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THE AFAR CUSTOMARY CRIMINAL JUSTICE SYSTEM: TOWARDS ITS  
BETTER ACCOMMODATION

BY:

OSMAN AHMAD MUHAMMAD

JUNE, 2017.

ADDIS ABABA,  
ETHIOPIA

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JUNE, 2017  
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## DECLARATION

I, **Osman Ahmad Muhammad**, hereby declare that the work submitted for this dissertation is the result of my personal effort and an original work. This work has not been submitted for any degree in any other University or institution. In case any Source, secondary or primary, has been used, it has been duly acknowledged and properly cited.

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## ACRONYMS

<i>ANRS</i>	Afar National Regional State
<i>EPA</i>	Environmental Protection Agency
<i>FDRE</i>	Federal Democratic Republic of Ethiopia
<i>UNESCO</i>	United Nations Education, Science and Cultural Organization
<i>ACCJS</i>	Afar Customary Criminal Justice System
<i>MSCJS</i>	mainstream criminal justice system
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ADR	Alternative Dispute Resolution
SNNP	Southern Nations, Nationalities and Peoples
SWOT	Strength, Weakness, Opportunity and Threats
Art.	Article

## GLOSSARY

<i>Mad" a</i>	the Afar Customary Law
<i>Mad' ah Abba</i>	Father of Law
<i>Mablo</i>	the Afar Customary Law Litigation Process
<i>Hara</i>	the Afar Customary Court of Law
<i>Makaban</i>	a Jury or Judges of Afar Customary Law ( <i>plural</i> )
<i>Makabantu</i>	Afar Customary Judge ( <i>singular</i> )
<i>Diyat</i>	Compensation for Killing
<i>Dikha</i>	Compensation for Injuries

<i>Fataha</i>	the Act of Completing Litigation by Reciting a Verse of a Qur'an or Mentioning the Name of Allah
<i>Woreda</i>	an Administrative Division Equivalent to District
<i>Fi'ima</i>	a Traditional Institution Responsible for the Enforcement of the Decisions of Makaban
<i>Afarre</i>	a Customary Law Applicable to the Afar Only
<i>Adanle</i>	a Customary Law Applicable to the None Afar
<i>Baklo</i>	a Kid Goat which is Used as a Unit of Payment for Compensation in Bur'uli Mad'a
<i>Kedoh Abba</i>	a Clan Leader
<i>Lee kee Ayso</i>	the Food and Drinks Necessary for Makaban during the Litigation Process ( <i>a Feast</i> )
<i>Habi or Mabbara</i>	a Human Guarantee Responsible for the Party's Good Behavior during Litigation Process
<i>Maruso or Doro'u</i>	is a Fine Imposed upon a Party for Court Contempt or Other Misbehaviors
<i>Maro</i>	Assembly of Makabon
<i>Afu</i>	Forgiveness/ Forgiving or Reconciliation
<i>Adoh yan mara</i>	White people-considered to be Commoners
<i>Asah yan mara</i>	Red people- noted as Nobles with Supreme Judicial Power
<i>Xeer</i>	the Somali Customary Law

## **Abstract**

*The state in Ethiopia is failed to enforce its laws effectively and it has also failed to recognize those customary practices officially and sufficiently, though there is a de facto accommodation of customary practices in most parts of the country such as the Afar region. This research has aimed at disclosing the problems of accommodating the customary criminal justice systems in Ethiopia, focusing on the ACCJS (mad'a) and recommending the possible solutions at the end. The research is a mixture of both doctrinal and none doctrinal and qualitative in nature. It has used both primary data collected through in-depth interviews using the purposive sampling method and also secondary data taken from varieties of books, journal articles, official documents, reports, etc.*

*The research findings have disclosed that The ACCJS is a widely applicable traditional mode of justice and the community uses this system as a primary source for all legal disputes. The general publics' opinion of the Afar people towards their customary dispute resolution is highly supporting and favoring the preservation of the current practices. In addition to this, almost all of the informants support the side by side operation of the two systems, with collaboration of one with the other and the harmonization of the two systems to render better service to the general public in the region. Particularly, it is an ambition of the majority that the Afar customary criminal justice system is given official recognition by the formal justice sector employing the best modes of accommodation based on the country's context.*

*At the same time, there are a number of conducive issues that can help the accommodation of mad'a by formal system such as the comprehensiveness, uniformity and regularity of mad'a and the de facto accommodation by the regional government, implicit tolerance by the federal state and some newly developed policies and draft laws at federal level, inclining to the authorization of the ADR system in criminal adjudications in the country, etc.*

### **Key Words:**

*This research contains key words such as Ethiopia, Afar, legal pluralism, customary law, criminal justice system, accommodation.*

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background of the Study

*"No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation".<sup>1</sup>*

*"...the vast majority of human behavior is shaped and influenced by informal and customary normative frameworks. Even in societies with the most developed legal systems, only about 5% of legal disputes (that is, 5% of situations that have been understood as 'legal') end up in courts."<sup>2</sup>*

As the above quotes amply demonstrate, legal and regulatory institutions may not obtain authority, legitimacy and effectiveness unless they reflect, as much as they can, social norms and values of their respective communities.<sup>3</sup>

People respect their customary law not due to the fear of punishment of the law; but their belief that those laws are manifestation of their long lived values.<sup>4</sup> Customary law is one of the elements of identity and hence an intrinsic value of the people.

Under modern state structure with advanced legal system, the issue of customary law is an issue of *legal pluralism*. Legal pluralism by definition is the existence of more than one legal order under one political system and hence it is the fact that there are, most of the time, multiple uncoordinated, coexisting or overlapping bodies of law.<sup>5</sup>

A like the case of many third world countries identified with plurality of norms and values, legal pluralism is also one of the peculiarities of Ethiopia. The country has recognized the existence of

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<sup>1</sup> Haile sellasie I, Emperor of Ethiopia Quoted in Fisher, Stanley Z., "Traditional Criminal Procedure in Ethiopia", The American Journal of Comparative Law, Vol. 19, No. 4, (1971), pp. 709-746

<sup>2</sup> Leila, Chirayath, et al , *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*,(2006), Prepared as a Background Paper for the *World Development Report (Equity and Development)*, p.2, available online at <https://namati.org>, accessed on May 20/05/2016

<sup>3</sup> Gebre Yntiso, Assefa Fiseha & Fekade Azeze (Eds.) *Introduction-Customary/Alternative Laws: Values, Practices and Legality*, in *Customary Dispute Resolution Mechanisms in Ethiopia*, (2012), Ethiopian Arbitration and Reconciliation Center, Addis Ababa, vol.2, p.32

<sup>4</sup> Id, p.40

<sup>5</sup> Tamanaha, Brian Z, "Understanding Legal Pluralism: Past to Present, Local to Global", Sydney Law Review, vol. 30, (2008), p. 375

plural norms and orders such as a state law, customary law and religious laws. This is recognized under the FDRE Constitution of Ethiopia.<sup>6</sup> Even though this is the constitutional position and the constitution is the supreme law of the land, there are clear paradoxes in Ethiopia with respect to principles of *legal pluralism*. Under the massive codification and legal transplantation of the 1950s and 1960s, customary practices that were in force were outlawed officially under article 3347(1) of the 1960 Civil Code of Ethiopia.<sup>7</sup>

Similar and related jurisprudence is that of the criminal issues. Criminal acts, with whatever severity they may be, are considered to be a state concern and cannot be adjudicated through customary dispute resolution mechanism. Particularly grave crimes such as homicide are not expected to be adjudicated through customary laws.

However, it is widely known that customary dispute resolution mechanisms remain effective in several parts of the country including central highlands and urban areas, where the state institutions are considered to have a dominant position.<sup>8</sup> Particularly the peripheral areas like the Afar region operate under a totally different legal system. To solve conflicts in Afar society, their clan elders as well as kinship, using their own local mechanisms, maintain peace through the process known as *mablo* (litigation) and *maro*(assembly).<sup>9</sup> There is wide lack of awareness about even the very existence of the state laws among the significant number of the Afar people, particularly on the part of the population living in rural areas.<sup>10</sup> Not only they do not lodge their cases at the state court of law, but also they consider doing that is illegal and punishable under the Afar customary law.<sup>11</sup>

The recognition of customary practices by the FDRE Constitution is limited only to personal and family matters.<sup>12</sup> Criminal justice issues are made not to be jurisdiction of customary laws at all.

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<sup>6</sup> The FDRE Constitution, 1995, Articles 34(5) and 78(5), Proc.no.1, Neg. Gaz., year 1. no.1

<sup>7</sup> Civil Code of Ethiopia, 1960, article 3347(1)

<sup>8</sup> Gebre Yntiso, Assefa Fisaha, &Fikade Azeze(Eds.), cited above at note 3, p.32

<sup>9</sup>Kelemework Tefera and Mitiku Haile, *Indigenous Institutions of Conflict Resolution Among the Ab'ala Afar of the Northern Ethiopia*, available online at <http://www.ossrea.net>, accessed on 27/11/2014

<sup>10</sup>Kahsay Gebre, *Mad'a: the Afar Customary Justice System*, in GebreYntiso, Assefa Fiseha & Fekade Azeze(Eds.), (2011), *Dispute Resolution Mechanisms in Ethiopia*, Ethiopian Arbitration and Conciliation Center, Addis Ababa, vol.1, p.325

<sup>11</sup>Kesete GebreHiwot, *the Afar Customary Law: Rich Cultural Heritage*, (2010), available online at <http://www.shabait.com/about-eritrea/history-a-culture>, accessed on 27/11/2014

<sup>12</sup> The FDRE Constitution, cited above at note 6, Arts. 34(5) and 78(5),

Though this is a normative aspect; however, the *de facto* situation is not the same. For instance, the Afar society in Ethiopia and elsewhere is well known for its customary law practices, handling almost all issues of criminal justice starting from petty offences to homicide.

## **1.2 Statement of the Problem**

In Ethiopia, there are varieties of legal systems though not recognized by the state as such sufficiently.<sup>13</sup> There are European originated state laws introduced to the nation during 1950s and 1960s through the codification process.<sup>14</sup> There are also different customary laws of different ethnic groups as well as religious laws such as the Sharia laws that exist side by side. This reality is evidence of the existence of legal pluralism in Ethiopia. However, since the codification process, the recognition accorded to customary practices by newly transplanted laws is very minimal or insignificant. Nonetheless, practically, those customary laws have endured to-date and have been effective enough despite the above mentioned denial of recognition by the state laws.

The reasons why the Ethiopian communities such as Afar insist on using their own customary laws and neglect the positive laws have to be scouted. Particularly, why the state up to this extent has tolerated the avoidance of its laws by those communities while it had already withheld recognition for them more apparently in areas of criminal justice is not yet answered question. There is no certainty for the situation of lack of a clear synergy between the two legal regimes to continue in the future in the same direction. In order to avoid such dilemma, options that should be taken to solve the problems of the stalemate must be thought of.

Therefore, a case in which, criminal adjudication by customary laws, in principle, are not recognized at the state level and, however, practically in some parts of the country like the Afar region, state laws are almost inapplicable, may not result in a harmonized legal system in the near future. Accordingly, to narrow the gaps and working towards creating more harmonized legal system is indispensable.

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<sup>13</sup>Gebre Yntiso, Assefa Fisaha, &Fikade Azeze(Eds.) *the State of Knowledge on Customary Dispute Resolution in Ethiopia*, in Customary Dispute Resolution Mechanisms in Ethiopia, (2011), Ethiopian Arbitration and Conciliation Center, Addis Ababa, vol.1, pp.21-35

<sup>14</sup> Id,p.23

## **1.3 Objectives of the Study**

### **1.3.1 General Objective of the Study**

The general objective of this Thesis is to explain the overall strengths and weaknesses of the Afar customary law in general and particularly its criminal justice system. It is also to recommend the strong aspects to be preserved and weaknesses to be improved. Moreover, the Thesis intends to make its recommendations to the state that the customary criminal justice systems have to be better accommodated under positive laws starting with the general guide lines in the constitutions of both federal and ANRS and particularly under the criminal justice system of the FDRE.

### **1.3.2 Specific Objectives of the Study**

The specific objectives of the Thesis are to:

- examine how social values and wisdom can help customary criminal justice system to endure and get recognition;
- ascertain the strengths as well as weaknesses of the Afar customary criminal justice system;
- investigate if there are possibilities to narrow the gaps between the state laws and Afar customary laws and secure more accommodation for the later under the mainstream justice system;
- recommend the Afar elders to improve the backward aspects and preserve the strong aspects of the Afar customary law particularly in its criminal justice sphere; and
- Call for the federal as well as the regional state governments to give due attention to the better accommodation of the Afar customary criminal justice system.

## **1.4 Research Questions**

This Thesis intends to investigate the following questions:

- Why do the Afar people prefer their customary criminal justice system to the formal court system?
- What are the strengths and weaknesses of the Afar customary justice system?

- Why has the Ethiopian state implicitly accommodated the customary criminal justice system to be a dominant practice in some regions of Ethiopia such as the Afar region while the legal framework has denied its recognition?
- Are there possibilities to narrow the gaps between the state laws and customary laws and to secure more recognition for the Afar customary criminal justice system under the mainstream justice system?
- Are there best practices of other jurisdictions that Ethiopia can adopt in accommodating its customary laws in general and Afar customary criminal justice system in particular?

### **1.5 Significance of the Study**

Customary laws have qualities that outweigh modern laws in terms of depth, intensity and details of legal procedures and particularly in moral responsibilities.<sup>15</sup> For centuries, the Afar customary law (*mad'a*) has proved its utility for the Afar community.<sup>16</sup> In Ethiopia, since the ultimate goal of national legal system is to insure peace and order, the customary practices are best known for their efficiency in this respect. Thus their accommodation and institutionalization will give many advantages to the nation. This Thesis is expected to serve as springboard for future researches on the Afar customary criminal justice system and further will contribute to its better accommodation and institutionalization process. It is expected to serve as the guidelines for the legislators both at national and regional levels while formulating their respective criminal laws and policies.

### **1.6 Research Methodology**

This Thesis is a mixture of both doctrinal and none doctrinal research and qualitative in nature. It has tried to explain the Afar customary law in terms of classification, structure, its strengths and weaknesses and how it can be accommodated by the mainstream criminal justice administration. In general, different literatures on the subject matter have been consulted. Structured and in-depth interviews with persons of customary knowledge and with renowned clan leaders and makaban were conducted.

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<sup>15</sup>Ibid

<sup>16</sup>Jamaluddin A. Redo, *the Afar Customary Law*, (1973) preface, p.1

The researcher adopted *purposive sampling* techniques selecting people with proven knowledge of the Afar customary laws such as clan leaders and makabon who have served as customary criminal court judges for a long period of time, researchers on the subject matter at regional and national levels, regular court judges, officers from regional justice bureau, regional police commission, public prosecutor, prison administration and other administrative bodies who are knowledgeable in the customary criminal justice system as well as conflict prevention and resolution. The researcher's prior personal knowledge and observations were also used. Official documents and reports were examined.

Since the Afar customary practices are almost identical everywhere, the data collected in certain area represents the remaining Afar.<sup>17</sup> Thus, this study, though, it was carried out in administrative zone one of the ANRS, it can represent all customary practices in the Afar region as a whole. In addition to that, some of the people interviewed were from different zones of the region and hence this makes a good representation of the region. In this interview, three court judges from all levels, three customary elders (makaban), one from justice bureau, one from police commission, one from the security and administration bureau, one from the regional council, one Afar customary law researcher and another customary law researcher at national level, one from regional prison administration and in total 13 people were interviewed.

