

**CONCEPT OF JUSTICE THAT SHAPE THE UPTAKE OF JUDICIAL SAFEGUARDS  
WITHIN *MASLAHA* PROCESSES IN GARISSA COUNTY, KENYA**

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**AUGUST, 2022**

## **DECLARATION**

I confirm that this thesis is my original work and has not been presented in any university. The thesis has been complemented by referenced works duly acknowledged. Where text, data, graphics, pictures or tables have been borrowed from other works including the internet, the sources are specifically accredited through referencing in accordance with anti-plagiarism regulations.

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## **DEDICATION**

To my wife Elizabeth Nelima Tulula.

Your inspiration and moral support made me walk this journey.

To my daughter and son Mayah Kimaru and Roy Ndungu

To my loving brother Daniel Macharia and mother Eunice Wanjiru for their encouragement and  
prayers.

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

ADRS	Alternative Dispute Resolution Systems
AJS	Alternative Justice Systems
CPC	Criminal Procedure Code
GOK	Government of Kenya
NACOSTI	National Council for Science, Technology and Innovation
NGO	Non-Governmental Organizations
NSC	National steering Council

## OPERATIONAL DEFINITION OF TERMS

**Concept of justice:** Was operationalized as salient contextual reality of group retaliation and its implication on interpretation and application of justice norms, procedures and remedies in the aftermath of a criminal transgression.

**Interests associated with customary adjudication authority:** refers to personal benefits that accrue from customary adjudication functions namely social relevance, social status, legitimacy, access to adjudication fee adjudicative authority, authority to control local resource.

**Judicial safeguards:** Legal frameworks emerging from formal courts interpretation and operationalization of Article 159 of the 2010 Constitution that aim to uphold objectivity within customary and community-based dispute resolution processes such as *maslaha*.

**Legitimacy:** the idea that state regulative approaches should reflect overarching notions of justice embedded within customary dispute resolution processes.

**Maslaha:** Systems of customs, norms and practices repeated by members of Somali community for such an extent of time they consider them mandatory

**Modogashe Agreement:** refers to a local agreement between Somali customary leaders and state agents that aim to promote state approaches of justice administration within customary systems of justice administration

**Restorative Solutions:** constructive forms of punishment that attempts to make offender accountable, address harm, amend and restore relationships constrained by criminal transgressions as opposed to imprisonment.

**Significance of Somali customary adjudicative forums:** comparative benefits associated with the use customary justice forums against formal justice systems such as accessibility, affordability, comprehensibility and timeliness.

**Social harmony:** restoration and maintaining of multiplex dependent relationships such as kinship ties that are used to distribute, share and protect communal resources such as grazing lands and watering points in small rural communities.

## ABSTRACT

*Maslaha* systems of justice continue to be utilized as mainstream and alternative forums in conflict resolution, adjudication of felonies and minor crimes among communities in North Eastern Kenya. Despite *maslaha* playing an important role in adjudication of criminal matters through established structures based on customary norms, studies report that their processes are vulnerable to abuse and may lack objectivity. This puts the victims at a disadvantage. Yet, evidence indicate that attempts to entrench safeguards through operationalization of Article 159 of the 2010 Constitution of Kenya in order to uphold fairness indicate varied adherence. Using Critical Procedural theory and Model of Informal Institutional Change, this study sought to identify salient contextual realities and social interests that shape the interpretation and application of norms, process, actors and remedies within *maslaha* forums. The study was guided by three objectives which were; to examine salient features of *maslaha* criminal justice process that influence the uptake of regulatory safeguard; to analyze judicial regulative models prioritized for *maslaha* criminal justice systems; to find out whether operationalization of judicial regulative safeguards was responsive to salient features of *maslaha* systems of justice. Phenomenological research design was adopted to study concepts of justice constructed from respondents' experiences and interactions with contextual realities and their implication on the adherence of judicial safeguards. Multi-stage sampling was used to cluster Garissa County according to its administrative units where purposive, snowballing and convenience approaches were used to sample study sites and respondents within customary justice forums, justice practitioners, government administrators, legal officers, human rights and paralegals. Data was collected through interviews and focus group discussion. Critical discourse analysis was used to analyze data. The findings of the study show that the main salient feature in *maslaha* judicial system were prioritization of social harm, collective responsibility, and communal reconciliation for peaceful coexistence. These were underpinned by contextual realities of clan rivalry that could trigger retaliation, local dilemmas of criminal justice administration, power dynamics between disputing parties and concerns for peace and order respectively. In regards to emerging jurisprudence on operationalization of Article 159, findings of this study show that the main values prioritized were disputant direct participation, autonomy and third-party neutrality. These were operationalized through original jurisdiction, non-related mediator and facilitative intervention strategies. They are expected to enhance objectivity in the process. As regards to responsiveness of the judicial safeguards to the salient justice features, the findings show that operationalization of the safeguards was not accommodative to situations and scenarios when salient features of justice linked with sustenance of social harmony, peace, order and community reconciliation were priced. For example, confining mediators to facilitative roles for objectivity purposes impeded their ability to avert retaliation through evaluative, directive and coercive interventions more so when crimes occur in situations of animosity and distrust among disputants' clans hence limited compliance. The study also shows that safeguards that promote non-interest related mediators thus displacing elders as mediators were less likely to be complied with since community members found elders to be more persuasive in pushing parties out of stalemates thereby preempting retaliations. The study also found that involvement of state justice institutions through original jurisdiction as a safeguard was limited due to institutional constraints such as complex procedures involved and witness intimidation. Thus, this study concluded that, less attention of judicial safeguards towards salient contextual realities identified affects their compliance within *maslaha* system of justice. Accordingly, this study recommends the need to carefully blend of regulations and with salient community justice practices.

## **CHAPTER ONE: INTRODUCTION**

### **1.0 Introduction**

This chapter presents the background of the study, statement of the problem, purpose of the study, objectives of the study, research questions, significance of the study, scope of the study, and limitations of the study.

### **1.1 Background to the Study**

Criminal justice system in any country plays a critical role in keeping the citizens safe through providing fair justice to help maintain order across the country. Judicial branch of the criminal justice system is specifically responsible for adjudicating criminal and civil cases and making decisions that are just and satisfactory towards the victims, criminals and the society as a whole. Accordingly, as argued by Gariside (2008), judiciary is expected to check and balance the core values of the society to contain and repress criminals, while at the same time protect the rights of the innocent hence individual liberty. The implication is that, justice system is designed to ensure a safe society for all. Further, as a social regulatory mechanism, the criminal justice system could be formal or informal but with the same goal of ensuring that the criminals are convicted and the innocent are protected for a peaceful coexistence.

Accordingly, the contemporary society is characterized by a multiplicity of criminal justice systems. Among them is the formal and customary criminal justice systems. The two systems of justice can be distinguished based on justice goal prioritized and level of formality. For example, Sessay (2018) argues that the administration of justice within formal criminal justice forums seeks to establish individual criminal responsibility. This is determined through a formal

adversarial process and in accordance with the formal due process. On the other hand, customary approaches of justice administration as observed by Ubink (2015) seeks to mitigate consequence of crime from an individual and community perspective. The aim, as argued by Garside (2008) is to regulate and manage the underlying social antagonism thus ensuring peaceful coexistence. As such this approach emphasizes on restorative justice interventions such as apologies, reconciliation, compensations and social harmony. The focus of this study is on customary justice systems that operate at the community level as alternative justice forums outside the confines and channels of formal justice systems. These are autonomous alternative justice institutions fully operated by the community. Unlike court-sanctioned AJS with heavy state involvement and guidance through state appointed mediators such as probation and children officers, actors involved in autonomous customary forums use their own procedures and rules and work independent of the state and mostly use customary law.

In many countries around the world and almost all African countries, autonomous customary justice systems continue to endure as alternatives and in some scenarios as the main justice forums. For example, Mohamed and Muriithi (2020) note that in some contexts, elders and kinship systems have been found to be useful alternatives in adjudicating criminal and civil wrongs for citizens who are not within the reach of formal justice. In essence, the customary justice systems seem to be appropriate in transient nomadic populations that are not settled and experience limited Government capacity. Therefore, despite the existence of modern criminal systems of justice, customary justice administration process operating beyond the limits of formal justice channels continue to have relevance thus the increased need for their recognition.

Customary justice systems have also been found to be important in fragile and conflict affected contexts. In such contexts, violence and war has destroyed capacity of formal justice institutions. Accordingly, Harper (2014) observes that they act as the mainstream justice forum in resolving criminal and civil wrongs for citizens who are not within the reach of formal justice systems. These include *jirga* in Afghanistan, *poro* and *sande* in rural Liberia. Similarly, studies by Isser (2011) and Buluma (2019) point out that ethnic-based approaches to justice administration are preferred in some jurisdictions due to their anchoring on popular local norms and practices. For example, *Abunzi* in Rwanda, *Pondo* community in South Africa, *Njuri Ncheke* system for *Ameru* and *Gada* system for *Borana* remain strong because they are grounded in the cultural traditions that people identify with.

*Maslaha* judicial system, which is the focus of this study, is deeply rooted in the Somali culture intertwined with Islamic beliefs. The *maslaha* judicial system has rules on how individuals are to behave to achieve harmonious coexistence. The rules in *maslaha* interact with local leaders, norms, and capacity to create incentives, proffer ways of perceived peaceful coexistence and generate legitimacy that have been held for years. Consequently, such resilience has led to their recognition by the government rather than abolishment.

Notably however, despite their enduring potential in complementing or supplementing state judicial institutions, customary systems of justice are not without contradictions. For example, Harper (2014) observes that settlement and solutions within customary forums are consensual in nature. Accordingly, social consensual approach is guided by goals such as social harmony and reconciliation that are uncertain and open to wide interpretation and manipulations. Such goals, although important, could subvert victim's justice needs and aspirations. On the multiplicity of

interpretations and manipulation, Bennett, Harrington, and Tom (2015) observe that clan and elders within customary adjudication processes may approach criminal violence as harm against the entire kin group. In this regard, the customary justice approach is limited since the elders may compensate the group while disregarding the interests of the victims thus the need for their regulation. In the contemporary society governed by not only customary laws but also national and international laws, group compensation can be problematic since individual rights can be suppressed by group rights. Despite these limitations, the customary judicial system remains resilient and continue to be utilized in many nations including Kenya. Such resilience has seen the Governments opting for recognition and regulation rather than abolishment.

In some extreme cases, Roder (2013) notes that customary justice forums rely on representation from elders, extended family members and kinship systems. Such representatives may use ambiguous justice goals such as social harmony, peace and reconciliation to force their interests. In this regard, there is fear of customary adjudication prioritizing personal interests while overlooking those of the victims. Such prioritization leaves victims hurting. Importantly, customary justice systems may negate the right of victims to a fair process, undermines their dignity and limits holding perpetrators of crime accountable to their actions. This notwithstanding, the customary judicial services continue to thrive in most communities in contemporary Africa particularly in North Eastern region in Kenya.

In view of the above, the resilience of community-based customary judicial system has compelled national governments in various countries to seek ways of improving services offered in such forums. This notwithstanding the emerging concern that access to justice in conflict-

prone societies and more so within persistent alternative justice mechanisms has been deemed a key ingredient for sustainable peace (Carothers, 2006). As a result, this has compelled governments to prescribe regulatory safeguards anchored on procedural safeguards and rule of law principles that are nationally and universally recognized. Further, reflecting on Procedural Justice Theory by Tyler (2005), procedural safeguards such as mediator's neutrality, victim self-determination and active participation significantly limit the undue influence of customary justice forums to manipulate, discriminate and violate standards of equity and fairness. Through upholding the customary justice system, Harper (2014) observes that government in most jurisdictions have prescribed safeguards that aim to uphold objectivity by insulating customary justice processes from elite capture, undue influence from influential community members, mediators and powerful perpetrators of crime. Accordingly, it is envisaged that the empowerment of the victims by upholding aspects of self-determination, active participation and mediators' neutrality are likely to ensure that the application of ethnic-based justice values and their procedures will be sensitive to justice needs of victims.

In this regard, the government regulatory safeguards are expected to offer structure, and formality for offering justice processes in a more objective way that is anchored on nationally and internationally accepted standards of criminal justice. This is thought to provide a way of establishing procedures and norms that would reconcile the formal judicial systems and the customary judicial systems, but more importantly reduce the vulnerability of the traditional systems.

However, as argued by Sessay (2018), the ability to achieve this depends on the extent to which operationalization of safeguards is responsive to salient contextual realities and social interests

that shape the interpretation of criminal transgression and course of justice administration process. For instance, criminal transgressions in conflict-prone areas may encounter scenarios that may call for prioritization of order/group reconciliation and compensations over victim's individual harm in order to avert further violence. Thus, escalation of violence and retaliation in the aftermath of a criminal transgression between groups can be perceived to be a salient contextual reality that shape the course of justice administration. Consequently, justice reformers are expected to ensure that operationalization of judicial safeguards does inhibit the ability of local justice forums to avert violence when such situations arise.

In view of the above, customary justice administration process is dynamic. This is so because their justice goals, norms, procedures and remedies can have varied interpretation and application across similar cases based on overarching salient contextual realities. Further, despite arguments by Clapham (2012) and Dunn (2013) suggesting that customary justice process can be universally characterized as restorative, inclusive, consensual decision making process, communal participation and wide-problem solving approach, operationalization of such concepts is contingent to prevailing contextual realities. This implies that customary justice processes generally apply flexible rules and procedures in response to changing social circumstances and economic realities. Therefore, customary justice administration process is dynamic in the sense that norms, procedures and remedies are flexibly interpreted and applied based on circumstances surrounding a criminal transgression. This being the case, operationalization of judicial safeguards is expected to uphold such dynamic structure that allows customary systems to craft pragmatic solutions that suit local conditions in order to increase chances of compliance.

Accordingly, Quinn (2014) and SungYong (2019) observe that being responsive to the prevailing social interests of justice administration is important since they inform perceptions, beliefs and values that guide our thoughts, reactions and behaviors. This is crucial since salient realities and interest shape perception which enables us to make sense of the world as we experience it. Therefore, one cannot underestimate the importance of concepts of justice informed by salient contextual realities that shape course of justice administration process within customary justice systems. To this end, this study identified salient social and community interests and realities of justice administration from perspective of end users that flexibly shape interpretation and inform which justice norms, procedures and remedies assume legitimacy, an aspect this study referred to salient concepts of justice.

Despite the need to account for the mediating effect of context sensitivity, Baker (2014) avers that there is the ever fear that technical-legalistic approach used to operationalize judicial regulative safeguards may miss their salient features informed by contextual realities. This may make the emerging regulatory jurisprudence less sensitive to local needs embedded within customary forums thus limiting their uptake and compliance. In Afghanistan for example, Erica (2013) observed that efforts of state authorities to limit the use of *jirga* elders by making them refer major criminal cases to state justice systems has often been resisted. Towards this end, there was need for empirical studies to identify and integrate salient benefits from the eyes of the locals associated with the use customary leaders in adjudication of major criminal cases in order to increase the chances of compliance.

Likewise, in East Africa, efforts to control discriminations based on gender within widely used community alternative justice forums by expanding participation in decision making to include

marginalized groups such as women and youth within the adjudication forums has also been resisted. In Uganda, for example, Ndulo (2015) note that efforts to have at least three women to participate in more accessible Local Land Committees has been resisted. Similarly, in Tanzania, Harper (2014) observes that the move by Village Land Council Authorities to have two women in the seven-member team has continuously been rejected by customary leaders. This being the case, there was need to examine salient contextual realities that inform legitimacy of customary authorities that justice reformers need to be aware of.

In Kenya, taking cognition of enduring community-based *maslaha* justice systems as alternatives in justice administration and their potential pitfalls in North Eastern Kenya, the Kenyan government has advanced a range of regulative strategies. An emerging jurisprudence as emphasized by Article 159 (2) (c) of the 2010 constitution provides regulative clauses namely repugnant to justice, morality and written laws when using ADRs. On the other hand, Ngugi et al., (2020, p. 21) in their task force report on ‘Alternative Justice Systems Framework Policy, 2020’ observe that these clauses do not further define their scope or operationalize whose morality and which justice standards to be used. This leaves room for courts to exercise interpretational discretion raising concerns on emerging jurisprudence ability to account for salient realities that shape the course of *maslaha* justice administration process.

Notwithstanding this lacuna, this study this study established that an emerging jurisprudence has been jurisdiction limitations where *maslaha* justice systems are not allowed to adjudicate major felonies such as murder. To this end, the use of *maslaha* is limited to minor or misdemeanor cases relating to offences of personal nature such as simple assault while major crimes are to be referred to state adjudication structures such as those found in courts of law. Second, where

criminal matters are referred to *maslaha* justice systems for resolution either by formal courts or from the community, certain values are prized namely disputant self-determination, active participation and process control. It is expected that the influence of elders and clan will be limited thus allowing the process to reflect the needs, wishes and aspiration of the disputing parties, hence objectivity.

Despite the stipulations laid down, *maslaha* justice system presides over cases with little regard of the regulatory safeguards as structured by the Government. For example, Wanyoike, Onkware and Okoth (2018) observed that 66.7% cases which consisted of violent crimes linked to intra-clan conflicts were addressed through *maslaha* forums in Garissa County. This raised the need to interrogate responsiveness of operationalization of judicial safeguards towards contextual dynamics likely to arise in the aftermath of conflict-related crimes and how they mediate compliance. Similarly, Mohamed and Muriithi (2020) observed that elders in *maslaha* often apply coercive, directive and evaluative interventions strategies in the aftermath of criminal transgressions. The above raised the need to for this study to further identify and interrogate situations and scenarios when such interventions are prized and whether operationalization of safeguards is accommodative to such eventualities.

To this end, given the supremacy of constitution, *maslaha* systems of justice are expected to comply with the set regulations subject to interpretation and operationalization by formal courts. On the other hand, *maslaha* systems of justice process are not immune to mediating role from salient contextual realities which may greatly affect the interpretation and application of justice norms, process and remedies from case to case hence the need to examine the case of *maslaha* in Garissa County. Therefore, this study sought to examine whether operationalization of judicial

safeguards is responsive to salient contextual realities likely to shape justice administration dynamics in Garissa County and how this affects their compliance.

## **1.2 Statement of the Problem**

Somali *maslaha* adjudication processes in Garissa County are popular due to their grounding on community local realities. However, despite their popularity, they are susceptible to abuse due to their reliance on consensus and ambiguous justice goals that are open to multiple interpretation. This makes it imperative to uphold objectivity by promoting third-party neutrality, disputant autonomy and self-determination throughout the process. The Government in cognition of enduring customary justice system in Garissa put in place regulatory safeguards in line with Article 159 of the constitution that aim to ensure an objective process. More importantly, efforts to safeguard disputing parties against domineering community elders, clan functionaries and ambiguous norms have mainly proceeded by subjecting the use of *maslaha* systems of justice to repugnancy clauses of morality, justice standards and written law since they are better placed to supervise and oversee compliance with procedural justice safeguards values that seek to uphold objectivity.

However, *maslaha* systems of justice continue to operate with limited regard for repugnancy clauses and their emerging jurisprudence. Despite this understanding, there has been little focus on the salient concepts of justice and how they mediate responsiveness of emerging regulatory jurisprudence. Therefore, the problem that provided the impetus of this study is that, despite limited regard for repugnancy clauses and their emerging jurisprudence for *maslaha* justice system, there is limited empirical data that explain how salient concepts of justice mediate in the

uptake and compliance of the judicial safeguards. This study therefore sought to find out salient features of *maslaha* systems of justice and how they mediate to judicial safeguards.

### **1.3 General Objective**

The overall objective for this study was to examine the jurisprudential implications of the recognition of *maslaha* systems of justice in accordance with article 159 of the 2010 constitution and uptake of state judicial regulative safeguards within *maslaha* justice processes in Garissa County

#### **1.3.1 Specific Objectives**

This study was informed by the following specific objectives:

- i. To examine salient features of *maslaha* justice systems relating to criminal offences that influence the uptake of regulatory safeguard.
- ii. To analyze judicial regulative models prioritized for *maslaha* criminal justice systems.
- iii. To examine the extent to which operationalization of judicial regulative safeguards is responsive to administration of justice within *maslaha* justice systems

### **1.4 Research Questions**

The present study was informed by the following research questions:

- i. What are the salient features of *maslaha* justice systems relating to criminal offences?
- ii. Which elements do judicial regulative models prioritize for *maslaha* criminal justice systems?
- iii. To what extent does operationalization of judicial regulative safeguards responsive to salient features of *maslaha* systems of justice?

## **1.5 Justification and Significance of the Study**

An analysis of popular concepts of justice is important in legitimizing social change and enhancing local ownership of state justice reforms within the Somali community. Therefore, understanding how popular concepts of justice shape the uptake of state regulative safeguards within Somali customary system is informative to both the legal system and the policy makers. In this regard, knowledge of salient contextual features that shape the course of justice administration processes within *maslaha* and the extent to which operationalization of judicial safeguards is responsive is important in enhancing their compliance. This can only be objectively identified through an empirical study hence the justification of this study.

The study is significant in various ways. Empirical analysis on experiences of state justice regulative strategies provides evidence based valuable information to international organizations involved in promoting and reforming customary justice systems. This then allows for the use of strategies in both customary and contemporary justice systems to administer justice objectively. Additionally, this approach will inform traditional leaders to find legitimate, satisfactory and fairness in administering justice within the Somali community.

This study mapped out a detailed analysis of prevailing justice concepts and how they interact with state regulative strategies. This is beneficial to the government in developing justice policies, reform agendas and linkages that are legitimate, relevant and sustainable. In addition, an examination of how state justice regulative strategies are mediated by local understanding of justice among the Somalis is pivotal. This adds empirical knowledge on how to integrate state-

centric liberal justice within African customary conflict resolution processes without altering organization, accessibility and operation of customary systems of justice.

At the time of writing this research, the judiciary is in the process of integrating alternative justice mechanisms by entrenching justice administration safeguards. The study's findings on interaction between safeguards and popular concept of justice will provide valuable insights on how to reconcile individual rights-based safeguards within collectivist justice practices.

### **1.6 Scope of the Study**

The study focused on Somali customary justice systems in Garissa County. Garissa County was ideal since Somali customary systems of justice are applied in conflict resolution and adjudication of violent crimes. In addition, *Modogashe* Agreement, a regulatory aspect of interest to this study is confined within Garissa County. The study covered the post 2010 Constitution period. This is because it is within this period that new provisions recognizing and regulating alternative justice forums were entrenched. Concept of justice in this study included overarching salient contextual realities that shape the course of criminal dispute resolution in terms of interpretation of criminal transgression and application of justice norms, process and remedies.

Additionally, another variable was the extent to which state judicial regulatory safeguards are accommodative and responsive to popular concept of justice within *maslaha*. Judicial safeguards comprised of how universally accepted standards of fairness within ADRs namely disputant self-determination, disputant party autonomy, processual control and third-party neutrality are

interpreted and operationalized in light of emerging jurisprudence from the court interpretation of Article 159 of the 2010 Kenyan Constitution. The population of the study consisted of adult (above 18yrs) Somali residents who had resided in Garissa for more than five years.

### **1.7 Limitations and Delimitations**

This study was constrained by some uncooperative respondents who were not willing to give vital information relating to customary justice practices. Notably, suspected offenders were concern with providing incriminating information which could be used against them in a formal court of law. This was addressed by assuring respondents that information gathered will handled with confidentiality and will be purely for academic purposes. Anonymity was also emphasized by making sure respondents do not provide personal details. Dates and location of interviews were also withheld to avoid exposing identity of respondents.

There was the possibility that respondents may give socially acceptable responses to avoid contradicting commonly held beliefs of culture and practices. To address this, respondents were educated on the importance of participating in the study and the need to provide objective responses.

Security was also a challenge for the researcher and research assistants. To address this, various security arrangements were put in place. First, the researcher was also in constant communication with security agents and local Sultans for updates on emerging security threats. In hostile and inaccessible areas, the researcher made arrangements to facilitate transportation of key informants to venues that are more secure for interviews.

## CHAPTER TWO: LITERATURE REVIEW

### 2.0 Introduction

The purpose of this study was to find out whether responsiveness of judicial safeguards towards dominant Somali concepts of justice in the aftermath of criminal transgressions affect their compliance. The present chapter focused its review of literature on salient features of *maslaha* system of justice administration. This section paid attention to anthropological and socio-legal studies and how they conceptualization of justice in light of history, culture and context.

The chapter also paid attention towards how formal courts are interpreting the concepts of morality, justice and written laws as entrenched in Article 159. Values prioritized and corresponding operationalization practices were examined given varied interpretation across jurisdictions. The chapter also paid a close analysis of how salient practices within customary justice processes may shape adherence of judicial regulative safeguards. The chapter ended by providing theoretical framework and underpinnings guiding the study and conceptual framework employed.

More importantly, key emerging gaps that makes this study different and important included identification of salient social reality rather than universal characterization of ADRs as restorative, implication of overarching salient realities and their implication on the interpretation and application of justice norms, process and remedies, and finally situations and scenarios when communal concerns and its associated practices were found to supersede the relevance of safeguards hence explaining their varied compliance. Thus, the thrust of this study can be seen putting together conceptualization of salient justice notions from the intersection of culture and

context, emerging jurisprudence associated with Article 159 and its responsiveness to salient concepts of justice.

## **2.1 Salient Features Customary Justice Forums**

This section begins by defining customary systems of dispute resolution. This is followed by examining literature that rely on cultural-orientation to understand nature of justice within customary forums and their shortcomings. Cultural-oriented literature is later augmented with observations from socio-legal scholars who bring in the idea of semiautonomous social fields as key contextual reality that mediate the relevance of cultural explanation.

The term customary justice system is often associated with African traditional customs that specific ethnic groups apply in managing disputes. Thus, their nature is dependent on how the term custom is understood. As argued by Kariuki (2015), this may comprise of the totality of behaviour patterns reflective of the traditions and practices within a particular group. On the same note, Ambani & Ahaya (2015) points out that some customs can be explained historically where the focus is on remote antiquity while others may have some aspects of modernity. Therefore, what customary justice systems are, is dependent on the meaning of the term custom.

Similarly, the term customary justice system is used synonymous with indigenous, community or non-formal state justice systems. Notably, as argued by Kariuki (2015), the tags have been used interchangeably to describe localized and culture-based administration of justice. Hence, traditional dispute resolution mechanisms are all those mechanisms that local or rural communities or peoples have applied in managing disputes/conflicts since time immemorial and which have passed from one generation to the other. Consequently, the administration and adjudication of justice within customary justice system has often been associated with

contextually informed lived realities such as agrarian living, close-knit social setting and lack of state thus prioritization of communal welfare and reconciliation.

Historically, Menkhaus (2015) notes that reconciliatory remedies through traditional forums were prioritized in situations where community was organized around informal contract. In these societies, Borzel and Risse (2015) observes that there was no sovereign body such as the state for mobilization. In this case, members of a community or group depended on one another for social, economic and political interaction. Chopra (2009) adds that in pre-colonial societies, reconciliation was key in restoring harmonious interactions essential for production of community goods and survival. As a result, Kariuki (2015) notes that redress to criminal violations prioritized outcomes that preserved existing relationships.

Therefore, criminal transgressions as argued by Herman (2017) were viewed as a violation of people and interpersonal relationships than between an individual and the state that was not in existence then. In this regard, customary justice approaches put into consideration severed relationships between members of a particular group against their complex network of relationship. This is because such relationships were critical for the well-being and survival of the community. In view of the above, the need for cooperation, strong group coherence and survival greatly informed their compliance and legitimacy. That is, the need to sustain life under precolonial realities created some aspect of obligation and fidelity to customary systems of justice.

However, customary justice practitioners such as (2020) note that these pre-colonial justice customs continue to prevail in modern society. To this end, Diala (2017) uses the term ‘living’

customary law to refer to modern adaptation of indigenous customs to modern socio-economic and political realities. Accordingly, Moore (1973) uses the term semi-autonomous fields to refer to socio-political fields that constantly influence the content of precolonial customs of justice in light of new realities. Further, Jackson (2014) notes that customary justice norms are applied in contexts with active semi-autonomous social fields with law making capabilities. This may comprise of elites, influential community leaders, clan functionaries and contextual realities such as accessibility to modern justice which shape which pre-colonial justice norms are prioritized hence their modern salience. Thus, the content within customary justice systems is constantly re-modified to meet community justice needs and to some extent personal interests hence their resilience in modern day societies. Hence, social fields have an influence on which customary justice are salient within a particular context. Given the existence of several social fields, this study sought to find out those that are overarching and influential in the case of *maslaha* processes in Garissa.

In the end, the content of salient customary justice systems is not static or purely traditionally-based. Rather, they are more of hybrid systems constantly being influenced by other modern and emerging social fields such as courts, legal frameworks, political elites, power difference among community members, social dislocation and influence of non-governmental organizations. For example, Dekha & Mason (2019) notes that reconciliations over prosecution of criminal cases is common in conflict-prone contexts where resource conflict may escalate into retaliations. However, no further attempts were made to understand conditions under which resource conflict may escalate into retaliation and their implications on customs, actors, process and remedies that are priced, an aspect this study sought to unearth. Further, study by Dekha and Mason did not further explain why and when formal institutions are involved in *maslaha* process and the

implication of retaliation thus necessitating this study. In addition, Menkhaus (2015) points out that limited capacity of state justice institutions among unsettled nomadic population in contexts of North Eastern Kenya may have implications on persistence of customary systems of justice. On this, Menkhaus study over glossed capacity of formal institutions thus overlooking situations when such nomadic groups were within the range of formal institutions. Further, the Government has continued to increase capacity of formal institutions. For example, in some cases, mobile courts have been established thus the need to examine the idea of limited capacity. Therefore, this being the case, the present study sought to find out how *maslaha* systems of justice have evolved, identify salient practices and underpinning contextual realities in modern contemporary Somali community.

Among the Somali communities, Schlee (2013) notes that conflicts, civil and criminal matters are often addressed by *xeer*. *Xeer*, as argued by Schlee comprises of a set of norms and values that address disputes and regulate relationship between individuals and between groups or inter-clan interactions. A major guiding principle for *xeer* is to safeguard the social cohesion of the community (Kinyanjui, 2010). Consequently, while litigating over criminal and civil disputes, emphasis is often on reconciliation through compensation. However, notwithstanding Schlee observations on the role of *xeer* and the goal of social harm, socio-legal studies by Dekha & Mason (2019) have reported hybridity in the sense that *maslaha* process are not entirely informal. Further, essentializing *maslaha* forums based on restorative goal of social harm miss out situations and scenarios when such values are priced thus the need for this study.

On hybridity, Sessay (2018) observes that customary processes may not only rely on custom but also statutory norms. For instance, Sessay notes that the *kassi* local courts operated by village

chief in Sierra Leone often experience limited coercive powers to initiate reconciliation. As such, they are forced to rely on statutory process of criminal litigation as a leverage to pressure reluctant parties into reconciliation. In this case, they adopt a hybrid nature in justice administration by using statutory norms where customary norms are ineffective. Thus, this study sought to examine source of influence and leverages among local adjudicators within *maslaha* and whether it had an implication on compliance with judicial safeguards.

Secondly, there was need for further studies to explore whether emphasis of reconciliation among the Somalis hinder the adoption of state regulative strategies which are more inclined to retributive forms of justice. On this aspect, Gundel & Berg (2016) points out that *xeer* norms of justice heavily focuses on maintenance of basic social bonds necessary for human survival. This also calls for an empirical analysis on whether this is the case in modern day Somali community in Garissa. Empirical studies should determine whether state regulative strategies accommodate or displaces the need to maintain basic social bonds and how it affects their compliance.

*Xeer* principles of justice are summarized as: first, there is a focus on collective payment of *mag* for criminal remedies such as murder, physical harm, theft and rape. Second, *xeer* consists of inter-clan conventions on protection and security in times of war. Third, it has provisions that guide on family obligations such as payment of dowry. Fourth, it provides a framework for management of resource utilization such as water, pasture and other natural resources (Clapham, 2012). In addition, Isser (2011) observes that majority of Somalis both in urban and rural areas use *xeer* as the initial avenue to seek justice. Despite evidence from Dekha & Mason (2019) observing that Somali customs continue to feature in criminal justice administration process, such characterization overlooks the implication of modern justice institutions, human rights

movements and emerging legal frameworks such as 2010 constitution. This is so because they have an implication on justice practices that assume salience an aspect that judicial safeguards ought to be cognizant of. This is an aspect this study sought to examine in the case of *maslaha* in Garissa County.

In addition, as argued by Diala (2017), customs are ‘living’ in the sense that they evolve to adapt to modern challenges of justice. He adds that customary institutions such as those of Somali community are semi-autonomous fields capable of continuously re-producing law-like norms. Thus, whether and how such *maslaha* approaches and values to justice administration have evolved, continue to be cherished and remain relevant within the modern Somali community is an aspect this study sought to interrogate. The above characterization also calls for an examination of contextual realities that make *xeer* principles of justice relevant and endure alongside modern justice systems.

The present study examined the overarching prevailing *xeer* practices applied in criminal adjudication. It then explored contextual realities that seems to make them endure and how such realities affect any restructuring by judicial regulative safeguards. In addition, restorative characterization of *xeer* assumes that they are static and not responding to social changes. This study explored how *xeer* has evolved, what aspects are abandoned and modified in modern day justice administration given their exposure to formal systems of justice and social dislocation.

Customary justice systems use conflict resolution mechanisms such as arbitration and mediation to provide redress in civil and criminal matters (Kimathi, 2013). Accordingly, chiefs, headmen or a group of elders are used to perform judicial or quasi-judicial roles in customary justice systems.

In most cases, such leaders are selected based on status such as being a respected member of the community. Bennett, Harrington and Tom (2015) observe that in some cases, the selection of leaders could be an inherited position while others assume judicial roles by virtue of being traditional political leaders. This implies that status of customary leaders greatly influences their legitimacy. Further, their status may be influenced by political roles, inheritance and respect they command. Given such variability, this study sought to find sources of legitimacy among third-parties used in *maslaha* forums.

In terms of procedures, customary norms of justice administration as argued by Harper (2014) are dynamic and flexible. This is so because norms that guide their procedures, actors and remedies are constantly being ‘reinvented’ in response to changing social circumstances, economic realities and intra-community politics. In the end, Baker (2014) observes that this dynamic structure allows its leaders to craft pragmatic solutions that suit local conditions and respond to the issues at the crux of a dispute.

Therefore, decisions are arrived at based on consensus. In most cases, outcomes and settlements are arrived based on compromises informed by mutual agreements. Notably, the overall goal of customary dispute resolution is often to restore social harmony; integral to this is a solution that is acceptable both to the parties and to the wider community. Notwithstanding this, Diala (2017) argues that customary justice processes are constantly changing to suit end users emerging justice needs. This implies that their content is constantly re-modified to meet community justice needs and to some extent personal interests. For example, they may involve aspects of formal laws and actors. This study, therefore, sought to find out whether Somali *maslaha* justice

systems include formal and informal resources when administering justice and how it affects uptake of state regulative safeguards

In view of the above, Menkhaus (2008) in his book *Mediated state on North Eastern Kenya* notes that Somali customary justice system is regulated by *xeer* which is oral in nature, flexible. He also notes that *xeer* borrows from Somali traditional customs and norms and partly from Islamic *sharia* law. That is, *sharia* law has an overarching influence on justice administration process in most Muslim-speaking communities of North Eastern Kenya. Similarly, Schlee (2013) underscores that administration of justice is also affected by modern realities such as power differences and exposure to modern justice systems and its right-based legal instruments. This necessitated the need to unearth overarching social realities and they shape complexities and dynamisms of *maslaha* justice administration process.

On this, Diala (2017) observes that vulnerable end users may leverage on state justice institutions and other strategies to secure their interests within customary systems of justice. This raises the need to further understand how social realities inform how various sources of norms assume legitimacy and their implication on operation of *maslaha* justice forums in Garissa County. Further, there was need to interrogate whether members of Somali community find the flexible nature of customary justice system in the sense that they can appeal to *sharia* and formal norms significant and whether such perceptions matter in compliance of state regulative strategies.

Other than *xeer*, *sharia* and elders, clan systems are another informal justice resource that plays a significant role in Somali justice administration process. For example, Mohamed & Muriithi (2020) note that crime is viewed as a group crisis or threat to clan existence rather than an

individual. Thus, clan seeks to ensure that the crime incidents does not disintegrate harmonious coexistence of clansmen. Hence, clan elders are expected to transform the crime into an opportunity for re-building relationships (Barfield, Neamat & Thier, 2011).

Clan mobilization is based on importance of shared ancestry and lineages. The goal was to mobilize community harmony against common adversaries during the pre-state era. However, even in modern times with the existence of state and highly complex independent relationships, Mohamed & Muriithi (2020) note that clans continue to feature in Somali community. This could be an indication of a critical unique social role they perform that is beyond the purview of formal justice institutions. Therefore, this study sought to further understand why clan systems continue to exist in modern day Somali community and their implication in justice administration process. Secondly, this section has pointed out towards hybridity in the sense that *maslaha* processes may refer to *sharia* doctrines, *xeer* and in some cases involve formal actors and legal frameworks thus raising the need to understand how clan relevancy is mediated by such dynamics. In view of the above, a key gap was the need to understand how various justice administration resources within *maslaha* assume legitimacy and provide a logical explanation that accounts for the complexities identified above rather than presenting them as isolated themes an aspect that this study sought to unearth.

In view of the above, Somali customary justice systems are often characterized with values, norms and practices of interconnectedness, collective responsibility, community participation and collective well-being. Such characterization assume that members of the Somali community have similar justice motivation for restorative and reconciliation outcomes that are static. However, this may not be the case always. For example, study by Harper (2014) have established

that popular concepts of justice may vary from time to time based on contextual variables such as social relevance, political interests and enforcement capacity of implementation agent. This study therefore sought to find out how various justice norms, procedure and practices, herein referred to as the concept of justice, unfold and acquire meaning in modern day Somali community.

## **2.2 Models that Underpin Judicial Regulatory Safeguards**

This section seeks to provide grounds that inform various regulative safeguards, values underpinning them, their operationalization and extent to which they complied within *maslaha* systems of justice. More importantly, Article 159 of the 2010 Constitution provides overarching guiding principles namely morality and justice. Further, the same Constitution provides for the respect of unique cultural values such as those present in traditional justice forums. As such, formal courts are left with interpretational discretion on what to allow and sanction. Consequently, this section begun with a critical examination of shortcoming associated with customary systems of justice identified. This was followed by an examination of various competing models and values prioritized by various programming interventions aimed at addressing shortcomings and areas of contestation. Key sites of contestation with regard to reform interventions touch on role and attributes of third-parties, aspects of process control, self-determination and when to involve formal actors for oversight and supervision.

### **2.2.1 Shortcomings Associated with *Maslaha* Justice Systems**

Despite the fact that customary forums enjoy legitimacy due to their cultural approach to criminal disputes, justice is rarely dispensed to a very high standard. This section therefore

sought to examine possible weakness of customary approaches to justice administration. This was of importance in understanding motivations and values that underpin regulative safeguards.

One of the emerging concerns is use of flexible norms and procedures. Harper (2014) observes that justice administration in customary informed forums is guided by indeterminate process and oral practices that are uncertain and open to wide interpretation. That is, they rely on consensus rather than strict application of rules as observed in formal litigation processes to arrive at a ruling. This is an aspect that makes them attractable and vulnerable to abuse. This is so because such flexibility allows disputing parties to craft their own norms and procedures that meet their needs and wishes. However, reliance on consensus for process and solutions with limited state oversight may encourage decision and outcomes that are arbitrary, unpredictable and vulnerable to abuse. For instance, Qtaishat (2018) notes that decision making process may not be consensual as described since weak parties may be put under pressure to agree to what is commonly perceived as fair and just.

Equally, sustaining social harmony may at times be at the expense of justice and human rights. For example, in Somali customary justice forums, Kariuki (2015) notes that overemphasis on community harmony can provide room for decisions that may reinforce existing power hierarchies, gender bias and perpetuate impunity against marginalized population in the name of promoting harmonious coexistence. Thus, what is commonly agreed as fair based on communitarian values may be as a result of power, status and wealth differentials, perception of group perception and discriminatory social norms. Therefore, the concept of social harmony as presented as an overarching goal in majority of alternative to formal litigation may be abused and manipulated to suppress demands and needs of disputants. This predisposes vulnerable

disputants to consent to decisions that are not satisfactory or fail to meet their initial goals within customary justice forum. However, whether the aspect of vulnerability associated with flexible norms and procedures is a concern in *maslaha* forums is an aspect this study sought to find out.

