Through the Economic Cost of Discrimination: The Way forward for Women in the Somali Customary Justice System

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Abstract

The Constitution of Kenya guarantees the promotion of customary justice systems. However, in many cases, the dictates of customary law are often in contravention with the progressive attitude embodied in the Constitution. The Constitution guarantees the right to equal treatment of men and women in social, political and cultural spheres. However, women in the Somali customary justice system do not enjoy this right. Women in the Somali customary justice system have no locus standi before any dispute resolution process and they cannot oversee the resolution of disputes as this position is reserved for the elders, who can only be men. Through Gary Becker's theory on the economics of discrimination, this paper establishes, through an economic lens, that there is a prevailing cost to the Somali community for failing to include women in the processes of the customary justice system. It suggests a way forward of promoting inclusivity in line with the characteristics of customary law.

Key Words: Somali customary justice system, discrimination of women and economics of discrimination

I. Introduction

The Somali customary justice system is guided by the *Xeer*, the Somali customary law.[1] For Somalis in Northern Kenya (the word 'Somalis' is hereinafter used to refer to Somalis from this region), the customary justice system is essential in seeking redress, as the formal justice system involves expensive and tedious

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1 Fox D, 'Women's human rights in Africa: Beyond the debate over the universality or relativity of human rights' 2(3) *African Studies Quarterly*, 1998, 13.

processes.[2] The customary justice system, on the other hand, is transparent, easily accessible, follows procedures that are easily understood by the community, involves communal participation and is based on norms that are forged into daily cultural practice.[3] This relation between the formal and customary justice systems is common amongst communities in Kenya and the Constitution of Kenya, 2010 (hereinafter, 'the Constitution') recognises the need for judicial authorities to promote the use of customary justice systems.[4]

In the eyes of the Somali community, the dictates of the *Xeer* are considered legitimate while the formal justice system is considered illegitimate and has a minimal role in Somali affairs.[5] Central to the Somali customary justice system is its objective to restore relations. In a study conducted by Tanja Chopra, the Somali elders contend that if cases are handled in court instead, the conflict may persist, rendering any chance of restoring relations remote.[6] As a result, many resort to the customary justice system in order to settle their disputes.

It is worth noting that the Constitution guarantees the equality of men and women to participate in political, economic and cultural spheres.[7] Despite this, women in the Somali customary justice system are still an excluded demographic.[8] The discrimination of women has a dual manifestation in the Somali customary justice system.[9] First, if a woman is a party to the dispute being resolved, she cannot represent herself before the elders. Rather, an immediate male family member or a male member of her clan must represent her.[10] A woman has the option of taking the grievance up with her husband's family or addressing it

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2 Chopra T, 'Justice versus peace in Northern Kenya' World Bank, Justice and Development Working Paper Series, Paper Number 49581, 2009, 3 –<https://openknowledge.worldbank.org/bitstream/handle/10986/18100/495810NWP0Box31f0version0with0cover.pdf?sequence=1&isAllowed=y> on 23 January 2018.
This paper is limited geographically to the Somalis who live in Northern Kenya. This study does not address the practice of dispute resolution for Somalis who live elsewhere as it is not supported by the literature that forms the backbone of this paper.

3 Ministry of Justice and Constitutional Affairs, Federal Government of Somalia, Policy Paper on the Somali Customary Justice System – <http://moj.gov.so/en/wp-content/uploads/2016/02/TDR-Unit-Policy-Paper-Customary-Justice-23-November-2014-.pdf> on 23 January 2018.

4 Article 159 (2), *Constitution of Kenya* (2010).

5 Chopra T, 'Justice versus peace in Northern Kenya', 8.

6 Chopra T, 'Justice versus peace in Northern Kenya', 6.

7 Article 27 (3), *Constitution of Kenya* (2010).

8 Ministry of Justice and Constitutional Affairs, Federal Government of Somalia, Policy Paper on the Somali Customary Justice System – <http://moj.gov.so/en/wp-content/uploads/2016/02/TDR-Unit-Policy-Paper-Customary-Justice-23-November-2014-.pdf> on 23 January 2018.

9 Abdile M, 'Customary dispute resolution in Somalia' 2(1) *African Conflict and Peacebuilding Review*, 2012, 98.

10 Abdile M, 'Customary dispute resolution in Somalia', 98.

through her own family. The male head of a family decides whether cases should be taken up with the head of the opponent family or whether they should be brought before elders to help identify a solution.[11]

Second, the position of the dispute resolver in a dispute resolution process is reserved for elders who can only be men and are regarded as distinguished members of the Somali society.[12] As such, a woman is denied the opportunity to oversee the resolution of a dispute in the Somali customary justice system. Consequently, and contrary to the constitutional guarantee of equality, there is an unequal relationship between men and women.

In addressing discrimination, economist Gary Becker proffered his theory of the '*Economics of Discrimination*'. He posits that discrimination on grounds such as sex or race has economic consequences for both the discriminator and the discriminated.[13] Becker provides that, 'when a party has a taste for discrimination, it must act as if it were willing to pay something, either directly or in the form of reduced income, to be associated with some person instead of others'.[14] Despite the fact that the Constitution should be adhered to *ab initio,* the prevailing cost of discrimination strongly buttresses the essential need to adhere to its dictates of equality. The constitutional prescription of equality, however, remains an elusive reality for women in the Somali customary justice system.