### **1.7 Scope of the Study**

This study was conducted in the Afar National Regional State particularly in administrative zone one, in areas such as Dubti, Aysa'ita and Samara-Logia city administration, though some people who were interviewed were from other zones.

### **1.8 Limitation of the Study**

While conducting this research, there were some challenges such as shortage of literature in the field of study, time limitation, financial constraints, etc. There are very limited researches done so far to serve as a source for this study in terms of the need of accommodation. Another limitation was time limitation. Finally, lack of sufficient financial support for the study had also negative impacts on the quality as well as coverage of the study.

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<sup>17</sup> Lenesil Assefaw and Original W/giorgis, *the Juvenile Justice under the Afar Customary Justice System*, no year of publication, the FDRE Supreme Court, Children Justice Project Office, p.8

## **1.9 Structure of the Study**

This research is qualitative in nature and used both primary and secondary data. The research findings have disclosed that the mad'a is a widely applicable traditional mode of justice among the Afar and they use this system as a primary source for all legal disputes. Accordingly a better accommodation for mad'a is recommended because of its wide acceptance by and practical utility for the Afar people. This Thesis is organized in the following manner. Chapter one is about the introduction of the Thesis. Under chapter two, theoretical and conceptual frameworks of the customary law have been analyzed. Under Chapter three, status of legal pluralism and customary laws in Ethiopia is explored. Chapter four is the main chapter which examines the accommodation of the Mad'a system. Chapter five is a final chapter which provides conclusion and recommendations.

## CHAPTER TWO

# CONCEPTUAL AND THEORETICAL FRAMEWORK OF CUSTOMARY LAW

### 2.1 Introduction

The fundamental arguments of this Thesis are that the customary criminal justice systems of different ethnic groups of Ethiopia including and mainly the Afar customary criminal justice system should be accorded with a better accommodation. Given the current legal system which has a considerable monopoly over legal matters in the country, at the frame work level, it cannot be considered a representative of the various ethnic groups, which to date, practice their customary laws with amazing frequency and magnitude, though without the formal recognition. The quest of better accommodation of customary practices in Ethiopia can have two main reasons which finally have, as an aim, to see more advanced and prosperous Ethiopian state. The *first* reason is from the perspective of the rights of nations, nationalities and peoples of Ethiopia. To be adjudicated according to their customs and preferences of the Ethiopian ethnic groups are alienable rights, which in turn raise a question of legitimacy against laws, imposed upon them. *The second* reason is to develop a legal system which draws its source and legitimacy from the people it governs and hence it will be a complete legal system which serves as a basis for all of the development resurgence process of Ethiopia at present.

Therefore, this Thesis, through its thorough study of the overall phenomenon of the customary practices of the country in general and the Afar customary criminal justice system in particular, is expected to indicate some ways which will enable the state to come out of the current quandary. Particularly, the Thesis will propose better ways in which the customary practices of the country could be accommodated and the situation of the deadlock between the formal and customary laws could be resolved.

Under the current chapter, we will study the conceptual and theoretical framework of the customary law in general. Definition, theories, prevalence, and status of accommodation of customary laws at theoretical levels will be well explored.

## 2.2 Definition of Customary Law

An attempt to define and characterize customary law is by itself in need of exhaustive study and committed works<sup>18</sup>. One cannot anticipate having a commonly understood definition for the term “customary law”. Accordingly, a few and more precise definitions of legal scholars will be presented hereunder:

One short definition of customary law says "it is generally understood to be that body of law, which is predominantly oral rather than written, and which derives its authority from sources other than the State<sup>19</sup>."

Another definition by the scholar known as B. Malinowski, puts customary law as "the positive law governing all the phases of tribal life, consists then of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society"<sup>20</sup>.

## 2.3 Concept Clarification

As it has been explained in the previous sub-section, the concepts and terminologies concerning customary laws are not as such precise. Particularly, for justice systems other than state justice systems which are twisted in line with the western style is given so many designations. Such designations include customary law, folk law, people’s law, unofficial law, indigenous law or primitive law, often implying its inferior position as compared with the modern Western state originated laws<sup>21</sup>. Some still tag it as indigenous, informal, non-formal, non-state or non-official

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<sup>18</sup> WIPO-World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: an Outline of the Issues* (2013), p.2, available at [www.wipo.int](http://www.wipo.int), last accessed on 5/12/16, 8:05 pm).

<sup>19</sup> M. S. Vani, "Customary Law and Modern Governance of Natural Resources in India: Conflicts, Prospects for Accord and Strategies", in Rajendra Pradhan (Ed.), *Legal Pluralism and Unofficial Law in Social, Economic and Political Development*(2003), Kathmandu: The International Centre for the Study of Nature, Environment and Culture, p. 409

<sup>20</sup> Malinowski, B., *Crime and Custom in Savage Society* (1926). London: Kegan Paul, p. 58

<sup>21</sup> Ayalew Getachew Assefa, *Customary Laws in Ethiopia: A Need for Better Recognition*, (2012), Women's Rights Perspective, A working Paper, Danish Institute For Human Rights, available at [http://www.menneskeret.dk/files/media/dokumenter/udgivelses/ayalew\\_report\\_ok.pdf](http://www.menneskeret.dk/files/media/dokumenter/udgivelses/ayalew_report_ok.pdf), p. 17, accessed on 13/06/2016

justice systems, often applying them interchangeably<sup>22</sup>. In relation to the forums entertaining the customary adjudication, the terms traditional courts, customary courts, and indigenous courts, may be used to refer to courts which are part of the formal state hierarchy of courts, but which use traditional leaders as judges or apply a form of customary law<sup>23</sup>. Though the title of this Thesis is entitled as '*the Afar Customary Criminal Justice System...*', the sources used as part of a literature review, include those sources entitled under the above different tags which are to mean ultimately, non-state justice systems but necessarily traditional. This is because not all non-state systems are traditional. For example, the popular justice forums or street committees in South Africa<sup>24</sup> are informal or non-state justice forums but they are not tradition system. Hence, those non-state justice systems which are not traditional are not used analogically with the customary justice system for the purpose of this Thesis.

## **2.4 Theories of Customary Law**

Theory is a blood line of any social science discipline because it defines the techniques we would use for how we think about our objects of study, and provides us the insights through which we sort out our subject matter in order to understand complex facts.<sup>25</sup> It gives us our organizing concepts, frames our research questions, and guides our scholarly interpretations.<sup>26</sup>

There are two general theories regarding the question as to when a custom is transformed into law. They are: analytical theory and historical theory.

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<sup>22</sup> Kariuki, Francis, *Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology*, p.1, available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf>, accessed on 5/12/16,8:35pm, no year of publication, Oduwole T. A. & Adegoke, Niyi, *Traditional and Informal Mechanisms of Crime Control*, National Open University of Nigeria, School of Art and Social Science, Nigeria, p.41, available at [www.nou.edu.ng](http://www.nou.edu.ng), accessed on 7/24/2016,8:18 pm.

<sup>23</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, (2000), Astron Printers, London, p.11

<sup>24</sup> Id, p.12

<sup>25</sup> B. Kraska Peter, "Criminal Justice Theory: Toward Legitimacy and an Infrastructure", *Justice Quarterly*, vol. 23 no. 2, (2006), p.167

<sup>26</sup> Id, pp.167-8

### **a) Analytical Theory**

Austin, Holland, and Gray are identified to be the forefront advocates of analytical theory. John Austin, the most notable personality spoken in support of the analytic school, believes that custom is a source of law and not law itself. Customs are not positive laws, according to Austin, until their existence is recognized by the decisions of the courts or recognized by the state laws through inclusion.<sup>27</sup> For Austin, sovereign will is the major component for the source and as well as validity of law. According to him, law is the top down process based on the orders of the sovereign accepted by his subjects. Since customs are not will or order of the sovereign, and not top down process, they are not laws.<sup>28</sup>

### **b) Historical Theory**

According to the historical theory, the growth of law does not depend upon the arbitrary will of any individual and it does not depend upon any accident.<sup>29</sup> It grows as a result of the intelligence of the people and it is derived from the common consciousness of the people.<sup>30</sup> The historical school of jurisprudence gave customs legal status even to the extent of making it the antecedent of common law.<sup>31</sup>

The position of this researcher is in favor of the second theory of customary law that is the historical theory of the customary law. This is because the researcher believes that the primary form of rules was a customary law and custom in turn is long lived values of the society transferred down from generation to generation over which a sovereign or any individual should not claim its invalidity and inferiority. Accordingly the source of any law should be a custom of a respective society and the validity of any positive law should be checked in light of such customs and not vice versa.

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<sup>27</sup> Austin. John, *Lectures on Jurisprudence or the Philosophy of Positive Law*, (5th Edition, 1885), Vol. 1, ed. R. Campbell. London: John Murray, P. 316-7

<sup>28</sup> Id, p.317

<sup>29</sup> Shekharkhadra, Chandra, *the Custom's Basic Elements to Establish It as the Valid Source of Law*, available at : <http://www.slideshare.net/chandra1020/custom-basic-elements-to-establish-it-as-the-valid-source-of-law-48135518>, Published on May 14, 2015 and Accessed on: August 3, 2016

<sup>30</sup> Ibid

<sup>31</sup> Allen, C. K., *Law in the Making*, (1961) London: Oxford University Press, p.2

## 2.5 Prevalence of Customary Law in Contemporary World

It is reported that in many developing countries in general and in most parts of Africa in particular, customary systems operating outside of the state regime are often the common form of regulation and dispute resolution, covering up to 90% of the population<sup>32</sup>.

Some studies indicate that out of 190 constitutions in the world, 115 were found to have relevant provisions concerning customary laws<sup>33</sup>. The highest level of recognition of customary law is found in African constitutions, both in terms of the number of countries with relevant provisions and the span of aspects of customary law covered. Of 52 African constitutions, 33 referred to customary law in some form<sup>34</sup>. Some statistical data depict surprising figures of the use of customary justice in different countries of the globe. In Malawi between 80 and 90% of all disputes are processed through customary justice forums.<sup>35</sup> In Bangladesh an estimated 60-70% of local disputes are solved through the Salish.<sup>36</sup> In Sierra Leone, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as ‘the rules of law, which, by custom, are applicable to particular communities in Sierra Leone’<sup>37</sup>. Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana<sup>38</sup>. There are estimates claiming that up to 80% of Burundians take their cases to the Bashingantahe institution as a first or sometimes only instance<sup>39</sup>. Likewise 99% of the Afghani people make their decisions according to *Pashtunwali* customary law because they believe that they have to make decisions according to their custom

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<sup>32</sup> Leila, Chirayath, et al , cited above at note 2, p.3

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Scharf, Wilfried, *Informal Justice Systems in Southern Africa: How Should Governments Respond?* Institute of Criminology, University of Cape Town, South Africa. No Year of Publication.

<sup>36</sup> UNDP, *Programming for Justice: Access for All*,(2005), A practitioner’s Guide to a Human Rights-Based Approach to Access to Justice, vol. 19

<sup>37</sup> Leila, Chirayath, et al, cited above at note 2, p. 20

<sup>38</sup> Ibid

<sup>39</sup> Wojkowska, Ewa, *Doing Justice: How Informal Justice Systems Can Contribute*, (2006), United Nations Development Programme, Oslo Governance Centre, p.12

and tradition<sup>40</sup>. In India many customs are accepted by law and exercised through the institution of the *Lok Adalat* tribunals<sup>41</sup>.

The map below tries to depict the places of the world where customary laws/ informal justice systems are abundantly used by the respective communities.



**Map 1:** The Red Spots Show the Distribution of Customary/ Informal Justice Systems Worldwide (Adopted from Ewa Wojkowska, 2006)

The status of customary law in Ethiopia is not different from other third world countries. The Practice of customary laws in majority of parts of Ethiopia are still alive despite the attempt to abolish them by the civil code of Ethiopia of 1960<sup>42</sup> and the total denial of criminal adjudication according to the customary laws in the whole legal system. The Afar people are one of the most notable parts of Ethiopian society that uses its customary law, almost for all purposes.

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<sup>40</sup> Khan, Hamid M., *Islamic Law, Customary Law, and Afghan Informal Justice*, ( 2015), United States Institute of Peace, Special Report no. 363

<sup>41</sup>Janine Ubink, and Benjamin van Rooij (Eds.), *Customary Justice: Perspectives on Legal Empowerment, Legal and Governance Reform*,(2011): Lessons Learned. No. 3, International Development Law Organization, University of Leiden, Faculty of Law, p.7

<sup>42</sup> Van Doren, John W, "Positivism and the Rule of Law, Formal Systems for Concealed Values: a Case study of the Ethiopian Legal System", *Journal of Transnational Law and Policy*, vol.3, no. 1, (1994), p.174

Therefore, the purpose of this Thesis is to examine the overall situation of the customary dispute resolution mechanisms in Ethiopia and particularly to examine the ACCJS and its need to get better accommodation.

### **2.5.1 Customary Law under International Law**

International law has taken customary law into account for more than 50 years, in conventions as well as non-binding declarations<sup>43</sup>. There is undoubtedly greater interest in and recognition of traditional justice in the international peace building community, at least at a rhetorical level<sup>44</sup>.

Article 27 of the UDHR gives everyone the right to participate freely in the cultural life of the community. The International Covenant on Economic, Social and Cultural Rights (ICESCR) article 15 compels states to recognize the rights of everyone to take part in cultural life. The UN Charter and the ICCPR, directly or indirectly, have also shown that customary law is part of a people's culture<sup>45</sup>. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also recognizes the rights of indigenous people to traditional lands, including respect for their traditions, customs and land tenure systems<sup>46</sup>. It also calls for the self-government of indigenous people and recognition of their institutions, without limiting their right to participate in the running of the State<sup>47</sup>. The emergence of a 'right to culture' since the 1950s provides additional support for the argument that states are bound by an obligation to foster customary laws.<sup>48</sup>

### **2.5.2 African Customary Law**

The term '*African customary law*' refers to the body of unwritten traditions, norms, social conventions and rules that, through long usage and widespread acceptance, direct and govern

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<sup>43</sup> Cuskelly, Katrina, *Customs and Constitutions: State Recognition of Customary Law around the World*, (2011), IUCN, Bangkok, Thailand, p.4

<sup>44</sup> Oduwole T. A. & Adegoke Niyi, cited above at note 22, p.68.

<sup>45</sup> Ayalew Getachew Assefa, cited above at note 21, p.20

<sup>46</sup> United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, G.A. res. 61/295, U.N. GAOR, 107th Sess., U.N. Doc. A/RES/61/295 (2007), Article 26. Available on-line: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (accessed 6 September 2014).

<sup>47</sup> Id. arts. 4, 5 and 34.

<sup>48</sup> S. Goonesekere, *a Right Based Approach to Realizing Gender Equality* (2010) available at <http://www.un.org/womenwatch/daw/news/index.html>, accessed on 01 December, 2014.