Another concern with consensual alternative justice forum is on selective exclusion and discrimination of marginalized groups. Clarke (2011) observe that customary justice forums that rely on cultural heritage to provide redress have often been accused of discriminating vulnerable groups such as women, children, the poor and minorities. Discrimination of vulnerable groups often manifest itself through participation in customary justice as disputing parties. In such scenarios, Kariuki (2015) observes that customary justice forums often fail to provide equal opportunities for participation of disputing parties based on gender, clan affiliation and social economic status. For example, Somali customary justice forums deny women equal opportunities to men in terms of participation. In most instances, male relatives act as representatives for women (Mohamed & Muriithi, 2020). Second, women are discriminated against based on their inheritance rights, freedom from sexual and domestic violence (Mohamed & Muriithi, 2020). This has the implication that any attempt to secure such rights within customary justice forums may not be forthcoming.

Equally, some sanctions within customary justice forums are discriminating or exploitative. For example, in Kenya, compensation based on status of women is discriminating. A widow, single and married girls may not receive the same compensation (Mohamed & Muriithi, 2020) as their male counterparts. Therefore, exclusion and marginalization in customary justice systems

manifest itself more evidently through unequal participation opportunities among disputing parties based on existing social inequalities.

Another discrimination concern is on procedural safeguards, accountability and enforcement. Customary justice forums may operate with little consideration for existing legal frameworks due to limited oversight. Dekha & Mason (2019) observes that customary forums refer and use various international and national human rights standards selectively based on existing biasness, prejudices and stereotypes in various ways. They inconsistently refer to due process safeguards that protect the accused against powers of the traditional adjudicator and community members who act as the jury. In the same vein, Chopra, Clapham & Isser (2015) add that accused persons may be coerced to give or accept incriminating evidence in order for the outcome to align with clan, elite or political aspirations.

Customary justice administration process as argued by Bennett, Harrington & Tom (2015) may invariably recognize presumption of innocence among the accused based on adjudicator's personal knowledge and subjective perceptions. For instance, the process of ascertaining evidence and facts is often arbitrary and at times may violate human rights. This happens since it is often based on adjudicator and community knowledge of the matter, previous interactions and settlement and disputant behaviour. Further, Harper (2014) adds that veracity of facts is commonly ascertained by adjudicator's knowledge of the disputants and their past, their character, dispute at hand and past determinations or previous conflicts. Therefore, on the question of assessing evidence, customary forums often rely on unsound evidentiary practices that are not based on adversarial process and modern scientific rationalism. Thus, this study

sought to find out strategies used to ascertain evidence gathered in instances where adjudicator's verdict is contested within *maslaha* justice systems.

In terms of accountability, customary justice systems rarely hold customary adjudicators accountable by the community. This predisposes them to corruption, elite capture, politicization and discrimination. On enforcement, Ali (2020) observes that Somali customary justice forums rely on social pressure. This makes their decision vulnerable due to lack of enforcement hence diminishing certainty of outcomes, promote forum shopping and impunity. Therefore, it can be observed that procedural safeguards are variably invoked making the process arbitrary.

In terms of accountability, Schlee (2013) observes that customary justice forums lack processes and mechanisms that put customary actors to account their decision and process when questions are raised. Equally, enforceability of outcomes is relative and based on status, power differentials and clan mobilization. This being the case, this study sought to examine strategies adopted by the weak to ensure that their needs are met within *maslaha* systems of justice. In addition, how these shortcomings inform regulative safeguards is an aspect this study sought to find.

Another concern is on abrogation of human rights and criminal justice standards. In most cases, customary justice forums have contravened international and local criminal justice standards in various ways. More importantly, Menkhaus (2015) notes that in criminal violations, Somali customary justice forums may order for a compensation, forgiveness or retaliation against the accused or his relatives and clan. Consequently, customary justice forums apply these sanctions arbitrary. Accordingly, in some cases they allow for sanctions such as retaliation which may be

detrimental to human dignity and rights to the accused and their family. Second is tolerating impunity in serious crimes. For example, among the Somalis, families of homicide victims may choose among prosecution, forgiveness, compensation or execution of the perpetrator.

This has the implication of double standards over how to address criminal violations compared to formal justice forums. Third is collective responsibility. Criminal responsibility in Somali customary justice forums is collective rather than individual. This has the implication that individual perpetrators can escape accountability thereby promoting a culture of impunity. Finally, compensation in Somali customary justice systems lack equality and deny right to a remedy. This is so because compensation may be based on gender and social status rather than on the nature of crime and harm. Equally, collective and compensatory nature of customary justice forums is often distributed to members of the clan, sub clan or extended family resulting to the victim receiving little or no compensation. Therefore, this study sought to understand how judicial regulative safeguards address the above concern within *maslaha* justice forums

In view of the above, there are several areas of concern within customary justice forums. They include flexible processes that focus on manipulative consensus and inconsistent decision-making process, commonly touted subjective goal of social harmony, relative treatment and participation of the marginalized groups, irregular adoption/use of internationally recognized procedural safeguards, inconsistent criminal justice standards and varied consideration of human rights concerns. This implies that customary norms are applied inconsistently leading to outcomes that are unpredictable, arbitrary and discriminatory. Therefore, there is a general concern over the ability of customary justice practices of dispute resolution to provide fair and

just methods for resolving disputes to all. The next section examines values and their associated strategies put in place to address shortcomings associated with the use of customary justice forums

### **2.2.2 Values Underpinning Regulatory Framework**

An overarching value that underpins regulatory safeguards in both mainstream and alternative within justice administration forums are largely derived from rule of law (Hollander-Blumoff & Tyler, 2003, Donais, 2013 & Swenson, 2018). Rule of law as argued by Brooks (2013) can be seen as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. Dunn (2013) further adds that these principles and standards may include adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

Rule of law movement in the Global South is traced to independence era in most post-colonial states. During colonization, most colonial masters introduced their own systems of justice that operated alongside the African customary justice systems (Ambani & Ahaya 2015). At independence, Ubink (2015) observes that social order of most African states was characterized by a dual justice system, with one based on African customs while the other on Global North systems of justice administration.

After independence, Clapham (2012) notes that amalgamation of various legal orders was considered a pre-condition for achieving development and minimizing structural racial discrimination in former colonies. As such, the rule of law movement within the African context is commonly viewed as a neocolonial tool which perceives cultures of Global South inferior. A significant question raised that this study sought to answer is to what extent has the rule of law values that seek to uphold fairness in ADR been able to integrate, displace or replace popular local concepts of justice.

On the other side, there seems to be fundamental differences between judicial processes based on the doctrine of rule of law and customary processes based on local understanding of justice. For example, customary justice systems adjudicate criminal matters based on the social cultural values, norms, beliefs and processes recognized and understood by the community (Wojkowska, 2006). Based on the local understanding, traditional justice systems are viewed to be more legitimate with high rates of compliance than the formal systems.

Second, customary justice process has high regard for beliefs and truths in superstitions, ancestral powers, sorcery and witchcraft commonly practices in traditional societies (Quinn, 2014). Third, Schlee (2013) notes that significant community members such as clan elders, ancestors, parents and fellow community members are highly regarded, respected and firmly embedded in custom and taboos of the community. Fourth, relationship among traditional societies is based on the spirit of reciprocity which promotes mutual exchanges of obligations, favors, and foods and communal survival among most African communities (Roder, 2014). Lubkeman (2011) adds that one of the major goals of customary justice systems is to restore

broken relationships through reparations and restorative justice strategies in the aftermath of criminal incidents. Hence adjudicating criminal matters amicably is essential in maintaining social fabric that hold society together. Common practices include focus on collective responsibility, oral and flexible processes, and embedding customs such as blood group in justice administration (Kinyanjui, 2010).

On the contrary, Harper (2014) notes that justice systems based on rule of law principles anchored on legal rational principles often contradict those governed by customary justice systems. This is due to: first, justice processes based on legal rational principles emphasize on clearly, written and publicly promulgated laws unlike customary justice processes that rely on customs and personal attributes of a leader. Second, authority is attached to offices and not individuals occupying them (Ayttey, 2010). Common practices include legal equality commonly achieved through advocating for individual criminal responsibility and direct victim-oriented compensation, reference to clear and written procedures and rules which is commonly achieved through codification and legal transplant, and more emphasis on judicial independence and elimination of all forms of human rights abuse.

However, such characterization describes fundamental differences between justice systems anchored on doctrines of rule of law and another based on customary practices. Such characterization fails to expound more on how members of close-knit societies perceive justice approaches anchored on rule of law and those based on customary practices in the face of liberalization, globalization and social dislocation. This study endeavored to empirically find out how members of such close-knit communities perceive the legitimacy of justice practices

anchored on the rule of law principles and those anchored on customary practices. Such understanding is important in mapping out public expectations or sense of justice within a contemporary society.

In order to improve access to justice in areas where non-state justice systems are more popular, Clapham (2012) notes that governments across the globe are increasingly shifting focus to limiting, integrating or regulating the use of customary justice systems in adjudication of criminal transgressions. Focus on criminal transgressions is important to the state because most customary justice approaches emphasize more on collective responsibility rather than individual responsibility (Erica, 2013). Second, customary justice systems are often based on norms that may disregard some offences as criminal thereby denying justice to the victims especially women (FIDA-Kenya, 2015). Third, they focus more on restorative justice and limited options for retributive justice which is also important in providing closure to the victims. Lastly, customary justice process lack capacity to conduct criminal proceeding (Flomoku, 2012). This may include lack of lawyers, expert to testify among others.

In most jurisdictions, Glub (2010) observes that state regulative safeguards focus majorly on embedding state approaches of justice administration into customary systems of justice. In addition, Jackson (2014) notes that state regulative safeguards are anchored on rule of law principles that are thought to be of significance in promoting rights of the vulnerable social groups through strengthening legal process and institutions. For example, Isser (2011) observes that judicial approaches anchored on the rule of law imposes limits on political regimes and

secondly, it sets legal limits in civil, criminal and private interactions through its four principles of legality, certainty, separation of powers and equality before the law (Buluma, 2019).

Similarly, Marshall (2014) adds that rule of law principles are anchored on liberalism which conceptualizes individuals as the basic and irreducible unit of society. Its core thesis as argued by Marshall (2014) is that in a society composed of plurality of persons each with his own aims, interests and conception of good is best managed by the concept of right and universal good. Such conceptualization raises questions on whose definition of right should be used in defining rule of law as applied in justice administration. Similarly, the above understanding may be problematic since it is based on the assumption that there exists some form of foundational ethic or right that is universally accessed through human reason independent of social, cultural or political considerations. This understanding may conflict with the alternative concepts of justice commonly practiced in communities of the Global South such as Borana and Somali. In these communities, emphasis is on communitarian than individualistic values. Accordingly, communitarian values may supersede individual values. Therefore, this study sought to find out whether such communitarian conceptions exist in the modern society and how they may influence compliance with state regulative safeguards based on rule of law.

In addition, as observed by Suma (2014), mainstreaming state regulatory safeguards based on rule of law within customary justice systems often involves three primary types of action. The first type of action is efforts to constrain the scope of jurisdiction of customary courts to minor disputes. Second, constant attempts to reaffirm prohibition of specific customary justice practices that are viewed as inherently at odds with international human rights norms. Third, efforts of

drafting of a number of exemplary laws that aim to address either high profile human rights violations or that correct gendered forms of inequality that previously enjoyed legal protection (Suma (2014).

These approaches have largely been pursued through a three-pronged strategy namely civic education, use of coercive legislative forms of action and dialogue driven strategies such as Modogashe agreement (Jackson, 2014). Civic education consists of a barrage of programs that aim to ‘sensitize’ the public about human rights and the rule of law. Civic education also informs chiefs and elders that all but the most trivial civil cases —and certainly all criminal cases including rape, murder, and any case that draws blood — are to be the sole purview of the formal courts. There has also been an effort to make it known that chiefs who accept such cases are liable for prosecution (Kariuki, 2015). However, whether these threats are complied with is an aspect this study sought to find out.

In a rush to improve access to justice in customary justice systems through state regulative strategies anchored on the rule of law, controversies have emerged over how the two systems with radically different norms, traditions and operations are to function together, reinforce each other and promote access to justice (Brooks, 2013). Kotter (2015) argues that promotion of Global North understanding of rule of law into most post-colonial jurisdictions raises significant fundamental questions on their applicability, acceptance and compatibility with local population. For example, Harper (2014), Chopra (2015) and Kotter (2015) observe that advancing state justice approaches anchored on rule of law often challenge the fundamental values that shape the foundation of customary justice systems raising legitimacy issues.

In addition, they argue that there is need for further interrogation given that community conceptualization of justice is not monolithic but very dynamic and likely to vary based on contextual realities. Such an outlook of justice, therefore, necessitated this study to find out whether this hold true among the Somalis. Brooks (2013) observes that transplanting state judicial regulative strategies based on the Global North values and norms may greatly undermine the effectiveness of local justice systems. Moreover, further studies are necessary to find out whether incompatibility of rule of law principles with local concepts of justice significantly influence the adoption of state judicial regulative safeguards.

Similarly, Marshall (2014) observes that state approaches of justice administration based on rule of law have grown to prominence in the absence of rigorous theoretical debates on the existing customary justice values and how they can be integrated in a manner that the locals perceive as legitimate. An understanding of the prevailing local concepts of justice when promoting a different form of justice is critical. This is because it helps in finding a suitable balance that allows eradication of retrogressive practices while at the same time doing it in a manner that is locally accepted and sustainable. This study attempted to understand how the balance is achieved by investigating issues likely to alter popular concepts of justice within customary adjudication forums.

### **2.2.3 Universal Fairness Values within Alternative Cultural Justice Forums**

International standards of justice have an implication on regulation of ADR especially in contexts prone to conflicts and that experience limited state presence. For example, multilateral development partners such as IDLO (International Development Law Organization), OECD (Organization for Economic, Co-operation and Development), UNDP (United Nation development Programme) and European Commission have clear policies that promote specific values of justice more so in fragile and conflicted-affected contexts such as those of North Eastern Region of Kenya. Further, these standards are reflected in national legal frameworks such as 2010 Constitution and engagements between multilateral development partners and Government justice institutions such as the judiciary. This section therefore sought to examine key values prioritized and the emerging debates on the same.

To begin with, justice administration process underpinned by objective values that empower justice users are considered an essential tool for sustainable peacebuilding from various dimensions. First, Erica & Strand (2014) observes that perceived grievances if unaddressed over long periods of time and fused with other factors such as political manipulation, play a considerable role in contributing to violent conflicts. Thus objective justice process are important for empowering the weak by providing adequate opportunities to address root cause the problem within ADRs. Second, Chopra (2009) argues that access to justice is an important ingredient for consolidation of peace. For example, if the public perceive that their justice needs are adequately addressed by variety of justice mechanisms, then they are more likely to trust and approve peacebuilding activities. Third, Desai, Isser & Woolcock (2012) further observed that access to justice can be used as a tool for protecting the rights of minorities, women and children as processes that is important in restoring rule of law within customary systems of justice. Therefore, judicial safeguards values that seek to empower justice users are an essential

component for objective justice processes thus the need for their embedment within persistent customary justice systems.

Given the importance and need for consensual and arbitrary justice administration within ADR for flexible and pragmatic solutions while not overlooking possible vulnerabilities, the concept of empowerment has played a great role in the international arena over what constitute fair alternative consensual justice process. Since its appearance in North America in mid-1970s, Ubink (2017) notes that its proponents argue that empowerment may offer disputing parties tools, skills, ability and opportunity to shape the process and outcome in accordance to their wish and demands. This allows them to apply traditional legal justice that is sensitive to ethnic, cultural, racial, and gender differences, as well as to the impact of sentiments and emotions on the evolution of disputes and the ability to settle them. As a result, several parameters associated with disputing party's empowerment have been developed.

#### **2.2.4 Self-determination**

Self-determination is an emerging regulative safeguard that seeks to protect disputing parties from abuse due to arbitral and consensual forums. The disputing parties' control of process is a term often interchanged with self-determination. In an alternative dispute resolution process, Hedeem (2005) notes that disputing parties are expected to have ultimate control in terms of both the process and outcome. Thus, self-determination can be seen as the act of coming to a voluntary un-coerced decision in which each party makes free and informed choices as to process and outcome. In this case, decision making process is left in the hands of parties and

more so the victim rather than social institutions that administer justice such as family systems and local actors.

Involvement of state justice institutions and actors is important in communal institutions that rely on customary ways of ensuring fairness but lack elaborate formal guidelines for redress in case of dissatisfaction. Ndulo (2011) observes that use of jurors who are familiar or part of the conflict, those with family bond and blood relationships limit aspects of impartiality due to the bond but at the same time, can be used to discriminate certain members based on their status. On the hand, objectivity and fairness requires that parties exercise self-determination at any stage, including third-party or mediator selection, process design, participation in or withdrawal from the process, and outcomes. Accordingly, self-determination aim to ensure that disputants actively and directly participate in alternative justice forums that rely on consensus and negotiation to arrive at solutions.

Decisions in customary justice systems are made through selected members of the community. They may include chief or sub-chiefs, headman or headwoman, elders or a group of elders, members of the extended family or kinship systems. In such communities, traditional leaders are chosen for the explicit purpose of performing a judicial or quasi-judicial role. In others, a person's position as a traditional political leader of the community includes the responsibility to hear and resolve disputes. Such participants in the administration of justice may use ambiguous communitarian notions of justice such as social harmony, peace and reconciliation to force their interests. Such a move as argued by Bendana and Chopra (2013) violates liberal justice standards that prioritize individual justice needs over those of community. Second, in formal litigation

process, the disputing process is left to lawyers to articulate rights and legal arguments on behalf of parties thus protecting disputants' rights. However, alternative cultural dispute resolution processes are expected to allow disputing parties to consensually actively seek for solutions in ways that reflect their needs and wishes hence the idea of process and outcome control consensually. Thus, self-determination empowers disputing parties by increasing their capacity to have a meaningful experience with alternative justice forums. This is realized in terms of ensuring that the process and outcomes reflects disputing party's needs, demands and wishes.

The disputants' control of the process and outcome reflects one of the procedural justice principles. This principle suggests that parties' control over procedural aspects of dispute resolution leads to fairness of the process and outcomes. The theory as argued by Tyler (2004) postulates one way of protecting vulnerable and weak disputing parties in consensual cultural alternative justice processes can be through optimal distribution of control between disputants and third-party decision makers. For example, though dated, Thibaut and Walker (1970) who were the earliest proponents of the model argued that vulnerable disputants can be protected from powerful group obligation, cultural and kinship ties by providing them with decision control. This could be in terms of autonomy to decide on suitable outcome and solution for themselves. Second, is on process control where Tyler argues that the ability of disputants to decide over information to be used when resolving a dispute equally minimizes chances for exploitation and abuse by local elites. Interpretively, party self-determination ensures that parties have control of the process and outcome.

In such arrangements, commonly referred to as high internal locus of control, adjudicators are expected as argued by Golann (2016) to refrain from imposing decisions on disputants. Unlike

litigation where the process exemplifies high external locus of control values through parties ceding control of the process to advocates, Somali customary adjudication process is expected to uphold high internal locus control by allowing parties to control their own destinies. As a result, an aspect of fairness within self-determination is based on the degree of disputing parties' control of the process. The more control of the process parties experience, the more the greater the sense of fairness and justness they are likely to experience. Therefore, this study sought to find out whether self-determination was a concern in regulation of Somali customary justice forums in Garissa.

On the other hand, despite the importance of self-determination, Schlee (2013) notes that impasse and stalemates that may arise within mediation processes have generated much debate on whether mediators may interfere with aspects of disputant self-determination. In this regard, Sander (2014) distinguishes between coercion within and coercion into mediation. That is, in some cases, mediators may be expected to pressure parties in order to push them out of stalemates. Others may provide some assessment in order to untangle stalemates.

However, whether this is perceived fair or unfair is also subject to debates. For example, Cremona (2014) notes that some proponents believe mediation means voluntarily agreeing to a result. Thus, parties cannot be forced into a settlement. Capulong (2012) on the other hand argues that disputing may accept use of pressure by mediators with the aim of convincing parties to try negotiation or put some pressure on one party in order to sustain the process. Thus, whether the claim that pressure to sustain mediation is universally accepted within *maslaha* is an aspect this study sought to find out.

On his part, Jensen (2009) argues that voluntary means that parties freely choose to participate and freely arrive at an agreement. However, the researcher also notes that there may be some aspect of pressure to try mediation. Further, Anam (2020) distinguishes between ‘not forced’ and ‘pressure to try.’ Thus, self-determination from this perspective can be compromised in favor of sustaining mediation process. Similarly, other key authorities such as Koman (2016) and Cremona (2014) observe that self-determination can be compromised to allow process but not towards outcomes. However, how Somali justice seekers experience such varying aspects of self-determination is an aspect this study sought to unearth.

### **2.2.5 Third-party Neutrality**

Another emerging value of regulative safeguards that seek to prioritize disputing parties’ needs and demands in consensual cultural justice forums is neutrality. Ideally, disputing parties may seek assistance from a third-party as a result of lack of trust and disagreement. Their intention to turn to a third-party for assistance result in laying their trust in the hands of the third party expecting to be shown the ‘light’. Under such circumstances, they can expect nothing short of the mediator/third-party being completely non-partisan. On this, Bercovich (2012) notes that customary justice forums that rely on cultural values to provide redress in the aftermath of criminal transgressions are expected to maintain a quasi-democratic process. This allows parties control over the process and outcome while maintaining a healthy interaction between disputants. Quasi democratic approach restricts third parties from advancing any specific outcomes while at the same time maintaining fair interactions between disputing parties.

Furthermore, Shapira (2016) observes that impartiality as an aspect of neutrality requires mediators to uphold facilitative roles while refraining from performing adjudicative roles. As a facilitator, Shapira notes that mediators are confined to asking probing questions then allow disputing parties to generate responses and reach an agreement by themselves on the most suitable option. Zamir (2011) adds that mediators are allowed to give summative statements, clarification, expounding and illuminating on understanding among others. This is based on responses provided and only if they don't give their own assessment or judgment. Therefore, the adjudicator follows the disputants rather than playing a leading role. It follows that this approach, therefore, limits third parties from exerting pressure among disputants to certain outcomes or making assessment of disputing party's positions and interests.

The need to have a neutral third-party or mediator to act as facilitators resonate with procedural justice theory requirement for a neutral decision maker. Such a decision maker is likely to provide equal opportunities for parties to present their case, an aspect commonly referred to as voice. The theory, as argued by Tyler (2005), provides that aspects of social justice may lead to positive feelings about social relationships and self-identity. This is especially where there is significant power difference between disputing parties. Therefore, fairness is linked to possible outcomes of positive feeling and high self-esteem that may accrue from an opportunity to voice individual concerns. Hollander-Blumoff (2011) adds that an opportunity to voice one's view and express feelings, needs, wishes and views listened to may result in positive feelings, commonly referred to as catharsis. Given parties self-determination in terms of high control of the process and outcomes, adjudicator's decision-making power is limited significantly. Thus, the

adjudicator role as a neutral third party is to assist disputants to conduct negotiations between themselves.

In addition, mediator's neutrality, settlement and coercion has also received much attention. For instance, Hedeem (2005) notes that mediators are expected to assist parties arrive at a settlement other than the requirement of them being neutral. Hedeem adds that they may act as enablers but also in practice, they are required to provide the boost or act as catalyst to settlement rates. This is an aspect that goes beyond facilitative roles. Similarly, Cremona (2014) and Koman (2016) highlight the importance of "reality-checking," where disputing parties' positions, interests and demands are assessed in terms of strengths, weaknesses and likely outcomes of their case. In such situations, a mediator asks questions or makes statements to encourage a disputant to appreciate the "realities" or undesirable alternatives should the matter proceed to full hearing.

Further, Hedeem (2005) notes that magistrates may prefer mediators who get cases settled. One way of achieving high settlement rates is by mediators providing best alternative to a negotiated agreement thus moving out of facilitative roles. Thus, as discussed, the role of reality-checking where parties gain a realistic sense of the strengths, weaknesses, and likely outcomes of their case from the mediator is important in expediting the process. Accordingly, the goal of settlement lends itself to mediators being highly directive. Whether mediators in *maslaha* forums are restricted to facilitative or non-facilitative intervention and how this is perceived by justice seekers based on their expectations is an aspect this study sought to find out.

### **2.2.6 Processual Equality**

Another regulative safeguard value is processual equality. On this, Qtaishat (2017) argues that one assumption for third-party intervention is that disputing parties are unable to maintain a balance of power in their bilateral negotiations. In this case, Qtaishat define power as the capability of a person or group to modify outcome, benefit or cost of another in a relationship. Such capabilities between disputants are manifested in the form of difference in financial resources, inexperience in bargaining skills, levels of intelligence, self-expression, threat of physical violence, feelings of inadequacy among others. Therefore, third parties or mediators aim to realign personal relationships through establishing balance of power between disputants. This may be achieved by disputants seeking imposition of third parties' power to create a level playing field in order to limit the stronger party from coercing the vulnerable to a settlement or judgment.

This implies that interaction among disputants ought to be reflective of equal treatment. Equal treatment as noted by Clark (2011) implies that all forms of inequalities among adversaries are addressed. To achieve equality, Zamir (2011) notes that balance of power is achieved by third parties or mediators assisting weak parties with various forms of inequalities while at the same time ensuring that they are not perceived to be over controlling by the stronger party. Therefore, processual equality imply that third parties are expected to promote a quasi-democratic process, a hybrid approach. This allows parties control over the process and outcome while maintaining their facilitative roles. For example, as a hybrid approach, quasi-democratic approach restricts third parties from advancing any specific outcomes as well as private agendas and interests while at the same time maintaining fair interactions between disputing parties.

On the other hand, Shapira (2016) notes that the role of third-party and processual raises two major competing approaches to fairness in ADR. One is the formalistic approach where Shapira notes that third-party treatment of one party differently is perceived improper favoritism. Generally, disputing parties may not be same in terms of articulation, self-expression and level of understanding of the process. Where this is noticed and from formalistic approach, third-parties are expected to refrain from providing specific assistance thus upholding equality rather than equity. This approach as argued by Ubink (2017) reflects a concept of formal equality that seems to ignore the differences between parties and focuses on the obligation to treat them equally. Thus, formal approach requires simply following rules.

Alternatively, the duty of impartiality can also be viewed through a substantive, realist lens. This approach as argued by Shapira (2016) recognizes that mediation parties might have different intelligence, skills, knowledge, economic resources, social status, and so forth. With this in mind, acknowledging that parties are different, the substantive approach adopts a concept of substantive equality. This requires that each party in the dispute is accorded the same treatment in circumstances where the parties are not equal. Thus, fairness is understood as applying rules flexibly to cater for different circumstances. More importantly, what is prescribed for by various regulations in Garissa was concern for this study. Consequently, how such aspects are operationalized against justice seekers' understanding and expectations a fair mediator in terms of their intervention strategies and its implication of compliance within Somali *maslaha* forums is an aspect this study sought to investigate.

### **2.2.7 Mediator/Third party Attributes**

Another value of concern was on the ideal attributes of the mediator/third-party in customary justice forums. To this end, a commonly debated attribute is insider-partial mediator. Under insider-partial mediation, facilitation is done by a person who is already involved in the conflict. In this case, an insider is someone who is part of the conflict or to some extent, is aligned with one side or the other. This can be a mediator who is part of the extended family or a sub-clan of the disputing parties.

Conversely, criminal adjudication processes are as argued by Kariuki (2015) expected to be conducted in an impartial and independent manner. This is so because a judicial forum that provides binding judicial outcome is expected to be composed of a jury that is free from undue influences. Consequently, one of the implications as noted by Svensson and Lindgen (2013) is that insider-partial mediators are restricted from handling matters where there exist previous or continuing relationships with the disputants. Therefore, in instances where close ties exist, a common encounter in customary justice forums, fairness demands that mediators disqualify themselves. Accordingly, at community level, customary justice forums should be insulated from mediators who happen to be local elites, political leaders and other influential personalities and bodies.

However, Bercovitch & Kadayifci-Orellana (2009) Bercovitch and Orellana (2008) note that consensual dispute resolution forums such as cultural mediation on the other hand are interactive process. This is because influence, resources and leverages of third-party play a crucial role in settlement. In most cases, insider-partial mediators in cultural justice forums are people of high stature and credibility. More importantly, Svensson and Lindgen (2013) note that the stature of the person mediating is an important factor to the success of insider-partial mediation. Thus, in

their view, despite mediators such as elders being people known and probably part of the conflict, respect and trust accorded to them by all parties is of importance. Therefore, this study sought to find out attributes of mediator/third-parties promoted by judicial safeguards. This was followed by an examination of how justice seekers within *maslaha* perceive and experience legitimacy of attributes promoted by Government in relation to insider/outsider and how it affects compliance.

In summary, fairness values in ADR have been attached to procedural elements of due process namely neutrality, process control and self-determination. However, despite their universal importance, this study has also shown that such concepts are open to multiple interpretation. This means that other than the universal approach to fairness values in ADR, other contextual concerns may matter. That is, justice does not take place in a social or political vacuum. It is deeply affected by the difficulties and experiences of daily survival, seeing that desperation strategies may be adopted by people who have run out of legal options hence concepts of justice. In sum, procedural justice and rule of law values although powerful in curving out universal safeguards for ADRs, they may be limited in scope. This is because of its predominant focus on fair process effects, thereby neglecting other factors or contextual realities that have significant influence on beliefs about the courts. To critically examine its importance in real-life justice setting, it is necessary to take a wider view of local experiences and emerging perceptions over such universal values an aspect this study sought to further understand.

### **2.2.8 Modogashe Agreement**

Great attention to North Eastern Kenya region is based on the evidence that majority of the population in North Eastern Kenyan region utilize customary justice systems as alternative

justice forums in addressing both criminal and civil matters. For example, a report commissioned by Judiciary of Kenya in 2020 observes that most disputes that required judicial process were resolved through informal and non-State-based means outside the confines of the Courts. (Judiciary of Kenya, 2020, p. 39). In addition, as observed by Dekha & Mason (2019), majority of conflict related crimes such as murder which frequently occur in the area due to limited resources and clan conflicts are often addressed through customary adjudication forums. Ubink (2015) explains that customary systems of justice are more popular since they are generally regarded as easily accessible due to their geographical proximity, use of local concepts, financial affordability, use of local languages and simple procedures and short duration of cases.

Similarly, Jackson (2014) observes that customary systems of justice are important in communities with multiplex dependent relationships such as kinship ties which are of significant importance in ordering the social, economic and political aspects of the society. Isser (2011) also corroborates the above findings by noting that customary systems of justice appear to be more suitable than the state systems of justice since their primary objective is focused on maintaining existing relationships which are fundamental for maintaining the social fabric and harmony. Therefore, accessibility and focus on community's understanding of justice needs makes customary systems of justice more attractive in enhancing survival and building cohesiveness in the close-knit communities such as pastoralist and indigenous societies.

Notwithstanding the fact that customary justice systems are the principal mechanism of adjudicating criminal and civil matters, such systems fail to adequately protect rights of women, children, minority and vulnerable (Harper, 2014). The normative framework found in many of customary adjudication processes do not sufficiently protect rights of vulnerable groups. For

example, customary adjudication process often tolerates practices that violate international human rights such as bride sales, female genital mutilation, widow inheritance, and forced marriage as a form of punishment and exchange of young women as a form of compensation (Harper, 2014).

In addition, Kimathi (2013) notes that customary adjudication processes often trivialize or disregard conflict related crimes and certain gender specific crimes such as statutory rape, domestic violence and crimes towards certain low status groups or clans as minor offences. In civil cases, customary adjudication rules and practices are discriminatory especially to women in situations such as inheritance, land ownership, dissolution of assets upon divorce and child custody (Ndulo, 2011).

Taking cognition of the shortcomings of customary justice systems, the government has entrenched regulative safeguards anchored on the rule of law within enduring customary adjudicatory processes (NSC, 2009). A major milestone achieved was the signing of an agreement in Modogashe sub-county, Garissa County by community leaders and Government. In this agreement, the elders who act as adjudicators in customary justice systems agreed to abide by some state approaches of justice administration. The agreement is famously known as Modogashe agreement. This agreement was signed on 29<sup>th</sup> August 2001 between community leaders of North Eastern Kenya and their counterparts from upper eastern region. The signing was witnessed by the former provincial and District Security and Intelligence Committees in a place called Modogashe (Office of the President, 2011). Modogashe is located at the border of North Eastern and Eastern provinces and it borders Garissa through Modogashe division

currently Lagdera sub county and Isiolo through Sericho division currently Garba Tula sub county.

The declaration is divided into two parts. The first part focuses on procedures to be followed in resolving conflicts while the second part emphasizes on regulating adjudication of conflict related crimes in accordance with the constitution and other written laws (NSC, 2009). Part one contains six provisions guiding conflict resolution process. For example, this section provides a framework for addressing resource conflict by devising a resource sharing plan and processes to be followed in case of a conflict (NSC, 2009). They include how a different community may use pastures of the neighboring community. In addition, in case of conflicts, the agreement provides a common agreement of resolution given that communities had varied approaches based on cultural values (NSC, 2009).

A major amendment of Modogashe declaration commonly overlooked by most studies was carried out in 2005 by National Steering Committee on Peacebuilding under the office of the president form the basis of the second part (NSC, 2009). This amendment is of concern because it focuses on transplanting state judicial regulative safeguards within customary justice systems. This was informed by the view that most customary justice systems are not only used in search for peace but frequently address violence and criminal matters that occur during conflicts (Tanja, 2015).

Kimathi (2013) observes that the amendments are aimed at aligning Modogashe declaration with state judicial regulative safeguards. This is due to frequent discrimination and disregard for

human rights by Somali customary adjudication processes. The amendment, as argued by Emma (2013) also aims at introducing individual criminal prosecution that should run parallel to communal conflict resolution in the aftermath of violent conflicts. This was aimed at promoting individual accountability as opposed to communal or collective responsibility.

In doing this, it acted as a deterrence while at the same time providing closure to victims and satisfying principles of justice. Chopra (2015) adds that revision of Modogashe declaration also sought to change payment of compensation from clan members to direct victims. This aims at restoring victims to their initial position before the wrong occurred. The practice has been compensating the whole kinship or clan systems which negates victim's needs (Quinn, 2014). Similarly, in criminal jurisdiction, the declaration introduced jurisdictional limitation for elders not to adjudicate over serious crimes such as rape and murder resulting from violent conflicts (Kimathi, 2013).

Therefore, despite previous studies enumerating the safeguards, there was need for further analysis on compliance of such amendments. More importantly, the above analysis has focused more on normative content while silent on the methods used to promote the above statist regulative safeguards and remedies which can significantly affect their compliance. Therefore, this study sought to find out existing state regulative safeguards, methods of implementation, common remedies, how these methods of implementations and remedies are perceived by members of the Somali community and whether such perceptions affect their adoption.

In addition, customary justice systems are often vulnerable to power abuse and trivialization of serious offences. This is done based on prevailing social values which often leads to powerful perpetrators escaping justice. However, Chopra (2015) observes that the remedy of compensation alone is not adequate enough to address serious crimes. It needs to be backed by retributive sanctions in order to provide closure, minimize motivations for revenge due to perception of lighter sentence of compensation, promote universal standard of criminal justice adjudication and contribute to consolidation of peace (Brooks, 2013).

In this case, the rule of law has often been presented as a static concept that continues to be blind of the contextual realities faced by customary justice systems. Such understanding fails to account for existing government and non-governmental efforts to make state regulative safeguards anchored on the rule of law sensitive to contextual realities. In this regard, Garissa, Modogashe agreement provides a platform for this study to examine developments and changes made to the rule of law principles. This may include changes in terms of codes, procedures and remedies through the negotiated dialogue driven processes involving elders and state authorities. More importantly, the study sought to find out whether involvement of recipient community has adequately domesticated state regulative safeguards to integrate local popular concepts of justice and how the extent of domestication influences its adoption. The next section examines popular concepts of justice.

### **2.3 Operationalization of Judicial Regulative Safeguards and Popular Cultures of Justice Administration**

In most jurisdictions, customary justice systems have remained resilient and popular. This is because they have continued to operate due to their positive elements such as grounded in local practices, accessibility, relatively inexpensive, speedy and less complicated. However, Ubink (2016) points out that most of the customary justice systems suffer from systemic inequalities, power imbalances, violate victim's human rights and discriminate against the socially excluded. Therefore, given that effective justice systems are crucial for development and maintaining inter and intra peace among communities, there has been attempts to reform negative elements found in customary justice systems.

Strategies to reform customary justice systems often present particular challenges. Muigua (2018) observes that attempts to restructure customary justice systems in accordance to state justice systems present the potential for clash of norms and values. This scenario presents a significant policy and practical challenge. On one side, human rights activities lobby for restructuring or dismissal of customary justice systems that are repugnant to justice and human rights principles. On the other side, community elders, leaders and customary justice activists argue against any form of external intrusion into their community justice mechanisms due to concerns of legitimacy. As such, there is a dilemma on how reformers are to strike a balance between restructuring customary justice systems to eradicate negative elements while at the same time retaining the social legitimacy of local leaders and efficiency and accessibility of customary justice systems. Therefore, although customary justice has the potential for improving access to justice, how to ensure that they are not in conflict with the Constitution (Bill of Rights) and whether they can be deployed in all kinds of criminal cases is an aspect that warrants further attention.

Against this background of complexity, various studies have examined responsiveness of regulatory frameworks towards local popular cultures and contextual realities that matter within customary justice systems. For example, Taabazui (2014) did a study to understand contextual factors that determine the viability of state constituted district assembly's committee to supervise traditional authority of chieftaincy in Ghana. He observed that such changes resulted in a struggle and competition for adjudicative power and legitimacy between chiefs and the appointed District assembly committee members. This resulted to a dysfunctional collaboration between the two parallel systems. Notably, Taabazui study focused on programming intervention strategies that relied on grass root formal institutions to supervise informal institutions. Current study illuminated on legal recognition with measures of conditionality as another approach towards reforming persistent customary forums. Further, whether competition for adjudicative power is a concern within *maslaha* justice forums and how it may influence uptake of judicial safeguards with regard to legal recognition of Article 159 of the 2010 Constitution is an aspect this study interrogated.

Sasay (2016) carried out a study on how restructuring of customary justice systems in order to eradicate human rights violations through regulatory Acts of parliament was leading to conflictive relationships with regulatory authorities in Sierra Leon. He reported that social relevance, institutional capacity and power to control local resources determined the extent to which such regulation resulted into conflictive relationship between traditional and state justice system actors. Notably, Sessay study was focused on programming intervention that target restructuring customary forums thus less focus on those that rely on legal recognition while respecting autonomy of customary forums. This being the case, whether aspects of social

relevance, institution capacity and power to control matter with emerging legal jurisprudence in Garissa County was an aspect this study sought to interrogate.

Moyeenul (2012) explored barriers to institutionalization of grass root alternative dispute resolution called *Shalish* in Bangladesh. He observed that elite's fear of loss of power significantly affected formalizing the *shalish* customary dispute resolution process. Whether this is also a concern for Somali elders and clan leaders in relation to operationalization of Article 159 is an aspect this study will seek to unearth. Gundel et al., (2016) examined political-economy dynamics that shape development of justice within *maslaha* justice forums in the Federal Republic of Somali. He observed clan-based mobilization, ideological division between secular and Islamic law difference and rent seeking economy undermined the development of credible justice institutions. Whether such dynamics matter in light of emerging jurisprudence for *maslaha* forums found in Garissa is an aspect that warranted further examination.

Jackson (2014) notes that several scholars have tried to understand potential and inherent risk involved when integrating state and customary justice systems as a regulative strategy. For example, Erica (2013) reported that in Afghanistan, official referral of felonies from traditional courts to formal courts was often resisted in criminal and land dispute while embraced in family disputes. However, recording decisions and showing how decisions were arrived at in state authorities was less controversial in civil and land cases although resisted for family and criminal cases. He observed that there was a significant relationship between adoption of referrals and perceived threat on local leaders' monopoly on judicial powers hence leaders were more likely to obstruct the process. Whether this can be the case with *maslaha* forums in Garissa County is aspect this study will interrogate further.

In Uganda, Ndulo (2011) reported that efforts to use quota system to allow at least three women to participate in local land committees was resisted. This is similar in Tanzania where an attempt to coerce village land council to have three women in the seven-member team was highly rejected. A major shortcoming of this approach as argued by Marshall (2014) is that power holders were unlikely to give up their monopoly of authority over dispute resolution. Further efforts to introduce legislation as a way of reconstituting power holders has not been welcomed. This is because such a move is perceived as an interference in local governance. Thus, there was need to further interrogate whether such aspects of legitimacy and power holders are experienced in relation to operationalization of Article 159 and if yes, what could be their implication in the uptake of regulative safeguards.