Part I of this paper is this introduction. Part II elucidates a conflict between the formal justice system and the customary justice system in Northern Kenya owing to the weak and sporadic presence of the formal justice system. This has rendered the role of formal law minimal, and there are concerted efforts by the Somali community to frustrate the processes of formal law. These efforts, the paper highlights, have their roots in the colonial period. Part III introduces the key theory underpinning the paper: Gary Becker's theory on the economics of discrimination. The paper applies this theory to the place of women in the Somali customary justice system and explores the prevailing cost by taking as case study, the Wajir Peace Group, which was made up of women who successfully sought to bring about peace after periods of incessant conflict among Somali clans in Wajir. This Part concludes by analysing the resulting limitation of the application of Becker's theory and the socio-cultural realities surrounding the

11 Chopra T and Ayuko B, 'Illusion of inclusion: Women's access to rights in Northern Kenya', 9.

12 Hagmann T, 'Bringing the sultans back in: Elders as peacemakers in Ethiopia's Somali region' in Buur L, Kyed H (eds) *State recognition and democratization in Sub-Saharan Africa*, Palgrave Macmillan, London, 2007, 35.

13 Becker G, *The economics of discrimination*, 2nd ed, University of Chicago Press, Chicago, 1971.

14 Becker G, *The economics of discrimination*, 14.

discrimination of Somali women. Part IV reconciles the place of women in the Somali customary justice system with their constitutional right to equality and non-discrimination. Part V provides the conclusion and recommendations to promote the inclusion of women in the dispute-resolution process.

II. An Overview of the Role and Nature of the Somali Customary Justice System

The colonial epoch saw the systematic denigration of customary justice systems within the hierarchy of the Kenyan legal order. The statutory recognition of the application of customary law in colonial Kenya began with the East Africa Order in Council,[15] which provided, *inter alia,* that African customary law would apply to the natives. The Commissioner was given power to 'alter or modify the operation of any native law or custom in so far as may be necessary in the interests of humanity and justice'.[16] The Order had limited application to Africans, whose cases would be heard in the Native Courts.[17]

In 1897, The Native Courts Regulation Ordinance recognised the use of the already existing customary justice systems that at the time consisted of local chiefs and council of elders as the leaders of the dispute resolution process.[18] These courts, akin to the customary justice systems albeit with recognition in law, applied customary law in the resolution of disputes brought before them.

Soon thereafter, the East African Native Courts (Amendment) Ordinance[19] introduced special courts with full jurisdiction over civil and criminal matters involving natives. These courts applied laws, including customary law so far as they were applicable and not repugnant to justice and morality.[20] However, Northern Kenya was neglected by the colonial government and these laws had a limited effect on the absorption of the Somali customary justice system. Njeri highlights the colonialists' attitude aptly:

> 'The British colonial government administered the Northern Frontier District (NFD)

15 *East Africa Order in Council* (1897).

16 Article 52 (c), *East Africa Order in Council* (1897).

17 Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 8.

18 Article 2(b), *Native Courts Regulations Ordinance* (1897). See also, Kariuki F, 'Customary law jurisprudence from Kenyan courts: Implications for traditional justice systems', 1 – <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf> on 6 April 2018.

19 *East African Native Courts (Amendment) Ordinance* (No. 31 of 1902).

20 Section 20, *East African Native Courts (Amendment) Ordinance* (No. 31 of 1902).

> region with a very light and segregative footprint, a fact attributable to the British perception of the Somali as a threat and also due to the climate of the area which rendered it incompatible with the white settlers' agricultural interests... in the expansive area, covering over 102,000 square miles, only a paltry, less than one hundred British police were present in 1909. Instead of the heavy colonial presence in places like Central Kenya where British colonial authorities, and their local African representatives, yielded extreme power over Africans, the role of resolving disputes in the NFD was relegated to the Somali elders and headmen'.[21]

This led to a more pronounced use of the Somali customary justice system over the formal justice system. Even though the 1967 Magistrates Courts Act gave the District Magistrate powers to hear claims that arose under African Customary Law,[22] this historical legacy cemented the legitimacy of the Somali customary justice system over the formal justice system in the Somali community. To this day, the presence of the formal justice system remains sporadic and inaccessible, thereby maintaining the central role that the customary justice system plays in the lives of Somalis.[23]

It is for this reason that Somali elders, in many instances, have approached the courts to request the withdrawal of cases. The elders contend that solving disputes is their responsibility especially where an out-of-court settlement has already been arrived at or, in their view, a legislated offense is not an offense under Somali customary law.[24] Moreover, Chopra provides that local concepts that define what is just and fair, how a conflict should be ended, how a perpetrator should be punished, and the responsible authorities to dispense justice differ drastically from the concepts espoused in the formal justice system.

Restoration of relations is central to the operation of the Somali customary justice system as it is aimed at finding harmony between vengeance and forgiveness. It is centred on finding a compromise rather than fulfilling the demands of any party.[25] Moreover, dispute resolution proceedings are not only between two individuals but are inclusive of the relatives and the neighbours of each party. This further enhances the communal involvement in all disputes as well as the overriding goal evident in most traditional justice resolution systems: a conclusive settlement that upholds the principles of reconciliation. In the case of

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21 Njeri M, 'Kenya that was never Kenyan; The Shifta war and the North Eastern Kenya' Medium, 2015 – <https://medium.com/@muturi/kenya-that-was-never-kenyan-the-shifta-war-the-north-eastern-kenya-e7fc3dd31865 > on 25 December 2019.

