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Il diritto consuetudinario in Somalia dall'amministrazione coloniale ai nuovi stati. Analisi storico-comparata di un caso di pluralismo giuridico resistente.

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The law of stateless societies has certain basic functional and structural features in common with the law of developed countries. It preserves a certain social order through obedience to rules. Of course, it has its own special features as well. There is no body of jurists to apply the rules; there are close links between operational rules and nonlegal doctrines; there is less a tendency to repetitivity of solutions. In short, the constitutive elements are different from those in, for example, West German or Canadian law. Yet it is still law because it is society's response to the need for social order. If one prefers to say that the rules of such a society are not law, one must at least admit that such rules belong to a wider category to which law belongs as well. Surely there can be no reason for refusing to compare the rules that belong to these two different subcategories.

(Sacco R., *Legal Formants*, 1991)

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Introduction

Somalia is one of the most fragile states in the world, often seen as an example of a collapsed state that has gone through multiple crises. Since the end of the authoritarian regime of Siyad Barre in 1991, the country is characterised by conflict and violence, exacerbated by recurrent natural disasters and subsequent conflicts over access to natural resources.

The lack of an effective State system has created a context in which justice is not provided by a single state justice system, but by different institutions connected to different powers coexisting in the territory. Indeed, Somalia is an interesting case of resistant legal pluralism in Africa, which over the centuries has witnessed several waves of conquests and subsequent legal influences.

This research aims to shed light on the different legal layers present in Somalia, in particular on the role of Somali customary law, or *xeer*, and the influences on local practices of both Islamic law and the Western-style legal systems introduced into the country by the Italian colonial administration, the British colonial administration and the Italian Trusteeship Administration.

The thesis aims to explore the developments and main features of the Somali multi-layered legal systems from a comparative historical perspective, highlighting how the Somali customary legal framework, Islamic law and the formal legal system are once again called to interact to prevent tensions and address increasing instability and conflicts in modern Somalia.

The first chapter provides a historical background of the Somali case, describing the historical and cultural contexts and developments. Without presuming to be exhaustive, the first chapter will provide an overview of the early Islamic influences in Somalia, which contributed to the cultural Islamisation of the local population. It will also analyse in detail the intrinsic elements of the Somali population, as well as the most important aspects of the Somali identity, based on social clan

organisation, fundamental for a full understanding of the characteristics of modern Somali society.

The second chapter will focus on the main features of Somali customary law, providing an overview on marriage and divorce practices, as well as criminal law and the traditional process. It will also study the impact and influence that first Islam and then colonial law had on customary law, in order to identify patterns and fully understand its historical evolution.

The third, fourth and fifth chapters are case studies of different historical periods, providing a framework on how the legal systems have historically interacted among them.

The third chapter will be the focus of our research, with an in-depth analysis of the legal models adopted by the Italian colonial administration in Somalia until its independence in 1960. The process that led to the creation of the Trust Territory of Somaliland under Italian Administration, as well as the role played by customary law under the subsequent judicial reorganisation in the territory will be analysed.

The fourth chapter will address the period of independence and the subsequent revolutionary regime established by Siyad Barre. The main legal and social reforms brought about by Barre will be emphasised, with a special focus on the evolution of land law under the regime, a crucial aspect that has been and continues to be the cause of violent conflicts in Somalia, historically very important for the pastoral populations dependent on natural resources and access to land.

The fifth chapter will focus on the post-revolutionary period, following the fall of the Barre regime, in which an attempt will be made to highlight the difficulties arising from the lack of a centralised state and the lack of law enforcement. We will see how this has created a peculiar situation in which the application of the different legal systems depends on the geographical area, social status, clan affiliation and social category. In particular, two of the different causes of conflict in Somalia will be explored, namely conflicts related to land ownership and violence against women and gender-based crimes.

Finally, an attempt will be made to draw conclusions on the challenges to access justice in Somalia and the possible role that a revised Customary law more aligned to international standards, and Alternative Dispute Resolution mechanisms could

play to enhance the reconciliation process in Somalia, until a formal state system could be put effectively in place.

Limitations of the study

The last decades have demonstrated the difficulties that non-Somali researchers have met to appropriately deal with the social and political situation in Somalia. Considering that widespread insecurity does not allow an in-depth analysis on the field, research on Somali affairs was mostly conducted in remote. Access to Somali literature, both academic and technical, is not easily available. The material used for this study combines literature review of both academic research and humanitarian agencies reports, as well as interviews conducted remotely to some Somali legal experts and local population. Another important limitation to be considered is the language, that has forced the author to rely only on material in English, in Italian, and French.

Finally, although the author strongly supports condemnations of the brutal and inhuman policies and slavering practices implemented by all colonial powers, considering the scope of this research, this aspect will unfortunately not be analysed in depth[1].

[1] For further readings on the matter of forced labour during Italian colonisation, see Bellucci S., *The Ascent of Italian Colonialism in Somalia and the Labour Question, 1890s-1930s*, in "Political and Legal aspects of Italian colonialism in Somalia", Carpanelli E., Scovazzi T., (edited by), Torino, G. Giappichelli Editore, 2020, pp. 123 - 134. On the reparations for crimes committed during colonial times in Somalia, see Bufalini A., *Reparation for colonial crimes: the case of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., pp. 215 – 230

Chapter I – The case of Somalia: from early Islamisation to European colonisation

The first chapter provides a historical background of the waves of conquests and subsequent influences over Somalia. It provides an overview of the early Islamic influences in Somalia, which contributed to the cultural Islamisation of Somali people. It analyses the key elements of the pastoralist and agropastoral Somali society, as well as the most important aspects of the Somali identity, based on clan identity. The last paragraph provides an historical overview of the European colonisation at the end of the XIX century, introducing in particular the early Italian presence in Southern Central Somalia, that will be further developed in Chapter III.

1.1 The Horn of Africa in space and time: early Islamic influence over Christian outposts

The Horn of Africa is one of the most complex regions in Africa. It has witnessed several waves of conquests and occupations that, in turn, have expressed their influence in terms of culture, political organisation and legal systems. In modern times, it is home to Djibouti, Eritrea, Ethiopia and Somalia, but considering broader frontiers, it may also be considered to include parts of Kenya, Sudan, South Sudan and Uganda.

While Christianity has been described as the predominant influence in the region in many early European texts[2], the Islamisation wave has played a significant role in the area since the seventh century, when Islam starts emerging as both a monotheistic religion and a socio-political organisation. In particular, Islamic penetration in the area spread following three main channels, the most significant originating from northern Africa and Egypt, followed by the eastern one through the ports of the Red Sea in eastern Sudan and Indian Ocean coasts, and the western

[2] Ethiopia was considered "an island of Christianity in the sea of Islam", as quoted by Kapteijns L., *Ethiopia and the Horn of Africa*, in Levtzion N., Pouwels R. L. (edited by), *The History of Islam in Africa,* Athens Oxford Cape Town, Ohio University Press, 2000, pp. 227-250

channel, through Darfur[3]. While in northern Sudan Islamisation was strictly linked to Arab identity and culture from Egypt[4], in Ethiopia, Eritrea and Somalia, Islam made landfall from the coasts of the Red Sea and Indian Ocean. As pointed out by Lewis, even though Muslim Arab influx in this area was not comparable to Sudan, Arab presence alongside the coastal line of what is considered contemporary Somali territory probably dates back to pre-Islamic era. Surely, there are sources confirming that already soon after the *hijra* (emigration) of the Prophet, Muslim Arab and Persian merchants engaged in commercial activities alongside the coast, establishing a string of trading posts, whose main settlements in the north was Zeila while in the south was Mogadishu[5]. Eventually, these rich merchants became local aristocrats and merged with the local Somali population, bringing about new mixed cultures. Although the early Semitic-speaking population of Ethiopia have, in general, rejected Islam, the presence of Islam was recorded even within the "island of Christianity"[6], the Kingdom of Aksum (modern Ethiopia), where Muslim traders established early Islamic communities[7]. As Giampaolo Calchi Novati mentions, the presence of the first Muslim Arab groups in Ethiopia dates back to early Islamic history when, following persecutions by Meccan authorities against Muhammad and his community, some believers moved to Abyssinia to find a king in a land of

[3] Lewis I. M. (edited by), *Islam in Tropical Africa,* Routledge Library Editions: International Islam, Routledge, Taylor & Francis Group, London, 2017, p. 4

[4] As a consequence of Arab invasion of Egypt from the seventh century on, there was a flux of Arab migrants to northern Sudan who mixed with the local Hamitic population, leading to an area extensively populated by Arab speakers. "*More than for most of the other Muslim peoples of Africa, for the Sudanese to be a Muslim is to be an Arab*", Lewis I. M., *Islam in Tropical Africa,* op. cit., *ibidem*

[5] Lewis I. M., *A modern history of the Somali: nation and state in the Horn of Africa,* Oxford, 2002, p. 20

[6] We will not deepen in this work the role of Christianity for the development of the Kingdom of Aksum. However, further reference can be found in Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra,* Torino, Società Editrice Internazionale, 1994

[7] Kapteijns L., *Ethiopia and the Horn of Africa, op. cit.*

justice where "no one shall be persecuted"[8]. However, in the long run the strong presence of Muslim communities with their new religion led to a slow decline of the Kingdom of Aksum. The Red Sea became the connection bridge between Arabia and the Horn, and the Muslim emigrants succeeded in spreading the "seed of Islam" to the detriment of the "greatness" of Aksum. The several Christian states of the kingdom suffered from the pressure of the Muslim powers establishing their authority alongside the coastal sites and limiting their access to the sea routes. Indeed, since its appearance, the Arab-Islamic presence had threatened the founding Christian principles of Ethiopia and the whole Horn of Africa, surrounding and increasingly narrowing the Christian territory. The Kingdom of Aksum lost its trading channel through the Red Sea and, in the meantime, Islam increased its popularity among the nomads, enemies of Aksum, attracted by its characteristic "flexibility of moral ruling and absence of a real hierarchy"[9], making Islam a favourable religion for the nomad populations. Jonathan Miran[10] claims that in the VIII century Muslim influence in the region became stronger, in particular when the Arabs of the Umayyad Caliphate occupied the Dahlak islands, and the local population converted to Islam. The new religion spread even in the territory of modern Eritrea one century later, when Arab tribes moved in the area between the Red Sea and the Nile. According to Hersi[11], up to year 950 A.D. Dahlak and Zeila were still considered Abyssinian ports by the contemporary sources as some *dhimmis*[12] resided there. After the tenth century, following the decline of Aksum, the Arabs increased their influence alongside the shore of the Gulf of Aden and in the hinterland of Abyssinia, founding some important States like Adal, Hadiya,

[8] Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra,* Torino, Società Editrice Internazionale, 1994

[9] *Ibid, p. 25*

[10] Miran J., *A Historical Overview of Islam in Eritrea*, in "Die Welt Des Islams", vol. 45, no. 2, 2005, pp. 177–215

[11] Hersi A. A., *The Arab Factor in Somali History: The Origins and the Development of Arab Enterprise and Cultural Influences in the Somali Peninsula*, Ph.D. dissertation in History, University of California, Los Angeles, 1977, p. 105

[12] Muslims subject to the Abyssinians

Harar, Ifat, Dawaro and Bale. Zeila[13] remained the main port securing access to Ethiopia.

Between the XII and the XIII century, the Dahlak islands became an independent sultanate, crucial for trading between Egypt and India on one side and Abyssinia and Yemen on the other, creating relative stability in the Red Sea region, where Islam could flourish. In Southern Somalia, Mogadishu, Brava and Merca were other important Arab-founded ports. Although the strategic and commercial power of Arab-Islamic states and populations intensified (especially thanks to the flourishing trade activities), the political power was still held by the Christians in Abyssinia, whom the Muslim authorities had to pay tributes. The early Muslim centres arisen in the periphery of the kingdom of Abyssinia, like Dawaro, Hadiya and Bale, engaged in intermittent struggles against the Abyssinians for almost five centuries for the political supremacy in the region. It was only in the first half of the XVI century that a major war in the upland subverted the political assets, threatening the continuity of the Ethiopian empire. Indeed, the Muslim presence in the region was circling the Christian territory, up to the point where, Giampaolo Calchi Novati[14] claims, the presence of Christian elements was made up of only small groups in the midst of a Muslim and pagan population.

As mentioned, in the first half of the XVI century, the Muslims and the Abyssinians engaged in a series of fights triggered by the refusal to pay tributes to the Christian emperor (Lebna Denghel) (1527). The Muslims of the State of Adal (mainly Somalis and Danakils), guided by Ahmad Ibn Ibrahim (called "the conqueror", *Ghazi*, by the Muslims, and "Left-handed", *Gran*, by the Christian-Ethiopians), gained some victories in the first phase, galvanised by the ambitious leader that strived for the conquest of Ethiopia. The more the Islamic army gained victories and territories, the more the increased number of conversions to Islam in the

[13] The city of Zeila was reported also by Ibn Baṭṭūṭa in his dairies when, approximately around 1330, he visited Eastern Africa coast (Somalia, Kenya and Tanzania). He describes the city as the capital of Barābra population, a group of black people, following the Islamic doctrine of the *shafi'* school. See Ibn Baṭṭūṭa, *I viaggi*, Italian translation by Tresso C. M., Einaudi, Torino, 2012, p. IX, 280-285

[14] Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra, op. cit.*, p. 26

Ethiopian hinterland jeopardised the cultural aspects of Ethiopian society. At this point, both parties appealed for an external support – to the Christian Portuguese and to the Muslim Ottomans. The involvement of the Portuguese[15] in this phase revealed to be crucial for the Ethiopian empire. Although at the beginning the technological advantage of the Europeans did not generate the desired effects, the subsequent death of the Muslim leader *Gran* gave the Ethiopians a big advantage, succeeding in containing the Islamic wave, supported by the Ottomans. However, the end of the war did not provide a clear result as both States, Ethiopia and Adal, resulted weakened. The lack of a clear win of the Muslim armies led to a decrease of the Muslim expansion in the hinterland and highlands of the Ethiopian territory, with subsequent exacerbation of religious conflict between Christians and Muslims.
A peculiar trait to be noticed in regard to Islamic legal influence is that, although geographically the area was closer to eastern Sudan where the *Maliki* and *Hanafi* Schools were predominant, the prevailing legal School in the area was the *Shafi'i* due to the constant cultural interchange with the Arabian peninsula[16].
As a result of the long, extenuating war between the Abyssinians and the Muslims of Adal, the Oromo, a Cushitic-speaking pastoralist people, would benefit from the situation, migrating and settling alongside the Southern part of the Ethiopian empire. By the second half of the XVI century, the Oromos had created a buffer zone between the Ethiopian lands and the Muslim populations, deeply affecting both sides.

[15] The Portuguese involvement was fuelled by a dual objective: the apparent reason was to support the cause of a Christian empire, the underlying reason was to avoid the strengthening of a Muslim power alongside the Eastern African coast, allied with the Ottomans, who already held a strong position and influence in Egypt and in the Arabian peninsula. See Calchi Novati G., *op. cit.*, p. 28. As J. Miran notes, the increasing interest in the Red Sea region at the onset of the XVI century was a direct consequence of the Ottoman conquest of Egypt in 1516-1517 and the imperial ambitions of the Portugese in the western Indian Ocean. Miran J., *Mapping Space and Mobility in the Red Sea Region, c.1500–1950*, History Compass 12/2 (2014): 197–216, p. 199

[16] See Lewis I. M., (edited by), *Islam in Tropical Africa*, *op. cit*, 2017

During the following three centuries, the Oromo population was slowly assimilated into the Ethiopian empire[17], contributing to the formation of a bigger and stable State[18]. The Oromo invasion triggered the end of the military power of Adal. Therefore, the local Islamic political organisation, hit also by the numerous military raids of the Oromo warriors, shrank back to the size of nomadic groups.

The decline of the coastal area of the Somali territory started at the end of the XV century, with the arrival of the Portuguese who carried out repeated raids alongside the Benadir coast[19] , occupying the pillar centres of Muslim presence in the area. Although these raids did not aim to subjugate the African territory to the direct control of the European power, the Portuguese occupation concurred to the decline of the Benadiri economic influence and eventually to the end of the Swahili power in the Horn of Africa[20]. In fact, the disarray caused by the Portuguese over the Indian Ocean Sea lanes and the concurrent shifting of commercial routes towards the southern harbours, like Malindi and Mombasa, decreased the strategic importance of the Somali coast[21].

[17] Although initially stopped by the Empire, they later on became an important military resource for the Amhara dominant castes. Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra, op. cit.*, p. 33

[18] For a detailed historical analysis of the evolution of the Ethiopian empire and the role of the Oromo population between the XVI and the XIX century, see Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra, op. cit.*, p. 29-38

[19] Reese recounts how *Vasco da Gama shelled Mogadishu on his return voyage from India in 1499, and a force led by Tristan da Cunha sacked and burned the town of Barawe in 1507*. See Reese S. S., *Urban Woes and Pious Remedies: Sufism in Nineteenth-Century Benaadir (Somalia)*, in "Africa Today", Vol. 46, No. 3, 1999, p. 172

[20] Calchi Novati reminds us that, by the end of the XV century, the Swahili presence, that went from Sufala to Mugadishu, took the form of autonomous cities alongside the coast. See Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra, op. cit.*, p. 46

[21] See Reese S. S., *Urban Woes and Pious Remedies: Sufism in Nineteenth-Century Benaadir (Somalia)*, op. cit., p. 172

By the second half of the XVI century, the pastoralist communities started moving from the coast to inland, towards Jubbaland and Shabelle[22], weakening the power of coastal centres. With the Ottoman occupation, under Oman the Somali coastal centres kept their autonomy. The situation changed under the reign of Sayyid Said, when the Benadir fell under the influence of the government of Zanzibar[23] and the Somali coast lost its central importance.

The Horn of Africa did subsequently witness a noteworthy wave of re-Islamisation in the second half of the XIX century, with a considerable impact on the political, social and religious spheres. One of the main aspects of the Islamic revivalism of the XIX century in the Horn of Africa region was the Mahdi of the Sudan (1880), who "*in the short period of four years […] had forged a dynamic Islamic state from a movement of religious puritanism*"[24]. Mahdi established a theocracy, based on the Sunna and the emergency laws promulgated by the Mahdi himself, funnelling into a Mahdist version of the *Shari'ah* meant to replace the four Sunni schools of Islamic law as well as to replace the local tribal laws.

The Islamic revival also shaped the sultanates alongside the coast[25]. However, differently from the Sudanese experience, the Muslims in the Somali territory did not unify under a unique political power.

1.2 The Somali region and the Arab-Islamic factor in its society

Following the historical developments described in section 1.1, Islam became a fundamental feature of Somali identity. The population was early converted to Sunni Islam, *Sha'afi* school, thanks also to close exchanges and trading connections

[22] Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e guerra, op. cit.*, p. 41

[23] The capital city was moved from Muscat to Zanzibar in 1840

[24] Dekmejian R. H., Wyszomirski M. J., *Charismatic Leadership in Islam: The Mahdi of the Sudan,* in "Comparative Studies in Society and History", 14(2), 1972, p. 207

[25] See paragraph 1.5

with the Arabian Peninsula. The Islamic identity was further reinforced by the establishment of Arab and Persian trading centres in the region[26]. Indeed, the Arab colonisation in eastern Africa was mainly exercised alongside the geographical coastal area as the ports of Zeila in the north, Harar, Mogadishu, Brava and Merca in the south[27]. The Arab influence had very important effects on the social organisation of local population, especially the nomadic one, as it introduced a more centralised governmental system, bringing about the "unifying" power of Islam.

The main Muslim mercantile centres and ports were established alongside the Somali coast, where Arab and Persian proselytizers settled and mixed with the local populations. Several examples of blended cultures are cited by Lewis[28], as in the city of Zeila, where the *Zeilawi* culture mixed components of Arab, Somali and 'Afar cultures, as well as other minor ethnic elements such as the Indian and the Persian. As previously mentioned, the port of Zeila was the main Arab settlement and the most important political centre in northern Somalia, functioning as key junction for trade between Abyssinia and the Arabian Peninsula and, at first, the political centre of the Muslim emirate of Adal. Another key centre of Arab influence in northern Somalia we have mentioned was Berbera, whose early developments are largely unrecorded, as little is known about its history before the XVIII and XIX centuries. On the southern coast, other trading ports were subsequently established. One of the main settlements was Mogadishu, where, according to some local inscriptions and documents, Arab and Persian presence dated back to the X century[29]. As pointed out also by the famous Italian scholar in Somali studies,

[26] Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, London, Haan, 1981, 1993, p. 9-10

[27] According to Hersi, the proof can be found in Somali oral traditions and some European writers. Hersi A. A., *The Arab Factor in Somali History: The Origins and the Development of Arab Enterprise and Cultural Influences in the Somali Peninsula*, op. cit., p. 105

[28] As proof, Lewis claims the presence of the Bravani dialect, the *Chimbalazi*. Lewis I. M. (edited by), *Islam in Tropical Africa*, *op. cit.*

[29] See Lewis I. M., *A modern history of Somalia*, *op. cit.*, p. 22

Enrico Cerulli[30], Mogadishu was an Arab colony which underwent different waves of not only Arab but also Persian immigrations. Indeed, the Persian influence in Mogadishu was much stronger than in the northern part of the country. Brava and Merka were other two important commercial centres whose establishment also dates back to the X century, crossroads for trading exchanges between Abyssinia, Arabian Peninsula and the East. In Brava, a Bantu cultural component was also present, blended with the Arab-Islamic one. By the end of the X century, both in the north and the south parts of the Somali coast, solid Arab settlements were established, functioning as radial points for Muslim expansion to reach the hinterland of the territories in the Horn of Africa.

