and state justice systems i.e. values, peoples, authorities, and the legitimacy of authorities of the two institutions following the enactment of the 1995 FDRE constitution.

1.7 Limitations of the study

Since the researcher is female and women are not allowed to observe and present at the adjudication place (Seid et Jotte, 2016) it will be impossible to conduct observation of the non-state adjudication process. The effect of this limitation is reduced through case study and interview.

1.8 Organization of the study

The study comprises five chapters. The first chapter is the introductory part of the study which includes the background of the study, statement of the problem, general and specific objectives of the study, research questions, significance, scope and limitations of the study. The second chapter is about literature and documents which are related and written with the concept of a non-state legal system and the theory employed to conduct the study. The third chapter mainly deals with the methodological part of the study that gives brief information on how the study was conducted. The fourth chapter of the study present data analysis and presentation that discusses the major findings of the study by scrutinizing the data that had been found through several sets of instruments. The last chapter culminates the study by providing a conclusion and recommendation.

CHAPTER TWO

DEFINITION OF KEY TERMS, CONCEPTUAL FRAMEWORK AND REVIEW OF RELATED LITERATURE

General Overview

From a legal perspective, the mechanisms of conflict resolution are two types: litigation through the state justice system and the non-state justice system (Yanming,2010). The non-state justice system can be either a religious legal system like Sharia or a customary legal system (Forsyth, 2007). So, it is possible to find more than two legal systems in a certain country.

Africans have their own way of conflict resolution mechanisms despite the state justice system like the religious justice system and other conflict resolution mechanisms according to the norms and traditions of the society. These conflict resolution mechanisms are called interchangeably either traditional justice systems, customary, non-formal, informal, indigenous or non-state justice system (Muigua,1).

For the purpose of consistency and contextualization, of the research with the Ethiopian case specifically the Somali region non-state justice system (hereinafter ‘NSJS’) is preferred. NSJS is preferred because these institutions are organized notwithstanding the participation of the state and according to the will of the respective society. Additionally, the researcher believes the other interchangeable names holds a tacit connotation as NSJS are at inferior position compared to the western made state justice system. Thus, to debunk such connotations NSJS is preferred.

This paper mainly focuses on only the state justice system and NSJS without including the religious justice system. But special consideration is given whenever an intersection is found between the NSJS and religious justice systems.

The study generally deals with institutionalizing the NSJS in the state justice system in Somali region. Yet this chapter discusses the concept and nature of the non-state justice system, the experience of selected African NSJS and models of institutionalizing the state justice system.

2.1 The concept of the NSJS System in Africa

In every society, conflict exists whenever incompatibility of interest arises and it can be solved in different ways depending on the interest of the conflicting parties. The conflict resolution mechanisms may be the state justice system or the conventionally accepted justice system of a society or religious conflict resolution mechanisms. Woodman (as cited by Forsyth, 2007) asserts that NSJS signifies institutional pluralism which includes recognition of structure, process and institutions of other legal systems. Though the level of their influence and acceptance by the state differs, the existence of NSJS denotes the inclination for legal pluralism.

NSJS in Africa lays its foundation in the culture and history of African people (Myers and Shinn, 2010). NSJS is a system that has developed independently in the context of pre-modern societal structures and has been practised over a reasonable period of time (Boege, 2006).

For Muigua (2017) African NSJS denotes every means Africans applied to manage conflict since older times and traditions which manifests African values and norms passed from generation to generation.

Galvanek and Planta (2019) define NSJS as a mechanism of conflict resolution characterized by a considerable duration of time, originated locally, non-alien, flexible, process-oriented, independent of the state and centrality of relationships and key persons. They also assert NSJS can emanate from ethnicity, tribe, culture or religion.

Most scholars consider time duration as a parameter to label a certain non-state conflict resolution mechanism. Yet the time criteria is subjected to contestation. Hobsbawm and Ranger (as cited by Galvanek and Planta 2019) introduced the term “*invented tradition*” and argues as traditions which claimed to be old are often recent in origin and sometimes reinvented. On the other hand, Galvanek and Planta (2019) assert that even the “*invented tradition*” can present a powerful narrative by taking the experience of Liberia where the government preferred the NSJS which is found to be difficult to know how the system operated prior to the original settlers. Similarly, Pimentel (2010) argues against the idea of Hobsbawm and Ranger’s “*invented tradition*” and asserts that with the changing circumstances in a society, some aspect of NSJS is subjected to change yet it doesn’t mean that it loses its original essence. Boege (2006) also argues in favor of the adaptability of NSJS with the emerging changes in society, however, the change is still rooted in custom.

NSJS existed even before the establishment of the state justice system (Muigua,2017). In the pre-colonial days Africans resolve their dispute through the tribunals which bestowed their trust on elders, chiefs, priests, priestesses, secret cults and etc. (Ajayi,2014). Ajayi (2014) asserts it is the introduction of the slave trade and the coming of colonial powers that corrupted and removed the African way of monitoring, managing, preventing, and resolving conflicts and the whole peace process.

Africans employ adjudication, arbitration, mediation, reconciliation and negation non-state justice methods to resolve their conflict (Ajayi,2014). In doing so they may apply legal principles to convince the conflicting parties as to the consequence of their action (Ajayi,2014).

The NSJS in Africa aimed at removing the root cause of conflict, bringing a genuine reconciliation among the conflicting parties, maintaining societal harmony, getting the truth, putting the right setting for societal production and development, promoting good governance and law and order, providing security of lives and property and getting collective wellbeing and happiness (Ajayi,2014). NSJS are conflict resolution mechanisms and employes negotiation, mediation and conciliation to address the root cause of conflict and enables the parties in conflict to reach at common satisfying and lasting solution (Muigua,2017)

As a certain society has its own peculiar values, NSJS may vary from society to society. Galvanek and Planta (2019) assert that heterogenous societies may have different NSJS approaches which may result in more contradiction than accommodation. Forsyth (2007) also states as the NSJS gets their recognition out of the growing acceptance of the validity and legitimacy of their adjudicative power which are accessibility, flexibility, cost-effectiveness and familial culture.

Thus, in this paper, African NSJS is defined as a legitimate or widely accepted conflict resolution mechanism; its process, procedures, values, norms, principles and authorities originated from a given community's culture and belief as opposed to state or external forces imposition, has been applicable for a reasonable long period of time and subjected to change with the changing circumstances.

2.1.1 Features of African NSJS

Though NSJS differ from society to society, there are a couple of common features found in most African NSJS. As the name implies it is a non-state or community-based and the conflict resolution methods are based on the accepted beliefs, norms and values of the community (Muigua,2017). Muigua (2017) states that high reliance on ancestral power, magic, witchcraft and superstition for truth and belief, high reverence for elders and communal thinking and togetherness are the other common feature of NSJS.

Sherry & Myers (as cited in Muigua,2017) asserts that NSJS operates based on cooperation, communitarianism, strong group coherence, conformity, shared values, flexible dialogues, restoration than punishment, consensus-based decision making and symbolized by exchange of food and drinks as the end of hostility and restoration of social harmony. Ayinla (as cited in Muigua,2017) asserts obedience to the decision of NSJS is greater than the state justice system owing to social and religious sanctions.

For Galvanek and Planta (2019), NSJS is a ‘community driven’ or ‘bottom up’ justice system since it is more participatory, and legitimate and promotes reconciliation and development. NSJS for several reasons may not retain the old-age principles. Muigua (2017) argues that African non-state justice systems are dynamic, it is possible to find the influence of new customs and practices than a strict old tradition. Similarly, Galvanek and Planta (2019) state that NSJS are subjected to change and decline in legitimacy owing to colonization, modernization, civil war, educational opportunity and migration.

Unlike the state justice system, NSJS neither have special procedures for criminal and civil cases nor recorded in any form of documentation (Muigua,2017). NSJS operates in the absence of written or statutory law. Their procedures, values and norms however pass from generation to generation. NSJS are not featured by monopoly and legitimacy of violence by the state like state justice system, as a result, a section of the society is entitled to ascertain their right in their way by their unwritten law in an orderly manner (Boage, 2006).

NSJS does not suffer the gap between legal transplantation and implementation since it originated with in the community itself. NSJS are well known and understood by the respective community (Galvanek and Planta, 2019).

Myers & Shinn (2010) argues as; colonialism and epistemological imperialism are the major constraints to hold back the development of African NSJS. Male domination is a significant feature of NSJS in Africa (Myers & Shinn, 2010). Myers & Shinn (2010) argues as male

domination in African NSJS shows improvements and provide some illustrations like women elders in Ethiopia since the late 1990s, full participation of women in the 2003 Ngok of Abyei People's Conference in Sudan, women's involvement in Kenya-Somalia border conflict and significant number of women members of parliament in Rwanda.

There is no single NSJS that applies to every society, it varies considerably from place to place. Unlike the state justice system, NSJS is context-based not universally applicable (Boage, 2006). According to Boage (2006), NSJS are "*Holistic and consensus based*". The ultimate goal of NSJS is the restoration of harmony and relationships. Reconciliation is the means to restore social harmony and the relationship of the parties in conflict. For the reconciliation and restoration to be real the conflicting parties need to have a voluntarily mutual understanding and interpretation of facts like what was the real cause of the conflict and actions and reactions each party took in the conflict, agreement to cease the conflict and look for solutions (Boage, 2006).

Since NSJS have no monopoly on legitimate use of violence to enforce their decisions, they follow a unique way, unlike the state justice system. If one of the conflicting parties fails to voluntarily abide by the decision, the punishment is held at a social and supernatural level; shaming, stigmatizing, cursing and sorcery (Boage, 2006).

The effectiveness of NSJS depends on the relationship of the conflicting parties. The party's common worldview and mutual acknowledgement towards the NSJS create a sense of belongingness to that specific system, eases the process and leads to effective results (Boage, 2006).

2.2 Models of Institutionalizing NSJS

Institutionalizing focused on the behavior of individuals, organizations and states engaged in looking for legitimacy and how they are formed by spreading new practices and ideas as new norms (Murigi,2020). Institutionalization is expressed in legal frameworks, policy formulation and implementation of the measures to ascertain NSJS is acceptable practice (Murigi,2020). Thus, the idea of institutionalizing NSJS is concerned with ways to legitimize NSJS which is getting legal recognition by enacting laws, and support by the state from the provision of resources to enabling NSJS to enforce their decision and enabling and respecting them to operate according to their inherent nature and values.

There is no one size fits all model for institutionalizing NSJS. States adopt and follow their own way. The spectrum of the nexus between NSJS and the state justice system ranges from constructive coexistence or where the state incorporates the NSJS into the legal system to antagonistic relations or where the state outlaws NSJS. Scholars come up with different models, yet none of them escape criticism; each model has its own pros and cons.

The nexus between NSJS and the state justice system is influenced by different factors. Forsyth (2007) argues, the relationship between the state justice system and NSJS is shaped by the good will of the state to accept the legality of the adjudicative power of NSJS. Similarly, Galvanek and Planta (2019) state four factors that shape the nexus between the state justice system and NSJS. These factors are the political, structural and historical relationship of the two systems; compatibility and complementarity of values and principles of the two systems; conflict type, degree of escalation, and external intervention finally individual characteristics of each mechanism such as strengths and weaknesses, legitimacy and constituency support of each of the two systems (Galvanek and Planta, 2019).