African traditional society<sup>49</sup>. Africa, both before and after the colonization, did not avoid its customary laws, irrespective of the attempts to influence it by the alien powers to impose their Europe grown legal systems. Seemingly, being desperate by the locally grown strong faith of the community in their customs and believes, the colonial powers finally, recognized the African customary laws to some extent. In areas colonized by British, a dual system of law was established whereby English common law was applied in areas directly ruled by them but customary law was used in areas under ‘indirect rule.’<sup>50</sup> In many African countries, for example, in Sierra Leone and Zambia, customary law has been given an explicit role both in civil and criminal justice through local courts<sup>51</sup>. The Somali people in the Horn of Africa follow a customary law system referred to by them as *Xeer*. It survives to a significant degree everywhere, including the Somali communities in the Ogaden region of Ethiopia<sup>52</sup>.

### **2.5.2.1 African Traditional Values under Regional Laws**

The African Charter, under its art.17, provides every individual with the right to freely take part in the cultural life of his/her community, and dictates that the promotion and protection of morals and traditional values recognized by the community shall be the duty of the state<sup>53</sup>. The Charter also obliges individuals to preserve and strengthen positive African cultural values in his/her relations with other members of the society. This is to be done in the spirit of tolerance, inclusiveness, dialogue and consultation, and, should contribute to the production of the moral wellbeing of society. It obliges individuals to contribute to the best of his/her abilities, at all times and at all levels, to the promotion and achievement of African unity. Article 22 of the Charter also provides all people with the right to their cultural development, with due regard to their freedom and identity and their equal enjoyment of the common heritage of humanity.

The charter for African cultural renaissance gives due regard for African cultures. It has included many provisions emphasizing upon the importance of African customs and cultural values.

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<sup>49</sup> Danne, Alexander P., "Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study", *Monush University Law Review*, Vol. 30, No 2, (2004), p.202

<sup>50</sup> Robins, Simon, *A place for Tradition in an Effective Criminal Justice System :Customary Justice in Sierra Leone, Tanzania and Zambia*, ( 2009), Institute for Security Studies: Policy Brief Nr. 17, p.1, available at <https://www.issafrica.org/uploads/No17OCT09.PDF>

<sup>51</sup> Id, p.3

<sup>52</sup> Sage, Andre Le, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiative*, Center for Humanitarian Dialogue Report,(2005), p.32

<sup>53</sup> The African Charter on Human and People’s Right, Article 17

Article 3(d), of the charter has one of its objectives to preserve and promote the African cultural heritage through preservation, restoration and rehabilitation<sup>54</sup>. It also aims to strengthen the role of culture in promoting peace and good governance<sup>55</sup>. It is also made clear from the language of art. 12(1) of the charter that States shall build the capacity of the cultural sector and stakeholders through the organization of festivals, seminars, conferences, training and refresher courses at national, sub-regional, continental and Pan-African level<sup>56</sup>. It is also stipulated from the art. 12(2) of the same charter that states shall guarantee equal access of women and men to cultural expression, decision-making, art and cultural professions<sup>57</sup>. Elders and traditional leaders are cultural stakeholders in their own right and their role and importance deserve official recognition in order for them to be integrated in modern mechanisms of conflict resolution and the inter-cultural dialogue system, according to art.14 of the charter<sup>58</sup>.

## **2.6 Why People Prefer the Usage of Customary Law?**

“A justice system is only as good as its capacity to respond to the demands made on it”<sup>59</sup>. Attaching less important values to customary laws and hence neglecting it may not result in favorable consequences. There is evidence that ignoring it in some cases is having serious negative implications<sup>60</sup>. This is because customary law can potentially provide justice that is more relevant and accessible than formal criminal justice systems that use concepts imported from colonial powers<sup>61</sup>. It is a common knowledge that customary justice systems are characterized by resilience, outlasting changes in government, conflict, natural disaster and endures the state based attempts to abolish them<sup>62</sup>. This is not without reason. It is because of the

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<sup>54</sup> AU, Charter for African Cultural Renaissance, (2006), Khartoum, Sudan, article 3/d.

<sup>55</sup>Id, article 3(j)

<sup>56</sup> Id, article 12/1

<sup>57</sup> Id, article 12/2

<sup>58</sup> Id, article 14/2

<sup>59</sup> F. Coleman, quoted in Amanda C. Rawls, *Policy Proposals for Justice Reform in Liberia: Opportunities under the Current Legal Framework to Expand Access to Justice*, in Janine Ubink, and Benjamin van Rooij (Eds.), *Customary Justice: Perspectives on Legal Empowerment*, (2011), International Development Law Organization, p.99

<sup>60</sup> Leila, Chirayath, et al, cited above at note 2, p.5

<sup>61</sup> Robins, Simon, cited above at note 50, p.1

<sup>62</sup> Harper, Erica, *Engaging with Customary Justice Systems*, (2011), in Janine Ubink, and Benjamin van Rooij(Eds.), cited above at note 41, p.32

source and legitimacy of the customary laws is intrinsic part of the respective community<sup>63</sup>. They are associated with the cultural norms and beliefs of the peoples and gain their legitimacy from the community values instead of the state"<sup>64</sup>.

## 2.7 Modes of Accommodation of Customary Law

### 2.7.1 Integration

The dictionary meaning of integration is bringing together of separate elements to create a whole unit.<sup>65</sup> In political process, most of the time, the term *integration* is used to describe the process of bringing together people of different races, for example, blacks and whites, in schools and other settings in USA.<sup>66</sup> When we use the term for the purpose of integrating customary practices in the legal system, therefore we mean incorporating or including different norms in the national legal codes. This question of integrating or incorporating the customary rules into formal legal system of a certain country is not extolled by majority of legal scholars. This is because they believe that incorporating or integrating customary laws into formal laws will create more problems to the system than solutions<sup>67</sup>. One of the problems the integration may entail is when the customary laws are incorporated in the formal laws and becomes jurisdiction of the formal courts, the community previously used it becomes reluctant to go to such courts and use it<sup>68</sup>. And this would mean for the community that they are resisting the formalized courts and procedures and resorting to systems which are outside the recognized systems, the result of which is not certain. Another problem is that when it is formalized through formal courts, customary laws will be forgotten or lost in a long run and also its dynamic and flexible nature

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<sup>63</sup> Cuskelly, Katrina, cited above at note 43, p.3

<sup>64</sup> Endalew Lijalem Enyew, *A Move Towards Restorative Justice in Ethiopia: Accommodating Customary Dispute Resolution Mechanisms with the Criminal Justice System*, (2013), A master's Thesis, Faculty of Humanities, Social Sciences and Education, University of Tromsø, Unpublished, p.73

<sup>65</sup> <http://Legal-Dictionary.thefreedictionary.com/Integration> , accessed on19/05/2017

<sup>66</sup> Ibid

<sup>67</sup> Yednekachew Kebede and Isayas Ayale, *Survey on the Customary Laws and Institutions*, in Elias Nur and Muradu Abdo,(Eds.),*Customary Laws and Institutions in Ethiopia*, (2015),Vol.1, Justice and Legal System Research Institute, Addis Ababa, p.51, in Amharic, the translation is mine.

<sup>68</sup> Ibid

will be undermined<sup>69</sup>. In general, it undermines the positive aspects of traditional and informal justice without any real gain"<sup>70</sup> When the customary laws are lost because of integration, the social integration and social bonds which are an important fabric of the traditional community in all senses of political, social and economic, are lost at the same time. And finally, those for whom it was intended to use formal forums because of integration will, inevitably, revolt against the system which is alien to them<sup>71</sup>.

### 2.7.2 Accommodation

The dictionary meaning of accommodation is Reconciliation or settlement of opposing views.<sup>72</sup> It could also mean a process of mutual adaptation between persons or social groups, usually achieved by eliminating or reducing hostility.<sup>73</sup> In this case, accommodation of customary law would mean eliminating the contradictory practices and mutual exclusion between the formal and customary justice system. It will have a meaning other than integration or incorporation. When we say a certain customary law should be recognized or accommodated, this is to say that its realities and existences should be acknowledged, and they have to be taken into account as a phenomenon<sup>74</sup>. One way of recognizing or accommodating the customary law is when a state recognizes customary law without specifying its contents, though this is criticized to be the weakest institutional normative linkage between the customs and the state, and this could be done, for instance, through a provision in the constitution or in another relevant law relating to the application of customary law<sup>75</sup>. For example, the Angolan constitution puts it as follows: "*The validity and legal force of custom which does not contradict the Constitution and does not threaten human dignity shall be recognized*"<sup>76</sup>. Putting the repugnancy test in place, as it is done in Nigerian courts; the customary laws could also be given recognition or accommodation.

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<sup>69</sup> Id, p.52

<sup>70</sup> Penal Reform International, cited above at note 23, p.4

<sup>71</sup> Yednekachew Kebede and Isayas Ayale, cited above at note 67, p.54

<sup>72</sup> Collins English Dictionary – Complete and Unabridged, (12th Edition, 2014)

<sup>73</sup> Ibid

<sup>74</sup> The Definition of Aboriginal Customary Laws, available online at <http://www.alrc.gov.au/publications/7.%20The%20Scope%20of%20the%20Report/definition-aboriginal-customary-laws> accessed on 27/11/2014

<sup>75</sup> Ubink, Janine, cited above at note 41, p.12

<sup>76</sup> The Constitution of Republic of Angola, 2010, Art. 7

## **2.8. Summary**

Customary law is a long lived value of any traditional society. It is a type of law that the ancient societies knew. There is still an amazing majority administered according to its customary laws. Up to 90% of people particularly those who reside in rural areas both in Africa and outside of Africa use customary rules to resolve their disputes. The case is not different in Ethiopia. 85 % of Ethiopians are rural dwellers who use their customary laws as an alternative legal system. Among those communities the Afar is one and above 90% of them adjudicates their cases according to their customary laws called *mad'a*. Though, in Ethiopia, customary practices, particularly criminal aspects of it do not have legal recognition, the majority of the community in the country side adjudicates their cases based on their customary law.

## CHAPTER THREE

### LEGAL PLURALISM AND CUSTOMARY LAWS IN ETHIOPIA

#### 3.1 Definition and Concept of Legal Pluralism

Majority of legal and anthropological scholars give similar definitions to the term legal pluralism. These definitions which are common for the majority of the scholars are summarized by the notable legal pluralism scholar John Griffith as "*Legal pluralism is a situation in which more than one legal order exists*".<sup>77</sup> The concept of legal pluralism, therefore, refers to a legal system in which a number of legal networks, legal orders and legal phenomenon exist side by side within the jurisdiction of certain locality.<sup>78</sup> In other words legal pluralism may be construed as the incorporation of customary norms or institutions in the mainstream legal system or it could also mean the independent existence of those customary institutions parallel to the state legal system under one political umbrella.<sup>79</sup> From the above definitions given by Griffith and other scholars, it is clear that the term legal pluralism entails the existence of more than one legal system operating parallel in the same territory or under the same political jurisdiction having almost equal legal status, at least, in theoretical level irrespective of the practical discrepancies among them.

#### 3.2 Legal Pluralism in Ethiopia

Having more than one identity group and hence having plural legal orders is a common feature of majority of states in Africa. In this respect, Ethiopia cannot be an exception.<sup>80</sup> Irrespective of this reality, the country's politico-legal history is understood by many for its suppression of the diverse customary and religious laws of the country.<sup>81</sup> This type of denial has been slightly

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<sup>77</sup> Griffith, John, "What is Legal Pluralism"? Journal of Legal Pluralism, (1986), no.24, p.38

<sup>78</sup> Aberra Degefa, *Legal Pluralism in Multicultural Setting: Legal Appraisal of Ethiopia's Monist Criminal Justice System*, in Elias N. Stebek and Muradu Abdo (Eds.), *Law and Development, and Legal Pluralism in Ethiopia*,(2013), JLSRI, p. 143

<sup>79</sup> Mohammed Abdo, "Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia", Mizan Law Review, Vol. 5, No.1, ( 2011), pp.93-94

<sup>80</sup> Tsehay Wada, "Coexistence between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects", African Journal of Legal Studies, vol.5, (2012), 269–293

<sup>81</sup> Aberra Degafa, cited above at note 78, p.145

changed in Ethiopia only recently through the introduction of the ethnic federal system. Traditionally, federalism is praised for its accommodation of diversity particularly when it is a multinational federal system and this is implemented through division of legislative powers between the central government and the constituents.<sup>82</sup> The reality of the existence of legal pluralism in Ethiopia is beyond doubt. Some have added to that conventional list of plural legal orders which include formal, customary and sharia laws, some spiritual practices and also other newly established dispute resolution forums as parts of distinct legal orders.<sup>83</sup> Accordingly, it seems from the reading of the FDRE constitution under its articles 9(1), 37(1), 34(5), 41(9), 78(4), 78(5), 79(2) and finally 91(1) has, directly or indirectly, established a legally pluralist system and gives recognition to multiple legal cultures and orders in current Ethiopia.

### **3.3 Customary Law in Ethiopian Legal System in Theory and Practice**

Different ethnic groups in Ethiopia have their own diverse customary laws and institutions which still co-exist with the formal justice system though without formal recognition by the state.<sup>84</sup> The uniformist mentality in Ethiopia did not support any law except the state laws<sup>85</sup>. Many scholars agree that the modern legal history of Ethiopia starts with the emperor HaileSELLASE I, starting from the time of Italian expulsion and the restoration of the imperial throne in 1941<sup>86</sup>. The idea of modernization of Ethiopia, particularly, in legal sphere started with the official Negarit Gazette Proclamation No.1/1942 and Proclamation no.2/1942, the later providing for the establishment of justice system and courts jurisdiction.<sup>87</sup> The later did not include any sphere or reference for the customary adjudication.<sup>88</sup> None of the 1930 constitution and the 1955 revised constitution of the imperial regime had given a place for the customary laws of the Ethiopian ethnic groups. Not only the constitutions but also other legal codes introduced to Ethiopia in 1950s and 1960s including Penal Code of Ethiopia of 1957, Criminal Procedure Code of Ethiopia of 1961, Civil Procedure Code of Empire of Ethiopia of 1965, gave any significant place to the customary laws. In general, when one investigates the nature of these legal codes

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<sup>82</sup> Alemayehu Fentaw, *Legal Pluralism in Light of the Federal and State Constitutions of Ethiopia: a Critical Appraisal*, (2004), Addis Ababa University, LL.M Thesis, Unpublished, p. 29

<sup>83</sup> Gebre Yntiso, *Systematizing Customary Knowledge in Ethiopia*, J. Eth. Law, vol.26, (2014), p.50

<sup>84</sup> Aberra Degefa, cited above at note 78, p.141

<sup>85</sup> Id, p.142

<sup>86</sup> Yednekachew Kebede and Isaias Ayale, cited above at note 67, p.37,

<sup>87</sup> Ibid

<sup>88</sup> Ibid

that were transplanted to Ethiopia during this period of time, it is clear that all had flavors of the western laws.<sup>89</sup> The 1960 Ethiopian Civil Code under its article 3347(2) code has repealed not only those laws and practices inconsistent with the code, but also those laws and practices which are consistent with it so long as it is included in the code, the language of the code which surprised many legal scholars.