A key challenge is the reforms to strike a balance between restructuring customary justice systems to eradicate negative elements. This should be done while retaining the social legitimacy of local leaders and efficiency and accessibility of customary justice systems. As such, one needs to take note of complexities and variability of contextual realities that matter. For example, in competition for adjudication of justice, power was a concern while for Liberia and Sierra Leone, social relevance, institutional capacity and power to control local resources were significant factors.

Accordingly, insights into how the right balance can be achieved is dynamic and heavily depend on local realities. For instance, realities such as power dynamics, legitimacy of adjudicators, social relevance of reformed justice frameworks and capacity of justice institutions what this study refers to as concept of justice significantly influence what justice resources such as actors,

formal and informal norms, remedies and sanctions assume relevance and legitimacy. Second, local realities that assume importance seems to be deeply ingrained in local justice experiences, cultures and practices.

This study therefore sought to fill the above gap by examining local experiences of justice seekers and justice practitioners. This is in order to understand what kind of justice resources assume relevance and legitimacy then retrospectively unearth key contextual realities that inform them. In addition, a question on how to forge a middle ground ought to focus on how both the customary and statutory justice systems better reflect local justice seekers, justice practitioners and community values of justice hence concept of justice.

Scholars and practitioners in Kenya have also conducted research some of them touching Northern Kenyan region where various contextual realities and dynamism worth consideration was implied from their studies. For instance, Mkutu (2017) observes that state justice forums lack capacity to have their outcomes complied with. However, Mkutu did not further analyze the implication of such contextual reality on course and justice administration process within *maslaha*. Further, less emphasis was dedicated towards understanding how such aspect of capacity affects compliance with emerging jurisprudence of Article 159. Thus, whether this affects the uptake of safeguards in terms of limited compliance and enforcement is an aspect this study interrogated.

Another study by Chopra and Bendana (2013) note the overarching and conditioning influence of social organization and mobilization of Somali justice resources such as clans and elders may

affect the overall justice administration process. That is, their influence seemed to condition performance of formal justice actors. However, their focus was on relationship between formal and informal justice institutions thus little efforts on emerging jurisprudence on operationalization of Article 159 of 2010 Constitution. This study, therefore, sought to find out whether such mobilization matter with reference to Article 159 and if this is the case, to what extent does it influence the compliance with the regulative safeguards that seek to re-configure informal justice resources such as clans and elders.

Another study by Chopra (2015) reported that traditional justice resources such as clan and elders have re-adopted themselves in view of devolution and access to accruing resources. In this way, they have reasserted their authority, power and relevance in modern day Somali community. More importantly, one way they assert their authority and legitimacy is through their leadership and adjudicative roles within *maslaha* justice forums. Thus, any attempt to restructure their roles through reforms may be challenged. Despite Chopra observations on the role of incentive associated with adjudicative, little efforts was done to cross-reference such concerns in light of Article 159. Therefore, whether incentives matter with operationalization of Article 159 and how it may impact justice and ultimate compliance of safeguard is an aspect that the present study engages with.

In the same vein, a study by Pamoja Trust Foundation (2020) conducted a study on how to enhance access to justice and strengthening the rule of law within Community Land Management Committees. This was perceived important for land and natural resource management thus development. They observed that limited skills and respect among AJS practitioners, lack of well-established procedures and standards of settlement and political

support were some of the constraining factors. More importantly, conceptualization of justice from the intersection between culture and overarching social realities is missing in the study conducted by Pamoja Trust Foundation. Further, little emphasis was made in relation to how such factors interact with the emerging jurisprudence associated with operationalization of Article 159 of the 2010 Constitution. This being the case, this study sought find out the case of *maslaha* in criminal matters and whether such factors had a role in their compliance to judicial safeguards which aim to make their practices objective.

A study by Safeworld (2019) found out that Garissa County is characterized by inter-clan conflicts that exist in tensions and animosity. Equally, threat to terrorism, incapacitated justice institution and nomadic livelihoods is a reality in Garissa County. However, in their study, little efforts were made to understand whether such realities influence compliance with Article 159. Thus, whether such dynamics matter towards the compliance and enforcement of judicial safeguards within *maslaha* systems of justice is an aspect this study sought to examine.

In summary, the following gaps can be deduced. First, while previous studies such of those of Mkutu (2017) and Safeworld (2019) may have identified an overarching social reality that may matter, little efforts were made to ascertain whether such factors mattered in light of the emerging jurisprudence associated with operationalization of Article 159. Second, while studies such as those of Chopra and Bendana (2013) highlighted on certain social realities, they overlooked how they shape the interpretation and course of justice administration process. Third, justice within customary forums discussed by studies such as Pamoja Trust Foundation (2020) overlooked the question of justice constructed from the intersection of culture and overarching

social realities. Fourth, focus of this study was on programming interventions that focus on legal recognition and conditions. Therefore, the depth of this study focused on conceptualization of justice and operationalization of Article 159 of 2010 Constitution.

### **2.3.1 Politics Associated with Customary Justice Administration**

State regulatory safeguards that limit the functions of customary justice systems may not only upset popular concepts of justice but also interests that accrue from non-state justice institutions such as political legitimacy. For example, Dressel (2012) argues that most customary authorities often express a strong disapproval of moving customary courts to formal justice department. The move is often perceived as a calculated attempt to undermine the institution of customary judicial authority for political or socio-economic gains.

This is corroborated by other scholars such as Jackson (2014) who observes that such move might be interpreted as a step to incapacitate institution of local elders and chieftaincy systems in favor of more modern local government structures. For example, in Somali, resulting voids in political control and security caused the clan system to become the principal source of justice. With this in mind, Garissa is perceived to be the main social-economic hub in North Eastern counties due to its livestock market. It acts as a key hub in the management of supply chain of livestock flows from Somalia and Ethiopia and distribution to urban centers in Kenya. More importantly, with an annual value of 60 million dollars, informal systems of governance through clans and family connections continue to manage and protect supply and distribution routes and address conflicts in collaboration with the local police officer (Ng'asike 2019). This has the implication that one way elders retain their authority is through control of maslaha systems

which have cascading implications on their authority in the livestock trade and its accruing benefits.

Thus any attempts to restructure their authority in justice administration may be rejected. In addition, it is expected that customary authorities ought to play a role within their local systems of justice since they are the custodians of customary law which local courts are supposed to apply (Kotter, 2015). For example, in Liberia, Sessay (2018) observes that traditional authorities' mainly local chiefs are powerful community gatekeepers who use their position to influence the use of customary norms in justice administration. Hence, there was need to further examine whether the same holds among Somali customary elders and kinship networks such as the clans in Garissa County.

On the same note, Tieleman & Uitermark (2019) argues that the enduring prominence of chiefs within customary justice forums has significant relationship with governance. Historically, Sessay (2016) notes that chiefs had performed pivotal roles as proxies of colonial governments. He further adds that cloaked in the mantle of tradition, they were entrusted with the management of populations and the extraction of resources. Although the context changed with decolonization, Jackson (2014) notes that it could be argued that chiefs remain indispensable for governments who seek to govern beyond the cities where they reside. Further, the state's weakness in the rural marginalized areas allows chiefs to take up the role of power brokers. Hence, chiefs are strong where the state is weak, further suggesting that rural–urban migration erodes the chiefs' power and prestige. Although this argument is plausible for some contexts, Tieleman & Uitermark adds that it falls short of explaining why chieftaincies have proliferated in emerging urban neighborhoods where no site-specific traditional seat existed previously. This

being the case, this study sought to find out the relevance and legitimacy of traditional authorities in modern day Somali community, their roles in justice administration and their implications of compliance with regulative safeguards.

Second, Jackson (2014) asserts that in some jurisdictions, state judicial regulations attempt to create parallel judicial authority structures that are no longer under the supervision and control chiefs and elders have increasingly been perceived as a major concern. For example, Jackson argues that attempts to create parallel judicial authorities within the space that customary justice systems operate raises a concern on alteration of local power relations and local elder's authority to enforce by laws and customs within their localities. Similarly, Quinn (2014) notes that such justice reforms are likely to alter local actor's power of adjudication and ability to control power of arrest within their locality. This is likely to shape the perceptions of the local leaders thus influence its adoption. Despite the above observations, this study was important in understanding whether concerns over loss of authority and relevance arise when promoting state regulatory safeguards in Garissa County.

Another area of concern as noted by Lubkeman (2011) focuses on regulatory safeguards that attempt to restructure customary systems of justice in order to accommodate vulnerable and marginalized groups within decision making and norm setting. Studies have observed that attempts by regulative strategies to promote vulnerable marginalized groups to participate in decision-making and norm setting within customary judicial forums have not been fully achieved. For example, Harper (2011) notes that in most customary judicial forums, women are allowed to participate but through representatives whom in most instances are male relatives. Similarly, Marshall (2014) adds that where right to participate is allowed, they are limited to

presentation of evidence rather than negotiation. Participation of the vulnerable through dialogue driven strategies such as Modogashe remains unclear within the Somali systems of justice. This raises the need to look deeper into existing and perceived political incentives within Somali community and whether they are likely to make local leaders resist devolving their authority.

At the same time, another study by Quinn (2014) interpreted the implications of state judicial regulative approaches to expand decision making committee as a way of enforcing new balance of adjudicative power in customary justice authority. For example, inclusion of more members such as youth leaders, local NGOs and women increasingly curtails the adjudicative authority of the ruling class (Isser, 2011). Aspiration of Youth and women who are not part of the ruling coalition for positions in customary courts has often been interpreted by local leaders as a move for 'newcomers' to enhance their authority and administration in conflict resolution processes between their peers and traditional rulers and also have an influence in redistribution of resources (Quinn, 2014). However, concerns have been raised over such disruptive tendency by local elders and chiefs. This has been frequently perceived as a move to undermine their administration (Ayittey, 2010). Despite human rights discourse being important, studies note that most approaches have placed an emphasis on human rights devoid of community responsibility (Chopra, 2015). This has led to the perception that human rights activism is actively playing a role to the breakdown of traditional reciprocal norms, erosion of certain practices and weakening of authorities (Jackson, 2014; Quinn, 2014; Kotter, 2015). It is not clear if similar views are held by Somali elders in regard to Modogashe agreement, hence the need to interrogate their perceptions towards the justification that extending decision making authority to vulnerable groups are inherently important from a human rights dimension.

## 2.4 Critical Procedural Justice Theory

This study was guided by Critical Procedural Theory which was instrumental in guiding the study on sources of resistance based on Universalist or relative interpretation and implementation of internationally agreed values associated with fair justice administration in ADR such as *maslaha* forums. Critical Procedural theory emerged from pioneering research of John Thibaut and Lauren walker in 1974 who were fascinated by the following fundamental question. What procedures are just? This question was inspired by the differences between inquisitorial and adversarial law systems. Accordingly, they compared the adversarial procedure of common-law countries with the inquisitorial procedure of civil-law countries by exposing law students to a simulated court trial in which they manipulated the opportunity participants had to choose their own lawyer. The findings of these experiments revealed that participants in the adversarial condition possessed certain critical factors that were associated with fair justice administration processes.

First, individuals care whether or not they have had an opportunity to present their own story, a factor that the literature commonly refers to as voice (Tyler, 2003). In the case of a third-party neutral procedure, parties or their advocates/attorneys typically present evidence to a decision maker. Limiting third party control, according to Grootelaar (2018), allows process control for parties involved thus an opportunity to avail all necessary information to defend themselves. This is because parties are more likely to be satisfied when they are provided with the opportunity to make and influence decisions on process and outcomes. Therefore, this allows such outcomes and processes to reflect their interests. This is an aspect associated with procedural fairness. Second, people assess whether or not the decision maker was neutral (Tyler, 1990). This

involves issues such as impartiality (lack of bias); the ability to gather and assess the information needed to make appropriate decisions; openness about the procedure (transparency); and consistency in the application of rules over people and across time. Third, and related, is the question of whether or not the third-party authority was trustworthy (Grootelaar, 2018).

More importantly, in criminal mediation, the voice of the victim is important. Thus, procedural theory standards prioritize individual rights in the sense of control of the process and decision as an essential aspect in justice administration. Indeed, liberalism conceives of the individuals more so the victim as the basic and irreducible unit of society, and finds it difficult to accommodate practices that do not correspond to this view. Therefore, procedural justice standards give precedence to rational self and conceives of the individual as a holder of rights, regardless of any other factors that may be involved.

Notwithstanding the importance of procedures, justice administration interactions are largely social in nature. From a justice administration lens, Grootelaar (2018) observes that fairness is not only determined by interpretation of procedural safeguards by legal scholars and other court officials. Rather, justice also emerges from the concerns, need and values of the people who bring their problem to the legal systems. To this end, critical perspective models challenge the extent to which procedural justice principles that prioritize individual over community are universally valued. Consequently, questions emerge over their relevance and adherence when they are used as templates to re-configure organization and functioning of customary justice practice resource. This raises questions on their adherence and uptake locally. Thus, although such universal standards particularly on decision-making and process control considerations among individual disputant are important in alternative justice forums, in most people's minds,

fair procedures may mean more than the individualistic concerns for process control based on their experiences. For instance, Grootelaar (2018) observes that despite the importance of procedural values of process control, such may be limited in scope because of its predominant focus on fair process effects, thereby neglecting other factors or contexts that can have significant influence on our beliefs of fairness.

In the same vein, Dunn (2013) raises legitimacy and sustainability questions surrounding the transferability of such universal standards and their implication on subordinating and marginalizing other equally important contextualized cultural practices of dispute resolution. This is done by propagating western discourses and theories as formal universal standards. Similarly, Lederach (1997) refers to the above scenario as neo-imperialism where there is attempt to transfer particular mediation values to other cultures as the right way to resolve disputes with minimal consideration of local justice challenges, constraints, needs and realities. Consequently, critical perspective raises awareness of the impact of local cultures, socioeconomic and political organization on justice administration problems and suitable safeguards. For example, neutrality is highly valued as an international standard in criminal mediations yet it overlooks the shortcomings of a neutral mediation process to perpetuate racism (Cobb & Rifkin, 1991), sexism, privilege and disadvantage thus the need to re-define their role. This implies that the need to address power indifference during negotiation may call for more than a neutral mediator.

Similarly, findings from empirical studies that have applied Critical Procedural Theory report that fair interactions between justice seekers and state safeguards is open to multiple interpretation. This implies that other than treatment and empowerment of victims and offenders

as enshrined in procedural safeguards and majority of safeguards in ADRs, other dynamics are equally important and, in some cases, overarching. For example, Sessay (2016) observes that what constitutes fair justice process is not only found in due process that prioritize disputant needs but also other dimensions such as access to institutions, affordable process, implementable outcomes, and accountability of court functionaries. Similarly, Bobocel, and Gosse (2015) observe that fair justice practices vary based on individualized concerns, needs, and values of people who bring their problems to the legal system.

In view of the above, this study was conscious of certain assumptions from critical perspective theory that may shape relevance of universal standards to justice administration. First, what constitute fair standards in relation to application of customary justice administration resources is open to multiple interpretation based on community experiences. This being the case, and taking cognition of Universalist and Relativist reform approaches, an emerging question that guided this study was: what are the key values and elements prioritized within judicial safeguards promoted for *maslaha* systems? Second, to what extent are the prioritized values and elements accommodative and responsive to *maslaha* salient justice practices and how does this shape their relevance and uptake?

Second, justice approaches are more likely to be perceived legitimate when there is consensus on commonly universally agreed objective standards such as procedural justice theory values (Dunn, 2013). However, such characterization raises doubts given that it is not easy to have a common stand on a universal standard of justice globally. Therefore, Critical procedural Theorist suggest that universal 'objective' standards of justice could be found in people's subjective perceptions and experience of justice systems rather than any single objective criteria (Pryce,

Johnson, & Maguire, 2017). To this end, an emerging question that guided this study was to what extent do Somali justice seekers find important in guiding their justice administration process? Do they relate to universal objectives or other values derived from local experiences? To achieve this, this study examined prevailing standards of fairness emerging from popular concepts of justice within the Somali community.

Third, the Critical Procedural Theory postulates that uptake of justice regulatory safeguards by litigants depends largely on their local relevance (Nagin & Telep, 2020). This is based on the observation that when litigants perceive the procedural safeguards used to be responsive to their needs and justice expectations, then they are more likely to adopt them. For example, Ramsey and Robinson (2015) observe that perception of fair standards is informed by litigants' control of the process, relationship with adjudicator and use of procedures that are acceptable, transparent and reflect common value system and local justice administration problems. However, Mazerolle, Sargeant, Bennett, & Murphy (2014) notes that what constitute a fair process of justice administration is relative to contexts. As such, there is need to further examine practices that might arouse subjective perception of fair processes of justice administration. Hence, this study was conscious of this and efforts were made to find out whether the same hold true among the Somali community. This was done by examining concerns among justice users between the process and outcome/remedies of justice administration.

Notably, operationalization of various regulative safeguard is relative. For example, disputant process control is achieved through constraining intervention roles of mediators or replacing customary with Government appointed mediators trained on due process. In the end, regulative safeguards result in re-organization of various justice resources (actors, norms, remedies and

values). More importantly, how community and justice users experience and perceive the emerging re-organization may affect their adherence. The above observations provided insights to this study.

First, when examining operationalization of regulative safeguards, this study probed further on the emerging re-configuration of composition, nature, actor and their roles, operation and justice administration process within *maslaha* systems of justice. Second, Critical Procedural theory focusses its attention on possible sources of resistance based on transplanting ‘universal objective standards’ while overlooking their responsiveness to salient justice practices. Accordingly, this study identified scenarios and instances where local salient justice practices were domineering thus affecting adherence to regulative models. Although this theory was important in guiding the study on parameters used to judge fairness of procedural safeguards, it was short on explaining salient features of customary justice hence the need for a second Model of Informal Institutional Change.

## **2.5 Model of Informal Institutional Change**

Concept of origin and persistence of Model of Informal Institutional Change was equally instrumental in guiding the study on overarching social realities that inform nature and operation of persistence of informal institutions. Helmke and Levitsky’s (2004) model of informal institutions seek to understand the origin and persistence of informal institutions in terms of processes, norms, actors and practices in a modern state. First, they postulate that informal institutional origin is relative to formal ones in the sense that they emerge and persist as problem solving response to weak state system.

Specifically, Helmke and Levitsky (2004) note that enhancing the performance of state institutions alters the nature of the problems that precipitated the creation of these informal mechanisms and increases the cost of using them. The key to such institutional change is endogeneity, meaning that the informal institution must have emerged out of the breakdown of state authority, whether to provide substitutive public functions or to promote particularistic activities proscribed by formal rules (Helmke & Levitsky, 2004). Thus, non-state justice institution may persist due to weakness of formal justice system. This implies that safeguards that seek to limit their jurisdiction in favor of formal courts may encounter resistance.

Accordingly, one safeguard sought to promote aspect of original jurisdiction in the sense of concentrating the application of customary justice norms within formal institutions. This implies that persistence of customary justice practices that contravene the above requirement. This could be due to endogenous factors such as effectiveness and capacity of formal justice institutions. Whether this is the case for persistent Somali *maslaha* justice forums was an aspect this study sought to examine.

Consequently, this assumption influenced the target population and inclusion criteria of this study to include respondents who had experienced and used both formal and *maslaha* justice forums. This allowed the study to capture their views emerging from their experiences from a grounded discovery of relationship rather than testing pre-conceived aspects associated with effectiveness of informal institutions had an implication. Reflexivity and triangulation of data from multiple sources was exercised to limit biasness.

Conversely, Helmke and Levitsky (2004) argues that there are informal institutions whose relationship with the state is exogenous, meaning that their *origin* and *persistence* is due to other factors beyond state capacity. That is, they are largely embedded in shared norms and expectations which predated the state system and have been relevant to socioeconomic conditions outside the state justice system (Dia, 1990). Thus, since the origin and persistence for this type of institutions is outside the processes of state justice institutions, changes in formal rules or increasing their effectiveness do not directly affect people's perception of their relevance nor the cost of using them. The examples of informal institutions linked to exogenous structures are pre-colonial governance rules, which evolved as parallel and resilient space of relatively autonomous local authority, functioning beyond direct state control.

Sessay (2018) add that such institutions are resilient despite modern state reconstruction for two reasons. First, their social relevance is deeply rooted in local norms and values promoted by various social fields such as elders, kinship systems. Second, social fields that uphold and socially enforce them are widely dispersed, evolving bottom-up through a more decentralized and less conscious manner of repeated interaction. Borzel & Risse (2015) points out that the pre-colonial governance systems are useful for survival outside modern legal and socioeconomic structures which marginalize most citizens in developing countries. For example, according to Chopra (2015) customary justice systems are perceived to be practical and realistic due to their anchoring on local norms that are free from legal complexities and its associated costs. Thus, any attempts by safeguards to alter such benefits may encounter resistance. Second, Schlee (2013) observes that in contexts where simple criminal transgression may escalate into group violence, the practice of elders and functionaries reaching out to the offended group and leveraging on

their status and religious doctrines to push for reconciliation rather than prosecution is prized. This is due to its importance of maintaining and restoring social harmony and order.

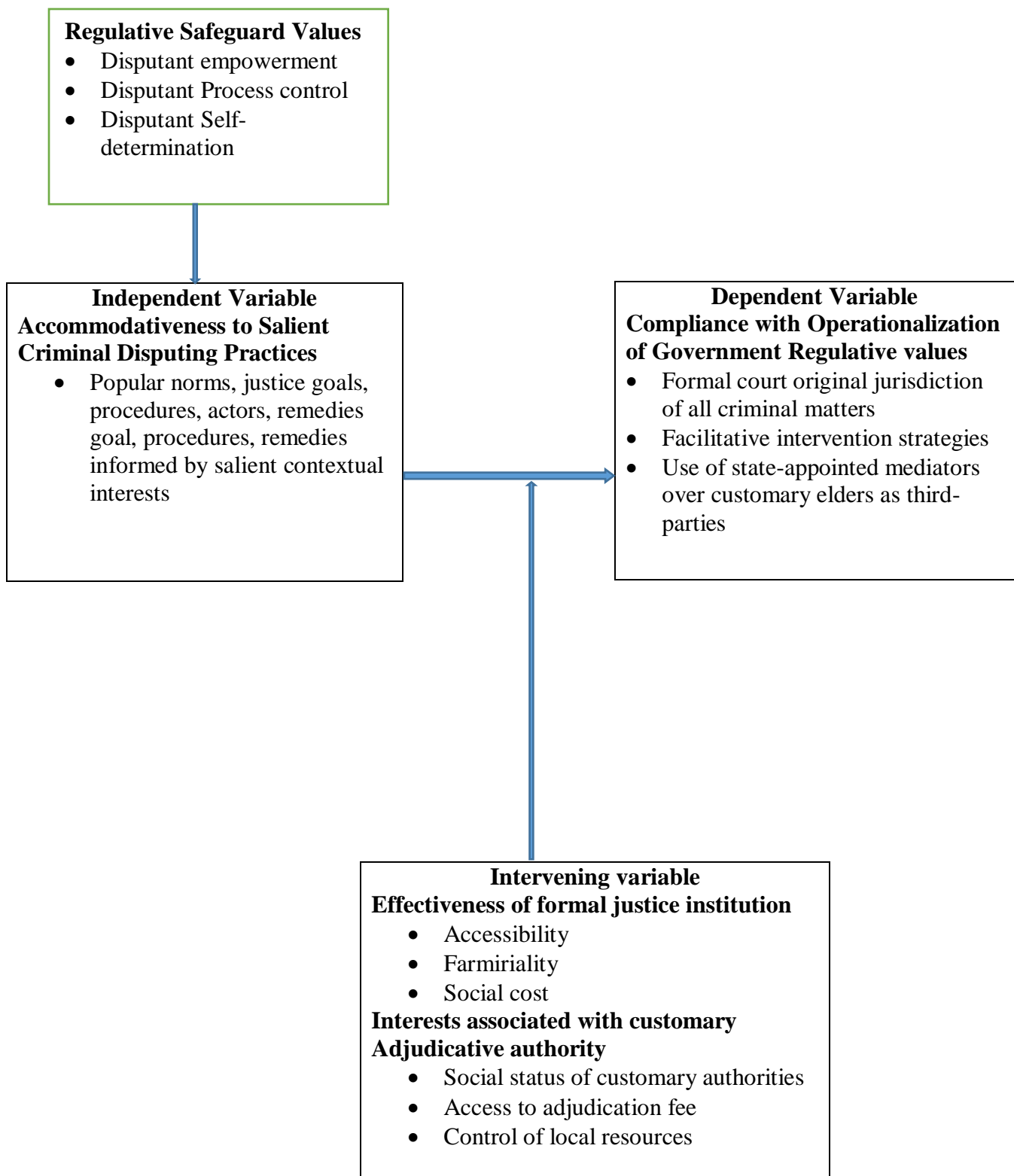
Therefore, any attempts by safeguards to limit roles of third-parties under the confines of neutrality may encounter limited adherence. Third, in cases where crime occurs among groups with strong social and economic interdependency such as those in marginalized regions, customary justice systems that seek to sustain social relationships are prized (Bendana & Chopra, 2013). Accordingly, the above underscores the importance of examining salient features within customary justice systems in light of their contextual realities that may influence adherence of judicial safeguards. The above guided this study to identify salient features within *maslaha* justice systems and their contextual justifications. Attempts were then made to examine the extent to which judicial safeguards were responsive and accommodative to these salient features.

Consequently, the logic of exogenous relationships implies that persistent salient features within customary justice systems could be motivated by other aspects beyond state institutions. The motivation could result from popular norms, cultures, social regulating fields and interlinked with communities' social, political and economic conditions perceived important in justice administration process. The nature and logic of customary justice processes could also be part of the incentive. Therefore, this theory guided this study to first understand popular notions of justice in terms of norms, procedures, actors and remedies shaped by contexts of end users (concept of justice) and then followed by how such concepts shape the uptake of safeguard. More importantly, safeguard seek to re-configure customary justice systems to uphold process control among victims of crime. How such new configurations are understood, experienced,

abandoned, upheld or modified in relation to community and end justice needs and concerns was the focus for this study.

## **2.6 Conceptual Framework**

The dependent variable was conceptualized as the compliance with state judicial regulative procedures of justice administration within Somali customary adjudication processes in Garissa County. This was operationalized as procedural requirement of initial reporting of all criminal matters to formal justice actors and institutions as first recourse for justice (original jurisdiction), use of facilitative intervention strategies where mediators act as guides and enablers and reliance of state-officers such as court-annexed mediators as third-parties. Critical Procedural theory and model of informal institutional change postulates that the more responsive justice regulatory procedure is to popular local cultures of criminal dispute resolution (concept of justice), the more likely they are to be adhered to. Therefore, independent variable comprised of concepts of justice within Somali community. This consisted of prevalent justice resources or customs in terms of norms, values, procedures, remedies and actors that are perceived to be responsive and social relevant to social, political and economic dynamics of criminal redress. The relationship was mediated by capacity of formal justice institutions in relation to oversight and supervision. This is captured in the diagram below:



**Figure 2.1: Conceptual Framework**

## CHAPTER THREE: RESEARCH METHODOLOGY

### 3.0 Introduction

The chapter outlines the methods that were used to carry out the study. In this chapter, the following are discussed in detail; the research design for the study, study site, study population, target population, the sampling size and sampling procedure, data collection, sources of data, data analysis and presentation methods. Lastly ethical considerations that were used in this study. This is discussed in the subsections below.

### 3.1 Research Design

This study adopted a phenomenological research design employing both qualitative and quantitative approaches with quantitative approach mainly used for collecting and analysis of demographic data. According to Creswell (2013), a phenomenological research design focuses on the commonality of a lived experience within a particular group with fundamental goal to arrive at a description of the nature of the particular phenomenon under investigation. The approach enhances the extraction of detailed qualitative data on the perceptions, opinions and attitudes based on the participant experiences with justice administration procedures within customary justice forums.

In this study, efforts were made to trace the lived experiences of the respondents with justice administration procedures within *maslaha* justice forums in Garissa. The study sought to establish the uptake of judicial safeguards in alternative dispute resolution (ADR) and salient issues likely to mediate their uptake. A phenomenological approach was thus deemed appropriate to understand how justice seekers, customary elders and community members experience and perceive Somali customary justice forums and implications of formal regulations.

### **3.2 Study Area**

The main goal of this study was to establish whether responsiveness of judicial safeguards towards salient contextual realities that shape the course of justice administration process affect their compliance and uptake. Accordingly, Garissa County was purposively selected mainly due to the persistence of *maslaha* justice forums that handle approximately 80% of major criminal crimes with limited regard for national and international justice standards (Chopra 2015, Wanyoike, Onkware, & Okoth 2018, Mohamed and Muriithi (2020) and Judiciary of Kenya 2020). In addition, the region experiences inter and intra-community violence, which are likely to have influence on justice administration process and the uptake of regulative safeguards. Further, Garissa County has witnessed considerable justice reform interventions under the umbrella of peacebuilding, rule of law and alternative justice processes. The choice of Garissa County was also motivated by the frequent use of non-state justice systems to address violent crimes resulting from frequent resource, clan conflicts and ordinary crimes. Thus, Garissa County provided an ideal location to study popular concepts of justice that may affect the uptake of state judicial processes.

### **3.3 Target Population**

A target population is defined as an entire group of individuals from that the study uses to generalize observations (Orodho, 2008) and draw conclusions. For this study, the target population comprised a group of citizens of Garissa County of Somali origin, the state officials involved in criminal justice system and customary justice practitioners. This is because, these are the groups that experience criminal activities as victims, perpetrators, or members of the community who are aggrieved or accused and may seek justice from those responsible for

corrective actions. As such they interact with the judicial systems (formal and informal either as users or service providers, therefore are better placed to address the concerns of the study.

### **3.4 Sample Size and Sample Size Determination**

As regards the sample size, the philosophy of saturation was applied. Theoretical saturation is understood as the point where the researcher feels that they have covered all possible emerging concepts, dimensions, patterns and variations from the field rather than based on repetition of data. Strauss & Corbin (1990) argue that the researcher can stop when he/she feels that they have attained theoretical saturation. Therefore, although the study targeted 40 justice end users comprising of victims and offender, the researcher felt that information from a sample of 21 justice users was satisfactory. This included 13 victims and 8 suspected perpetrators of crime.

Similarly, another category of respondents important to this study are those involved in administration of justice and regulation of *maslaha* systems of justice. These included elders, Sultans, religious leaders, court officials, Administration officers, Court-annexed mediators, Probation officers and law enforcement officers. Although the researcher would have liked to interview 50 respondents, after interviewing 34 respondents cumulatively from the above categories, the researcher felt that the information gathered was adequate and satisfactory as shown below.

**Table 3.1: Distribution of Study's Respondents**

<b>Respondents</b>	<b>Pseudo Tag</b>	<b>Total</b>
Suspected Perpetrators	Crime Suspect	8
Victim of Crime	Victim of Crime	13
Sultan	Clan leader	1
Elders	Village elders	7
Chief	Government Administrator	1
Senior officers- County commander OCPD and OCS	Senior police officers	3
Crime section officers	Crime officers	7
Magistrate	Legal official	1
Prosecutor	Legal official	1
Local women representative-market and self-help representatives	Women representative/leader	2
Sheikh	Religious leader	1
Assistant County Commissioner	Senior government administrator	2
Human rights activist	Human rights activist	2
UNDP Peace Officials	Representative of International Peace organization	2
Court-annexed mediator	Legal official	1
Probation officer	Legal official	1
Paralegals	Paralegals	2
<b>Total</b>		<b>55</b>

The study had a total of 55 respondents with varying experience regarding *maslaha* system of justice and their regulation. This is because the strength of qualitative studies is to explore depth and complexity of emerging phenomena and variance from multiple perspectives. Further, Green and Thorogood (2004) observe that interview-based study provides little information especially if only 20 respondents are interviewed. On the other hand, Ritchie, Lewis, & Elam (2003) suggested that research that employs individual interviews can conduct no more than 60 interviews to allow researchers to manage complex task of analysis. Thus, too many participants and too few participants can lower the quality of the information gathered. Sandelowski (1995)

recommends that qualitative samples should be large enough to allow unfolding of new and richly textured understanding of the phenomena but small enough allow the deep case-oriented analysis.

Apart from interview schedules, the study also used two focused group discussions. The groups comprised one for *maslaha* justice practitioners (elders) and another one for crime officers who had handled cases referred from *maslaha* or ended up with *maslaha* elders. The focused groups for elders consisted of six elders selected from those interviewed individually. The second focused group discussions for crime officers consisted of seven participants selected from respondents. On the number of respondents in FGDs, Carlsen and Glenton (2011) observe that 6-12 participants are considered sufficient in social sciences. Thus, two FGDs were within the expected standard as observed by Carlsen and Glenton (2011). In terms of sample size in FGDs, Carlsen and Glenton add that more information is obtained when two FGDs have at least four participants while one FGD has at least eight participants in qualitative studies. In view of the above, the two FGDs were within the recommended range.

### **3.5 Sampling Techniques**

Based on the objectives of this study, interest was to understand whether responsiveness towards concepts of justice informed by salient contextual realities influence the uptake of judicial safeguards in *maslaha* criminal justice system. Accordingly, there was need to select different groups of people from the habitants of Garissa County and from different locations. The approach used to sampling was thus a multistage approach.

Garissa County was first clustered according to its administrative locations to select the sub-counties from where participants would be selected as shown in the below table:

**Table 3.2: Administrative Units in Garissa County**

S/N.	Sub-county	Locations
1.	Dadaab	Liboi, Labasigale, Abakaile, Dadaab, Dertu, Damajale
2.	Lagdera	Sabena, Modogashe, Maalimin, Baraki, Benane, Goreale
3.	Balambala	Jara, Balambala, Danyere, Saka, Sankur
4.	Garissa Township	Waberi, Galbet, Bula medina, Township, Iftin
5.	Fafi	Fafi, Jarajila, Nanighi, Dekaharia, Bura
6.	Ijara	Hulugho, Sangailu, Ijara, Masalani

Etikan (2016) argues that when collecting qualitative data, it is important to that the data collected contribute to better understanding to theoretical frameworks and assumptions of the study. In this case, the researcher decides on what need to be known and sets out to find people who can provide the desired knowledge by virtue of their experience and location. To this end, purposive sampling which is the deliberate choice of participants or study sites due to the qualities the participant was used.

In view of the above, the first study site of interest to this study was that which experiences frequent violent conflicts. Theoretically, criminal incidents entangled with intractable clan conflicts may have an implication on course of justice administration process and ultimately

adherence to judicial safeguards. This is so because interpersonal crimes that emerge from such contexts may escalate into group violence due to clan existing animosity and tensions. Therefore, the need to prevent retaliatory violence was theoretically expected to influence intervention strategies, justice goals and process. In the end, adherence to Government regulative safeguards is dependent on the extent to which they are responsive unique justice needs informed by crimes entangled with conflicts hence the need for their inclusion in this study. According to Safeworld (2020), *Wagberi* and *Bula Medina* location in Garissa Township have been identified as hotspot areas for inter-clan conflicts between *Alulihan* and *Abudwak*. Their proximity to Garissa town makes untitled land in these regions valuable and open to land related ownership violence. Therefore, based on the above scenario, *Wagberi* and *Bula Medina* were purposively selected for the study.

Second, Modogashe location in *Lagdera* sub-county was purposively selected because it is a hotspot for violent conflicts between Somali and Borana. The region is also home to Modogashe Declaration, a local peace agreement that guides the resolution of violent conflicts between the two communities. As such, the dynamics associated with border addressing violent conflicts between Somali and Borana and how *Modogashe Declaration* affect adherence to judicial safeguards was a concern for this study.

Further, it is imperative to point out that access to formal justice institutions and actors is a contextual reality that may have an implication on adherence of judicial safeguards. This is so because, presence of formal justice institutions is important for enforcement and compliance of

judicial safeguards. Accordingly, *Masalani* location in *Hulugho* were found to fit the above realities hence purposively selected.

Third, borderlands with high transient populations due to pastoralism may also have unique contextual realities that may have implications on the uptake of safeguards. Notably, high transient population and porous border is likely to affect enforceability and compliance of Government judicial regulative directives. Based on the above, *Damajale* location in *Dadaab* Sub Counties was purposively selected.

This was followed by purposely selecting citizens of Garissa who were of the Somali origin had resided in the area for a period not less than five years, the government officials who are in charge of law enforcement and those who work in the judiciary system. Having purposively selected groups of interest, clustering and stratifying members within the identified groups was conducted. For the citizens of Somali origin, individuals were clustered depending on how they related to the *maslaha* systems of justice as per the interests of the study. These were offenders and suspected perpetrators who had active criminal matters. Other clusters included elders, Sultans, and religious leaders.

In the first cluster, proportionate convenience and snowballing sampling was done for the group that served as arbitrators that included Sultan, religious leaders and elders. As regards to the victims and suspected perpetrator, snowballing sampling technique was used to obtain the participants. On the other hand, given government increased surveillance against the use of *maslaha* in major criminal cases, suspected offenders were particularly not willing to come out

for fear of arrest and arraignment in formal courts hence snowballing. According to Drăgan & Isaic-Maniu (2012), snowballing can be used when researcher encounters ‘hidden’ population that is not willing to come out in the open for fear of victimization or social stigma. He further adds that ‘hidden’ not only mean illegal or with high chances of victimization but also unregistered, lack official information and that is difficult to identify.

In the cluster of law enforcement, proportionate stratified sampling was applied. The participants were then conveniently sampled from each rank or strata. Various strata consisting of government justice actors namely magistrates, prosecutors, probation officers, court-annexed mediators, police commanders, OCS in charge of crime section, County Commissioner, area chiefs were identified. These officers have an obligation to ensure that alternative justice administration process comply with criminal justice administration standards and regulations. Thus, their views and experiences with *maslaha* was important for this study.

Within the clusters, purposive exclusion criteria was used to exclude residents that were not of Somali origin and those involved in civil cases. The inclusion criteria for victims and suspected perpetrators cluster included those actively involved with *maslaha* justice processes, articulate in Swahili and those involved in felonies such as murder and crimes linked to communal conflicts. For arbitrators group, those that could communicate in Swahili, those who were actively involved in adjudicating criminal cases, those that handled conflict-related crimes, murder, assault and rape were approached, those operating in urban areas such as Garissa township, border areas such as *Damajale* and *Hulugho* and in conflict-infested such as *Modogashe*. Finally, for government agents, those that were handling criminal matters that had first been reported to

*maslaha* forums were approached. Another inclusion criterion for this group were those officers whose criminal matters were withdrawn by victims or community back to *maslaha* for redress.

Focused group discussions were also used. One comprised on elders where both purposive and snowballing was used. The researcher sought help from Sultan, clan leaders, to identify those who were actively involved in adjudicating criminal cases, had received referred from state justice actors and institutions such as police and prosecutor, had referred matters to police and courts, those that handled conflict-related crimes, those operating in urban area such as Garissa township according to KNB (2014), border-areas such as Dadaab and *Hulugho* and in conflict-infested areas *Modogashe* and *Mbalambala*. A second FGD was administered to crime officers. In charge crime office was used to help the researcher identify officers who were handling criminal matters that had been first reported to *maslaha* forums. Another inclusion criterion were officers handling criminal matters that were withdrawn by victims or community back to *maslaha* for redress were approached.

### **3.6 Instruments of Data collection**

Interview schedules, focused group discussion, and document analysis were used to collect data in this study. Data collected from the three tools was triangulated for purposes of complementarity and validation of the findings.

#### **3.6.1 Interview Schedule**

Interview schedule was important since it enabled the researcher obtain in-depth information on customary justice processes and how such experiences influence the uptake of regulative

safeguards. Additionally, interview schedules were important since they allowed respondents to freely respond to questions. This provided the researcher an opportunity to probe the respondents further for more information.

In view of the above, an interview schedule was administered to respondents who at the time of the study were active justice seekers within *maslaha* justice forums. The first part of the interview schedule sought to find out the salient features of *maslaha* justice forums. Sub-questions consisted of outstanding goals and justice administration process which focused on initiation process, stages applied, reconciliation strategies, popular remedies and actors involved. The second section sought to understand existing government regulative practices (prohibitions and requirements) on the use ADR in criminal matters.

This section consisted of sub-themes namely goals of judicial safeguards and corresponding restructuring of *maslaha* systems of justice administration. The restructuring was based on prescribed mediator's intervention strategies, ideal mediator, level of empowerment towards victims of crime, composition of *maslaha* forums and lastly, how such goals are implemented by various actors such as court, police, chiefs, paralegals and enabling legal framework).