22 *Magistrates Courts Act* (Act No. 17 of 1967).

23 Chopra T, 'Justice versus peace in Northern Kenya', 3.

24 Chopra T, 'Justice versus peace in Northern Kenya', 6.

25 Abdile M, 'Customary dispute resolution in Somalia', 91.

a retributive objective, Somali customary law stresses the need for compensation (such as payment of blood money). It does not go as far as ostracising the offenders to a point where their re-integration into society is no longer possible.[26]

The prevalent use of the customary justice system in the resolution of disputes, as opposed to the formal justice system, ought to give credence to the need for the operations of the Somali customary justice system to comply with constitutional principles of equality.

III. An Economic Cost to the Exclusion of Women from the Customary Justice System

Gary Becker in his book 'The Economics of Discrimination' proffered the argument that discrimination on grounds such as race or gender can have economic consequences for both the discriminating party and the party that is discriminated against.[27] The foundation of his analytical framework is summated in the following statement: 'when an individual has a taste for discrimination, he must act as if he were willing to pay something, either directly or in the form of reduced income, to be associated with some person instead of others'.[28]

In order to understand his thesis, one must turn to the prevailing race relations evident in the United States in the mid-twentieth century. In the field of employment, black people would be paid less than white people for a job that required the same level of skill and qualification.[29] This, in Becker's view, is costly to the parties involved as, on the one hand, the employer who hires a white man incurs a greater expense for the same productivity and, on the other, a black man is paid less for the same level of productivity.[30]

Possibly, there can be two rationales for the employer employing a white man over a black man. First, he might refrain from hiring the black man owing to an erroneous underestimation of his true economic efficiency. Therefore, the

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26 Abdile M, 'Customary dispute resolution in Somalia', 95.

27 Becker G, *The economics of discrimination*, 1971.

28 Becker G, *The economics of discrimination*, 14.

29 Murphy K, 'How Gary Becker saw the scourge of discrimination' Chicago Booth Review, 15 June 2015 –<http://review.chicagobooth.edu/magazine/winter-2014/how-gary-becker-saw-the-scourge-of-discrimination > on 4 May 2018.

30 Murphy K, 'How Gary Becker saw the scourge of discrimination' Chicago Booth Review, 15 June 2015 –<http://review.chicagobooth.edu/magazine/winter-2014/how-gary-becker-saw-the-scourge-of-discrimination > on 4 May 2018.

employer's behaviour in this case could be discriminatory owing to his ignorance of the true economic efficiency of the black man (as compared to the white man).

Secondly, the employer's behaviour may also be based on prejudice against the black man, which is purely a matter of preference. Ignorance of the truth can be rectified with increase in knowledge. However, prejudice is independent of knowledge and cannot be rectified only by an increase in knowledge.[31] The overall economic consequence of prejudicial discrimination, in Becker's view, can result in the loss of value to the market and will result in an inefficient outcome to the detriment of the discriminating market players.[32]

i. Exploring the Basics

The theory espouses differing lines of analysis that can be evaluated and critiqued. However, certain basics must first be established before embarking on the application of Becker's theory to the Somali customary justice system. In a perfect market, where all factors are held constant, the law of supply and demand mandates, on the one hand, that the higher the price of a given quantity of goods, the higher the supply and the lower the demand. On the other, the lower the price of a given quantity of goods, the lower the supply available and the higher the demand. These two opposing forces, in a perfect market, will result in an equilibrium price as depicted in the illustration below with an optimum supply of goods and demand for the supplied goods.[33] The equilibrium price, which is the price of the good where the quantity of goods demanded is the same as the quantity of goods supplied, is an efficient and desirable outcome that ensures that the producer sells all they produce and the consumer buys all they demand.[34]

31 Becker G, *The economics of discrimination*, 16.

32 Tabarrok A, 'In the market, discrimination is expensive' Foundation for Economic Education, 22 September 2016 – < https://fee.org/articles/in-the-market-discrimination-is-expensive/ > on 4 May 2018.

33 Ehrbar A, 'Supply' – < https://www.econlib.org/library/Enc/Supply.html> on 14 August 2019.

34 Ehrbar A, 'Supply' – < https://www.econlib.org/library/Enc/Supply.html> on 14 August 2019.

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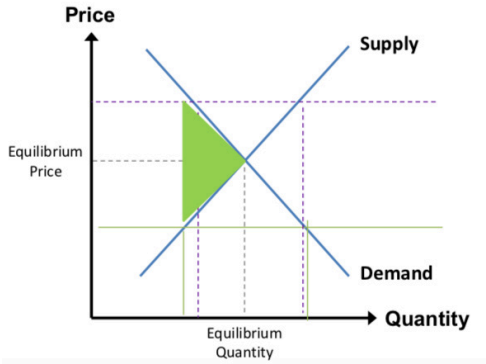

Realistically, however, external influences in the market can lead to a distortion of the equilibrium price resulting in an imperfect market. An imperfect market is one in which the efficient and desirable market clearing price cannot be attained. This is due to an inefficient allocation of resources in the market, resulting in a loss of economic efficiency for society. This is more often than not occasioned by the act of a third party -often the government or one with the power to influence the operation of the market- through the use of law, and, in normal cases, it takes the form of a tax or a subsidy. The illustration below, whose associated cost is a tax, is useful in explaining the concept of deadweight loss and its impact on the market.