The FDRE Constitution of 1995 is considered to be a departure in comparison with the previous constitutions in terms of giving recognition to Ethiopia's customs and customary laws. The constitution in its preamble, starts with the phrases such as "*we the nations, nationalities and peoples of Ethiopia.*" a language considered to be tantamount to the bases of legitimacy of governmental power and laws enacted by it in Ethiopia nowadays.<sup>90</sup> This phrase of the preamble and the subsequent provisions of the constitution concerning the recognition of multiculturalism and multi-nationalism in Ethiopia were praised by some scholars as if it is a departure from the previous rejectionist position.<sup>91</sup>

Even though the state recognition for the customary criminal justice system is already withheld, these systems are operating widely and quite independently from the state influences, particularly at the community levels in the rural areas of Ethiopia<sup>92</sup>. Many studies show that the Ethiopian society still, by shocking degree, prefers its customary practices over the state justice system and among the cases lodged at courts, more than 76% is withdrawn before proper investigation.<sup>93</sup> This fact is becoming unquestionable and at the same time gaining momentum and implicit recognition even including law enforcers and government officials.<sup>94</sup>

### **3.4 Customary Law under the Criminal Justice System of Ethiopia**

There are some positive developments considered to be a good start and some degree of improvement in respects of giving the customary criminal adjudication legal and policy frameworks for the first time in the country's legal history. Those developments are the formulation of the FDRE Criminal Justice Policy of 2011 and the Draft Criminal Procedure Code of the FDRE as well.

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<sup>89</sup> Fisher, Stanley Z., quoted in Tsehay Wada, cited above at note 80, p.277

<sup>90</sup> Yednekachew Kebede and Isaias Ayale, cited above at note 67, p.48

<sup>91</sup> Aberra Degafa, cited above at note 78, p. 145

<sup>92</sup> Ibid

<sup>93</sup> Gebre Yntiso, cited above at note 83, p.41

<sup>94</sup> Ibid

### 3.4.1 The Criminal Justice Policy of the FDRE

As a result of the above mentioned age old legal problems in Ethiopia, the country has launched a new initiative which is represented by formulating a new criminal justice policy as of February, 2011.<sup>95</sup> With all preconditions and specifications under different articles, the policy states under article 4.6.1, "*starting from the investigation, the criminal matter at any trial level, based on either by the public prosecutor or the accused person's request or by the court's own motion, can be referred to the alternative dispute resolutions*". Therefore, the public prosecutor, if he believes that the alternative forums can ensure lasting solution, he may not institute a criminal charge.<sup>96</sup> At the same time, the policy gives directions to the criminal laws and practices that they have to adjust themselves in line with the ideas included in this policy in the future.<sup>97</sup>

In favor of the reference of the criminal case to the alternative dispute resolution, the policy talks about the ways in which the police may stop investigation process, upon the request of either of the parties, for crimes punishable by *simple imprisonment* or only upon *private complaint* on the condition that a reconciliatory agreement is reached between the accused and the victim.<sup>98</sup> Similarly, the public prosecutor *may not institute* a case if he\she is convinced that the criminal case between the accused and the victim will be sustainably solved through the customary dispute resolution mechanisms rather than the regular court system even if the crimes are grave.<sup>99</sup> In such cases, the public prosecutor is given a discretionary power to refer the case to the customary dispute resolution mechanisms.

### 3.4.2 The Draft Criminal Procedure Code of the FDRE

The New Draft Criminal Procedure Code of Ethiopia appears to reflect what has been proposed in the Federal Criminal Justice Policy. The draft criminal procedure code supports the criminal cases to be adjudicated through the reconciliation process if the criminal case is punishable with the maximum of three years imprisonment or the case is punishable on the private complaints.<sup>100</sup> In addition to that the criminal must be repentant for the crime he has committed with making an apology for the victim and agreeing to pay compensation for the victim. At the same time, the

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<sup>95</sup> this policy is written in Amharic and all translations thereof is for the researcher

<sup>96</sup> Ibid.

<sup>97</sup> Ibid

<sup>98</sup> Id, art. 3.9(b)

<sup>99</sup> Id, art. 3.12(c)

<sup>100</sup> The Draft Criminal Procedure Code of the FDRE, (2011), art. 215(1)

offender has to secure the consent of the victim to that effect.<sup>101</sup> The draft criminal procedure code emphasizes on the case where the public prosecutor may not institute a criminal charge against a suspect in the interest of the public. This is when the public prosecutor believes that the criminal case may get better solution in the customary institutions.<sup>102</sup>

However, the legality of this alternative dispute resolution process may not be free from criticism in the absence of clear provision in the constitution which allows such process to be conducted. This is because any law or customary practice which contradicts the Constitution is null and void.<sup>103</sup>

In general, concerning the space given to the alternative dispute resolution in the criminal justice systems particularly under the above mentioned policy and draft code has *five* related shortcomings. These are: *one*, the criminal justice policy is a policy and guidelines based on which other laws can be formulated and it is not a law by itself. Therefore, unless additional laws that enforce the policy position are enacted, it will not have any meaning. *Second*, the draft criminal procedure is a draft and not yet a law and nobody knows when it becomes a law. Unless this draft is changed into an authoritative law, its existence will not have any meaning as well. *Third*, the scope of those alternative dispute resolutions are only limited to the minor offences and therefore its scope does not make somebody optimistic. *Fourth*, those limited referral chances given with regard to customary criminal adjudication are still based upon the discretion of the public prosecutors as well as the judges. *Fifth*, there is no constitutional support for alternative dispute resolution mechanisms with regard the criminal adjudication in Ethiopia so far. Unless the constitution is amended and includes such provisions, any attempt to enact such laws will mean to be contradictory to the constitutional provisions in particular to the constitutional supremacy clause under article 9(1) of the FDRE constitution.

### **3.5 Summary**

The FDRE Constitution, under its various articles has recognized customary adjudication limiting it to family and personal issues. With regard to the customary criminal justice system, though it operates in the country in practice widely, its recognition at a framework level

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<sup>101</sup> Id, art. 215(2)

<sup>102</sup> Id, art.213(2)(a)

<sup>103</sup> The FDRE Constitution, cited above at note 6, art. 9(1)

remained hopeless. Unfortunately, those practices are based on their *de facto* existence and they are doing this without any formal recognition at the state level.

However, there are some positive developments which are considered to be a good start and some degree of improvement in regard with giving the customary criminal adjudication, legal and policy frameworks for the first time in the country's legal history. Those developments are the formulation of the FDRE Criminal Justice Policy of 2011 and the Draft Criminal Procedure Code of the FDRE as well. Both the policy and the draft code permit the use of the customary resolution mechanisms for the minor crimes and crimes punishable upon complaints. However, the problems with the policy and the draft code are that they give very limited space to the ADR process. The draft code and other similar laws which may be enacted in the future in support of the customary criminal adjudication do not have sufficient constitutional support so far. Therefore, unless, the constitution is amended and is adjusted in this line, the attempt to enact any law in this respect will remain to be a shaky endeavor.

The next chapter is about the Afar customary criminal justice system (mad'a). The current chapter will serve as the entry point to study of the status of the customary practice in the Afar society. All legal framework problems and practical disparities in the legal orders in Ethiopia that we have seen in this chapter are considered to be the exact replica in the Afar customary criminal justice system. Therefore, the chapter will deeply investigate what the problems look like and what the solutions have to be.

## CHAPTER FOUR

### ACCOMMODATING MAD'A

#### 4.1 Introduction

The chapter at hand is a continuation of the problems of the Ethiopian legal system which is emanating from the framework denial for the recognition of the customary criminal practices. As it has been indicated above, the practice of customary criminal adjudication on ground is an immense phenomenon and the Afar people is one of the communities who use their customary criminal adjudication extensively. Therefore, this chapter investigates the reasons why the Afar people insist on using their customary practices while neglecting the formal justice sector and also explores the reasons that made the Ethiopian state in general, tacitly to allow this practice without the official recognition? There is a summary of matters that warrant the accommodation of the ACCJS. The strengths and weakness of the ACCJS is sufficiently studied and the recommendations to improve the weakness and to preserve the strengths are also made. It is a belief of this researcher that the position of the age old monist criminal justice policy should be modified and the *de facto* accommodation of the Afar customary criminal justice system should be granted the framework and official accommodation by the mainstream criminal justice system of Ethiopia.

#### 4.2 Description of the Afar People, Its Habitat and Legal System

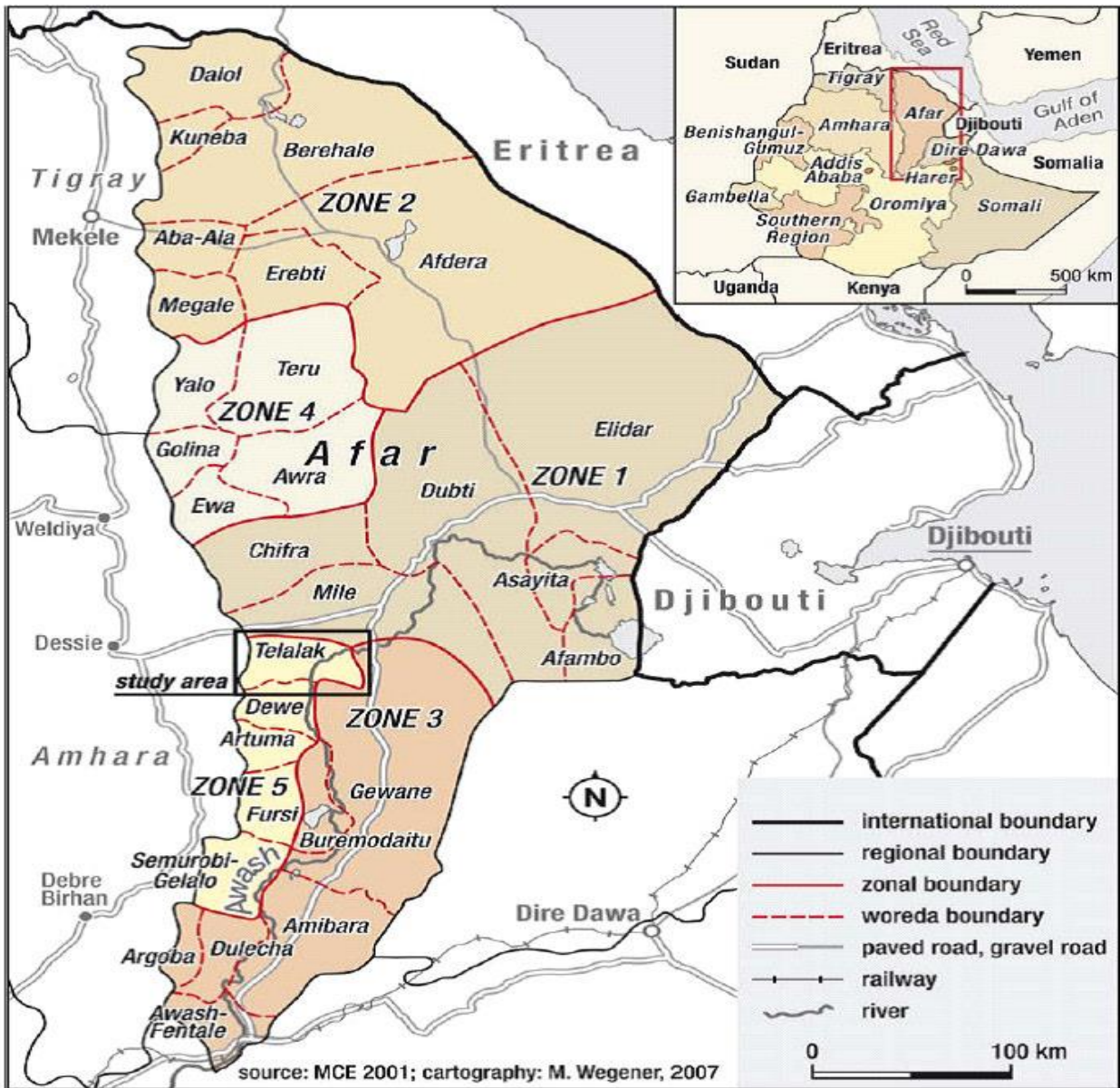
The Afar people is believed to belong to the genealogy of the eastern Cushitic speaking family<sup>104</sup> and they inhabit the northern part of the African rift valley which constitutes the modern day horn of African countries such as Ethiopia, Djibouti, and Eritrea.<sup>105</sup> The Afar is, almost entirely,

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<sup>104</sup> Yasin Muhammad Yasin, *Regional Dynamics of Inter-Ethnic Conflicts in the Horn of Africa: An Analysis of the Afar-Somali Conflict in Ethiopia and Djibouti*, (2010), PhD Thesis, University of Hamburg , Unpublished, p.49

<sup>105</sup> Shihem, Kasim, *Influence of Islam on Afar*, , (1982), PhD dissertation, Unpublished, University of Washington, Eritrea was not mentioned by Kasim because it was part of Ethiopia at that time but I had to add it now since it is an independent country.

followers of Islam and speaks a language they call Afaraf.<sup>106</sup> They are predominantly nomadic of which the majority is still practicing '*transhumant pastoralism*' for subsistence.<sup>107</sup>



**Map 2:** Administrative zones and woredas of the Afar national regional state (taken from EPA of the FDRE, 2010)

<sup>106</sup> Kabsay Gebre, cited above at note 10, p. 324

<sup>107</sup> Getachew Talachew and Shimelis Habtewold, *Customary Dispute Resolution in Afar Society*, in Alula Bunkhrust and Getachew Assefa(Eds.), in *Grass Roots Justice in Ethiopia: the Contribution of Customary Dispute Resolution*, (2008), p.93

The Afar national regional state in Ethiopia is one of the nine autonomous regional states which comprise the federal democratic republic of Ethiopia mentioned under article 47(1) of the FDRE constitution of 1995. The Afar National regional state shares its boundaries with the Tigray regional state and the state of Eritrea in the north, with Oromia regional state in the south, with Somali regional state and Djibouti republic in the east, and Amhara regional state in the west.<sup>108</sup> The region has total area coverage of 270, 000 square kilometers according to the central statistical Agency of Ethiopia of 2008 and population size of about 1.4 million people according to the same statistical data. The Afar regional state is composed of 5 administrative zones and 32 woredas/ districts/, 28 towns and 400 urban and rural kebelles.<sup>109</sup>

#### **4.2.1 Legal Pluralism in the ANRS**

When we consider the legal regimes operating in the Afar national regional state, we can say that there is a real legal pluralism in the region. The legal system includes the sharia law dominating family and personal matters such as marriage and divorce, succession, maintenance; etc.<sup>110</sup>, the Afar customary law that dominates the overall process of dispute resolution mechanisms among the various Afar clans and the formal legal system which dominates purely the state interested matters, for example, tax, security issues, etc. The Afar, since time immemorial, administer themselves by their customary law known as *Mad'a*, and practice it through its litigation process known as *Mablo* in the court of law called *Hara* by the body of jury named as *Makaban*.<sup>111</sup> The constitution of the ANRS under its article 33(5), replicating what is provided under article 34(5) of the FDRE constitution, entitles individuals to seek relief with religious or customary laws. In the same manner, the ANRS constitution under Article 65 formally recognizes religious and customary courts which were in existence and functioning prior to the enactment of the constitution and this article is also in line with the article 78(5) of the FDRE constitution. Under Article 63, the ANRS constitution also allows for the establishment of councils of elders at various levels of the regional administration. The last provision is not yet followed by more

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<sup>108</sup> Ibid

<sup>109</sup> Kelemework Tafere and Gebreyesus Teklu, "From Traditional *Dagu* to Mobile and Media Technologies: Communication and Livelihood Change Among the Afar Pastoralists of Ethiopia", Wudpecker Journal of Sociology and Anthropology, Vol. 1, No.3, ( 2013) pp. 35 - 40

<sup>110</sup> Lenasil Assefaw and Original W/giorgis, cited above at note 17, p.29, see also Shihem, Kasim, cited above at note 105, p.165

<sup>111</sup> Yasin Muhammad, cited above at note 104, p.52

detailed laws and therefore, the status of this provision and other laws in relation with the legal pluralism are vague. Though there is a fertile ground for the existence of the legal pluralism in the region, the discrepancies between the wide customary practice by the community and a very limited and also a very vague status of existing frame work may not enable us to praise the situation. Therefore, this chapter is going to study the overall aspects of the Afar customary criminal justice system and the ways in which it can be accommodated under the mainstream criminal justice system in Ethiopia.