The third section of the schedule sought to find out whether popular concepts of justice influence the uptake of judicial regulative safeguards. Accordingly, this section probed for instances and scenarios where salient justice practices overrule the need to adhere to judicial safeguards based on respondent's experience. Other than justice seekers, an interview schedule was also administered to Sultan, clan elders and government justice actors namely magistrate, officer

commanding station and section, paralegals, administrative officers, local women representatives, chiefs and assistance chiefs, non-governmental organizations representatives and local sheikhs. Findings from justice seekers were triangulated with those from clan leaders, elders, government justice actors and those from non-governmental organizations such as paralegals.

### **3.6.2 Focused Group Discussion**

Thomas et al. (1995) argues that FGDs are important for complementing other methods of data collection in providing in-depth information in a relatively short period of time. Equally, FGDs can provide rich data due to its ability to capture various perspectives and interaction among participants. Therefore, this study administered two FGDs, one to elders and another one to crime officers in addition to interview schedules conducted among victims and offenders. Elders were purposively selected due to their knowledge and role in political and justice administration process within the Somali community.

Crime officers were equally important due to their wide involvement in *maslaha* justice administration process in its contemporary state. This is related to the views of Mohamed (2020) and Chopra (2015) acknowledge the hybrid nature of justice administration process in North Eastern region. They observe that most criminal matters had involved local law enforcers either at initiation, during the process, at termination or enforcement. FGDs consisted of three major questions. The first question examined salient features of justice administration within *maslaha* forums. This was done in relation to criminal offences and their underlying contextual justifications. The second question sought judicial prohibitions and requirements in the case of persistent *maslaha* justice forums in criminal matters. The third question sought to analyze how

salient features and their contextual realities based on local experiences is likely to influence the adherence of judicial ADR safeguards. Data from the two FGDs was triangulated with that from interview schedules.

### **3.6.3 Document Analysis Guide**

Document analysis was also undertaken on policies guiding justice administration within alternative justice systems. Documents reviewed included local declarations such as Modogashe declarations, 2010 Constitution of Kenya and Criminal Procedure Code. Information from these documents was triangulated with data from other data collection instruments.

### **3.7 Validity and Reliability**

Unlike quantitative research that relies on statistical procedures to measure observable facts, qualitative approaches aim to naturally study phenomena in its context. This calls for extreme rigor because of the potential of subjectivity inherent in this type of research. Lorelli et al. (2017) argue that reliability and validity have been related with ‘trustworthiness’ as the central concept in their framework to appraise the rigor of a qualitative study. Yin (1994) describes trustworthiness as a criterion to judge the quality of a research design namely credibility, transferability, dependability and confirmability.

Credibility which refers to the accuracy and truthful depiction of a participant’s lived experience (Lorelli et al, 2017). In this study, credibility was achieved through prolonged engagement and persistent engagement with respondents for nine months (June 2019 to February 2020). The length of period helped the researcher to learn the context of the phenomenon in which it is embedded and to minimize distortions of data. This period also allowed sufficient time for the

researcher to familiarize with the setting and context, to test for misinformation, to build trust, and to probe further on emerging themes.

Another strategy used to enhance credibility of findings was persistent observation. Through observation, the researcher identified characteristics and elements relevant to salient features of Somali customary justice practices, values and implementation strategies of regulative safeguards and contextual realities likely to affect their uptake. Data triangulation was also used to enhance credibility. The findings from justice seekers were also corroborated by key informants such as elders, magistrates, local law enforcement officers, human rights and paralegals all who form part of justice administration architecture in Garissa. Investigator triangulation or peer briefing was also used where supervisors and two experts who have carried out anthropological research on Somali customary justice process and action research on alternative justice forums and regulations. This was done through referrals and meetings where they provided a critique of interview guides and emerging themes. Triangulation was used to crosscheck the data and interpretations by the supervisor and experts.

Transferability is the degree to which the results can be transferred in other contexts with other respondents. It involves describing not just the behaviour and experiences, but their context as well, so that the behaviour and experiences become meaningful to an outsider. According to Morse & Richards (2002), transferability can also be achieved by contextualizing new concepts, patterns and variation. In this study, transferability was achieved corroborating the findings with the existing literature and theoretical models including triangulation of the primary data and secondary data.

Dependability involves participants' evaluation of the findings, interpretation and recommendations of the study such that all are supported by the data as received from participants of the study. This was achieved by triangulating the views of different groups such as victims, offenders, elders, Government justice actors and paralegals as well as in focus group discussions and interviews were spontaneity in responses.

Confirmability is the degree to which data and interpretations of the findings are not infringements of the inquirer's imagination but clearly derived from the data. To achieve this, an audit trail took place to examine the processes whereby data was collected and analyzed and interpretations made. Last was on reflexivity. Reflexivity was achieved through recording down pre-existing beliefs of study objectives in order to make the researcher self-aware and bracket own biasness.

### **3.8 Pretesting of Research Instruments**

Pretest was conducted to detect word ambiguity, language barrier as well as discovering possible flaws in measurement variables. Morse & Richards (2002) observes that the pretest interaction to self-correct between design and implementation is important in ensuring reliability and rigor. In addition, pretesting provides advance warning about how or why a main research project can fail by indicating where research protocols are not followed or not feasible. Consequently, the interview schedule and FGD were administered to a group of 3 Somali justice seekers in East-Leigh Nairobi County. The area had similar characteristics to the study area in terms of presence and use of *maslaha* justice forums, and access to Somali justice practitioners. It also sought to

find out how disregard of state regulative safeguards on the use cultural justice process to provide redress in criminal matters influence its outcome.

Accordingly, feedback from pretest helped this study to further focus on implications of judicial safeguards on structure, composition and operation of *maslaha* justice systems. In addition, the pretest looked at how such new configurations are responsive to existing community justice practices informed by contextual realities. This enabled the study to capture instances where actions and motivation affected the relevance of regulative safeguards. Findings from the pretest also ensured that the questions were not ambiguous. This allowed the study to validate study methodology to unearth motivations, experiences and perceptions.

### **3.9 Data Collection Procedures**

Given the study's focus on criminal justice administration, creating trust and rapport was of importance. Since I was not a member of the Somali community, establishing a linkage of entry in to the field was paramount for the success of this study. In addition, language barrier presented significant challenges. In order to address the language barrier, the researcher recruited an interpreter who was a native of Garissa and of Somali origin. Consequently, the researcher purposively approached the Dean, Loresho Police training Nairobi who then introduced the researcher to Garissa County Police Commander. In turn, the County Commander introduced the researcher to his two assistant officers: Commanding Station and Officer Police Divisions. The two officers facilitated entry into the field.

The County Commander also introduced the researcher to various head of various Departments one of them being Directorate of Criminal Investigations and Crime Officers. The officers in turn linked the researcher to officers under their command and clan leaders commonly referred to as clan Sultans. The County Police Commandant also introduced the researcher to County Commissioner Garissa who then referred the researcher to Assistant County Commissioners and from the linkages, the researcher was able to get chiefs, magistrates, prosecutor, area Probation Officer, paralegals and vocal local women leaders of whom three were market leaders. The rest were spouses of key significant personalities such as former chiefs and ward representatives.

Once in the field, the researcher first organized a familiarization meeting with county police commanders and administrative officers to establish a rapport. Purpose of the study was explained to referrals, contacts exchanged and appointment prior to data collection exercise organized. On the date of appointment, respondents were first briefed on the importance of the study, then the researcher engaged them into data collection activity. Statements from respondents were noted down in field notebook. At the end of the day, the researcher went through the notes to identify emerging themes from the day's activities hence memoing. Memoing, as argued by Birks, Chapman and Karen (2008) have been identified as important tools in qualitative studies since they help researchers to make conceptual leaps from raw data.

This allows the researcher to keep track of emerging themes and compare them across respondents. In this regard, memoing assisted the researcher to keep track of emerging themes, compare them across respondents and identify areas for further probing in the subsequent interviews. Where the exercise of data collection was not complete, follow-up appointments

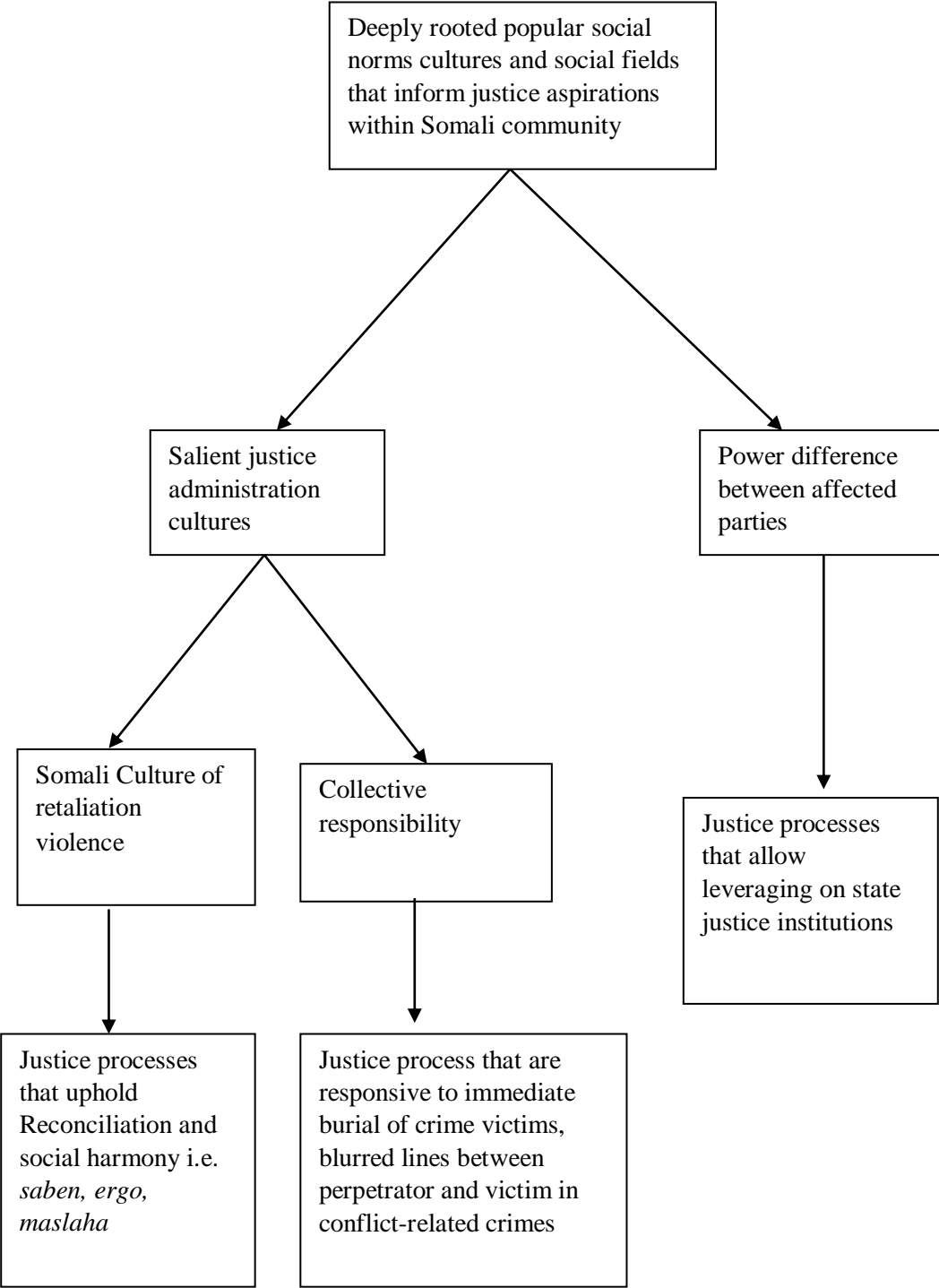
were arranged. The process continued until saturation in terms of variability and emerging patterns was arrived at and when research questions were adequately answered.

### **3.10 Data Analysis**

The first stage was data preparation. The data from interview and FGDs were transcribed to make the responses clearer and summarized as a way of data reduction. The researcher transcribed to summarize key themes along data collection exercise. Field notes were taken down during interviews and FGDs.

The second important stage was data coding. This entailed searching for general statements about relationship among categories of data. This process involves organizing data into manageable units through combining and synthesizing ideas to develop constructs or themes that illuminate important findings in the research (Cohen, Manion & Morrison (2007). According to Miles and Huberman (1994), codes act as tags used for assigning units of meaning to the descriptive data compiled during the study. Thus, the choice of words or phrases to be selected as codes should be embedded in a particular logic as set out in the objectives or conceptual lens. In line with this view, the first objective sought to identify salient features of *maslaha*. Accordingly, emerging codes were captured on data associated with outstanding justice process, norms, remedies and justice paths and their underpinning contextual realities. The codes were then summarized into overarching themes or categories. It is instructive to point out that local practice of group retaliation deeply rooted in local cultures of justice of Somali and power difference in Garissa was a key theme as shown below.

**Figure 3.1: Emerging themes**



**Table 3.3: Coding Scheme for Analysis**

<b>Data</b>	<b>Codes</b>	<b>Thinking tools</b>	<b>Writing up themes</b>
<p><i>Our maslaha forums aim to address harm caused by criminal incidents.....</i></p> <p><i>Our justice systems emphasize on maslaha. Maslaha is an Islamic principle meaning preventing further damage through apologies and compensation.....</i></p> <p><i>Majority of the rural parts in Garissa County are conflict-prone due untitled communal land. Simple land-related misunderstanding and crimes between individuals may trigger clan or family retaliation due existing clan tensions over ownership of land....</i></p> <p><i>Maslaha forums bring the victim and offender into a dialogue where we collectively identify and address consequences of crime....</i></p> <p><i>Middlemen, commonly elders, who initiate saben are paid some 'facilitation fee' for their efforts...</i></p> <p><i>Elders reach out and bring together disputing groups. They can perform a wide range of activities ranging from reaching out to disputing parties, listening to evidence presented where they identify harm and factors to determine the final value of compensation.....</i></p> <p><i>Elders may use Somali proverbs to educate parties on the need to give up their right to prosecute over that of customary remedies such as compensation and reconciliation..</i></p>	<p>Salient goals and their corresponding processes, actors and remedies used</p> <p>Salient justice administration cultures</p> <p>Justice processes that uphold Reconciliation and social harmony</p>	<p>Important cultures and realities that inform justice administration within Somali community</p>	<p>Emerging justice models and their key features in terms of goals, processes, actors and remedies used and underpinning contextual realities</p>

<i>Most maslaha processes are initiated by threats for arrest and prosecution from the victims.....</i>			
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The second objective sought to find out elements prioritized by judicial regulative safeguards applied for alternative justice forums. In this case, emerging codes were captured on regulation of third-parties/mediators, jurisdiction limitation, procedures, remedies and linkages between state and customary justice forums. The codes were then summarized into overarching goals, values, implementation strategies and their restructuring and re-organization of *maslaha* systems of justice.

The third objective sought to find out whether responsiveness to contextual realities that inform salient justice practices influence compliance towards safeguards. An emerging major code for example was on the need to minimize retaliation which had ripple effects on adherence to safeguards that was contradictory to this goal as shown below.

With reference to analysis techniques, objective one sought to understand salient features of Somali customary justice forums from an experiential perspective. Consequently, critical discourse analysis approach was used. Critical discourse analysis was used to contextualize and give meaning to popular justice culture based on respondents’ responses. Objective two sought to examine regulative safeguards in terms of their overarching goals, values and implementation strategies. Thus, thematic analysis was used to pick the above aspects of regulative safeguards. In objective three, the goal was to examine whether salient concepts of justice had an influence on the uptake of regulative safeguards. Thus, critical discourse analysis was used.

### **3.11 Ethical Consideration of the Study**

The researcher first sought approval from two relevant bodies namely Ethics Review Board based in Kenyatta University and a research permit from National Commission of Science, Technology and Innovation (NACOSTI). County Commissioner office and National Police Service was also informed and permission secured before commencement. This was due to the nature of the study and security concerns. Participants of the study were recruited on a voluntary basis without coercion. Informed Consent sought for the study was voluntary. This was reinforced by signing of a consent form by participants. To ensure that the research observed ethical values and rights of human subjects, self-determination, anonymity and confidentiality were maintained. Issues of anonymity were guaranteed to the participants by ensuring that their names are not attached on their verbatim. Debriefing was conducted at the end of session with participants

## CHAPTER FOUR: DATA PRESENTATION AND ANALYSIS

### 4.1 Introduction

The main goal of this study was to establish whether responsiveness of judicial safeguards towards salient contextual realities that shape the course of justice administration process affect their compliance. To this end, establishing how justice is understood and experienced locally in light of formal regulations within community-based Somali customary justice forums (*maslaha*) was important. Therefore, data collection was designed to capture local engagement with informal justice institutions not excluding possible involvement of Government justice actors such as police, judicial institutions and local administration. This was achieved by designing interview and focused group discussion guides that traced how disputants addressed or were addressing criminal transgressions within customary and state justice processes.

This allowed the study to capture a range of interactions between formal and informal justice institutions, their advantages and shortcomings based on their expectations and how disputants responded to identified safeguards. Respondents were also used to provide information on organizational features of state safeguards in terms of how they approached alternatives to litigations such as customary justice processes, their guiding values, approaches used to implement them and their experience. Findings were derived from a triangulated review of three data sets. In this chapter, the findings are presented and discussed to answer the research questions which guided the study. They were;

- i. What are the salient features of *maslaha* justice systems relating to criminal offences that influence the uptake of regulatory safeguard?

- ii. Which elements do judicial regulative models prioritize for *maslaha* criminal justice systems
- iii. To what extent does operationalization of judicial regulative safeguards responsive to salient features of *maslaha* Systems of Justice?

This chapter begins with the demographic characteristic before addressing the main research questions

#### 4.2 Demographic Characteristics of Respondents

Findings of this study were derived from interview schedules with 21 justice end users and 34 strategic practitioners within justice administration process that consisted of justice practitioners, Government officials and judicial actors. Respondents involved in FGDs were selected from respondents who participated in the interview schedule. Below are tables showing composition of respondents of end justice users based on nature of crime involved in, position in the aftermath of criminal transgression (victim/offender) and gender.

**Table 4.1: Respondents of Interview Schedule by Nature of Crime Involved**

<b>Crime</b>	<b>N</b>	<b>%</b>
Murder	4	19%
Assault	10	47.6%
Rape	1	4.8%
Conflict-related crime	6	28.6%
<b>Totals</b>	<b>21</b>	<b>100%</b>

As observed in the table above, majority of victims and perpetrators were involved in assault with 47.6%, followed by conflict-related crimes 28.6%. Murder and rape constituted 19% and 4.8% respectively. This was important in understanding whether the nature of the crime had implications on the course of justice administration process. Further, various categories crimes

may call for specific redress and remedies. Thus, safeguards that inhibit the ability of justice forums to meet such unique needs may face limited compliance hence the need for wide categories of criminal transgressions. On the other hand, a possible explanation for high cases of assault in Garissa County could be attributed to aspects of self-help. This then informs local perceptions on accessibility of using formal institutions for justice administration for redress. Menkhaus (2015) notes that self-help refers to a situation where aggrieved persons may opt for non-institutionalized forums such as clan and personal redress rather than relying on the government authorities. This is often due to limited access of formal systems of justice. Limited access could be inform of high cost of hiring an advocate for representation, procedural bureaucracies and complexity of formal justice process that discourages their use thus resulting to alternatives. In the end, high cases of assault could be an expression self-help associated with negative perceptions towards the use of government justice institutions.

**Table 4.2: Respondents of Interview Schedule by Position in the Aftermath of Criminal Incident**

<b>Position in Crime</b>	<b>N</b>	<b>%</b>
Victim	13	62%
Perpetrators	8	38%
<b>Totals</b>	<b>21</b>	<b>100%</b>

As observed in the above table, victims with 62% were more accessible than offenders. A possible explanation for the above phenomena could be attributed to the fear of post-investigative follow-ups in the aftermath customary criminal mediations. For example, a suspected perpetrator of crime observed that “I am afraid that your intention may be to revive the matter and present it for prosecution” (Crime suspect 1).

As observed in the above quotes, offenders are uncomfortable to discuss their criminal experiences and mediations within *maslaha* forums. Most of the people fear giving out

information that could be used to revive their prosecution in a formal court. According to UNDOC (2014), depending on the national legal systems, prosecutors may apply to reopen a trial when new evidence that has a bearing on the ultimate issue of guilt or innocence if the case is unearthed. Therefore, the fears of the perpetrators may not be unfounded, an aspect that may explain their limited participation in the study.

For victims, one possible reason for relatively high participation in comparison to offenders could be that they perceived the encounter as a healing forum. For example, Shapland (2018) note that one-way crime victims are able to normalize their emotions is through dialogues with significant others. In doing this, crime victims are provided with the opportunity to express their feelings hence elevating their self-concept. Therefore, interview schedules provided spaces and forums where crime victims expressed the harm and hurt experienced. The forums further created avenues to address victims' fears and anxieties. In addition, victimhood may at times be in a state of helplessness due to the processes followed in these forums. This may increase the victims' willingness to share their experience with others with the hope for possible help or further interventions hence the high rate of participation.

#### **4.2.1 Respondents of Interview Schedule by Gender**

Majority of interviewees with 81% (n-17) were male while the females were 19% (n-4). Limited participation of women in the study is attributed to Somali gendered dynamics and position of a women in a typical family household. Generally, Dekah (2019) observes that the family is the most basic structure of Somali community. She adds that it consists of an expansive kinship network including extended family members. Each family kinship group also belongs to a larger clan and sub clan based on their shared ancestry with other Somalis. Healy (2013) adds that all clan affiliations are inherited through the family father's lineage. In this regard, men hold a

dominant position and decision-making authority thus act as spokesperson in the aftermath of criminal transgressions. Therefore, this could explain the high number of men in interview schedule.

Women on the other hand are expected to perform complementary obligations and their participation to certain activities is determined by closest male relatives such as spouses, fathers, and sons among others. For example, Alaga (2018) notes that despite modernization, women in the Somali society are still expected to show modesty-*(xishood)* by being polite, humble and reserved. This could be the reason for their limited participation in the study. In addition, crime in Somali community is approached from a collective perspective where elders and close male relatives represent the female victim. Therefore, it can be implied that the position of women and patriarchal collective approach to justice may have limited their involvement as key respondents in the aftermath of criminal transgressions.

Second, interview schedules were also administered to local chiefs, elders, magistrate, public prosecutors, Court-annexed mediators, Sultan (clan leaders), local religious leader's sheikhs, Administrative Officers, members of civil groups, local women mediators and paralegals. Below is a table showing distribution of key informants.

**Table 4.5: Distribution of Study Informants**

<b>Respondents</b>	<b>Pseudo Tag</b>	<b>Total</b>
Sultan	Clan leader	1
Elders	Village elders	7
Chief	Government Administrator	1
Senior officers- County commander OCPD and OCS	Senior police officers	3
Crime section officers	Crime officers	7
Magistrate	Legal official	1
Prosecutor	Legal official	1
Local women representative-market and self-help representatives	Women representative/leader	2
Sheikh	Religious leader	1
Assistant County Commissioner	Senior government administrator	2
Human rights activist	Human rights activist	2
UNDP Peace Officials	Representative of International Peace organization	2
Court-annexed mediator	Legal official	1
Probation officer	Legal official	1
Paralegals	Paralegals	2
<b>Total</b>		<b>34</b>

### **4.3 Salient Features of Somali *Maslaha* Justice Systems**

This study sought to examine whether responsiveness of judicial safeguards towards salient contextual realities affects their compliance hence their uptake. It was established from the literature and theoretical readings that compliance towards regulatory safeguards is primarily based on the extent to which implementation and operationalization of safeguards is accommodative towards salient social interests and realities that shape the interpretation of criminal transgression and course of justice administration process. Thus, the ability to accommodate and respond to salient persistent justice administration practices may matter in their uptake.

Generally, *maslaha* justice systems have been presented as a set of cultural justice practices informed by the nature and living conditions of pre-colonial society. However, such pre-colonial justice practices are not static and continue to evolve, transform and adapt to meet contemporary justice needs. For example, Pilane (2013) observes that the true nature of customary law is a ‘living’ body of law-like customs. Additionally, it is active and dynamic with an inherent capacity to evolve to keep with the changing lives, needs and interest of the people and community who it governs. Therefore, in order to understand what constitutes salient practices of customary justice, this study paid attention to how various pre-colonial customary justice administration resources such as norms, processes, remedies and actors are prioritized, re-engineered and assume legitimacy in modern day society. Second, the study attempted to unearth underlying social and contextual realities that inform salience of such practices from justice seekers’ perspective. As such, the findings of this study identified specific salient customary administration practices popular in modern Somali community in Garissa County as discussed below.

#### **4.3.1 Overarching Goal of Somali Customary Justice system: Prioritization of Victim's Harm, Needs and Social Harm**

To understand the salient features of Somali customary justice processes, the first question probed respondents on the overarching goal of Somali customary justice forums. This was done in relation to how Somali customary justice provides redress to criminal transgressions. Accordingly, a clan leader observed that 'our *maslaha* forums aim to address harm caused by criminal incidents on victims and their kinsmen as provided by *sharia* doctrines and Somali customs. Harm may include physical injury, broken relationships, incapacitation of bread winners and emerging animosity' (Clan leader 1).

Similarly, a Village elder also observed that:

Our justice systems emphasize on *maslaha*. *Maslaha* is an Islamic principle meaning preventing further damage through apologies and compensation. Affected parties work together to help deter further consequences of crime that may strain relationships between clansmen and kinsmen of the offended party. (Village elder 1)

The quotations above demonstrate the fact that Somali customary justice forums seem to focus on the harm caused by criminal incidents. In doing this, the Somali customary justice fails to strictly comply with state legal criminal procedures that prioritize prosecution to establish guilt and possible imprisonment of the offender. Accordingly, aspects of preventing further damage as implied from respondents' local understanding of *maslaha* seems to put more emphasis on the need to prioritize victim's harm.

Equally, as implied from aspects of ‘working together’ and ‘offloading further consequence of crime’, *maslaha* processes concern itself with restoring broken relationships among the victim, offender and their kinsmen. This implies aspects of social harm since the affected parties are brought together to identify injury caused on relationships followed by necessary remedial actions. Therefore, this approach to justice is concerned with reconciliation other than prosecution of the offenders. Though there is need to prosecute perpetrators as a way of addressing legal harm in terms of breach to overarching normative legal rules, *maslaha* justice forums prioritize non-legal harms such as physical injury, economic loss and strained social relationships between families, sub-clans and overall clans. Such an approach to justice overshadows legal requirement for prosecution in favor of individual and community needs created in the aftermath of a criminal experience.

The above findings are in line with those of Schlee (2013) in his article titled ‘idealized traditions versus Somali realities.’ According to Schlee (2013), *sharia* doctrines of compensation and forgiveness have an overarching influence on goals of Somali justice administration approaches. Schlee argues that *Sharia* doctrines provide for various forms of punishments in the aftermath of criminal transgressions but also stresses on the importance of patience and forgiveness which leads to reconciliation and compensation. Compensation aims to alleviate suffering in terms of medical cost caused to the victim and affected group. Compensation is also used to neutralize emerging animosity and the urge to retaliate by the affected parties’ hence social reconciliation. Therefore, compensation and forgiveness over time has evolved into the notion of *maslaha* where victim and offender groups can opt to address harms as an outcome of justice.

In view of the above, *maslaha* justice forums broadly target victims of crime and social groups such as kinsmen and clans. Consequently, respondents were further probed on the importance of addressing victims' needs and harm. On this, a victim of crime observed that 'crime incidents may lead emotional and economic suffering that may require consideration in justice forums' (Female Victim 1). Accordingly, another victim pointed out that:

In case of physical injury, an emerging need may include money to take care of medical bills during the recovery period before elders' sitting. It may also require apologies to stop further emotional suffering associated with consequences of crime. In homicide, this may call for some steps to support victims' dependents in order to fill the pain and gap left by the deceased. In most cases, the final compensation money may be used to begin some business or buy camels which act as a source of income thus erasing enmity. (Male Victim 1)

The quotations above capture the fact that criminal experiences may lead to emotional, physical and economic harm. These are aspects that *maslaha* forums is keen to address and if possible, alleviate. Generally, the extent and implication of injury on victim's livelihood and dependents tend to generate economic strain accompanied by nervousness, anger and extreme anxiety due emerging complications. For example, perceptions of inadequacies and helplessness due to victimization leads victims to experience depression, feelings of revenge and need for justice. As such, there is need to prevent further suffering which is realized through *maslaha*. In this regard, justice within *maslaha* is not always perceived as violation of state criminal norms followed by determination of guilt and punishment, an aspect commonly referred to as retribution. By approaching justice in this manner, consequences of crime are mitigated.

The findings above are in line with those of Green (2020) who observed that close family members and dependents may equally experience economic and emotional strain when their breadwinner is incapacitated by criminal incidents. Therefore, Somali *maslaha* justice forums prioritize the social and economic implications of crime through various ways. One of them is their compensatory remedies where the money is used to support victim's dependents in case of homicide as observed by respondents in the quotes above. Their compensation may be used to fill the financial gap left to victims' dependents in case of homicide. The compensation may be used to start a business to support the dependents.

Therefore, the views of victims seem to agree with those of elders on the overarching goal of Somali customary justice forums. In this case, Somali customary justice seeks to provide redress to harm that might consist of adverse emotional, social, physical and economic implications of criminal incidents. This is in line with the views of Hillyard and Tombs (2007) who argued that social harm approach is a productive way of examining justice needs in the aftermath of criminal experiences. This is because it provides non-legal indicators of the harm caused that should be addressed based on peoples understanding, attitudes as well as experience.

The above argument is corroborated with those of Mohamed and Muriithi (2020) in 'A Critical Perspective of Analysis of *Maslaha* as a Traditional Dispute'. According to Mohamed and Muriithi, *maslaha* system as practiced within the Somali community involves compensations in terms of money and livestock. The aim of the compensation is to alleviate immediate harm and suffering caused by a criminal incident. Accordingly, aspects of suffering are closely related with

respondent's observation of *maslaha* as a concept of justice and its role in stopping further suffering of the victim and those affected by the criminal transgression.

#### **4.3.2 Neutralizing Group Retaliation**

In view of the above, *maslaha* systems of justice focus more on addressing consequences of crime towards the affected parties and clan and kinship systems. This is suggestive that social groups in which victims and offenders belong to within the Somali society may have an influence on responses to criminal transgressions. Further, taking cognition that responses to criminal transgressions is socially constructed as argued by Goldman Paddock and Cropanzano (2004), social groups may have an implication on responses towards injustices. To this end, existing relationships between social groups within Somali society to which affected parties belong to may greatly influence response strategies. Some of the response strategies may border on group retaliation. During data collection, a village elder pointed out that:

Majority of the rural parts in Garissa County are conflict-prone due to untitled communal land. Simple land-related misunderstanding and crimes between individuals may trigger clan or family retaliation due to existing clan tensions over ownership of land. Thus, reconciliation through *maslaha* plays an important role in alleviating animosity and retaliation. (Village elder 2)

Similarly, a Senior Police Officer observed that:

This is a conflict zone where animosity, distrust and suspicion exist among the three major clans namely *Abdalla*, *Aluiyan* and *Abduwak*. Clan tensions exists alongside territorial boundaries, resource conflicts and wrangles associated with elective positions within devolved Government. For example, currently, with expansion of Garissa town,

there has been an increase of family feuds and violence due to land-related frauds. This is motivated by the increasing value of land in Garissa Township. ‘*Saben*, a key process within *maslaha* justice process is important for sustaining peaceful coexistence of clans and families involved in a crime. (Senior Police Officer 3)

The above findings were collaborated by the Senior Government Administrator who observed that:

Simple crimes can trigger clan violence. In one case, a shopkeeper was injured by a group of youths chewing ‘*miraa*’ next to his shop. This was after an argument ensued when he requested the young men to leave since they were ‘scaring’ away customers. During the argument, one of the young men hit the shopkeeper with a stick sustaining serious injury on the forehead. The perpetrator’s family immediately paid *saben* of 80,000 Kenyan shillings to cool down the tension. This is because the shop owner was mobilizing close sub-clan members for revenge. (Senior government administrator 1)

The quotations above show that simple interpersonal criminal transgression can assume clan and family violence dimension due to existing tensions and distrust among members of different clans and family. This has the implication that other than the cultural Islamic principle of *maslaha* that seeks to prevent further harm, another contextual reality that matter is the need to prevent group retaliation and violence. The above findings are in line with those of Menkhaus (2016) that in North Eastern region of Kenya, animosity, distrust and tensions exist among clans due to past and continuing conflicts. The distrust and tensions may be caused by resource access and distribution, territorial disputes and political competition. Consequently, *maslaha* is quick to address simple criminal transgressions that may trigger existing tensions which could easily escalate to group violence. In this regard, Somali customary justice reconciliation remedies are

handy in minimizing escalation of violence in such conflict-affected contexts. In the end, order and peace are maintained hence social harm minimized.

In regard to the observation by a senior police officer in the quotations above, Garissa County is demarcated along three major worrying clans namely *Abdalla*, *Aluiyan* and *Abduwak*. The demarcation of clans is an aspect that may trigger clan tensions and group conflicts over access and sharing of key resources and strategic interests. On this, respondents pointed out that increased value of land in cosmopolitan urban centers has led to an increase in family and clan feuds due to land-related frauds coupled with communal land ownership. Thus, in such contexts, criminal transgression can become flashpoints for violence an aspect *maslaha* justice administration processes are cognizant of.

In view of the above, *maslaha* justice processes in Garissa underscores the importance of reconciling parties to minimize escalation of interpersonal crimes into large scale group violence. This finding resonates with that of Safeworld (2020) where it was observed that animosity and suspicion is prevalent between the *Abduwak* and *Aluiyan* clans and their sub-clans in North Eastern region of Kenya. The tensions between these two groups exist due to competition for political seats, devolution and resource scarcity (Safeworld, 2020). Therefore, interpersonal criminal transgressions may easily escalate to group violence hence the need for customary justice practice of reconciliation in modern day Somali community.

Consequently, *maslaha*'s restorative and reconciliation remedies are important in Garissa County due to the existence of long-term protracted conflicts embedded in a cycle of revenge and generational grievances among the three dominant clans. Thus, the move to restore social trust

and reconcile parties is a defense mechanism of preempting the possible communal conflict and escalation of group violence. In view of the above, Somalis continue to value groups that they belong to which is perceived as a source of identity, self-concept leading to ‘*us-and-them*’ scenario. For instance, Roberts et al., (1999) argues that in such scenarios, group identity is an important part of the self-concept and its members derive self-esteem from their sense of belonging to that group. Therefore, attack to an individual is perceived to affect the whole group thus attracting group retaliation as a way of reasserting their status. Accordingly, clan or family animosity from existing tensions and past conflicts is an influential aspect on prioritization of social harm within Somali customary justice system.

Further, the complexity of relationships within Somali community reinforces the use of customary justice. For instance, a local Clan Leader pointed out that:

You may think that we rely only on state institutions for survival. However, extended family, sub-clans and clans are basic units and very influential in accessing and sharing communal resources such as pastures and land, delivery of justice and political rights. An assault against an individual may be perceived as a wrong against the offended group and may affect the social and economic activities in our society. This is why our *maslaha* forums focus more on maintaining group harmony and peace. (Clan Leader 1)

The quotation above indicates that sustaining harmony between and within kinship systems is of importance for the well-being of the community. This is so because groups such as clan and family act as the basic units where social, political and economic rights are derived and distributed. In this case, there is need to sustain cohesiveness among its members. For instance, cultural groups can act as an important modern social field where they are used as tools to

provide their members with rights to access various resources. That is, members of the group are only users of collective rights belonging to the family, lineage, clan, tribe or ethnic group as a whole hence some kind of cohesiveness. In the same vein, a disputing individual transforms his group into a disputing group and it follows that if he is wronged, he may depend upon his group for support, for in some vicarious manner, they too have been wronged. Thus, given the nature of group interactions and collectiveness in cultural and socio-economic undertakings, reconciliation is important in minimizing tensions the escalation of tensions between individuals to their supporters or peers.

As argued by Scharf (2000), reconciliation is paramount in communities where economic and social dependence is dominated by informal governance systems such as kinship relationships. In this regard, according to Scharf, individual difference and conflict may threaten group relationships. Thus, individual difference has the potential to disrupt social harmony. Accordingly, Bendana and Chopra (2013) observe that performance of and outcomes of justice in North Eastern region of Kenya continue to be conditioned and filtered through the local need to sustain clan harmony, a crucial enabler for attaining social, political and economic interests. Thus, criminal transgressions are viewed not so much as matters between individuals, but as issues concerning entire relationships within the community. This implies that group solidarity may subvert individual needs to realize harmonious existence of individuals. In the end, addressing social is an aspect prioritized within *maslaha* justice administration process in Garissa County.

However, the above observations fail to capture the fear that championing group solidarity and social harmony masks other personal interests and motives. For example, a local human rights activist observed that:

At times, aspects of group retaliation may be invoked for personal gains. For example, the offended group may advocate for reconciliation due to compensation that is shared collectively. On the other hand, the offending party may use it to avoid criminal prosecution which is perceived to have grave consequences compared to reconciliation and compensation. (Human Rights activist 1)

It is instructive to point out that the quotation above shows how *maslaha* justice practices may be used to suppress victim's justice need. Similarly, the offending party may use aspects of reconciliation as a way of avoiding individual criminal responsibility. This implies that, despite the genuine concern of providing safety-net for de-escalation of violence, *maslaha* may be used to serve other ulterior motives for individuals within the group.

The findings above resonate with those of Medani (2011) in his study in Egypt's informal institutions. He observes that informal institutions are important due their role in complementing or substituting the performance of the formal systems of justice. In addition, Medani cautions that informal institutional networks may be encouraged and sustained in modern contemporaries due to perverse incentives and goals. In his context, the concern was how some elites use them to control and regulate land under communal ownership to favor their personal interest.

The findings in the present study are also corroborated by Meagher's (2010) informative study of social networks and the informal economy in Nigeria. In her study, she sought to understand

frequent use of informal institutions in modern day society. She argues that under certain conditions, persistent justice practices can constitute social capital and social liability. For example, they can be used to provide remedies beyond legal frameworks while at the same time be used to avoid criminal prosecution. In other scenarios, they can be used for political mobilization. Thus, the above observation raises the need to regulate informal institutions to entrench of human rights within customary justice systems.

In view of the above, despite the possibility that *maslaha* justice systems may be used to serve other ulterior motives for specific individuals, this study does not underestimate the importance of reconciliation and social harmony in the aftermath of criminal transgressions in Garissa. This is so because solidarity of a group is a necessary condition for the maintenance of the social equilibrium, order and peace in the community hence the need for reconciliation. In this regard, ‘*saben*’ is often initiated with the aim of reaching out and consoling the offended party. Accordingly, a village elder observed that:

*Maslaha* forums bring the victim and offender into a dialogue where we collectively identify and address consequences of crime. *Ergo*, who act as representatives or middlemen from aggressor’s side are first sent to the offended family and clan to pay ‘*saben*’ or ‘pole’ in Swahili. *Saben* is money paid immediately to the victim’s side as sign of remorse which can be used to slaughter and share a goat or take care of medical expenses. In case of death, *saben* may be used to take care of the deceased’s family needs before the final compensation. Final compensation is used to assist the dependent secure a source of living. (Village elder 3)

While another respondent observed that ‘healing and reconciliation is achieved by addressing consequence of crime in two stages. During the first stage, the mediators’ aim is to initiate healing process by showing remorse through *saben* and apology’ (Village elder 5).

The quotations above demonstrate that emerging harm and needs relating to criminal behaviour are addressed through two stages. The first stage which is characterized by payment of ‘*saben*’ is a remorse-seeking gesture that involves the aggressor’s clan and family reaching out to the other group as a sign of consolation for the damage. Notably, *ergo* commonly referred to us middlemen, delegates or brokers are used to reach out to victims’ family or clan and pass their condolences and feeling of remorse in the first stage.

During such preliminary sitting, perpetrator group through *ergo* are made to understand the harm caused by their own and a *saben* is paid. This stage is important since it soothes the other group not to take revenge and minimize animosity thus beginning the process of dialogue. It is also a form of acknowledgement of the wrong done and taking responsibility by the perpetrator which could be seen as the first step in restorative justice. ‘Brokers’ are quick to pay a visit to the offended group, present their condolence and pay *saben* as a sign of remorse. This stage is also important since it minimizes animosity thus initiating the process of dialogue and reconciliation.