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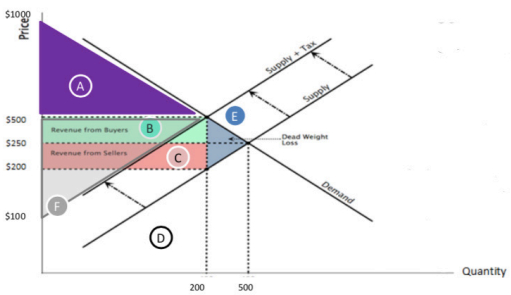

[35] SLS 2216, Economics for Lawyers Class, Amandla Oooko Ombaka and Kwame Owino.

[36] SLS 2216, Economics for Lawyers Class, Amandla Oooko Ombaka and Kwame Owino. For avoidance of doubt, **B** is revenue from buyers and **C** is revenue from sellers, and the Dead Weight Loss is at USD 250.

Without the interference of a tax, the equilibrium market clearing price for the goods in question is USD 250. However, the imposed tax has increased the cost of the goods in question thereby affecting the equilibrium price of the goods and increasing it to USD 500. This change has the effect of reducing the quantity demanded from 500 units to 200 units owing to the increased cost of acquiring the goods. If one takes the case of suppliers who supplied 500 units to the market at the equilibrium price of USD 250, the increased cost imposed by the tax has resulted in a loss of demand, meaning they have to dispose of the supplies. Therefore, deadweight loss essentially represents the loss to the market given the increased cost imposed by the tax.

The market in this case is the overall dispute resolution system where the product of justice is sought.[37] The market players consist of alleged victims and/or perpetrators as the consumers of justice, and the elders who lead the proceedings as the suppliers of justice. The perfect market, as earlier highlighted, would be one where impediments to the achievement of a justiciable outcome do not exist for all intents and purposes. Such a scenario is impracticable. As provided earlier, the more realistic model would be one of an imperfect market where impediments are introduced in the operation of the market, resulting in a distorted equilibrium. A distorted equilibrium, therefore, has the effect of increasing the cost of acquiring the product. Impediments to the operation of the market can be direct (through a positive action by a third party such as the imposition of the tax) or indirect (unintended consequence of some action). However, the objective of the operation of any market is to ensure a minimisation of the impediments, thereby increasing the odds of achieving an efficient and desirable outcome. The exclusion of women from direct participation in the Somali customary justice system is, in the author's considered opinion, one such impediment that increases the cost of attaining justice.

Observably, the exclusion of women from direct participation (not through the normal operation of the market but through the use of customary law) results in a distorted and inefficient market for justice. For all intents and purposes, the consumers of justice will only be limited to the outcome that could possibly be generated by one gender, as the opposing gender is entirely excluded from directly participating in the customary justice system, not on the basis of ignorance of a woman's true economic efficiency (competence) but on the basis of prejudice. This represents a loss in efficiency to the Somali society with the

[37] Undoubtedly, deeming justice as an economic product is likely to raise some eyebrows. However, there is an exploration into the limitations to its application later in the chapter.

probable impediment of justice, contrary to the inherent objective of any system of dispute resolution.

ii. Substitutability of Men and Women in the Market

Becker takes his analysis a step further. Supposing that men and women can be perfectly substituted in the place of each other in the customary justice system, the cost of using women and men would be exactly the same.[38] This is because any party could sufficiently perform in the place of the other party, with the same outcome. Supposing men and women as perfect substitutes is an ideal scenario and is not reflective of the multitude of factors that would differentiate the contribution made by a woman and a man to the dispute resolution process. Furthermore, legal interpretation and the capacity to empathise with the realities that form the core of any dispute is largely a subjective process and is not a matter of arithmetic. This renders the idea of perfect substitution realistically impracticable.

However, supposing men and women are imperfect substitutes, that is to say they have different skill sets that result in differing levels of productivity, then there will be a different cost to the consumer of the service.[39] The consumer will pay more for the party that will guarantee higher productivity and will pay lower for the party that will guarantee less productivity. The consumer can then favour the party whose skill set will deliver the desired outcome. This line of analysis is more reflective of reality. The concept of imperfect substitutability applied to the Somali customary justice system dictates that so long as a woman has the right skill set and qualification to preside over a dispute or represent a party to a dispute, then the consumer of justice (being the alleged victim or the perpetrator) should not be denied the opportunity to have a woman in any of the two scenarios. The basis of this decision is on the knowledge of the true economic efficiency (competence) that will result in the desired outcome.

iii. Loss to the Entire Somali Community

One can contrast the state of the Somali community to that of a hypothetical community, X, in which there is no exclusion of women on the basis of prejudice, and if there is any exclusion of any party, it is solely on the basis of

[38] Becker G, *The economics of discrimination*, 17.
[39] Becker G, *The economics of discrimination*, 17.