### 4.3 Peculiarities of Mad'a

Some researchers believe that the mad'a, though it has both the positive and negative aspects that are inherent to any informal justice system, there are many peculiarities that are unique to it. One peculiarity of the Afar customary criminal justice system is that it disproves the argument of many scholars in relation with the division of function of the organs in the customary systems. The argument says "there is no separation of functions or separation of persons because one customary judge can be a law enactor, a law interpreter and a law enforcer at the same time". While the Afar customary law disproves this since there is a very strong executive institution known as *fi'ima*.<sup>112</sup> *Fi'ima* means the association of young people at the same age level acting as an executive body or police force. This institution was in the past the only executive body that could enforce the decisions of the customary courts using their coercive powers whenever necessary. Getachew and Shimelis have proved that there are three separate organs of governance in the Afar customary laws similar to the modern government , putting it in this way: "there is a separation between the judiciary (*mad'a abba* and *malla*), the legislative(*kedo abba*, *mablo*, and *maguar'a*), and the executive(*fi'ima* and *fi'ima abba*)".<sup>113</sup> The other peculiarity is its internal network for dispute resolution which is very complex or comprehensive. For example, *yallak dagna*, *wadayiinu*, *Alla*, *aligginu*, *fargaaga'u*, *muggaa'innu*, *afkehinnu*<sup>114</sup> and so many

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<sup>112</sup> Interview with Abdulfatah Abdellah, a Customary Law Researcher, 29/04/2017, Addis Ababa

<sup>113</sup> Getachew and Shimelis, cited above at note 107, p.95

<sup>114</sup> *Yallak dagna*, *wadayiinu*, *Alla* are terms meaning the same thing and it is a promise of special relationship created between two parties which continues for their descendants through generations, *aligginu* is special relationship created during marriage that is one person becomes special friend for the bridegroom, and the relationship created in such occasion lasts as long as they are a live and can continue even after their death among their descendants, *fargaaga'u* is a term given to the practice of putting a baby on the shoulder of a man creating special relation and friendship between them , *muggaa'innu* is naming a baby after someone and this is also

similar practices are all means of conflict prevention and conflict resolution mechanisms.<sup>115</sup> The similar peculiarity is that there is a concept of *conflict of laws*, which is very rare in other customary systems. They have terminologies for the laws that are applicable to the Afar among themselves known as *Afarre* (the law for Afar) and for the laws applicable to none-Afar known as *Adanle* (the law for human being)<sup>116</sup>.

#### 4.4 Classification of Mad'a

The Afar customary law is classified in to five customary law systems such as Bur'uli mad'a, 350 years old, mainly applicable in all parts of zone two and in some parts of zone four of the ANRS and in all areas of the Eritrea Afar ; Budito badih mad'a, 150-175 years old, is applicable in some parts of zone one and also in some parts of zone four of the ANRS ; Afke'ek ma'adeh mad'a, 150 years old, which is applicable in parts of zone one only; Bodoyta melah mad'a, 150 years old, is applicable in zone five only, and finally Debnek we'imih mad'a, 150 years old, which is applied in zone three of the ANRS and in some parts of the republic of Djibouti.<sup>117</sup> There are no substantial differences among the Afar customary laws.<sup>118</sup> The substantive and procedural rules and the conduct of hearing are all the same over the Afar land.<sup>119</sup> The only difference is in terms of enforcement. Some customary laws effect the payment of compensation in *baklo* (a kid goat), some others in cows, and others by camel. But there is also a difference in amounts paid. For example, for compensation of homicide it is 100 camels or 3000 *baklo* for most of the Afar customary laws (*mad'a*) while for some, it is 50 camels or 1500 *baklo* as the case for *bodoytâ mela* customary law.<sup>120</sup>

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intended to forge a psychology of belonging between the two, *afkehinnu* is special partnership between two clans and this relationship obliges the member of both clans not to resort to a conflict whatever the causes and reasons may be. In general all of these terms are means of conflict preventions and resolution mechanisms.

<sup>115</sup> Abdulfatah Abdellah, cited above at note 112,

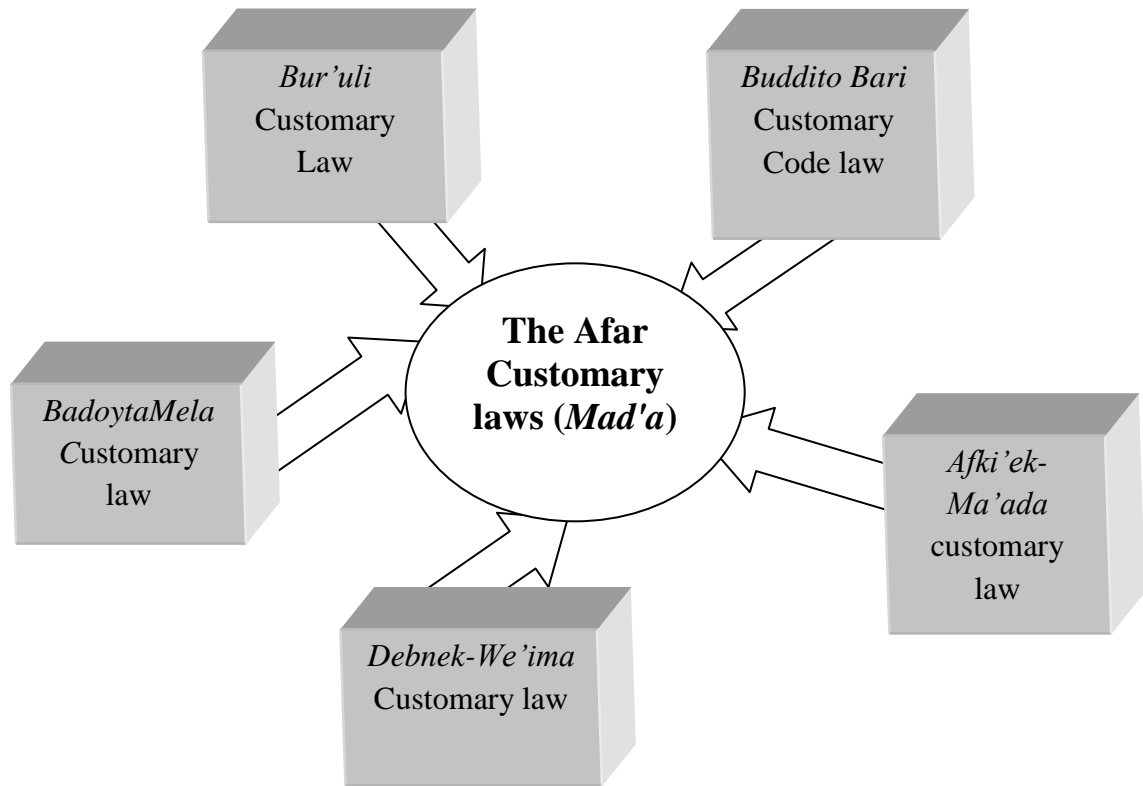
<sup>116</sup> Id, Lenesil Assefaw and Original W/giorgis, cited above at note 17, p.10

<sup>117</sup> Culture and Tourism Bureau, *the Afar Customary Law*, ( 2016), p. 4, Lenisil and Original, cited above at note17, p.28)

<sup>118</sup> Yasin Muhammad, cited above at note104, p.52

<sup>119</sup> Shihem, Kasim, cited above at note 105, p.166, Getachew and Shimelis, cited above at note107, p.100

<sup>120</sup> Interview with Jamal A. Redo, *the Afar Customary Law Researcher*, 02/04/2015, Logiya



**Figure 1:** Different codes of mad'a, (Adopted from Culture and Tourism Bureau of the ANRS, the Afar customary law, 2016)

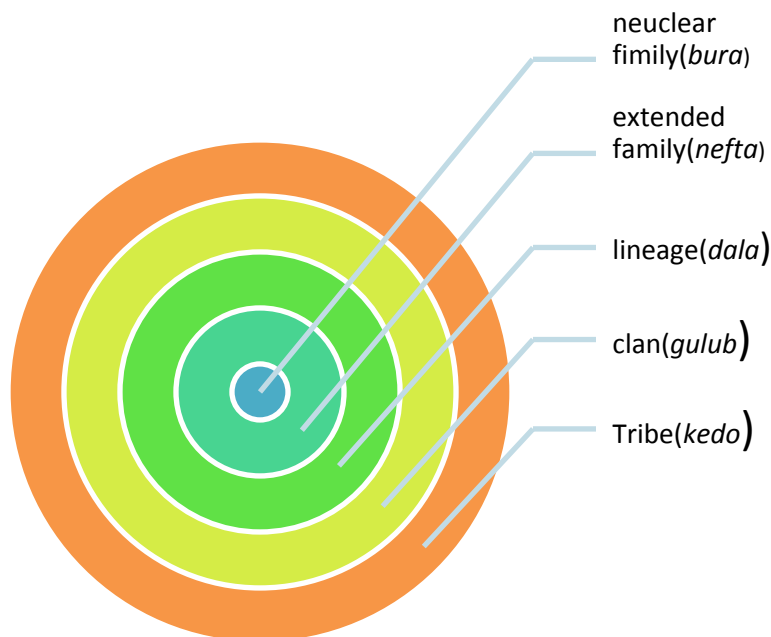
## 4.5 Structure of Courts and Procedure of Adjudication in Mad'a

### 4.5.1 Structure of Courts

The Structure of the Afar customary courts follow more or less the structure of the social structure of the Afar society, though not exactly the same. Inherently in customary justice systems, disputes at lower levels may be solved within the family through the extended family elders. For other serious disputes, a case may be referred to customary judges and tribal leaders with a proved customary knowledge at higher levels<sup>121</sup> The Afar, based on the blood relation and kinship, have a social organization divided in to five layers: those are a nuclear family known as *bura* comprising father, mother and children, an extended family known as *nefta*, composed

<sup>121</sup> Aberra Degefa, cited above at note 78,p. 149

of three to four generations, a lineage called *dala* includes a group of *neftas* extended up to seven generations, several *dalas* making *gulub*(clan) and several *gulubs* forming a *kedo*(tribe).<sup>122</sup>



**Figure 2:** The social Hierarchy of the Afar society: (Adopted from Yasin Muhammad, 2010; Getachew and Shimelis, 2008, and Lenesil and Original; with some design and content modifications)

In the Afar National regional state, it is estimated that there are more than 100 tribes and those tribes in general are categorized in to two major groups as *Adoh yan mara* (white people) considered to be commoners and *Asah yan mara* (red people) who most of the time, noted as nobles with supreme judicial power in the whole Afar domain.<sup>123</sup> As it is indicated above, less grave crimes, particularly, if it is within the same clan and sub clan members, can be adjudicated by *kedoh abba*(clan leader) and grave crimes such as theft of camel, homicide, etc., within the same clan members and disputes between different clans are directly referred to the makaban of a neutral clans.<sup>124</sup>

#### 4.5.2 Procedure of Adjudication

The Afar customary laws in general follow very accurate and detailed rules of procedure.

<sup>122</sup> Getachew and Shemelis, cited above at note107 , p.94, foot note 91, see also Lenesi Assefaw and Original W/giorgis, cited above at note 17, p.27

<sup>123</sup> Kaysay Gebre, cited above at note 10, p.324

<sup>124</sup> Getachew and Shimelis cited above at note 107, p.96

The rules do not make distinction between civil and criminal litigations.<sup>125</sup> However, for grave crimes such as homicide, it follows very accurate and clear procedures.<sup>126</sup> The procedural rules are divers and, based on the nature of cases at hand, each follows particular procedural rules. However, the common types of procedures for almost all types of litigations that I have extracted from information I drew from informants as well as from a number of literatures on the subject matter are summarized below as follows:

First the parties aggrieved can submit their complaints to makaban and then the Makaban fix the hearing day if the applicant is a major person. But if he is a minor, they request him to bring his guardian and then fix the hearing day and place.<sup>127</sup> On the hearing day, before they commence the hearing process, they ask from a party who made a complaint to cover a cost (a feast) for food and drinks called *lee kee ayso*. After that the makaban ask both the plaintiff as well as the defendant to bring the human guarantee called *habi or mabbara* who are held responsible for the parties' decent behavior throughout the litigation process<sup>128</sup>. When they commence the hearing process, the makaban give the first chance to the plaintiff. Then the defendant is given a chance for plea of guilt or otherwise. After that a second chance is given for both parties. When the parties finish their claims, the makabon either give a chance to any of the attendants in the court room to summarize what have been said by both parties or one of the makabon by himself makes a summary of the debate on the allegations and responses made thereto.<sup>129</sup>

The makaban, after they analyze the content of the debate, discuss among themselves whether the debate needs additional witness or it is enough to give a verdict based on the debate of the parties. If they believe that an additional witness is required, they hear the witness and declare the final judgment to the disputants. If the witness is not present at the time, they adjourn the case some other day on which they announce the final verdict. If the defendant does not admit the allegation and there are no witnesses for the parties, the defendant is made to take Oath or swear in the name of Allah by touching the holy Qur'an. However, before taking oath, his relatives try to convince him for not taking oath because it is believed that taking an oath falsely

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<sup>125</sup> Getachew and Shimelis, cited above at note 107, p.97

<sup>126</sup> Interview with Salih Usman, *Zone Two High Court Judge*, 10/04/2017/ Logiya

<sup>127</sup> Interview with Ibrahim hamad, *a Makabantu*, 05/04/2017, Aysa'ita, Interview with Hanfare Asawkaytu, *a Makabantu*, 06,04/2017/ Logiya, , Culture and Tourism Bureau, cited above at note, pp.79-83.

<sup>128</sup> Shehim, Kasim, cited above at note105, p. 189

<sup>129</sup> Culture and Tourism Bureau, cited above a t note117 ,p.79, Getachew and Shimelis, cited above at note 107, p. 98

will have disastrous consequences on the party and his relatives as well.<sup>130</sup> After announcing the final judgment by the makaban, if there is a party unsatisfied, they can request for an appeal to other *Hara* or customary court. Finally, the final judgment is concluded by making *fatiha* (reading a verse of the Holy Qur'an and making *dua* or blessings).