Galvanek and Planta (2019) and Forsyth (2007) mentioned different models of institutionalizing NSJS on the degree of support by the state, recognition of the exclusive jurisdiction of NSJS, the type of regulation and supervision the state applies and the two systems' relation in terms of appeal and case referral. Even though these scholars come up with their models, in some of the models it is hard to put a clear demarcation especially when the state loosened its relation with NSJS.

The hybrid model was adopted in Liberia during the British colonial rule; was by bringing together the NSJS and the state justice system and giving a supervisory power to the latter including the power to appoint and remove the tribal chiefs and headmen (Galvanek and Planta, 2019). Yet the supervisory power of the state reduced the public trust in tribal chiefs and headmen (Galvanek and Planta, 2019). This model is similar to Forsyth (2007) seventh model; full incorporation of the NSJS by the state. In this model, NSJS is considered as part of the state justice system and employs state norms and procedures (Forsyth,2007). It promotes enriching of procedures and ideas, gives constitutional recognition to NSJS and promotes accountability yet it compromises the flexibility and informality of NSJS, untrained chiefs are required to adjudicate state justice system and high dominance of the state is mentioned as disadvantage (Forsyth,2007).

The selective integration /co-optation model is when the actor or functional institution of one mechanism is integrated into the other with the purpose of increasing legitimacy and pressuring the conflicting parties to come to an agreement (Galvanek and Planta, 2019). However, there is a chance for the advisors to be undermined by the assumption to be state-contracted (Galvanek and Planta, 2019).

The mutually requested and accepted intervention model is either of the two systems that demand the other to accompany or support the conflict resolution process (Galvanek and Planta, 2019).

In the case of the undue interference model despite the accepted jurisdiction of NSJS, there is unlimited intervention and handling of cases by the state justice system (Galvanek and Planta, 2019). This model results in disempowering the NSJS.

The case referral is another model to institutionalize NSJS (Galvanek and Planta, 2019). Case referral is applied when the conflicting parties fail to exhaust local remedies before bringing the case to the state justice system, when they fail to comply with the jurisdiction of the justice system, when the personnel in a given system lacks the expertise to resolve the case and when the conflicting parties need to withdraw the case from the state justice system to solve their dispute through mediation (Galvanek and Planta, 2019). As the case referral model of Galvanek and Planta (2019) , Forsyth (2007) states, formal recognition of unshared jurisdiction of NSJS with in a given geographical area or subject matter as the fifth model. This model recognizes the exclusive adjudicative power of NSJS. Case referral promotes the exclusive jurisdiction of NSJS and avoids forum shopping yet since unshared jurisdiction is given to NSJS it closes the opportunity to enrich the whole justice system, unable the state to check for abuse of power and discriminates marginalized groups of society (Forsyth,2007).

In the pragmatic cooperation model, the irresistible amount of conflict in a given society forces both the NSJS and the state justice system to work together regardless of their differences (Galvanek and Planta, 2019). This model is quite similar to third model of Forsyth (2007); informal recognition but active encouragement of NSJS by the state. Galvanek and Planta (2019) and Forsyth (2007) argues as states apply this model when governments accept the shortcomings of the state justice system to manage conflict. This model paves a way to preserve the NSJS and prevent the dominance of the state justice system but limits the power of NSJS to enforce orders and is subjected to abuse of power by NSJS since there is no regulating mechanism (Forsyth,2007).

Repression of NSJS by rendering it illegal by the state to the extent of penalizing who so ever exercises non-state adjudicative power, is the first model by Forsyth (2007). Forsyth (2007) argues, even though this model ascertains legal homogeneity, it undermines the parties right to get justice by the system they choose and the accessibility and the speedy way of resolving conflicts.

Forsyth's (2007) second model is formal independence between the systems but implied acceptance of NSJS by the state. This model is flexible and accessible yet it is subjected to 'forum shopping', abuse of power and human rights violation by NSJS and jurisdictional overlaps which ultimately result in the inability to render justice (Forsyth,2007).

The fourth model is limited to formal recognition by the state of the exercise of jurisdiction by a NSJS (Forsyth,2007). In this model the state enacts laws for a limited recognition of NSJS; no exclusive jurisdiction, no compelling power and access to limited state resources (Forsyth,2007). Forsyth (2007) states that this model fosters legal pluralism yet leads to a human rights violation in the name of tradition, double jeopardy and cripples the enforcement power of NSJS owing to limited access to state resources.

Forsyth's (2007) sixth model is formal recognition of NSJS to exercise jurisdiction, enforce decisions and use compelling powers. Getting the support of the state in terms of resources and enforcement and preserving the values and norms of NSJS are the main advantages of this model but are criticized for the dependence of the chiefs on the state than the community and the high probability of compromising community values to get much support of the state (Forsyth,2007).

As it is mentioned above there is no one fits all model yet states are at liberty to adopt any of the above-mentioned models or customize it to their context and apply it. The underlining idea behind institutionalizing NSJS is ascertaining justice through promoting cultural and social interactions. To meet this objective; states need to retool, relearn and recast NSJS as a social and legal institution (Murigi,2020).

Muigua (2017) asserts that not to hinder the growth and their dynamic nature, NSJS don't have to be legislated; yet if there is a need to regulate, it should be through setting the framework of principles like protection of fundamental human rights, fairness and nondiscrimination. Macfarlane (2007) also argues that institutionalizing NSJS poses a danger by introducing a state-made system, taking away their independence and flexibility and detaching it from the community.

2.3 Institutionalizing NSJS- Experience of Selected African NSJS

Considering the great demand for African solutions for African problems, emphasis needs to be given for institutionalizing African-rooted justice systems and their incorporation into the state justice system. In explaining the need for the coexistence of NSJS and the state justice system, Mutisi (2012) asserts, realizing the interrelation between NSJS and the state justice system could be the core of promoting sustainable peace. Thus, the question of how the two justice systems could coexist needs to be addressed.

Although slavery and colonialism (Ajayi, 2014) try to wipe out NSJS; the resilient nature of Africans with the legal recognition under international and national instruments, NSJS are legalized and institutionalized in different African countries (Muigua, 2017).

At the international level, the United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 under Articles 26 & 27 give recognition for indigenous people's customary law, and their right of adjudication through the respective customary law and puts states under obligation to fulfil and respect this right. International Labor Organization Convention on Indigenous and Tribal Peoples Convention No. 169 under articles 8 & 9 recognizes indigenous and tribal people's right to retain their customary laws and adjudicate their cases according to their customary laws and institutions. Rio Declaration on Environment and Development also under principle 22 calls for states to recognize and support indigenous people's identity, customs and interests to ensure the effective achievement on sustainable development. These and other international instruments signify the emphasis given to NSJS.

At a national level also, African states gave NSJS legal recognition under their constitutions. To mention some; Article 34 (4 & 5) of the FDRE constitution mandated NSJS over family and personal matters. Under Article 159 (2) (c), the Constitution of Kenya recognizes and promotes the judicial authority of NSJS. Article 11 of Rwandan constitution recognizes Rwandan culture as a source of endogenic solution.

Ethiopia

There is no doubt that NSJS have been part and parcel of the Ethiopian legal system. Given the fact that the Ethiopian judiciary is not accessible to all parts of the country, Ethiopia has for centuries been using NSJS.

The resolution of disputes through NSJS is primarily initiated by the good will and consent of the parties to the dispute although sometimes, courts or other quasi-judicial or even executive

bodies could play a role in referring the settlement of disputes through NSJS (Woldegebriel ,2015). In the olden days, and most especially under the Fetha Negast, disputes between individuals or communities were encouraged to be settled amicably (Gowok,2008).

It was after the codifications of Ethiopian laws toward the end of the 1950s and the beginning of the 1960s that serious measures were taken to adopt laws for the recognition and modernization of NSJS (Woldegebriel,2015). It was the 1960 civil code of Ethiopia which outlawed the application of all written and unwritten customary laws regardless of its effect aiming at modernizing the laws. Similarly, the 1957 criminal code leaves no room for NSJS on criminal matters.

However, with the enactment of the 1995 constitution, NSJS regained their status over family and personal cases up on the consent of the parties. Article 34(5) of the constitution gives power to religious and customary courts over family and personal matters as long as the parties as far as the conflicting parties consent is obtained. Once the consent of the parties is ascertained the rules, laws and norms of that given system will be applicable irrespective of its relation to other laws.

Even though the federal and regional constitutions as well as other laws don't mandate NSJS adjudicative power over criminal cases, practically NSJS entertain criminal matters in different parts of the country (Endalemaw, 2014). Assefa (2011) and Bahta (2014) also state that though the state tries to take away the judicial power of NSJS, the latter is not limited to personal and family matters but encompasses all kinds of cases with different procedures unique to the respective community. Their application goes beyond individual criminal matters to serious homicide cases and ethnic or community conflicts like the conflict between the pastoral community of Afar vs Amhara or Somali, Oromia vs Somali (Bezabh,2019).

Though the constitution limited the application of NSJS, they practice their adjudicative power in all cases and no state organ takes action against this practice. In most parts of the country state justice system takes second place to NSJS and the personnel in the state justice machinery are aware of the fact that once a criminal matter is settled by NSJS members of the community are not willing to cooperate with the state justice system (Macfarlane,2007). Assefa (2012) affirms the fact that the state justice system is deprioritized and less preferred than the NSJS by taking the practice in Afar and Somali regions even on criminal matters as well. The gap between the practice and the law resulted not because the nation is disobedient. But the codified laws were entirely transplanted from European legal systems which are alien

to the people, resulting in banning of the application of NSJS (Bezabh,2019). Even though the transplanted European laws weren't owing to colonization but rather modernizing the laws, it suffers rejection since failed to take in to account home rooted justice system.

In addition to the legal lacuna on the power of NSJS, the constitution is silent about the nexus between the NSJS and the state justice system. No legislation provides whether the decision of religious or customary courts is subjected to appeal to the state courts and a means to address forum shopping (Assefa, 2012).

Thus, it is possible to conclude as there is a gap between the legislations and the practice on the mandate of NSJS and their interaction with the state justice system. Above all the legislative limitation on the power of NSJS can't take away their community-driven legitimacy.

Somalia

Somalia's legal system is typical of a pluralist legal system where the *Xeer* (customary law), the Sharia law and the state justice system are applied simultaneously (Vargas, 2011). The Sharia law is applicable for family matters while the *Xeer* takes the rest of the case and the state justice system serves to register or formalize the judgments made by *Xeer* and is applicable in urban areas (Gundel, 2006). *Xeer* dated back even before the colonial time (Kulow,2018). According to Ibrahim (2018), in Somalia NSJS the clan leaders play a significant role in both mediation and arbitration with in the clan structure, customary law (*Xeer*) and clan elders' traditional authority. Ibrahim (2018) also states that Somalia NSJS operates by the unwritten law *Xeer*, transferred orally from generation to generation, emphasizes payment of compensation (*diya*) and forgiveness (*xalay dhalay*). *Xeer* is characterized by its flexibility like other NSJS in Africa. *Xeer* is applied dynamically to fit with the changing circumstances and varies between different groups (Vargas, 2011). *Xeer* is the most accessible and preferable justice system among Somalis (Vargas, 2011). *Xeer* is not universalistic but contextualized depending on the case between clans or sub clans but there are certain rules applicable to all Somalis like compensation payment; and it is not strict yet subjected to negotiation by the elders' council (Osman,2010).