The population of these areas and its characteristic features had a big impact on the process of spreading Islam in the hinterlands. In order to understand the critical role played by the population in this exchange process, we must look closely at the original inhabitants of the Horn of Africa region. The two main groups interchanging and getting in contact within the region were the people of the highlands and the population of the lower lands and coast, whose different living environment had created different characteristics in their social and political structures. In fact, the typical organisation of the people from the highlands corresponded to a more stable and centralised political structure, mirroring the sedentary agricultural populations, expression of the Ethiopian and Abyssinians kingdoms. On the other side, the nomadic and pastoralist populations of the arid and semiarid areas grew in more flexible social and political organisations[31]. Giampaolo Calchi Novati claims that the social and organisational structures of these groups were directly intertwined with the different religious believes. In fact, according to the different organisational features typical of the pastoralist nomadic and the farming sedentary populations, the two main monotheistic religions exercised a different degree of influence on these social groups. Moreover, he states that one of the reasons for the unification of the Ethiopian States of the highlands

[30] Cerulli E., *Somalia. Scritti vari editi ed inediti, Vol. I, Storia della Somalia, L'Islam in Somalia, Il libro degli Zengi,* Amministrazione Fiduciaria Italiana della Somalia (a cura di), Roma, 1957, p.135

[31] Calchi Novati G., *Il Corno d'Africa nella storia e nella politica. Etiopia, Somalia ed Eritrea fra nazionalismi, sottosviluppo e Guerra, op. cit.,* 1994, p. 7-8

was the common belief in the Christian religion and principles, that later became the official religion of the Kingdom; while, all around Ethiopian highlands, Islam became popular thanks to the presence of a similar environment to the Arabian peninsula (both in geographical and social terms), where Islam first spread. The Somali society falls into the nomadic and pastoralist milieu. We will later on analyse the effect that the dichotomy between the pastoral nomadic and the sedentary agricultural forms of social organisation will have on the Somali political structures and, most of all, on its legal system(s). To better understand the evolution of the Somali social structures, it is important to dig into the characteristics of the Somali population that might have had a huge impact on the socio-political structures. In fact, an interesting study conducted by Martin Doornbos[32] reminds us of an additional third element of Somali society, that is the trichotomy of the pastoral nomadic, the agricultural and the urban population and their respective political organisations. As Doornbos points out: "*Historically, towns were important as market places for the pastoralists. Urban crafts and other occupations also performed a service function for the pastoral economy*"[33]. However, he explains, for a long time the towns had "*communities of Arab and Asian traders who constituted foreign commercial élites who had limited social contact with rural Somali society*", resulting in alienated groups of commercial and administrative élites, with a limited impact on the political life[34]. Even Cerulli's findings confirm this theory when considering the foundation of Mogadishu[35] and the presence of Arab and Persian foreign merchants. As previously mentioned, Mogadishu was an Arab commercial colony for almost 350 years, between the 900 A.D. and 1250 A.D. The Arab tribes residing in the city had their own leader, however they recognised the highest religious authority to one tribe among them, that held *de facto* the

[32] Doornbos M., *Pasture and Polis: The Roots of Political Marginalization of Somali Pastoralism*, in Markakis J. (edited by), "Conflict and the Decline of Pastoralism in the Horn of Africa", Institute of Social Studies, MacMillan Press LTD, London, 1993.

[33] *Ivi*, p. 106

[34] According to the author, this applied also to the next administrations in the XVIII and XIX centuries, and even to the British rule

[35] On the several theories on the foundation of Mogadishu, see Cerulli E., *op. cit.*, 1957, p.18

judicial power[36]. From a document in Arabic by the *šaykh Fakhr al-Dīn*[37], Cerulli notes that the Arabs and the Persians had to "*unite themselves politically against the nomadic (Somali) tribes"* surrounding Mogadishu and the invaders from the sea and a "*federation was concluded in the same Xth century A.D. and composed of thirty-nine clans*". Therefore, "*the trade was even more developed under such conditions of internal peace"*[38]. Four leaders lead most probably this confederation. He also mentioned the agreement among the clans to recognise the religious authority of the Muqrī[39] clans (the *Qaḥṭān ibn Wā'il* dynasty) to establish a dynasty of *'ulamā',* from which to choose the *qāḍī* of the city.

An important element we can notice from Cerulli's documents is the political organisation in Mogadishu, where the Muqrī clans (the *Qaḥṭān* dynasty) detained the main religious positions, both the *qāḍī* and the *ẖaṭīb* of the *al-ğāmi'* mosque in Mogadishu. Holding the control of the main religious authorities meant that, without a sovereign rule, they controlled the political power[40]. Hence, the city of Mogadishu was governed by the *mutaqaddimūn*, the local dignitaries of the tribes, thereby proving that "*Ciò è una delle tante prove del valore spesso misconosciuto della tradizione in confronto anche della critica storica moderna*"[41]. Cerulli points out that even at the time he was writing, 1922, the main *qāḍī* of Mogadishu was chosen among the *rēr Faqī*, the clan descending from the *Qaḥṭān* dynasty, thereby keeping the privilege of being also chief of the Islamic legal school in Mogadishu. Indeed, the main Arab tribes of the above-mentioned confederation are reported to have been preserved, adopting Somali adaptations of their names. So, for example, the *Qaḥṭān ibn Wā'il* dynasty corresponded to the more modern Somali *rēr Faqī,*

[36] Cerulli E., *op. cit.*, 1957, p. 39

[37] The founder of the sultanate in Mogadishu in the thirteenth century

[38] Cerulli E., *op. cit.*, 1957, p. 135

[39] In regard to the term Mukri, Cerulli says that the term can have two origins: it can be derived by the *faqih* Abū Bakr al-Muqrī, or by the Arabic term *muqri'* meaning "reader of the qur'an". *Op. cit.*, p. 30

[40] Cerulli E., *op. cit.*, 1957, p. 19

[41] My translation: "This is one of the many evidences of the value often unacknowledged of tradition in comparison also with the modern historical critic", where we can read *tradition* as the custom, therefore customary norms and rules. Cerulli E., *op. cit.*, 1957, p. 19

the *ʻAqabī* to the Somali *rēr Šēḫ*, the *ʻAfīfī* to the *Gudmanä*, the *Ǧid'atī* to the *Šānšiya*[42]. It is therefore clear that the Somali people blended into the Arab colony tribes, while, at the same time, new tribes were forming in the city, combining Somali people with new Arab immigrants and Arab belonging to the original tribes[43].

Almost three centuries after the creation of the federation[44] Mogadishu became a sultanate, established by *Abu Bakr bin Fakhr ad-Dīn*, and reached its prosperity between the XIV and the XV centuries. The *šaykh ad-Dīn* gradually increased his fame and reputation within the religious chaste, while ensuring consensus and gaining cooperation with the *Qaḥṭān* dynasty, which maintained its privileges and moral influence over the population. Cerulli noted that this practice by the *Qaḥṭān* dynasty to renounce to part of its powers in favour of an external third party was a common practice for their political custom in order to maintain the judicial power over the indigenous population, delegating the political responsibilities of the government to others[45]. After the first centuries of prosperity, the sultanate of Mogadishu deteriorated around the XV and XVI centuries and then collapsed. The local political organisation reversed back to a federation, while at the same time losing most of its commercial power due to the emerging European empires (the Portuguese and the British powers). Taking advantage of a weakened city, both from the political and from the commercial point of view, the Somali beduins invaded the city and took over the power in Mogadishu in the XVIII century. Cerulli reported the invasion of the Somali Bedouins and the installation of their *Imām* in the second half of the XVIII century as the last major immigration movement, after which the ethnicity of the population remained almost the same as the modern Somali population.

[42] Cerulli E., *op. cit.*, 1957, p. 39

[43] Cerulli E., *op. cit.*, 1957, p. 40

[44] Cerulli's hypothesis dates the change of regime in Mogadishu in the first half of the XIII century.

[45] Cerulli E., *op. cit.*, 1957, p. 20

1.3 Somali society and clan identity

The Somali society is quite homogeneous in terms of culture and especially religion. The identity of most part[46] of Somali people is peculiarly tripartite. Alongside the national identity, the Islamic identity plays an essential role in the identification of the population as a cohesive group. Indeed, there is no doubt on the strong adherence of Somalis to Islam, a factor that is made clear by the tendency of Somali individuals to trace the origin of their ancestors back to the Prophet's family[47]. The Somali and the Islamic identities are then strongly interlinked with a third one, that is the clan identity. Clan organisation underlies Somali society, functioning as a wire connecting the Somali families to one another. It is perhaps perceived as being the dominant identity for the Somali people. To provide an idea of the fundamental importance of clan identity for every Somali individual, we can refer to the explanations provided by Elmi A. A. when addressing the reasons of what might have made the clan identity as the dominant identity[48]. The author explains, among other points, how clan identity is perceived by most Somalis as necessary for identification as it is used to recognise each individual within the specific group, even to the level where it is possible to trace a person by simply knowing their genealogy and the clan and sub clan they belong to. He points out how this function is strongly linked to the Islamic value of tribal recognition, making reference to Surah 49:13, which states: "*O you men! surely We have created you of a male and a female, and made you tribes and families that you may know each other; […]*"[49]. What needs to be highlighted at this point is also the importance

[46] In his analysis of the identity of the Somali population, Elmi A. A. does not take into account the Arab, the Baravans and the Bantu minorities, having a different cultural component. See Abdi Elmi A., *Understanding the Somalia conflagration. Identity, Political Islam and Peacebuilding*, Pambazuka Press, Oxford, 2010, p. 29

[47] Even though no historical proof can confirm the presence of Muhammad's direct genealogy in the Horn of Africa. See Calchi Novati G., *op. cit.*, 1994, p. 11

[48] See Elmi A. A., *op. cit.*, 2010, p. 32-34

[49] Electronic version of The Holy Qur'an, translated by M.H. Shakir and published by Tahrike Tarsile Qur'an, Inc., in 1983.

of clan identity and belonging in relation to community living and those situations that would normally be ruled by the law. Elmi reports a clear metaphor where clan identity is compared to a life insurance, meaning that belonging to a clan entails a degree of community assistance and support in the various phases of life, from marriage to murder. Such a community safety net becomes indispensable within a context where a central authority with enforcement powers might have little (if none) influence over the nomadic populations. Therefore, *"such a situation makes clan identity the last refuge that one uses in order to safeguard one's life and property"*[50].

Somalia counts between five and six major clan-families, also referred to with the Arab word *qabiil*, all claiming descent from two ancestors, Sab and Samaale[51]. The number of the main clan-families may vary according to the different scholars and depending on the sub-division of existing clans[52]. In this study we will take into consideration the approach used by one of the main scholars of Islamic studies, I. M. Lewis, who identifies six major clan-families: Darod, Dir, Digil (Rahanweyn), Mirifle (Rahanweyn), Hawiye and Isaaq. Each clan is then divided into sub-clans, lineages, sub-lineages and so on. A detail which is worth to note is the fact that, at least in pre-revolutionary Somalia, the clan was considered as the main political unit, which recognised the leadership of a hereditary male (called in various ways, all with the meaning of "Sultan") whose authority was not greater than all the other male members of the clan. In fact, as Hersi notes, this Sultan is an honoured *primus inter pares* within the assembly of the adult males of the clan, who wield the ultimate authority[53].

Setting temporarily aside the most recent internal displacement of the population following the post-revolutionary phase and the collapse of the Somali State, the six major clans could be allocated to specific geographical areas[54]. For example, the

[50] See Elmi A. A., *op. cit.*, 2010, p. 32

[53] See Hersi A. A., *op. cit.*

[54] See Map 1 – Somalia, Clan distribution

Darood clans, the largest and most widely distributed clan, populates the north-eastern (Puntland) and south-western parts of Somalia, as well as north-eastern Kenya and the Ogaden region in Ethiopia (named after the largest group, Ogadeni). The headquarters of the Dir family are reported by Lewis to be historically in the Harar-Zeila area, north-eastern part of the Country, with some presence alongside the southern coast. The Hawiya have always populated the Hiran, Mudug and Benadir regions, stretching across the Shabelle river and in the trans-Juba region and north-eastern Kenya. The Isaaq clans occupy the north-western part of the country (modern Somaliland). The Digil and Mirifle (Rahanweyn) populate the centre-south part of the country, the area around Baidoa, with some presence around Mogadishu. Alongside these clans, there are also outsiders, groups not belonging to the clan framework and the Somali genealogy, such as the ethnic minorities, the Arab community and some Italians, mainly engaging in commercial activities. Some of them are considered inferior for being occupational caste groups, such as the Swahili or Bantu-speaking communities (descendant of the ancient black slaves), known as *sab* (here not referring to one of the ancestors, *Sab*). For this reason, they have always suffered from abuse, violence, land-grabbing and depredation, and many of them have fled the country in the past and in the present times[55].

Somali clan membership is based on patrilinear descent (*tol)*, narrated by the name of male members in a family. To understand the features of clan identity, it is necessary to start with the explanation behind the names of male individuals. The first name of Somali men is usually made of three names, where the second and the third ones are the father's and the grandfather's first names. According to this rule, children take the father's genealogy, including daughters, whose children take her husband's genealogy[56], and so on.

[55] For an extensive analysis of groups of outsiders, see Abbink J., *The Total Somali Clan Genealogy (second edition),* African Studies Centre, Leiden University, The Netherlands. ASC Working Paper 84 / 2009

[56] This is locally known as *abtirsinyo* or *abtirsiimo* ('the counting of fathers'). See Elmi, *op. cit.*, p. 31, and Abbink J., *The Total Somali Clan Genealogy (second edition), op. cit.*. Most recently, several

However, sometimes the genealogy can use the uterine lines (*Bah)*, tracing back to the women who married the male ancestor[57].

We can distinguish six levels of *tol*, including the clan-family, the clan moieties, the clans, the sub-clans, the lineages and the sub-lineages or *mag*-paying groups (the Arabic *diya*-paying = blood's money), which can be considered the lowest level of grouping, indicating *"an existing kin-group showing solidarity and corporate identity on the basis of its obligation to unite and pay 'blood money' in case of a homicide"*[58]. The boundaries of each intermediate level are not strict; therefore, groups can become bigger or shrink, subdividing into more segments. The terminology used to identify the different levels of segmentations is not strict either, and labels can shift their meaning also due to territorial dispersion, social change.

In his study on the genealogy of Somali clans (building on the works of Prof. I. M. Lewis *The Somali Lineage system and the Total Genealogy*), J. Abbink believes that tracing the Somali genealogy is "a reflection of, perhaps perennial, 'work in progress', and […] does not purport to be an accurate historical tree at any specific point in time"[59]. Although there exists an unquestionable historical genealogy of Somali people within the Somali territory, Abbink states that an accurate genealogic tree would be impossible to complete due to several concomitant factors, such as: the inevitable melting pot of linkages with other people of the Horn of Africa, namely the Oromo and Orma; the multiple assimilation of different clans/sub-clans to other clans when facing particular religious, economic or political challenges[60]; and, even more relevant to our study, the weakening of the respect of clan rights, in particular on property rights, mainly due to the application of Muslim *Shari'ah* at the expenses of the customary law.

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online sources have been created to trace the genealogy of the main clans, such as http://www.abtirsi.com/; http://codkabeeshadireed.blogspot.com/

[57] See Abbink J., *The Total Somali Clan Genealogy*, *op. cit.*, p. 5

[58] Abbink J., *The Total Somali Clan Genealogy*, *op.cit.*, p. 6.

[59] Abbink refers to the total genealogy as a metaphoric, symbolic construct.

[60] This is explained by the author with the institute of *sheegat*, or adoption, where individuals or clans can temporarily merge with another clan and then separate and rejoin the original clan.

1.4 Clanship and social functions

For the purpose of this study, it is particularly relevant to provide an analysis of the rules governing Somali clanship, its social functions, as well as the social interaction among the different clan-families and lower lineages, as it forms the very basis of Somali customary law.

The peculiar semiarid climatological conditions of the country have developed a fundamentally pastoral economy, with a society dependent on the meagre regional natural resources and local products. Transhumance makes the pastoralist population extremely mobile within the Horn of Africa region. Barter trade was an essential aspect of the society to access products that could not be locally obtained. Being a pastoral nomadic people, Somalis have a long tradition of herding camels, sheep, goats, and cattle. The remainder of the population is historically associated to cultivation and keeping livestock. In the work produced by Prof. Lewis in the nineties[61], almost 60-70% of the population was still reported to be associated to nomadic pastoralism, while the remainder to be cultivator. The study on Somali clanship reported in these pages, refers to the social organisation of the pastoralist society, mostly present in the North of the country.

In the Somali precolonial pastoral economy, the main economic control over the herd ownership is held by the basic social unit of the household, over which the clan would have very little economic control, while all clan members would have common access to pastureland and water sources[62]. The pastoralist productive unit tend to be small and more or less concentrated, to make best use of the scarce natural resources and unstable environmental conditions, very much dependant on yearly

[61] Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, London, Haan, 1981, 1993, p.10

[62] For a more in-depth analysis of the types of grazing, grazing and water sources rights and the customs of the different groups, see also Colucci M., *Principi di diritto consuetudinario della Somalia italiana meridionale – I gruppi sociali, le proprietà*, Firenze, Soc. An. Editrice La Voce, 1924, pp. 240 ss.

rainfall patterns[63]. In fact, the concentration of one or more households in the same area would depend very much on the availability of natural resources (mainly water and grazing land), and the level of harmony or conflict among the pastoralist units. As explained by Samatar, in summer and spring time, when the rainfalls have created enough water sources and made pastureland lush, families would tend to be widely dispersed as they can easily access them; on the contrary, in dry seasons, the families would gather together, increasing population density around the home wells. Pastoral families would also cohabit together to accomplish common activities that could not be achieved by the labour force of a single household, for example well digging[64]. This form of cohabitation that would ensure the survival and preservation of a group of families represents the *reer*[65] [66]. Several elements are put in place in order to take maximum advantage of the scarce natural resources available, as well as to minimise the risks for the units of production, such as having large and diverse herd, establishing reliable relationships with other production units, ensuring reciprocal stock exchanges between them.

Clans and their sub-divisions are led by the elders, which could include in principle all adult male members.

Internal clan covenants would regulate relationships among members of the same clan, while external collective responsibilities would then be regulated by

[63] For an in dept study on the geographical context and climatological dependency of the country from the rainfall patterns, see Samatar A. I., *The State and Rural Transformation in Northern Somalia 1884-1986*, The University of Wisconsin Press, 1989

[64] A Somali proverb says: "*Together the teeth can cut*" (*Ilko wada jir bey wax ku gooyaan*), meaning 'Unity is power'. *This proverb underscores the notion of family unity as the foundation of family strength*. See Heitritter, D.L., Somali Family Strength: Working in the Communities, A report prepared for Family & Children's Service, Minneapolis, Minnesota and the University of Minnesota Extension Service for use in Community Outreach, June 1999, p. 5; and Putnam D.B., Noor M.C., The Somalis: Their History and Culture, Refugee Fact Sheet Series No. 9, published by The Refugee Service Center, Center for Applied Linguistics, Washington DC, 1993, p. 27

[65] See Samatar A. I., *The State and Rural Transformation in Northern Somalia 1884-1986*, cit., p. 24

[66] The word *reer* meaning group or lineage in an extended sense. See Lewis I. M., *Clanship and Contract in Northern Somaliland*, in "Journal of the International African Institute", Vol. 29, No. 3, Cambridge University Press on behalf of the International African Institute, 1959, p. 278

agreements with external clans. Therefore, as Hersi notices, *different treaties with different clans are liable to embody differing terms of settlement for the same kind of dispute*[67].