During the hearing, if one party accuses any one of the customary judges or makaban for partiality, then the remaining customary judges investigate the accusation and if they believe that there is a good reason to have a doubt, the judge must be excluded from the *maro* (an assembly).<sup>131</sup> However, if the Accusation is found not to be true, then the accuser is penalized or fined with *maruso* or *doro'u* for the defamation.<sup>132</sup> When strange cases appear before the makaban which does not have a precedent, it is called in Afar language as *mabboni* and *maballoni* which literally means 'not heard and not seen crime. This means a very strange case and its penalty is 12 cows or 120 *baklo* in criminal cases. The payment is not as compensation for the injury caused but the penalty for the offender since he/she has committed a strange offence. It is a direct penalty for the offender and divided among the customary judges in the same manner as the fine is paid to the state in the modern time.<sup>133</sup> The examples can be as fighting of five men with one man or chopping off parts of the body of a person inhumanely, or stabbing a corpse, etc.,<sup>134</sup> and then it follows with other penalties such as compensating the victim. Compensation for any crime is paid separately and directly to the victim and his clan and the amount is decided based on the nature of the case.<sup>135</sup> Concerning the cases involving the none Afar, it is based on their preference. If they consented to the Afar customary adjudication, then the makaban apply their customary rule. However, if they prefer to go to the court of law, they are free to do so.<sup>136</sup> Concerning the Afar who wants to get a relief by state courts instead of the ACCJS, the makaban do not stop anyone who wishes that. However, most of the time, people do not opt for that and even after they have gone there, they come back to makaban

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<sup>130</sup> Ibid

<sup>131</sup> Ibrahim Hamad, cited above at note 127

<sup>132</sup> Culture and Tourism Bureau, cited above at note 117, , p.78

<sup>133</sup> Interview with Muhammad Musa, *a Customary Judge and the Former Regional High Court Judge*, 09/04/2017, Samara

<sup>134</sup> Ibrahim Hamad, cited above at note 127

<sup>135</sup> Ibid

<sup>136</sup> Ibid

because it is difficult to get enough remedies for the Afar-Afar disputes at the formal courts.<sup>137</sup> Therefore, the system is semi-obligatory because of the nature of societal psychology, but not completely.

#### **4.6 Frequency of Cases at Customary Courts vis-a-vis Formal Courts**

The number of people who go to the state courts is nowadays increasing in comparison with the past from almost zero to some percent. Since the situation nowadays is different from the past because the Afar have their own state administration, government, police, prosecutors and court system, the confidence of people upon the state courts has been increased.<sup>138</sup> However, according to the majority of the informants and other research results show that the majority of the Afar people still use the customary justice system. About 91-95% of the Afar people still use the customary systems to solve their cases.<sup>139</sup> Those who use the formal courts are some of the urban dwellers, though some rural people in some localities such as Dubti town said to come and lodge their cases in formal courts many times<sup>140</sup>. Nearly all cases of inter-clan homicide end up in reconciliation.<sup>141</sup> Though there is no very clear and purified statistical data, among the Afar prison population majority of them are people imprisoned for committing homicide and rape crimes. While from none Afar, majority of them are those who are imprisoned for committing crime of theft.<sup>142</sup>

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<sup>137</sup> Ibid

<sup>138</sup> Muhammad Musa, cited above at note 133

<sup>139</sup> Getachew and Shimelis, cited above at note 107, p.96, Lenasil and Original, cited above at note 17, p.10

<sup>140</sup> Interview with Aliyu Hussien, *Dubti District Court Judge*, 02/04/2017, Dubti

<sup>141</sup> Kalemework and Gebreyesus, cited above at note 109, p. 41

<sup>142</sup> Interview with Hassan Muhammad, *From Regional Prison Administration*, 02/04/2017, Samara

The following table affirms the above information provided by the informants about the number and type of crimes frequently occurred in the Afar National Regional State.

S.no	Crime type	Name of prisons										Grand total	
		Aysa'ita		Ab'ala		Adibtoli		Kaluwan		Dalefage			
		M	F	M	F	M	F	M	F	M	F	M	F
1	Homicide	33	3	20		91	2	32	1	42		118	6
2	Homicide attempt	22		3		23		29		4		81	
3	Robbery	7		2		5		28				42	
4	Theft	62		6		60		21		14		163	
5	Beating	44		4		6		25		4		83	
6	Perjury	1						3				4	
7	Insult and intimidation			1				3				4	
8	Hiding			1								1	
9	diverging	3		3						5		11	
10	Rape	44		9		40		6		7		106	
11	Adultery									1		1	
12	Bodily injury	28		3		20		8		4	1	63	1
13	Property destruction			2				20				22	
14	Mistrust	20		5		2		5		2		34	
15	Deception	3		5				11				19	
16	Insurrection			5						1		6	
17	Arson			1								1	
18	Drug trafficking					2						2	
19	Rule breakage	19	2	4				6	1	1		30	3
20	Selling and buying arms			1		1				1		3	
21	Contrabands s					17	1					17	1
22	Stabbing	1										1	
23	Human trafficking												
24	Anti-peace movement	3										3	
25	Abuse of power												
26	Different types of crimes	148	2									148	2
27	Clan conflict	7				6				5		18	7
	Total	445	7	75		273	3	197	2	91	1	1081	13

**Table 1:** *the number of prisoners and type of crimes committed by them in the prisons of the ANRS on January 8, 2016(source: ANRS prison administration)*

People who complete their term of sentence are few. Until the final judgment is pronounced against the arrested persons, they can leave the prison at any time if the government and the customary elders reach an agreement.<sup>143</sup> Most of the time crimes of rape and crimes of theft cannot be finished by reconciliation of customary laws. because the nature and consequences of crime of rape and the concern which is given for it by the government and the risk of recidivism

<sup>143</sup> Ibid

risk of the theft, they cannot be subject to the reconciliation<sup>144</sup>. At the same time, concerning theft, there is no fear of clan dispute that will risk the peace and order of the state as well as the social harmony among the Afar clans.<sup>145</sup> Generally, though the resort to use formal court is possible in principle, most cases of intra-Afar conflicts are adjudicated by the Makaban out of formal courts.<sup>146</sup>

As the above table demonstrates, the rate of crime and the size of the prison population in the ANRS are very low. In General, the very a small size of the prison population of the Afar region shows that, majority of cases are adjudicated out of courts and one of the factors that made crime rate to remain low is that the customary system is effective enough to administer its subjects.

#### **4.7. Why the Afar Society Insists on Using Its Mad'a System?**

The Afar people have their own long lived customary laws that they believe to be sufficient to administer themselves. The law is unique in terms of its comprehensiveness that it deals with every aspect of live<sup>147</sup>. It is not a law that governs people and their properties alone, but also a type of law which is very friendly with nature.<sup>148</sup> It is a belief of majority that under this system, not only every criminal issue is treated but also everything is treated in more detail than the state criminal law.<sup>149</sup> For example, shooting somebody from front side and from behind is not treated in the same way. If he/she is shot dead from front side the victim might have attempted to hurt or kill the offender and the offender might have taken this measure as a self-defense. If the shooting is done from behind or back side, this may imply that the victim was either not aware of the offender's intention to kill him or he/she was trying to escape with his/her life which amounts he/she did not have any intention to injure the offender and this aggravates the suspect's responsibility.<sup>150</sup> When we come to the compensation, the front and back parts of the body are not given the same value. For example, a damage caused to the forehead is considered grave because it is easily exposed to onlookers whereby the victim may be subject to constant

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<sup>144</sup> Ibid

<sup>145</sup> Ibid

<sup>146</sup> Kelemework and Gebreyesus, cited above at note 109, pp. 40-41

<sup>147</sup> Muhammad Musa, cited above at note 133

<sup>148</sup> Abdulfatah Abdellah, cited above at note 112

<sup>149</sup> Salih Usman, cited above at note 126.

<sup>150</sup> Ibid

humiliation.<sup>151</sup> According to Kalemework, the indigenous institutions do not restrict themselves in restitution and lifting of injustice but at the same time they work towards repairing the affected social harmony and endeavor to create conducive environment for lasting peace and order.<sup>152</sup> The state justice system does not give instant solution for the case at hand. It takes from two to four and sometimes even more than six years to give final decision. While for the Afar makaban it may not take more than few days.<sup>153</sup> The other reason is that when the government courts adjudicate the criminal cases they focus on the punishment of the individual criminal rather than reconciling the two sides and restoring the damaged social harmony.<sup>154</sup>

The Afar people consider their customary law as their legitimate property. There is a feeling of the ownership. While they consider the state laws as an alien legal system which does not have any connection with them<sup>155</sup>. This means it is all about the question of legitimacy.<sup>156</sup> The Afar people consider any member who goes to a state court to get relief as if he/she is an odd member of the community. They call this one as *kaafirinna* or *amharinna* meaning an act out of their culture or creed. If someone resorts to go to state courts, the customary elders used to penalize him with one *sitting camel* which is not a live one and it equals 120 ETB.<sup>157</sup>

All of my informants believe that it is their customary criminal justice system which is more effective to control crime prevalence in the region. This is because the Afar customary system gives a comprehensive solution by investigating the root causes of the crime and the reconciliation process is satisfying both parties. The state formal system, however, does not give solution to the root causes and does not focus on the reconciliation process<sup>158</sup>. In the same manner as the case in table 1 above, the following table provides that the number of offenders who receive final judgment is very low. It is only around 700 people who are sentenced for their crimes in the whole region at the time when the data used by this thesis was prepared and around 360 with pending cases, in total there were around one thousand prisoners in the whole region.

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<sup>151</sup> Kalemework and Gebreyesus. cited above at note 109, p.42

<sup>152</sup> Ibid

<sup>153</sup> Ibrahim Hamad, cited above at note 127

<sup>154</sup> Id

<sup>155</sup> Salih Usman, cited above at note 126

<sup>156</sup> Ibid

<sup>157</sup> Ibid

<sup>158</sup> Hanfare Asawkaytu, cited above at note 127

This is considered to be one of the indicators of that the ACCJS is very effective controlling its subjects strictly and giving a comprehensive solution through treating the root causes of crimes.

S. No	Name of the prison	Sentenced prisoners		Prisoners with pending cases		Total		Grand Total
		M	F	M	F	M	F	
1	<b>Aysa'ita</b>	285	2	160	5	445	7	452
2	<b>Ab'ala</b>	60	----	15	----	75	---	75
3	<b>Adibtoli</b>	195	1	78	2	273	3	276
4	<b>Kaluwan</b>	110	1	87	1	197	2	199
5	<b>Dalefage</b>	<b>62</b>	1	29	-	91	1	92
<b>Total</b>		<b>714</b>	<b>6</b>	<b>367</b>	<b>7</b>	<b>1081</b>	<b>13</b>	<b>1094</b>

**Table 2:** *the number of sentenced prisoners and prisoners with pending cases in the prisons of the ANRS on January 8, 2016 (Source: prison administration of the ANRS)*

According to the respondents, one factor that makes the mad'a system more effective than the state justice system is the wisdom and the advanced techniques the mad'a use to detect the criminals. The community discovers the criminal at any cost and hand him over for the justice system. Even if the criminal is hidden for a time being, the community can know him, and his clan will be responsible, and after the clan is held responsible, it is easy to secure his presence through the clan agent. Since the Afar community knows that the crime and criminal will not escape the justice at all, they prevent it from occurrence in advance.

A table on the following page shows the crime rates in different regions of Ethiopia and at the same time it proves that the Afar region is one of the regions in which crime rate and number of offenders are the lowest because of the effectiveness of the ACCJS and the factors of social control which made a difference from other regions.

S.No	Region	Number of crimes occurred	Individual offenders		
			M	F	Total
1	Tigray	35,777	N.A	N.A	35,777
2	Afar	1,208	1,671	207	1,878
3	Amhara	44,556	69,909	5,575	75,484
4	Oromia	N.A	N.A	N.A	N.A
5	Somali	966	5,205	780	5,985
6	Benishangul Gumus	3,122	4,470	491	4,961
7	SNNP	N.A	N.A	N.A	N.A
8	Gambella	655	984	155	1,139
9	Harari	6,222	798	298	1,096
10	Addis Ababa city administration	N.A	N.A	N.A	N.A
11	Dire dawa administration	5,567	5,389	1,655	7,044
12	Federal police	N.A	N.A	N.A	N.A
<b>Total</b>		98,073	88,426	9,161	133,364

**Table 3:** *Number of Crimes Recorded and Number of Persons Recorded As Offenders by Sex and Region: 2009/2010, (Source: CSA (2009/10))*

Because of its efficacy and the sense of ownership the Afar commoners have in relation to their mad'a system, many people including researchers believe that the customary law of the Afar people, is the most valuable asset for them more than Dalol or Ertale tourist sites, archeological discoveries such as Lucy or awash valley basin and other natural resources.<sup>159</sup> Shortly, why the Afar community adheres to its customary usage is not peculiar to the Afar, rather it is a framework problem of the legal centralism ideology and the monist legal system of Ethiopia created in 1950s and 1960s.

#### **4.8 Collaboration and Interface between the Two Systems**

When we probe the status of interface between the two systems in the region, there is no any framework that enables the two systems to have such interface. Irrespective of the above mentioned deadlock between the two systems in the region, which is a problem originally emanating from the national legal system of Ethiopia; the current situation in the region is totally different in practice. The customary elders told this researcher that they get a lot of help from the state justice organs whenever they require it. The government and its law enforcers cooperate

<sup>159</sup> Abdulfatah Abdellah, cited above at note 112

with the customary elders to prevent crimes and to resolve the disputes when they occur.<sup>160</sup> The systems cooperate each other sufficiently because they believe that the objective of both systems is one and that is to ensure the sustainable peace and order<sup>161</sup>. The role both parties play in the justice administration at regional level is not a competitive rather complementary.<sup>162</sup> The regional government even allocates budgets to facilitate the activities of the customary elders sometimes.<sup>163</sup> The customary elders/ makaban told this researcher that when somebody is arrested or accused for criminal offences, they go to the state justice administration to get the arrested people released. Then they are requested by the state organ that they have to follow some formality such as writing an application and signing on it for promising that they will handle the issue properly and will ensure the peaceful resolution of the matter.<sup>164</sup> In such cases the only thing the court can ask for is making a report of the resolution to the court in which the case was pending.<sup>165</sup> Another practical interface between the formal and customary systems is at appellate level. When the cases are lodged at the court for appeal, and if this case is solved through customary adjudication and if the court is sure that the case is sufficiently solved and there is no any doubt of continuance of the dispute, the court uses that customary decision for *mitigating* the judgment against the offender.<sup>166</sup>

#### **4.9 SWOT Analysis of the Afar Customary Criminal Justice System**

##### **4.9.1 Strengths**

Most notably the ACCJS focuses on the restoration of the harmed social harmony and reconciliation among the disputing parties through payment of fair compensation, punishing the offender at least morally through the process of integrative shaming and satisfying the victim party confessing the offender's responsibility for the harm incurred.<sup>167</sup> The other strong side could be mentioned as the criminal event is solved very quickly. They do not give time for it

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<sup>160</sup> Ibid

<sup>161</sup> Interview with Muhammad Awal, *a Former Conflict Prevention and Resolution Desk Officer of the Security and Administration Bureau of the ANRS*, 10/04/2017, Samara

<sup>162</sup> Kalework Tefere Reda, cited above at note 146, pp.37 and 42

<sup>163</sup> Getachew and Shimelis, cited above at note 107, p.103

<sup>164</sup> Ibrahim Hamad, cited above at note 127

<sup>165</sup> Aliyu Hussien, cited above at note 140

<sup>166</sup> Interview with Ibrahim Ali, *Vice President of the Regional Supreme Court*, 04/04/2017, Samara