The Somalia NSJS is the only social structure which sustains collapse owing to civil war (Gundel, 2006). Gundel (2006) also states that the NSJS of Somaliland and the state are codependent, the state needs the NSJS since the later solves problems and saves money so does the elders needs the state to help them.

Following Somalia's independence attempts were made to incorporate *Xeer* to the state-led legal system (Brosis, 2011). Brosis (2011) asserts that the attempt to incorporate *Xeer* failed due to the state's allegation as *Xeer* is backward. Yet in 2003 regional declaration was made in Toghdeer, Somaliland (Vargas,2011). Vargas (2011) states that after intense conversation among the elder's regional declaration was signed which targeted shifting clan responsibility to individual criminal accountability, compensation of the victim or the family than the clan, submission of NSJS jurisdiction to the state justice system over series crimes, incorporation of Sharia principles to promote widows right to inheritance and remarrying of their choice and protection of IDPs, minorities and vulnerable groups. After similar declarations were made in the other regions of Somaliland, in 2009 a decision was made to have a ratified and unified single national declaration which made Somaliland successful in the application of NSJS, though yet not ratified (Vargas,2011). Though *Xeer* is applicable in both Somaliland and Puntland, legal pluralism and lack of clearly determined jurisdiction has brought lawlessness (Vargas,2011).

Thus, in Somalia following the national declarations on reforming NSJS and the state justice system's role in formalizing the decision of NSJS it is possible to conclude the existence of a positive relationship between the NSJS and the state justice system and the state's acknowledgement of the jurisdiction and status of NSJS.

Kenya

During the colonial period, the introduction of the English legal system replaces the existing African NSJS and labeled it backward and uncivilized (Muigua, 2017). The exclusion of NSJS raised resistance against the colonial rule and resulted in its incorporation to the state justice system; but it was valid as long as it didn't contravene English laws (Ibid). The constitution of Kenya gives legal recognition to NSJS under Article 159, subject to non-contradiction to the bill of rights, the constitution and any written law and non-repugnant to justice and morality. According to Muigua (2017), the recognition, support and involvement of the state in NSJS varies from place to place. The constitution of Kenya demands state courts to follow traditional dispute resolution mechanisms and gives legal recognition for 'local community initiatives' to resolve land disputes and the Marriage Act 2014 allows parties to resolve their dispute through customary dispute resolution mechanisms (Ibid). Also enacted the Alternate dispute resolution act 2019 and the attorney general published a task force to validate the policy framework (Murigi,2020).

Muigua (2017) states the constitution of Kenya, doesn't prohibit the applicability of NSJS yet courts held different stands to entertain criminal matters. Some benches base the consent of the parties for NSJS use to their cases and some benches prohibit for the use of NSJS based on the kind of crime (Ibid).

Murigi (2020) argues as NSJS in Kenya gets constitutional recognition but is not institutionalized and have adequate attention.

Rwanda

In Rwanda, there are different NSJS which are legally recognized by the state with different conflict resolution jurisdictions. The notorious NSJS of Rwanda is *gacaca*. Even though Rwandans followed *gacaca* and *abunzi* way before the colonial period (Mutisi,2012), it was formally incorporated by the government, the overwhelming prisoners of the 1994 genocide in Rwanda gave rise to the court of *gacaca* in 2002 and upon its incorporation operated with the full-scale involvement of the people (Myers & Shinn, 2010). Like other African NSJS, *gacaca* principled collectivism than individualism, reconciliation and compensation than retribution (Ibid). After the Rwanda genocide the government institutionalized *gacaca* to seek the truth about the Rwanda genocide, to provide speedy trial, to remove impunity, to reconcile the society, and to resolve their conflict with their own customs and found to be effective in dealing with genocide cases which international criminal tribunal for Rwanda and state justice system were unable to handle (Muigua, 2017).

Observing the irrefutable result of *gacaca* courts the government of Rwanda concluded to incorporate NSJS into its state justice system and enacted Organic Law No. 31/2006 with the objective of decentralizing and providing an accessible and cost-effective justice system (Mutisi,2012). This law recognizes the jurisdiction of *abunzi* or the local mediators to resolve conflict through mediation on both criminal except genocide cases and civil cases like land, family and inheritance issues (Mutisi,2012). Mutisi (2012) states that *abunzi* is the hybrid of NSJS and state justice system where the involvement and control of the state are witnessed to be high. According to Organic Law No. 31/2006 *abunzi* has a mandatory first instance mediation jurisdiction and the state first degree court has appellate jurisdiction on the decisions of the *abunzi* (Mutisi,2012).

The judges of *gacaca* (Myers & Shinn, 2010) and *abunzi* (Mutisi,2012) were elected by the Rwandans and on the bases of their integrity and trained law, conflict resolution and judicial ethics (Myers & Shinn, 2010). Both *gacaca* and *abunzi* aimed at restoring harmony,

rebuilding broken relationships and reconciliation than retribution thus they followed a non-adversarial system (Mutisi,2012).

Accepting the affirmative side of institutionalizing *abunzi*, Mutisi (2012) argues that the mandatory mediation jurisdiction makes it part of the state justice system and supports the idea of “invented tradition”.

Thus, the constitution and other legislations marked the institutionalization of NSJS in Rwanda. This signifies *gacaca*'s shared jurisdiction over genocide with the state justice system and the state's initiation for the establishment of both *gacaca* and *abunzi*; which enables these systems to effectively utilize state resources and enforce their decisions.

South Africa

South Africa is labeled as a legal pluralist country consisting of the transplanted common law and customary or indigenous legal systems (Rautenbach, 2015). Rautenbach (2015) states that until 1994 South Africa's customary law had a second place to the state law if it is found to contravene the latter but onwards 1994 the customary law got a parallel status with the common law. The enactment of the two post-Apartheid constitutions is praised for bringing the indigenous justice system to equal footing with the state justice system. Customary courts with constitutional recognition are treated as formal or official while the rest is informal (Rautenbach, 2015). Though subjected to some jurisdictional limitations the Black Administration Act 38 recognized both criminal and civil jurisdiction of traditional courts and the procedures are allowed to be according to the customary law as long as it goes in line with the constitution (Rautenbach, 2015).

Rautenbach (2015) argues as even though the traditional courts legislation act doesn't mention ubuntu expressly, the ubuntu jurisprudence or the communitarian ideology is boldly manifested in the whole process. Ubuntu expresses African communal thinking as opposed to individualism.

National Traditional Leadership and Governance Framework Act,' was enacted in 2004 and has been amended several times. The act sets out the roles and responsibilities of different levels of traditional leaders, institutions and dispute resolution mechanisms, and specifies their relationship with different levels of government.

In addition to the constitution other legislations of South Africa gave legal recognition for the traditional justice system. Hence the non-state justice systems are deemed to be part of the legal system of the Republic of South Africa.

2.4 Reasons for opting for NSJS

The western ideology of justice has become the predominant one in every corner of the world and other ways of justice including home grown justice systems are perceived as “the other or different from” the Western one (Boege, 2006). They set the standards, procedures and ways of communication to address the issues (Ibid), regardless of the society’s perception of justice and ways of resolving conflict. Africa is not an exception to be influenced by the western way of justice. Ajayi (2014) states that Africans are forced to abandon their peculiar way of the justice system by colonialism; which caused instability, delayed economic development, replacement of dialogue with fighting and endless court proceedings. Boege (2006) argues that in addition to colonialism; capitalist expansion, imperialism and globalization by European powers are the factors that influenced and changed NSJS of the global south.

African NSJS have validity, legitimacy and cultural compatibility since it is home-grown and are cost-effective (Muigua, 2017). Unlike the state justice system, NSJSs are efficient, easily accessible and don’t apply legal technicalities and complex procedures (Muigua, 2017).

There are a couple of reasons to opt for NSJS. Galvanek and Planta (2019) describe the qualities of NSJS as community originated legitimacy, emphasizing the process than the result, focusing on the psycho-social dimension of the conflict and its transformation, inclusive and participatory as opposed to an alien approach. The speedy process and effectiveness in terms of cost and place makes NSJS preferable than a state-imposed system (Galvanek and Planta, 2019).

The state-introduced adjudication process has its own procedure and is uniform to everyone as a result it lacks the flexibility of addressing every individual’s specific situation. Whereas NSJS follow a unique procedure to every case and are adaptable to the situation (Galvanek and Planta, 2019). Boege (2006) also states that, NSJS gives emphasis to the process and follows a unique way such as renegotiation and revision of issues as long as it helps to resolve the conflict. This adaptability enables the parties to participate in each and every stage and come up with their own solutions. Ultimately results in realistic conflict resolution than a mere peace accord (Boege, 2006). Thus, since the goal of every justice system is to prevent conflict and ascertain peace, the best way is to help the conflicting parties to pour out

what is in their hearts by giving them a chance to reconsider the facts and the solutions thereof.

As the name infers NSJS are distinct and independent of the state system. Thus, they operate regardless of the existence of the state. In fragile and failed states NSJS plays a significant role to maintain peace, controlling and terminate violence and sustainable peacebuilding (Boage, 2006). Ibrahim (2018) also affirms the significant role of elders in ensuring peace and building relationships when the state is failed to do so.

Peacebuilding in Somaliland and in Bougainville manifests the effectiveness and resilience of NSJS in a fragile and failed states and debunks western perception as the inevitability of conflict where there is no state (Boage, 2006). Thus, it wouldn't be wrong to argue NSJSs are essential to ascertain peace irrespective of the existence of a state.

NSJSs are rooted in the community and drive their legitimacy from the community they belong. Unlike the alien state justice system, NSJSs are familiar to the community which levels up their effectiveness and preferability (Boage, 2006). Instead of a system imposed by the state, it is better to opt for the one which holds the conventional beliefs, procedures, norms and values of a community.

Inclusivity and a participatory approach led to effective conflict resolution. Unlike the state justice system, NSJS are flexible and gives chances to the conflicting parties to present their grievances and possible solutions (Muigua, 2017). Muigua (2017) asserts that when the conflicting parties are allowed to redefine the conflict and their relationship the outcome will satisfy them and it avoids compulsive power-based relationships. So that, Boage (2006) states reaching a consensus-based solution pays a lot though the process is time-consuming and complex. Since the parties get the chance to participate in each and every stage of the conflict resolution process including proposing a possible solution, it creates a sense of duty to abide by the final solution.

According to Boage (2006), NSJS focuses on the psycho-social and spiritual element of conflicts. They involve in emotional and spiritual healing beyond the visible effect of the conflict; helps to heal from traumatizing experiences of conflict by the healers, priests and spiritual authorities (Ibid).

2.5 Challenges against NSJS

Owing to several reasons NSJS can't escape critics. The involvement of ritual activities; the perception as NSJS is inferior to the state justice system; bribery, corruption and favoritism

of the elders; challenges of modernization against social capital and ties; legal and policy gap as to the application of NSJS and the threat it poses to fundamental human rights and freedoms are the major challenges raised against NSJS (Muigua, 2017).