The clan would therefore have a tripartite social function:

a) *mediate petty conflicts within the clan, and between its members and those of other clans;*
b) *serve as a forum and an "organization" through which the exploitation of nature by its members was managed – that is, exploring new grazing areas and/or designating range areas and prohibiting grazing during particular seasons (xidmo); and*
c) *mitigate the effects of natural and personal tragedies.*[68]

As previously explained, the clan represents the highest lineage of political organisation within the Somali society, while several lower levels of reciprocal cooperation and very flexible political realignment exist, such as the *diya*-paying group (or *mug*-paying group), often also referred to with the Somali word *Jilib*. The diya-paying group would generally have between a few hundreds to a few thousand members and would represents the *more stable political unit in a shifting system of agnatic attachment*[69]. The individual members of this group are bound by a politico-legal contract, *ḥeer*[70], that is a *pledge of mutual support among the members against*

[67] See Hersi A. A., *The Arab Factor in Somali History: The Origins and the Development of Arab Enterprise and Cultural Influences in the Somali Peninsula*, cit., p. 16

[68] Samatar A. I., *The State and Rural Transformation in Northern Somalia 1884-1986*, The University of Wisconsin Press, 1989, p. 16

[69] See Lewis I. M., *A Pastoral Democracy, A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, International African Institute, Oxford, (reprint) 1998, p. 6

[70] The term *ḥeer* (or *xeer*) can be translated as 'custom', 'agreement', 'contract' or 'treaty'. A common way to state the existence of this agreement is '*ḥeer baa innagu deheeya'* ('There is an agreement between us'). See Lewis I. M., *A Pastoral Democracy, A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, cit., p. 161. Two parties are of the same *ḥeer* (*waa is ku heer*) when their relations *are regulated by a common treaty, either specifically*

other diya-paying groups[71]. Being a pledge of collective political and jural responsibility, *ḥeer* agreements are mainly related to collective defence and security, political cohesion, and they are the base to share payments and/or receipt of compensation in case of murder committed by or against a member of the group. In the case of physical injuries or hurt to pride and dignity, the compensation is instead received or paid individually or by the closest family[72].

The parties can be regulated by the *ḥeer* either because they have directly agreed on their terms or because they have inherited it from their ancestors, therefore continue to be bound by it. More importantly, it is necessary to highlight the flexibility of these agreements as their terms can be modified, some abrogated, some new ones made according to emerging needs[73].

In the Somali precolonial pastoral society, characterized by the lack of state institutions or official political leaders, law and order are therefore ensured within and by this group. In particular, it is the responsibility of the elders to ensure the respect of the politico-legal contract:

> *When conflicts arose, elders from various levels of political segmentation gathered in a Shir (elders' council) to mediate between the concerned parties. The Shir was the forum in which the problems of the political unit(s) were discussed and settled. […]*

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entered into by them or inherited from their ancestors and accepted by them. The majority of these agreements regulate collective defence and security, or political cohesion in general. In British Somaliland, these agreements could be submitted in the form of petition to the local District Commissioners, and the British offices maintained a file of local clan treaties; in this way, these ḥeer agreements became sources of law, *since the collective responsibility recognised by the government* was that defined in those agreements. The documents would generally bear the signatures of the chief elders of both parties. For examples of *ḥeer* agreements, see Lewis I. M., *Clanship and Contract in Northern Somaliland,* op. cit., pp. 282 and 286 ss.

[71] See Samatar A. I., *The State and Rural Transformation in Northern Somalia 1884-1986,* cit., p. 26

[72] See Hersi A. A., *The Arab Factor in Somali History: The Origins and the Development of Arab Enterprise and Cultural Influences in the Somali Peninsula*, cit., p. 15

[73] See Lewis I. M., *A Pastoral Democracy, A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa,* cit., p. 162

> *The relationships between various lineages, in terms of peace and war treaties, were decided in these Shirs. The council had no officials or standing committees, and the participants dispersed as soon as the matters at hand were resolved. Even thought there were no officials in these gatherings, the lineage "heads" (wherever these lineage heads existed) served as group spokesmen without formal authority over the membership*[74].

In its comprehensive work on Somali pastoral democracy, I.M. Lewis explains the fundamental underlying complementarity between the politico-legal contract and clanship, arguing that only the combination of the two elements can really explain the existence of political interaction in the Somali pastoralist society. Indeed, Lewis highlights the fact that the meaning of the words *ḥeer* and *tol* (clanship), have similar implications as both terms *emphasize security and cohesion*, the only difference being that *tol solidarity derives from agnatic status in the lineage system, and ḥeer from egalitarian contract*[75]. The latter binds its members both in relation to internal crimes and collective responsibility towards the external groups.

Although we will not address them in detail in our study, different types of social interactions are instead reported for that (minority) part of the Somali population dedicated to agriculture, mainly present in the Western and southern territories of the country[76]. It is therefore necessary to mention that in those territories the semi-sedentary lifestyle has influenced the social system in a way that the attachment to the territory has come to replace the loyalties based on agnatic belonging typical of

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[74] See Samatar A. I., *The State and Rural Transformation in Northern Somalia 1884-1986*, cit., p. 26

[75] See Lewis I. M., *A Pastoral Democracy, A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, cit., p. 162

[76] Lewis reports them to be placed in the western part of the Northern Regions and in Harar Province of Ethiopia, where *following the example of the neighbouring Oromo farmers, Somali pastoralists have turned to plough cultivation, and stable agricultural villages have replaced the nomads' temporary encampments* as well as among the Digil and Rahanweyn cultivators in the Southern territories. See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980*, p. 12-13

the pastoralist society[77], creating a different type of grouping based on a different type of tie, namely co-residence and all those agricultural activities linked to harvesting and maintenance of the ponds for their water sources. In these cases, lineage and clan names can be sometimes inspired by localities and territorial aggregations, rather than a common ancestor[78].

In this context, it is noted by Lewis that the agricultural way of life has evolved in a social stratification, modifying the local social organisation to the point of creating three social classes, categorised according to their rights to the land: putative descendants of the original groups, long-standing accretions, and recently adopted clients[79]. Among these three, the first group is clearly the one enjoying the greatest rights of land ownership, while the latter two groups do not possess secure rights. For the clients, the continuous access to land allocated by their hosts is in this context ensured only as long as the clients fulfil the clan membership's duties. That is a set of obligations binding the host as well as the client and include the acceptance of solidarity in blood feud.

It is thus clear that in the case of semi-sedentary communities, the social and political organisation has developed into a type of chieftainship, where trust and loyalty is defined upon residential and neighbourhood presence rather than kinship. In this context, a presumed categorization of the two political and social forms of

[77] See Hersi A. A., *The Arab Factor in Somali History: The Origins and the Development of Arab Enterprise and Cultural Influences in the Somali Peninsula*, cit., p. 16

[78] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, op. cit.*, p. 14

[79] This is the case of the Digil and Rahanweyn cultivators, and in particular of the *Sab* people, descendant of the Digil, comprising a mix of ethnic origin, including probably those deriving from *Bantu* and *Oromo* people. See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980*, p. 13. The mixture that the *Sab* people has undergone over time is also reported with its negative acceptation perceived by Somali people also by Marotta Gigli. However, he claims, they all acknowledge being descendants of the same legendary ancestors. See Marotta Gigli G., *Giustizia sotto l'albero. Taccuino d'un Giudice in Somalia*, Fratelli Palombi Editori, Roma, 1989, p. 40-41

organisation is based on different cultural perceptions, in which the pastoral community perceives a form of superiority and scorn towards the agricultural one[80]. Despite the sense of disdain for the cultivating activities and sedentary way of life, the two communities can collaborate and engage in transactions on a regular basis, such as for the use of grazing land, access to water sources or grain trade, taking advantage of the mutual benefits from both activities. In addition, some nomads have also turned to cultivation where the activity has proved to be profitable, confirming that the divergencies between the two groups are not as insuperable as it might be perceived.

1.5 Imperial partition and European colonisation ('800)

The history of the eastern part of the Horn of Africa is dominated by Somali expansion from the north and Muslim commerce alongside the coast. A gradual enlargement of the Somali territory was made possible thanks to different waves of migration, in particular clans' movements in the hinterland, which expanded the control over the territory until the plains of northern Kenya[81]. By the XVIII century, the clans in Somaliland had reached a similar ethnic composition as the current one. By the mid-XIX century a territorial control balance was reached in favour of the hinterland populations, who attained political influence over the coastal area. The great waves of migrations that lasted almost nine hundred years, ended only in the first half of the XX century. It happened after the government of Kenya in 1936

[80] Lewis gives the example of the *Sab* and the *Samale* clans, the former cultivators while the latter nomads. The two groups *are represented as brothers of common descent from a line of ancestors which eventually links the Somali as a whole to Arabia and proclaims their single origin.* See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa*, Oxford, 1980, p. 15

[81] This expansion involved bloodshed and continuous war with the local populations, the Oromo people and the Bantu. See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa*, Oxford, 1980, p. 18-19

tacitly recognised that the Warday Galla people were finally assimilated and the Oromo population, that had occupied vast parts of the territory, were penned up[82].

The early forms of European presence in the Horn of Africa dates back to the XV century, when the Portuguese were the first European power to engage in the discovery of the continent. The Portuguese navigator Vasco da Gama first saw Mogadishu during his return voyage from India[83] in 1499. After him, Pedro Alvarez Cabral and Tristao da Cunha established trading posts over the main Somali harbours, in particular in Brava[84]. The Portuguese presence in East Africa and the Horn became evident when the Ethiopian king invoked their (Christian) help against the Muslim conqueror Ahmad Ibn Ibrahim *Gran* in 1541. In the following centuries, other European explorers reported having voyaged across those lands, such as the French explorer Charles Guillain, who visited the southern Somali coast in 1847, and the German traveller, von der Decken, who sailed up the Juba River in 1865.[85]

In the XVII century, Zeila, that after the decline of the Adal State had regained its commercial position, and Berbera fell under the authority of the Ottomans and were incorporated in the Empire. The southern Somali Coast was also exposed to foreign influence, mainly connected to the political situation in the Indian Ocean. Mogadishu and the other East African ports fell under the Omani protection of the

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[82] After a large part of them had perished near the Tana River at the very height of the dry season Ivi, p. 31

[83] Vasco da Gama embarked on his first journey to India in 1497 to open the sea route to Asia. E. Cerulli reports this episode in his work saying that Mogadishu appeared to the Portuguese explorer as a big city with multi-level houses, typical southern-Arabic houses. He decided not to engage with a city that seemed densely populated and fortified, therefore he proceeded his journey to Malindi. According to Cerulli, this episode confirmed the prosperity of Mogadishu in the XVI century. Cerulli E., *Somalia. Scritti vari editi ed inediti, Vol. I, Storia della Somalia, L'Islam in Somalia, Il libro degli Zengi*, Amministrazione Fiduciaria Italiana della Somalia (a cura di), Roma, 1957, p. 115-117.

[84] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.)*, Milano, Antonino Giuffrè, 1954, p. 1

[85] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980*, p. 30

Imam of Muscat, that was detaining a rising influence in the Indian Ocean[86]. In the first half of XIX century, when the Sultan died without appointing an heir, two of his sons were appointed as rulers, one of the mainlands and the other of the independent Sultanate of Zanzibar. Therefore, the southern Somali coast area was also under the jurisdiction of the Sultan of Zanzibar[87]. However, the Benadir ports at that time also acknowledged the authority of the Somali Geledi clan in the hinterland, which could more directly enforce its authority over the territory. Although the Sultan of Zanzibar held a more powerful position, his authority was considered to be mostly nominal. Nonetheless, the two Sultans managed to maintain a delicate balance of power over the Benadir that allowed both to benefit from it. Beyond the Benadir ports, the northern part of the coast was under the authority of the politically independent Majerteen Sultanate, which kept its connections with the Omani Sultanates, while Zeila and Berbera were formally still under the authority of the Ottoman Empire[88].

In the mid-XIX century, Somali coastal areas, which were no longer isolated and mostly controlled by the populations of the hinterland, rapidly witnessed the European colonial competition in the Scramble for Africa, mainly between the Italians, the French, and the British. Egypt and Abyssinia were also interested in the territorial partition. The colonial interests of England, France, and Italy materialised in different areas of the Somali territory.

The British were involved, to different extents, especially in the northern territories of Somalia. A commercial treaty was signed in 1827 between the British East Africa

[86] See Lewis I. M., *A modern history of the Somalia: Nation and State in the Horn of Africa,* cit., p. 37, and Meregazzi R., L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.), Milano, Antonino Giuffrè, 1954, p. 1

[87] As recorded by Guadagni, the Zanzibar administration was limited to collecting revenues on caravans coming from the hinterland, without focussing nor investing into the agricultural exploitation of the country. See Guadagni M., *Colonial Origins of the Public Domain in Southern Somalia (1892–1912)*, in "Journal of African Law" 22(1), p. 2

[88] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa,* cit., p. 38-39

Company and Zeila governor's local clan, Habar Awal[89]. The Majerteen Sultanate signed a treaty in 1839 with the British at Aden, agreeing to protect British ships wrecked off its coasts.

Later, in 1839 Britain acquired Aden by force, to be used as station for the route to India, although it was a territory with scarce natural resources that was almost entirely dependent from externally sourced supplies. The British never formalised the occupation of the Somali coast, while they mainly had utilitarian interests in Somaliland's territories, for the collection of ancillary supplies (mainly meat) to Aden and the coastal areas[90]. It was only in 1887 that a British Protectorate was established over Somaliland[91].

England felt constantly threatened by the presence of other powers who had bigger imperial ambitions in the region. Although the British did not intend to occupy the Somali territory itself, it was considered unfavourable to them to have other European (and non-European) powers on the other side of the Gulf of Aden. The French had established their presence in the Gulf in the port of Obock[92] already in 1859, but the first Franco-Ethiopian trading company was installed in the port only in 1881, several years after the opening of the Suez Canal. Britain did not contest Italian claims over the Red Sea area in that same period, when a former Italian missionary, Giuseppe Sapeto, peacefully bought a piece of land over the port of Assab on behalf of the Italian Government in 1869[93]. The following year, the port

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[89] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980*, p. 33

[90] In fact, the British colonial expansion in Eastern Africa did not include Somalia as their primary objective and the control over Jubbaland had always been rather uncertain; while the control over Kenya was considered central to maintain their presence in the region. See Calchi Novati G., *Il passaggio dell'Oltregiuba all'Italia e I suoi effetti per l''unità nazionale somala*, in "Proceedings of the Third International Congress of Somali Studies", pp. 283-290, Il Pensiero Scientifico Editore, 1988, p. 286

[91] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980*, p. 40-41

[92] In modern Djibouti

[93] See de Leone E., *Un centenario: l'acquisto della Baia di Assab (1869-1969)*, in "Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente, marzo 1970, Anno 25, No. 1, pp. 75-81

of Assab was entirely bought by the Italian shipping company "Compagnia Rubattino" as a shipping post from Red Sea to India. After the initial hostile reactions to the Italian expansion, England began to see the Italian presence as a counter-balancing factor to the more threatening French expansion in the area. This was the reasoning behind the British support to the Italian protectorate on the Eritrean coast, in 1885, from Assab to Massawa. With the subsequent Treaty of Uccialli signed in 1889 between Italy and Abyssinia, which established an Italian protectorate of the former over the latter, Italy became more concerned in the partition of the Somali territory.

In the meantime, Egypt revived its claims over the Red Sea ports, claiming jurisdiction over the Somali coast. In 1869 the Egyptian occupation of Bulhar and Berbera raised preoccupation to the British for the safety of supplies that from Somaliland were needed in Aden. Albeit initially hostile to the Egyptian expansion over the Somali territory (during the 1870s), the British signed a convention in 1877, wherewith they accepted the Egyptian jurisdiction up to Ras Hafun, one of the most Eastern points of Somalia. In so doing, England sought to preclude the expansion of other European powers over the Somali part of the Gulf of Aden. In fact, the agreement with the Egyptians included a provision according to which no part of the Somali coast could be transferred to a foreign power[94]. Indeed, in 1882 Italy, under the British pressure, recognised the Egyptian authority to the north and south of Assab. The Egyptian authority over the Somali territories was far from easily achieved, mainly due to the difficulties with the nomadic clans of the hinterlands, even though they were united by the same religion. The rise of the Mahdi revolution in the 1880s forced the Egyptians to concentrate their resources in the Sudan, putting an end to their presence in the Somali ports of Harar, Zeila and Berbera. The sudden evacuation of these towns in 1884 were to leave empty spots and highly likely instabilities in the area. It was perceived such a high risk for the British government that it eventually agreed to a direct involvement to ensure the control over those territories from other foreign powers, in order to keep the safety of the meat supplies for Aden.

[94] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980,* p. 42-43

Thus, the British concluded agreements with the local Somali clans for British protection in 1885, the Anglo-Somali treaties, wherewith the Somali clans did not concede their lands to the British, but agreed to "*never to cede, sell, mortgage, or otherwise give for occupation, save to the British Government, any portion of the territory presently inhabited by them or being under their control"*[95]. The treaties made clear that the purpose of the Agreements with the British Government was to keep the Somali independence and maintain the order. The Somali clansmen granted the right of residence on the Somali coast to British Agents appointed by the British Government. Soon after, the *"gracious favour and protection of Her Majesty the Queen-Empress"*[96] was extended to the territories of the five clans, through treaties signed with the five clans in 1886, with the goal to keep peaceful and friendly relations. However, the Somali clans were obliged not to start relations with other foreign powers without the British consent. The manoeuvre was not meant to be an attempt to expand British occupation inland; instead, the instructions were for the three British 'Vice-Consuls' deployed over the Somali coast[97] by 1884, to work under the direct authority of the British Resident at Aden and to not assume powers beyond maintaining peace. This approach was fully in line with the non-primary interest of Britain on the Somali coast, meant to merely be a source of provisions for Aden. In Berbera and Bulhar, the Vice-Consuls managed to keep the order, with the aid of the Somali Coast Police and the safety of trade with the interior was ensured by an irregular force of armed caravan guards. The intervention of forces from Aden were instead needed inland, where in addition to raiding and looting caravans, there was a growing sympathy for the cause of the Mahdi in the Sudan. When the Police of Zeila mutinied, the Indian Infantry had to intervene, and Berbera witnessed a riot.

The rivalry with the French, who in 1885 claimed their territory to be extended close to Jibuti, exacerbated and the British claimed the extension of their Protectorate from Berbera to the same area claimed by France. Although a conflict

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[95] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa, Longman Group Limited, 1980*, p. 47

[96] *Ibidem*

[97] The Vice-Consuls were posted in Berbera, Bulhar and Zeila. *Ibidem*

was seen as inevitable at this point, the two governments negotiated the Anglo-French Agreement in 1888. The agreement laid the basis for the definition of boundaries of the British and French Protectorates in Somalia, between Zeila and Jibuti. The latter became the capital of the French colony.

Italy, the third European power present in the area, claimed control over the eastern territory to the British Protectorate, the Somali coast over the Indian Ocean. The Italians were in fact willing to expand their control inland from their Eritrean colony. The claim over the Somali territory arrived on the same year of the Treaty of Uccialli (1889), negotiated between Italy and the King Menelik of Ethiopia[98], which later on resulted in a well-known linguistic controversy over art. XVII[99].

[98] The Italian Government, eager to expand its control over Ethiopia, supported the overturning of King John of Tigre, by proving weapons to one of his vassals, King Menelik of Shoa, controlling the central region of Ethiopia, an area of 85000 square kilometre, including the capital, Addis Abeba. However, the two kings agreed that Menelik would become Emperor at the death of King John. See Papa N., *L'Africa italiana. I giudici, le leggi, le pene e la questione della razza,* Storia del diritto e delle sitituzioni/Studi 1, Aracne editrice, Roma, 2009, p. 49

[99]Several Academic articles were published during the 1960 on the controversies linked to the linguistical differences of the Italian and Amharic versions of the article. The Italian version read the following: "Sua Maesta' il re dei re d'Etiopia consente di servirsi del governo di Sua Maesta' il re d'Italia per tutte le trattazioni di affari che avesse con altre potenze o governi" (original text from REGIO DECRETO 10 aprile 1890, n. 6835). The misinterpretation occurred over the term "consente" (consent). As Papa explains in his work, the use of the word was not meant to impose a legal obligation over the King Menelik, rather a moral commitment to be using Italian mediation in his relations with foreign governments. While the Amharic version of the Treaty read the following: "*Per qualsiasi necessità di cui abbia bisogno presso i sovrani d'Europa sarà possible corrispondere con l'aiuto del Governo italiano*" (translation from Papa N., *op.cit.*, pp. 51). The Amharic version was instead interpreted as 'granting the possibility' to the Ethiopians to make use of the Italian government when negotiating with other European countries and governments. The discrepancies of the different text in Italian and Amharic, were used by the Italian government as a pretext to notify to and obtain from the European countries the formal recognition of the Italian Protectorate over Ethiopia. For a detailed analysis of the article, see Giglio C., *L'Articolo XVII del Trattato di Uccialli*, in "Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente", Anno 22, No. 2 (GIUGNO 1967), Istituto Italiano per l'Africa e l'Oriente (IsIAO), 1967, p. 137; and Papa N., *L'Africa italiana. I giudici, le leggi, le pene e la questione della razza,* Storia del diritto e delle sitituzioni/Studi 1, Aracne editrice, Roma, 2009, pp. 50-54

Under the General Act[100] of the Conference of Berlin on West Africa of 1885, the Government of Italy notified to all other European countries the beginning of the Italian Protectorate over Ethiopia, which secured the territory from other similar claims. Presuming on the agreement of King Menelik over the Italian Protectorate, the Italian Government agreed boundary protocols with the British in 1891 and 1894, trying to secure the newly claimed boundaries[101].