<sup>167</sup> Aliyu Hussien, cited above at note 140

particularly for serious crimes. And the reconciliation process is very complete.<sup>168</sup> Though there is no imprisonment in the Afar customary criminal justice system, the offender is punished to an unexpected level making him humiliated in front of others by words of mouth. There is a proverb in Afaraf saying " *yabti ugra hadi ugrak umah*" which means *beating by words is more severe than beating by stick*'. Since, starting with the investigation process and searching for evidence, the verdicts made against the offenders are reached by the *makaban* through consultation with the clan leaders, elders, and the opinions of other stakeholders, the enforcement process is easy and guaranteed.<sup>169</sup>

#### **4.9.2 Weaknesses**

One of the major weaknesses of the Afar customary criminal justice system is that the criminal is not punished sufficiently. Since the responsibility is shared among the members of the offender's clan or family, the perpetrator is not individually made to suffer the proper punishment.<sup>170</sup> Though under articles 101 and 102 of the criminal code of Ethiopia, compensation is granted for the victim of crime, however, this is an accessory issue to the imposition of a proper punishment on the offender personally, which is limited by payment of compensation under the Afar customary criminal justice system. The other weakness of the ACCJS is the revenge system. If the criminal is not caught or if he is absconded, his close relatives become a legitimate target of revenge.<sup>171</sup> Killing any member of the offender clan in retaliation is legally sanctioned and approved if happened in the Afar. The worst of that is the clan leader or any other person with high respect and prestige in the clan may also be targeted<sup>172</sup>. The approval of *maro* for the practice of revenge by the victim relatives aggravates the situation. When a suspect or his relative is killed without proof of their guiltiness by neutral *makaban*, and giving them a chance to defend themselves, this amounts an extra judicial killing and against the provisions of right to life enshrined under the article 3 of the UDHR and article 6(1), (2) of the ICCPR as well as article 14 of the FDRE constitution. Gender discrimination is one of the weaknesses in the Afar customary law. Woman cannot be appointed as a judge. She cannot represent herself at a court of law and more than this the compensation paid for women is half of that paid for man. For

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<sup>168</sup> Interview with Seyfu Abebe, A Public Prosecutor of Zone One, 05/04/2017 Aysa'ita

<sup>169</sup> Kaysay Gebre, cited above at note 10, p.338

<sup>170</sup> Salih Usman, cited above at note 126

<sup>171</sup> Seyfu Abebe, cited above at note 168

<sup>172</sup> Kalemework, cited above at note 146, p. 41

example, if it is 100 camels paid as a compensation for man killing, it is 50 camel paid for woman killed and also compensation for married and unmarried woman is not the same. An offence against married woman is more punishable under mad'a<sup>173</sup>. This practice is against the national constitutional and international human rights standards. It is against art.25 of the FDRE constitution and art.26 of the ICCPR which advocate the right of equality before law for all. It is also against the women's rights of equality with men enshrined under article 34 of the FDRE constitution.<sup>174</sup> Another weakness is, since it is a traditional rule and its efforts to adjust itself to the new developments are very trivial, its continuity and endurance is in a danger.<sup>175</sup>

### **4.9.3 Opportunities**

With the adoption of the federal form of government in Ethiopia, the system that empowers the various groups to develop their identity is expected to play a great role for giving space for customary criminal adjudications.<sup>176</sup> Such inspiration already seems to be launched under the Ethiopian Federal Criminal justice Policy of 2010 which proposes an alternative criminal dispute settlement out of courts provided that criminal ADR can be opted for by the parties with the discretion of the prosecutor and the court.<sup>177</sup> Similar position also has been indicated by the draft criminal procedure of the FDRE, though the problem with this policy and draft code is that they gave full discretion to the prosecutor and the court, as a general framework. The other opportunity for the ACCJS is the works done so far in terms of researching and codifying the Afar customary laws by the regional government. This work will enable all of the stakeholders to know the weaknesses and strengths of this system and further works to improve its status will be done based on it.<sup>178</sup>

### **4.9.4 Threats**

It is obvious that traditions are always under continues threat. If you cannot adjust yourself to any modern development, the traditional way of life cannot endure forever. Therefore, if the Afar customary laws do not adjust themselves to new developments, it will be endangered and

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<sup>173</sup> Kahsay Gebre, cited above at note 10, p. 327, Hanfare Asawkaytu, cited above at note 127

<sup>174</sup> Getachew and Shilesi, cited above at note 107, p.102

<sup>175</sup> Jamaluddin A. Redo, cited above at note 120, Kahsay Gebre, cited above at note10, p.339

<sup>176</sup> Alemayehu Fentaw, cited above at note 82, p. 26

<sup>177</sup> Aberra Degafa, cited above at note 78, p. 146

<sup>178</sup> Abdulfatah Abdellah, cited above at note 112

particularly its existence without the state recognition is doubtful.<sup>179</sup> In relation to this point, *urbanization* is having serious negative impacts upon our community. Corruption is spreading very fast among the customary elders and members of the community as well. Chewing chat, for instance, is the main problem for our customary elders which expose them to corruption. If they become corrupt, they cannot be neutral and they cannot render just decisions. These seem to be the negative impacts of urbanization upon us.<sup>180</sup> The other notable threat for the Afar customary criminal justice system is lack of formal recognition by both the federal and state legal systems. Without any formal recognition, its continuity is endangered as well<sup>181</sup>. The state has more power and resources and it can force any one to accept its rules at any time. At the same time, even it can deny to accept the dispute resolutions concluded by customary elders, a practice which is happening in fact in regions such as Oromia and SNNP according to some sources.<sup>182</sup> There are also doubts that the regional state officials are competent to make efforts and have ability to make legal analyses to invest any positive opportunities for empowering the traditional justice institutions in the region.<sup>183</sup>

One of the threats to the Afar customary law is codifying it without conducting enough research. We may destruct the Afar customary laws through codification or other forms of institutionalization, thinking that we are developing it, if we lack enough knowledge and awareness about the system and in what way it should be developed or institutionalized. For example, some people believe that the attempt to make the five customary codes as one code is an erroneous understanding. In this situation since they are alternative dispute resolution systems, their alternativeness will be undermined. Therefore, it should be kept in the original form.<sup>184</sup>

#### **4.10 Accommodation of the ACCJS under the MSCJS**

Accommodation of the ACCJS is the main theme of this research. This is a question of the entire people of Afar including their intellectuals, researchers and even the state officials including almost all of the justice sector personnel as the findings of the research at hand reveals. At the

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<sup>179</sup> Jamal A. Redo, cited above at note 120, Muhammad Musa, cited above at note 133

<sup>180</sup> Ibrahim Hamad, cited above at note 127

<sup>181</sup> Seyfu Abebe, cited above at note 168

<sup>182</sup> Aberra Degafa, cited above at note 78, p.148, footnote 4, Abdulfatah Abdellah, cited above at note 112

<sup>183</sup> Abdulfatah Abdellah, cited above at note 112

<sup>184</sup> Ibid

same time, no body supports the total replacement of the Afar customary criminal justice system by the state criminal justice system. They rather support the side by side operation. The people's expectation is that their customary law will get recognition by their government and then the two legal systems will be harmonized.<sup>185</sup> Therefore they tell without any hesitation that they support the institutionalization of the Afar customary criminal justice system. This is because they believe that if it is recognized by the state, the public awareness about this customary law will increase. And that means it will be known by many people because of its publication and the system then will have a guarantee for its smooth functioning. The cooperation between the customary system and the formal system will also be widened and the ACCJS will be applied in more regularity under both systems. Finally, its transformation from generation to generation will be guaranteed.<sup>186</sup> However, majority of the respondents are also aware of the fact that in order to recognize the Afar customary criminal justice system, both systems may need further research and reformation<sup>187</sup>. The clan issues are blood and bodily harms as well as issues of property rights which are considered to be owned in common by the clan or family members and any type of violence against life, persons and their properties can give rise to intergroup dispute. Here the customary adjudication is necessary. Otherwise it is not all types of crime that the Afar is interested in. There are a number of crimes which are the state jurisdiction, for example, theft, tax evasion, etc., and for such reasons a state laws are also equally important. But if the ACCJS lacks formal recognition, this simultaneousness will not have any sustainability. It is clear that the ANRS constitution under its article 63 provides for the establishment of the council of elders at various levels of the region. However, in practice, this provision is not given any legal effect. By legal effect I mean no secondary law that gives detail about the provision is yet enacted. Actually, there are elders providing advice regularly to the state government at various levels in the region.<sup>188</sup> According to respondents, In order for the Afar customary criminal justice system, to get recognition, it must be studied well as a legal system. Without the comprehensive study, legal recognition is not expected according to them. In general, some respondents believe that it is through doing three things that the Afar customary criminal justice system could come close to

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<sup>185</sup> Ibrahim Hamd, cited above at note 127

<sup>186</sup> Id, Hanfare Asawkaytu, cited above at note 127, Aliyu Hussien, cited above at note 140

<sup>187</sup> Muhammad Musa, cited above at note 133

<sup>188</sup> Interview with Idris Muhammad, *the Administrator of the Office of the Speaker of the Regional Council*, 10/04/2017, Samara,

be recognized. *First*, the thorough study of the Afar customary criminal justice system must be done to know its strength, weakness, opportunity, threat, modes of accommodation, etc. *Second*, it should be codified in order to ensure its certainty because when it remains in words of mouth (*oral*) it is not easy to be understood well. *Third*, the regional authority must have a psychological preparation in order to complete the process.<sup>189</sup> After the structure, scope and all other issues are ascertained, and then the regional government can enact proclamations recognizing the customary laws.<sup>190</sup>

#### **4.10.1 Summary of Matters that Warrant an Accommodation of ACCJS**

The monopoly of Afar customary laws in the region is one of the factors that warrant recognition of the same. About 91% and above of the Afar still effectively use their customary law.<sup>191</sup> And even there are areas where the inhabitants have no idea of the mere existence of the state law, leave alone to use it.<sup>192</sup> Plus to that the uniform application of the Afar customary rules all over the Afar inhabited areas<sup>193</sup> and the absence of any significant discrepancy among the five sub-legal regimes or customary codes of the Afar,<sup>194</sup> are aspects accommodation of the same.

The solution given through customary process is comprehensive resulting in a lasting solution and also it reduces the burden of courts of law. It saves time, resource and gives an expedient and instant solution to the dispute at hand.<sup>195</sup> Moreover, it is the community's right to be adjudicated according to their custom. It is one of the international human rights concern. One of the factors that warrant the recognition of the customary adjudication is the ineffectiveness or weakness of the state institutions. According to some researchers and some of my informants, the reasons for the implicit recognition of the customary laws by the state are because of lack of power and efficacy on the part of the state. Because of the economic problems, the size of the country and

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<sup>189</sup> Abdulfatah Abdellah, cited above at note 112

<sup>190</sup> Ibid

<sup>191</sup> Lensil and Original, cited above at note 17, p.10

<sup>192</sup> Khasay Gebre, cited above at note 10, p. 325

<sup>193</sup> Ibid

<sup>194</sup> Yasin Muhammad, cited above at note 104, p.52, Shihem, Kasim, cited above at note 105, p.166, Jamaluddin A. Redo, cited above at note 120

<sup>195</sup> Aliyu Hussien, cited above at note 140

the population size on one hand and because of the legitimacy problems of the existing laws on the other hand, the state could not enforce its legal system properly.<sup>196</sup>

It is not logical to say that the state has tolerated the application of the customary criminal laws because it has helped the government in terms of the dispute resolution since, had the reality been in this way, the state could have helped the customary system in terms of recognizing and so on. Based on such realities, as a researcher, somebody is right to advice a state to accept the informal system that has proved its competence.

An additional and important factor that warrants the accommodation of the Afar customary criminal justice system is that the old mono legal policy which is a result of centralist policy started with the introduction of the six legal codes to Ethiopia during the 1950s and 1960 is with no ground today. Today, request for legal decentralization is logical and must be accepted because of the current federal state structure. A federal system in general and particularly the ethnic federalism obliges the state to reconsider its mono criminal legal policy and it should be understood that this is not a matter of preference rather an obligation on the Ethiopian state.

The overall goal of one legal system is expected to fulfill two conditions: One is to increase access to justice for the individuals and group members of the society, and second, to do that in a manner that is realistic, legitimate, and that satisfies the justice demands of the population.<sup>197</sup> In this respect the customary laws are proven to be more accessible for the majority of the people and it is more realistic and legitimate because it is based on their own preference and culture, etc. Therefore this is a sufficient reason for accommodating the customary laws by the state.

Since the cooperation between the two systems is high in the Afar National Regional state, this mutual recognition between them will enhance this position. The relative weakness of the state and the relative strength of its counterpart in its own sphere, as explained above, dictates the first one to accommodate the later for the sake of sustainable peace in the future.<sup>198</sup>

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<sup>196</sup> Abdulfatah Abdallah, cited above at note 112

<sup>197</sup> Costantinos BT Costantinos, *Legal Empowerment of the Poor to Access Justice*, in Elian N. Stebek and Muradu Abdo (Eds.) *Law and Development and Legal Pluralism in Ethiopia*, Justice and Legal System Research Institute, Addis Ababa, (2013), p.49

<sup>198</sup> Kalemework Tefere Reda, cited above at note 146,p.38

The customary laws in general are criticized for lack of enforcement mechanisms, while ACCJS disproves this in the way that there is the *fi'ima* institute, revenge and clan fear, the traditional ostracism as well as the cooperation by the state to execute customary judgments now days, guarantee the competence of the ACCJS's.

Multiculturalism obliges that laws and policies, and strategies to be reflective of the diversity in terms of values and norms in the society.<sup>199</sup> The question of legal pluralism is a synonym with questions of power and it means empowering a group in all terms including in their legal institutional autonomy and hence it challenges legal centralist perspectives.<sup>200</sup> The right of individuals to practice their culture is one of the international human rights concern and getting an access to justice through traditional mechanisms within the context of their culture may not be excluded from the broader right.<sup>201</sup>

It is a belief of this researcher that all of the above mentioned factors and perhaps many more which are not mentioned in this sub topic are expected to give full picture to all stakeholders, at its forefront is the state, to accommodate the ACCJS.

#### **4.10. 2 The *De facto* Accommodation of the ACCJS**

Though the legal frame work accommodation, both at federal as well as the regional state level, is not sufficient, the *de facto* accommodation of the ACCJS at the regional level is clearly visible. This practical accommodation is both at judiciary as well as political level. At judiciary level, there are practices of approval of customary elder's adjudication by all of the police, public prosecutor as well as the courts. The other part of the *de facto* Accommodation of the ACCJS in the ANRS emanates from the political will of the executive body of the region. In the region, there are elder's advisory bodies both at local as well as regional level. Their total number is 43. Two elder advisors are from four zones and 3 form zone three because of the existence of Arguba special woreda, and in total 11 advisors provide advice to the regional administration. In addition there is one advising elder from each woreda and in total of 32 advisors at woreda levels exist. Though these elders help the government a lot in conflict resolution, their mandate and

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<sup>199</sup> Aberra Degafa, cited above at note 78, p.143

<sup>200</sup> Id, p. 144

<sup>201</sup> Jamal A. Redo, cited above at note 120 , Ibrahim Ali, cited above at note 166, Yonatan Fesseha, *Legal Pluralism and the South African Experience: Customary Law as a Constitutional Right*, in Elias N. Stebek and Muradu Abdo (Eds.)Law and Development, and Legal Pluralism in Ethiopia,( 2013), pp.178-9

their job description is not yet clear.<sup>202</sup> They participate in conflict resolution tasks widely without any job description. Therefore, at the regional level, I was informed that the government at this time has a plan to enact laws which describe their job in detail. So far those advisers participate in the regional council sessions. But the new plan intends to establish for those elders a procedure that enables them to conduct their own meetings and make report to the regional councils.<sup>203</sup> Though it is not legally framed, we can say that in this way, the ANRS has tacitly recognized the Afar customary criminal adjudication.<sup>204</sup>

#### **4.11 Modes of Accommodation Sought**

For accommodation of certain practice, literature uses different terms such as recognition, integration, incorporation, accommodation, etc. These terms are also used, most of the time, interchangeably, and may mean one thing or different things based on their context. The type of accommodation of the ACCJS will be determined by the specific situation of that system and the national legal system of Ethiopia in general. In this regard, we can consider the experiences of some African countries in relation to the options of accommodating the customary adjudications under their national legal and judiciary system.