an understanding of that party's true economic efficiency, which translates to a certain level of competence over another party. On the one hand, the consumer of justice in community X can access justice with lower impediments since direct participation in the customary justice system hinges on the ability of the individual to render a just decision and/or the ability to represent the alleged victim or perpetrator with competence, irrespective of the gender. On the other, the consumer of justice in the Somali community that deliberately excludes one gender from direct participation, in Becker's words, has to forfeit an amount of income – justice in this case – to be exclusively associated with the male gender and not of the female gender.[40]

The feasibility of this illustration is further complicated by the fact that the consumer of justice in the Somali community cannot seek justice from community X for a wrong that is prescribed within the dictates of Somali custom as the two communities do not share similar laws and traditions. Furthermore, the wrong may not even be provided for in community X's customs. For instance, if an individual wants a leather shoe, he has the option of buying it from supplier A or B. Supplier A is selling a poor-quality shoe for USD 50 whereas Supplier B is selling a good quality shoe at USD 50. The rational consumer would buy it from Supplier B and forego Supplier A. If a consumer of justice in the Somali community finds that he or she will be barred from accessing justice owing to the exclusion of women, he or she cannot seek justice in community X. This inherent limitation may make one question the need to assess the economic cost of discrimination in the Somali customary justice system *ab initio*. However, one would be misplaced to fault the application of the theory in its entirety, as the economic cost of discrimination still prevails and the undesired outcome has not been displaced.

The case of the Wajir Peace Group aptly depicts the negative externality to the Somali community in failing to address the prevailing cost when women are excluded from the dispute resolution process based on prejudice and not competence. Wajir, a county in Northern Kenya, is shared by various Somali clans, principally Ajuraan, Degodia and Ogaden.[41] The region is characterised by extreme poverty and scarce resources, in particular pastures and wells.[42] The Ajuraan considered themselves the original inhabitants of Wajir. However, since

[40] Becker G, *The economics of discrimination*, 16.

[41] Aden A, *Xeer: Traditional mediation in Somalia,* University of Massachusetts, Boston, 2011, 43.

[42] Issifu A, 'Local peace committees in Africa: The unseen role in conflict resolution and peacebuilding' 9(1) *Africology: The Journal of Pan African Studies*, 2016, 149.

independence, the migration of many Somali clans into the region gravely strained the scarce resources in the region.[43] Gradually, owing to increased competition over the scarce resources, tensions between the various clans began to surface.[44] In 1992, the underlying tensions came to the fore when manipulation of votes in the multi-party election in Kenya resulted in ethnic clashes that led to an all-out conflict (around 1200 fatalities, looting and destruction of businesses as well as the extensive rustling of livestock).[45]

A group of educated women who witnessed the untold destruction the conflict was having on their businesses and families got together and decided to put an end to the violent skirmishes that brought about this destruction, which was never before witnessed in Wajir.[46] They were known as the Wajir Peace Group. It is noteworthy that the women in that period of war ignored the custom that mandated their exclusion from dispute resolution and set about their peacebuilding initiative by approaching the elders in the warring clans and gradually expanded their efforts to youths, *sheikhs*, business leaders and civil servants as well as the district commissioner.[47] The women's success was attributed, on the one hand, to their extensive knowledge of the concepts of justice within their own societies as well as their power structures, and, on the other, exercising external pressure beyond the level of their own community so as to restore peace.[48] Their peacebuilding efforts culminated with the Al-Fatah Declaration, which set out the guidelines for the restoration of peace and future relations between the feuding clans.[49]

Denying women the opportunity to contribute to the Somali customary justice system incurs the cost of losing out on novel and innovative ideas, and different perspectives as well as the courage to bring about peace when violent skirmishes have permeated throughout the entire community. This, in line with Becker's theory, is the depiction of the negative externality that results in the overall loss to the Somali community.

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43 Aden A, *Xeer: Traditional mediation in Somalia*, 43.

44 Issifu A, 'Local peace committees in Africa', 149.

45 Tongeren P, 'Potential cornerstone of infrastructures for peace? How local peace committees can make a difference' 1(1) *Peacebuilding Journal,* 2013, 39-60. See also, Menkhaus K, 'The rise of a mediated state in Northern Kenya: The Wajir story and its implications for state building' 21(2) *Afrika Focus*, 2008, 23-38.

46 Kratli S and Swift J, 'Understanding and managing pastoral conflict in Kenya: A literature review' *Institute for Development Studies*, University of Sussex, 1999, 33 –<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.505.7930&rep=rep1&type=pdf > on 5 May 2018.

47 Kratli S and Swift J, 'Understanding and managing pastoral conflict in Kenya: A literature review', 33.

48 Chopra T, 'Building informal justice systems in Northern Kenya', 14.

49 Aden A, *Xeer: Traditional mediation in Somalia*, 44.

iv. Limitations to the Application of Becker's Theory

A good number of people may not deny that the objective of any dispute resolution system is justice and truth. There is no single definition of justice, and its conceptualisation has been the subject of inquiry amongst legal, ethical and political philosophers.[50] The application of Becker's theory in determining the exact quantum of loss that the Somali community suffers by excluding the women from directly participating would be a difficult endeavour. Arriving at a just outcome is an endeavour that requires competence and skill in making the right decision. Competence, assuredly, does not guarantee a just outcome. However, it is better for the attainment of justice for competent persons to be involved in the dispute resolution process. The exclusion of women, not based on their competence over the matter in dispute, is likely to result in a loss to the Somali community.