The above findings agree with those of Chopra (2017) who observed that such preliminary sessions among Muslim communities of North Eastern Kenya are important in stopping further suffering on victims of crime and suppress any intentions for revenge or retaliation. By reaching out and taking care of the victims of crime, Mohammed (2016) adds that the money paid symbolically sends a gesture of remorse for the suffering caused. Ultimately, acts of remorse and

concern send important messages and are signs for peaceful resolution of the crime thus reconciliation.

Similarly, other than cooling down animosity, the first stage in Somali customary process also seeks to address immediate needs resulting from criminal experiences. As identified by respondents, these forums can be seen to alleviate victims suffering through payment of *saben* which assist the injured party to cater for the emerging expenses. Given the importance of *saben*, Somali proverbs are used to encourage parties on use of dialogue over violence in the aftermath of criminal transgressions. Additionally, the proverbs are also used to encourage people to take responsibility of their actions. This is well captured in the following Somali proverb that '*he who spits upon your hand must reach and rub it*' [Paralegal 1]. This proverb underscores the need for dialogue especially by the offender to reach amicable solution with the offended.

In addition, Somali proverbs are also used to seek audience and soften other parties resent in the first stage. For example, as observed in one of the proverbs identified by the respondents, words such as 'spitting upon' and 'rubbing and must reach out' creates an obligation on the offender's side to take the first initiative of reaching out to the victim hence initiating the process of reconciliation. In addition, such words create a reciprocal obligation from the side of the victim to welcome attempts for peaceful redress such as healing, addressing harm and needs hence reconciliation. Therefore, this study observes that *saben* and middlemen play an important role in initiating reconciliation process thus restoring the social harm.

The findings above are in line with observations made by Gathaara, Sirera and Wasanga (2019) that folk wisdom helps in the development of ways of thinking in many ways. One such

development relates to critical and creative thinking. This is especially evident in the way they are used to transmit creative knowledge as a medium for fulfilment of a variety of socially desired goals (Gathaara, Sirera & Wasanga, 2019). In this case, some Somali proverbs are used to inculcate reconciliatory justice cultures.

However, on the flipside, the presence of middlemen and the use of *saben* within the community without state oversight raises important questions on the undue influence and personal interests. For example, a local human rights activist noted that:

Middlemen, commonly elders, who initiate *saben* are paid some ‘facilitation fee’ for their efforts. Majority of them are found around the police station where they scout for ‘clients’ reporting criminal matters. We fear that they at times force victims into reconciliation in order to get some commission from compensation paid to the victim and their clan. (Human rights activist 1)

The quotation above reinforces the fact that despite the importance of reaching out to offended parties, middlemen involved to initiate *saben* may coerce victims into reconciliation due to incentives commonly associated with *maslaha* forums. This is evident in aspects of ‘scouting’ for clients.’ The scouting for clients is therefore suggestive of subverting genuine justice needs of the affected parties in favor of personal gains. This observation resonates with Okoth’s (2019) who points out that *ergo* or the middlemen are paid some commission for their efforts to avert violence immediately after crime commission. In this way, *ergo* gives room for dialogue and reconciliation. In the end, the *ergo* process accrues some incentive which may at times mask the genuine interest for reconciliation through *maslaha* systems of justice.

This could mean that the use and initiation of *maslaha* is not necessarily a voluntary process. Therefore, it implies that given a choice, other members of Somali community may opt for modern judiciary system. This is so because monetary gains may override genuine motivations for reconciliation. Similarly, *ergo* is also seen as an active social-political field that uses *maslaha* systems to mask their interests. Threats of retaliation as discussed in previous sections of this thesis can be used by *ergo* to coerce parties into *maslaha* even when it is contrary to their wish. This could explain why such practices continue to exist in modern day Somali community. However, the influential role of the elders who act as *ergo* in abating escalation of communal violence cannot be underestimated. This therefore calls for some regulations to secure disputing parties' autonomy on the use of *maslaha* forums. On the other hand, victims' autonomy needs to be cautiously balanced with the need to sustain peace in situations where violence is imminent.

Additionally, given their reliance on religious and customary justice practices that are open to wide interpretation, Somali justice process may lack clear rules and standards on when to compensate, forgive or prosecute as a means of addressing harm. This scenario opens room for manipulation and abuse of the processes. The concept of social harm is also relatively open, therefore, although it may be productive for social coexistence, it is also potentially fraught with danger. This is because approaching crime from social harm lacks standards leaving it open to multiple interpretations. This therefore raises the need to have safeguards in place in order to ensure objectivity and consent on the appropriate means used to address social harm.

Respondents were also clear on goals of *maslaha* from those of formal justice forums. For example, it was observed by a victim of crime that 'unlike government courts that focus more on imprisonment of offenders, our forums aim to address problems and needs created by the

criminal incidents by bringing affected parties together with assistance of elders hence mediation' (Male crime victim 4). In this case, prioritization of crime victims' harm and needs by Somali customary justice forums in the aftermath of a criminal transgression distinctively vary from the goals of justice processes in Government formal courts. Notably, the issue of imprisoning the offender as observed above are based on what the state prioritizes in the aftermath of a criminal incident. For instance, government courts attach importance to violated state norms by offender's criminal conduct, followed by determination of guilt and finally imposition of an appropriate sentence such as imprisonment.

The findings above are in line with those of Muigua (2019) who observed that formal forums prioritize offender accountability by reducing the criminal act to existing criminal codes followed by establishing guilt and appropriate sentence. Muigua further distinguishes customary from formal justice. He argues that the focus of customary justice is on offender taking responsibility and taking actions to repair harms caused. Thus, attention to law breaking, punishment and addressing victim's harm and needs can be used to understand goals of various justice forums.

Therefore, state court differs with Somali *maslaha* customary forums in that they prioritize harm and emerging needs based on community customs while the other state norms violated and corresponding punishment. This is not to say that the formal courts entirely neglect needs and harm of the crime victims but rather observe that formal justice forums reject the idea that reconciliation and restoration should take precedent over norm violation, due process and establishment of criminal culpability over victim's harm and need. For instance, Wenzel and Okimoto (2016) observe that state courts first prioritize norm violation and determination of guilt

after which victims can then institute civil proceedings for compensation. They may also opt for out of court settlement.

The philosophical differences evident in state judicial system and the customary system is an aspect that has sustained the customary judicial systems across Africa, *maslaha* court included. This is informed by the fact that formal courts are characterized by adversarial procedures, complex and long, and outcomes such as a prison term among others may appear ill adapted to reality unlike the philosophy of criminal resolution in traditional communities (Herman, 2017).

However, the *maslaha* judicial system has some limitations that may necessitate blending the traditional approaches and the modern court systems. This is to ensure justice for the victims as well as holding the offenders responsible for their actions. In addition, the purity of *maslaha* judicial systems may be difficult to uphold. This is because the traditional judicial systems exist in the modern society. In this case, they advocate for the state judicial systems with the overall powers bestowed on the state. To this end, the study revealed some degree of hybrid approach in the *maslaha* judiciary system. This is presented in the next section.

#### **4.3.3 Elders' Multiple Intervention Strategies in *Saben* Stage**

Among the unique features of *maslaha* customary courts like any other traditional justice systems is that community leaders perform various roles, ranging from decision makers, advocates and adjudicators. The elders wield authority by taking charge of the *maslaha* process from the beginning to the end. The study revealed that elders take responsibility of initiating the process. The elders also hold power that shaped the direction of the whole process including the disciplinary and compensatory measure albeit in consultation with the community members.

As such, the significant place of elders in the Somali justice forums is evident through a blend of multiple roles they are expected to perform. For instance, a legal official observed that ‘Somali elders continue to play an important role in Somali customary justice forums’ (Legal official 1).

On his part, a paralegal pointed out that:

Elders reach out and bring together disputing groups for dialogue. They can perform a wide range of activities ranging from reaching out to disputing parties, listening to evidence presented where they identify harm and factors to consider in order to assist parties arrive at a final value of compensation. (Paralegal 1)

Accordingly, a crime victim observed that ‘elders, with the help of community members may assess evidence presented to identify wrongs done, assign blame and obligation to correct the wrong thus averting further violence’ (Male crime victim 6).

As observed in the quotations above, Somali elders undertake various roles. One of their roles is to reach out to disputing parties and initiate the process of peaceful resolution of the criminal transgression. This is implied from aspects of ‘dialogue’ and ‘reaching out’ which is suggestive of a peaceful approach in the aftermath of a criminal offence. This approach to crime resolution is applied irrespective of the crime and or whether the offender is perceived guilty. This is attributed to the fact that the cohesiveness of the society and peace concerns comes first. Therefore, any transgression perceived to have some degree of upsetting society is quickly addressed to avoid social harm. The proactivity of the elders charged with the responsibility of customary judiciary issues differs significantly from the process in the state courts. This is

because, in state courts, magistrates and judges come in when the investigations have been done and with clear understanding that the perpetrator has a case to answer.

Secondly, roles of reaching out and evaluating evidence to assist parties identify harm and agree on compensation value border on aspects of empowerment within transformative roles. As argued by Bush and Fogler (2013), empowerment within transformative intervention aim to leverage on disputing parties' own strength and their own capacity to handle life's problems. Thus, assessing evidence to clarify harm and obligations for redress may help parties understand what need to be done and why. In turn, this assists parties arrive at a mutual agreement.

Taking criminal disputes as socially constructed, Goldman, Paddock and Cropanzano (2004) aver that elders may be more concerned with intervening to restore/sustain social order before the individuals transform an injurious experience to a legal claim or even retaliation. According to Goldman et al (2004), the significance of occurrence of a dispute cannot be judged by the event itself rather by how the dispute transforms through time. Accordingly, perceived injurious occurrence may move from naming, to blaming, to claiming before turning into a dispute. Therefore, the proactivity of the elders is a preventive measure to minimize escalation of the perceived injurious events to legal issues or retaliation. This is afforded through cultural and religious factors that emphasize on reconciliation. In the end, social harm is prevented.

Elders are adjudicators where they listen to evidence presented and make a judgment on wrongs committed and corresponding harm and needs as pointed out by respondents. In this process, elders allow parties to present their evidence followed by interrogation to ascertain the veracity of information provided on harm incurred. Accordingly, roles of Somali elders within *maslaha*

justice forums vary. This finding is in line with those of Mohamed and Muriithi (2020), who noted that Somali elders act as arbitrators and often rely on the past knowledge and interaction of disputing parties to interrogate and assess veracity of testimony. They add that close relatives and community members who are privy to the incidence may also be consulted in the process.

This may indicate community participatory role through village elders other than formal prosecution in criminal dispute resolution. According to Tang (2017), community participation has significant positive relationship with conflict management. This is perhaps due to the fact that crime is socially constructed. Therefore, community members, especially the leaders hold the power to shape how an event is perceived and resolved. According to Abel and Sarat (1980), an examination of antecedent stages to a criminal behaviour unearths how influential social groups influence and shape competing claims between victim and offender over responsibility, who is to be blamed and to what extent and what need to be done hence criminal disputes. In the end, involvement of key social groups is important to disputing parties such as elders and clans to which disputants belong to. This has an implication on the justice process.

Similarly, arguing from a social constructivist view, Przemienieck (2017) argues that crime is a social reality. Therefore, the interaction of members of the society holds a sway on how it is resolved. As such, through interactions, the members of the community affected arrive at a consensus and devise ways to sustain what has been agreed. From a psychological perspective, the relatives may offer support and counsel that would act as a buffer against further harm. The inclusion of relatives and community members is strategic in ensuring the ruling arrived at is binding. Further, according to human rights lobbyist, ‘in *saben* stage, elders play an important

role in persuading victims to accept reconciliation over revenge and prosecution through appeal to sharia doctrines and need for peaceful resolution' (Human rights activist 2).

The quotation above shows that elders act as catalyst where they may persuade parties to a compromise and reconciliation over prosecution and revenge. To achieve this, respondents observe that, appeal to *sharia* doctrines may be used to persuade victims' family and clan forego retaliation or criminal prosecution. Accordingly, the above findings agree with those of Ulloso (2016) who observed that a major goal of third-parties or mediations in customary systems of justice is to evoke empathy. Interpretively, elders play a transformative role through appeal for commonalities such as shared identities, and interdependencies. This is done to evoke empathy which is an essential aspect in reconciliation processes thus foregoing the need for retaliation.

In view of the above, this study therefore observes that a salient feature of elders in Somali customary justice forums is a range of strategies applied in *saben* stage. This ranges from transformative and adjudicative aspects such as facilitative and evaluative. The facilitative role is implied from their efforts to reach out to disputing parties as a sign of remorse, cooling down situation and initiation of reconciliation processes. As evaluators, their act as adjudicators where they make decisions on the kind of harm experienced, assign blame, obligations and final compensation amount is implied. Their transformative roles can also be understood from acts of empowering the victims through appeal to various aspects such as shared commonalities in order to arrive at a compromise.

The above findings further imply that the elders' role is evident traditional values of mediation. First, elders as mediators are not neutral as presented in modern styles of mediation values where they are expected to act as facilitators. The elders are supposed to strategically guide the process

towards reconciliation and compensatory remedies through appeal to aspects such as shared religions doctrines. As such, elders constantly guide parties towards social reconciliation, harmony and other community values associated with redress to criminal transgressions. In this way, the victim's choice is limited to aspects of communally accepted values. This is meant to maintain interaction and co-operation in other areas, reduce retaliation violence and to enhance parties opt for reconciliation remedies.

#### **4.3.4 Salient Reconciliatory Strategies Applied in the *Maslaha* Customary Courts**

The Customary justice system has the responsibilities of not only upholding social cohesion, preempting retaliation and peace in the community but also encouraging victims of crime to heal, forgive and address the root cause of the problem. Notably, after persuading crime the victim and their offended group to contain their urge to retaliate or prosecute, the next important step is making amends to correct the situation often through restorative justice strategies. The elders' responsibilities are enormous and their role is crucial in shaping popular concept of justice. Therefore, reflecting on the social realities, a constant issue that informs the strategies is the need to ensure that it not only responds to the harm caused against the community but also address implications of crime satisfactorily. In view of the above, *maslaha* judiciary process applies a blend of strategies loosely described as coercive and non-coercive to mobilize the full power and authority of the system. This seeks to assist disputing parties arrive at a mutually agreeable solution while at the same time promoting reconciliation for a peaceful coexistence.

Accordingly, an emerging salient feature of *maslaha* justice process is the use of both coercive and non-coercive strategies to assist parties settle their grievances after *saben*. In relation to this,

the respondents in the study were asked to explain the nature of reconciliation in *maslaha* justice forums. A local religious leader observed that:

Reconciliation seeks to transform relationships from a state of enmity to that of friendship. This is achieved by perpetrator group taking collective responsibility, providing information on why they did so followed by steps to correct the mistake through compensation and apologies. (Religious leader 1)

In this case, reconciliation process in the second stage after *saben* consist of two major processes namely acknowledging responsibility and making amends. In the first processes of taking responsibility, the perpetrator is provided with the opportunity to accept wrongs and harm resulting from their actions. This is followed by making amends where perpetrator takes the initiative to right his/her wrongs through restorative solutions such as compensation and apology hence reconciliation.

Transformation from state of enmity to that of friendship through acknowledging responsibility are in line with those of Boven (2019). He underscores the concept of restoring victim's sense of community respect. This reduces enmity and negative emotional reaction in the community. Boven notes that in a community, people are held together by respecting each other. Thus, anyone who commits crime violates the principle by treating the victim with less respect hence losing his moral stature. To accept the offender as a full member of community with equal moral stature, Walker (2010) argues that the offender turns to victim and ask him/her to restore moral stature through owning up to wrong, taking blame, being responsible for disrespecting the victim and community. This practice may significantly restore victim's sense of respect and worth

thereby reducing the negative emotions such as anger towards offender. This approach is key in initiating the process of reconciliation and healing.

In addition, a non-coercive strategy used by Somali customary justice process to persuade parties into a settlement and ultimate reconciliation was education. According to a local paralegal, ‘Elders may educate victim and their family on importance of forgiveness and compensation as provided by sharia doctrines’ (Paralegal 1). In addition, a victim of crime pointed out that ‘elders use Somali proverbs to educate parties on the need to give their right to prosecute over that of customary remedies such as compensation and reconciliation’ (Male victim of crime 7).

As observed in the quotations above, education is used to remind parties on the importance of forgiveness and mutual problem sharing. This seeks to make disputing parties soften their retributive positions for restorative remedies. Accordingly, education is linked to preserving society in future generation through provision of knowledge and skills (Kantazara, 2016). Education is used to remind the victims on their obligation to consider forgiveness and compensation in the aftermath a criminal violation as provided by *sharia* doctrines and Somali proverbs. Accordingly, the act of educating parties on their cultural and religious obligations of forgiveness is a leverage to persuade parties into compromising their positions. Further, one of the local religious leaders observed that ‘elders may also remind parties on their common ancestry and other forms of shared identity in order to soften their position’ (Religious leader 1).

Based on the above, education is used to sensitize parties on various commonalities thus softening positions. The rationale behind this could be understood from the views of Ackerman (2002) who observed that the efforts of individuals to resolve their disputes are compatible with

the desire to reinforce the societal fabric. As such, sensitization on commonalities is a reminder to the disputants about reputational bonds forged for the wellbeing of the group that could be threatened when animosity is maintained. Thus, the need for rebuilding the social capital, threatened by disputes to maintain community bonds. Similarly, Galtung (2010) argued that a disagreement can largely depend on the attitudes of indifference parties have towards one another. Thus, educating parties on overarching commonalities such as those based on shared ancestry or religious identity is of importance for mitigating any forms of negative attitude and resistance.

The above findings are in line with the views of McNeal and Brown (2015) who observed that commonality among adversaries such as members of the same ancestry, political, economic, power, resources and cultural group increases the likelihood of re-establishing relationship among parties by minimizing areas of contention. In such a situation, they argue that appeal for commonalities in form of shared culture and religion is of importance for counteracting feelings of anomie, alienation, isolation and fear that may be motivating victim resistance to a compromise. Therefore, education in Somali customary forums is strategically applied to unconsciously create new narratives, knowledge and attitudes that aim to increase homogeneity among adversaries thus minimizing chances and areas for resistance. A Crime victim also noted that 'elders educate parties on past and future interdependencies in order to minimize resistance for a compromise' (Female crime victim 3).

In this regard, education is used to persuade parties to soften their stand for the sake of on going or future interdependencies between the victim's and offender's clans. Habermas (2005) observes that a mediator may promote certain narratives through various communication

techniques that seek to consciously and unconsciously increase the perceived value of each party. In this case, education reminds victims and their groups on the importance of forgiveness and compensation in order to sustain multiplex interdependent relationships such as resource sharing and trade.

In addition, the process of settlement and reconciliation in the second stage after *saben* may also be arrived at through coercive interventions such as threats of retaliation and social harmony. For instance, a local women leader observed that ‘goals of reconciliation, retaliation and social harmony may be abused and manipulated to coerce women and the poor into a compromise and unfavorable sharing formula of compensation’ (Women leader 1). Accordingly, a legal official also noted that ‘elders or even strong parties may put more overemphasis on reconciliation as the overall goal coercing women and those not well connected and lack influence into accepting unfair reconciliation remedies and settlements’ (Legal official 2).

The quotations above demonstrate that the overarching goals of reconciliation and mitigation against retaliation may be used to coerce parties into a compromise. Similarly, along the way, family and clansmen may be used to pressure victims into accepting compromise and unfavorable sharing formula on compensation. This has the implication that at times, reconciliation within Somali customary justice forums is not always guided by appeal for commonalities and shared identities.

The commonalities may include culture, kinship ties and religion but power difference based on social identities and threats of clan retaliation. These important principles of sustaining peace and order may be used to deny the weak fair process. In the end, although social harmony and order

is a genuine concern for majority of Somalis, there is a possibility of using them for personal gains. In this case, there is the fear of local justice practitioners and well-connected parties from using notions of social harm, retaliation and reconciliation to pursue personal gains. In this regard, instrumentalization of *maslaha* systems of justice for personal gains is not a rare occurrence.

In line with this view, Ackerman (2002) observes that popularized effects of criminal disputes on the well-being of the community gives local leaders and public at large a legitimate interest in the regulation of disputing conduct. Therefore, the emphasis on conciliation is an effort of the elders to use their position to ensure that the threats to social bonds are addressed. Citing Gledone, Ackerman (2002) observes that there is a legitimate interest for mobilizing and encouraging people to recognize the interconnected factors that sustain their wellbeing in the society. However, this study cautions on the need to take cognizant that the weak parties may face challenges. There is therefore the need to balance between community interests and individual autonomy.

It can also be noted that weak parties such as women and those that lack influence and social connections are most affected. This is because they may lack social power and resources to resist if coercive strategies are used. This implies that disputant social identity within customary justice forums is an indicator a form of influence manifested through gender, economic status and social influence which affects disputant's bargaining power. These identities conversely have a significant impact on strategies used by customary elders and chances of resolving them fairly.

The above findings agree with those of Chopra (2019) who observed that coercion involves some element of power which may consist of ability to withhold a reward and social influence. In this situation, power differences between parties and elders is used to push parties to a compromise than allow them to voluntarily arrive at a compromise based on education and empowerment. Consequently, vulnerability to power abuse may discourage weak parties from utilizing *maslaha* forums hence the need for standards that can ensure weak parties' interests are considered. For instance, a crime officer observed that:

A common feature of Somali disputing process involves bargaining and negotiation for compensation with the assistance of kinship groups such as '*diya*'. In these forums, appeal for brotherliness, relationship and closeness between disputants and past justice interactions affect the final amount to be paid. (Crime officer 1)

Additionally, a village elder observed that:

In case of murder, one million translated from compensation of 100 camels, is to be paid as a form of compensation. However, the amount can be reduced based on how the crime occurred, closeness of the parties' involved and past justice experiences. In some cases, victims may fail to get any compensation based on their bargaining power. (Village elder 6)

As observed from the quotations above, the process of reconciliation within Somali customary justice forums consists of negotiation and bargaining from the commonly accepted amount of fine. This implies that weak parties may be coerced to accept the will of the stronger group due to the flexibility in disputing process. Ideally, as discussed in previous sections, kinsmen and extended family members are involved to ensure that their members receive fair trial. However, this is at times not forthcoming given that these functionaries may fail to stand by their members

to ensure that they receive full compensation and their needs addressed. Thus, the outcomes may fail to be representative of needs and wishes of the affected parties. Therefore, there is need for state intervention to shield weak parties from flexible manipulative justice administration processes. This finding agrees with those of Schlee (2013) who observed that majority of Muslim groups share certain core features where the final compensation amount to be paid is an outcome of other factors such as clan position and gender of the disputants hence the need for standardization.

These findings are also corroborated by Ndulo's (2011) argument that, justice administration in North Eastern region of Kenya is more of a heated negotiation process between disputants' groups with appeal for 'brotherliness' and 'social harmony'. This is done in order to minimize final compensation amount and suppress emerging victim's needs. This study therefore observes that Somali justice forums are open to manipulation especially among powerless parties. This is due to their reference to *sharia* remedies, appeal to customary mitigation strategies such as brotherliness, interdependence and shared commonalities. Notably, while education and persuasion nature of reconciliations appear to be the positive aspect in the Somali justice system, the coercive manipulative aspects present the darker side of the process. Blinded by the politics of customary justice values, the mediators may use coercive approaches viewed by the victims as punitive. This aspect of Somali justice system thus cast doubt on the quality of the outcome of the *maslaha* justice system in realizing fineness in the process of justice administration.

Conversely, from the respondent's views, education provided the best restorative justice outcome. For instance, a paralegal observed that 'Satisfactory outcomes are those that are voluntary' (Paralegal 1). On the same, a victim of crime pointed out that 'I find choices that I

make on my own and in agreement with the offender after being educated and sensitized on importance of forgiveness to be long-lasting and are easily complied with' (Female crime victim 20). Lastly, a human right also activist observed that 'most times, what is agreed among affected parties works out better than when decisions and remedies that do not reflect their will are imposed' (Human rights activists 1).

The quotations above demonstrate that fair and satisfactory reconciliation processes and outcomes are those that provide victim and offender with an opportunity to take a decision as implied from aspects of voluntarism. Therefore, as discussed earlier, education strategies that appeal to *sharia* doctrines and aspects of brotherliness are perceived to be fair if parties are advised and then allowed to make a choice. These observations on the quality of customary reconciliation processes agree with the findings of Kariuki & Ngetich (2019) who observed that such less intrusive strategies are satisfactory when they empower parties to make their own decision for a mutual problem solving. Kariuki & Ngetich adds that empowerment in the context of Somali customary justice forums can be achieved by appealing to shared commonalities and interdependencies but allow parties to voluntarily compromise their positions.

These findings agree with those of Harper (2016) who observes that unlike the use of coercion, education strategies empower parties. This allows them the opportunity to voluntarily dig deeper and identify cause, harm and needs and reject power coercion thus more enduring. Therefore, an ideal intervention is that which involves the use of education and advising in order to empower parties to voluntarily arrive at mutual satisfactory solution.

In this case, weak disputing parties were clear on manipulative strategies applied. This ensured that their needs and wishes are factored in the final settlement and reconciliation plans. On this, one crime victim pointed out that:

We have our own ways of protecting our interests and demands within *maslaha* forums. We may threaten or actually present the matter to a court of law or to local police when we feel that the outcomes provided will not be fair. Threat of arrest and imprisonment ensures that they don't intimidate and force us to take less or no compensations. (Female crime victim 4)

And a local women representative also observed that 'at times when police and chief are reluctant to assist, some may give false accusations such as sexual assault to complicate the matter leaving perpetrators with little room for abusive negotiations' (Women representative 2).

The quotations above underscore the fact that vulnerable groups such as women and economically disadvantaged disputants may rely on state authorities to ensure that their interests within customary forums are adequately addressed. For example, in situations where weak parties perceive that dispute will be managed according to relative power rather than needs, harm and voluntary compromise, victims may mobilize strong networks that may coerce customary forums to re-think on compromise strategies to be applied. Thus, the quotes above point out that state justice authorities may be used as extra-legal institutions and weapons marshalled by weak parties. This works to enhance and transform their power and enhance their bargaining position within Somali *maslaha* forums that may prescribe discriminatory practices deeply embedded in the community's cultures.

The above quotes also point out that weak parties especially women may also give false accusations that attract severe sentence. This works as a strategy of increasing their bargaining power when they foresee the use discriminatory norms and practices. Notably, the threat of severe sanctions associated with false accusation especially in sexual offences can be used by the victim to intimidate perpetrators into complying with certain demands. Equally, sexual offences often attract public attention from human rights bodies, an aspect that may be weaponized by female victims in their quest for justice. Consequently, this may significantly increase bargaining position of the weak parties within hybrid process of *maslaha*.

On this, Luke (2005) observes that everyone has power and that those perceived to be weak in the society have different ways of expressing their power and therefore being equally manipulative. For instance, as depicted in the quote above, some may give false accusations in sexual assault which may enable them to achieve their desired outcome. In general, power relations are ubiquitous to human interaction and as Luke (2005) observed, it can take multiple dimensions based on available resources and avenues. Thus, power issues in the *maslaha* forums may create opportunities for abuse and illegitimate outcome that could hurt rather than heal the society.

These findings also re-affirm the views of Hillyard et al., (2008) that lack of standards in approaching crime as a social harm is fraught with potential dangers that compromise justice needs of the victims. This re-emphasizes the need for regulative safeguards. More importantly, the above findings paint the complexity of popular concept of justice in terms of what justice resources assume as legitimacy. Therefore, power differences, injustices and strong disapproval

by government and non-governmental agencies on sexual-related offences can be leveraged by the vulnerable in their quest for justice within *maslaha* forums.

#### **4.3.5 Collective Responsibility**

Customary justice system is prized due to their flexible approaches towards sustaining peace and meeting the needs of the affected parties. This minimizes chances of group retaliation. To achieve these goals, the procedures therein compared to formal litigation are stripped off technicalities that may derail them from achieving their intended goal of sustaining social harmony. Therefore, given the importance of expeditious justice process in reconciliation and meeting the emerging needs and harm, collective responsibility is used to navigate through common set-backs that may be encountered during the reconciliation process.

Consequently, another salient feature of *maslaha* justice forums was the overarching importance of collective responsibility. As observed by a local clan leader:

Collective responsibility is an important element in achieving reconciliation. For example, where individual acceptance of liability is not forthcoming, family of clan may assume collective responsibility of their own for the sake of peace and reconciliation.

(Clan leader 1)

A village elder from a focused group discussion also observed that ‘when the perpetrator is not able to raise *saben* or final agreed compensation amount, the extended family, the sub-clan or *diya* blood group may assume collective responsibility and come in to assist’ (Village elder 2).

In addition, a senior police officer narrated that:

Recently, there were wrangles between Somali and non-Somali over market spaces. These wrangles escalated into violence leading to the death of a Somali trader by a non-Somali perpetrator who could not be traced immediately for arrest since he crossed over to Republic of Somali. Somali business persons became very agitated and intelligence reports indicated that they were mobilizing themselves for retaliation. I requested the intervention of local Sultan to cool down the animosity. Non-Somalis were later asked to select their representatives who assumed collective responsibility for offence committed by their own. Reconciliation process was initiated after *saben* of 230,000 Kenyan shillings was collectively paid hence averting further bloodshed. (Senior police officer 2)

As observed in the above quotes, aspects of collective responsibility are an essential enabler for reconciliation process in instances where the perpetrator cannot be traced for prosecution. In such situations, perpetrators kinsmen or partners can intervene and assume collective responsibility and may involve contributing *saben* and compensation on behalf of their own for sake of their safety and peace. The above findings agree with those of Gardner and El-Bushra (2017) who observed that in instances where the individual perpetrator is unable to raise enough compensation to make amend, his/her kinsmen may step in and assist to contribute *saben* or compensation money thus assuming some aspect of collective responsibility. This is well captured by a legal official who pointed out that:

Aspects of collective responsibility and compensation remedies is ideal in situations where identification of perpetrators is not easy especially in crimes associated with inter-communal conflicts. In some situations, it is not easy to categorize who is the victim or perpetrator due to cycle of violence and retaliations. (Legal official 2)

As observed in the above quotes, notions of justice applied by elders such as collective responsibility and compensatory remedies are contingent on dilemmas experienced in criminal administration process in Garissa County. One such dilemma as highlighted from the legal official's quote is the inability to prosecute crimes associated with inter-communal conflicts. In such transgressions, communities and clansmen are often not willing to produce perpetrators who directly committed offence. Identification of perpetrators may also be problematic due to the nature of groups' strict oaths and obligations not to betray their own who was in the 'line of duty' of protecting their interest. In such circumstances where the perpetrator is not known and not likely to be identified, collective justice approaches by offending clan members are often the most likely workable option thus reasserting elders' authority.

Another prosecutorial challenge and the importance of collective responsibility as observed from the quotes is the inability to distinguish victim or perpetrators as required by legal codes in most conflict related crimes. In most cases, worrying communities or clans are caught up in a vicious cycle of victim-perpetrator violence. That is, both parties are involved in retaliatory violence blurring the lines between victim and perpetrator. Thus, based on the above observations, *maslaha* justice practices such as collective responsibility and reconciliation are more practical than individual prosecution thus making elders more relevant in modern day justice arena. Notably, in collective justice, the whole clan or community assumes responsibility to reconcile and compensate each other for damages caused rather than looking for perpetrators in order to establish guilt which may be an elusive endeavor.

Another prosecutorial challenge and the need for collective responsibility is the immediate burial of victims of homicide in Somali community. As observed by a crime officer:

Even in 'normal' crimes between individuals, the practice of immediate burial of victims of homicides makes the process complicated in our courts. Thus, we often encourage collective responsibility to promote some sense of justice rather than none. (Crime officer 1)

As observed in the quotes, immediate burying of victims of homicide in interpersonal crimes presents prosecutorial challenges that often lead to matters being referred to customary actors. For example, a deceased body is of forensic importance in answering crucial investigative and prosecutorial questions such as how the murder happened, where, location and how they link to the suspect. Therefore, prosecuting homicide suspects without the deceased's body may significantly weaken or complicate the case.

This study therefore observes that customary ways of responding to wrongdoing such as collective responsibility have not decayed in light of presence of modern justice institutions, social dislocation and urbanization. Their relevance in modern day society can be re-ignited by prosecutorial constraints witnessed in crimes associated with conflicts and cultural practices of burying the dead. This has the implication that state actors expected to uphold formal practices such individual criminal responsibility may revert to informal collective responsibility as a pragmatic option. In view of the above, from the eyes of local actors, dilemmas posed by crimes associated with conflicts and cultural burial practice seems to make certain *maslaha* justice practices indispensable.

#### 4.3.6 Leveraging on Formal Justice Institutions and Actors

Initiation, compliance and enforcement of decisions within customary justice forums usually rely on social pressure. Most often, Harper (2014) observes that such pressure is linked to normative commitment to customary rules, authorities and shame associated with rejecting them. This has the implication that deviant and powerful members of the community either economically or politically may be less responsive to such pressure or may further ignore customary decision with impunity. Where socially perceived weak parties are unable to mobilize popularized culture of retaliation, formal systems of justice may come in handy.

In view of the above, where affected parties fail to gather support from kinship, another emerging salient feature of *maslaha* justice forums was leveraging on formal institutions and state actors. For instance, a crime officer noted that ‘most *maslaha* processes are initiated by threats for arrest and prosecution from the victims. Victims will rush to us and make a report. Based on the preliminary investigations, we may make an arrest’ (Crime officer 2). Accordingly, a village elder observed that ‘word on impending arrest is used to push offender family and clan to reach out to the victim’s family or clan for negotiations. Witnesses may be intimidated to weaken the case thus forcing victims to revert back to *maslaha* forums’ (Village elder 3).

As observed in the quotes above, majority of Somali customary justice forums seem to lack the capacity to initiate reconciliation process by themselves at times. This is an aspect that push them to seek assistance from local police. Accordingly, where an offending party is reluctant to initiate

reconciliation process through *saben*, victims may use state authorities' arrest powers and investigative capacity to initiate and even sustain the process hence aspects of hybridity.

This is implied from respondent's aspects of a complainant reporting and presenting the matter to the police. When an arrest is made, victims may withdraw the case for out of court settlement. This is an aspect that point out to hybridity in terms of relying on state authorities to initiate customary processes. Thus, threats of arrest can be seen to serve as a tool for pushing reluctant offending parties into dialogue. Consequently, it can also be seen that Somali customary justice forums may be limited in initiating forums for reconciliation processes in case of reluctance by the offended parties. This shortcoming seems to be minimized by reporting the offence to the police and the threat or actual arrest used by the offended party as a leverage for the initiation of *maslaha* reconciliation process. This could be attributed to lack of standardized traditional framework and adequate enforcement mechanisms that could be applied by all people coupled with the fact that indigenous communities exist in dual worlds, one of state judicial system and the customary system, both of which may be relevant for their justice

This views resonates with Karp (1999) who argued that non-state community justice lacks specific framework of accountability to cultural justice standards a situation that may lead to reliance and leveraging with established Government institutions and process. In addition, Atim and Proctor (2013) observe that the traditional justice system often lacks codified traditional justice system as most of them are oral thus based on memory and practice. Accordingly, without proper framework and without a codified formalized centralized system, the victims' may not have a clear path of reporting thus leveraging on established processes such as those of the police.

As observed, initiation of *maslaha* seems to rely on good will and moral persuasion of the offender to voluntarily reach out to the victim for redress. However, where such voluntary action is not forthcoming, police and their coercive powers play a significant role in initiating and sustaining customary restorative processes. On this, respondents were further probed on how a matter reported to the police is diverted back to the community for redress through *maslaha* forums. Muigua (2019) observes that referrals of criminal cases for out of court of reconciliation lies within the discretion of the courts and in consultation with the prosecution and after assessing their suitability. This means that there may be scenarios where police may fail to allow the matter back to *maslaha* elders for reconciliation. Thus, respondents were asked to explain what happens in instances where the police fail to release the offender and the matter for out of court settlement. On this, a senior police officer also noted that:

After effecting an arrest, the same complainant/victim may come back seeking to withdraw the matter for dialogue and settlement in *maslaha* forums. At times, clan and community may intimidate witnesses to recant their statement and influence them to stop cooperating with us should we hesitate to release the suspect for reconciliation back in the community. They are well informed that without a witness, the case does not stand a chance. (Senior police officer 1)

As observed in the quote above, witness intimidation may be used as a strategy to coerce reluctant victims consent to *maslaha* forums with the aim of decreasing prospects of a successful prosecution. Aspects of intimidation from clan and community may imply that despite popular

support for restorative remedies within Somali community based on their cultural practices, such motivations may not always be the same among parties of crime.

For instance, victims may prefer prosecution while offenders may push for reconciliation over prosecution to reciprocate past restorative remedies extended to victim offending kinsmen. Therefore, witness intimidation is popular in cases where there is disagreement among the victim, his/her extended family, clan and the Government justice institutions. Hence, one way the community, clans and extended family may halt police prosecution is to pressure witnesses not to present their testimony or recant it.

In the absence of a complainant and witness greatly limits prosecution of the matter in a court of law. This has the implication that reconciliation and use of *maslaha* forums may not always be homogeneously valued within the Somali community. Although it may be embraced at community and individual level, there could be mixed feelings. This finding resonates with those of Gathaara, Sirera and Wasanga (2019) who observed that in Africa, collective moral standards were inculcated in individual's right from childhood and therefore community loyalty supersedes individual interests. This makes individuals yield to the community demands even if it is to their disadvantage. More significantly, the preference of traditional justice systems over formal courts may be attributed to the former focusing on conciliation and working to restore social cohesion, as opposed to the latter which may be viewed as "remote, alien and intimidating whose judgment may not reflect the interest of the society.

On the same note, witness intimidation is a strategy of achieving other personal interests other than those associated with addressing harm and sustaining social harmony. According to Chabal

and Daloz (1999), subverting formal institutions can be a strategic goal that seek to make them remain vacuous and ineffectual because their usefulness is greatest when least formalized. In the case of *maslaha*, weakening the involvement of formal justice actors can partly be seen as a strategy of popularizing the effectiveness of customary justice actors and *maslaha* systems over formal ones for both social needs and personal gains.

This dovetails with previous observations that such moves can be motivated by incentives likely to accrue when local elders are perceived to be effective and popular than formal actors in criminal justice administration through *maslaha*. In spite of this, it has been demonstrated in the preceding sections that interpersonal criminal transgression can spiral out of control leading to violence. Thus, it is crucial not to forget the role of elders, local elites and *maslaha* systems of justice in neutralizing animosity.

Aspects of hybridity also emerged from the role of investigative authorities to initiate *maslaha* process in situations where victims of crimes and the offended parties fail to identify perpetrators in the aftermath of a criminal incident. For example, a crime officer observed that:

In situations where the suspect cannot be identified such as hit and run accidents, offended parties may report the matter to the police for further investigation and identification of suspects through their modern investigative systems. Once the perpetrator is identified, parties may either seek withdrawal of the matter for reconciliation or proceed with prosecution. (Crime officer 6)

As observed in the quotes above, in situations where victims and their family or clan are unable to identify suspects, such matters are presented to state authorities for investigations. In any

justice forums, identification of perpetrator and determination of the level of responsibility is an essential component for the initiation of both criminal prosecution and customary mediations. Where this is not forthcoming, access to modern investigative tools is essential in identifying suspects for commencement of justice processes hence aspects of hybridity. For instance, state investigative reports can be used to identify levels of responsibilities and who is at fault between conflicting parties in the aftermath of a criminal incident. This greatly minimizes disputes on level of responsibility.

Notably, customary mediators are often elders who possess wisdom on community ways of justice administration thus lacking modern investigative skills. This has the implication that reliance on local community leaders with limited modern investigative techniques. In addition, limited resources within Somali customary justice forums may affect their effectiveness in cases where they face complex investigative questions coupled with inaccessibility of government investigative authorities. As a result, they may rely on government justice systems to compensate for their investigative shortcomings hence aspects of hybridity.

In view of the above, it seems that Somali customary justice forum acknowledges the value of modern approaches in investigation and the validity of the evidence. This is especially so in addressing modern crimes and indication that they recognize formal state powers and authorities. This observation is in line with the views of Atim and Proctor (2013) who argued that traditional justice leaders may lack competency, skills, capacity and resources to answer key investigative questions that are necessary for reconciliation process. Atim and Proctor note that modern crimes may include actions that are beyond the scope of cultural norms thus requiring the use of legal codes to assign blame and extent of responsibility. Indeed, acknowledgement of responsibility is

a critical pre-requisite for reconciliation. Consequently, reliance of modern justice actors and legal codes to answer complex investigative puzzles such as identification of perpetrators in the aftermath of criminal incidents that may require some kind of specialization and modern investigative technology. Once investigations have identified the suspect, fault and arrests made, parties may pick up the matter and even request for negotiations hence the importance of state actors in customary justice processes.