Huyes (as cited by Galvanek and Planta, 2019) argues the notions of authentic, effective and home-grown as to NSJS is mystifying or romanticizing it while neglecting its limitations like its hierarchical or patriarchal approach exclusive to certain groups. Mutisi (2012) also asserts since the systems are male-dominated, women remained unrepresented and their voices unheard.

Mostly NSJS are constructed on the community context based on tribe, language and so on. Which results in the inevitability of otherization. For this reason, Galvanek and Planta (2019) criticize NSJS for undermining the heterogenous nature of a society. Similarly, Boage (2006) affirms the above critics by stressing the need for the reconstruction of NSJS to advance their effectiveness and applicability, in a way to include outsiders and resisters in the community context.

Unlike state justice system, NSJS don't have a monopoly to the legitimate use of violence (Boage, 2006). In the absence of exclusive power to enforce their decisions and punish the perpetrators, it is difficult for NSJS to avoid the recurrence of conflict. As a result, leads to normalizing conflict, specially violence against marginalized groups of society like children and women (Boage, 2006).

The other drawback of NSJS is its contradiction with universal human rights principles. Male dominant and gerontocratic rules women are excluded from the conflict resolution process and some of the decisions may violate their liberty and their right against any bodily harm (Boage, 2006). On the other hand, some scholars challenge the notion of NSJS's contradiction with universal human rights principles. Donnelly (as cited by Muigua, 2017) argues the idea of the universal human rights principle is the imposition of "western moral codes" and undermines the cultural context of a given society. Similarly, Juma (2001) calls for re-defining human right principles and a change of attitude towards NSJS to maximize their effectiveness and address the so-called contradiction. Thus, from a cultural relativist perspective, it's quite difficult to conclude NSJS are against human right principles.

The other area of critics is the level of accountability of NSJS. Authorities' abuse of power for personal gain, corruption, political affiliation, bias and misconduct reduced their legitimacy and effectiveness (Boage, 2006).

2.6 Institutionalizing NSJS in Somali region

Since the FDRE constitution under Article 34 (5) gave recognition for religious and customary laws on family and personal laws only up on the consent of the parties. Using the federal constitution as a bench mark regional states adopted their constitution by recognizing the NSJS. As such the Somali regional state gave legal recognition for the NSJS on family, personal and property matters.

Contrary to the constitution, the Somali elders adjudicate criminal cases through the NSJS (Hagmann, 2007, Pankhrust et Assefa,2016). Most of Somalis are reverent for the NSJS than the state justice system (Hagmann, 2007, Pankhrust et Assefa,2016). The elders have every jurisdiction despite what is stipulated under the formal laws and legal system. Large number of criminal cases settled through the NSJS, without the legal recognition of the state law (Mohammed et Jotte, 2016).

The NSJS is the most accustomed means of conflict resolution mechanism in Somali region. Yet the rational for co-opting the NSJS than the state justice system by the community, its operation and the interaction between the state and the NSJS are not yet scrutinized. Therefore, this study has been focused on to analyze the role, operation and legal status of the NSJS in the region, how the community describe and reasons for opt for it, and assess its interaction with the state justice system.

CHAPTER THREE

RESEARCH METHODOLOGY

Under this chapter the methodological approach employed to conduct the research will be discussed. Thus, research design, sampling technique, data collection method, data analysis and ethical consideration have been incorporated.

3.1. Research Design

To understand behaviors, explore the socially constructed epistemology and investigate events and theories qualitative research design is the best approach (Croswell,2003). Qualitative approach has significance in investigating individual experiences and behaviors (Croswell,2003). Thus, in this research a qualitative research design employed. Qualitative research design is considered since it enables to investigate and know how the community describe the Somali NSJS, where the Somali NSJS derived its legitimacy, its interaction with the state justice system, what the procedure looks like and investigate individual experiences.

3.1.1. Sampling Technique

To address the research problems non-probability sampling technique is employed. Among non-probability sampling techniques, the researcher opted for purposeful sampling technique

3.1.1.1. Purposeful Sampling Technique

Since the rationale behind qualitative research is purposefully selecting the participants to enable the researcher to comprehend the problem and the research question (Croswell,2003), participants were selected based on their position and expertise.

A total of 17 people were included in the study; of which 2 of them were judges from Somali regional State Supreme court, 3 public prosecutors from Somali regional State Justice bureau, 2 police officers from Somali regional State police commission, 2 culture and tourism experts from Somali regional State culture and tourism bureau, 2 experts from Somali regional State bureau of women and children affairs, 3 elders, Shilabo woreda peace and security sector head and 2 suspects of homicide case.

3.1.2. Data Collection Method

In this study both primary and secondary data collection methods are employed. Since primary data helped the researcher to get first-hand information, interview is used as a primary data collection method. Hence, the researcher gathered first-hand information from judges,

prosecutors, police officers and from other experts on women and children affairs and culture and tourism bureau. Additionally, secondary data collection methods are employed.

3.1.2.1 Case studies

Case studies are helpful to deeply understand the process, individuals' behavior and collect detailed information about the events (Creswell,2003). Thus, to understand the real-life experience and the procedures of the NSJS a case study is used.

Data collected through interview and the case studies and the document analysis transcribed and organized.

3.1.2.2 Interview

Interview helps to pose unstructured and open-ended questions and collect more ideas the more the interviewees explain (Creswell,2003). Interview as a main data collection tool is conducted to generate data with different groups particularly Somali elders, judges and selected state officials. The interview was carried on face to face and over a phone call with the participants.

3.1.2.3 Document Analysis

In this method the researcher analyzed documentary source like laws, relevant books, articles, documents, journals, working paper, reports and websites of relevant international and regional institutions as a source of data.

3.1.3. Data Analysis Technique

Concerning the data analysis, the researcher used narrative and thematic techniques of a qualitative way of data analysis. The researcher transcribed the data collected through interview and document analysis then organize the data according to their contexts.

3.1.4. Ethical Consideration

As Creswell (2003) states, it is the researcher's duty to respect the rights, needs and values of the respondents and to inform them the objective of the research. As such the researcher ensured the respondents right by asking their free and expressed consent and informed them the objective of the research. Their permission was also obtained for audio recording during the interview.

Regarding the documents, to ensure originality and credibility and to avoid plagiarism the researcher appropriately cited and gave credit for each author.

CHAPTER FOUR

DATA PRESENTATION AND ANALYSIS

4.1 Historical Perspective: NSJS in the Ethiopia Pre 1995 Constitution

Ethiopia is home of diversity and one of the oldest states in the world with its own ways of resolving conflicts. As history tells the country followed several ways of settling disputes. Prior to the fourteenth century, the Old Testament precepts and customary laws were used to settle conflicts (Assefa, 2020).

Mid fourteenth introduced a new experience of legal system and conflict resolution methods. As mentioned in the first chapter, the first attempt of codifying laws was made by Zera Yaikob. While Zera Yaikob was in power, in 1450 the first written law named *Mats'hafa Fewes Manfassāwī*, or “The Book of Spiritual Remedy” was presented; containing sixty-two articles of dominantly criminal matters (Augustyniak, 2012). Because of its spiritual nature, it wasn't able to address the then legal issues; yet it gave rise to *Fetha Negest* (Law of kings) by the same emperor Zera Yaikob (Augustyniak, 2012).

Fetha Negast (Law of kings) served to solve conflicts with in the church and secular matters (Beru, 2013). Under the *Fetha Negast*, disputes between individuals or communities were encouraged to be settled amicably (Gowok,2008). The customary law was applicable as long as it didn't contravene the *Fetha Negast* and for cases where the *Fetha Negast* was silent (Beru, 2013). This process usually entailed the comity of elders or people appointed on ad-hoc basis to settle particular disputes that have arisen either in matrimonial cases or between communities (Gowok,2008). There were also other non-state methods of settling disputes through religious leaders (Gowok,2008).

After Zera Yaikob, in the late 1950's and 1960's during the reign of emperor Hailesilassie a different kind of codification of laws were made. The emperor's intention in codifying the laws was modernizing the legal system, bringing uniformity all over the country and creating certainty about the rights and duties of citizens (Beru,2013). Between the period of 1957 up to 1967, five codes were enacted; the Penal Code, the Criminal Procedure Code, the Civil Code, the Civil Procedure Code and the Commercial Code.

The introduction of these law outlawed the existing the non-state justice system which apply customary laws. Assefa (2020) states that this codification process aimed at abolishing customary laws from the legal system. It is proved to be true by the enactment of the 1960

civil code. The 1960 civil code under article 3347 introduced limitation on the application of customary laws as ‘*Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided in this code shall be replaced by this code and hereby repealed*’. Regarding criminal law, the 1957 penal law under Article 10 expressly outlawed customary law from the criminal law area.

Regardless of the aspiration of the emperor for the codification of these laws, the application was highly challenged and a discrepancy was created between the aspiration and the reality. Abdo (2007) states that, failing to adopt the transplanted laws with the context of the country and denying customary and religious laws the status they demanded resulted to silent resistance of the people to apply these laws. He also argues that, the attachment of the people to the non-state justice systems and to its laws and the its collective nature differs from the incorporated western laws; which renders the later lack the intended legitimacy.

Following the fall of the imperial era, though the *Derge* regime advocated Marxist-Leninist and rejects the ideology of the west; akin to its predecessors disregarded and expelled customary laws (Assefa, 2020). Decertifying the non-state justice system at the government level continued until the fall of the *Derge* regime, though different ethno-cultural societies continued practicing (Assefa, 2020).

The 1930 penal code was enacted to replace the criminal law part of the the *Fetha Negast*, the 1943 Judicial administration decree which allowed *Sharia* and customary laws to deal with small claims and petty offences and the 1947 proclamation for the establishment of *Abia Dagna* (local judges) are the prominent one in relation to customary laws (Assefa, 2020).

4.2 Status of NSJS under the 1995 FDRE Constitution and Regional Constitutions

The 1995 enacted FDRE constitution under Article 34 (5) gave recognition for the adjudication power of religious and customary laws on family and personal laws up on the consent of the parties and the particulars to be determined by the law. Article 78 sub article 5 also entrusted the House of Peoples representatives and state councils the power to officially give recognition to religious and customary courts. In accordance to these provisions the House of people’s representatives enacted proclamation no. 188/1999, Federal courts of *Sharia* consolidation proclamation.

Using the federal constitution as a bench mark regional states adopted their constitution by recognizing the non-state justice system. The regional state constitutions contain similar

narration concerning NSJS. Akin to the federal government, regional states enacted laws regarding *Sharia* courts. But neither at the federal nor at regional states level no law is enacted concerning customary laws (Assefa, 2020).

Yet this legal recognition is not absolute, subjected to two limitations. The first limitation is set by the supremacy clause of the constitution Article 9 (1) which limits the adjudication power of religious and customary courts in cases of contravention with the constitution. The other limitation is jurisdictional limitation; the reading of Article 34 (5) tells the adjudication power of non-state justice systems is limited to family and personal matters, public law areas like criminal, employment and constitutional matters will remain outside the scope of non-state justice systems.

Even though the law expressly outlawed written or unwritten non state justice systems, due to the inaccessibility of state laws and institutions to rural parts of the country and since it failed to reach to the heart of the people, non-state justice systems continued to operate in different parts of the country (Assefa,2012).