**Angolan:** the Angolan constitution of 2010 provides the general frame work for the recognition of the customary laws under its article 7 which says "*The validity and legal force of custom which does not contradict the Constitution and does not threaten human dignity shall be recognized.*"<sup>205</sup> This constitution provides a general test of consistence with the constitution and absence of any threat for human dignity, recognizing all customary practices without any limitation, including the criminal adjudication.

**South Africa:** in South Africa, Chiefs' and headmen's courts have criminal jurisdiction over statutory offences, offences under the common law or customary law offences except those specified under the third Schedule of the Black Administration Act.<sup>206</sup> The excluded offences are

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<sup>202</sup> Idris Muhammad, cited above at note 188

<sup>203</sup> Ibid

<sup>204</sup> Ibid

<sup>205</sup> the Constitution of the Republic of Angola, 2010, Art.7

<sup>206</sup> the Black Administration Act, No.38, 1927

mainly the more serious offences such as treason, sedition, murder, culpable homicide, rape, arson, robbery.

**Zimbabwe:** courts in Zimbabwe have its structure as upper courts (the Supreme Court, the High Court and the Magistrates' Courts) and the lower primary courts (the village and community courts). The lower courts are granted jurisdiction in customary law matters only including some criminal offences.<sup>207</sup> It is also clear from section 20 (1) the customary court act that the procedure and law of evidence to be used are that of customary laws and not formal law focusing on its informality and simplicity.

**Nigeria:** There is a clear appellate procedure that "an appeal shall lay from decisions of a customary Court of Appeal to the Court of Appeal as of right in any civil proceedings with respect to any question of customary law"<sup>208</sup>. In Nigeria there is also a test known as a *repugnancy test* for courts to ascertain the suitability of the customary system at hand. The *repugnancy test* is the official government's legal requirement that a customary law or tradition, to be enforced, must be neither repugnant to natural justice, equity, and good conscience, nor contrary to any written (official) law<sup>209</sup>. Accordingly, all state *Customary Courts Law* empowers a Customary Court to apply native laws and customs except where a native law or custom violates the repugnancy test.

How to accommodate or institutionalize the customary dispute resolution mechanism in general, seems to be a home work for all Ethiopians. Though they agree upon the need of accommodation of customary dispute resolution mechanisms, debates among scholars at different occasions have been revolving around how these mechanisms can be institutionalized, a question which is not yet lucky to get an answer. Some legal scholars support the general recognition of the customary dispute resolution by the constitution and others advocate the establishment of special institutions that can be referred with such disputes directly by courts and public prosecutors"<sup>210</sup>.

Whatever be the right mode of the accommodation be, it seems that two things have to be done. One is to provide general frame work recognition of the customary criminal adjudication at

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<sup>207</sup> The Customary law and primary courts act (act no.6 of 1981)

<sup>208</sup> Constitution of the Federal Republic of Nigeria, 1999, ss237(b), § ss288

<sup>209</sup> Ibid

<sup>210</sup> Endalew Lijalem Enyew, cited above at note 64, p.73

country level. Second, a thorough study of the existing systems and possible alternatives should be carried on before rushing to the establishment of independent customary institutions or incorporating all practices in to the formal legal system. What we need in Ethiopia, at this moment, is, a frame work initiatives. If this gap is filled, since we have a federal structure of state in which power is devolved down to the lowest level, respective regions can enact their bylaws, starting with their sub-national constitutions in which they accommodate their respective customary practices.

#### **4.12 Summary**

The chapter at hand has discussed a lot of issues, beginning with the classification, peculiarities, structure and procedures of the mad'a system. It has also discussed the frequency of using the mad'a system by the community and the reasons why the community opts to use the mad'a system. It has also explored the interface between the formal system and the mad'a system. Strengths, weakness, opportunities and threats to mad'a system have been studied. The quests of accommodation and modes of accommodation, the matters that warrant the accommodation for mad'a have been investigated under this chapter.

The findings in this chapter has revealed that the mada' system is a comprehensive system which provides detailed solution for every criminal matter. Particularly, the system is very effective in inter and intra clan and other types of disputes resolutions. Accordingly, the regional government of the ANRS has already accommodated this system by *de facto* and it has increased the collaboration of the formal system with mad'a system. The research further has discovered that there are strong sides and good opportunities that should be exploited by the regional government to enhance the status of the mad'a system. There are also weak sides and threats which have to be tackled. There are a number of matters that can help the mad'a system to be accommodated by the state both at regional and federal state levels which should be seriously considered. The right of the people to be adjudicated according to their cultures and to their preference, and the federal state structure that supports this idea are some factors that warrant the accommodation of the mad'a system.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

There are good reasons for giving contemporary attention to customary laws. One justification is a set of problems relating to the legitimacy and practical utility of the transplanted laws

Like many other countries, Ethiopia is characterized both by *de facto* Legal pluralism and the framework problems at the same time. In Ethiopia, efforts made so far to accommodate customary practices at framework level are trivial, except in civil matters such as family and personal issues. Customary criminal adjudication has been transferred wholesale to state jurisdiction.

However, practically the customary criminal adjudication as dispute resolution mechanisms has remained without any significant change among the various ethnic groups of Ethiopia for the last six decades. Particularly in the peripheral areas such as Afar region, customary practice is operating under total autonomy from the state. About 91-95% of the Afar people still use the customary systems to solve their legal cases.

The Afar people use their customary law and neglect the state laws because of different reasons. Mad'a is considered to be comprehensive in terms of treating all criminal matters and it treats every criminal matter in a more details than the state criminal law. The other reason why the Afar use their CCJS is because it focuses on the restoration of severed social bond and harmony and it does this very instantly, more faster than the state system which focus on the penalty of individual and suffers from delays. The other reason is that they consider their customary law as the only legitimate legal system belonging to them while the formal system is considered by them as an alien system which does not have any link with them.

Irrespective of the framework deadlock between the two systems in the whole nation in general and in the ANRS in particular, there are possibilities of narrowing the existing gaps. This can be inferred from the failure of the formal justice sector for more than sixty year to enhance itself and to render satisfactory services to the general public on one side and a relative effectiveness of the mad'a which has a total monopoly in the region on the other side. The other suitable factor

helpful to accommodate the ACCJS is *de facto* accommodation. There is unreserved collaboration between the two systems at regional level including budget allocation for elders by the regional government which can be developed in to a framework accommodation. Multiculturalism which is, nowadays, given a high acclaim in Ethiopia, obliges that laws, policies, and strategies to be reflective of the diversity in terms of values and norms in the society and hence the customary practices are the main part of cultural identity which deserves accommodation. When we investigate the proper modes of accommodation for the ACCJS, it will be dependent upon the overall historical, socio economic, and politico-legal context of the country. However, there is a need to have a general policy shift from the current rejectionist to more accommodative policy towards the customary criminal adjudication.

## 5.2 Recommendations

Because of its unquestionable legitimacy and practical importance, the ACCJS has to be accommodated at both the federal and state levels.

Constitutional amendment is mandatory if we are going to attempt to give a framework for accommodation of CCJS because there is no constitutional base so far. Without constitutional support, subordinate laws cannot be enacted in favor of the customary criminal adjudication.

In order for the Afar customary criminal justice system to be accommodated, it must be studied well as a legal system. Both systems, the formal and customary systems, will need to be further researched in order to know their pros and cons before recognizing the ACCJs.

Secondary legislations must be enacted by the regional council of the ANRS in order to give practical effect to article 63 of the regional constitution that provides for the establishment of council of elders at various levels of the state.

The efforts to collect the orally held *mad'a* rules and codifying them should continue and the regional as well as the federal governments have to support the process both financially and with expertise. However, all parties must be vigilant not to destroy the basic quality of *mad'a* through the attempt to make it uniform.

The weak sides of the ACCJS must be rectified by the active involvement of the customary elders as well as other stakeholders.

In order to pick up the competence as well as the awareness of the Afar makaban, both the regional as well as the federal state must provide the Afar customary elders and makabans with continuous trainings in order to improve the weakness of their customary adjudications.

The *maro* (assembly) or *makaban* must authorize the punishment individually of those who commit a crime, irrespective of the reconciliation process and payment of compensation for the victim.

In general, since the laws the state tries to apply have no relation with the culture, creed, and way of life of the Afar people. Their customary law is a matter of value and identity. Therefore, it is not logical and legal to force them to denounce their identity in favor of anything else.

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Interview with Hanfare Asawkaytu, *a Makabantu*, on 06/04/2017, Logiya

Interview with Hassan Muhammad, *From Regional Prison Administration*, on 02/04/2017, Samara

Interview with Ibrahim Ali, *Vice President of the Regional Supreme Court*, on 04/04/2017, Samara

Interview Ibrahim Hamad, *a Customary Judge (Makabantu)*, on 05/04/2017, Aysaita

Interview with Idris Muhammad, *the Administrator of the Office of the Speaker of the Regional Council*, on 10/04/2017, Samara

Interview with Jamal A. Redo, *the Afar Customary Law Researcher*, on 02/04/2017, Logiya

Interview with Muhammad Akhadar, *Crime Investigation Officer of the Regional Police Commission*, on 03/04/2017, Samara

Interview with Muhammad Awal, *a Former Conflict Prevention and Resolution Desk Officer of the Security and Administration Bureau of the ANRS*, on 10/04/2017, Samara

Interview with Muhammad Mussa, *Customary Judge and a Former Regional High Court Judge*, on 09/04/2017, Samara

Interview Salih Usman, *Zone Two High Court Judge*, on 10/04/2017, Logiya

Interview with Seyfu Abebe, *Public Prosecutor of Zone One*, on 05/04/2017, Aysa'ita

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## ANNEX 1

### List of Informants (Interviewees)

For the purpose of this research, officials and experts of the following institutions were interviewed.

S. No.	Name	Position	Date of Interview	Place of Interview	Phone Number
1	Ibrahim Hamad	Makabantu	05/04/2017	Aysa'ita	0912336696
2	Muhammad Musa Ali	Makabantu and Former High Court Judge	09/04/2017	Samara	0913693949
3	Hanfare Asawkaytu	Makabantu	06/04/2017	Logiya	No phone
4	Aliyu Hussien Dabule	Dubti Woreda Court Judge	02/04/2017	Dubti	0911053246
5	Salih Usman	Zone Two High Court Judge	10/04/2017,	Logiya	0913880526
6	Ibrahim Ali Asire	Regional Supreme Court Vice President	04/04/2017	Samara	0911052478
7	Idris Muhammad Ali	Regional Council Office Administrator	10/04/2017	Samara	0911906157
8	Muhammad Awal	Former Conflict Prevention and Resolution Core Process Owner of Regional Security and Administration Bureau	10/04/2017	Samara	0912069613
9	Seyfu Abebe	From Zone One Public Prosecutor/Justice Office	05/04/2017	Aysa'ita	0913258903
10	Muhammad Akhadar	Crime investigation Officer of the regional Police Commission	03/04/2017	Samara	0910166836
11	Hassan Muhammad	From Regional Prison Administration	02/04/2017	Samara	0920700473
12	Jamal A. Redo	The Afar Customary Law Researcher	02/04/2017	Logiya	0913697778
13	Abdulfatah Abdallah	National Customary Law Researcher	29/04/2017	Addis Ababa	0911216838

## ANNEX 2

### Interview Questions (Guidelines)

**Research title:** *The Afar Customary Criminal Justice System: Towards its Better Accommodation*

First, I would like to thank you for being voluntary to respond on my interview questions. I am an LL.M degree student at Addis Ababa university school of law, conducting a Thesis under the title: "*The Afar Customary Criminal Justice System: Towards its Better Accommodation*". I chose you for this interview because of my belief that you have better knowledge on the area. Accordingly, thanking you again, I will proceed to the questions directly.

Name of the interviewee: \_\_\_\_\_, phone number: \_\_\_\_\_

Position: \_\_\_\_\_, date of interview \_\_\_\_\_, place of interview \_\_\_\_\_

1. Why do you think that the Afar community insists on using its customary law and neglects the state laws?
2. Is a number of people using the formal court system increasing or decreasing?
3. Do you prefer the total replacement of the state criminal justice system by the Afar customary criminal justice systems in the region?
4. What does cooperation between the formal and non-formal sectors look like?
5. Do you have an attitude of institutionalization of the Afar customary criminal justice system is needed? What advantages do you think the recognition of the Afar customary criminal justice system will ensure?
6. What is the degree of the participation in the customary court adjudication? Is there anybody who is not allowed to take party?
7. In order to control the prevalence of crime, which one do you think is more effective? Customary law or formal criminal justice system? And how?
8. What do you do as a customary judge if a strange or new case having no any precedent appears before you?
9. Is the Afar customary criminal justice applicable to non-Afar? What alternatives are available for criminal cases when both Afar and none Afar involve in a case?
10. If one of the parties denies using customary courts and instead opts for the formal one, is the system voluntary or obligatory?

11. What chances are available for the party who is not satisfied by the customary judges' decisions to appeal against it? Is there a hierarchy of courts?
12. Do you think that the urbanization has any effect on the Afar customary criminal justice system? What is that, if any?
13. What are weak and strong sides of and threats and opportunities for the Afar customary laws?
14. Do you prefer the total replacement of the Afar customary criminal justice systems by the state criminal justices system? If not why?
15. What constraints exist against the community not to use the formal courts?
16. As a principle, criminal adjudication by customary laws are prohibited in Ethiopia, however, practically in some parties of the country like the Afar region, the state laws are almost in applicable, how can you explain this implicit tolerance by the government?
17. Whose jurisdiction is it to adjudicate the inter or intra group disputes?
18. Who are the main population of your prison (ethnicity, age, sex, type of crimes suspected / sentenced for)?
19. What percent of crime suspects or sentenced persons remain in a jail and complete their term of sentence after receiving the final verdict by the formal court?
20. Who are the majority of prisoners who complete their terms of sentence without being released or interfered with by the customary elders (age, sex, ethnicity, types of crime)?
21. Have the regional legislature ever attempted to give a legal framework for the Afar customary law in general and criminal justice system in particular?
22. What is the status of article 63 of the 2002 revised regional constitution which talks about the establishment of the customary elders at all levels?
23. Is there anything applied on ground practically irrespective of the absence of sufficient legal framework?
24. Do you observe any peculiarities from the Afar customary criminal justice system?
25. Are there possibilities to narrow the gaps between the state laws and customary laws and to secure more recognition of the Afar customary criminal justice system under the national and regional constitutions?

26. What are the main international experiences from which Ethiopia can draw lessons in relation with recognition of customary criminal justice systems?

Finally, believing that all information provided by you will serve as a good input for this research as well as for the further researches on the area, thank you very much.