This study can therefore make two major observations on hybrid practice common in the initiation of *maslaha* processes. First, reliance of state authorities such as the police to apportion blame based on legal codes and identification of suspects is crucial for initiation of *maslaha* process in the aftermath of criminal incidents. Second, threat or actual arrest of suspect is essential for initiation of the process in cases where the victim prefer reconciliation and in situations where the offender is less cooperative. Therefore, access to state investigative instruments and authorities' coercive power may significantly affect effectiveness of Somali justice processes.

In view of this, Somali *maslaha* processes may not be presented as purely informal in terms of actors. Arguably, some situations as discussed above, may require state agents to intervene to jumpstart the customary judicial process. Similarly, presenting Somali *maslaha* mediation processes as purely restorative may not be accurate as discussed by restorative justice theorists such as Zehr (2016). This is so because the Somali *maslaha* process may rely on aspects of threat or actual prosecution and arrest which are retributive in nature. Coercion and intimidation of the victims as well as threats to the perpetrator can also not be perceived in the concept of restorative justice which aspires for voluntary reflection and action.

Third, as observed in the above quotes, *maslaha* justice institutions can be presented as ‘living’ rather than static customs due to their adaption. Notably, Daly (2019) observes that cultural justice institutions have often been depicted as pre-colonial practices that are static and not adapting to emerging challenges. In addition, such terms dichotomize Somali justice institutions as ‘formal and informal’ thus missing out on important interactions where they are complemented by state officers such as the police. The findings of this study affirms that Somali justice norms and institutions are evolving and adapting to emerging dilemmas thus influencing their legitimacy. For example, reliance on formal authorities is crucial in increasing their capacity to handle modern crimes that require some aspect of technology and special skills.

Equally, formal justice actors can be seen to increase the capacity of Somali justice norms whose strength may diminish in light of social dislocation and urbanization thus enhancing their legitimacy in modern Somali community. Reliance on state investigative reports to identify unknown suspects and who is at fault in situations where there is contention is an aspect of change and adaptability. In addition, it will also be recalled that *Sharia* doctrines are essential in influencing culturally restorative responses and remedies to aspects of guilt and harm within Somali community. Thus, careful integration of elements of both Somali customary and Government justice forums is an essential aspect.

In view of the above, *maslaha* justice forum as described appears to be a hybrid system with state justice actors playing a key role in providing a balanced process that addresses emerging shortcomings in locally accepted ways hence legitimizing the process. This is in line with the views of Crook Asante and Brobbey (2011) who argued that an ideal hybrid justice system is that

which carefully integrates formal and informal process based on locally accepted ways. This study therefore cautions on dichotomous views such as restorative and retributive, formal and informal actors in customary practices and instead argues for hybridity in which locally accepted concepts blend with modern approaches in to overcome some judicial challenges of traditional realities. Notably, what constitute popular concept of justice is best understood from local experiences and justice resources that often assume legitimacy in light of contextual realities rather than pre-determined dichotomies of restorative and retributive.

This in contradiction with the views of Hebert (2015) who argued for normative approach to which justice actors, processes and institution must comply with certain prescribed universal values and beliefs in order to be considered legitimate. Reflecting on the views of Roos & Lidstrom (2014) who treats legitimacy or the 'rightness' of justice resources as being determined by end user experiences, realities and aspirations in a given society, the *maslaha* justice forums appear to be responsive to 'collective' end user's needs, aspirations and beliefs thus providing an incentive for their use and prioritization.

In view of the above, an understanding of the salient features of Somali customary justice practices can also be seen to clarify the otherwise complex concept of justice among Somali in Garissa. Notably, the above findings point out that relevance of justice administration norms (formal and informal) are not only informed by pre-colonial cultural practices but also influenced other contextual lived constraints of the Somali community such as dilemmas in prosecuting crimes through state justice institutions, politicization and instrumentalization of local culture of retaliation and the need to reconcile parties and address their needs and harm. Thus, what constitute popular concept of justice is more of a hybrid of formal and informal institutions,

actors and remedies based on encountered complexities, interests and constraints rather than dichotomized formal/informal or restorative/retributive characterization.

In conclusion, the first objective sought to find out the salient features of Somali *maslaha* justice forums. Based on evidence from respondents, it can be concluded that two major salient features include prioritization of social harm and hybrid justice processes such as leveraging on state justice institution and actors, coercive and non-coercive intervention strategies and use of elders and local state officers such as the police. More importantly, whether responsiveness to these complex salient features influence the uptake of state regulative safeguards was an aspect the third objective sought to find out. Other than salient feature, evidence amassed by this study also pointed out that *maslaha* justice practices are vulnerable to abuse and manipulation. Consequently, the next section sought to examine values prioritized and implementation strategies used.

#### 4.4 Models Prioritized by Judicial Regulative Models

The second objective was on models prioritized by state regulative safeguards for Somali customary adjudication systems in Garissa County. Garissa is characterized by pluralism a situation where non-state cultural justice systems namely *maslaha* with unique norms and practices coexist alongside state justice forums. It was also shown that *maslaha* justice system is prone to manipulation which is likely to influence justice negatively. Therefore, the goal of this objective was to find out values prioritized by government in its quest to uphold fairness within alternative justice institutions that handle criminal matters.

Secondly, citing Ngugi et al., (2020, pp. 21-23) in Alternative Justice Systems Baseline Policy Task Force Report of 2020, the promulgation of the 2010 Constitution has set standards required to provide guidance on the use of traditional justice mechanisms such as *maslaha*. Accordingly, Article 159(3) of the Constitution requires that the use of ADRs should not be repugnant to *justice* and *morality* or inconsistent with any *written law*. On the other hand, Ngugi et al., (2020) in their Task force report on *Alternative Justice Systems Framework Policy, 2020* commissioned by Kenyan Judiciary, it was observed that the clause does not further define or operationalize justice and morality. This implies that court discretion is applied. This being the case, an emerging question that further necessitated this objective was which values and models in relation to justice and morality are prioritized to guide the use of *maslaha* systems of justice administration? To this end, the results yielded different values that were seen to be crucial for justice and fairness, their corresponding implementation strategies and extent of compliance as presented and discussed below.

#### 4.4.1 Empowerment of both victims and perpetrators

The first question sought to establish overarching goal of judicial regulative safeguards. To establish the overarching values of Judicial Regulative Safeguards on Alternative justice forums, respondents were asked to explain the overarching goal of judicial safeguards within alternative justice forums such as Somali *maslaha*. This was important in understanding how the state understand weaknesses of ADRs and their overall approach in correcting such shortcomings. One aspect observed was the issue associated with empowerment. Accordingly, a community paralegal observed that ‘safeguards seek to ensure that victims and offenders are empowered to use alternative justice forums. For example, safeguards aim to ensure that disputants have the ability to benefit from *maslaha* forums’ (Paralegal 1) While on his part, a local human rights activists observed that ‘the goal is to ensure that victims are enabled to fairly use various procedures and remedies as practiced in consensual forums such as those of *maslaha* forums’ (Human right activist 2).

From the information above, it is evident that a major goal of government regulative safeguards within customary justice forums such as *maslaha* processes is to empower disputants to use various process and remedies as implied from aspects of ‘ability’ and ‘enabling.’ Notably, empowerment is an essential aspect in alternative justice processes such as those of *maslaha* forums that are consensual in nature. In such consensual justice practices, outcomes are arrived based on some kind of compromise or agreement thus the need to ensure that the process and remedies reflect the needs and wishes of victim and offender.

The findings are in line with those of Kariuki (2015) who observed that satisfaction and fairness is often associated with the extent to which primary parties are capacitated and enabled to use various norms, procedures and remedies to arrive at a mutual consensus. Therefore, aspects of increasing ability and enabling as observed from the quotes can be seen to be closely related to the goal of increasing empowering disputants thus increasing their capacity to use various informal justice processes such as those of *maslaha* forums. A senior Government administrator also observed that ‘judicial safeguards also aim to increase ability of disputants stand against abuse and discriminations in alternative justice forums such as *maslaha* forums’ (Senior Government administrator 2).

Therefore, based on the above, safeguards increase the ability of disputants to uphold their rights and obtain outcomes that are fair and equitable within *maslaha* forums. Generally, *maslaha* justice forums are very arbitral as discussed in objective one. That is, despite them having commonly accepted practices, decision making at various stages is consensual. This is based on what the adjudicator figures out along the way. Such unpredictable and non-predefined processes make alternative dispute resolution forums vulnerable to abuse due to power differences.

For example, Ajayi and Buhari (2014) in their article ‘Methods of conflict resolution in African traditional society’ observe that disputant relationship and position within kinship systems in Somali community may greatly affect access to *Maslaha* forums. In other situations, Menkhaus, (2015) notes that goals for peace within *Maslaha* forums may be variedly used, abused and manipulated. In this case, the disputants are denied an opportunity to assess suitability of remedies available within *Maslaha* justice forums. As such, there is need to empower disputing parties. This in turn increases their ability to withstand any form of abuses.

#### 4.4.2 Active and Direct Participation

Generally, Somali customary justice forums practice collective responsibility where direct victims and offenders are represented by their kinsmen. In addition, payment of compensation and responsibility may be collective in nature. That is group members may step in for their own. However, despite the importance and benefits of collective responsibility, outcomes of such processes may fail to reflect the needs of disputing parties hence the need for active participation and involvement.

Therefore, given the collective nature of customary justice processes, there is need to empower disputing parties in order to ensure that their needs, wants and wishes are put into consideration. Ubink (2019) points out that re-distribution of power from mediators and kinsmen can play a very important role in ensuring that marginalized groups get a fair treatment in alternative justice forums. In addition, the move to redistribute power increases disputant's ability to challenge forms of abuses within *maslaha* forums.

Therefore, an emerging value closely linked with the overarching goal of empowerment and the need to re-distribute power is victim and offender active participation. In doing this, there is control of the justice processes and administration. A legal official observed that:

Given the consensual nature of justice administration process in alternative justice forums, the state is expected to ensure that victim and offender are actively involved rather than being represented and that the final solution reflect the needs of individual victim and offender (legal official 3).

The quotation above underscores the place of judicial safeguards which seek to ensure active participation and involvement of disputing parties in ADRs. This is because the parties are

expected to be actively involved in shaping the process and outcomes of the process. This implies that victim and suspected perpetrator become the primary parties and central to the process. Active participation and involvement reflect modern ideal of ADR. The involvement of disputing parties ensures that individual needs and demands are prioritized before those of group. This move seems to have implications on the collective justice aspect within Somali justice forum where clan and extended family represent victims and offenders. This finding is in line with those of Hollander-Blumoff and Tyler (2011) who observed that under active participation, adjudicative authority is re-distributed back to disputing parties thus minimizing chances that their needs and wants are subverted by functionaries in representing them during justice administration process.

Accordingly, Huyse and Salter (2008) point out that victims of crime may have varied expectations on what needs to be done for them to experience meaningful reconciliation. They may range from emotional healing through apologies, the need to re-assert their self-worth or status in the aftermath of criminal transgressions. Others may seek material reparations or compensation in addition to apologies thus the need to secure their active participation and involvement. In some situations, victim and perpetrator can be from different status and have varied access to different resources that may significantly lead to power differentials as argued by Harper (2011). For example, in Somali justice forums, weak parties may be coerced to accept and comply with the will of the powerful group or party. Thus, active participation and involvement ensures that weak disputing parties' interest and needs are put into consideration. This is realized by limiting collective aspects of justice within Somali justice forums. Therefore, balance of power between victim and offender and their groups is paramount.

The above findings agree with those of Shapira (2012) who observed that informal justice resources within alternative forums are more likely to be fair when the choice is left in the hands of victims rather than the community. Similarly, Harper (2014) notes that allowing victims and perpetrators to actively and directly participate in negotiation and communication process may significantly limit the undue influence of communitarian values that are coercive, discriminatory and violate standards of equity and fairness. Thus, in collective justice practices where primary parties are represented by kinsmen, there is the risk of missing out wishes of the affected hence not achieving full reconciliation. In this case, there is need for active participation of the affected parties aimed at realizing fairness.

On this, respondents were asked to explain how active participation and involvement in alternative justice forums such as *maslaha* is operationalized. A legal official observed that ‘when criminal matters are referred for compensation, the process transform from criminal to civil process where the aim is to address damages associated with criminal transgression. Thus, mediation rules on civil cases are commonly applied’ (Legal official 1).

Another legal official observed that:

Mediation rules of 2015 provide guidance on disputant process control. For example, in the preliminary section, mediation is conceptualized as a process where a mediator facilitates resolution of a dispute between two or more parties but does not include attempts to make a determination. (Legal official 2)

Accordingly, a human rights activist also observed that ‘as a facilitator, mediators may ask question to assist parties identify harm and suitable remedies in order to arrive at reconciliation.

The aim is to allow disputants to identify harm, needs and appropriate remedies' (Human rights activist 2).

Based on the quotations above, one way of upholding active involvement and participation is by limiting mediators to facilitative roles. Respondent's aspects of guidance and facilitator implies that mediators in ADR are not allowed to perform arbitral duties. Rather, they are expected to offer guidance on applicable norms and possible areas of compromise then allow parties to mutually agree by themselves on the most suitable option and areas for compromise.

This move as argued by Anam (2020) may limit chances of abuses in the sense that by performing a more facilitative role, it minimizes the possibility of disputants' perceiving mediators' suggestion as biased or partial. In addition, Muigua (2018) notes that decisions in alternative consensual justice forums are more likely to be satisfactory when they are mutually arrived at by parties themselves voluntarily. Thus, the move to uphold disputant's interests and needs by limiting the role of third parties may result to increased satisfaction.

Therefore, unlike arbitrators or evaluators where mediators in customary forums make their own assessment, make judgment and direct on key issues that warrant attention in order to reconcile parties, as facilitators, they are limited to asking questions and allow parties to give their own position and possible solution. This ensures that parties have the ultimate decision authority. Thus, an aspect of fairness within ADR involves mediators being restrained from giving verdicts or express opinions hence upholding disputant process control. This is an aspect that reflect modern ideals.

The above findings are in line with those of Bercovitch (2019) who notes that as facilitators, they may ask parties to evaluate and note down the strength and weakness of their claims and then allow them to find areas of compromise by themselves. Second, he adds that they may ask questions on what aspects they may consider to assist them develop a settlement proposal. Finally, he concludes that they may ask questions that assist parties weigh various proposals and arrive at the final settlement.

These findings also agree with those of Shapira (2012). She observes that the move to limit mediators' intervention to that of facilitation in customary justice forums minimizes chances of them guiding the process towards their own interests other than those of disputing parties. Thus, to ensure fairness through active participation and involvement, there is need to limit the roles of mediators.

In the same vein, the move to uphold disputant process implies that kinsmen, clan and family cannot dispute on behalf of their members due to the fear that their wishes and interests may fail to reflect those of victim and perpetrator. This has the implication that Somali elders are expected to refrain from acting as arbitrators to facilitators while clan members and extended families are restrained from participating in the process. Where allowed, their role is that of spectator rather than representing the victim or perpetrator.

On the other hand, studies continue to report evidence of Somali elders within *maslaha* forums may perform arbitration, evaluative or directive roles which are beyond the expected facilitative roles. For instance, Mohamed and Muriithi (2020) observed that *maslaha* elders continue to apply directive and evaluative interventions strategies in North Eastern Kenya. This raised the

need to further interrogate scenarios and instances where relevancy of such roles comes in handy and whether operationalization of facilitative regulations was sensitive to such circumstances. This is an aspect addressed in objective three of this study. Second, clan and family systems may feature in Somali justice administration process. For instance, Safeworld (2020) notes that clan systems continue to be actively involved in Somali justice administration process. This raised the need to further interrogate situations and scenarios where clan systems are prized, whether safeguards were responsive to such situations and how their importance affects compliance with facilitative interventions.

#### **4.4.3 Party Autonomy on the Choice for Alternative Justice Forums**

Majority of customary justice operate alongside formal justice institutions hence chances of conflicts over the suitable choice of forums are not a rare occurrence. On the other hand, availability of both forums may lead to a scenario referred to as forum shopping. This is a situation where parties strategically choose a forum that best suits their interest. In other instances, given the reconciliatory and compensatory sanctions as compared to imprisonment, victims may be coerced towards alternative justice forums in the aftermath of criminal cases.

In view of the above, another emerging value as part of regulative agenda within ADRs such as *maslaha* was party autonomy on the choice for alternative justice forums. On this, a legal official observed that ‘victims are expected to be provided with an opportunity to make free and informed choice to use such alternative justice forums’ (Legal official 4).

This is because one aspect of fairness when using alternative justice processes is victim's autonomy to use alternative justice forums such as *maslaha* for redress. This is implied from respondent's reference to aspects to opportunity to make free and informed decision. Party autonomy as argued by Welsh (2017) can be understood as the decision-making opportunity provided to disputants relating to the most suitable redress forum. The principle is important due to certain fairness concerns. Dekha & Mason (2019) observes that disputing parties are best placed to understand issues and suitable remedies. Therefore, by providing them with an opportunity to voluntarily select a suitable alternative system for redress, they get the chance to independently select a forum that can maximize their interests and that which is likely to meet their justice needs and wishes. In addition, parties' autonomy in selecting a suitable forum is also associated with aspect of fairness. For example, Kariuki, & Ngetich (2019) observes that autonomy provides parties with the options to choose forums that they perceive to be satisfactory.

The above findings are in line with those of Tyler (2005) in his Procedural Justice Model where he observed that disputing parties are more likely to be satisfied when they are provided with the chance to influence decisions on norms to be used and remedies. Such an opportunity allows such process and outcomes to reflect their interests, wishes and experiences. In addition, the model postulate that people are more willing to accept the fate when they believe that they were fully involved and that their input mattered in the final output. Therefore, opportunity to make free and informed decision is an essential aspect in ADRs. It will be recalled that the initiation of *maslaha* forums may be compromised by intermediaries such as ergo and other coercive powers. Thus, protecting autonomy as a regulatory mechanism is ensuring that choice for ADR reflect those of the affected parties.

Respondents were further asked to show how aspects of party autonomy and choice of forum are operationalized. A legal official observed that:

Article 159 (2) (c) of the 2010 constitution mandates formal courts to explore the viability of using culture in providing redress in both civil and criminal transgressions. For example, the court may explore traditional dispute resolution mechanisms before resorting to litigation. (Legal official 2)

An extract of Article 159 (2) (c) of 2010 Kenya constitution states that:

...In exercising judicial authority, the courts and tribunals shall be guided by the following principles; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted..... (Article 159(2) (c))

As observed in the above quote and extract, the 2010 Constitution of Kenya mandates formal courts to explore the use of alternatives such as traditional dispute resolution forums before litigation. Accordingly, formal assumes judicial authority where it is expected to oversight the use of various redress mechanisms ranging from litigation to mediation. This implies that one way the courts ensure party autonomy is respected is by use of formal courts to oversee and supervise referrals of criminal matters to various alternatives. In practice, this implies that for one to use Somali customary justice, criminal matters are first required to be presented in a formal court where the court may then explore the merits and demerits of referring a matter to a *maslaha* forum.

Consequently, aspects such as ‘*explore viability*’ are measures put in place to ensure that the choice of ADR reflect victims’ aspirations, wishes and needs. However, on the other hand,

courts' interests of justice and assessment may at times override victims' preferences and choice for ADR in criminal cases. Article 159 equally seems to consolidate justice process within formal institution. This is an aspect that reflects state law pluralism where cultural justice practices are incorporated into formal legal hierarchy. The goal is to concentrate cultural justice administration processes within formal institutions in order to supervise their application and compliance with justice administration standards.

The above findings are in line with those of Ubink (2015) where she observed that one way African countries such as Kenya and Uganda are responding to oversight and supervision of prevalent customary norms is by bestowing formal courts with the responsibility of applying customs in criminal matters. Commonly referred to as original jurisdiction, the goal, Ubink adds is to allow magistrates and judges to oversight the application of customs in compliance to human rights standards. Generally, original jurisdiction as a safeguard mandates law enforcement agencies and Administrative Officers to ensure that criminal matters in their jurisdiction are referred to state courts. This is done through the police rather than community elders for redress. This allows oversight, supervision and promotion of a single justice institution in areas where non-state systems persist.

Modern values require that disputants and more the victim to have the ultimate choice on the use of ADRs (Otiso, 2017). On the other hand, the concept of mandating formal court to apply ADR hence original jurisdiction implies that autonomy on the choice for alternative justice forums such *maslaha* forums is not fully independent on disputing parties. For example, as discussed above, disputing party's choice is limited to formal courts as the forum of first contact. This regulation limits their direct approach to customary elders without the consent of formal courts

who are perceived to be the main victim in criminal violation. As such, the ideal situation is that disputing parties have to present their matter before a court of law to supervise their referral in *maslaha* forums.

In view of the above, although Article 159 limits *maslaha* elders from addressing major crimes directly from the community other than those referred to them by magistrate court, Dekha & Mason (2019) observes that, in North Eastern Kenya, majority of violent crimes resulting from resource conflicts were settled by *maslaha* forums without any involvement of formal courts. This may imply the existence of situations and scenarios when original jurisdiction seems to be of less relevance in the eyes of locals within *maslaha* forums. The above observations therefore raised the need to further interrogate complexities and dynamisms associated with justice administration process in the case of violent crimes and responsiveness original jurisdiction as regulatory safeguards to such dynamics and how this affects their compliance. This was an aspect addressed in the next objective. In addition, Wanyoike, Onkware and Okoth (2018) observe that cases of murder are rarely reported to formal justice systems despite existence of such incidents in the community. This implies that serious criminal cases continue to be addressed within *maslaha* forum thus undermining jurisdiction authority of formal courts in criminal cases as provided under article 159 of the 2010 constitution. The above observation formed the basis for objective three which sought to find out dynamics influencing such decisions and whether safeguards are accommodative to such circumstances.

Further examination of Article 159 reveals factors that formal courts may consider when referring criminal matters for out of court customary mediation. A legal official observed that

‘referral of criminal matters back to elders by the court is not a given. The move should not contradict principles of justice’ (Legal official 1). In addition, an extract from Article 159 (3) states that:

... The use of traditional dispute resolution mechanisms shall not be used in way that contravenes the bill of rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is consistent with Constitution or any written law. (Article 159 (3))

As observed in the quotations above, referral of criminal matters to community-based ADRs from formal courts is further regulated by aspects of bill of rights, repugnancy tests and compliance with other written laws. Accordingly, criminal matters can only be permitted as long as they are not repugnant to justice, morality or in contravention of any written laws. This implies that the customs are subordinated to state laws and notions of justice when providing redress in criminal transgressions.

The above findings are in line with those of Ambani & Ahaya (2015) who observed that repugnancy clauses consist of a set of conditions that guide the use of cultural values in criminal justice administration. Ambani & Ahaya adds that the aim is to ensure that their application is not against morality and justice. For example, forgiveness and compensation in case of murder contravenes criminal justice standards that prescribe imprisonment as a form of punishment in case of murder. Karuiki (2015) observes that criminal matters are perceived to be of public interests where the complainant becomes nominal and the matter is prosecuted by the state through the public prosecutor. This has the implication that parties’ autonomy on the choice of ADR is limited in cases where such a move is in contravention of morality and natural justice.

Respondents were further asked to explain the implication of natural justice, morality and written laws on use of ADRs. A legal official observed that *'by written law, we mean that the application of ADR is subject to existing regulations such as Section 176 of the criminal procedure code'* (legal official 2). An extract of Section 176 laws of Kenya states that:

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated. (Section 176 of CPC)

As observed in the above quotes and extract, limitation on the use of ADR from the perspective of written laws implies that their use should align with the provisions of legal statutes. One of the statutes as observed by the respondent is Criminal Procedure Code. From the extract, it is clear that the choice is limited to minor crimes such as assault that do not amount to major felonies such as murder and rape. These views resonate with those of Mohamed and Muriithi (2020) who observed that the application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land such as the criminal procedure code.

Accordingly, to allow forgiveness and compensation in criminal murder without imprisonment may be perceived to subvert criminal justice standards given the gravity of the offence. This may also be perceived to be repugnant to justice morality in the sense that serious felonies such as murder cannot be resolved through compensation. Notably, cardinal principle dictates that, punishment ought to be proportionate to suffering caused. Therefore, in cases where the matter

involves the offence of murder, which can be classified as a felony, the use of ADR is prohibited as outlined by section 176 of the Criminal Procedure Code.

In reference to Somali customary justice processes, section 176 limits the jurisdiction is limited to minor cases such as simple assault. Secondly, aspects of court referring matters to reconciliation implies that criminal cases have to be reported first to Government courts where they can then be referred to reconciliation provided that they are minor in nature for an out of court settlement. Third, the use of *maslaha* is limited to their reconciliation remedies. Accordingly, it can be observed that repugnance to morality and justice is associated with nature of crimes referred for reconciliation and proportionality of punishment meted. In addition, it can also be observed that a significant written law to consider when making referrals to ADRs as provided in the constitution is the section 176 of the Criminal Procedure Code.

Notwithstanding this, in Garissa, customary justice forums, elders continue to provide redress in major criminal transgressions contrary to section 176 of the Criminal Procedure Code. For instance, Wanyoike, Onkware and Okoth (2018) observed that 66.7% cases which consisted of felonies such as rape and murder were reported to formal justice administrators but addressed through *maslaha* forums in Garissa County. They also observed that judicial officers raised the concern that community elders and *maslaha* forums influenced the collapse of cases before courts without the consent of formal court.

In their findings, they also observed that in some scenarios, murder cases were never reported to formal courts despite such incidents occurring in the community (Wanyoike, Onkware & Okoth, 2018). The above observations point out that *maslaha* forums continue to address major criminal

cases despite the ban. Similarly, Chopra (2015) observed that majority of inter-clan violent conflicts that consisted of grievous harm, death and destruction of property are often addressed by community elders through *maslaha* forums without any involvement of formal courts. This raised the need to further interrogate dilemmas and complexities likely to be encountered when attempting to provide redress in the various criminal matters within *maslaha* and whether regulations were sensitive to such situations. This is an aspect that was addressed in the next objective.

In the same vein, a legal official observed that ‘prosecution of criminal incidents is often perceived as a public good bestowed to the public prosecutor. Therefore, prosecutors ought to be consulted before the use of ADR’ (Legal official 2). As observed in the quotes above, prosecution of criminal cases is prioritized as a public good and any attempt to use ADR ought to be in consultation with the public prosecutor. Accordingly, it can be implied that criminal prosecution is an essential aspect for minimizing chances of citizens taking law into their hands thus maintaining order in society. Given its public importance, public prosecutor is expected to ensure that the process is protected from any abuses which may lead to inability of state deterring criminal cases and incidents of extra-judicial. Thus, the aspect of protecting criminal adjudications from abuse and adverse reactions to injustices can be seen to border on aspects of justice as a condition provided in article 159 of the 2010 constitutions when using ADRs.

Further, legal official 2 observed that that prosecutors need to be consulted before a matter is referred to ADRs. Therefore, it can be implied that the Director of Public Prosecutions is the custodian of prosecutorial powers thus he/she cannot be bypassed when negotiating for out of

court settlement. Accordingly, the matters need to be first presented to formal court and be of minor in nature, consent of the public prosecutor has to be sought before referring matters to Somali customary justice forum for redress.

On the other hand, however, consent of Deputy Public Prosecutor is at times not sought after in North Eastern Kenya. For example, Wanyoike, Onkware and Okoth (2018) point out that criminal matters would be presented before the magistrate court but not all are resolved at this formal level. They observed a phenomenon where disputing parties would withdraw criminal matters before a court without the consent of the prosecutor. For example, it was pointed out that:

When asked what became of cases that were before the courts but were never resolved at the level, judicial officers averred that they often received requests to drop matters before them for ADR a request that they out rightly rejected. However they noted that they were aware that Somali customary justice forums had seized matters before the courts and once the latter concluded disputes, cases before the courts would collapse....or out rightly gave non-incriminating testimony against the accused. (Wanyoike, Onkware & Okoth, 2018, p. 4)

The above observations seem to imply the existence of situations and scenarios where the DPP consent is less regarded when withdrawing of criminal cases from formal courts. This further reinforced the need for objective three to interrogate whether regulations were responsive to such situations and how this affected their compliance.

#### **4.4.4 International Standards on ADR: Third-party Facilitative Intervention Strategies**

International standards of justice also have an implication on regulation of ADR especially in contexts that are prone to conflicts and that experience limited state presence. For example, Desal, Isser and Woolcook (2012) in their article ‘Rethinking Justice and Reform in Fragile and Conflict Affected State’ observe that multilateral development partners such as IDLO, OECD, UNDP and European Commission have clear policies attached to their funding on what is to be prioritized in fragile and conflicted-affected contexts.

Consequently, respondents were asked to explain any non-governmental developmental organizations that have partnered with Judiciary and their influence on regulation of ADRs. An emerging regulative value prioritized was third-party neutrality understood from facilitative roles. For instance, a representative from an international peace organization observed that ‘we train mediators to encourage and facilitate parties arrive at a solution. Their limited interference may send signals of objectivity hence legitimacy, trust and increased effectiveness’ (Representative from an international peace organization 1). Another respondent observed that ‘as facilitators, their role is limited to sustaining communication between parties while allowing them to settle by themselves’ (Representative from an international peace organization 1).

The quotations above capture the fact that international organization partners enhance fairness within customary ADR. This is done by training mediators to act as facilitators and encouragers in the justice process. Fairness is implied from objectivity which is linked to increased trust and legitimacy and which is tied to third-party limited intervention. Accordingly, aspects of limiting mediators to communication and allowing them to arrive at a solution implies that, as facilitators,

mediators are required to act as guides while allowing disputants to voluntarily search for a mutual agreement between themselves without undue influence thus achieving fairness. This shows that when matters are referred to *maslaha* for mediation, elders who commonly act as mediators are expected to refrain from actively directing the mediation discussions. From the above quotes, it can be implied that elders are not allowed to assess strengths of party's position, proposing or enforcing certain position, expressing or enforcing their opinions to the disputants.

This approach to mediator's roles reflects Western-inspired standards of neutrality. Ubink (2017) notes that mediators' level of intervention in the process is limited to that of an enabler. This is closely related to respondent's aspects of facilitation, allowing them to arrive at their own solutions and an encourager. This finding resonates with those of Koman (2016) who observed that absence of decisive authority from third-parties in criminal mediation forums protects disputants from mediator's biasness, partiality and prejudice thus objectivity.

Generally, Somali customary justice forums of *maslaha* are part of alternative justice forums that rely on what Schlee (2013) refers to as consensual approaches based on mutual agreements between parties and the mediator. In such consensual approaches, there is the ever fear of or elders who often act as mediators coercing a party or parties to a settlement. Somali customary justice practitioners have also been accused of inconsistently applying different justice standards based on the social position and social network of participants. For example, Harper (2014) in 'Perspectives on involving non-state justice and customary actors in justice and security sector reforms' observes that customary justice forums may result to compensation, forgiveness, retaliation or in-action based on one's social standing, relation between disputants and clan affiliation.

Consequently, by prescribing facilitative roles to mediators, the goal is to limit their tendency to promote certain values based on their interests. However, this understanding on the role of mediator is not universally shared within the Somali *maslaha* forums. According to a study by Dekha (2017), Somali elders in North Eastern region may assume arbitration roles in Somali *maslaha* forums where they listen and give a determination based on their assessment of the matter. As arbitrators, they assess and evaluate evidence presented by witnesses and make a determination.

This is a move that seems to contravene consensual ADR from a Western value perspective thus raising the need to further understand situations when such roles are called for. This was covered in depth in the next objective. Similarly, Mohamed and Muriithi (2020) note that in some instances, Somali elders may actively direct the criminal mediation discussions and enforce their opinion. This resonates with the role of African mediators who were perceived to play a more directive role rather than that of a facilitator. As such, the need to have mediators in *maslaha* forums to restrain their role to that of facilitator or encourager seems not always to be adhered to raising the need to further understand from respondents' perspective on why this is the case. This is an aspect the next objective sought to further interrogate.

Another regulative value prioritized by international partners was on the use of third-parties or mediators with non interest related status. A legal official pointed out that 'third parties not related to the disputing parties are ideal. This will minimize tendencies to influence the process towards existing relationships' (Legal official 3). Another legal official also observed that

‘Persons who are not related to parties are preferred in such consensual processes. For example, use of paralegals, local chiefs and local advocates is encouraged’ (Legal official 4).

The quotations above show that aspects of neutrality among third parties are considered important hence the requirement that third parties not related to the disputants are ideal. This is so because mediators with interest related status are vulnerable to guiding the process with the intention of favoring one party. Accordingly, one aspect of limiting unwarranted interference from third parties is through promoting the use of non-related facilitators. This increases chances for partiality based on previous and existing relationships. For example, mediators in *maslaha* justice forums can be close relatives such as head of the extended family hence increasing the chances of biasness. Thus, neutral mediators such as paralegals, local chief and local advocates are encouraged due to their legal training and strict code of ethics that regulates their profession.

The above observations on non-interest-related status and aspects of fairness seems to agree with Welsh (2017) observes that Western mediation styles practices requires that third parties are restricted from engaging in processes where there exist previous, current or future relationships with the disputants. Western ADR model prioritize parties’ control of the process and self-determination. Thus, one way ADR ensure fairness is by limiting mediators who may have some compromising relationships with any of the disputing parties.

This is contrary to traditional perspectives where insider mediators who have close ties with disputing parties are perceived to be ideal mediators. Disputing parties in Garissa County for example, continue to refer their cases to Somali elders with close family ties. In addition,

Wanyoike, Onkware and Okoth (2018) observed that Somali elders adjudicated 66.7% of cases while the formal courts handled 33.3% in North Eastern region. The above empirical data created the need for objective three which sought to understand why Somali elders continue to attract legitimacy despite their partial nature. Further, whether such operationalization of safeguards was sensitive to such scenarios was an aspect further covered in the next objective.

The move to promote non-interest related mediator in *maslaha* justice forum seems to reflect modern understanding of impartiality. Lee (2013) notes that modern understanding of impartiality focuses more on the attitude of third party towards disputants where they are required to be unbiased. Thus, disinterested status is ideal since they have no personal interest in the issues or outcome of the process. Therefore, an outsider mediator who is not related to disputing parties may best fulfill the concept of neutrality. This is because there are no attachments with disputing parties or social structure of a particular group that may prefer certain outcomes. However, as argued, the applicability of this aspect remains a challenge in the Somali justice system.

#### **4.4.5 Local Peace Declaration and Regulation of ADR: Modogashe Peace Declaration**

Judicial regulation on ADRs is also found in Government-community based local peace agreement as observed by a senior Government administrator that:

In Garissa, there exist local declarations between communities and the government on the use of community-based approaches of justice administration. For example, under Modogashe Declaration, conflicting groups are expected to present perpetrators to formal justice institutions for prosecution in the aftermath of violent criminal conflicts. (Senior Government administrator 2).

As observed, in some contexts, Local Declarations form the main framework that guide on justice administration options in volatile contexts. Notably, they provide those perpetrators of felonies such as murder are forwarded to formal courts for prosecution. This leads to some form of hybrid justice arrangements between the community and Government. Accordingly, local forums such as *maslaha* are expected to promote peace while formal courts prosecute and punish the perpetrators. This implies that aspects of peacemaking and criminal accountability often associated with criminal prosecution are to be pursued side by side.

The findings above are in line with those of Odendal (2013) who observes that local peace declaration provide processes and structures that integrate community peacemaking initiatives with state obligation to prosecute criminal elements associated with violent conflicts. On the other hand, however, Chopra (2015) observes that local peace committees, a component of local peace declaration often fail to present perpetrators of major crimes to formal courts for prosecution after peace meetings. This raises the need to further examine limited regard for the declaration where communities are expected to present perpetrators for prosecution and whether such situations were considered by reformers.

In conclusion, the above section sought to examine values prioritized by state regulative safeguards and how they re-configure justice administration process within Somali customary justice forums. Data pointed out that, key values prioritized in the actualization of repugnancy clause in criminal matters include active participation, party autonomy, third-party neutrality and non-interest related status which reflects more of Western styles of ADR. This section further identified how these values are operationalized and regulative frameworks used to support their

implementation namely 2010 Constitution, Mediation Rules of 2015 and Criminal Procedure Code.

To this end, strategies such as original jurisdiction, jurisdiction limitation in the case of felonies and seeking consent from state justice were examined. The findings however, paint a picture of varied compliance with evidence pointing out situations and scenarios for limited regard for various regulations within *maslaha* justice process.

The above findings laid ground for the third objective. It sought to find out whether judicial safeguard values and their operationalization was responsive and accommodative to situations and scenarios when salient justice practices identified in objective one were domineering. These situations and scenarios were evidenced based on studies discussed in objective two on compliance of safeguards within *maslaha* justice systems operating in North Eastern Kenya. Notably, it is important to point out that judicial safeguards generally seek to re-structure customary justice administrative process. This is done by prioritizing values that re-define roles of third-parties or mediators, subverting certain customary procedures and principles that seem discriminative and prioritize disputants' individual needs, justice and aspirations.

To this end, the question is, to what extent is the operationalization of these safeguards responsive to situations and scenarios when salient features of justice administration seems to subvert relevance of judicial safeguards within *maslaha*. Particularly, objective one identified salient features of *maslaha* justice systems relating to criminal offences that may greatly shape compliance of regulatory safeguard. However, evidence in objective two pointed out varied compliance towards these safeguard and in some cases limited compliance. This implies that,

despite safeguards being of benign intentions and for the good of the society, there seems to exist situations and scenarios when such benefits may be overlooked.

In addition, it will also be recalled that popular notions of justice administration within *maslaha* were found to reflect scenarios and situations of flexibility, negotiation, hybridity and reinterpretation of customs in light of lived realities. Thus, a major concern for regulative authorities was on the need to interpret and apply these safeguards fairly. Notably, careful integrating safeguards within *maslaha* systems of justice process without subverting their logic, effectiveness and legitimacy is an important concern for compliance. Therefore, identifying scenarios and situations that call for prioritization of customs over safeguards and vice versa is equally of importance. This is expected since formal courts are expected to ensure that their interpretation and operationalization is responsive to justice standards but also reflective of community needs, realities and aspirations. In view of the above, the extent to which operationalization of these safeguards is responsive to situations and scenarios that seems to subvert relevance of judicial safeguards within *maslaha* justice administration is a concern sought to be addressed in the next objective.

#### **4.5. Extent to which Operationalization of Judicial Regulative Safeguards is Responsive to Salient Features of *Maslaha* Systems of Justice.**

In order to better understand varied and limited compliance as discussed in objective two, the third objective sought to identify such scenarios and situations when identified contextual realities in objective two were found to be domineering over prescribed safeguards in the eyes of the its end users. This was importance in examining the extent to which operationalization of judicial safeguards are accommodative to such situations. Notably, findings from objective one of this study raised the concern that one cannot overlook the importance of popular cultures of justice administration process within *maslaha* justice systems. This is so because salient cultures shape perception which enables us to make sense of the world as we experience it. Accordingly, like policy, law does not live in a vacuum, therefore the realization of its aims depends on the extent to which it is backed up by a credible commitment. This is done in order to coordinate expectations often shaped by the interests of elites, justice seekers and by the prevailing social norms.

In view of the above, being responsive to the prevailing social interests of justice administration as argued by Quinn (2014) & SungYong (2019) is important since they inform perceptions, beliefs and values that guide our thoughts, reactions and behaviors. Therefore, values and operationalization strategies of judicial safeguards are expected to be sensitive to situations and scenarios where local salient cultures seem to undermine regulative safeguards as demonstrated in objective two. This is an aspect this study refers to responsiveness or their accommodativeness to popular concepts of justice. Therefore, this objective sought to identify such situations and

scenarios, whether judicial safeguards are sensitive to such situations and how this shapes their compliance.