Limited to formal recognition by the state of the exercise of jurisdiction by the NSJS is one model of institutionalizing NSJS suggested by Forsyth (2007). Looking to the constitutionally recognized jurisdictions of NSJS of Ethiopia, it is possible to assert that Ethiopia followed the “Limited to formal recognition by the state of the exercise of jurisdiction by the NSJS” model of institutionalizing.

4.3 The interaction between the state justice system and NSJS

As it is stated above the adjudicative power of the NSJS is limited to personal and family matters under the federal constitution as well as regional constitutions. Assefa (2012) argues that though both the federal and regional governments ruled out NSJS, in many places of the country specially in the peripheral areas NSJS has a huge significance and resolve conflicts regardless of the jurisdictional limit. The inaccessibility of state laws and institutions to rural parts of the country and since it failed to reach to the heart of the people, non-state justice systems continued to operate in different parts of the country (Assefa,2012).

Degefa (2020) states that, though the law banned NSJS to entertain criminal matters the practice deviates from the law. The competition of the state and NSJS over criminal matter brought unintended problem like double jeopardy of perpetrator (Degefa,2020).

Forum shopping is the other worth mentioning point regarding the interaction between the state and non-state justice systems. Unlike religious courts (specifically *Sharia* courts), there is no legislation for customary courts both at federal and regional state. In the absence of such clear legislation, since the jurisdiction of customary courts bases on the consent of the parties there is a chance of abuse of the other party's rights by giving and revoking their consent (Amsalu, 2020).

Though the law stipulates a clear jurisdictional limit, NSJS exercise judicial power over family, personal, civil and criminal matters (Hagmann, 2007, Pankhrust et Assefa,2016). Looking to the gap between the law and the practice, it is possible to argue for the reconsideration of the legal status of NSJS.

4.4 Non-State Justice System and Conflict in Somali Region

4.4.1 Background of Somali Region

Somali regional state covering area of 279,252 square kilometers, the second largest region located in the south- eastern part of Ethiopia. The Region shares borders with the Afar and Oromia Region and Dire Dawa to the West, Djibouti to the North, de facto state Somaliland to the North-East, Somalia from East to South, and Kenya to the South-West (Ethiopia peace observatory, n.d.). The region obtained its membership status of the Federal Democratic Republic of Ethiopia by article 47 of the 1995 FDRE constitution. The region is divided in to nine zones and fifty-three kebeles having Jijiga the capital city of the region.

According to the FDRE population census commission census result of 2007, the ethnic Somali group is the third largest ethnic group in the country (Ethiopia peace observatory, n.d.). As per the 2007 census result the region has a total population of 4,439,147 consisting of 2,468,784 (55.6%) male and 1,970,363 (44.4%) female (PCC,2008). But by 2017 it is estimated that the population in the Somali Region is around 5.7 million (ESS, 2017). Even though ethnic Somalis are the dominant one, other ethnic groups live in the region.

More than 80 % of the total area of the region is low land resulted to the low altitude of the region that ranges from 500 to 1600 meters above sea level and arid and semi-arid climatic condition (Seid et Jotte, 2016). The region is one of the pastoral areas but trade activity is also conducted as a livelihood. The region is considered among the less developed regions. The region's geographical location on the periphery, lack of infrastructure and weak state structure contributed for the under development of the region (Human Rights Watch, 2008).

The way the region is formed and its relation with the central government impacted the legitimacy of government institutions and the non-state justice system. According to Muhumed & Siraj (2017), the formation of Somali region dated back to 1897 when Britain gave the region to Ethiopia in a secret agreement. Since Ethiopia's controlling the region was considered as colonial expansion, in 1900 it faced Somali's resistance led by Sayyid Mohammed (Emmenegger,2021). Territorial sovereignty of Ethiopia in relation to Somali region remains contestable. Haggmann (2021) and Emmenegger (2021) state that, most Somalis believe that in addition to Britain and Italy, Ethiopia also colonized the territory of Somalia which used to called Ogaden; as a result, the contemporary Somali region belongs to Somalia and the Somali people.

The political participation and identity of the Somalis in the region has been debatable. The Ethiopian People's Revolutionary Democratic Front (EPRDF) coming in to power in May 1991 marked the recognition of Somalis as one of the country's nations, nationalities and peoples since the formation of the state and the incorporation of Somali lived in Ogaden in to Ethiopia in the late 19th century (Haggmann & Khalif,2008). Though the Somalis in the region acquire citizenship status, they experienced silence, partial acceptance, distrust and rejection of the state; which resulted the armed struggle of different groups like Ogaden National Liberation Front (ONLF) and West Somali Liberation Front (WSLF) (Haggmann, 2021). Haggmann & Khalif (2008) state that, owing to the weak state incursion the state justice system remains to lack legitimacy; which leads Somalis to rely on the non-state justice system, *xeer*.

In addition to its timeless ancestral foundation, the historical background and politics of the region, lack of strong state structure, inadequate infrastructure and underdevelopment played a significant role in the region for co-opting the non-state justice system, *xeer*.

4.4.2 Conflict in Somali Region

Akin to any society, conflict is inevitable in the Somali region as well. The conflict can be inter-ethnic, inter clan, between individuals or between the state and different groups. The causes of the conflict differ depending on the interest of the conflicting parties. The notable causes of conflict in Somali region are scarcity of natural resources like water and grazing land, (Boah et Mamo, 2008), livestock raids and revenge tradition (Muluken,2020). Inter-

ethnic conflict between Somali and the neighboring Oromo and Afar caused by border dispute, over utilization of rangeland and water (Boah et Mamo, 2008).

There has been a conflict between the state and other groups in the region; such major conflict is the one between the state and ONLF. The narration of conflict between the state and ONLF goes back to Ethiopia's occupation of Somali inhabited lands during the imperial era. Following the downfall of the *Derge* regime, the failed attempt of ONLF to rule over the region, the under representation of the Somalis, lack of regional autonomy and the declined request for self-determination resulted armed struggle (Hagmann, 2020). Since its commencement it involved different national and international actors in addition to the conflicting parties. The former president of the region Abdi Mohamed Omar and the regional special force; the non-Ogaden clans of Somalis; the Ogaden diaspora community; Somaliland, Puntland and Jubbaland, and Eritrea played a significant role in the state- ONLF conflict (Hagmann, 2020). This conflict come to an end by the October 21,2018 Asmera peace agreement. Even though it is not verified by an independent body and difficult to accurately determine, between 1995 and 2007, about 2,395 extra-judicial killings, 1,945 cases of rape, and more than 3,000 forced disappearances are recorded from the conflict between the state and ONLF (Hagmann, 2014).

Irrespective of the causes of the conflict, it resulted tremendous devastating consequences. Lose of human and livestock's lives, demolition of properties, restriction of movement specially to the pastoralist community, destruction of the already scarce natural resources and displacement are the major consequences of the conflict in the region (Boah et Mamo, 2008).

The data obtained from the informants also indicate competition over natural resource (land and water), political unrest, border conflict, family cases; inheritance issues and provision of maintenance, crimes; rape, abduction, homicide, theft and robbery as a cause of conflict.

All of the informants stated that conflict is human nature and unavoidable but can be resolved amicably without causing the loss of lives and destruction of properties.

They also mentioned that the region has both the state and non-state conflict resolution systems. Even though all of the respondents recognize the role of the two systems in conflict resolution, they differ on the jurisdictional limitation and seriousness of cases to be seen by each system. The data obtained from all of the respondents showed the significant role non-state justice system played in resolving conflict over natural resources and intra-clan conflicts. On the other hand, informants (KI 002, September 1, 2023, KI 003, KI 004, KI

005, August 30,2023) stated that any kind of criminal cases and civil cases which are related with fundamental human rights specially women and children rights, shouldn't be entertained by non-state justice systems. Regardless of the jurisdictional limitation, the non-state justice system even on criminal matters like extenuated homicide and homicide by negligence which are punishable under the criminal code article 541 and 543 respectively and maintenance and inheritance cases as far as the parties' consent is obtained (KI 012 & KI 014, September 1,2023, KI 013, August 29,2023, KI 015 & KI 016, August 28,2023).

According to the data found from the informants, with in Somali people the Somali non-state justice system has the ultimate acceptable authority since it belongs to the people, unlike the state justice system given as a political document.

The primary and secondary data analysis shows that, scarcity of natural resource, land, border and political disputes are the main causes of conflict in the region. To resolve these conflicts Somalis, apply their NSJS which has high acceptance of the society.

4.4.3 NSJS in Somali Region

Similar to other African nations, Somali people has their own conflict resolution or justice system; a system preexist the formation of the current state structure and separate from the state and religious justice system. This the NSJS of Somali people is known as *xeer*. *Xeer* is literally translated as treaty or contract (Mohammed et Jotte, 2016). It also has philosophical significance related with the Somali house construction. Mohammed et Jotte (2016) states that, Somali traditional house constructed with different items and the items tied up together with a long rope called *xeer*. As the long rope *xeer* used to tie up items, *xeer* the justice system as a treaty or contract is believed to bring the Somalis together. Somalis assume the fairness of *xeer* and deviating from it results in annoying Allah; thus, the peacemaking and conflict resolution rests on the shoulder of the local elders than the formal legal system (Hagmann, 2007, Pankhrust et Assefa,2016).

Xeer is the predominant justice system with unwritten laws passed orally for generations governing the civil and criminal cases among Somalis (Leite,2017). *Xeer* is not static but changes with the changing circumstances (Hagman,2007). Besides safeguarding material and political security, its flexibility and addressing the parties and the changing circumstances, makes *xeer* legitimate system among Somalis (Hagman,2007).

Xeer is categorized in to two; *Xeer Guud* and *xeer Gaar*. *Xeer Guud* contains both civil and criminal decisions and enforceable despite clan differences while *Xeer Gaar* is a decision applicable to specific community or clan (Leite,2017).

Akin to other NSJS in Africa, *Xeer* is characterized with its collective nature. Mohammed et Jotte (2016) state that, an individual identifies himself with his clan identity and the liability of an individual is the clan will be held liable. Informants (KI 006 & KI 007, August 31, 2023) confirmed that, when the elders hold an individual responsible and ordered for payment of compensation either in money or in terms of cattle, their decision holds the clan responsible and the payment will be made by the contribution of all of the clan members.

As a common law legal system *xeer* employes case law or precedent. In deciding a conflict, elders of *xeer* uses the decision they made with earlier similar case; in the absence of previously decided similar case they pass their decision by negotiation and compromise with the parties and that decision will serve as a precedent for future cases (Mohammed et Jotte, 2016).

Composition and appointment of elders

Xeer elders titled differently in different clans. They can be called as *boqor*, *garad*, *sultan*, *ugas*, *isimo* or *beel daajiye* (Hagman,2007, Mohammed et Jotte, 2016). Somali NSJS elders' appointment has its own procedure and criteria. Hagman (2007) asserts that, age is not a deal breaker to be appointed as Somali elder, instead there are various evolving criteria like the character; integrity and impartiality; communication skill; the ability to persuade and compromise, religious knowledge and family tree of a person. Based on these criteria elders will be elected from their respective sub clan, clan or family by majority vote after the nominee present his idea why he should be elected as an elder (Mohammed et Jotte, 2016). After the election process the future elders will be announced by the chair-person or *ugas* of the clan. Somali elders composed of only men, never women and marginalized groups of the society. Women and marginalized groups are neither eligible for election nor allowed to vote (Mohammed et Jotte, 2016).