Following the subsequent Italian defeat at Adwa[102], the Italian Government saw even more the Somali colony as pivotal to defend the Benadir coast over a possible Ethiopian attack.

Somalia was the latest territory in the Horn of Africa which entered the sphere of interest of the Italian colonial government. As previously mentioned, the Italian claim over Somalia came on the same year of the Treaty of Uccialli (1889). However, already in December 1888 the Sultan of Hobyo submitted formal request of protectorate to Italy[103]. The person who played a key role in maintaining Italian

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[100] Art. 34 of the General Act of the Berlin Conference on West Africa, 26 February 1885: "Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own". Therefore, *European Powers agreed to notify each other of their acquisitions in Africa; such a notification* was sufficient to establish ownership over an African territory, unless another power objected for having previously claimed it. See Pankhurst E. S., *Ex-Italian Somaliland. How it was acquired. How it was ruled. Its Future…*, Philosophical Library, New York, 1951, p. 12

[101] See Pankhurst E. S., *Ex-Italian Somaliland. How it was acquired. How it was ruled. Its Future…*, Philosophical Library, New York, 1951, p. 12

[102] The Battle of Adwa took place in 1896, after the Italians had occupied the territory of Eritrea and had come at close contact with the Ethiopians. The Italian incredible defeat changed completely the Italian colonial approach, which reopened towards a dialogue with King Menelik. The Peace Treaty was concluded in Addis Abeba on 26 October 1896, repealing the Treaty of Uccialli and recognising the independence of Ethiopia. See Papa N., *op. cit.*, 2009, p. 54 . An interesting reconstruction of the events of the battle, can be found in Vaccari P., LA BATTAGLIA DI ADUA (1° marzo 1896), in "Annali Di Scienze Politiche", vol. 8, no. 3/4, Rubbettino Editore, 1935, pp. 272–82

[103] See Papa N., *L'Africa italiana. I giudici, le leggi, le pene e la questione della razza,* cit., pp. 99 ss

interests in Somalia was the Italian Consul at Zanzibar, Mr. Vincenzo Filonardi, who also had personal economic interests in the area. He built up relationships with the local Sultans of the Red Sea, from Cape Guardafui to the Juba River[104]. On 8 February 1889 Mr. Filonardi concluded a treaty with Yusuf 'Ali, the Majerteyn Sultan of Hobyo, by which the Sultan's territory was placed under the Italian Protectorate. According to the treaty, the Sultan of Hobyo could not enter into agreements nor treaties with other Powers without the Italian consent[105]. In return, the Consul promised 1200 tallers per year as a compensation for the conclusion of the treaty[106].

A few months later, a similar agreement was concluded with the hereditary Sultan of all the Majerteyn ('Isman) at Alula, on 7 April 1889, again by Filonardi on behalf of Italy. As Scovazzi points out, although Yusuf Ali mediated between Italy and 'Isman, these negotiations were more complicated, as the Sultan of Majerteyn *made clear that he did not need any protection*[107]. Nonetheless the Protectorate agreement

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[104] See Pankhurst E. S., *Ex-Italian Somaliland. How it was acquired. How it was ruled. Its Future…,* cit., p.12

[105] The text of the Treaty read: "*Noi dichiariamo che la bandiera d'Italia resterà inalberata nel nostro paese ed in tutti i nostri possedimenti, che i nostri sudditi e possedimenti sono sotto la protezione e governo dell'Italia. Dichiariamo inoltre che noi non faremo contratti o trattati con qualsiasi Governo o persona senza il pieno consenso del governo d'Italia*". See Scovazzi T., "The Origins of Italian Colonization in Somalia", in Carpanelli E., Scovazzi T. (edited by), *Political and legal aspects of Italian colonialism in Somalia*, Torino, G. Giappichelli Editore, 2020, p. 26

[106] "*Noi promettiamo al Sultano Jusuf Ali Jusuf, Sultano d'Obbia, un'annualità di talleri mille duecento, come compenso del trattato oggi da esso stipulato e firmato a favore del regio Governo italiano*". Maria Theresa tallers were Austrian silver coins. They were later on increased up to 1800 tallers per year, to avoid any differential treatment between the Sultan of Hobyo and the Sultan of the Majerteen, 'Isman, see Scovazzi T., *ibidem*, pp. 26-28

[107] Scovazzi reports a brief text containing the reply of the Sultan of Majerteyn, contained in a letter dated 26 March 1889, from Captain Amoretti, commander of the Italian ship "*Rapido"*, to the Minister of Navy: "*Il Sultano dei Migertini rispose che era la prima volta che vedeva Italiani e navi Italiane e che sarebbe stato desideroso di stringere amicizia con l'Italia, ma che non poteva accettare né la nostra bandiera, né il protettorato, avendo tutti i suoi antenati, ed Egli stesso, rifiutate sempre simili proposte più volte avanzate da altre nazioni. Aggiunse in seguito che il suo popolo era forte e che non aveva bisogno di aiuti perché nel caso che fosse attaccato alle coste si*

was concluded with the payment by Italy of an annual allowance of 1800 tallers per year[108].

The Italian Government immediately notified the other Powers of the newly acquired territories under Italian Protectorate. However, Italian control over the coast was not complete yet, as the Sultan of Zanzibar held control over the coastal part southern to Hobyo and the Majerteyns, including the ports of Kisimayu, Brava, Merka, and Mogadishu. While the negotiations on the Italian protectorate over Ethiopia was still ongoing and dynamic, the Italian Government strove to secure control over those ports that would represent natural outlets over the Ocean and the Red Sea for the – very much sought for – Ethiopian Empire under Italian Protectorate. As Pankhurst reminds us, the negotiations with the Sultan of Zanzibar over those territories had been already ongoing with the British Government for the cession of the ports of Brava, Merka, and Mogadishu to the British East Africa Company:

> *The Italians most adroitly persuaded the British Government to surrender the concession for these ports to them as soon as it was obtained from the Sultan, whilst the Port of Kismayu was to be jointly occupied. The arrangement was, of course, part of the division of the African coast between European Powers, each of the bigger ones getting a proportion, by agreement, in order to avoid fighting among themselves. This had been the purpose of the Congress of Berlin.*
> *Britain, […], was disposed at that time to favour concessions to Italy, assuming that she would be peaceful and loyal, in view of the rivalry*

ritirerebbe nell'interno. Non scoraggiati da tali risposte e coadiuvati dal Sultano di Obia si continuarono le trattative per cattivarci la fiducia del Sultano dei Migertini". Scovazzi T., *ibidem*, p. 27

[108] The text of the Treaty read: "*Noi abbiamo messo il nostro paese e tutto ciò che possediamo da Ras Auad a Ras-el-Kyle (Uadi-Nogal per ultimo limite) sotto la protezione e governo di S. M. il magnanimo Re d'Italia. (…) Noi abbiamo accettata la bandiera italiana per inalberarla nei paesi sopra menzionati. Dichiariamo che noi non faremo trattati o contratti con altri Governi o persone. Dichiariamo inoltre che impediremo con tutte le nostre forze che un atto non giusto colpisca i sudditi italiani e loro amici in tutti i nostri possedimenti*", Scovazzi T., *ibidem*, p. 28

which then existed between Britain and France, and between Germany and the other Powers[109].

The opportunity for Italy to enter the Somali scene was indeed directly connected to the German attempt to enter into contact with the Sultan of Zanzibar for the same territories. To hamper the possible negotiations of Germany, the British Government favoured the Italian ally to conclude agreements with the Sultan of Zanzibar. The first friendship agreement ("accordo di amicizia") between Italy, represented by the Italian explorer Antonio Cecchi, and the Sultan was signed on 28 May 1885[110]. The following year, Mr. Filonardi managed to conclude an initial negotiation on 24 October 1886 with the Sultan of Zanzibar for the southern ports. At the end of 1889 the Imperial British East Africa Company ceded the Benadir ports[111]. However, the formal agreement between Italy and Zanzibar came only in August 1892, according to which the Italian Government obtained the right to administer politically and judicially, in the name of the Sultan, the cities over the Benadir. In exchange for an annual allowance of 160 000 rupiah, the Italian government was *free to derive what profit they might [get] from the coast and to administer it, but it still remained the property of the Sultan*[112]. Particularly relevant was the concession by the Sultan to authorize the Italian government to cede the administration of these cities and territories to an Italian company "Compagnia italiana per la Somalia V. Filonardi & C."[113], whose commissioners were in fact given all the powers[114].

On this point, Pandolfo explains very clearly the different approach used by the Italian Government to administer its Eastern African colonies: if the administration

[109] See Pankhurst E. S., *Ex-Italian Somaliland. How it was acquired. How it was ruled. Its Future…*, cit. p. 13

[110] See Pandolfo M., *La Somalia coloniale: una storia ai margini della memoria italiana,* in "Diacronie – Studi di Storia Contemporanea", n. 14, 2, 2013

[111] See Lewis I. M., *A modern history of Somalia: Nation and State in the Horn of Africa,* cit., p.51

[112] *Ibidem*

[113] The private company of Mr. Filonardi

[114] See Pandolfo M., *La Somalia coloniale; una storia ai margini della memoria italiana,* op. cit.

of Eritrea was conceived as direct rule over the territory by Italy, the Government opted for a type of management under indirect rule over the Somali territories, entrusting them to Mr. Filonardi's private company. The control modality of commercial concession to private companies was a very well-known means of administration used also by other European powers, in particular Britain. Appointing a commercial company to administer a colonial territory was perceived as a more peaceful mean of penetration, less hostile at the international level and, most of all, allowed the colonising country to achieve its results with a minimum expenditure. However, there was a substantial difference between Italy and other European countries in regard to the public control exerted on commercial companies, which in the British, French and German cases was much higher than in the case of Italy[115].

Mr. Filonardi continued to strive to negotiate other protectorate agreements with local chiefs. Indeed, he concluded an additional protectorate agreement with nine chiefs of Atalah[116] on 7 March 1891. The following year, the Italian Minister of Foreign Affairs, recognised the intention of Mr. Filonardi to manage the administration of Itala by means of his private Company. The intent of Filonardi's Company was to simplify and promote the development of commerce and industries in and around Itala, in the interest of Italy. In exchange for that, the Minister granted an annual subsidy of 50 000 Italian lire. Among the tasks entrusted to the company, there were the prevention of slave trade, firearms, and war ammunitions. Furthermore, all acts of public interest were subject to the control of

[115] "*Le società inglesi, tedesche o francesi, costituite con patente sovrana, erano meno manovrabili dai privati e più controllate dallo Stato. Erano quindi più soggette all'autorità pubblica, ma anche da essa più sorrette, ad esempio ricevendo il diritto di monopolio economico nel territorio. Soprattutto, erano più ricche di capitali*", Corada G., *Lafolè: un dramma dell'Italia coloniale*, Roma, Ediesse, 1996, p. 51, as cited by Pandolfo M., *La Somalia coloniale; una storia ai margini della memoria italiana*, cit.

[116] Subsequently called by Filonardi "Itala", a place on the coast, see Scovazzi T., *ibidem*, p. 29

the Italian Government, further specifying that the Italian personal statute law, for both civil and penal issues was to be applied to Italian settlers[117].

At a later time, when the contract with Mr. Filonardi's company expired, the Italian government concluded a rental agreement of Somali lands[118] with another company, the *Società anonima commerciale italiana del Benadir*[119].

On 9 October 1905, Italy created the Commissariat of Northern Italian Somalia, since the economic development of the colony did not meet the expectations of the government.

The Benadir company, who was supposed to develop the Italian presence beyond the mere presence alongside the coast, was mostly perceived to be an economic loss, and was subsequently deprived of its control over the colonial territories[120]. Despite the profits made during their activity in Somalia, both companies passed the administration of the territory to the Government, also on the occasion of a

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[117] The original text of the note is reported by Scovazzi from an exchange of notes between the Minister of Foreign Affairs Benedetto Brin and Filonardi between 30 June and 5 July 1892: "*Apprendo con piacere l'intenzione di cotesta spettabile Ditta di assumere l'amministrazione di quella stazione, allo scopo di agevolare e favorire nella medesima lo sviluppo del commercio e delle industrie, per quanto sarà possibile nell'interesse della madre patria; e non ho difficoltà di concederle la chiesta sovvenzione annua di lire 50.000 (…). La Ditta rappresentata dalla S.V. deve, conformemente alle sue proposte, mantenere ad Itala l'effettivo attuale degli ascari e marinai, composto d'un ghida, un sergente, due caporali, un contabile, sessantatrè uomini armati, un pilota e sei marinai; deve impedire nella stazione di commercio il commercio degli schiavi, delle armi da fuoco e delle munizioni da guerra, ed assoggettare al controllo del regio Governo tutti gli atti di pubblico interesse, restando bene inteso che tutti i coloni aventi cittadinanza italiana debbono ritenersi, sotto ogni rapporto civile e penale, soggetti allo statuto personale della madre patria.*" See Scovazzi T., *ibidem*, p. 29-30

[118] For an interesting analysis of the origin of colonial public domain in the former Italian Somaliland colony, see Guadagni M., *Colonial Origins of the Public Domain in Southern Somalia (1892–1912)*, in "Journal of African Law" 22(1), 1978

[119] Italian Commercial anonimous company of Benadir

[120] For an in-depth reference to the missionary initiative, and the role of the Catholic missions within the Italian colony of Somalia in the early 1900s, see Ceci L., *Il vessillo e la croce. Colonialismo, missioni cattoliche e islam in Somalia (1903-1924)*, Roma, Carocci Editore, 2006 and Marongiu Buonaiuti C., *Politica e religioni nel colonialismo italiano (1882-1941)*, Giuffrè Editore, Milano, 1982, pp. 107 ss.

national scandal about slavery conditions in Somalia under the companies' administration. Italian public opinion *strongly demanded more energetic action against slavery, but such action was too complex and burdensome for private organizations*[121].

Finally, with the Law of 5 April 1908, Italian Somali territories were brought under the direct control of Italy, which started also administering the Northern Somali territories, creating the second Italian colony in the Horn of Africa, the Italian Somalia[122] [123].

[121] See Guadagni M., *Colonial Origins of the Public Domain in Southern Somalia (1892–1912)*, in "Journal of African Law" 22(1), p. 2

[122] See Pandolfo M., *La Somalia coloniale; una storia ai margini della memoria italiana*, cit.

[123] During the years of occupation, the Italian colonial administration was guilty of racial atrocities and persecutions committed against the local population. The prevalence of slavery in the southern part of the colony was also noted in foreign reports, such as in Great Britain Foreign Office, Historical Section, *Italian Somaliland*, London, H. M. Stationery off, 1920, Retrieved from the Library of Congress, https://www.loc.gov/item/a22000985/. For a detailed analysis of the crimes committed by the Italian colonial administration, see Pankhurst E. S., Ex-Italian Somaliland. How it was acquired. How it was ruled. Its Future…, Philosophical Library, New York, 1951

Chapter II – Legal Pluralism and Somali Customary law

The second chapter focuses on the concepts of legal pluralism in African contexts and the main features of Somali customary law, providing an overview on marriage and divorce practices, as well as criminal law and the traditional forms of process. It also highlights the impact that first Islamic law and subsequently Western legal systems during colonial times had on Somali customary law. In fact, the European expansion, described in Chapter I, brought in new legal systems in Somalia, which initiated a process of interaction with the local ones.

2.1 Legal Pluralism in African contexts

The African continent represents one of the main settings where it is possible to observe the concrete coexistence of plural legal systems within the same territory. As Prof. Mancuso highlights, one of the fundamental themes of research and discussion for scholars of African law is the functional aspect for the effective implementation of legal pluralism within state contexts in which legal layers have overlapped and influenced each other over time, raising a certain level of interest not only from the anthropological point of view, but also from the mere operative one[124].

Since the colonial era, the economic, the political, and the legal spheres have been characterised by pluralism. In fact, next to the State's institutions, political clan institutions have survived, as well as clan's economic systems, functioning mostly at the level of informal economy.

In the African context, the customary systems, the Islamic system and the European private law systems, have developed a variable level of coexistence. In fact, it has been possible to see different outcomes, for example the cases in which the State has completely repudiated the traditional laws; or the State has declared the intention to respect the traditional systems, opting for its codification in order to

[124] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", edited by Carpanelli E., Scovazzi T., Giappichelli Editore, Torino, 2020, p. 135.

preserve it and mandating the judges to recognise the customary systems; or even the State has, tacitly or openly, fostered the survival of traditional courts, keeping them separated from the modern legal system. However, in each territory and case, the models of coexistence have proved to be quite volatile, in terms of States' willingness to modify the role of traditional systems according to the evolving political context. Indeed, in the cases where traditional law had been repudiated, the State has subsequently reaffirmed the need to reconsider the importance of African ancestral systems; or, inversely, the traditional courts have subsequently been deprived of their initially attributed competences, in favour of modern law courts and judges. However, as Prof. Sacco indicates, for the concerned African countries, it has always been possible to find – *de facto* – the coexistence of the European legal system, the traditional system and the Islamic system[125].

The approach we will use to study the complex legal apparatus is the stratigraphic method, based on the assessment of the different legal layers that have overlapped in times, as outlined by Prof. Sacco. The first layer we meet when performing the stratigraphic analysis is the traditional layer, followed by the second layer, interconnected with the religious aspect, namely Islam in the African context object of our study. A third layer, is the one based on European law, brought by European colonisers, interconnected with British law and – for the Somali context – Italian law. A fourth layer is based on the political and legal choices made by the newly independent African States in the post-colonial era, adopting in most cases a socialist-based system. Finally, a fifth layer is based on the systems on which the modern African states have built on when reforming the country in the transition into the globalised world[126].

The study of African traditional legal systems has enabled scholars to identify common features linked to the type of societies in which it has developed.

Indeed, it has very often been found to be interconnected with different levels of social complexity. For example, for those communities based on hunting and fishing, the social groups are smaller and Sacco reports the possibility to find less

[125] Sacco R., Gambaro A., *Sistemi Giuridici Comparati*, Quarta Edizione, UTET Giuridica, 2018, pp. 392-393

[126] Sacco R., Gambaro A., *Sistemi Giuridici Comparati*, *op. cit.*, p. 393-394

complex legal rules, where there is no profound use of the sacral element, and the legal rules are fewer and less arduous to implement[127].

Vis-à-vis these communities based on hunting and fishing, the social groups structured at a slightly more complex level, the agro-pastoral societies, are characterised by widespread powers throughout the whole society. These groups of pastoralists and farmers, much bigger and more structured, are self-organised without a centralised power. African traditional law has proved to be effective in those cases, without necessarily the need to have a centralised State's legal system. In these contexts, lacking complex legal rules, it is understandable that African traditional law can be unwritten, only passed through orally, from generation to generation, without a body of jurists to apply the legal norms, and the character of the interpreter of the law – the judge – is more flexible and not necessarily specialised in legal disciplines. Indeed, the orality of the legal norms, with all the contours relating to its non-crystallisation in precise linguistic formulas, has allowed African traditional legal systems to be flexible, adapting and evolving with time to several social dimensions. In fact, the crystallisation of the traditional legal norms, originally developed in the unwritten form, into a written form would always imply a certain degree of alteration due to the pre-conceptions and previous knowledge of legal scholars and jurists trained in a different legal system, with different reference benchmarks, aspect that would necessarily lead to an alteration of the original content of the traditional norm. Moreover, the written translation of the oral norm would inevitably fail to catch all the variables leading to the case, not only the mere events triggering the specific case, but also the more nuanced ones, typical of the decision-making power of the traditional law, including above all the relationship between the judge and the person being judged, the different social positions of the two parts, the magical element, and so on and so forth. As previously mentioned, the aim of the traditional law decision may very often be led by the need to find a viable solution to reconciliation and peace to strengthen the

[127] These legal systems are part of what has been defined as "diritto sommerso" (hidden or "folk" law). Sacco R., Gambaro A., *Sistemi Giuridici Comparati*, *op. cit.*, p. 22-23

internal cohesion of the community, rather than the fairness of the decision in itself[128].