Moreover, the application of socio-cultural phenomena – gender relations in the Somali customary justice system in this case – to the mathematical reasoning of economic discourse does have its limitations. The complexity of the Somali social organisation is premised among varying incidents including gender, age and class.[51] Kapteijn highlights that these social relations determined, among other things, access to the means of production, the division of labour, the exercise of power and political authority as well as the determination of basic moral values.[52]

With respect to the exercise of power and political authority,[53] Somali custom dictates that adult men of sound minds who were autonomous producers (men who owned camels) could exercise political authority.[54] Kapteijn provides that women, on the other hand, could not formally head any form of productive unit as they were precluded from doing so by custom, *ab initio*. The exclusion of women from heading any form of productive unit precluded them from the ability to own camels and so they could not become autonomous producers. Regarding productivity, division of labour was clearly established and was stratified along the lines of gender and age. Expending one's labour on the means

50 <https://plato.stanford.edu/entries/justice/> on 18 December 2019.

51 However, the focus of this article is on the difference in relations on the basis of gender.

52 Kapteijns L, 'Gender relations and the transformation of the Northern Somali pastoral tradition', 243.

53 Dispute resolution, under Somali customary law falls under the exercise of political authority and power.

54 Kapteijns L, 'Gender relations and the transformation of the Northern Somali pastoral tradition', 245.

of production did not mean that they were owners of their production; rather, all production belonged to the head of the productive unit which in most cases was a man. The waters become murkier when one explored the prevailing social attitudes to gender roles. One can observe the totality of the inculcation of the idea of women as subservient to men in the poetry mothers teach their daughters to sing from birth.[55] An example is:

> 'Daughter, the wealth that comes by night
> belongs to the girl who is quiet.
> Daughter, where there is no girl
> Daughter, no wealth is received,
> Daughter, and no camels are milked....
> A marriageable young man is in the house
> and men pass by its side ....
> lest we become an empty space
> [by not receiving bride wealth for you]
> Quiet down for us…'[56]

Marriage was a key institution that embodied the differential treatment between women and men. Women were expected to serve the husband and to be obedient wives. This attitude was reinforced in oral literature that was taught to girls from a very young age.[57]

However, one ought to be careful when drawing distinctions between gender roles that represent the optimum division of labour and the evident exclusion that stops equal opportunity of participation. For instance, societal norms dictate that girls in their teenage years would herd the flocks and help their mothers in the execution of domestic chores, whereas the boys would join the camel camps, which involved more tedious physical labour, and searching for pastures over extremely long distances.[58] Married women continued to be responsible for the flocks of sheep and goats of the family. They executed all domestic chores including cooking, maintenance of the collapsible hut and, above all, childcare.[59] Women were not suited to the physical demands of seeking new pasture and the

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55 Lewis I, *Understanding Somalia and Somaliland*, Cambridge University Press, New York, 2008, 13.

56 Kapteijns L, 'Gender relations and the transformation of the Northern Somali pastoral tradition', 248.

57 Lewis I, *Understanding Somalia and Somaliland*, 14. See also Lee C, *The shaping of Somali society: Reconstructing the history of a pastoral people 1600-1900*, University of Pennsylvania, Philadelphia, 1982, 38-83.

58 Kapteijns L, 'Gender relations and the transformation of the Northern Somali pastoral tradition', 244.

59 Kapteijns L, 'Gender relations and the transformation of the Northern Somali pastoral tradition', 244.

discrimination in this case was based on general physical ability. However, as the case of the Wajir Peace Group has illustrated, it is important to be aware of the cost to the entire community of the exclusion of women from participation in the customary justice system.

The complexity of this social organisation shows that Becker's theory cannot be the single viewpoint to understanding the prevailing cost of discrimination against women in the Somali customary justice system. To develop a cogent solution would take more than just economic reasoning; it would require an interdisciplinary approach and further study of the factors influencing prevailing gender relations.

IV. Reconciling the Right of Equality and Non-discrimination with the Place of Women in the Somali Customary Justice System

Indeed, the right to equality and non-discrimination is a right that should be enjoyed by all Kenyans irrespective of their gender, ethnicity or socio-economic status. The question then arises as to the practicality of enforcing this right, given the prevailing realities in the Somali customary justice system.

The case of the Wajir Peace Group highlighted in the previous Part portrayed the cost to the Somali community on the discrimination against women in the dispute resolution process. Periods of incessant conflict in Northern Kenya, including inter-clan conflicts among the Somali community, led to the creation of peace committees whose mandate was to restore peaceful relations by adopting the value systems inherent in the customary justice systems.[60] The value systems underpinning the peace committees discourage the participation of women in the conflict resolution process.[61] However, these peace committees derive their strength from their deep roots of the socio-cultural system of the Somali community.

Drawing on local power structures is an important ingredient for the success of its peace committees, but this has often resulted in the trade-off that

[60] Chopra T, 'Building Informal Justice Systems in Northern Kenya', 14-21.