According to the informants (KI 006 & KI 007, August 31, 2023), elders can be elected according to their blood line. If the elder passed away and left with no son, the nearest male relative will replace the deceased and appointed as an elder. They also stated that, if the nearest relative found to be under the age of 15, the appointment ceremony will be conducted

but an advisor will be assigned for the minor elder till reach 15. The appointment ceremony symbolized by transferring *cimaamadsaar* or a scarf and *cunno shub* or pouring out a milk on the head of the newly appointed elder. They also added that the ceremony differs depending on the clan.

All of the informants responded that, the elders can be called as *boqor*, *garad*, *sultan*, *ugas*, *isimo* or *beel daajiye* interchangeably and elected from their clan based on a majority vote system. They also stated that women and marginalized groups are not eligible to vote and be voted.

Mode of operation

In *xeer*, there is neither specific place nor elders to entertain cases. The case starts by plaintiff informing the disputing issue to elders of his clan or sub clan up on his choice (Mohammed et Jotte, 2016). These elders will inform the case to the elders of the defendant and decide the time and place to resolve the case (Ibid). When a conflict arises between two parties of a same clan, the elders of the respective clan in the given area will resolve the conflict; when the conflict involves parties of different clans, the elders of each clan will be in charge to resolve the conflict (ibid).

Leite (2017) and Mohammed et Jotte (2016) state that, women and minority groups have no right to bring their case on their personal capacity instead they will be represented by the male relative. The informants also confirmed that women and young people are not allowed to attend at *xeer* even at their own case but they will be represented by their male relative

According the informants (KI 012 & KI 014, September 1, 2023 & KI 013, August 29, 2023), since *xeer* operates orally the plaintiff informs the case orally to the elders of the area. Among these elders one of them will inform the other party about the issue brought against him and the place and time of hearing the case. They also mentioned that, in rural areas the hearing conducts under a tree and in urban areas it is in a house selected by the elders. These informants stated that, on the first day of hearing both parties will be asked of their consent to resolve the conflict through *xeer* and if they have any complain on any of the elders. They also mentioned that to ensure full confidence of the parties, if one of the parties is concerned on the impartiality of one or more of the elders, he is entitled to demand for the replacement.

The parties have full freedom not to grant their consent to the adjudicative power of the elders. If one of the parties is not consented to *xeer*, he is at freedom to take the case either to

state court or sharia court (Ibid). After obtaining their expressed consent, the hearing commences by giving the first chance to the plaintiff and then the defendant will be given a chance to admit or deny what is mentioned by the plaintiff. In case of denial, both parties will summon their witnesses. After hearing the witnesses, the elders will pass their judgement according to the existing case law (similar decision they pass for same case) (Ibid).

The informants expressed as *xeer* has an appeal system. They stated that, the unsatisfied party has a right to appeal. The unsatisfied party expresses his interest of appeal by saying “*Geed kale ayaan uqaadan*” literally translated as “I will go to another tree”. This expression is used since the adjudication process is undertaken under the tree. If the case was heard before the elders of a given sub clan, the appeal will be taken to the elders of the clan. If the case was heard by the elders of a clan, the appeal will be taken to clan elders of another place.

According to the informants, since the decision of the elders is taken seriously defendants or offenders will execute the decision. In cases of refusal the individual will face discrimination, shaming and exclusion by clan members.

The primary and secondary data shows as *xeer* ensures fair trial; starting from duly summoning the parties and witnesses, ascertain the consent of the parties to an appeal system. Additionally, the operation of *xeer* has discriminatory aspect on women and minorities such as outcasted groups not to appear and present their case before the elders of *xeer*. The study found that, unless a woman or a person from a minority group has a male relative or a male representative, she /he will be denied the right to justice under the *xeer*.

Jurisdiction of *Xeer*

The FDRE constitution under Article 34 (5) and Somali regional state constitution under article 34(5) gave recognition for religious and customary laws on family and personal laws only up on the consent of the parties. Both constitutions banned the criminal jurisdiction of *xeer*. Contrary to the state laws, the Somali elders adjudicate criminal cases (Hagmann, 2007, Pankhrust et Assefa,2016).

Xeer elders adjudicate criminal cases regardless of what is written under the law (KI 012 & KI 014, September 1,2023, KI 013, August 29,2023, KI 015 & KI 016, August 28,2023). They also mentioned that even both the victim (the family of the victim) and the perpetrator opt for the solution of elders than the state court. Similarly, KI 002 (September 1, 2023)

mentioned a recent intra clan conflict case in Shilabo Woreda which caused the death of 40 people; which was settled by elders.

On the other hand, other informants (KI 001, August 29, 2023, KI 002, September 1, 2023 & KI 003, KI 004 & KI 005, August 30, 2023) responded that, there were times even after a criminal suit filed against the perpetrator, the elders and the victim (the family of the victim) approach the court and prosecutors' office for the charge to be dropped since they made an agreement and paid compensation. They also stated that, beside the awareness gap of the elders concerning criminal jurisdiction; *xeer* is deep rooted in the heart of Somali people and helps to restore the broken relationship between the conflicting parties, which makes it preferable than the state justice system. These informants informed that, following the past 7-5 years with an extensive legal awareness creation by the government and non-governmental organizations; changes have been noted. They stated as the elders by their initiation started reporting to the police and refusing to solve criminal cases like rape, armed robbery and homicide cases.

Since the elders get to know it is beyond their power to adjudicate criminal cases, they report to the police (KI 012 & KI 014, September 1, 2023, KI 013, August 29, 2023). They also added exceptionally looking to the seriousness of the crime and the manner of its commission, they entertain criminal cases.

According to KI 015 (August 28, 2023), he committed a homicide by negligence in 2020. He used to be a driver for Jijiga University who was arrested for only nine months after causing the death of pedestrian. He stated that, though he isn't ethnic Somali, while he was in jail the elders were asked for reconciliation; his family on behalf of him made an agreement with the victim's family and paid a blood money 500,000.00 (five hundred thousand birr). After the elders make sure the payment of the money, they went to the court to demand the release of the prisoner. The court granted their request and ordered for his release without passing judgement and punishment. A similar incident occurred in 2022 by KI 016 (August 28, 2023) a non-Somali ethnic, by a motor cycle. Akin to the first case, the wrong doer's family ordered by the elders to pay 500,000.00 (five hundred thousand birr) to the victim's family. After the payment of the money; the elders went to the prison administration submitted the agreement reached by the parties and demanded for the release of the prisoner. In this case the wrong doer arrested only for three months, brought to the court only twice and released even before criminal charge filed against him.

From the primary and secondary data, since adjudicative power over family and personal matters are given to NSJS elders, no gap between the law and the practice is found. But regarding criminal jurisdiction of *xeer* elders, this research found that both the Somalis and non-ethnic Somalis still opt for *xeer* regardless of its jurisdictional limitation.

The settlement of Merehan- Mechahil conflict in Shilabo woreda (2023)

Shilabo woreda is located in the Korahe zone, Somali region. According to Ethiopian Statistical service (Ethiopian Statistical Service, n.d.) the population of Shilabo recorded as 7,48; 24,303 male and 3,179 female. The city inhabited by Merehan, Awrtable, Mekahil, Darood and Hawiye subclans (KI 002, September 1, 2023 & KI 017, October 24, 2023).

Shilabo has a history of recurring conflict over natural resource between the inhabited subclans (Ibid). On 2023 a conflict arose between subclans of Merehan and Mekahil over one of the kebele, Aleen kebele of Shilabo woreda (Ibid). KI 017 (October 24, 2023) states that, both Merehan and Mekahil belong to the Ogaden clan; yet the Merehans lived in Somali region as well as Somalia. The Merehans who live in Somalia believe as the government of Ethiopia took their land and fight for its return (KI 017, October 24, 2023). The 2023 conflict initiated by the Merehans of Somalia by killing four Mekahils claiming Aleen kebele (KI 017, October 24, 2023). Following the death of the four Mekahils, the Mekahils killed a man from Merehan subclan (Ibid). The Merehans of the Somali region also take part in the conflict siding with their subclans of Somalia (KI 002, September 1, 2023).

The Merehans are more militarized than the Mekahils, thus to stop the conflict the special force of Somali region mobilized to the conflict area (Ibid). Since the Merehans consider the regional special force as a supporter of Mekahil, the fight continued between the special force and the Merehans; on one night while the special forces are at their camp the Merehans launched an attack and killed eleven members of the special force (Ibid). The special force of the region went to Abduwaq, the city of Merehans in Somalia for revenge. In this conflict more than forty people have died (KI 002, September 1, 2023 & KI 017, October 24, 2023). The intervention of the regional special force intensifies the conflict and its consequence (KI 017, October 24, 2023).

After the loss of lives, even though the specific terms of the agreement remain undisclosed, the elders of these subclans gathered to settle the conflict and reached to an agreement to mutually utilize the resources and live together (KI 002, September 1, 2023 & KI 017,

October 24, 2023); yet the question as to whom the land belong remained unsolved (KI 017, October 24, 2023). The settlement process wind up with out the involvement of the state of either side (KI 002, September 1, 2023 & KI 017, October 24, 2023).

The primary and secondary data analysis shows that, the reverence of Somali people to the non-state justice system to the extent of settling a border dispute. From the reading of the FDRE constitution Article 87 (3), the national defense force is bestowed with the mandate to protect the territorial integrity of the country. Yet in Somali region the practice is different from the law; it is the elders who have the power to settle border disputes the way they deem right.

Above all the manner how this conflict is managed and administered by the Somali NSJS evidences the inherent legitimacy the system has and the significant role it plays in the absence or inability of the state system to resolve the conflict.

4.5 *Xeer* and Women and Minorities Rights

In relation to fundamental human rights like the right of equality, the right for a fair trial, the right to be heard, the right to produce evidences, and the right to be represented; *xeer* get both the praise and critics.

Mohammed et Jotte (2016) state that, *xeer* guarantees the right for a fair trial by giving them equal chance to be heard, to produce any kind of evidences they believe to prove their case and to be represented by the person of their choice.

One of the flaws of *xeer* is discrimination against women and minority groups (Leite,2017). Leite (2017) states that, the discrimination against women and minorities goes to the extent of banning them from electing and being elected as an elder. Member of *Gobooye* i.e marginalized people engaged in hunting, blacksmith, shoe-making, slaughtering is allowed to appear in *xeer* as long as he is a male but women are not entitled to appear by their own personal capacity either as a plaintiff or a defendant or a witness (Mohammed et Jotte, 2016).

All of the informants' state as minorities are not allowed to elect and be elected as an elder. On the bases of how women are treated in *xeer*, the informants state that, *xeer* undermines women and minority groups right of equality and the right for a fair trial. They state that, women have no right to be elected as elder, to elect a person of their choice and have no right to fair trial. They also mention that, women's representation by the male relative is not of

their choice. KI,009 (August 30, 2023) stated that “*how can my father, husband or brother express the pain I suffered? How can I say I am heard while am silenced not to speak my experience by myself?*”.