This traditional approach to law has inevitably started changing as an effect of the encounter with European colonisers, whose rules and institutions have been introduced at different levels. With the independency of former colonies in post-colonial times, these rules have become administered by natives, while the traditional legal layers can, in certain contexts, still be sufficiently operational and play a crucial role for the enforcement of those rules. Since in our study we will adopt the Comparative law method, we will acknowledge that the African traditional legal systems have certainly their own specificities, and many points diverging from more complex legal systems, including for example the possibility that two similar cases could lead to two different legal decisions – for the reasons outlined above; nonetheless, these systems are still law because they are *society's response to the need for social order*, while we will also need to be aware that they have *basic functional and structural features* in common with more complex systems of laws[129].

For scholars of African legal systems and Somali studies, having a thorough knowledge of Somali customary law is critical since it can still play a role in the modern State, and it is, at different degrees, still implemented in specific contexts and communities. It is in fact well-known that the structuring of new legal systems may trigger the clandestine survival of pre-existing legal systems[130]. Since Somali traditional law can be considered a "*diritto sommerso*", in-depth knowledge is crucial.

Besides, African traditional legal systems should never be considered immutable. When in contact with other legal systems of different origin, such as the European models, African traditional law can mutate accordingly and the European models may take a different form to that of the country of origin, derived from the mixture of the form of European law and content derived from traditional African law.

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[128] Sacco R., Gambaro A., *Sistemi Giuridici Comparati, op. cit.*, p. 395-396

[129] Sacco R., *Legal Formants: A Dynamic Approach to Comparative Law*, in "The American Journal of Comparative Law", Vol. 39, No. 1, 1991, pp. 7-9

[130] This is the case for the already mentioned above "diritti sommersi" or hidden laws.

Differently from what happened during the revolutionary period, when traditional law was banished in an attempt to eradicate it, the post-colonial state institution and legal systems should re-evaluate the role of Somali customary law from a contemporary perspective, in order to ensure a secured place for Somali culture[131].

2.2 Somali customary law

We have mentioned how, in some African contexts, the traditional legal framework has been either completely undermined by the colonisers' law or officially integrated in the newly emerged State's legal systems. The Somali case remains quite peculiar in the overall African landscape, as Somalia is – in itself – an exceptional example of African legal pluralism, historically developed both as a colony and as an independent State [132].

From the legal point of view, Somalia is characterized by a multi-layered system where State law, *Shari'ah* law and Customary law (*xeer*) overlap creating a versatile legal system. Such pluralism – or, historically speaking, dualism – has always been a unique feature of the Somali context, where both *Xeer* and *Shari'ah* have always played a role in the social and political landscapes, and – more recently – in the more official constitutive processes of post-colonial times[133].

The oldest legal layer under examination is the pre-Islamic customary law, referred to as *Xeer,* a flexible complex of rules and obligations in constant evolution, whose judges are the clan's elders, seeking reconciliation and peace among internal

[131] See Sacco R., *Le grandi linee del Sistema giuridico somalo,* op. cit., p. 29-32

[132] See Battera F., *State-building e diritto consuetudinario in Somalia,* in "Diritti tradizionali e religiosi in alcuni ordinamenti contemporanei", EUT Edizioni Università di Trieste, 2005, p. 37-38

[133] See Battera F., *State-building e diritto consuetudinario in Somalia,* in "Diritti tradizionali e religiosi in alcuni ordinamenti contemporanei", *cit.* , p. 38

members and external clans, rather than the implementation of social rules or fair justice in itself [134].

One of the key aspects of pre-Islamic *Xeer* we ought to consider is the almost total absence of a basis of supranatural elements. Indeed, a special feature of *Xeer*, distinguishing it from other African ancestral laws, is the fact that it is based neither on religion nor on sacral elements. This aspect will also help us understand to a certain extent the reasons of the survival of this set of rules within the Somali society even after the advent of Islam. In fact, Islam accepted the pre-existing rules of external conduct, justifying them as legal customs, but rejected the ancestral sacredness and the magical element that came with it[135].

As extensively detailed in the first chapter, Somali society has a long tradition of pastoralism, as well as communities based on farming and agriculture. In this specific context, the traditional legal system has developed in a form of *diffused power*[136], where the clan's male elders detain judicial power in the form of an assembly, without necessarily the presence of a chieftain.

Still in the first chapter, we have also addressed the key role played by the elders' council, the *Shir*, to mediate conflicts between the clans, in order to ensure the

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[134] See Sacco R., *Le grandi linee del Sistema giuridico somalo*, Studi di diritto comparato, Giuffrè Editore, Milano, 1985, p. 21

[135] Comparing Somali law to other pre-Islamic ancestral laws, Sacco highlights how the secular base of Somali law is common to only another African law, the Berber one, both lacking the magic-religious element typical of Africal ancestral laws. One possible explanation, he notes, could be that the pre-existing magic-religious aspect did not survive the encounter with Shari'ah law after the Islamisation waves of these two populations. See Sacco R., *Le grandi linee del Sistema giuridico somalo*, cit., p. 22. Performing a deeper comparative analysis of the similarities between the Berber and the Somali customary legal systems, Sacco points out how for both the Berber and the Somali societies the pre-Islamic sacral elements are still to be found within many aspects of the society but have almost no influence on the legal element. This can be explained by the fact that, differently from the rest of the Arab-Islamic world, the advent of Islam in the Maghreb and in Somalia produced a dissociation of the local legal standard from the magic element. See Sacco R., *Di alcune singolari convergenze fra il diritto ancentrale dei berberi e quello dei somali*, in "Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente", Year 44, No. 3 (SEPTEMBER 1989), Istituto Italiano per l'Africa e l'Oriente (IsIAO), p. 365-366

[136] "Potere diffuso", widespread, without a centralised power as single authority, such as the State.

respect of the politico-legal contract underlying social interactions among different groups. However, the *Shir* is not considered a religious assembly, nor the chief elder (*boqor* or *ugas*) is seen as a religious figure[137].

Another pivotal aspect of *Xeer* is the role of the individual within the clan. From a customary legal perspective, the Somali individual enjoys rights as part of a group, acting in solidarity with its people. In this regard, in fact, Cerulli highlights to what extent the internal solidarity of the group acts at the same time as a limitation (as the individual acts within the group's limits) and as a form of protection of the individual (as the group is responsible for the actions committed by its own members against members of another group)[138].

The Somali customary law is not systematised[139], handed down from generation to generation mainly orally, remaining in this way extremely flexible, without risking a calcification of the legal layer[140]. In fact, the application of *Xeer* varies from place

[137] Although some religious aspects can be found in practices, in particular in the southern part of the country, such as the oath that the elder is called to respect may involve the figure of God, See Sacco R., *Le grandi linee del Sistema giuridico somalo*, cit., p. 22

[138] See Cerulli E., *Somalia. Scritti vari editi ed inediti aggio i, Vol. III, La poesia dei somali, la tribù somala, lingua somala in caratteri arabi ed altri saggi*, Ministero degli Affari Esteri (a cura di), Roma, 1957, p. 47

[139] However, there are records of *xeer* contracts collected by Lewis in written forms during the British late colonial period. One example is the contract signed by the Hinjiinleh, a *diya*-paying group of the Dhulbahante, with an estimated male strength of 580, with three segments, the Yusuf Adan, Farah Adan and Ahmed Adan. A statement lodged in the District Office and dated 8 September 1954, records a contract which consisted of five articles, the first two related to how blood money was to be shared, the third on the procedures to follow in case of homicide occurring within the group, the fourth on homicide occurring outside the group and the fifth on the homicide of an outsider woman by a member of the group. See Mohamed J., *Kinship and Contract in Somali Politics*, in "Journal of the International African Institute", Vol. 77, No. 2, Cambridge University Press on Behalf of the International African Institute, 2007, p. 243 and Lewis I. M., *Clanship and Contract in Northern Somaliland*, in "Journal of the International African Institute", Vol. 29, No. 3, Cambridge University Press on behalf of the International African Institute, 1959, p. 288

[140] Sacco R., *Le grandi linee del Sistema giuridico somalo*, cit., p. 23

to place, it is *local, emanating from specific bilateral agreements between specific sub-clans that traditionally live adjacent to one another*[141].

This unwritten system of rules continues to be predominant in rural areas, outside the control of regional administration. If the basic concept of *Xeer* is that it is flexible and adaptable and varies from place to place, some principles of *Xeer*, that we will consider as the core of Somali *Xeer*, are universal, as they are shared and generally accepted by all Somali clans[142].

> *These generally accepted principles of xeer are referred to as xissi adkaaday: a term which designates the most fundamental, immutable aspects of xeer that have unquestionable hereditary precedents. They […] include, in the xeer context, (1) collective payment of diyah for death, physical harm, theft, rape, and defamation, as well as the provision of assistance to relatives; (2) maintenance of inter-clan harmony by sparing the lives of "socially respected groups", entering into negotiations with "peace emissaries" in good faith, and treating women fairly without abuse; (3) family obligations including payment of dowry, the replacement of a deceased husband by his brother (dumaal), a widower's rights to marry a deceased's wife sister (xigsiisan), and the penalties for eloping; (4) resource-utilization rules regarding the use of water, pasture, and other natural resources, and provision of financial support to newlyweds and married family relatives as well as the temporary or permanent donation of livestock and other livestock of the poor*[143].

Elliesie also highlights how these common principles of *Xeer* may present some similarities with the *jus cogens* in international law.

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[141] See Elliesie H., *Statehood and Constitution-Building in Somalia. Islamic Responses to a Failed State*, in "Constitutionalism in Islamic countries: Between Upheaval and Continuity", (edited by) Grote R. and Röder T., Oxford University Press, 2012, p. 570

[142] Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law Initiatives*, Report from the Center for Humanitarian Dialogue, July 2005, p. 32

[143] See Elliesie H., *Statehood and Constitution-Building in Somalia. Islamic Responses to a Failed State*, cit, p. 570.

Hence, these universally accepted principles include, among the others, the blood-money, that is close to the concept of *diya* in *Shari'ah*[144], and regulate the rights of the clans on land, water[145] and livestock, as well as common day-to-day interactions, civil affairs, and dispute settlements. In particular, *Xeer* can be divided in two broad categories, *Xeer guud* and *Xeer gaar*.

Xeer guud regulates daily social life and disputes between members of the same clan or between different clans. It includes a penal section (*dhig*) and a civil section (*dhaqasho*), dealing with private property, family law, land, and hospitality. The penal section can be divided into three sub-sections, including homicide (*qudh*), aggression (*qoon*), and thievery (*tuugo*), which can be in turn sub-divided, depending on the crime[146].

Xeer gaar regulates the production of economic interactions among clans[147]. It is made up of the rules applicable to the specific clans and sub-clans involved in pastoralism, fishing, and other local economic production.

The criteria used in the process of *xeer* decision-making include the rule of the precedent, applicable to common problems that a clan had previously met, and the

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[144] However, differently from Islamic law, the responsibility in *xeer* is collective and the whole clan is called to contribute.

[145] On the regulation of ownership and use of water sources, it is interesting to recall a detail cited by Marotta Gigli G. in his notes as judge in Somalia. While travelling towards Ogaden at the border between Somalia and Ethiopia, and referring to the lack of a real dividing line between the two countries, he recountes: "*Segni però vi sono dei combattimenti che qui vi sono avvenuti da almeno cento anni, poiché prima le dispute, che pure vi dovevano essere per il possesso e l'uso dell'acqua, si componevano, dopo defatiganti discussioni, in soluzioni di compromesso di cui ancora si trova traccia nelle regole dettate dal testur (l'uso, la consuetudine) circa lo sfruttamento dei pozzi*" (my translation: There are signs, however, of the fights that have taken place here for at least the last one hundred years, as previously the disputes, which must have been there for the ownership and use of water, were settled, after tiresome discussions, in compromise solutions of which there is still a trace in the rules prescribed by the *testur* (the use, the custom) about the exploitation of the wells). See Marotta Gigli G., *Giustizia sotto l'albero. Taccuino d'un Giudice in Somalia*, cit., p. 43.

[146] Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law Initiatives*, op. cit., p. 33

[147] See Elliesie H., *Statehood and Constitution-Building in Somalia. Islamic Responses to a Failed State*, cit, p. 570.

jurisprudence of the elders, in case of a new situation for which no precedents were set.

Concerning the chieftainship, different terms have been used during the centuries to define the clan's leadership depending on the population and the region, like the words *Waber*[148], *boqoor*[149], *garaad*, *malaaq*[150], *ugaas*[151], *islaan*[152], *islau*[153], *imaan*[154]. However, the most renowned is *Suldaan*, from the Arab term *sultan*. Whichever term was used to refer to the leader, the chieftain is not seen simply as a monarch, but more precisely as a mediator supported in the decision-making by other elders of the community, highly regarded by other members of the tribe for their social status and their knowledge of the customary practices, in compliance with *Shari'ah* law[155].

The violations are considered collective since the responsibility of the single perpetrator resides on the whole clan, as does the right to revenge the particular violation (e.g. in case of homicide, the whole clan retains the right to revenge the member who was killed, by killing another member of the clan of the murderer).

It is therefore clear that the *Xeer* system regulates the clan's life, assigning to each group different roles, including collective defence and defence of its own members,

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[148] It is a term used to identify the chief of the tribes in the Somali Hiiran area and the Webi valley in Oromia. See Cerulli E., *Somalia. Scritti vari editi ed inediti, Vol. III, La poesia dei somali, la tribù somala, lingua somala in caratteri arabi ed altri saggi,* cit., p. 56.

[149] The title given in the past to the *Majerteens'* chief. See Cerulli E., *Somalia*, op. cit., p. 57.

[150] The use of these terms is recalled by Cerulli already among other Muslim Eastern African (Ethiopian) groups, in particular the Emirate of Harar in the XV and XVI centuries. See Cerulli E., *Somalia*, op. cit., p. 57 .

[151] Term largely used among Northern and Southern Somali tribes, as well as in Ogaden region. See Cerulli E., *Ibidem*

[152] Cerulli explains this as the probable Somali pronunciation of the world *Islām*, title used for the head of the *Majerteen* tribe, *'Umar Maḥmūd*. See Cerulli E., *Ibidem*

[153] Term found also as *islaaw*, used in the Hawiya tribe to indicate the brothers or the closest relatives of the chief. See Cerulli E., *Ibidem*

[154] Again, probably originated by the Somali pronunciation of the Arab word *Imām*; See Cerulli E., *Ibidem*

[155] See Battera F., *State-building e diritto consuetudinario in Somalia,* in "Diritti tradizionali e religiosi in alcuni ordinamenti contemporanei", EUT Edizioni Università di Trieste, 2005, p. 30-31

retaliation, and offence roles. However, this regulatory role is performed in an anti-egalitarian way, according to capacity and social position, therefore depending on each member's occupation and economic function; this would translate into subdividing the community into castes[156].
We will now elaborate upon specific aspects of Somali traditional law system, to grasp the nuances behind it.

2.3 Civil section in Somali customary law: Dhaqasho

The civil section of Somali customary law, known as *Dhaqasho*, can be sub-divided into four main categories, related to family matter (*xilo*) including marriage and divorce, private property (*xoolo*), land (*deegan*), and hospitality (*maamuus*). The areas related to family and private property in *Xeer* have been almost entirely influenced by *Shari'ah* law[157], although, in some practices, Somali law parts company with Islamic law .

2.3.1 Marriage

The marriage (*al-nikāḥ*) according to *Shari'ah* law law is a contract and as such, to be valid, it requires that there are some essential constituent elements (*arkān an-nikāḥ*), typical of any contract. These are: a) the ability of the parties, b) their consent, c) the expression of the consent, d) the object or matter around which the consent takes place. In addition, given the nature of the Muslim marriage contract, there are two additional elements necessary for the validity of the contract, namely

[156] Sacco R., *Le grandi linee del Sistema giuridico somalo*, op. cit., p. 23 and Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., p. 137

[157] Similarly to what has happened also in *secular, state judicial systems to regulate primarily family, inheritance and minor civil dispute issues*. See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law Initiatives*, op. cit., p. 33

the *walī* or matrimonial curator, and the payment of the wedding gift or dowry (*mahr*) from the husband to the wife[158].

In Islamic law, the marriage is polygamous, and the Muslim man can have up to four legitimate wives[159].

The Somali family composition has slightly changed in time, in particular in the past decades. The main aim of marriage has often been *to produce children, especially male heirs who will add strength and honour to their father's lineage and enhance his reputation and status*[160].

The Somali family organisation is traditionally based on polygynous marriage and complies with the Islamic Law's rule of having maximum four wives at any other time[161].

The Somali polygynous family is divided into uterine groups (*baho*) according to the agnatic affiliation of a man' several wives, *so in the lineage system as a whole uterine cleavages supplement strictly agnatic segmentation in the definition of lineages*[162].

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[158] See Santillana D., *Istituzioni di diritto musulmano malichita con riguardo anche al Sistema sciafiita*, Vol. V, pp. 190-307, Istituto per l'Oriente, Roma, 1938-1943, p. 200

[159] This is prescribed by the *Qur'an*, IV, 3: "*And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one or what your right hands possess*". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983

[160] See Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, cit, p.13

[161] The marriage practices described in this chapter are based on a study conducted by Lewis with the northern Somaliland nomadic representatives (Dir, Isaaq, Daarood and Hawiye). However, it can be assumed that these provide a general picture of how Somali marriage and family practices are, to a large extent, valid also for southern pastoral communities, although the Southern Somali may differ in terms of social and economic organisation, with the prevailing adoption of agriculture and consequent development of a hierarchical political system, where the main political unit seems to be based mainly on territorial aggregations. See Lewis I. M., *Marriage and The Family in Northern Somaliland*, East African Studies, No. 15, East African Institute of Social Research, Kampala, Uganda, 1962

[162] As lineages are defined *primarily by reference to their apical agnatic ancestors, and secondarily according to the affiliation of their founders' mothers*. See Lewis I. M., *Marriage and The Family*

According to data cited by Prof. I. M. Lewis[163], polygyny tends to increase with age and status, therefore men would probably at least have two wives at some point of their lives, and this would be valid both for the pastoralist and more sedentary communities.

The older and wealthier the man, the more likely he would have more wives at a time than younger men. However, the frequency of marriage was already reported being highly and very unstable. The number of children a man could have may also vary, with some elders reported reaching even more than 100 living descendants. This attitude to low or inexistent birth control schemes could be explicable by Lewis with the need to cope with a harsh environment, scarce resources, and natural hazards. In addition, being the Somali society pillared on the family ties, as the political power of a family-clan would be measured also against their numbers, a higher number of children would mean having higher political strengths[164].

in Northern Somaliland, East African Studies, No. 15, East African Institute of Social Research, Kampala, Uganda, 1962, p. 27

[163] The data showed by I.M. Lewis date back to the '80s and '90s of the last century. However, Somalia's high fertility rate is still reportedly very high and appears to have changed very little since the 1970s: "*Despite civil war and famine raising its mortality rate, Somalia's high fertility rate and large proportion of people of reproductive age maintain rapid population growth, with each generation being larger than the prior one. More than 60% of Somalia's population is younger than 25, and the fertility rate is among the world's highest at almost 6 children per woman – a rate that has decreased little since the 1970s*". See the World Factbook, Somalia, U.S. Government, CIA https://www.cia.gov/the-world-factbook/countries/somalia . Indeed, the fertility rate from 1970 was reported at 7.2 (total births per woman), a higher peak was reached in the years between 1995 and 1998 (7.7), while in 2020 it is reported at 5.9 (see data from world bank, page visited in September 2022: https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?end=2020&locations=SO&start=1960&view=chart). When comparing the data to a European country, for example Italy, in 1970 the fertility rate was 2.4 (total births per woman), while in 2020 it dropped to 1.2 (total births per woman).

[164] See Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, cit, p.13

Marriage among Somali nomads has often had a political connotation, meant to be an alliance among hostile or potentially hostile groups[165].

It would be indeed usually[166] performed between individuals who are outside their *diya-paying* groups, that is outside the basic political unit.

Older and wealthier men would generally also have more livestock, a key element for marriage, which is directly intertwined with the political aspect of marriage. Once the parties would both agree on the match, discussions on the engagement and marriage would start. The betrothal would normally involve several marriage gifts. The Islamic element of Somali marriage is certainly evident in the *mahr*, the wedding gift that the groom pays to the bride for an agreed value in cash or in kind. This payment would sometimes be used as a divorce surety for the woman, being only paid in case of divorce. However, other forms of payments are expected within the Somali marriage transaction, in particular to seal the political alliance.

The value and amounts exchanged in gifts would vary depending on the parties and the desirability of the match, not exclusively connected to the personal qualities of the individual involved, but mostly to the willingness of the two groups to connect the two families and lineages[167].