[61] Chopra T and Ayuko B, 'Illusion of inclusion: Women's Access to Rights in Northern Kenya' Legal Resources Foundation Trust, Justice for the Poor, 2008, 36-39 – https://openknowledge.worldbank.org/bitstream/handle/10986/12787/701730ESW0P1170ts0in0Northern0Kenya.pdf?sequence=1&isAllowed=y on 4 May 2018. See also, Chopra T, 'Building Informal Justice Systems in Northern Kenya', 36-41.

local power dynamics are not based on inclusive processes.[62] With the motivation of promoting inclusivity, government agencies and donor groups sought to mandate the compulsory inclusion in law of women into the peace committees as a pre-condition of their validity.[63] However, such attempts by government and donor agencies to enforce women participation in the peace committees have proven to be difficult. This is because peace committees adopt the values of the customary justice system.[64]

These value systems discourage the participation of women in the conflict resolution process for three main reasons.[65] Firstly, it is the responsibility of elders, through interacting with elders from other clans and communities, to promote and ensure peaceful relations.[66]

Secondly, elders, who can only be adult *males* of sound mind and autonomous producers, have the reputation of integrity and impartiality, knowledge of the customary law and religious prescriptions, and the oratorical skills to apply and persuade the parties and public opinion.[67]

Thirdly, the peace committees derive their strength from deep roots in the local value system, and imposing the inclusion of women in the committees, being contrary to the local custom and concepts of justice, may jeopardise the integrity and legitimacy of the committees. This, in the elders' view, may harm the resolution of conflict that has dogged the community for many decades.[68]

In some cases, they have jeopardised the effectiveness of the committees.[69] For instance, men deliberately exclude women from the peace process but only involve them when donors are present. Other meetings are held when women cannot leave their households.[70] Certainly, an observer can conclude that there is an organised and deliberate frustration of the peace process by the men in the

62 Chopra T, 'Building informal justice systems in Northern Kenya', 3.

63 Chopra T, 'Building informal Justice systems in Northern Kenya', 38.

64 Chopra T, 'Building informal justice systems in Northern Kenya', 14-21.

65 Chopra T and Ayuko B, 'Illusion of inclusion: Women's access to rights in Northern Kenya' Legal Resources Foundation Trust, Justice for the Poor, Working paper 70173, 2008, 36-39 – <https://openknowledge.worldbank.org/bitstream/handle/10986/12787/701730ESW0P1170ts0in0Northern0Kenya.pdf?sequence=1&isAllowed=y>on 4 May 2018. See also, Chopra T, 'Building informal justice systems in Northern Kenya', 36-41.

66 Abdile M, 'Customary dispute resolution in Somalia', 97-98.

67 Abdile M, 'Customary dispute resolution in Somalia', 97-98; See also Kapteijns L, 'Gender relations and the transformation of the Northern Somali pastoral tradition', 246.

68 Chopra T and Ayuko B, 'Illusion of inclusion: Women's access to rights in Northern Kenya', 3.

69 Chopra T, 'Building informal justice systems in Northern Kenya', 3.

70 Chopra T, 'Building informal justice systems in Northern Kenya', 38.

community with the aim of maintaining the existing power structures that make up the very fabric of the societal organisation.

Undoubtedly, in reconciling the right to equality and non-discrimination to the position of women in the Somali customary justice system, a dilemma presents itself: how to ensure the practical efficacy of enforcing the right of equality and non-discrimination versus the objective of ensuring the success of the Somali customary justice system that is intended to achieve a stable and peaceful co-existence within and between the various Somali clans in Northern Kenya.

In addressing the practical efficacy of promoting equality of women to the Somali customary justice system, one cannot help but turn to the formal justice system. Admittedly, there are instances where an interaction between the formal justice system and customary justice systems has occurred with little conflict. Certain judicial decisions, guided by the constitutional requirement to promote traditional dispute resolution, illustrate this.[71] In *R v Lenaas Lenchura*,[72] the accused was charged with murder after killing the deceased in a dispute over who would fetch water first. The accused's counsel submitted that water is a scarce resource in Samburu and the court ought to take into consideration the circumstances of the case. Justice Emukule resorted to the customary laws of the accused. He sentenced the accused to five years suspended sentence and required him to pay compensation of one female camel to the family of the deceased as dictated by their customs.[73] Other examples include *R v Mohamed Abdow Mohamed*,[74] *R v Juliana Mwikali Kiteme and 3 others*,[75] and *Lubuaru M'Imanyara v Daniel Murungi*.[76]

However, it is often the case that in ensuring the supremacy of the Constitution, customary law, owing to the repugnancy qualification,[77] is denigrated and 'crucified in preference of novel values mostly originating from western traditions and value systems'.[78] In *Maria Gisege Angoi v Macella Nyomenda*,[79] the

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71 Article 159 (2) (c), *Constitution of Kenya* (2010).

72 *R v Lenaas Lenchura* (2011) eKLR.

73 Kariuki F, 'Customary law jurisprudence from Kenyan courts: Implications for traditional justice systems', 9 – <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf> on 30 April 2018.

74 *R v Mohamed Abdow Mohamed* (2013) eKLR.

75 *R v Juliana Mwikali Kiteme and 3 others* (2017) eKLR.

76 *Lubuaru M'Imanyara v Daniel Murungi* (2013) eKLR.