#### **4.5.1 Threat to Retaliation and its Implication towards Mediator's Intervention Strategies**

To begin with, various safeguards and their corresponding values were identified in objective two, one of them being the need to constrain *maslaha* mediators within facilitative roles. This was important to constrain powerful third-parties and functionaries from subverting disputant needs, aspirations and demands when using *maslaha* systems of justice. It will also be recalled that in objective one, local Somali culture of clan and sub-clan retaliation was a salient justice administration tool that greatly shaped responses to criminal transgressions. Therefore, respondents were asked to explain scenarios and situations where popular culture and threat to retaliation override the process and roles of mediators when initiating *saben* and reconciling disputing parties. To this end, an emerging scenario was when a criminal transgression occurs in the midst of heightened clan tensions, most often due to ongoing resource conflicts. On this, a government administrator observed that:

When clan tensions are high due ongoing conflicts, clan retaliation and violence cannot be ruled especially when simple crimes even not associated with the conflicts occur. In such situations, parties are encouraged to reach out to each other but when they fail, elders in conjunction with my office may pressure or force the perpetrator for the sake of peace. (Government administrator 1).

In relation to the above, crimes occurring in the midst of heightened tensions is an emerging scenario within *maslaha* that warrants attention. This is because the choice of mediators'

intervention strategies can go beyond the confines of facilitative requirements. Accordingly, a report from Safeworld (2020) observes that Garissa and its environs periodically experience conflicts over watering points, pastures and boundaries. Therefore, when tensions are high due to ongoing conflicts, interpersonal crimes may escalate into retaliation violence. This is aspect locals are aware of hence the need to put in pre-emptive strategies.

This implies that roles and intervention strategies of mediators within *maslaha* systems of justice are versatile contingent to existing concern for community order and peace. Therefore, in situations where crimes occur in the middle of heightened tensions and perpetrators are not willing to reach out, mediators may persuade or even coerce the perpetrator to reach out to the victims in order to prevent further escalations and retaliation.

In view of the above, criminal transgressions, existing tension, clan retaliation and threat to peace are likely scenarios where intervention strategies move away from aspects of encouragement and to directive strategies. This is because parties are pushed to initiate *saben* and reconciliation process. This implies that full compliance of mediator's facilitative roles within *maslaha* overlooks limitations. This is especially evident in scenarios where crime occur in the midst of clan tensions and reluctance of parties to reach out to each for dialogue.

The findings above on varied relevance of intervention strategies agree with those of Bagshaw (2009). While citing Lederach's concept of residue of imperialism, Bagshaw argues against the practice of overlooking the impact of local justice cultures in favor of prescribing styles, strategies, process and outcomes based Western values. He adds that approaching ADRs as culturally complex systems of meanings may help justice reformers understand instances when

various intervention strategies acquire meaning. Therefore, preference for non-facilitative roles is a product and a response to popular disputing cultures. A good example here is the Somali culture of retaliation and the need to sustain peace among volatile clans and sub-clans.

Situations of hostilities, the need to sustain peace and choice of intervention strategy were also corroborated by a crime officer who observed that:

Simple criminal transgressions can unearth sub-clan or family animosity thus possible retaliation. For example, criminal incidents may touch on old scars and existing hatred between families thus triggering violence. When fatalities are high or involves children and women, clansmen may easily go for revenge. In such situations, mediators are expected to quickly reach out to the victim group to halt any impending retaliation violence. (Crime officer 4)

The quotation above demonstrates that existing hostilities between parties to crimes and adverse consequences may easily degenerate into group retaliation. This happens in the aftermath of a criminal transgression hence necessitating the need to sustain peace and social harmony. In the end, this may influence the suitability of mediators' intervention styles. Levels of tension and hostilities are gauged from aspects such as number of fatalities, existing clan animosity, anger and hatred exacerbated by in or out group dimensions of the criminal incident. In situations where tensions are extremely high, mediators are often expected to perform advocacy roles beyond facilitative expectations where they may reach out to worrying communities to send a message of peace thus limiting chances for retaliation. This observation, therefore, points out that intensity of hostility coupled with the need to sustain peace in the aftermath of criminal

transgression is a possible scenario that may significantly affect the need for mediators to move beyond facilitative roles prescribed by regulative safeguards to those of advocacy.

To this end, in situations of hostilities and tensions, promoting and sustaining continuous dialogue between victim, offender and their functionaries is essential for peace and harmony within the Somali community. Accordingly, in the event a stalemate is encountered along the process, elders and the community are willing to go an extra mile to push parties towards reconciliation in the interest of peace and order as observed by a Legal official that:

Mediators who allow disputing parties to agree by themselves then apply some mild pressure in case of a stalemate are ideal. However, in instances where reconciliation is not forthcoming from disputing parties themselves, third-parties may apply some pressure to initiate the process or push parties out of a stalemate thus averting further violence when tensions are high. (Legal official 3)

The quotation above shows that mediators or third parties who apply a wide range of intervention strategies ranging from non-intrusive to intrusive strategies are more ideal. This is especially when hostilities and tensions are high. This is because mediators have access to other intervention strategies that is used to sustain dialogue in case stalemates emerge during the process.

Accordingly, confining third-parties to facilitative roles may limit their ability to quickly reconcile parties and restore order and peace in case a stalemate arises. Non-intrusive strategies such as facilitative is seen from respondents' reference to aspects of allowing parties to agree by

themselves. On the other hand, intrusive roles are evident from respondent's aspects of pressure to move parties out of a stalemate. This has the implication that, access to a wide range of intervention strategies beyond those of facilitation seems to be ideal due to stalemates that may arise in the course of mediation within *maslaha* justice forums. Thus, ability to move parties out of a stalemate in scenarios where tensions are high may limit preference for facilitative intervention roles as prescribed by judicial regulatory frameworks.

As established in the discussions of this study, functionaries, *ergo* and clan can either push parties to reach out to each other or do it for the sake of peace and restoring social harmony. In addition, as argued in objective one, such a move may not always be motivated by genuine concerns such as peace. Personal interests may also inform such moves. In the end, either motivated by peace or personal motive, these are complexities and dynamism within *maslaha* with significant implication on facilitative intervention regulative that cannot be wished away.

The findings resonate with Contingency Model argued by (Bercovitch, 2019) where he suggests that process, styles, strategies and practices in alternative dispute resolution mechanisms can best be understood from their disputing environment. Accordingly, when a criminal transgression assumes an ethnic or clan dimension and politics associated, more intrusive strategies beyond facilitative may be used to minimize further consequences. Therefore, confining mediators in customary-based justice systems such as *maslaha* to facilitative role based on their perceived importance from human rights perspective while overlooking their ability to push parties out of a stalemate in contexts where expeditious settlement of disputes is important may limit their compliance.

The need to push parties out of stalemate cannot only be motivated by the need to avert impending retaliation due to existing tensions and hostilities. In this regard, other situations and scenarios such as discovery of new information in the course of negotiation can stall the process. This then calls for wide intervention strategies beyond those of facilitation. On this, a crime victim observed that:

Stalemates in criminal mediations can result after learning new information on offender's motivation for the crime during reconciliation stage. In other situations, rumors on offender likelihood of not paying compensation may stall the process or disagreement on who is to blame for the harm. (Crime victim 3)

As observed in the quotation above, stalemates in criminal mediation may result from a number of situations as identified by respondents. First, victims can change their position in the course of negotiation as new information becomes available thus decreasing their willingness to reconcile. For instance, new information on intention of perpetrator likelihood of not paying compensation may affect the process. The findings above are also in line with those of Tanya (2011) who adds that new information on victimization such as motivations behind the criminal action can act as a stressor. This may overwhelm victim's coping mechanism thus throwing them out of normal emotional state. For example, discovery of such information may lead to feelings of helplessness, anger and may exacerbate posttraumatic stress. This decreases spaces for mutual agreement.

In such situations, mediators may need to discriminate new information on offender culpability in order to limit negative feelings. To achieve this, mediators are required to shift from facilitative to transformative roles. Unlike a facilitative mediator where questions are asked to

nudge the parties towards a mutually beneficial outcome, Folger & Bush (2014) note that transformative mediator focuses on re-establishing broken relationship between parties. Therefore, the need for mediators to clear miscommunications and rumors plays a transformative role in an effort to sustain the community interests. Thus, understanding scenarios and situations where facilitative interventions are limited illuminates the level of their responsiveness and importance for customization to accommodate contextual realities.

This finding also resonates with those of Dekha & Mason (2019) who observed that new information on offender culpability and attribution may present new positions and interests in the course of reconciliation. This in turn derails the process of reconciliation. Therefore, when such situation arise, mediators may be required to neutralize emerging negative emotions hence transformative interventions. In such cases, mediators may appeal to religious values or commonality to suppress negative emotions.

Respondents also observed that stalemates or impasse can result from disagreement over responsibility of harm in the aftermath of criminal transgressions. This is evident in disagreement over who to blame as shown in the above quotes. In such situations, mediators may be required to evaluate the strengths and weakness of testimony in order to break the ice. This allows them to move away from prescribed facilitative to evaluative roles. That is, one way of pushing parties out of such stalemate may require more than facilitative interventions to more intrusive styles that may involve mediators' judgment, assessment and some influence often found in transformative and evaluative models. Therefore, this finding suggests that regulations on ADR that solely approach and define facilitative model based on the level of intrusiveness and its

associated fairness concerns is limited. This is because it overlooks an important aspect of their ability to navigate through an impasse or stalemate that may arise in the course of negotiations.

Another situation that can be associated with stalemates within *maslaha* justice systems is disputant characteristics. This influences on the relevance of intervention strategy. For example, a village elder observed that:

It is easier to reach an agreement between members of a similar clan than when they are from distant clans. For example, disputants from Abduwak can easily arrive at an agreement than when it is between Abduwak and Aluiyan clans. (Village elder 4)

In addition, a legal official pointed out that ‘closely related disputants based on clan may not require much intervention from the mediator’ (Legal official 4).

The quotes above point out that the level of commonality and connectedness between disputing parties has an influence of the suitability of mediator’s intervention strategy. This is evident from respondents’ attention to perceived differences in terms of clan affiliation and relations between disputing parties and easiness of arriving at an agreement. Notably, areas of commonality such as shared clan and past interdependencies are used to neutralize negative perceptions hence reconciling disputing parties.

These finding are in line with Bercovitch (2019) observation that heterogeneity among adversaries may be used by parties to widen their differences and increase area of contention. Interpretively, homogeneity among disputing parties and narratives of past, current and future interactions and interdependencies may be used as leverages to soften hard stands. In view of the

above, party differences such as those based on clan may aggravate the situation by increasing group suspicion and hostilities thus affecting ability of *maslaha* to arrive at mutual accommodation.

In such cases, one role of mediator is to increase perception of commonalities in order to increase chances for accommodation hence a transformative role. Thus, disputing parties that have little aspects of commonality such as clan and religious norms that define conflicts are more likely to require intervention strategies beyond those of a facilitator. This study, therefore, observes that characteristics of disputing parties in terms of their perceived shared commonality presents a situation that may influence suitability and relevance of facilitative interventions in customary criminal mediations.

Non-cooperation was also identified as a possible situation that can act as source of stalemate.

On this, a victim of crime pointed out that:

My brothers and close cousins threatened to revenge against any family member from the offenders' side should they fail to cooperate and produce the perpetrator. In such cases, elders and clansmen coerced the offending group to meet us for an amicable solution.  
(Female crime victim 5)

As observed in the quotation above, non-cooperation from the perpetrator's side followed by threat to group violence and the need to sustain peace among families seems to have an influence on intervention strategy. Notions of group violence can be implied from motivations for revenge towards the family of the offender's side. Equally, aspects of intervention strategies are shown in respondent's attention to coercing offending group to reach out to the victim.

Therefore, reluctance to produce perpetrator may attract group retaliatory violence. This then requires some aspects of directive intervention from elders in a bid to avoid retaliation. Therefore, perpetrator availability, group violence and need to maintain peace is seen as a mix of justice administration dynamisms, challenges and local cultures of justice that may influence choice of third-party intervention strategies. As argued in objective one, motivations for peace within the Somali community is prioritized in the aftermath of criminal violations thus overriding all other aspects such facilitative interventions, accountability and prosecution.

Cultural practice of group retaliatory violence implied from aspects of revenge against family is understood from popular culture of justice that are informed by *sharia* and local politics associated with Somali justice administration. Schlee (2013) observes that *sharia* doctrines provide for retaliation, forgiveness or compensation in the aftermath of a criminal violation. Therefore, Somali customary norms (*xeer*) equally have implications on how *sharia* justice doctrines are implemented. In this regard, retaliation may be directed towards the perpetrator and his/her immediate or extended family or the sub-clan thus assuming collective responsibility. As argued in objective one, this is partly motivated by incentives that accrue from compensation but also by genuine concern to alleviate suffering of victims. Therefore, the practice of collective responsibility and violence can be understood from popular Somali cultures of justice administration.

Second, motivation for collective responsibility which is implied from aspects of failure to cooperate and produce the perpetrator is understood as a response to justice administration challenges. In this case, one of the justice problem scenario, was the inability to bring a suspect

to account for their action thus making the transgression assume a group dimension. Ideally, Schlee (2013) notes that such threats are aimed at pressuring family members to produce the perpetrator. In cases where such attempts are fruitless, family members are expected to assume collective responsibility. Therefore, the findings above point out that Somali customary justice resources such as collective responsibility has relevance in modern day justice administration. This is due to its ability to ensure reconciliation process for peace proceed even without the perpetrator being present.

Consequently, the need to avert violence as observed by respondents' aspects of retaliation may imply that mediators may be required to assume more directive and intrusive strategies such as coercion, a move that goes beyond facilitative roles. Thus, the need to navigate through emerging scenarios and situation such as parties' reluctance, unavailability of perpetrator and the need to sustain peace may see mediators gradually begin with facilitative to more directive strategies. Equally, group violence, collective responsibility and the need to sustain peace is a product of local cultures of dispute management and responsiveness to contextual realities of Somali community respectively hence a versatile process.

Incitement and misrepresentation of grievances in the aftermath of criminal transgressions was another emerging scenario that significantly influenced intervention strategies. For example, a senior police officer observed that:

Retaliatory violence may also occur when local leaders incite the affected clan, sub-clan or family with narratives of grudge or hatred from the perpetrator group thus attracting

group justice. In such situations, elders may use religious teachings to minimize animosity and re-establish relationships. (Senior police officer 2)

The quotations above show that criminal transgressions may attract group retaliation when the incident is misinterpreted and miscommunicated. This creates an impression of deep-rooted hatred and animosity. This may influence the choice of intervention strategy. This is because at times certain narratives of the offence may raise and provoke a sense of collective group victimhood thus increasing chances of retaliatory violence. In other words, interpersonal criminal transgressions may move beyond individual harm to societal harm which should be taken into consideration for peaceful coexistence.

In the end, such situations may call for other intervention strategies other than facilitative. Accordingly, negative perceptions and attitudes held beyond harm inflicted to an individual may have implication on reconciliation and settlement process. For instance, such perceptions may lead to suspicion among parties thus limiting room for mutual agreements. Parties in such situations are also less likely to meet each other due to fear of violence. Consequently, under such situations, respondents observed that the mediator is expected to first seek to address negative attitudes and re-establishing relationships between disputing parties and their groups for meaningful negotiation to begin. During such endeavors, mediators may strategically leverage on religious doctrines on forgiveness to increase perception of commonality among disputing groups. They may also enlighten them on common identities that transcend beyond sub-clan characteristics to overarching clan families or even religious affiliation.

To this end, narratives on shared common identities are linked to re-building trust and confidence thus acting as a leverage for peaceful outcomes. Second, education may be used to caution disputing groups on selfish motivations behind local leaders' incitement and consequences of retaliation. As activists, mediators may engage in concerted efforts of neutralizing underlying historical negative perception and attitudes between groups that may escalate to clan violence in the aftermath of criminal transgressions.

The findings above demonstrate that mediators may be required to move beyond facilitative to transformative roles in situations and scenarios where criminal transgressions have resulted to increased tensions among Somali clans. Consequently, when attitude becomes a source of dispute in the aftermath of a criminal transgression, mediators may be forced to move beyond their facilitative to more transformative interventions. This finding resonates with those of Douglas & Coburn (2013) who notes that ignoring such negative perceptions may lead to suspicion. This then leads to limited room for mutual agreements. For example, parties in such situations are also less likely to meet each other due to fear of violence.

The findings above on social realities exude the limitations of a neutral facilitator as postulated in procedural justice safeguards and operationalization of judicial safeguard. The need to sustain peace and navigate through normal negotiation stalemates in criminal mediation within *maslaha* illuminates shortcomings of the relevance of pure facilitative mediators. Consequently, based on the findings of this study, judicial safeguards, the rule of law and ADR reform programmes that put more emphasis on prescribing roles of a fair mediator. This is operationalized through legal safeguards that call for full compliance with facilitative interventions in almost all criminal

transgressions. However, as discussed above, such operationalization overlooks the responsiveness of such roles to emerging situations and scenarios identified above which appears to be limiting.

Second, findings of this study point to the need to contextualize the ADR reforms agenda to enhance their effectiveness. Notably, citing Lederach in Bagshaw (2009), ADR models grounded on cultural contexts are more likely to be sustainable and effective. Therefore, rather than transplanting safeguards due to their pinning on Procedural Justice Models to other cultural contexts, ADR practitioners also need to approach strategies, styles and models within their particular context.

In addition, the values prioritized by Procedural Justice Models need to move beyond the rights of disputing party such as party-autonomy and choice of forum to include the interest of the larger community. This is because individuals exist in a community and within a specific cultural setting that has its importance in justice administration process. Therefore, despite emphasis by Rule of law and human rights theorists such as Tyler (2005), Hollander-Blumoff (2011) & Brooks (2013) on neutral mediators in the form of facilitative roles and its associated benefits, flexibility to contextual realities such as scenarios and situations discussed, are worth consideration.

This is so because findings of this study point out that in situations where hostilities and tensions exist, interpersonal criminal transgression may unearth existing group tensions and conflicts which may harm the society. Hence, the need for extra measures and interventions beyond

facilitative in order to avert violence. Equally, as discussed, negotiations in *maslaha* may encounter stalemates or deadlocks due to discovery of new information, incitement narrative by leaders, disputant characteristics in terms of group affiliation and non-corporation. Thus, mediators may need to move beyond facilitation in order to best assist parties arrive at an agreement. Thus, such illumination highlights significant sources of resistance in the adherence of judicial regulative safeguards.

Arguing from cultural criminology, Sunde, Ilan, and Sandberg (2020) observe that the relationship between cultural mediated meaning and individual experience can crystalize a subculture that appeals to disaffected and/or perceive to be marginalized. Arguing from a primordialism perspective, Allahar, (1996) notes that for individuals, places and things that sustain physical and emotional life come to acquire a power and control over humans that are elevated to the level of the sacred.

This leads to unquestioning devotion that acknowledges the vulnerability of the individual human being and dependence on community that cultivates conformity. As such, the mobilization of a group based on their values to retaliate may be achieved quite easily to upset the community balance. Therefore, coercing parties are pivotal on peaceful coexistence of members of a community. This is in line with the respondent's view that peace is of ultimate importance. This study therefore echoes the need for procedural justice theorists to re-examine priority of the concept of party autonomy and the choice of alternative justice forums in situations where peace is at stake among clans and communities in North Eastern Kenya.

In view of the above, there is need to blend social realities with procedural justice values. For example, the need to sustain peace and account for the nature of disputes in the aftermath of criminal transgressions is an important ingredient that mediators should put in consideration. Equally, the need to navigate through stalemates that ultimately escalate into dissatisfaction and retaliations is important too. Therefore, overemphasis of ADR reform programmes on prescribing roles of a fair mediator overlooking the responsiveness of such roles in contexts where criminal transgressions may assume group retaliation and escalation of violence may not only be counterproductive but also defeatist in itself. The findings of this study therefore point out the need to abandon universalists interpretation and transplanting of facilitative roles in favor of particularism. By assuming a particularism interpretation of safeguards, reformers will be conscious of contextual realities, scenarios and situations, likely to shape their social relevance.

Nevertheless, the move to allow intervention strategies beyond those of facilitation may have an implication on disputing party-autonomy and choice of forum. As discussed, the need for peace may lead to mediators educating, persuading and even coercing disputing parties to reach out to each other. On the other hand, party-autonomy is associated with fairness due to its instrumental value for allowing disputing parties to decide on choice to use ADR when it is likely to meet their own justice needs and demands.

However, as discussed, where interpersonal criminal transgression unearths existing group tensions and conflicts and as observed by respondents that peace is of ultimate importance, community interests should override individual interest. Similarly, Przemieniecki (2017) argue that whilst recognizing the form of individual harm is important, it is also important to take

cognizant that the social harm has the capacity to inflict extremely negative consequences on overall security and wellbeing of the community.

In summary, the above findings challenge the transplanting of Western constructs of ADR instead apply principles that are contextual relevant to address transgressions in the society. The present study has established that Somali customary justice forums are reflective of various contextual realities that should be taken into consideration for effective and meaningful reconciliation process. As discussed earlier on, various intervention strategies can be seen to promote the idea of halting or preventing escalation of violence and need to navigate stalemates neglected within modern conventional ADRs approaches. The appeal to overarching inclusive values such as religion, community values that are closely linked to transformative styles as well as directive strategies such as use of pressure and coercion cannot be underestimated.

In addition, linking White's (1986) interpretation of Foucault's Critical Theory Perspective to Lederach works further raises the need to understand contextual epistemologies of disputing process and reform agenda. For instance, Foucault notes that knowledge and truths need to be understood in its history, culture and social context. He adds that what constitutes knowledge is linked to power and language. By this, it can be implied that codification, institutionalization and regulation of ADRs is conducted by persons who select certain aspects while excluding or marginalizing others for the sake of peace.

Combining Lederach and Foucault perspectives, instituting local epistemologies of how people deal with disputes in their cultural setting is productive in justice proceedings for individuals and

communities in the aftermath of criminal transgression. However, the study is also alive to the realities of possible manipulation as informed by contextual realities. Therefore, finding a middle ground to balance between regulatory safeguards and contextual realities seem to be viable option.

In view of the above respondents were further asked to explain how aspects of facilitative roles and the need for more intrusive and persuasive interventions due to stalemates and concern for peace can be balanced. In response, a local paralegal staff observed that ‘some mild pressure is necessary in making parties soften their ground thus allowing room for further negotiation’ (Paralegal 1) In this case, the use of coercion seems to be fair in instances where it is intended to help parties move out of a stalemate. In fact, in modern ADR practices, mediation strategies cannot free themselves from non-facilitative strategies such as use of pressure. This is one of the tactics that is applied to sustain the process. More importantly, findings of this study point out that pressure to sustain the dialogue with the aim of assisting to soften their ground can be contrasted from pressuring parties into accepting a particular outcome or choice.

These views are collaborated by Bagshaw (2009) who observed that dichotomization of mediation practice based on directive and non-directive intervention strategies seems to be false. This is so because in practice, intervention styles are contingent to disputing parties’ interaction, local cultures and course of mediation itself. Thus, various strategies often overlap, run together and change over the course of the process. The above distinction also agrees with that of Hedeem (2005) who observed that progressive use of directive and manipulative strategies may be perceived fair when parties believe that the intention is to keep them on track towards an agreement. Therefore, this study can observe that the use of such intrusive strategies may not

always be perceived to be unfair if the intention is to put parties on course to an agreement. This has the implication that, the requirement that facilitative mediators desist from pressuring disputing parties may not always be universally accepted within the Somali community.

The above findings also point out that providing an evaluation and judgment on parties' position may be excusable. This happens in situations where its intention is to sustain the process and not coerce parties to settle on a certain outcome. Thus, educating parties on such instances prepares them in advance hence reducing chances of perceiving the intervention biased. The findings above also cast doubt on whether there can be a 'purely' facilitative model in practice without aspects of transformation, evaluation, direction and judgment given the high possibility of stalemates between disputing parties.

Reflecting on respondents' affirmation of Community to maintain order, Ackerman (2013) who argues that individuals cede a degree of their autonomy in the interest of community cohesion and peace. It could also mean that the litigants trust the community judgment to offer a better solution than the self-initiated approach. Therefore, the transformative roles, though seen as violation of state safeguard on the role of mediators may be seen as not only affirming the community's authority but also crucial for communal cohesion. As SungYong (2019) observes, the principles of traditional customary systems not only present philosophical differences from the formal judiciary systems, they also reflect practical considerations. Community cohesion is an important practical need in the society.

The findings and conclusion above have various implications on the relevance of Modern styles of mediation. First, any attempts to constrain customary mediator's roles to that of facilitation

may create a vacuum hence influencing the effectiveness of such forums to sustain peace and meet end users' justice needs. It was observed that where reconciliation is not forthcoming from disputing parties, mild intrusive interventions are of importance in moving them out of a stalemate thus sustaining the process. Thus, it appears that there is a very thin line between mediation and arbitration in the Somali culture. Accordingly, depending on the progress of mediation, the facilitator may end up arbitrating therefore, blurring the mediator/arbitrator roles. Therefore, despite the need to uphold universal facilitative roles that aim to protect disputing parties from undue influence, this study observes that mediators' access and use of other intrusive interventions such as transformative is also an important aspect for sustaining negotiations in case of an impasse or stalemate.

Second, the findings equally have an implication on how universal fairness values on process and decision control are experienced within Somali community. Ideally, disputing parties are expected to freely decide on the most suitable process, norms and remedies that reflects their justice needs and interests. However, on the contrary, findings of this study show that certain contextual realities with mediation process such as impasse may require mediators to go beyond facilitative interventions in order to sustain interaction between disputing parties. On the other hand, the move to exert pressure can be seen to interfere with the principles of decision making and process control.

This study therefore observes that values on decision and process control should be prioritized when there is significant progress. However, when progress is not forthcoming voluntarily from facilitative interventions, findings of this study point out that evaluative interventions followed

by directive strategies may be applied with caution. This is important in minimizing the tendency to use non-facilitative strategies for purposes of sustaining the process and not coercing parties to accept a particular decision. Consequently, by exercising such caution, mediators can uphold the intended goal and decision control which seek to ensure disputant self-determination on the final settlement option. Where parties are not able to agree, the matter can be reverted back to the court for litigation. The process should also provide parties with the right to terminate the process at any time as a safeguard should they feel some sense of pressure to accept a certain decision or process.

Third, the findings on the preference for mediators who use non-facilitative strategies in case of stalemate seems to raise another contextual dimension of fairness other than that provided by Procedural Justice Theory. Notably, Procedural Justice theorization on fair styles of interventions is clouded with the goal of protecting disputing parties from undue influence of third parties in customary criminal mediation processes (Hollander-Blumoff & Tyler, 2011). Consequently, fairness is associated with limiting mediators' level of intrusiveness thus promoting facilitative interventions. For example, proponents of facilitative model such as Nagin & Telep (2017) perceive that ADR process is more likely to be free from undue influence when third parties or mediators are restrained from pressuring parties to concede to their opinion or judgment of the matter. Therefore, less intrusive interventions in terms of absence of pressure to disputing parties are more likely to be perceived fair according to Procedural Justice Theorists.

However, as observed, Somali cultural approaches to justice administration are equally sensitive on the capacity of more intrusive intervention styles to move parties out of a stalemate.

Therefore, despite various universal procedural values used to determine fair ADR process such as equal treatment, opportunity, ability of an intervention strategy to move parties out of a stalemate or impasse is an important aspect of a fair ADR process thus influencing popular concepts of justice.

Based on the findings of this study, it is observed that contextual realities go beyond third-party neutrality commonly understood from the modern ADR values of facilitative roles, party autonomy and self-determination as highlighted by procedural justice theorist. The ADR process takes place in a specific context and therefore the ability of these procedural to sustain negotiations is an informal aspect beyond formal procedures. This is an important aspect in legitimacy of the customary judicial system hence, worth consideration.

Fourth, in terms of study's theoretical contribution and conceptual clarification, the proponents of Critical Procedural Justice such as Dunn (2013), Bobocel & Gosse (2015) argue that the definition of what constitutes fair safeguards may be much broader than the normative legal framework requiring mediators to act as facilitators within a typical Alternative Dispute Resolution mechanism in criminal transgressions. In line with their thoughts, the findings of this study observe that another important non-legal source of fairness and justice is on the ability of mediators or third parties to push parties out of a stalemate. This is significant as it steers them towards the path of reconciliation thus sustaining peace and harmony in ethnically divided societies. Therefore, pure Procedural Theory should be conscious on the implications of facilitative role on the capacity of mediators to sustain the process and perceptions of fairness where disputing parties present irrational and unrealistic positions while peace and order is at stake.

#### **4.5.2 Local Relevance of Non-Interest Related Status**

Another ADR regulatory aspect was on the attributes of third party in criminal mediations. It is instructive to note that formal courts seek to ensure impartiality and neutrality by prioritizing outsider-partial mediators commonly referred to as persons with non-interest related status. This is so because they are perceived to be more impartial and neutral since they have less influences due to lack of previous or existing interactions. Interest related status can therefore be understood as mediators who lack previous and current interactions and relationships with disputing parties that may be used to influence the process and outcomes against those of the disputants. As such elders are perceived as interest-related status and are discouraged from acting as mediators. In order to understand how the aspect of interest-related status is experienced and perceived in reference to the question of elders, respondents were first asked to explain why they might prefer elders as mediators in justice administration process. Findings are presented below.

#### **4.5.3 Mediator's Religious and Moral Standing**

To begin with, majority of criminal disputes in ADR are resolved through compromise where the mediator persuades parties to soften their position. As such, mediators are seen as a powerful catalytic agent whose presence and identity alone influences the parties' negotiating behavior. Therefore, an emerging theme was on their religious and moral standings. A victim of crime observed that 'elders with religious and high moral standing are easily given an ear and their outcomes are easily complied with since they perceived to be neutral' (Female crime victim 6).

Another one observed that ‘religious stories and teachings of forgiveness are important in neutralizing hostile perception and retaliatory motivations and opening room for dialogue’ (Female crime victim 7).

As observed in the quotes above, despite the move to limit elders in criminal mediations, their religious and moral standing seems to have an influence on the level of persuasion in criminal mediations. Mediators with religious and moral reputation are likely to be persuasive due to the following reasons. First, their admiration and respect due to their moral standings may act as a leverage hence making them readily followed. For instance, aspects of morality and religiosity can be associated with impartiality in the sense that a moral mediator has nothing to gain but are motivated and guided by religious doctrines and practices of forgiveness and peacemaking. This perception therefore may increase their trust and legitimacy thus disputing parties can easily listen and comply with their directions thus being more trusted.

Given their consensual nature, mediator’s identity and leverages are an important aspect in criminal mediations. Accordingly, Bercovitch (2019) observes that compromise in criminal mediations may greatly rely on mediator’s identity and leverages. On this, Shapira (2012) argues that a leverage entails some form of influence or inducements which is used to increase legitimacy and trust thus persuading parties to a settlement. Accordingly, mediators with religious and moral reputation are likely to gain trust and legitimacy among disputing parties. This may translate into a form of leverage that can be used to positively influence the process.

These findings on the role of religious and moral attributes on addressing negative attitudes in the aftermath of a criminal mediation agree with those of Galtung (2005) in his informative concept on triangle of conflict. Galtung observes that scope of conflicts is interrelated with attitudes, contexts and behaviour. Attitude centers on stereotypes, hatred, suspicion, negative emotions and perceptions while context touches on structural aspects such as unequal access to multiple justice options while behaviour focus on the aggressive actions or reaction. Therefore, where stalemates are a product of underlying hostilities, religious and moral narratives may be used to transform such negative attitudes. In such situations, elders may be more admirable thus affecting compliance with non-interested mediator requirements.

Second, moral and religious mediators have access to moral and spiritual values which significantly influence their level of persuasiveness. For instance, in Somali community, religious leaders use moral narratives, moral vocabularies, proverbs and myths to promote an attitude of remorse, neutralize negative group perceptions and animosity, forgiveness and accommodations among disputing parties. Third, religious and moral standing seems to be of importance in addressing hostile perceptions within a criminal dispute. Generally, Chopra (2015) observes that the nature of the root cause of criminal disputes in Garissa County may involve multiple issues ranging from tangible aspects such as conflicts over land, watering points to intangible issues such sub-clan animosity, perceptions of exploitation and marginalization. Based on respondent's attention to neutralizing hostile group perceptions and retaliatory motivations, moral and religious doctrines seem to be of importance in countering such negative perceptions with narratives of forgiveness, peacemaking and reconciliation.

This finding on role of religious and moral attributes in addressing negative attitudes in the aftermath of a criminal mediation agree with those of Galtung (2005) in his informative concept on triangle of conflict. Galtung observes that scope of conflicts is interrelated among attitudes, contexts and behaviour. Attitude centers on stereotypes, hatred, suspicion, negative emotions and perceptions while context touches on structural aspects such as unequal access to multiple justice options while behaviour focus on the aggressive actions or reaction. Therefore, where stalemates are a product of underlying hostilities, religious and moral narratives are used to transform such negative attitudes.

Religiosity and moral authority are therefore seen as a leverage for building trust in criminal disputes with intangible issues such as sub-clan animosity, perceptions of exploitation and marginalization within the Somali community. Second, moral and religious standings have an implication on compliance due to perception of impartiality and use of religious narratives and teachings. Third, moral and religious authority is equally important since it increases mediator's level of persuasion. This is ideal in transforming negative attitudes likely to cause an impasse within criminal mediation processes. In view of the above, elders who are perceived to have high moral and religious standing in the community are ideal in handling mediation processes in criminal cases.

On the other hand, respondents were also conscious of limitation of using elders in mediations. For instance, a villager observed that 'moral and religious mediators work best when disputing parties perceive them as important' (Village elder 2).

Therefore, where disputing parties don't equally value religion and moral values, their use may be less likely to have an implication. Religious and moral aspects can be valued differently between disputing groups. For example, with modernity, new values and identities have emerged disrupting value for morality and religious institutions. However, some studies such as those of Bercovitch & Kadayifci-Orellana (2009), Schlee (2013) & Kotter (2015) point out that religion and morality continue to be an important aspect of modern identity. This is perhaps due to the fact that most world religions share commonalities. Therefore, religion and moral resources are of importance in criminal disputes entangled in intangible issues such as group animosity.

In view of the above, among the Somali justice seekers, mediator's identity and leverages are highly regarded. On the other hand, Procedural Justice Model as argued by Tyler (2003) postulates that an ideal neutral mediator is that who can consistently apply norms and remedies consistently without being influenced by their own biasness or favor. This is implemented by limiting the use of interest-related mediators such as elders in criminal mediation process who may have influence on the course of mediation. However, the above conceptualization of a neutral mediator based on roles and status overlooks the various leverages and resources such as those that accrue with elders and their implication in mediation process. This study therefore, notes that mediators' identity and leverages are worth considering when prescribing neutral mediators within Somali customary justice forums.

#### **4.5.4 Accessibility and Choice of Mediator**

Criminal mediation can be a continuous engagement based on the nature of issues. Thus, continuous involvement of mediators is an important aspect for constant support and

consultation. Accordingly, another emerging preference for community elders as mediators was on continued accessibility. As observed by a crime victim, 'local community leaders have long-term benefits since they can be easily approached even after the mediation process' (Male crime victim 1).

As observed in the above, continued access to mediators has a bearing on the suitability of an ideal mediator. Notably, continued availability of mediators long after the mediation process was an important element as observed by respondents. This implies that mediation encounters ought not to be seen as short-term isolated events. Rather, mediators need to continue offering their services such as facilitate communication, clarify issues and address any emerging misunderstanding hence making them more sustainable. These views resonate with those of Dekha & Mason (2019) that for mediators who are accessible to disputing parties, reconciliation process may be preferred due to their continued consultation on other emerging issues.

On the other hand, access to state authorities for criminal mediation may depend on access to key resources necessary to overcome interferences within the formal justice landscape. As observed by a victim of crime, 'you need someone to hold your hand through the system. Access to influential networks is necessary to push your file and minimize exploitation' (Female Crime Victim 4).

In this case, the involvement of state judicial authorities in criminal mediation may require support and connections from influential personalities. This is evident from respondent's mention of aspects such as 'hold your hand' and 'push your file.' These observations resonate with those of Jackson (2014) who observes that the formal court system is actually seen as an

effective mechanism by which an individual who has more resources namely personal connections, political power, money can gain an unfair advantage against someone who cannot mobilize such resources. Thus, rather than a remedy for injustice, according to Jackson, the formal system is viewed by many as a mechanism by which the rich and powerful very effectively perpetrate injustice. In view of the above, power and resources are an essential determinants of justice outcomes. This is a factor that influences access and use of state justice officers as mediators in the aftermath of criminal transgressions.

Accessibility was also perceived in terms of physical proximity of formal justice institution. For example, a local paralegal observed that ‘in remote areas with nomadic transient populations, formal courts are not accessible. In other contexts, threat of terrorism may affect establishment of formal justice institutions’ (Paralegal 1). In addition, a legal official also observed that ‘in Garissa County, we have courts concentrated in Garissa Town and three mobile courts in Dadaab, Modogashe and Masalani’ (legal official 2).

This implies that physical access to formal courts is a concern likely to affect utilization of formal justice forums. One aspect that influences physical access to formal justice forums is their limited distribution. This is implied from respondent’s observation on concentration of courts in Garissa town and three mobile courts in Dadaab, Modogashe and *Masalani*. In this case, the distribution of formal justice forums may have implications on direct and indirect cost. For example, disputants from far flanked areas such as *Ijara* and *Hulugho*, may be required to cover a distance of approximate 246 kilometers with poor roads. Other associated costs may include accommodation and food as one may have to travel a day before in order to attend court sessions

early morning. Therefore, access to formal justice resources may be a determining factor. Closely related to direct cost is indirect cost.

These findings resonate with those of Sessay (2018) where it was observed that indirect cost associated with the interruption of livelihood activities due to time spent away to attend formal courts found in urban centers far away from villages may be discouraging. This is corroborated by Chopra (2015) who argues that majority of citizens in Garissa engage in informal activities such as pastoralism and livestock trade where interruptions may lead to economic implications. In such contexts, formal courts situated away from settlements may be discouraging thus leading to majority of justice seekers to revert to reconciliation and compensatory justice remedies provided by elders that are close to parties of criminal transgression. In view of the above, attempts to provide formal courts with original jurisdiction may not be sustainable in contexts where such forums are not physically accessible.

Respondent's attention to aspects of nomadic transient populations, threat to terrorism and limited access to formal justice forums raises concerns of limited statehood. Limited statehood as noted by Kotter (2015) may refer to contexts or situations where state justice institutions such as the police have minimum presence. Nomadic lifestyles present unique challenges to state-building. For example, as argued by Mkutu (2017), lack of concentrated populations due to their transient nature present challenges for the establishment of sustainable government justice institutions. Accordingly, Muigua & Kariuki (2015) observed that accessibility to the formal judicial system is hampered by the cost, travel and time required to bring a case in a formal court. In addition, the use of formal procedures may necessitate legal representation and legal aid

or other forms of support that are often lacking in many local communities. Further, formal courts may not always be well equipped to hear disputes and render judgments promptly and equitably, hence discouraging many.

It is worth noting that formal courts may prioritize the use of state appointed officers as mediators in criminal violations. However, as discussed above, this move is affected by access to key resources essential to navigate the justice landscape, need for continuous consultation and physical proximity.

#### **4.5.5 Authority over Informal Justice Resources and Choice of Mediators**

Another emerging theme on importance of elders was on access and control of informal justice resources such as kinship systems. A village elder observed that:

Local sultans are respected as overall clan leaders who can quickly mobilize kinship and mag-paying systems in case of conflict-related crimes. For example, disputing parties are quick to mobilize compensations when Sultans are involved. In extreme case, their threat to non-cooperative offenders is taken seriously. (Village elder 1)

Similarly, a crime officer observed that ‘Sultan bring informal networks such as mag and diya into disputing forums which are used to mobilize locals to contribute funds for compensation for sustainable peace’ (Crime officer 5).

In this case, mediators who have authority over informal justice administration resources such as clan and mag-paying groups are highly regarded. Accordingly, local Sultans are highly respected clan leaders whose authority is important in pushing reluctant offending groups to the

negotiation table. Their authority is also used to mobilize kinsmen into complying with contributing compensation money thus sustain peace. Continued relevance and authority of local Sultans in modern day Somali community is attributed to how community organization of Somali people has been re-adopted with emerging political and economic incentives.

This is in line with Ali (2020) where he notes that Somali society is based on segmentary social order with clan and sub clan led by sultans. He adds that their roles in pre-colonial society was to ensure harmony among the various segments of Somali lineages. Gundel & Berg (2016) note that authority of Somali sultans has evolved from promoting harmony among various clans to securing political and economic benefits for its members.

Chopra (2015) on the other hand, notes that mediators are increasingly perceived as gatekeepers to communal land. Further, Kimathi (2013) observed that their authority and power is attributed to the emerging role as go-between the political class and the community. Dekha & Mason (2019) add that with the devolved system of governance in Kenya, Sultans continue to represent clan interests in the sharing of political seats, jobs and other opportunities. Therefore, given the incentives and resources they control within the community, local Sultans are perceived as authorities whose decisions are easily respected and complied with. When involved in criminal mediations, their influence on clan and *mag* paying systems makes the process swifter. That is, parties are more willing to give their contributions in time in order to avoid severing their relationships and accruing benefits with the Sultan. Their decision is highly respected thus parties may comply to avoid retaliation hence their preference is not unfounded.