Belonging to this category of marriage gifts is the *gabbaati*, the first gift that is provided to the bride's parents, establishing the engagement. This gift can be paid in money or livestock and could be retained by the bride's family in case the man would break the engagement or if the arrangements would take too long to conclude. At the same time, it could be retained by the suitor in case the woman

[165] This aspect of marriage as an instrument of political bonding between families can also be found in the Hobiyo, which became a widespread practice even at the highest levels of administration, as explained by Battera. For more detailes on the Majeerteen sultanate and Hobiyo, see Battera F., *Politicizzazione ed evoluzione della forma stato nell'Islam periferico: Il caso della Somalia nord-orientale. Dal sultanato Majeerteen a Hobiyo*, in Fasana E. (edited by), "Ai confini degli imperi: nuove linee, nuove frontiere", CEDAM, Casa Editrice Dott. Antonio Milani, 1998, pp. 75 - 76

[166] The Majerteen clan makes an exception to this, see Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, cit, p.15

[167] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, East African Studies, No. 15, East African Institute of Social Research, Kampala, Uganda, 1962, p. 14

marries someone else while engaged to him, or even if the woman would compromise herself by openly associating with other men[168].

Once settling the engagement, the real and appropriate marriage gifts would be exchanged between the bride and groom's families and their lineages. The main marriage payments from the man's group to the woman's family is known as the *yarad*[169], while the return gift committed during or after the wedding to the groom's family, is known as the *dibaad*[170]. The *Yarad* would normally be paid on the wedding day or shortly after, but any other subsequent gifts to the wife or her family would fall under this category of bride-wealth[171]. These gifts would normally include many different prestigious items other than money, most preferably livestock in the form of camels. The woman's family would also provide the family's house, the *Aros*, as well as milk sheep and goats, and camels for the safe transportation of the family[172].

In his work on Somali marriage, Professor Lewis reports a very detailed list[173] of gifts exchanges according to the local customary rules within the nomadic communities[174]. For example, livestock would be the preferred items exchanged; among those items holding most value, horses and camels would be the most prized ones.

The *Yarad* would normally be received by the bride's father, or paternal uncle or elder brother, and normally shared within the polygynous family, belonging to the livestock and cattle of the mother of the bride, excluding the part that would be returned to the groom's family as *dibaad*, dowry.

The *yarad* would normally be originated from within the polygynous family, mainly from the wealth of the uterine family of the groom, although *in principle*

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[168] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 14

[169] Lewis refers to this as the "bride-wealth"

[170] This would instead consist in the proper dowry, although other terms were reported to be used by Lewis, such as the *diiqo*

[171] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 14

[172] See Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, op. cit., p.15

[173] See Table 1

[174] Dating back to the 1960s

only men own grazing camels and normally at birth a boy is given a she-camel known as the "navel-knot" (huddunhid) which represents the nucleus of his future herd (sheep and goats are often also given). As he grows up his navel-knot stock increase and he may acquire other stock as gifts from kinsmen[175].

The *yarad* is usually agreed between the two parties during the negotiations that precede the marriage; the *dibaad*, instead, is considered the dowry that the woman's family have a *moral obligation* to give in return, without a specific agreed value, as it is decided unilaterally by the family of the bride. However, it would normally be seen as an *index of standing of the family*, therefore a poor dowry would *reflect badly* on the family. Nonetheless, the *dibaad* would never exceed the two thirds of the *yarad*[176].

The transaction of the dowry and the exchange of gifts between the families do not end with the wedding, but would normally be regarded as continuous, accompanying the marital relationship; therefore, each time the bride would visit her kins, any gift donated by her family to the husband would be regarded as an addition to the initial dowry[177].

If, as previously mentioned, these pre-marriage exchanges would be quite common among the northern pastoral communities, things were reported to be slightly different for the southern cultivators' groups, where the main marriage transaction would be the *mahr*, and the family's house would be provided by the groom. In addition, it was still reported by Lewis, a preference among the southern cultivators' groups to marry within the maternal or paternal line, with a cousin, explicable with the need to help integrate the very heterogeneous *Digil* and *Rahanweyn* clans[178].

Indeed, although these gifts and marriage exchanges would retain a fundamental importance for political linkages among nomadic clans, the crucial legal aspect that would bound the couple in the wedlock would still be represented by the Islamic *mahr*, the essential element in Muslim marriage contract, whose basic foundation

[175] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 10

[176] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 16

[177] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 17

[178] See Lewis I. M., *Understanding Somalia. Guide to Culture, History and Social Institutions*, op. cit., p.15

of law, including norms, procedures and modes of fixation, is found in the *Qu'ran*[179] and in the *Sunnah*:

> *Mahr is basically a 'gift', which becomes due from a Muslim husband to his wife on marriage as a token of respect symbolizing his sincerity and love for her. The subject matter of gift can be money or any other thing having value, without a higher limit, depending upon the acceptance of the wife. Upon the object or property given as mahr, the ownership lies exclusively with the wife*[180].

The strong Muslim element in Somali marriage is therefore unequivocal.

As confirmed also by Lewis, for the Somali marriage to be valid, the Muslim ceremony must take place. The *mahr*, that can then be referred to as *the woman's personal dower*, is agreed upon in presence of witnesses and a "man of religion", the *wadaad*, in front of which the bride and the groom provide their formal consent to the union and are pronounced man and wife. Without the dowry and the Muslim contract, the relationship would not be considered as marriage, and it would normally happen after at least part of the *Yarad* is paid: "*the dower contract establishes the union of a man and a woman in matrimony and gives the husband full rights to all children which his wife bears during the marriage, whoever begets them. Marriage can take place without bride-wealth but not without dower*"[181].

However, in practice the dower to the wife would not need to be paid necessarily at marriage but could be postponed until the marriage is terminated by divorce or by death of the husband. What legitimises the wedding among Somali clans is considered the dower agreement, a fundamental transaction.

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[179] This is prescribed by the *Qur'an*, IV, 4: "*And give women their dowries as a free gift, but if they of themselves be pleased to give up to you a portion of it, then eat it with enjoyment and with wholesome result*". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983

[180] See Wani M. A., *Muslim Women's Right To 'Mahr': An Appraisal Of The Statutory Laws In Muslim Countries*, in "Journal of the Indian Law Institute", July-September 2001, Vol. 43, no. 3, pp. 388–409

[181] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 17-18

It is clear from the explanations presented above that the legitimisation of marriage within the Somali pastoral communities takes place at two different levels, the Islamic element legitimising at the legal level, and the customary practice legitimising it at political and social level. In fact, a successful match foresees the exchange of gifts between the families, and although the *settlement of the woman's personal dower (mahar) gives a man full uxorial and genetricial rights over his wife […], it is bride-wealth (yarad) and dowry (dibaad) which create and maintain an effective affinal relationship, and in the filial generation the important matrilateral connection between their respective lineages*[182].

It is unquestionable the role that family relationships play in the Somali marriage contract. In addition to the exchange of bride-wealth and dowry, this wider aspect was further evident in two old customs among northern pastoralist communities of widow inheritance and sororate.

The widow inheritance is referred to in Somali with *waa la dumaalay*, *dumaal* being the wife of the brother or of a patrilineal cousin. Traditionally, in fact, the widow was to be married by the deceased husband's brother or a patrilineal cousin, so that the new children born out of this marriage would be both maternal half-siblings of the children born from the previous marriage, and paternal cousins. This new marriage would prevent that the woman would leave her deceased husband's group, taking with her inheritance and the dowry received at marriage; in this way, the children born from the first husband would not leave the lineage. The new marriage would require a new dowry, but not a new betrothal gift, as this exchange had already taken place with the husband's lineage. In the case of widow inheritance, the bride-wealth (*yarad*) is called *haal dumaalleed* (compensation for widow inheritance), and it would usually be a reduced one.

The sororate is referred to in Somali as *higsiisan*. Traditionally, in case the wife of a man is deceased, the husband could ask to marry her younger sister or cousin. If this request was not met, then the man could claim a return of the *yarad*. However, in case of a sororatic marriage, similarly to the custom in case of widow inheritance,

[182] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 23

a new exchange of dowry was required. The children of the deceased woman would then be raised by her sister, in her household.
These two old traditions were both already recorded as quite unusual in Northern Somalia by Lewis, explicable by him thanks to the Natives Betrothal and Marriage Ordinance of 1928, allowing a widowed or divorced woman to decide on her subsequent marriage "contrary to tribal custom"[183].

2.3.1.1 Blood-wealth of the married woman

In the Somali patrilineal society the married woman is affectively and economically absorbed in her husband's family.
Being the marriage exogamic, and in direct contrast with what is provided by *Shari'ah* law, customary law refuses any succession rights in favour of women. Indeed, the hereditary vocation of the woman could jeopardise the group's heritage, especially in the presence of an heir son, born in the husband's group[184].
However, marriage does not necessary lead to the woman's complete identification with the man's lineage.
Despite the fact that the husband acquires full uxorial and genetricial rights over his wife, by the dower contract and exchange of marriage gifts between the two families, the wife's ties with her natal lineage still constitute an important linkage throughout her life, and even after the marriage she remains part of that lineage. The brothers and male agnatic kins of the woman do play a role checking on her well-being.
Lewis would explain this behaviour with the tendency of the Somali society to *acknowledge the instability of marriage and frequency of divorce in their society*,

[183] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 18-19

[184] See Sacco Sacco R., *Di alcune singolari convergenze fra il diritto ancentrale dei berberi e quello dei somali*, in "Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente", Year 44, No. 3 (SEPTEMBER 1989), Istituto Italiano per l'Africa e l'Oriente (IsIAO), p. 356

that would eventually reinforce the more *binding and irrevocable character of agnatic affiliation*[185].

The responsibility for blood-wealth of a married woman and its distribution can explain the rather singular distribution of jural responsibility for a married woman between her birth lineage and her lineage of marriage among Somali clans. The woman's kin after marriage still consider her as being a member of their *diya-paying* group, therefore they are hold accountable for the more serious crimes she may commit, as well as for her life.

In fact, although *marriage confers on the husband rights over a woman as wife and mother which cannot be alienated except with his consent*[186], the wife never completely identifies with her husband's kin. Maintaining strong agnatic loyalties with her natal kin, with her own siblings and agnates, and keeping constant connections with them, the wife retains in this way the legal and political status of her birth. Thus, the husband is not the only responsible for his wife and the married woman's position can be compared to a protected relative living in a group of people of a different *diya*-paying group.

Different approaches to the division of responsibility between the natal kin and the husband's kin apply depending to the clan-family which she belongs[187].

Lewis reports different cases and division of the blood-money in case a married woman is killed. The practice among the Isaaq would be to share the blood-wealth between her agnatic kin and her husband's, and these same groups would also contribute to the payment in case the woman is the defendant. However, for this clan the husband is considered the only responsible for the payment of smaller amounts in case of damage and small debts, as long as the value is less than the full blood-wealth of the woman, fixed at 50 camels.

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[185] Lewis even reports a saying in Somali that according to him reflects the interpretation of the nature of marriage among Somali, that is "*dahdin iyo dalasho, by which women distinguish between their relatives by marriage and their agnatic kin. The word dahdin, relatives by marriage, comes from the verb dah, to pause or stop in transit on a journey, and this is precisely how Somali view marriage*". See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 33

[186] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 31

[187] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., *ibidem*

In other contexts, for example among the Darood clan, the agnatic kin of the woman would be considered the sole responsible for both the payment of blood-money in case the woman is guilty of homicide, and the claim of blood-wealth in case she is killed. The practice would exclude completely the husband from getting access to her blood-wealth. Children of the murdered woman would, instead, be entitled to a share of her blood-wealth[188].

In the case of homicide (among the Darood and Isaaq clans), if a woman murders her husband, it is her own kin who is called to settle the blood payment with the husband's kin. If the deceased has left children, they would be entitled to receive the bulk of the blood-wealth. Lewis reports in his research a case in which for the killing of her husband, the woman's kin paid only a reduced amount to the orphan children. While. If the mother kills one of her children, her agnatic kin are held responsible to pay full blood wealth to the husband and his lineage.

In the case the husband murders his wife, her agnatic kin claim full blood-wealth from his *diya-paying* group[189].

When the children become adult, the responsibility of the husband's kin towards the wife tend to increase, supposedly increasing the woman's tie with her husband's kin.

2.3.2 Divorce

The Muslim marriage is a social contract between two people, and, in Islamic law, marriage is highly revered and detailed both in the *Qur'an* and in the *Sunnah*. Islam *treats marriage as an everlasting institution with specific rights and responsibilities assigned to each partner* and *introduces checks and balances to protect and secure the rights of all stakeholders in this matter – the husband, the wife, the children,*

[188] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 32

[189] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 32

and society at large[190]. However, Islam does not *rule out* the dissolution of marriage through divorce *as a last resort for estranged couples*[191].

Initially, the *Qur'an* foresees an attempt at reconciliation through arbitration[192].

Should this fail, *Shari'ah* law foresees specific ways of dissolution of marriage. The husband can dissolve the marriage by (triple) repudiation, which must be pronounced three times during three successive intermenstrual periods[193].

In fact, the dissolution of the marriage does not occur *ipso facto* but only after the third pronunciation, provided that the husband has no contact with his wife[194]. In case there are any sexual intercourses in between the three repudiations, his will to continue married life is presumed.

This timing is foreseen by the *Qur'an* to prevent too hasty separations, allowing the husband to reconsider his choice and get back with his wife. However, this form of triple repudiation which is foreseen in the *Qur'an*[195] is in practice replaced by a

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[190] See Shagufta O., *Dissolution of Marriage: Practices, Laws and Islamic Teachings*, in "Policy Perspectives", Vol. 4, No. 1 (January-June 2007), Pluto Journals, p. 91

[191] See Shagufta O., *Dissolution of Marriage: Practices, Laws and Islamic Teachings,* op. cit., p. 92

[192] This is prescribed by the *Qur'an*, IV, 35: "*And if you fear a breach between the two, then appoint judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them, surely Allah is Knowing*". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983

[193] This form of repudiation is considered as '*sunni'* or 'canonic', as it conforms to what the canonical tradition of the *sunnah* requires. However, although repudiation is in general allowed by the Islamic tradition, it is considered reprehensible (*makrūh*) by the *sunnah* and all the Islamic schools. See Santillana D., *Istituzioni di diritto musulmano malichita con riguardo anche al Sistema sciafiita, op. cit.*, p. 254

[194] See Santillana D., *Istituzioni di diritto musulmano malichita con riguardo anche al Sistema sciafiita, op. cit.*, p. 255

[195] This is prescribed by the *Qur'an*, II, 229-231: "*Divorce may be (pronounced) twice, then keep (them) in good fellowship or let (them) go with kindness; and it is not lawful for you to take any part of what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby. These are the limits of Allah, so do not exceed them and whoever exceeds the limits of Allah these it is that are the unjust.*

'modern' different form consisting of pronouncing the repudiation three times consecutively[196], called *bid'ī*[197].

So if he divorces her she shall not be lawful to him afterwards until she marries another husband; then if he divorces her there is no blame on them both if they return to each other (by marriage), if they think that they can keep within the limits of Allah, and these are the limits of Allah which He makes clear for a people who know.

And when you divorce women and they reach their prescribed time, then either retain them in good fellowship or set them free with liberality, and do not retain them for injury, so that you exceed the limits, and whoever does this, he indeed is unjust to his own soul; and do not take Allah's communications for a mockery, and remember the favor of Allah upon you, and that which He has revealed to you of the Book and the Wisdom, admonishing you thereby; and be careful (of your duty to) Allah, and know that Allah is the Knower of all things". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983

[196] See Cilardo A., *Il matrimonio islamico e i matrimoni interreligiosi secondo il diritto islamico*, in Zilio-Grandi I. (a cura di), "Sposare l'altro. Matrimoni e matrimoni misti nell'ordinamento italiano e nel diritto islamico", Marsilio Editori, Venezia, 2006, p. 65-67

[197] See Santillana D., *Istituzioni di diritto musulmano malichita con riguardo anche al Sistema sciafiita, op. cit.*, p. 255

Other forms of divorce foreseen by the *Shari'ah* are the *ẓihār*[198], the *īlā*[199], the *li'ān*[200] and the *ḫul'*[201].

[198] This is prescribed by the *Qur'an*, XXXIII, 4: "*Allah has not made for any man two hearts within him; nor has He made your wives whose backs you liken to the backs of your mothers as your mothers*". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983.

The divorce *ẓihār* has pre-Islamic origin, and provides that the husband compares his wife to the back of a woman forbidden to him, such as his mother or sister, declaring prohibited any sexual act. The *Qur'an* maintains this form of divorce, as long as the husband performs an act of atonement. See Santillana D., *Istituzioni di diritto musulmano malichita con riguardo anche al Sistema sciafiita*, *op. cit.*, p. 269

[199] This is prescribed by the *Qur'an*, II, 226-227: "*Those who swear that they will not go in to their wives should wait four months; so if they go back, then Allah is surely Forgiving, Merciful.*

And if they have resolved on a divorce, then Allah is surely Hearing, Knowing.". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983.

The divorce *īlā* is an additional method of dissolution of marriage, occurring when the husband swears to refrain from sexual intercourse with his wife. See Cilardo A., *Il matrimonio islamico e i matrimoni interreligiosi secondo il diritto islamico*, in Zilio-Grandi I. (a cura di), op. cit., p. 67

[200] This is prescribed by the *Qur'an*, XXIV, 6-9: "*And (as for) those who accuse their wives and have no witnesses except themselves, the evidence of one of these (should be taken) four times, bearing Allah to witness that he is most surely of the truthful ones.*

And the fifth (time) that the curse of Allah be on him if he is one of the liars.

And it shall avert the chastisement from her if she testify four times, bearing Allah to witness that he is most surely one of the liars;

And the fifth (time) that the wrath of Allah be on her if he is one of the truthful.". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983

The divorce *li'ān* occurs when the husband proclaims an imprecatory oath to his wife, claiming that he is not the father of the son begotten by his wife, refusing his paternity. The consequence of this oath is the rejection of paternity and the subsequent dissolution of the marriage bond. Such a practice is provided by the *Qur'an* in the absence of necessary evidence to accuse the wife of adultery. See Cilardo A., *Il matrimonio islamico e i matrimoni interreligiosi secondo il diritto islamico*, in Zilio-Grandi I. (a cura di), op. cit., p. 67

[201] This is prescribed by the *Qur'an*, II, 229: "*[…] there is no blame on them for what she gives up to become free thereby […]*". Electronic version of The Holy Qur'an, translated by M.H. Shakir, 1983

The *ḫul'* is a form of divorce which may be required by mutual consent by payment of a compensation (*ḫul'*) by the wife to the husband, so that he consents to repudiate her. See Santillana

Research has showed that among the Somali Northern pastoralists, divorce wa quite frequent, especially for men[202]. Being the majority of the Somali population Sunni Muslim of *Shafi'I* school, the rules for divorce follow the Islamic rules, including the respect of the *'idda* before being able to marry again (set at one hundred days of statutory period).

Divorce among the Somali pastoralists communities is possible for a man at any time, by pronouncing three times in the presence of witnesses the Islamic divorce phrase "I divorce you". This would unilaterally dissolve the marriage.

Different causes of conflict within the couple could end up in divorce, including infertility (mainly of the woman), jealousy among the co-wives, misconduct of the wife, incompatibility. It has also been recorded among the possible causes of divorce the friction between the two families on the late or partial payment of the bride-wealth or over the payment of the wife's dowry.

Misconduct on the side of the wife, including adultery and illegitimate relations outside marriage, are heavily despicable and would most likely lead to divorce[203]. In the case of adultery, the husband would be entitled to claim compensation from her lover.