77 Article 159 (3), *Constitution of Kenya* (2010), Section 3(2), *Judicature Act* (Act No. 16 of 1967).

78 Ambani O and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' 1(1) *Strathmore Law Journal*, 2015, 57.

79 *Maria Gisege Angoi v Macella Nyomenda* (KLR) 1981.

High Court held that the practice of woman to woman marriage was repugnant to justice and morality since it prevented the other woman from freely choosing whom to marry. Francis Kariuki opines that the decision did not consider the circumstances of the local communities and seems to interpret the repugnancy and morality of customs in a limiting manner.[80] Here, the repugnancy qualification was invoked because the formal justice system with its Western and Christian values was contradicted by African customary practice. This Western (largely Christian) yardstick of justice and morality was entrenched by judicial officers in the colonial era who believed that 'the only standard of justice and morality which a British court in Africa can apply is its own British standard'.[81]

Elsewhere, in *Katet Nchoe and Nalangu Sekut v R*,[82] the High Court of Kenya held that the Maasai custom of circumcising females was repugnant to justice and morality. For this, the Court relied on the Ghanaian Constitution, which defines a repugnant custom as one that is harmful both to the social and physical well-being of a citizen. By disregarding the customs and practices of the Maasai and adopting the definition of repugnancy of the Ghanaians, the court was insensitive to the uncircumcised Maasai women who are shunned by their male counterparts.[83] It does not answer the question of whether the courts will compel Maasai men to marry their uncircumcised women. It further failed to consider the circumcision of males which, when measured against its *ratio*, also causes pain. The status quo is provided by Ambani and Ahaya: [84]

> 'Indigenous practices whether religious, moral or customary have to contend with the fact that there are official restrictions both express and tacit… one may safely argue that customary freedom is not achievable by a significant portion of the mostly rural populations in Kenya'.[85]

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80 Kariuki F, 'Customary law jurisprudence from Kenyan courts: Implications for traditional justice systems', 8 – <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf> on 30 April 2018.

81 Njeri M, 'Kenya that was never Kenyan; The Shifta war and the North Eastern Kenya' Medium, 2015 – <https://medium.com/@muturi/kenya-that-was-never-kenyan-the-shifta-war-the-north-eastern-kenya-e7fc3dd31865> on 25 December 2019.

82 *Katet Nchoe and Nalangu Sekut v R* (2011) eKLR.

83 Kariuki F, 'Customary law jurisprudence from Kenyan courts: Implications for traditional justice systems', 7 – <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf> on 30 April 2018.

84 Ambani O and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' 1(1) *Strathmore Law Journal*, 2015, 57.

85 Ambani O and Ahaya O, 'The wretched African traditionalists in Kenya', 57.

Therefore, the use of formal means to reform customary practices is often detached from the context in which the custom operates. In the author's view, this has led to more harm than good. It is the belief of legislators and civil society activists that if there exists a social ill, the solution to such an ill would be to promulgate a law that would use the coercive power of the state to wish the problem away. So long as the Somali community sees the imposition of novel and entirely western norms on the processes of their customs, there will be a resistance, expressed or implied. Having established the prevailing economic cost to the Somali community for failing to integrate the participation of women in the Somali customary justice system, it is important that government agencies and donor groups ensure the inclusivity of women in a sustainable manner.

V. Recommendation and Conclusion

In order to enhance the inclusivity of women in the Somali customary justice system, the author makes various recommendations.

i. Recommendations

The social realities are extremely complex and imposing a worldview that is novel and has its roots in Western discourse and traditions on a people without really analysing the potential ramifications could prove disastrous. In light of this, it is in the author's considered opinion that the courts ought to provide a remedy that ought to ensure the inclusion of women into the customary justice system. This remedy cannot be one that compels the immediate alteration of the customs of the Somali people in line with the constitutional principle of equality. The judiciary ought to mandate the State to form a taskforce whose mandate will be to conduct civil awareness campaigns on the importance of inclusion as has been evidenced in this paper. This move ought to be buttressed by the efforts of donor groups and civil societies' sensitisation campaigns aimed at promoting the participation of women in the exercise of political authority.

Noteworthy is the fact that customary rules in their very nature are not moribund but are a representation of the cultural and intellectual accumulation that has occurred within societies over the years. To the communities, customary rules are germane as they are an expression of social changes, their struggles and aspirations.[86] Therefore, institutional changes at the community level ought to be

[86] Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016, 51.

made. Such institutional changes include incorporating the idea of equality into the formal education processes. This would equip the future generations of men with an appreciation of the contributions women can make in moving society forward. Without changes in attitude, any proposed recommendations might fail.

Indeed, the inclusion of women within the Somali customary justice system is important and should be a priority. However, such a change to the local custom ought not to be abrupt and forceful as it may affect the legitimacy of the objective. Rather, it should be effected in a gradual manner where the value addition of educated women to the dispute resolution process is evident, thereby resulting in their inclusivity being well received by the community.

ii. Conclusion

The economic cost is a real occurrence and the lack of an inclusive process is a danger when it comes to the Somali customary justice system. However, government agencies and donor groups, in a bid to ensure inclusivity, have failed to tailor their potential solutions to the dynamics of the customs of the Somali community thereby resulting in more harm than good. It is no easy feat to change a social mindset. It may take 30 years, 50 years or 100 years. One may not see it in their lifetime but a step in the right direction, with the right policy and the right intention, will ultimately lead to change.