Practices like *dumaal*, where a widow is forced to marry a male relative of her deceased husband; *higsiiian*, where a widower is given the right to marry his deceased wife’s sister and *godobtir*, the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement are against women’s right (KI 008, KI 009, KI 011, August 30, 2023 & KI 010, August 29, 20233). They stated that, in earlier times to conclude any of these marriages the consent of the women was not taken in to consideration; yet as a result of the growing awareness of the society about women’s right, their consent become deal breaker.

On the other hand, KI 001, KI 012, KI 013 & KI 04 (August 29, 20233 & September 1, 20233) argue that, *xeer* has its own tradition and way of doing things which demands the evaluation to be according to its values and rules. The restriction on women’s participation in the election and in the hearing, process doesn’t violate women’s right. They also argue as, allowing only men in *xeer* shows nothing other than role difference. Under the *xeer* the equal amount of compensation paid for the damage men and women suffered manifests the equal treatment women have.

In this analysis, it was observed that the different stand on the nexus between *xeer* and human rights, evidenced the contention between universalism and cultural relativism approaches of human rights. Human rights are rights every human being obtained just by being a human. Since an individual human is the subject of human right, renouncing the exercise of these rights for whatever reason should be left for the subject. From the initial *xeer* denies women and minorities participation to vote and be voted and women to present their own case. While the system is denying these groups some of their rights, how is possible for it to ensure their rights?

Strengths, Challenges and Effectiveness of *xeer*

The respondents indicated that the decision of *xeer* elders is more enforceable than the state courts and state official decision. Their justification is unlike the state-imposed justice system *xeer* is one of their identities tied with their culture and language and lived for centuries with in the Somali people. The state laws and the justice system are alien to their culture and taken as a political document whereas the indigeneity of *xeer* guaranteed its acceptance to the extent of hiding the conflicts from the intervention of the state (KI 005, August 30, 2023).

The Somali people are more obedient to the decision of *xeer* elders since it is not imposed by colonizers like the state justice system (KI,006, August 31, 2023). The respondents stated that, the availability of *xeer* elders even to the remote areas, the shorter time the process takes and the lesser cost it needed is the quality of *xeer*.

Regarding the challenges the respondents informed that, owing to the oral tradition of *xeer* its originality is challenged and the young educated generation is less informed about it. The regional government needs the intervention of elders to settle clan conflicts; in doing so it appoints elders who are loyal to implement the interest of the state and end up deviating from the original values of *xeer* (KI,006 & KI,007, August 31, 2023). The respondents also mentioned that, the decision of the elders is passed orally and serve as a precedent; however, over the course of time the later elders pass a different decision to the former one for identical cases as a result the predictability of elders' decision become questionable (Ibid). When a person commits an offence and ordered to pay compensation by the elders, the respective clan of the person is expected to contribute for the compensation; as a result, the offender doesn't feel the pain of the punishment not to commit it again (KI,010, August 29, 20233 & KI,011, August 30, 20233). The other challenge mentioned by the respondents is lack of compulsory force to execute the decision of the elders in case of refusal despite shaming and exclusion of the person from any social activities (KI 012 & KI 014, September 1,2023, KI 013, August 29,2023). The other challenge posed against *xeer* is its's discriminatory aspect, in relation to women and minority rights.

The data obtained from the respondents indicates the advantages of using the NSJS. The expediency, cost effectiveness, accessibility and its home-grown nature are the advantages of using the NSJS in the region. The challenges mentioned by the respondents points to the areas where the *xeer* needs to be updated to the documentation system and the reason for institutionalization.

4.6 The Interaction between *Xeer* and the State Justice System

Maintaining the region's peace and security is one area of interaction of the two systems. The high reverence of Somali people to the NSJS, makes it preferable in peacemaking and conflict resolution than the state justice system. Hagman (2007) states that, "*bringing the sultan back*" in 1999 and 2000 in Somali region helps in peace making and conflict resolution. Similarly, Mohammed et Jotte (2016) state that, to control the citizens through the

NSJS and to ensure peace and order the state officials provide full support in executing the decision of NSJS.

For serious cases the elders request the state to enforce their decision and most of the time their demand gets acceptance (ibid). The informants confirmed that, when inter clan conflict and conflict over the utilization of land and other natural resources occurred; the state officials request the elders of the NSJS to settle the conflict. They also stated that, up on the request of the conflicting parties or the initiation of judges, courts refer family and personal matters to be resolved by elders. The respondents also added, following the legal awareness creation made in the region; the elders bring serious crimes like aggravated homicide, rape and armed robbery cases to the police.

According to KI 002 (September 1, 2023), even though the state doesn't supervise the operation of NSJS; the state interacts with the elders of the NSJS through multi-layer capacity building programs.

Both the federal and regional state constitution legally acknowledge the adjudicative power of Somali NSJS. Since both the state and the NSJS are operating simultaneously, there is a chance for the two systems to interact. In Somali region, referral of cases between the two systems is where their interaction is witnessed. Though there is no a legally stipulated mechanism of governing the interaction between these two systems, the reality shows the positive interaction.

4.7 Institutionalizing NSJS in Somali Region

As it is mentioned in Chapter two, colonialism put a maximum effort to eliminate the non-state justice systems of Africa. However, the post-colonial periods exhibit the effort made to bring back the non-state justice system with the intention of removing western laws with its prospects and filling the gap created by the fall of political power (Murigi, 2020).

Institutionalizing deals with the process of establishing institutions and achieve legitimacy. Institutionalizing the non-state justice system involves; trial, applying new mechanisms to settle the conflict; regularization, incorporate the new mechanisms in to regular use and formalization, includes the ways conflict settlement mechanisms are codified, stipulated in policy statements and manifested in the agreement of the parties (Manring,1987). Murigi (2020) also states that, institutionalizing the NSJS expressed through normalizing choosing for it in legislations, policy formulations and implementation measures. Thus,

institutionalizing the NSJS goes beyond constitutionalizing or legal recognition. It encompasses ascertaining its normative status by providing the adequate attention.

Institutionalizing the non-state justice system has both pros and cons. Macfarlane (2007) states that, institutionalizing the NSJS paves a way for the insertion of state made systems. on the other hand, Manring (1987) argues as, institutionalizing the NSJS ensures legitimacy and acceptance of the NSJS not only by the conflicting parties but by the community at large affected by the conflict and the settlement made by the parties.

Attempts have made to institutionalize the NSJS in the Somali region. The NSJS in Somali region has sufficient legislative backup. The readings of FDRE constitution article 78 (5) and Somali region constitutions article 56 entrusted the Somali region state council the mandate to establish elders and clan leaders' council. Though the regional government has been establishing elders and clan leaders' council since 1999, it was not backed by any legislation (Hagman, 2007). Hagman also asserts that, in the absence of legislation elders' terms of reference, election and dismissal procedures were subjected to interpretation. Above all the recognition was subjected to the good will of the government and has been using it as a political tool to balance the politics of the region (Hagmann, 2007).

On August, 2023, the Somali regional state council enacted a proclamation for the establishment of elders and clan leaders' council based on article 56 of the regional constitution. The council of elders and clan leader's proclamation states the necessity of establishing the council, eligibility criteria, election procedure, powers and duties of the members of the council and administration of finances.

The elders and clan leaders' establishment proclamation under its preamble provides three reasons for the need to establish elders and clan leaders' council: to work on cooperation, peaceful coexistence, social integration, unity and participation in social change, democracy, development and climate change; it was found that the local community was organized in clan and interacts each other on clan bases; the respect and sensitivity of Somali people can be used in the work of peace, distribution of public services and strengthening peoples satisfaction with the government.

The elders and clan leaders' establishment proclamation is the first one to establish the council in a legally accepted way. Thus, the composition of the council, election and appointment process, powers and duties, independency, jurisdiction, mode of operation in conflict resolution, and enforcing the decision of the council needs to be deal duly.

4.7.1 Composition, Selection and Eligibility Requirement of Members of the Council

According to the council of elders and clan leaders' establishment proclamation the council contains 114 members of clan leaders and other members based on their intellectual capacity (Article 10 (2) for six years term of office (Article 9).

Article 10 (3) states that, the members of the council nominated by the committee consisting members of the state council and shareholders of a given area. The committee assigned by the regional president to select the nominees. Within thirty days the president shall submit the nominees for the regional council for approval (article 10 (4).

Though the proclamation states as to the council members are elected by the committee, it remains silent how the selection procedure is to be conducted, who are eligible to vote and either it is on simple majority vote. According to the respondents and scholarly works mentioned above, women and minorities are excluded from participating in the elders voting process. The proclamation is silent about the participation of these groups.

The proclamation under Article 12 provides a list of membership criteria. To be elected as elders and clan leaders' council member a person needs to be; an Ethiopian Somali, above the age of 30, has a knowledge of Somali language, culture and traditional law, university graduate with at least 5 years of experience in the field, a person of good character like generous, tolerant and honest, who has not been convicted of criminal charges for the last three years and who is physically and mentally fit to perform the duty.

For an elder to be chosen by the society; character; integrity and impartiality; communication skill; the ability to persuade and compromise, religious knowledge and family tree of a person are the qualities to look for (Hagman,2007, Mohammed et Jotte, 2016). The respondents also confirmed these lists as eligibility criteria.

The council establishment proclamation introduced new criteria of a university knowledge and at least five years of related work experience. It also sets minimum age limit as eligibility requirement. According to Hagman (2007) and the respondents age has no significance. Setting minimum age limit and a university knowledge with a five years of related work experience per se may not have a negative impact. But by introducing these two criteria the state imposes a new tradition.

Above all one area of critiques against the Somali NSJS is, its exclusion of women and minorities. The establishing proclamation left unaddressed the eligibility of women and minorities as an elder and clan leader. Setting physical health as a requirement (Article 12(6)) is also discriminatory to physically disabled people.

The headquarter of the council is at the city of Jijiga. It can establish permanent or temporary offices at zonal and woreda level (Article 5)

4.7.2 Jurisdiction, Powers and Duties of the Council

Article 9 of the proclamation provides a list of powers and duties of the council. Yet, it doesn't expressly state civil or criminal jurisdiction of the council.

According to Article 9 (3), (4), (5) and (6) of the proclamation, the council is entrusted with the power of resolving conflicts that arise between tribes or clans, between neighboring ethnic groups and tribes living in the neighboring states; government agencies, political parties and conflict between tribes over natural resources. Looking to the reading of these sub articles the material jurisdiction of the council is limited to group conflict excluding a conflict that arise between individuals. The provisions don't expressly provide the council's adjudicative power either on civil or criminal matters only.

In addition to conflict resolution the council has a power and duty to work on strengthening unity, cooperation and peace in the region and protect culture and history of the people of Somali in the region (Article 9 (1& 2)).

The elders and clan leaders' council shall check and review legislations and statements issued by the state council; to protect the Somali people culture and maintain the harmony between the culture and shall take measures to legislations and statements against morals and good behavior of Somali people (Article 9 (9 &10)). It shall also harmonize the non-state laws and state laws.

4.7.3 Independence, Mode of Operation and Enforcing the Decision of the Council

As institutionalizing the Somali NSJS is crucial so does its institutional independency. The proclamation under Article 4(2) states the council is independent from both the executive and legislative branches of the regional government. It also mentioned that the council is accountable only to the regional constitution and the people of Somali. The council's

budgetary independency is ensured under Article 25 (3). The council is entitled to independent utilization of the budget. These provisions are evident as the council already got the legislative independency.