On the other hand, for the woman it would be more complicated to dissolve the marriage. The cases in which a wife could file for divorce are rather limited, however should she be forced to do that, the woman could force her husband to divorce her by deserting him or threatening to become a prostitute. The conjugal relation could become so strained that the marriage is dissolved by mutual consent. For the sake of our study, the key factor to analyse in case of dissolution of marriage is the payment of the wife's dowry, which is seldom paid prior to divorce. It can

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D., *Istituzioni di diritto musulmano malichita con riguardo anche al Sistema sciafiita*, *op. cit.*, p. 271-275

[202] In his anthropological research, Lewis reported that out of 77 mariages observed, 19 ended in divorce, with a ratio of 32%. When analysing the cases brought to the official Qadi's courts in 1956, out of 995 cases, almost 70% (699 cases) were related to divorce. See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 34

[203] Rape is, instead, not accounted by Lewis as a main cause of divorce, since the woman is not perceived as responsible. See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 35

happen that the agreed amount of the dowry is not paid at divorce, for example if the wife has deserted the husband or there has been any misconduct from her side.
On the other hand, the amount of bride-wealth to be repaid by the wife's kin may depend on the reasons for the divorce. In case the husbands would ask for divorce for adultery or absence of the wife, the bride-wealth returned by the wife's kin would depend on the difference between the original bride-wealth paid and the dowry received, as well as the amount of living stock and the presence of children born out of the marriage[204]. In the Northern Somali tradition, the enforcement of the decisions on marital and divorce matters would fall under the jurisdiction of the *Qadi*'s courts only for matters related to the repayment of the *mahr*, the Islamic personal dowry of the wife. In the case of the bride-wealth, the claims for its return or payment would instead be settled outside the official courts system, applying the customary rules for conflict resolution, as a way of negotiating the agreements between families and lineages[205].
On the custody of children in case of divorce, the Somali practice differs from Islamic rules in case of divorce. In fact, the *Shafi'I* school gives the mother the right to keep custody of the children: girls are allowed to stay with their mother up until puberty or marriage, while boys up to the age of seven or until puberty.
In Somali practice, the father has absolute right to the custody of all the children, boys and girls, but in practice infants are allowed to stay with their mother until weaning, before being returned to their father. This is done to prevent that the children might become affiliated to the lineage of the mother[206].
In case the mother keeps the custody of the daughters for a longer period, this could affect her right to maintenance from her ex-husband, resulting in its loss.
However, it is to be noted that even if in case of divorce the matrilineal relationship created by marriage is weakened *in its socio-economic implications*, the affective tie between the children and their mother and her family remains. This is evident

[204] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 36

[205] In which case, the more powerful lineages would have more leverage in the negotiations. See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 37

[206] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 37

from the fact that the mother's lineage name could still be used to differentiate uterine lineages, even if the ancestor's parents were divorced[207].

2.4 Penal section in Somali customary law: Dhig and the blood-money

Wrongdoings in Somali Customary law can be classified in three categories: homicide (*dil*), for which the compensation due is the *diya*; wounding (*qoon*), for which the compensation to be paid is the *qoomal*; and insult (*dalliil*), for which the compensation due is the *haal*.[208]

When addressing crime and punishment in Somali customary law in case of homicide, the payment of compensation has been surely influenced by Islamic law, however customary law presents its own peculiar features.

First and foremost, homicides in the Somali society were traditionally often linked to either conflicts between clans, due to the use of land for grazing and water sources, or to the undertaking of acts of retaliation[209]. The homicide of a member of a clan or tribal group by the member of another clan would result in the disruption of peace between the two clans, that could only be restored if appropriate satisfaction is obtained or, in case this was impossible, the clan of the victim would undertake retaliation against the group of the perpetrator[210].

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[207] See Lewis I. M., *Marriage and The Family in Northern Somaliland*, op. cit., p. 38

[208] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, in "Journal of African Law", Vol. 11, No. 2, pp. 99-118, School of Oriental and African Studies, 1967, p. 101. These references have been analysed and are specifically reported for Somali Customary law in British Somaliland. However, to a large extent, they can be considered valid also for Customary law in Italian Somaliland, with specific differences and features that will be progressively explained in the text.

[209] See Santiapichi S., *Il prezzo del sangue e l'omicidio nel diritto somalo*, in "Quaderni dell'Istituto Universitario della Somalia", Milano, Giuffrè Editore, 1963, p. 3

[210] See Contini P., *The Evolution of Blood-Money for Homicide in Somalia*, in "Journal of African Law", Vol. 15, No. 1, pp. 77-84, School of Oriental and African Studies, 1971, p. 78

Strongly influenced by Islamic law in this aspect, the Somali customary law considers the revenge, the composition, and the reconciliation as part of a whole healing process, referring the punishment of the murderer to the victim's own clan, with variable prices and modalities for the blood money[211].

The penal responsibility is therefore not individual but collective, being attributable to the so-called *diya-paying* (or *mug-paying*) groups of the murderer and the victim. The *mug-paying* group is a contractual alliance, binding people for collective responsibility in terms of compensation for actions committed or suffered by the group. As we have seen, this group of people is strongly connected by two main types of relations: the kinship (*tol*), as the members of the same *diya-paying* group are connected by the same agnatic line to a common ancestor; and agreement (*ḥerr*), which provides collective defence and security[212].

Although the payment of *diya* is encouraged, each crime against a member of a clan could bring to vindicatory justice of the victim's group against any member of the responsible group. The modality and amounts of compensation are decided by the assembly of the clan[213]. However, two are the main points of variation from the Islamic concept of *diya-paying*. In Islamic law, in case of homicide or personal injury in which the *qiṣāṣ* (talion) is not enforceable, the *diya* can be paid as reparation of the wrongdoing owed by the offender or his next of kin to the victim or the victim's family[214]. In case of voluntary homicide, the *diya* is due only by the offender; in all other cases, Islamic law admits that the offender's *'āqila*[215] is called

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[211] See Santiapichi S., *Il prezzo del sangue e l'omicidio nel diritto somalo*, op. cit., p. 4

[212] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 101

[213] See Battera F., *State-building e diritto consuetudinario in Somalia,* op. cit., p. 30

[214] This would substitute the right of retaliation and, as remarked by Scolart, it corresponds to the price of *composition* or *wergeld* in Romanic and Germanic law. See Scolart D., *L'Islam, il reato, la pena. Dal Fiqh alla codificazione del diritto penale*, Roma, Istituto per l'Oriente C.A. Nallino, 2013, pp. 42

[215] That is "*il gruppo di persone sulle quali incombe, in virtù della solidarietà naturale con l'auore dell'omicidio o delle lesioni personali, l'onere di saldare la compensazione in natura o in moneta, cioè di versare la diya*" (my translation: "the group of people who, by virtue of their natural solidarity with the perpetrator of the homicide or the personal injury, bear the burden of paying

to pay the *diya*, as part of the shared financial responsibility. This aspect supports the explanation according to which the *diya* is intended to be a compensation for the damage to the victim or the victim's family, regardless of the financial possibilities of the offender[216].

Differently from *Shari'ah* law, Somali customary law foresees that the *diya* is payable collectively and not only by the offender himself[217] (in case of voluntary homicide), therefore the relation is between tribes and not between individuals; in addition, it foresees the reparation of the crime in order to restore peace and avoid the cycle of revenge, rather than paying back the blood compensation as a penal punishment[218]. As observed by Noor Muhammad, *diya* which is considered a penal punishment hence it falls under Islamic Criminal law[219], is considered reparation for civil damages for Somali customary law. This substantial difference can be traced back to when Islam spread among the Hamitic tribes, the talion was never fully introduced nor enforced among those populations, while the less severe systems of compensation continued being implemented. When the British took control of those territories in the Horn of Africa, the administration of Criminal law fell under the Indian Penal Code introduced by the British authorities. This meant

compensation in kind or in money, that is paying the *diya*). See Scolart D., *L'Islam, il reato, la pena. Dal Fiqh alla codificazione del diritto penale*, op. cit., 2013, p. 48

[216] For a more detailed analysis of the meaning of *diya* in Islamic law, see Scolart D., *L'Islam, il reato, la pena. Dal Fiqh alla codificazione del diritto penale*, Roma, Istituto per l'Oriente C.A. Nallino, 2013, pp. 42-55

[217] See Contini P., *The Evolution of Blood-Money for Homicide in Somalia*, op. cit., p. 78

[218] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 101

[219] However, it is important to note what Scolart further highlights in this regard: "*Della diya si parla nei testi di diritto penale perché la sua disciplina contribuisce a chiarire alcune particolarità dei reati di omicidio e lesioni personali. Tuttavia, la diya non è una sanzione, ma una forma di responsabilità patrimoniale derivante da una particolare forma di illecito, cioè appunto da un delitto di sangue*" (My translation: "The *diya* is mentioned in the texts of criminal law because its discipline helps to clarify certain aspects of homicide and personal injury. However, *diya* is not a sanction, but a form of financial liability arising from a particular form of tort, i.e. a blood crime"). See Scolart D., *L'Islam, il reato, la pena. Dal Fiqh alla codificazione del diritto penale*, Roma, Istituto per l'Oriente C.A. Nallino, 2013, p. 48

that homicide was considered an offence against the State, while the clan of the victim could still claim compensation for the loss of the member of the clan, therefore claiming civil damages[220].

In addition, the *diya* is not due in case there is sentence of death or imprisonment for at least ten years, as well as there is no distinction between premeditated and accidental homicide[221]. This can be explained by the fact that the *diya* is not considered a criminal punishment but as a compensation for the loss of a member of the group, which is the same damage for the clan regardless of whether the homicide was premeditated, voluntary or accidental[222]. In case of homicide, if the injured party accepts the compensation, the murderer can be set free[223].

Collective responsibility has the purpose of allowing the whole *diya*-paying group to contribute to the payment in such a way that the settlement in ensured and that vicious cycles of vindicatory killings between tribes are not triggered.

The concept of *diya* is fully embedded in the structure of Somali society, where *each individual pays and receives diya within his group which, in a wider sense, guarantees the security and protection of his life and property. Thus, as a member of his collectivity he is both insurer and insured*[224]. The standard rate of the *diya* is based on *Shari'ah* law and is irrespective of the age, wealth or position of the victim: for the homicide of a man, it is set at 100 camels, while for the homicide of a woman it is set at 50 camels. However, special *ḥerr* can be agreed for higher or lower rates[225], as well as for different modalities of payment. In fact, money or different type of livestock could also be accepted, equalling the value of camels, such as the case reported by Lewis, in which the *Guadabursi and Issa clans had an agreement (ḥerr) that between them the compensation payable for a man's life was*

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[220] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 102

[221] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit.,*ibidem*

[222] See Contini P., *The Evolution of Blood-Money for Homicide in Somalia*, op. cit., p. 79

[223] See Battera F., *State-building e diritto consuetudinario in Somalia,* op. cit., p. 36

[224] See Contini P., *The Evolution of Blood-Money for Homicide in Somalia*, op. cit., p. 78

[225] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 102

ten she-camels, ten cows, 100 sheep and goats, and one nubile girl fitted out for marriage and complete with all her household equipment[226].

Noor Mohammad highlights also the possibility of agreeing on a portion of the *diya*, which corresponds to the *jiffo*, equalling to one third of the *diya* (thirty-three and one third camels), allowed when a sentence of imprisonment of less than ten years would be imposed[227].

It is indeed clear that the negotiations between the groups are often long, as many factors are to be considered when settling on the amount of the *diya*. In fact, it can depend on the pre-existence of a *ḥerr* between the two clans, their affinity, the existence of friendship or enmity between them, the social condition as well as the age and gender of the victim, the circumstances of the event[228].

Continuing in the compensation classification, in case of wounds, the Somali Customary law has generally adopted the principles of *Shari'ah* law when defining and classifying the types of wounds and the *qoomal* to be paid as compensation[229].

Finally, in case of wounded pride for insult, a verbal compensation, *haal*, should be used as a form of apology. Wounded pride may arise from different types of insults: in case a man is struck on the face with a sandal of a whip in public; insult to the

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[226] The case reported was referred to a period prior to the 1900s. See Contini P., *The Evolution of Blood-Money for Homicide in Somalia*, op. cit., p. 79

[227] This rule was based on a decision of the Subordinate Court of Civil Appeal in British Somaliland, Civil Appeal N. 9, 1952, *Omar Ismail* v. *Askar Abdillahi*

[228] See Contini P., *The Evolution of Blood-Money for Homicide in Somalia*, op. cit., p. 79

[229] Noor Mohammad refers, once again, to a decision taken in British Somaliland by the Supreme Court in the case *Shamis Godleh* v. *Hawira Godleh*, Civil Appeal N. 21, 1965, wherein ten kinds of wounds on the head and face are classified, following Shari'ah law: 1. *Harisa*, if only the skin has been cut or scraped; 2. *Damia*, if blood has flowed; 3. *Badia*, if the flesh has been injured; 4. *Mutalahima*, ifthe flesh has been penetrated; 5. *Simhak*, if the membrane enters the flesh and the bone is injured; 6. *Mudiha*, if the bone has been uncovered; 7. *Hashima*, if the bone itself has been injured; 8. *Munakkila*, if the bone is broken, so that the fragments are separated; 9. *Mamuma*, if the membrane of the brain has been injured; 10. *Damigha*, if the brain is injured. In all the mentioned cases, the Supreme Court ruled that *compensation under customary law should be awarded according to the rates prescribed in Shariat law*. Specific compensation rules were also laid down for wounds on the head and face. See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 103

honour of a family is represented by rape or illicit intercourse with an unengaged girl; if the girl is betrothed, then the fiancé can claim the compensation; failure to marry a girl after the engagement is an insult to her father; marrying a girl already engaged to another man, is an insult to the fiancé[230].

Regarding the subjects called to pay or entitled to claim the compensation according to Somali customary law, Noor Muhammad highlights the main guiding principle, according to which "*no man receives or pays compensation individually*"[231]. The compensation is generally claimed by the next of kin, in case of homicide, or by the injured victim, in case of personal injury.

Two possibilities of division are identified within the clan, which can variate depending on each clan, but according to two main principles: the *goro-leh* (penis possessors) or *goro-tirris* (penis count) principle, which indicates that all men pay and receive equally, regardless of their age or their social and economic status; or the *gabno* (wealth in stock) principle, according to which each *rer* pays or receives in proportion to its wealth.

The *diya* is generally divided in two different portions, the larger *mag deer* and the smaller *jiffo* (equal to one third of the *diya*). The former represents the main part of the blood money and is usually paid and/or received by all the members of the group, while the latter is usually paid and/or received by the next of kin of the victim (normally *the male agnates descended from a common ancestor of the third or fourth ascending generation*)[232]. Peculiar is the case when a married woman commits a crime, as in this case the compensation is due by her *diya-paying* group and not her husband's, as we have seen in the previous paragraphs; however, if the

[230] According to Wright, and as reported by Noor Mohammad, the compensation for these insults was a pony, equalling the value of five camels, see Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 104

[231] Principle highlighted in the case *Yusuf Abdi v. Gulaid Samater*, Subordinate Court of Civil Appeal, Civil Revision Case No. 3, 1957, as referred by Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 104

[232] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 104

woman and the injured victim belong to the same group, the husband is held responsible[233].

2.5 The judicial process in Somali Customary law

Two are the possible forms of judicial processes foreseen by the Somali customary law system, that can lead to a judicial decision and to the settlement of peace between clans:

- the *masalaxo*, or mediation;
- the *gar dawe*, or arbitration.

When a violation of customary law has occurred, a delegation of elders (an *ergo*) is summoned by one of the clans involved, or by a neutral third party, to set up the negotiation process, conveying preliminary messages between the clans involved[234]. It is normally the offended clan who starts the investigation of the incident, to determine the offence/damage/harm suffered, to be presented in front of the other clans[235].

The group of elders chosen to be the judges of the dispute are known as *xeer beegti*, whose leader is usually the most senior member within the same *qolo*. The elders of the *xeer beegti* are normally composed of members of the victim's clan, members of the perpetrator's clan and sometimes also members of a third party, neutral clan. The process according to customary law does not foresee the presence of a

[233] See Noor Muhammad H. N. A., *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, op. cit., p. 105

[234] As Friedman explaines, elders judges may require the parties to agree to abide by the verdict, sometimes in writing. However, in inter-clan disputes, enforcement is up to the clan of the victim. See Friedman D. D., *Legal Systems Very Different From Ours*, Legal Monographs and Treatises, 2019, Chapter 12, "Somali Law"

[235] See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law Initiatives*, op. cit., p. 33

professional group, such as legal practitioners – lawyers, judges. Any male adult who is perceived to have merits within the clan, speaking and negotiating skills, as well as propriety, can be included in the *xeer beegti* and act as lawyer. However, being male dominated, *xeer* cases result extremely discriminatory against women, who are never allowed to be part of the expert elders nor to act as advocated for any party.

The selected members of the *xeer beegti* are then separated by their communities to avoid any possible influence on the decision. The process in itself follows a very traditional procedure, in which the council of elders, the parties involved, their representatives and the guarantors of the compensation, sit all under a big tree, while the case is presented orally and open to public hearing. A person is usually designated to memorise, repeat, and summarise the case to the elders. Both parties then have the right to appeal a judgement, a maximum number of times according to the rules of their clan. The court of appeal must consist of more judges than the initial court, from a larger group of families or clans[236].

The *gar dawe*, arbitration process is generally considered for the most serious crimes and for recidivist criminals, applying the principle of "the winner takes all". However, the most commonly used approach is the *masalaxo*, or mediation process, in which the main goal is to reach a final decision considered satisfying and agreeable by all parties, regardless of whether the exact rules of customary law are implemented. Once again, this shows the need to reach peace among clans, rather than fair justice.

Although the compensation received at the end of a mediation process might be considered less favourable for the victim or the victim's party, reaching an agreement by mediation is considered to have the blessing of the whole clan, therefore, to be honoured by the other party and be guaranteed in a timely way[237].

[236] See Friedman D. D., *Legal Systems Very Different From Ours*, Legal Monographs and Treatises, 2019, Chapter 12, "Somali Law"

[237] See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law Initiatives*, op. cit., p. 25

2.6 Impact of Islamic law on Customary law and their interaction

We have seen so far how legal pluralism in African contexts, including Somalia, identifies religious law as an additional, often separate, source of local law, permeating many aspects of the daily life of individuals which are not covered by the customary law.

If we tried to analyse in more detail the impact that religious law has had on Somali customary law, it is necessary to take into account the flexibility that *Shari'ah* law provides with regard to the *'urf* or local customs of the populations that the Arab-Islamic community was gradually conquering[238]. If theoretically, in fact, the *shari'ah*, as far as the penetrability of human laws within sacred law is concerned, did not allow human secular law, whether spontaneous or authoritative, to compete with holy law, it is also true that the application of *shari'ah* and the Islamic way of life had to be gradually introduced in the lives of the people who converted to Islam. Thus, at least initially, Islam accepted that in the same way as peoples retained their own language, they could also retain their own traditions, as long as these customary behaviours and rules were not in contrast with the mandatory principles of *Shari'ah*.

Historically, it is true that Islamic law was in any case permeated by pre-Islamic traditions and that even the Islamic law spread by the first Arab colonizers and conquerors had brought with them not only religious law but also pre-Islamic customs.

As Prof. Sacco reminds us, *the populations that have been Islamised for centuries still show that they do not want to abandon their customs just as they have not abandoned their language*, as for example in the case of the Somali population[239].

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[238] The customary legal traditions are also known in Muslim societies as *adat* law, which must always be placed at a secondary level compared to *Shari'ah* and is applicable as long as it does not contradict the religious law.Schlee G., *Customary law and the joys of statelessness: idealised traditions versus Somali realities*, in "Journal of Eastern African Studies", Vol. 7, No. 2, 2013, p. 259

[239] My translation. See Sacco R., Gambaro A., *Sistemi Giuridici Comparati*, Terza Edizione, UTET Giuridica, 2008, p. 354

Although Islamic religious law, thanks in part to the widespread activity of the *Qadis*, has tended to prevail over Somali customary law, it is also true that, being the Somali *xeer* a laic customary law, the relation with the sacred law of *Shari'ah* has not been linear.

In fact, Somali *Xeer* has retained some of its peculiar characteristics, resisting the permeation of Islam even in certain matters such as the personal status law which is generally highly influenced by Islamic law in African contexts.

There is indeed the matter of liability in criminal and civil law where we have seen that Somali customary law maintains collective responsibility, not admitting (except in a few cases and only very recently) the concept of individual liability.

Indeed, when a crime is committed, customary law only allows two possible solutions, revenge against any member of the perpetrator's group, or payment of the *diya* or *mug* by the perpetrator's group to the victim's group.

As a matter of fact, customary law does not allow the payment or receipt of individual compensation, but only collectively, due by or to the *diya-paying* group. This represents a case where customary law has been able to modify *shari'ah* principles, as also recognised in the ruling of the Somali Supreme Court of 1964[240].

Another aspect in which customary law has influenced Islamic law in Somalia is inheritance and succession rights. While under Islamic law women can be among the *Qur'an* heirs, although they inherit half of how much a man would inherit[241], Somali customary law rejects any right of succession for women - *in frontal opposition to the well-known and undisputed contrary sciaraitic principle*[242].

As Mancuso further argues, in the Somali context, the *jamiica* or religious congregations had instead a *considerable influence on land tenure*, rejecting

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[240] Judgement of the Somalia Supreme Court No. 2 of 16 May 1964, as cited by Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", edited by Carpanelli E., Scovazzi T., Giappichelli Editore, Torino, 2020, pp. 151 - 152

[241] See Sacco R., Gambaro A., *Sistemi Giuridici Comparati*, Terza Edizione, UTET Giuridica, 2008, p. 350

[242] See Sacco R., *Di alcune singolari convergenze fra il diritto ancentrale dei berberi e quello dei somali*, in "Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente", op. cit., p. 356

nomadism in favour of sedentarism and obtaining rights on lands that were then shared with other members of the congregation. As far as it concerned the *xeer*, these lands were considered as a *concession from the tribal group to the congregation in an attempt to continue to recognise a lordship (albeit limited) on the land by the group*[243].