In view of the above, findings of this study point out that the use of mediators such as elders with social and political authority have advantages especially in conflict-related crimes. In such incidents, quick initiation of reconciliation process is of importance for promoting peace. Thus, their authority is of importance for mobilizing clan and mag systems into negotiating table in order to discontinue any bloodshed. In addition, their authority is of importance in mobilizing timely contributions of compensatory money to avoid re-occurrence of violence.

Therefore, the move to prioritize neutral and non-interested mediators overlooks the implication of mediator's identity, informal resource and leverages in justice forums and their accessibility. Their relevance as discussed can be manifested in scope and nature of criminal dispute where intangible issues are of concern, efficiency of the process in terms of levels of persuasion and compliance initiation, and ability to mobilization of kinship justice resources such as collective responsibility and collective compensation. The need to understand how various justice actors acquire and relevance meaning before any attempts to reconfigure them through various human rights standards values cannot be underestimated. Thus, relevant justice actors and notions are best understood from their context and more so based on how justice seekers navigate various resources rather than reliance of pre-determined homogeneous categories such as restorative, retributive, formal and informal.

Respondents were also clear on instances where they may prefer mediators who are not community elders. On this, a local women leader observed that 'police investigative reports are very influential in pushing parties to an agreement' (Local women representative 2). In addition, senior police officer also observed that 'police decision on who is the victim and offender based

on evidence presented and legal criteria moves the reconciliation process away from the lengthy debate on who is to blame and responsible' (Senior police officer 2). This shows that police powers to categorize between the guilty from the innocent based on investigative reports and legal frameworks increases the chances for a settlement. Therefore, this makes their involvement attractive over community elders. Notably, the threat for arrest and prosecution that accrue from being labelled as an offender increases the probability of consenting to victims demands thus making the process more expeditious. Therefore, use of mediators such as state officers rather than community elders may also be preferred due to the implication of their authority and powers on the rate of settlement.

The above findings agree with those of Wourji (2012) who observed that contestation over criminal responsibility in customary forums may push parties to approach formal justice authorities as mediators. One of the aims is to rely on their capability and legal authority to push parties out of a stalemate. In view of the above, this study concludes that access to authoritative legal evaluation of criminal liability is an important aspect that for effective reconciliation process in criminal mediation. This study therefore observes that state justice actors are preferred where stalemates persist in terms of liability and responsibility of the criminal harm.

In view of the above, this study established that access to authoritative legal evaluation of criminal liability is equally an important aspect for effective reconciliation process in Somali criminal mediation. The study further established that state justice actors and their powers is preferred where stalemates persist in terms of liability and responsibility of the criminal harm. It is also important to note that religious values and commonality is used to leverage parties out of a stalemate.

Respondents further observed that relevance of such resources is based on the extent to which parties can identify with religion and other identities presented. Where effectiveness is questioned, state actors such as the police and authority is used as an alternative. These findings also point out that formal and informal justice systems interact with each other in criminal mediation process. Therefore, regulative safeguards that assume dichotomization of formal and informal may miss the bigger picture of justice administration process.

#### **4.6 Witness Intimidation**

The intimidation of witnesses is an emerging challenge experienced in the administration of justice. For instance, a victim of crime observed that ‘use of police makes the process quick due to the threat for incarceration. However, clan and elders may intimidate witnesses and victims to withdrawal from the matter thus making their involvement ineffective’ (Male crime victim 6). In addition, a legal official also observed that ‘clan and elders can form parallel justice forums then demand the victims and witness to withdraw the matter from the police. This can be motivated by the need to sustain peace or at times to serve their own interests’ (legal official 1).

This shows that despite the need to involve police in the mediation process, their effectiveness may be affected by witness intimidation. Clan and local political leaders in Garissa and the larger North Eastern region have the tendency to intimidate witness and victims. This is done in order to limit and control the involvement and oversight of police and state justice systems in criminal mediation. Accordingly, witness intimidation aims to convince them to recant their testimony or

fail to present themselves when required. Their withdrawal may greatly weaken the case leading to the release of the suspect.

The findings above agree with those of Wanyoike, Onkware & Okoth (2018) who observed that in Garissa, witness and victim intimidation is often performed by intermediaries or *maslaha* brokers commonly referred to as *ergo*. They are often strategically positioned at police stations where they scout for criminal matters that can be referred to community *maslaha*. In most cases, they work with the suspected perpetrator to invoke *sharia* doctrines and relationship concerns in order to push for reconciliation over prosecution. Where victims do not give in to such cultural and social concerns, they involve the larger clan to pressure and intimidate the witnesses and victims. One possible motivation for the involvement of clan and *ergo* is the incentives that accrue from *maslaha* compensatory remedies. Generally, *maslaha* forums aim for compensation where mediators get a share of the money contributed.

Another motivation for witness intimidation as identified by respondents is peace. This is where use of *maslaha* reconciliation process is essential to prevent escalation of violence. This is common in serious crimes that can trigger public outcry such as murder and grievous assault. Therefore, promoters of state authorities in criminal mediations ignore the deep-rooted Somali cultural justice practices and accruing incentives. The findings above show that the use of state justice authorities such as police in criminal mediations is not suitable. This is evident in situations where there exist influential local informal justice organizations such as clan and elders. This is made worse by a culture of witness intimidation in justice administration process.

#### **4.6.1 Complex Procedural and Local Relevance of Original Jurisdiction**

Another regulative safeguard was original jurisdiction where criminal cases are first required to be reported in formal courts for oversight and supervision. This is done despite the need to refer to Somali cultural values for redress. Consequently, respondents were asked to explain factors that may affect the initial involvement of formal courts based on their experiences. An emerging theme was on the procedural conditions attached with the involvement of state authorities. On this, a paralegal observed that:

These officials require one to follow complex and strict protocols for them to be involved in mediation hence discouraging their use. For example, one need to have a case in court and the offender to have pleaded guilty for them to be of assistance in criminal mediation process. (Paralegal 1)

The above quotation demonstrates that procedural conditions attached with the involvement of state authorities in criminal mediation discourages the involvement of state justice actors in criminal mediation. For victims to access and involve the police, the matter has to be reported and filed in the occurrence book. This is followed by the officer commanding station assigning the case to an officer who then commences the investigations process. Such strict protocols are discouraging especially in cases where one lacks adequate resources and connections to monitor progress. On the other hand, to get the attention of public prosecutor or court appointed mediators, the matter has to be before a court of law.

In a court of law, a plea is taken and based on magistrate assessment, the matter may be referred for an out of court settlement. Thus, the process may require legal knowledge, strict adherence of

the process and patience. Therefore, attachment to formal procedures in order to secure the involvement of state justice actors is time consuming. This is in regard to various requirements to be fulfilled before the involvement of state justice authorities in criminal mediation. This study therefore observes that despite the importance of involving state authorities in criminal mediation, formal procedural requirements for their involvement limit their accessibility. This reinforces the need for reformers to ensure that their access is free from complex procedural technicalities.

#### **4.6.2 State Judicial Authorities and Collective Responsibility**

Respondents were also clear on limited use of collective responsibility when involving the local police. On this, a victim of crime observed that:

Police and prosecutors do not allow collective criminal responsibility. This makes them less ideal in situations where perpetrators are missing or not known. In law, community or clan cannot assume responsibility on behalf of the perpetrator as practiced in Somali culture. (Female crime victim 3)

As such, the involvement of state justice authorities limits the use of collective responsibility in formal criminal mediations. Collective responsibility often comes in when an identified perpetrator fails to reach out to the offended group. The goal is to allow reconciliation process to proceed despite the absence of the perpetrator thus averting further violence and bloodshed. In such situations, kinsmen may not be willing to identify persons within the group who carried out the criminal act. Without specific perpetrators and witnesses, the involvement of police is limited.

This is so because formal state justice authorities define a criminal as the individuals directly involved in the commission of the act. Anyone assuming collective responsibility may not neatly fit into the legal descriptions of a perpetrator thus making their involvement less effective. Therefore, in cases where perpetrators cannot be traced, their involvement is greatly limited. This finding is in line with those of Schlee (2013) who argues that collective responsibility is of importance in sustaining justice administration process thus averting violence in Somali community.

In view of the above, various contextual and cultural realities within the Somali community impede initial involvement of state authorities in the aftermath of criminal transgressions. These are witness intimidation, complex procedures and access to key justice administration resources. In this case, despite the modern notion that formal courts are mainstream avenues for justice while non-state alternatives, such an assumption seems not true among the Somalis. Given the various challenges identified, formal justice forums may be perceived as alternatives. Therefore, any reform and regulative frameworks that approaches state justice institutions and actors as mainstream justice avenues may not be sustainable in instances where they are perceived and experienced as alternatives.

In conclusion, one of the regulative safeguards requires that mediators play more of facilitative roles. However, compliance to facilitative intervention strategy had an implication on ability of *maslaha* justice administration process to arrive at a settlement. For example, limitation to facilitative strategies affected ability of a mediator to sustain peace, move parties of a stalemate and sustain reconciliation process. Thus, although the move to limit their intervention is

important in minimizing forms of biasness and abuse, on the other hand, one cannot overlook the possibility that such limitations have an implication on their ability to meet Somali justice needs and goals. Little regard for their locally accepted roles may impede the uptake of facilitative regulatory safeguards.

Another regulatory safeguard seeks to promote the use of state judicial officials as mediators due to their non-interest related status. However, findings of this study point out that certain key attributes within *maslaha* are perceived to be of importance resulting to Somali elders being preferred. These are based on their access to wide range of leverages essential for addressing intangible aspects of criminal dispute. Second, elders act as political authorities of kinship and clan systems thus have powers to mobilize locals through these systems for enforcement of their outcomes and contribution of compensations. Third, since their forums rely on social pressure and moral persuasion, reliance on authoritative figures as third parties is key for the successful implementation of outcomes.

Fourth, elders are more trusted and perceived more legitimate due to their religious and moral authority. In addition, as discussed, elders are preferred due to limited state presence in far-to-reach areas such as Modogashe. Accordingly, the move to substitute them with state appointed mediators while at the same time overlooking their unique roles based on their social attributes and status may be defeatist. In addition, despite the emerging narrative that elder's role will diminish in the advent of modern justice systems, such assumptions may not hold true among the Somalis based on their social and cultural realities.

Another regulative safeguard sought for the initial involvement of have state justice institutions for purposes of oversight and supervision, a strategy commonly referred to us original jurisdiction. Notably, it was observed that state justice actors as mediators are preferred due to their authority and powers and ability to expedite the mediation process. They also act as a source of leverage to initiate the reconciliation process where local elders and kinships systems are not willing to initiate justice administration process in the aftermath of criminal. However, their involvement seems to be mediated by familiarity and comprehensibility of the procedures one has to fulfill before accessing them. In addition, direct and indirect cost impedes the uptake of key resources necessary to overcome interferences within the formal justice landscape and their less regard for collective responsibility in formal criminal mediations. The distribution of state justice institutions is conspicuously absent in highly transient nomadic populations thus making such an intervention unsustainable. Accordingly, local justice users concern with common justice administration problems that plague formal systems affect the uptake of this safeguard.

## CHAPTER FIVE: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Major Findings

This study sought to examine concepts of justice constructed from end users' contextual realities that shape the uptake of judicial safeguards in accordance with *maslaha* system of justice. By concept of justice, as used in this work, refers to salient contextual realities that shape dynamic interpretation and application of justice norms, procedures and remedies in the aftermath of a criminal transgression. In the section that follows, guided by the main objective of this study, a summary of what emerged from this study is provided.

#### 5.1.2 Salient features of *maslaha* justice systems relating to criminal offences

The study sought to explore the salient features of *maslaha* justice systems relating to criminal offences. It emerged that *maslaha* justice forums continue to be used in redressing both major and minor criminal transgressions in present day Somali community. Information collected during the study point out that, salient features of *maslaha* justice forums include prioritization of victim and social harm, collective responsibility and leverage on Government law enforcers for initiation, and a blend of intrusive and non-intrusive intervention strategies. Importantly, focus on community social harm is important for soothing and reconciling the offended group thus minimizing retaliation. This is so because existing animosity and conflicts among Somali complex clan systems is a contextual social reality that can lead simple interpersonal crimes escalating into group or clan violence.

Collective responsibility was also an overarching concept of justice used to navigate through common set-backs that may be encountered during the reconciliation process thus minimizing chances for retaliations. Common set-backs encountered by justice seekers in Garissa that warranted collective responsibility included perpetrator's inability to pay *saben*, when known perpetrators cannot be traced for prosecution or when identification of perpetrators is not easy especially in crimes associated with inter-communal conflicts that are characterized in a vicious cycle of retaliation. It was also instrumental in conflict related crimes where warring clans are not willing to produce perpetrators. Furthermore, *maslaha* justice forums rely on social pressure and where this is not successful, disputing parties may take recourse to government law enforcers. Thus, in summary, Somali concepts of justice common in *maslaha* can be characterized as prioritization of social harm, collective responsibility and leverage on Government law enforcers for initiation, and a blend of intrusive and non-intrusive intervention strategies. These salient concepts of justice were informed by contextual realities namely concern for retaliation, need to navigating common dilemmas encountered in the process of reconciliation, power dynamics among disputing parties and concerns for peace and order respectively.

Despite their popularity and meeting community's needs, the consensual nature of *maslaha* procedures and their reliance on arbitral processes through kinship systems to represent the victim and offender and their ambiguous justice principles such as social harmony make them vulnerable to abuse and discrimination. Considering persistent use of *maslaha* justice forums and given the importance of justice as a pre-requisite in sustaining peace among the Somali clans in

Garissa, the Government has put in place judicial safeguards to ensure objectivity and fairness in their processes.

### **5.1.3 Elements prioritized by judicial regulative models for *maslaha* criminal justice systems**

The second objective sought to find out elements prioritized by judicial safeguards in response to the vulnerabilities associated with *maslaha* justice forums. This study found out that major values prioritized included empowerment, active participation, inter-party autonomy and third-party neutrality. These were implemented through legal clauses and practice of original jurisdiction limitation, non-related status third-party and facilitative intervention strategies. It also emerged that judicial safeguards focused on reforming justice administration procedures used to apply customary justice doctrines in providing redress in criminal transgressions. It also emerged that procedural values entrenched in the safeguards prioritized individual justice needs and rights over those of the community and social groups. However, these were not always in line with the philosophy and concepts of justice of the *maslaha* that prioritized social harm over individual harm. To this end, compliance of the safeguards was bound to encounter resistance and limited utility as informed by the social context.

### **5.1.4 Extent to which operationalization of judicial regulative safeguards are responsive to salient cultures of justice administration within *maslaha* justice systems**

The third objective sought to find out the extent to which the judicial safeguards were accommodative of Somali popular notions of justice. It emerged that operationalization of the safeguards was not sensitive and accommodative to situations and scenarios when concepts of justice and their underpinning realities mattered in the eyes of end users. For example, it

emerged that criminal transgressions that occurred in the midst of heightened clan animosity and tensions increased the risk for clan retaliations among affected parties thus necessitating the need for wide use of intervention strategies in order to prevent further violence. In the end, failure to identify situations when full compliance towards third-party facilitative roles can be exempted when operationalizing safeguards affected their compliance. Similarly, the urge to expedite the process in order to minimize retaliatory violence was also a significant contextual reality that pushed mediators to apply other strategies such as transformative, evaluative and even directive interventions. Thus, the effectiveness and settlement rates of *maslaha* justice forums greatly determined by intervention strategies are important in minimizing retaliation. Therefore, oversight by judicial safeguards to the above situations while operationalizing facilitative intervention strategies is a factor that affects their compliance by its end users.

Further, it emerged that effectiveness and settlement rates was greatly determined by mediator's persuasiveness and was significantly shaped by their leverages and resources, moral authority and authority over customary justice groups such as clans. Consequently, these realities seemed to overshadow preference for non-interest related status who were touted by the Government for their neutrality and subject matter expertise. Accordingly, elders, were found to be preferred.

Further to the above, this study found out that initial involvement of state justice institutions or original jurisdiction was limited due to formal institutional constraints such as complex procedures involved, local practice of witness intimidation and their less regard for collective responsibility to justice administration. In the end, failure to adequately address such concerns while operationalizing original jurisdiction regulatory safeguard within *maslaha* justice forums in Garissa is a concern that affects their local compliance. Thus, in view of the above, less

attention to the responsiveness of state judicial regulative safeguards to contextual realities, constraints and their corresponding notions of justice in terms of norms, practices and values prioritized by end users and community seems to affect their uptake.

This is so because judicial safeguards and their corresponding operationalizing strategies overlook situations and scenario when salient contextual realities identified above significantly shape course of justice administration where specific justice processes, actors, process and remedies are prioritized. Therefore, among the Somalis in Garissa, concepts of justice derived from salient contextual realities shape and prioritize various justice processes, norms, actors and remedies which ultimately impede compliance towards judicial safeguards.

## **5.2 Conclusion**

From the foregoing, this study can draw the following conclusions. First, from the study, we can conclude that, operationalization of morality and justice by the judiciary overlooked situations and scenarios when salient contextual realities and their emerging justice administration process mattered more in the eyes of local end users. More importantly, according to findings, emerging safeguards tend to emphasize more on procedures, norms, remedies and outcomes that prioritize and empower individual needs and promote objectivity of the process thus overlooking situations and scenarios when their relevance is greatly affected by salient concepts of justice.

Secondly, this study concludes that there is a dissonance between what judicial safeguards prioritize and local salient notions of justice embedded within *maslaha* forums. For example, as highlighted, contextual realities that underpinned salient justice practices within *maslaha* forums such as the need to prioritize social harm and reconciliation were too crucial to be ignored by the

safeguards. Thus, where safeguards were found to subvert the ability of *maslaha* forums to minimize retaliatory violence, their adherence was greatly affected. Accordingly, the need to sustain peace in the aftermath of criminal transgression had cascading implication in the administration of justice. To this end, persuasiveness of mediators and settlement rate in terms of ability to expeditiously arrive at a consensus in *maslaha* justice forums was of great importance. Thus, mediator's persuasiveness in criminal matters was highly associated with factors such as religious and moral authority. Elders possessed much of these qualities. This greatly affected ideal third-parties and relevance of non-interest related status third parties who often possessed subject matter expertise. In the same vein, effectiveness of formal institutions based on complex procedures involved, local practice of witness intimidation and regard for collective responsibility and local justice cultures were found to be overarching contextual realities that affected effective operationalization of original jurisdiction.

In view of the above, although judicial safeguards are important in empowering victims, this study concludes that their responsiveness to end user's experiences, expectations, realities and aspirations have an overriding effect on their uptake. In the case of Somali community in Garissa County, these contextual realities include threat of retaliatory culture, settlement rates or quick resolution of criminal disputes, mediator's leverages and capacity of formal justice institutions in form of simple procedures, access and ability to prevent witness intimidation.

Further, this study concludes that certain features associated with operationalization of judicial safeguards greatly affect their uptake in various ways. First, the overly individualistic frameworks underpinning safeguards overlook their implication on salient justice administration

practices that are reflective of the economic, social and political realities of the community. For example, overemphasis on individual justice needs over those of community welfare misses out cultural nuances such as retaliatory violence that are collectivist in nature and important in maintaining order and peace. Second, state centric implementation of jurisdiction limitation and original jurisdiction overlooks capacity and legitimacy of formal justice actors within justice administration process. Third is the top-down implementations and operationalization which pays little attention to end user justice concerns such as existing conflicts, animosity and retaliation seems to affect customary justice reform processes. Lastly, technical legalistic approach devoid of customary justice dynamics deeply affected by cultural, social and political nuances of justice administration process thus affecting their compliance.

Consequently, the universal importance attached to pre-determined values prioritized within judicial safeguards may have relative reception in different contexts. Equally, as observed, legitimate judicial safeguards are those that are responsive to end user's needs, aspirations and beliefs thus providing an incentive for compliance and prioritization. Thus, in view of the above, less attention on the responsiveness of state judicial regulative safeguards to contextual realities, needs and their corresponding notions of justice in terms of norms, practices and values prioritized by end users and community seems to affect their uptake. In addition, their implementing strategies tend to build more on state justice institutions an aspect referred to as state centric thus overlooking contextual realities and how they shape legitimate justice norms, actors, processes and remedies.

Ultimately, nature and operation customary systems of justice can be understood from the concept of justice is derived from contextual realities and how they shape and prioritize various justice processes, norms, actors and remedies. Consequently, judicial safeguards that turn blind eye to these arrangements and configurations may encounter challenges within Somali community. Accordingly, this study concludes that less importance on concepts of justice developed from community lens of contextual realities and needs impede the uptake of state judicial safeguards within Somali *maslaha* justice forums in Garissa County.

### **5.3 Policy Recommendation**

One of the major findings in the first objective was that, social harm through Somali elders and local cultures seems to be is a justice goal prioritized by *maslaha* justice forums. Equally, the study found that social harm seems to be an important justice motivation due to culture of retaliation and existing clan animosity. This may imply that peace may matter more than the need for accountability through prosecution and formal justice institutions more so in conflict-related crimes and those wrongdoing that transform from interpersonal to group violence.

In view of the above, this study recommends a careful blend of judicial regulations and salient community justice practices based on end users' realities and needs. Formal justice institutions can develop a framework for embracing and accommodating popular and legitimate Somali justice practices and actors that aim at addressing social harm and sustaining peace. Such changes should be incremental and consultative with both justice practitioners and diverse end users in order to capture both state and community aspirations.

Closely related to objective one was that their process is fraught with abuse and discriminations. Therefore, given limited enforcement capacity of state actors in North Eastern region, this study recommends incentive-driven accountability strategies since they are more likely to be self-enforcing thus sustainable and attractive to elders, clan systems and family representing disputing parties. This may include tokens and other benefits to forums and actors that administer justice fairly.

In the second objective, it was concluded that despite the importance of judicial reforms, their over-prioritization of individualism in order to enhance objectivity may conflict and undermine community justice interests. This study therefore recommends blending of Global North individualistic frameworks and African styles of ADRs which are more collective and community-centric through dialogues. Consequently, rather than a blanket imposition of such values, key areas where breaches of human rights standards occur should be identified and targeted for reform. This will minimize undermining positive elements. For example, this study observed that initiation of *maslaha* forums was a concern and a common point for abuse. The study also identified other areas that require careful balancing such as the need to sustain dialogue towards settlement while refraining from imposing an outcome hence objectivity. Accordingly, dialogues can be used to provide entry points on how best to integrate the two competing values in locally accepted ways. Key opinion shapers within the Somali community such as elders, clan systems and leaders, local political elites and youths can be included for change and support.

In the third objective, it was concluded that various contextual realities seem to impede compliance of judicial safeguards in *maslaha* justice forums. This study therefore makes the

following recommendations. First, it was observed that facilitative intervention strategies may limit third-party ability to navigate through stalemates common in *maslaha* justice forums. Accordingly, this study recommends the need for a flexible code of practice with clear guideline on when mediators may move out of facilitative strategies. Notably, the need to sustain mediation dialogue, push parties out of a stalemate, sustain peace and cool down retaliation can be key areas to consider.

It was also concluded that mediator's resources and leverages and rate of settlement have overarching social importance among justice seekers. Therefore, this study recommends a review of qualification requirements for mediators within *maslaha* justice forums from subject matter expertise to other communally desired traits such as religiosity, moral authority and control of clan justice systems. Further, given the importance of objectivity and fairness, this study recommends co-mediation where *maslaha* forums may involve two mediators, a local elder and a representative of the Government, judiciary representatives and representatives of human right bodies to ensure aspects of fairness while upholding community justice ideals and aspirations.

This study also underscored limited concern for original jurisdiction in formal courts due to accessibility, complex procedures involved and cost. This study therefore recommends the need for Government to limit or waive complexities involved in instances where a matter is being referred to an out of court mediation. A committee can be set up that involves judiciary and law enforcement where they receive and attach a judicial state officer such as Court-annexed mediators in cases suitable for *maslaha* thus absolving them of the complex process.

## **5.4 Study's Implication**

### **5.4.1 Implications for Theory**

This study was informed by two competing approaches to Procedural Justice Theory namely orthodox and critical perspectives. Consequently, the orthodox theory as argued by Tyler (2004) sets out certain universally agreed parameters of fairness that ought to be prioritized in alternative justice processes reforms. These are process control, self-determination and third-party neutrality.

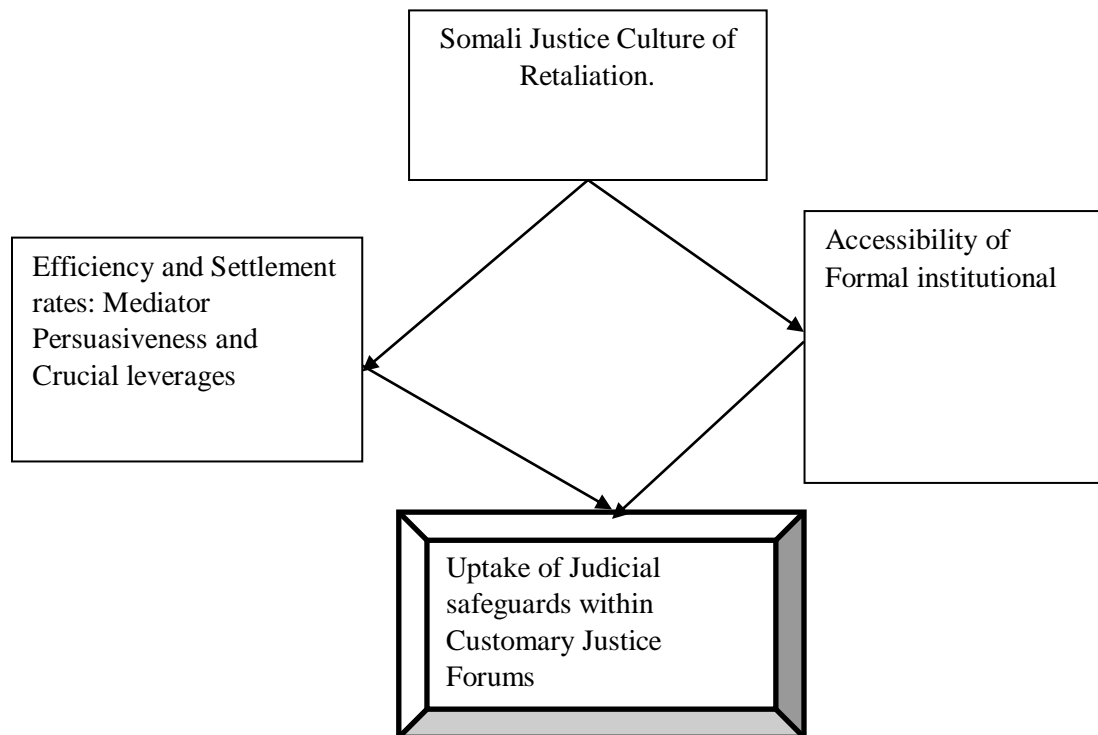
Notwithstanding the importance of the above individualized parameters to fair process, the findings of this study found out that end user experience and definition of fair processes is relative and may be much broader than the identified parameters. This is in support of critical procedural advocates. Notably, it was observed that other non-legal parameters of a fair process matter. These may include several issues such as effectiveness of formal institutions, local justice cultures, capacity of third-party and their accessibility. Findings of this study therefore add another set of contextual realities as mediating variables. These are summed up as concepts of justice on top of the universal fairness standards as postulated by Procedural Justice Theory. Although standard universal parameters of objectivity in ADR are important in ensuring fairness, their transferability and full compliance may vary based on the social setting. Thus, this study stands with critical procedural perspective over orthodox procedural proponents.

### **5.4.2 Implications on Practice**

Based on evidence amassed from this study, we advance a tentative model on critical approach to reforming customary systems of justice administration. The model is based on analysis of

contextual realities that are likely to shape the adherence of judicial safeguards within *maslaha* justice forums.

Towards this end, this study has identified key conceptual realities that shape concept of justice and human rights values and standards contained within judicial safeguards. These are Somali's own culturally informed and socially differentiated beliefs about justice administration, capacity of formal justice institutions and efficiency of justice administration processes as shown the figure below.



As a result, a major overarching contextual reality that shape uptake of judicial safeguard was the prevalence of local Somali justice practice of retaliation. Given the concern for Somali culture of retaliation coupled with animosity and distrust among clans and sub-clans and the urge to

expedite the process, mediators often apply a variety of intervention strategies beyond the facilitative ones in order to push parties out of a stalemate encountered during reconciliation process. This has the implication that, promotion of pre-determined technocratic approaches may fail to account for such realities hence limited adherence.

Stalemates were identified to be a concern that may derail the process thus attracting group violence. Similarly, the urge to expedite the process hence minimizing retaliatory violence was also a significant contextual reality that pushed mediators to apply other strategies such as transformative, evaluative and even directive roles. Arriving at a settlement is also important in minimizing retaliation. Towards this end, mediator's persuasiveness influenced by their leverages such as moral authority and political authority are essential in assisting parties to arrive at a settlement. Consequently, the need for regulative safeguards to promote universal practice of non-interested mediator may experience limited uptake. This has the implication that the concept non-interest related mediators as promoted by human rights standards in ADRs may not be universally acceptable in all contexts.

Access to formal justice institution and their actors for oversight and supervision of the uptake of judicial safeguards is another key aspect of concern. Notably, supervision is greatly affected where such institutions are found to be inaccessible in terms of complex procedures involved, local practice of witness intimidation and their less regard for collective responsibility to justice administration. This has the implication that state-centric approach of concentrating judicial safeguards within formal justice institutions may encounter limited relevance in contexts where they have limited capacity.

In conclusion, reform strategies that rely on a pre-deterministic viewpoint when engaging with persistent customary justice practices may often down play mediating influence of contextual complexities. As observed already, such approaches have often been legalistic, state-centric and top-down in nature thus overlooking the implications of such strategies in contexts where conception and administration of justice change based on the economic, social and political realities of the community.

#### **5.4.3 Limitations of the Study**

This study set out to examine contextual realities likely to influence the uptake of state judicial safeguards. In the process, certain limitations were encountered. First was limitation on data collection. The study targeted victims and suspected perpetrators with active cases in *maslaha* justice forums. However, majority of perpetrators were not willing to open in fear of prosecution in formal criminal courts.

This was perhaps influenced by the methodology adopted. Phenomenology adopted by this study used in-depth interviews and FGDs to unpack experiences of respondents. Although useful, interviews provide less anonymity thus making most of offenders and victims shy away. Similarly, unlike questionnaire where respondents can attend to the questions at their own convenience, interviews may require presence of respondent's thus limiting participation. However, As Cook et al., (1992) have argued that:

The practical value of social science depends on the ability to deliver useful knowledge about the causes of social problems and effectiveness of policies and programs designed to alleviate them. The immense diversity of social life however, make it difficult if not

impossible to derive conclusive knowledge from any single study no matter how well or intelligently analyzed...This basic fact of social life renders the success of social science crucially dependent upon its ability to accumulate results a cross the many studies of a given social process or program. (Cook et al, 1992, p, vii)

Though limited by various factors as outlined, this thesis achieved the objective of identifying some of the factors that underpin concept of justices and how they influence compliance of judicial safeguards in *maslaha* judicial system in the Somali community. However, to drive conclusive knowledge requires further research in core areas identified below.

## **5.5 Future Research**

Findings of this study has shown that the rule of law, justice programming reforms and their corresponding assumptions and implementation strategies may not always be ideal for engaging with persistent customary justice institutions. The study observes that rule of law reforms and their state-centric strategies are important but their assumptions and implementation strategies need to be revamped to accommodate various contextual realities as recommended by this study. Notably, popular concepts were examined in light of contextual and institutional constraints. This study therefore observes that a promising line of inquiry could be an examination of other variables such as Somali identities, politics of adjudication roles and their influence on what constitute popular concepts of justice. In the end, whether accommodation of such notions of justice by judicial reformers affect their compliance is an area that future studies can further examine.

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## Appendix I: Consent to Participate In the Study

My name is Joseph Kimaru Karanja, a postgraduate student at Kenyatta University, and I am undertaking a study on The Concept of Justice That Shape the Uptake of Judicial Safeguards within Maslaha Criminal Justice Processes in Garissa County. This study aims to find out whether responsiveness of judicial safeguards towards dominant Somali concepts of justice in the aftermath of criminal transgressions affect their compliance in Garissa County. The findings of this study will provide insights on how Government judicial safeguard regulations can be adopted in a legitimate way within Somali customary systems of justice. Therefore, your participation is important since it will enable me to get data for the study, which may be used to make important decisions and avail more information regarding the human rights and maslaha justice systems. I am seeking your permission to involve you in this study as a resource person, if you agree sign in the consent form in the next page. You are kindly requested to give your consent to participate in this research. Your personal identity will be kept private and confidential. Any information you give will be treated with utmost confidentiality. Research tools will not identify by name and the results will be only used for research purposes. You are also free to discontinue your participation in this research at any level, as you may want.

Please complete this consent form

I..... accept/not accept to participate in the research study  
having understood its purpose.

Respondent signature ..... Date .....

## **Appendix II: Interview Schedule**

### **Section A: bio-data**

- a) Gender
- b) Victim/offender
- c) Nature of crime involved in

### **Section B**

- a) What kind of justice forums exists in your community?
- b) How and what informs outstanding practices that inform ways through which criminal matters are addressed within *maslaha* systems of justice? (*Areas probed further: goals, process and justice administration process which focused on initiation process, stages applied, reconciliation strategies, popular remedies and actors involved*).
- c) Are you aware of any prohibitions and requirements by the Government/local administration/courts towards the use of Somali customary justice system in criminal cases? (*If yes, further areas probed included goals of judicial safeguards, nature of restructuring within maslaha systems of justice in terms of prescribed mediator's intervention strategies/role of mediators, clan involvement, level of empowerment towards victims of crime, administration procedures, composition of maslaha forums and lastly how such goals are implemented by various actors namely court, police, chiefs, paralegals and enabling legal framework*).

### **Section C**

- a) Do you think Somali *maslaha* systems of justice are adhering to directives/prohibitions from Government justice officials identified in section (a)?
- b) Is there any resistance to these changes? *Areas further probed: instances and scenarios where they experienced or observed maslaha forums overlooking directions from government judicial officer).*
- c) Give suggestions on how to promote government safeguards and reforms within Somali customary adjudicative processes.
- d) Is there anything else you would like to say about justice reforms in your community?

### **Appendix III: Focused group Discussions Guide**

- a) How and what informs the way criminal matters are addressed within *maslaha* systems of justice
- b) What are the existing Government prohibitions and requirements on the use of Somali customary justice system in criminal cases?
- c) Are *maslaha* systems of justice adhering to these changes?
- d) Based on your experiences, which instances, situations and circumstances have you observed *maslaha* contravening judicial safeguards

#### Appendix IV: Budget

	Item Description	Cost component		
		Unit	Rate in \$	Totals \$
1.	Researcher transport to and from Garissa	5 trips	60	300
2.	Respondents facilitation (transport, accommodation and honorariums)	50 respondents	100	5000
3.	Meeting room rentals			2600
4.	Meals and accommodation (researcher)	30 days	50\$ per day	1500
5.	Communication	20 days	5\$ per day	100
6.	Local transport			1000
7.	Laptop computer	1 unit		500
8.	Internet services			100
9.	Printing and photocopy services			200
10.	Stationaries			200
11.	Security services			2000
12.	Insurance cover			300
13.	Miscellaneous			80
	<b>Grand Total</b>			<b>13,280\$</b>

# Appendix V: Research Permit from NACOSTI

## THE SCIENCE, TECHNOLOGY AND INNOVATION ACT, 2013

The Grant of Research Licenses is guided by the Science, Technology and Innovation (Research Licensing) Regulations, 2014.

### CONDITIONS

1. The License is valid for the proposed research, location and specified period.
2. The License and any rights thereunder are non-transferable.
3. The Licensee shall inform the County Governor before commencement of the research.
4. Excavation, filming and collection of specimens are subject to further necessary clearance from relevant Government Agencies.
5. The License does not give authority to transfer research materials.
6. NACOSTI may monitor and evaluate the licensed research project.
7. The Licensee shall submit one hard copy and upload a soft copy of their final report within one year of completion of the research.
8. NACOSTI reserves the right to modify the conditions of the License including cancellation without prior notice.

National Commission for Science, Technology and Innovation  
P.O. Box 30623 - 00100, Nairobi, Kenya

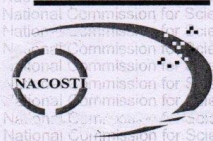
TEL: 020 400 7000, 0713 788787, 0735 404245

Email: dg@nacosti.go.ke, registry@nacosti.go.ke

Website: www.nacosti.go.ke



REPUBLIC OF KENYA



National Commission for Science, Technology and Innovation

### RESEARCH LICENSE

Serial No.A 23413

CONDITIONS: see back page

THIS IS TO CERTIFY THAT:

**MR. JOSEPH KIMARU KARANJA**

**of KENYATTA UNIVERSITY, 12299-20100**

**NAKURU, has been permitted to conduct research in Garissa County**

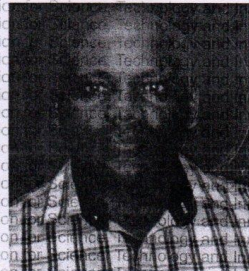
**on the topic: CONCEPT OF JUSTICE AND ADOPTION OF STATE JUDICIAL SAFEGUARDS WITHIN SOMALI ADJUDICATION PROCESSES IN GARISSA COUNTY (2005-2019)KENYA**

**for the period ending: 6th March, 2020**

Permit No : NACOSTI/P/19/59195/28549

Date Of Issue : 6th March, 2019

Fee Received :Ksh 2000



Applicant's Signature

Director General  
National Commission for Science, Technology & Innovation

## Appendix VI: Research Authorization from Graduate School



**KENYATTA UNIVERSITY**  
GRADUATE SCHOOL

E-mail: [dean-graduate@ku.ac.ke](mailto:dean-graduate@ku.ac.ke) P.O. Box 43844, 00100  
Website: [www.ku.ac.ke](http://www.ku.ac.ke) NAIROBI, KENYA  
Tel. 8710901 Ext. 57530

**OUR REF: C82/31794/15** Date: 21<sup>st</sup> February, 2019

The Director General,  
National Commission for Science, Technology & Innovation  
P.O. Box 30623-00100,  
**NAIROBI**

Dear Sir/Madam,

RE: RESEARCH AUTHORIZATION FOR MR. JOSEPH K. KARANJA REG. NO. C82/31794/15

I write to introduce Mr. Karanja who is a Postgraduate Student of this University. She is registered for Ph.D. Degree programme in the Department of Security & Correction Science in the School of Security, Diplomacy & Peace Studies.

Mr. Karanja intends to conduct research for Ph.D. Thesis entitled, "Concepts of Justice and Adoption of State Judicial Safeguards within Somali Adjudication Processes in Garissa County (2005-2019) Kenya"

Any assistance given will be highly appreciated.

Yours faithfully,



**PROF. ELISHIBA KIMANI**  
**DEAN, GRADUATE SCHOOL**

RM/cao

**Appendix VII: Ministry of Interior and Coordination of National Government Research Authorization**

**THE PRESIDENCY**

MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT

Telegrams: "COUNTY" GARISSA.  
Telephone: Garissa  
[ccgsacounty@gmail.com](mailto:ccgsacounty@gmail.com)



OFFICE OF THE  
COUNTY COMMISSIONER  
P.O BOX 1-70100  
GARISSA COUNTY

When replying please quote

REF.NO: CC/EDU/7/3/(130)

28<sup>th</sup> march, 2019

Joseph Kimaru Karanja  
Kenyatta University  
P. O. Box 43844-00100

**NAIROBI.**

**RE: RESEARCH AUTHORIZATION**

Refer to your letter Ref. No. NACOSTI/P/19/59195/28549 dated 6<sup>th</sup> march, 2019 from Director General/CEO on application for authority to carry out research on "***Concept Of Justice And Adoption Of State Judicial Safeguards Within Somali Adjudication Processes In Garissa County(2005-2019) Kenya***", For The Period Ending 6<sup>th</sup> March,2020.

I am pleased to inform you that you have been authorized to undertake your research in Garissa County.

E. C Lelgo  
For: County Commissioner

**GARISSA COUNTY.**

# Appendix VIII: Map of Study Area