The proclamation is silent how the conflict resolution procedure to be conducted; either following the existing non-state way or any. But regarding the execution of its decision, Article 26 (1) states that, every person, government official, members of political organization and government employees are obligation to execute the decision of the council. Yet, the remedy for failure to act accordingly is not provided.

Overall, the proclamation can be taken as a good beginning for institutionalizing the Somali NSJS. But there are some areas which need consideration. Women and minorities right in the establishment proclamation of elders and clan leaders' council is still left unaddressed. The criminal jurisdiction of the council is still vague.

4.8 Justification for Institutionalizing NSJS in Somali Region

The primary and secondary data mentioned so far shows that Somali NSJS has been operating effectively with its limitations. Its inherent legitimacy and acceptance among the Somali people of the region, effectiveness to settle intraclan and individual conflicts, maintain the regional peace and security, and the historical and political background of the region and ascertaining justice through promoting cultural and social interactions calls for institutionalizing the NSJS of Somali region.

As it is discussed in chapter two institutionalizing NSJS ascertained by legitimizing NSJS by legislative and policy frameworks, provision of resources to enabling NSJS to enforce their decision and respect the system to operate according to its inherent nature and values. Most importantly states are at freedom to adapt their own model depending on their context since there is no one size fits all model of institutionalizing NSJS.

Institutionalizing NSJS in Somali region demands formal recognition. Formal recognition enables the NSJS to exercise jurisdiction, enforce decisions and use compelling powers (Forsyth, 2007). Formal recognition is praised for getting the support of the state in terms of resources and enforcement power to help to preserve the values and norms of NSJS.

The FDRE constitution, the Somali regional constitution as well as the newly enacted proclamation for the establishment of elders and clan leaders' council indicates the formal recognition of the Somali region NSJS. Though these legislations formally expressed the

jurisdiction of the NSJS, the practice deviates from the law. The silent treatment and tacit acceptance of the shortcomings of the state to manage conflict of the state shows as the state informally recognized the adjudicative power of the NSJS.

The absence of formal recognition limits the power of NSJS to enforce orders, helps the state to politicize the NSJS, and since there is no regulating mechanism it paves a way to abuse of power and violation of human rights by NSJS. To address these shortcomings of informal recognition, the Somali NSJS needs formal recognition of jurisdiction beyond personal and family matters; over intraclan conflict and criminal matters through formal legislative and policy formation. The formal recognition needs to extend to financing and provision of necessary infrastructure, empowering the NSJS to enforce their decision, supervision of the state to the protection of human rights and control of abuse of power.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Ethiopia is a country with plenty of indigenous knowledge, practices and justice systems. Looking back to the justice system of the country, the non-state justice system has been treated differently by different regimes. During some regimes the non-state justice systems were totally banned from application while in some other regimes it got limited recognition.

The Somali people like the other nations of the country have their own homegrown justice system, which has been applicable for immemorable time. Somali non-state justice named *xeer* has been working beside the state justice system both on civil and criminal matters.

The Somali's reverence to the *Xeer*, its effectiveness to maintain peace and security of the region and its flexibility to adapt with the changing circumstances makes it preferable justice system and conflict resolution method. As a result, Somali elders has been adjudicating any case either civil or criminal regardless of their legally given jurisdictions.

Both the FDRE and the Somali regional state constitutions state that, non-state justice systems including religious courts are given the adjudicatory power over personal and family matters up on the consent of the parties. But in Somali region the elders of the non-state justice system adjudicate criminal matters as long as the parties are consented to it. Owing to its conflict resolution capacity, the Somali non-state justice system gets the regional government support. The Somali non-state justice system *Xeer* is praised for holding together the society. At the same time there are some areas to be criticized about.

The legitimacy it has and its effectiveness in bringing peace and security to the region shows as the Somali NSJS demands formal legislative recognition of its jurisdiction, provision of infrastructure , supervision to ensure human rights are respected and control abuse of powers.

5.2 Recommendation

5.2.1 Recommendations for the NSJS of Somali Region

So far, the researcher critically analyzed the NSJS of Somali region. Even though the Somali NSJS plays a significant role in the justice system of the region, there are some aspects need to be addressed. To fill these gaps the researcher would like to suggest the following points

1. Enacting a clear legal and policy framework on the jurisdiction of NSJS specially on criminal matters
2. Incorporating fundamental human right principles without undermining the adjudicative power of Somali NSJS
3. Incorporating the tradition and process of NSJS in to the formal education system to ensure its continuity
4. Building the capacity of the elders through training on human right issues.
5. Establish supervisory mechanism to check abuse of power.
6. Provision of infrastructure and finance to equip the NSJS.

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Annex 1

Interview guide questions

I. Introduction

I want to thank you for taking the time to meet with me today.

My Name is Mihiret Dereje Tiruneh, a student of the graduate school of Institute for Peace and

security studies at AAU. I am now doing my Master's thesis on the title "Institutionalizing Non-State Justice System to State Justice System in the Somali Region ".

The purpose of this research is to examine the Somali NSJS, analyze its interaction with the state justice system and how the Somali people describe it. You are purposely selected because

of your experience and expertise knowledge in the study area. This interview will be recorded up on your express consent and shall not be used for any purpose than this study.

II. Interview guide for elders

1. Composition and function of judges
 - How is the appointment of judges (Ugas)?
 - Qualification, background, gender composition, minorities representation in the
 - What is the function and role of the judges?
2. Court records
 - any recorded decision (request for sample if they are willing)
 - if no, what happens during appeal?
3. Mode of operation
 - How is the case flow? how many cases handled per day/ month/ year?
 - What affects case flow,
 - What type of cases they entertain?
 - Do they know their jurisdiction and jurisdictional limits or adjudicate regardless?
 - How is the jurisdiction determined on both civil and criminal cases? (the place where the crime committed or any parameter)
 - How do they solve conflict over jurisdiction between state courts and xeer?
 - Do they consider some factors before decision like age, gender, economic and social status of parties?
 - How do they summon parties and witness?

- Are there cases referred to xeer authorities/ courts or by xeer to authorities/ courts?
 - Is there any system to appeal to state court or within the Xeer?
 - Is there any particular procedure mandated by the state concerning women, children and other minorities?
 - How are the fees and fines determined and collected? Any additional/informal fees?
 - Who are the dominant users?
4. Efficiency of xeer
- How do they enforce their decisions?
 - Do the state enforce the decision of xeer?
 - What is the remedy for non-observance of their decisions?
 - Is there any support from the government to maximize their potential in terms of material, financial or training?
5. Infrastructure
- How is the adjudication conducted? Is it in the office, court room, or any other setting?
 - Any problem related to stationary, place?
6. Fundamental human rights
- women and children right, (how do they deal with cases like *dumaal* (where a widow is forced to marry a male relative of her deceased husband, (vis a vis Fed cons Art 35(1,2,4) & Reg con 35(1,2,4) &103
 - *higsiiian* (where a widower is given the right to marry his deceased wife's sister) (vis a vis Fed cons Art 35(1,2,4) & Reg con 35(1,2,4) &103
 - *godobtir* (the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement) (vis a vis Fed cons Art 35(1,2,4) & Reg con 35(1,2,4) &103
 - Women inheritance right (vis a vis Fed cons Art 35(7) & Reg con Art 35(7) &103
 - fair trial (the right to be heard, to be represented, produce evidence, to appear, equality of parties)
7. Do the parties know and exercise their constitutional right to choose or not to consent to xeer? Any consequence for not consenting to xeer? (vis a vis Fed cons Art 34(5) & Reg con 34(5) &66

8. Supervision by the state and their relation
 - Is there any mechanism for the state to regulate abuse of power? Or check accountability?
9. Is xeer valuable/relevant?
 - Why? How many % of the respondents affirmed?
10. Any problem in practicing xeer (legal, administrative, infrastructure)
11. Which one is more preferred xeer or state justice system?

III. Interview guide for state judges, police, prosecutor, office of women and children affairs and tourism office experts

- Name/Age/Sex/ educational background/Duration in office/District/Post-held?
- Is there collaboration between your office and xeer ? If so, what form does the collaboration take? If not, why?
- Do you perceive xeer as impartial? why?
- What are the factors that influence the decisions of xeer judges?
- Have you any knowledge/received reports of problems faced by various people in using xeer? If so, what are the common problems and complaints?
- How do you describe xeer in terms of fundamental human rights (women, children, minorities)? Are the constitutional rights ensured (right to fair trial, representation, personal appearance, to be heard, consent to xeer)
- Do the xeer judges know their jurisdiction? Do they exercise with in or beyond their jurisdiction? If yes, why?
- Appeal to state courts? Or with in the xeer system?
- Have you been approached to assist in the enforcement of decisions of xeer decisions? Cite examples.
- What do you consider as: the strengths and weaknesses of xeer?
- Give your comparison between xeer and the state court system.
- What other alternative dispute resolution mechanisms exist the Somali region? identify them in order of priority given to them.
- Indicators of efficiency and effectiveness of xeer?
- Any suggestions for change in xeer system?
- Identify areas where you think xeer judges need support
- What solution do you suggest to formalize the performance of xeer
- Any other comments?

Annex 2

List of Key Informants

| No | Code | Education level | Responsibility | Date |
|----|--------|---------------------------|------------------------------------------------------------|-------------------|
| 1 | KI,001 | LLM | Somali Regional State Supreme court Vice president & Judge | August 29, 2023 |
| 2 | KI,002 | LLM, MA | Somali Regional State Supreme Court Judge | September 1, 2023 |
| 3 | KI,003 | LLB | Public Prosecutor | August 30, 2023 |
| 4 | KI,004 | LLB | Public Prosecutor | August 30, 2023 |
| 5 | KI,005 | LLB | Public Prosecutor | August 30, 2023 |
| 6 | KI,006 | MA | Culture and tourism expert | August 31, 2023 |
| 7 | KI,007 | BA degree | Culture and tourism expert | August 31, 2023 |
| 8 | KI,008 | BA degree | Police officer | August 30, 2023 |
| 9 | KI,009 | Diploma | Police officer and forensic expert | August 30, 2023 |
| 10 | KI,010 | BA degree | BOWAC expert | August 29, 2023 |
| 11 | KI,011 | BA degree | BOWAC expert | August 30, 2023 |
| 12 | KI,012 | BA degree | Elder (<i>Ugas</i>) | September 1, 2023 |
| 13 | KI,013 | BA degree | Elder (<i>Ugas</i>) | August 29, 2023 |
| 14 | KI,014 | Diploma | Elder (<i>Ugas</i>) | September 1, 2023 |
| 15 | KI,015 | 10 th complete | Driver | August 28, 2023 |
| 16 | KI,016 | Degree | Nurse | August 28, 2023 |
| 17 | KI,017 | Degree | Shilabo woreda peace and security sector head | October 24, 2023 |

Declaration

I, Mihiret Dereje Tiruneh declare that this thesis is my original work and has not been presented for a degree at any other University, and that all sources of material used for the thesis have been duly acknowledged.

Date: _____

Signature: _____