When the Italian colonial administration entered in contact with the local law in Eastern African territories, the customary rules were subordinated to the Italian metropolitan law, and both the custom and the Islamic rule were included in the same "box" of indigenous law, considering them, at least initially, as a *unique customary normative order*. The lack of codifications and accessible written laws made it even more difficult for the European colonizers to truly understand the differences between the customary and religion legal orders and the interactions between them[244].

2.7 Encounter and Impact of colonialisations over the customary legal system in Somalia

By the time the colonial administrations came into contact with the local legal systems of Eastern Africa, they encountered different contexts, where some of the local societies had more centralised authority systems, while others had none, causing administrative challenges in the early years of colonial rules, especially for the British and their policy of Indirect rule over their colonies.

As outlined by Allott, there were several aspects that the colonial administrations had to consider when they met the local customary systems in Eastern Africa.

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[243] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia,* in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., pp. 151 - 152

[244] Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", *ibidem*

Among the more specific aspects we should note that the local law was a reflection of the local way of life as it was *integrated with the way of life and beliefs of the society*. This is also evident in the fact that in the private sphere the customary law is organised around family and lineages, therefore kinship is a strong basis of the customary rules. In turn, this would also explain why the local systems relied on a different *approach to adjudication and the settlement of disputes from that adopted by Western laws, notably in the pre-eminence accorded to the concepts of arbitration and conciliation*, with the intention to maintain peace balance among the different groups[245].

Another aspect worth to note is what Allott defines as the '*conservative spirit*' of such laws, although the customary laws can also change over time, to adapt to the evolving societies.

Finally, the last aspect to consider was the different approach around equality and status differentiation, on gender, age or rank.

The recognition of customary law by the colonial administration was contingent upon applying the "*repugnancy clause*", specifically that *only that [aspect of] customary law which was not repugnant to justice and morality was to be enforced*[246].

When considering the customary law in East Africa, one cannot fail to mention also the role played by Islam and *Shari'ah* law principles which, especially along the coastal territories, led to mutations and perhaps sometimes distortions of customary rules.

Historians have reported that the presence of Islam in Somalia led to the *establishment of Islamic authorities that governed Somalia until the arrival of*

[245] See Allott A.N., *Customary Law in East Africa*, in "Africa Spectrum", Vol. 4, No. 3 Law in East Africa, Institute of African Affairs at GIGA, Hamburg/Germany, 1969, pp. 12-13

[246] And in this reasoning it is interesting to side with the author, asking "Whose justice and whose morality"? being clear that the courts answered with the colonialist justice and morality, namely the British, in defining the standards to follow. In particular, it is even more interesting to note that the recognition of customary law by the British administration in the colonial period in Eastern Africa included not only civil law, but also criminal customary laws, surviving for a long time side by side with the Western Penal Codes. See Allott A.N., *Customary Law in East Africa, op. cit.*, pp. 14

colonial powers in the late 18th century[247], who divided ethnic Somalis. Notoriously, the British colonisers established a protectorate in the North in 1887, while the Italians colonised the South in 1889 and the French colonised Djibouti. The two other parts were annexed to Ethiopia and Kenya (the Somali region of Ethiopia and the Northern Frontier District NFD).

The colonial administrations had different features and consequently different administrative approaches to the local contexts they found, creating different cultures and social systems.

Experts of Somali history have showed how Islam has very often become a unifying element for Somali clans against external domination[248].

When Islam penetrated the territory, it peacefully integrated into the existing local customs, shaping Somali identity and the local governance systems, including the customary law. The colonial administrations, instead, as noted by Omar, imposed external governance systems, *designed to serve colonial interests* rather than the local populations[249].

The colonisation of the European colonial powers consisted in three main possible approaches towards local legal orders: *suppression, coexistence, and conservation*. The Italian administration officially adopted the conservation principle, as long as the local law did not contravene the public order in the colony[250].

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[247] See Omar Y. S., *The Role of Islam in Peace and Development in Somalia (Continuity and Change)*, in "Religions" 2022, Vol. 13, Issue 11: 1074, Special Issue Religion, Conflict Transformation, and Peacebuilding: New Perspectives, https://doi.org/10.3390/rel13111074, November 2022, p. 4

[248] Historical events have for example been the army of Ahmed Gurey, the Muslim leader in the Horn of Africa, who included also Somali clans in the fight against the Christian Kingdom of Ethiopia in the XVI century; or the battle against the Italian humiliating colonial policies fought by the member of the *Qaadiriyya Sufi Order* Sheikh Axmad Xaaji Mahdi, urging Somali clans in the Shabelle region to fight against Italian colonialists. See Omar Y. S., *The Role of Islam in Peace and Development in Somalia (Continuity and Change)*, op. cit., p. 4-5

[249] See Omar Y. S., *The Role of Islam in Peace and Development in Somalia (Continuity and Change)*, op. cit., p. 8

[250] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", edited by Carpanelli E., Scovazzi T., Giappichelli Editore, Torino, 2020, p. 139

Indeed, when the European powers began their colonial penetration into the Somali territories, the legal surface they encountered was characterised, in the outermost layer, by *Shari'ah* law, under which it was possible to identify certain customary practices as well.

Unfortunately, has it has been established in several cases, the European colonial powers have sometimes confused customary practices with *Shari'ah* law, mixing aspects of the two systems and sometimes imposing practices of one or the other without, however, understanding in depth the underlying differences between them[251].

This was the case also for the Italian colonial administration in Somalia[252].

Under the Italian colonial rule, in Somalia three legal systems generally coexisted, consisting of Italian law applicable in the colony, which prevailed in cases of conflict of laws, Islamic law and customary law. Nevertheless, as Mancuso highlights, often the foreign legislator, lacking a particularly thorough knowledge or even interest in the distinction between the two sources of law, the religious and the customary one, included both customary and Islamic law under the same term of 'indigenous law', finding it easier to blend the two different legal orders into a single one. Indeed, the local normative orders, both religious and customary, although considered sources of colonial law by Italian scholars, were regarded as external to it, with the main limitation that they were only applicable to the local population.

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[251] See Sacco R., *Di alcune singolari convergenze fra il diritto ancentrale dei berberi e quello dei somali*, in "Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente", Year 44, No. 3 (SEPTEMBER 1989), Istituto Italiano per l'Africa e l'Oriente (IsIAO), p. 349

[252] As for the British administration, traditional Somali practices and society were also very much confused as they believed that the *Aqils* could ran the traditional society along tribal lines, therefore attempted to identify the *Aqils* that ruled them, using them as intermediaries between the colonial administration and the tribes, without considering the fact that according to Somali customary practices they did not have full authority to govern and mobilise the clan families. See Mohamed J., *Kinship and Contract in Somali Politics*, in "Journal of the International African Institute", Vol. 77, No. 2, Cambridge University Press on Behalf of the International African Institute, 2007, pp. 229 - 230

Somali customary law as perceived by the Italian administration, consisted of a set of traditional rules passed down orally by clan elders and leaders, 'created' during the *shir*, the assembly of elders. However, since the Italian colonial administration recognised religious autonomy and since Somalis are Muslims of *Shaf'i* school, Islamic law was also recognised as *an exclusive source of law in matters of personal status for Muslims and in the relations between Muslims*, of course only in case in which *the applicable rules were not contrary to the principles of public policy of the colonizing country*[253].

The interest of the colonial administration in the local law during the first period of colonisation was expressed particularly in the attempt to analyse more closely and develop a greater technical knowledge of local customary law.

Studies and field research by colonial officials and judges stationed in East Africa flourished in this period, in an attempt to codify the rules of local customary law within the Italian colonies to facilitate its application by the colonial judges. However, since they were drafted *by* Europeans and *for* European judges, those codifications did not include records of procedural rules that constituted the *essence of the African legal* culture, instead they created a crystallization of the substantive rules hitherto in place. As Mancuso argues, the *essence* of those laws survived in some cases, in particular among those communities which remained not easily reached by the colonial rulers, such as communities in the countryside or urban underground organisations. When the colonial power recognised the flexibility of the customary legal norms, and the impossibility to codify them due to their intrinsic features, the approach to the study of local customary law changed, recognising that only a local judge could actually fully understand the customary law practices in conflict-resolution cases related to local people. Thus, if for political or public policy reasons the judge was European, it was expected that he would be assisted by an experienced local advisor[254].

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[253] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., pp. 138 - 141

[254] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., p. 139

Chapter III – Legal pluralism and colonial powers – the Trust Territory of Somaliland under Italian administration

The third chapter is the focus of our research, with an in-depth analysis of the legal models adopted by the Italian colonial administration in Somalia until its independence in 1960. It will analyse the different judicial models applied by the Italian colonial administration in the East African colonies, continuing with the historical overview of the creation of the Trust Territory of Somaliland under Italian Administration and its legal aspects connected to the reorganisation of the justice system and the role played by Somali customary law.

3.1 The Administration of the Italian Eastern African Empire and its judicial systems

We have provided an overview of the evolution of the Italian presence in the Horn of Africa in the first chapter, and in particular, on the establishment of the Italian Somalia in 1908.

When at the end of the XIX century Italy colonized Somalia, a civil law system was brought in, while deciding not to introduce drastic changes to avoid disrupting the organisation of the Somali society, being aware of the local laws and clan divisions. Therefore, since the early colonial period, the Italian administration used the *double track system*, providing that Italian citizens and assimilated were subject to Italian law, while local people were subject to their local law *xeer* applied by the *qadi*[255].

[255] The judicial system during and after the Filonardi Company was based on the dual system of jurisdiction, leaving cases involving local people in all matters, civil and criminal, to their own *Qadi* judge, who, however, had to be appointed by the Italian authorities.

Moreover, the Provisional Regulation of 14 March 1895 of the Filonardi Company introduced three degrees of jurisdiction. Ex Circolare of 12 March 1903, matters related to slavery were assigned to a dedicated court. See Marongiu Buonaiuti C., *Politica e religioni nel colonialismo italiano (1882-1941)*, Giuffrè Editore, Milano, 1982, pp. 108 - 109

However, Somali people also had the possibility to resort to the Resident, the Italian judge, assisted by the local notables[256].

This system was further confirmed by the 1908 Ordinance of Italian Somalia, applicable to the entire colonial territory, which provided that the local population would be subject to both Islamic and customary law, according to their respective areas, unless the application of Italian law was requested by the parties.

However, it was clear from the outset that the formal coexistence of the two legal systems did not go hand in hand with the introduction of a Western-style metropolitan law, and the limits of applying local law in contexts where Italian metropolitan law was predominant. Indeed, if a conflict between applicable rules arose, metropolitan law tended to prevail over local law, as it was considered more evolved and 'civilised' than the other.

In relation to the judicial system introduced, the Italian colonial administration recognised the *qadi* as Islamic judge with jurisdiction in criminal law, in accordance with local norms, and an indigenous court, *Tribunale dell'Indigenato*, as a second local jurisdiction, which was fundamentally a political jurisdiction aiming at judging all cases that could create an obstacle to the activity of the Italian government. Customary law was considered as a supplementary element reduced to the role of a *legal formant in the application of the rules of metropolitan law*[257].

When at the end of the war in Abyssinia, on 5th May 1936, Italy proclaimed the formation of its Eastern African Empire, Italian Somalia became part of the Eastern African territory under Italian control[258]. This control was ideally to be exercised with a form of government of "direct rule" over the populations of all the newly acquired territories, which would not imply the direct abolishment of local rules in favour of Italian law, nor would it exclude the possibility that the local population could take part in the administration of their territories, *as already applied in her*

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[256] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., pp. 141 - 142

[257] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., pp. 145 - 146

[258] See Map 2

older colonies[259]. In fact, this type of form of administration was already in place in Eritrea and Somalia; since Italy considered the populations of these countries very close to those of Abyssinia, the other two colonies were merged together to form the Italian Empire of East Africa. This was subsequently sub-divided into regional governments, with an attempt to include, under each regional government, people with similar features, speaking the same language, having the same traditions and economic organisation, as well as, taking into account ethnics and religious factors, to the possible extent.

A certain Italian interest in preserving the customs of local population stems from a set of decisions, as highlighted by Zoli, such as to draft official acts in the local language, being it Amharic, Tigrigna or Arabic, depending on the province; to teach in schools for local people in local languages, such as Amharic, Tigrigna, Galla, Caffino, Harari or Somali; to make it compulsory the teaching of Arabic in all Muslim regions[260].

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[259] The principles of direct rule "as understood by Italy" were stated by Zoli, in his paper: "*Given the differences in the mentality, the levels of civilization and the social development, religion and customs which exist between the Italians and the peoples of Ethiopia, and among those peoples themselves, an extension pure and simple of Italian jurisprudence to the whole of the new empire would be absurd and unjust. […]. Indeed, in his speech before the Senate, Signor Lessona clearly defined the fundamental principles of direct rule as understood by Italy and as already applied in her older colonies. These fundamental principles may be briefly stated as follows: (a) Political power is to be exercised in its totality by the Italian authorities, with no compromises or half measures, (b) Native notables may be attached to the central government as advisers, (c) Native notables may be called upon to participate in the local administrations, (d) The governmental action of the Italian authorities can be exercised through these native functionaries and in a manner that involves the least possible departure from local law and custom, whenever the latter are not in conflict with public order and with the ethical principles of European civilization*". See Zoli C., The Organization of Italy's East African Empire, in "Foreign Affairs", vol. 16, No. 1, Council on Foreign Relations, Oct. 1937, p. 83

[260] And further on this, Zoli: "*The Viceroy may, if he sees fit, decree that in certain regions instruction is also to be given in a language other than these just mentioned. All this demonstrates that Italy intends to preserve the linguistic patrimony of her subjects and to protect their ethnic individuality within the framework of her civilizing mission*". Zoli C., The Organization of Italy's East African Empire, in "Foreign Affairs", vol. 16, No. 1, Council on Foreign Relations, Oct. 1937, p. 84

It was certainly no secret that the Italian government was looking to detain control over those large African territories also in view of relocating some Italian settlers – *a part of her superabundant population* - in the new lands, mainly farmers and workers[261]. In order to create favourable conditions *for white settlement*, that would attract immigrants from the motherland, the government made the juridical foundations of the Empire *sufficiently elastic to allow Italians and natives to live side by side in tranquillity and with respect for each other's spheres of activity*[262].

[261] Whose presence, though, *contrary to the fears expressed in some quarters, will in no way injure the rights of the natives*. Zoli C., The Organization of Italy's East African Empire, op. cit., p. 84

[262] However, this certainly was not aimed at creating integration among the two communities. In fact, at the same time were also enforced laws that prohibited mixed marriages between Italians and the local population, in order to *protect the race* and *prevent dangerous cross-breeding and the consequent damage to morality and public order*. Zoli C., *The Organization of Italy's East African Empire*, op. cit., p. 85. This forbiddance was certainly not new within the Italian colonies in the field of private law. Indeed, art. 74 of the project of civil code for the Italian colony of Eritrea, stated the ban on marriages between Italian women and colonial subject men. This ban specifically for Italian women testified the inferior position of women in the Italian legal system, as enshrined in the Pisanelli Code of 1865, according to which, in art. 134, women could not, without the authorisation of their husbands, "*donare, alienare beni immobili, sottoporli ad ipoteca, contrarre muti, cedere o riscuotere capitali, costituirsi sicurtà, né transigere o stare in giudizio relativamente a tali atti*" (my translation: donate, dispose of real estate, mortgage, borrow, assign or collect capital, build securities, nor settle or sue in respect of such acts). Since in the marriage, the husband detained superior legal position than the wife, mixed marriages with an Italian woman would have put the indigenous man in a superior legal position than the Italian woman. This fact would have been unacceptable by the Italian colonizer as representing a serious prejudice to the authority of the State. Although initially the number of women in the colonies who were willing to marry indigenous men was limited, after the creation of the Italian Eastern African Empire in 1936 the number of women in the colonies grew, posing a threat to the authority of the State who would have to deal with increasing requests. The solution was found with the decision by which the Italian woman marrying an indigenous man would lose her Italian citizenship, becoming a subject herself, as stated in art 28 of the Regio Decreto-Legge 1 giugno 1936, n. 1019, *Ordinamento e Amministrazione dell'Africa Oreintale Italiana*. It subsequently became a crime, punishable by imprisonment from one to five years, as per REGIO DECRETO-LEGGE 19 aprile 1937, n. 880 *Sanzioni per i rapporti d'indole coniugale fra cittadini e sudditi*. Regio Decreto-Legge convertito con modificazioni dalla L. 30 dicembre 1937, n. 2590. See Martone L., *Diritto d'Oltremare. Legge e ordine per le colonie del Regno d'Italia*, Giuffrè Editore, Milano, 2008, pp. 13-16

This translated into a specific judicial system that would enable the Italian settlers to be applied a different set of laws – the laws of the motherland - rather than those applicable to the indigenous population.

The Italian government, in fact, did not grant the same natural rights to the local population that were valid for the Italian citizens; in this way, fully embedding the "higher" goal of "civilizing mission" of the colonial power over the subjects, while failing to reach the overall goal of cultural uniformity with the motherland.

From a legal perspective, this "wave of civilisation" should have "marched against barbarism", rooting its principles in the founding values of the Western legal tradition, inherited from the Enlightenment thinking; however, those principles of natural law rights, shared and accepted by most of the European powers, were not part of the ideology of the European governments when, since the mid-XIX century, they came in close contact with the African populations. Those founding principles of Enlightenment – liberty, equality, and property – *non si ritrovano nella realtà d'Oltremare per i sudditi indigeni*[263].

The legal system developed was instead differentiating based on the personal status of the individual it applied to, solely based on a racial differentiation between the colonizers and the natives.

On the organisation of the judicial system for the Italian colonies, the government thus opted for the *rule of duplicity*, which adopted two different jurisdictions, one for the indigenous population and the other for Italian and third-country citizens[264]. The procedural system was also adapted to the context.

This model of "dual jurisdictional pyramid"[265] implemented by the Italian colonial administration, envisaged that the Italian-model judicial bodies would decide over cases involving Italian citizens, while the Islamic-model judicial bodies would decide over cases involving Somali citizens. Hence, in particular in private law

[263] My translation: are not found in the Overseas reality for indigenous subjects. See Martone L., *La giustizia italiana nelle colonie*, G. Giappichelli Editore, Torino, 2015, pp. 7-9

[264] See Martone L., *Diritto d'Oltremare. Legge e ordine per le colonie del Regno d'Italia*, op. cit, p. 22

[265] See Sacco R., *Le grandi linee del sistema giuridico somalo*, op. cit., p. 41

matters, Italian law was applied by the Italian judge, while *Shari'ah* and *Xeer* were applied by the *qadi*.

This compartmentalised system would prevent any type of communication between the two judicial systems. However, in practical terms, this was fully implemented only in those matters that constitute the so-called *personal status law*, therefore including personal law, family law and inheritance.

The judicial authority of the Somali judge on personal status law, with the application of *Shari'ah* law integrated with Somali customary law, represented a fundamental legal principle. In parallel, the applicability of Italian law by the Italian judicial authority entailed the impossibility that the Somali customary system would *trespass* into the sphere of Italian citizens. On the contrary, outside the sphere of personal status law, the Italian laws could penetrate the laws applicable to Somali citizens. The technical instruments used by the Italian administration to transfer the applicability of Italian laws were mainly three: the derogation from jurisdiction – either voluntary or legal; the express or tacit contractual clause by which the Italian law was extended to the case; the subjection of Italian-Somali mixed cases to Italian jurisdiction.

These instruments were foreseen, to different extents, by the judiciary systems over time, and in particular for those in 1911, 1935, 1936, 1956[266].

The justice system of the colonial State was built around the person of the *single judge* and on the concept of *simplification of procedures*.

The authority of the single judge was initially introduced for the Eritrean colony, in 1908, thereby establishing the *judge of the colony* for Italian citizens, as one and unique judge for civil cases that would reach a maximum value of 2,000 *lire*[267].

The Court of the Colony was composed of the judge of the Colony presiding it, and the honorary judges, able to decide on all civil and commercial matters for any value

[266] See Sacco R., *Le grandi linee del sistema giuridico somalo*, op. cit., p. 42

[267] As per art. 32 of the REGIO DECRETO 2 luglio 1908, n. 325, Concernente il riordinamento giudiziario della Colonia Eritrea: "*Il giudice della Colonia risiede in Asmara, e decide come giudice unico di tutte le cause civili, escluse quelle devolute alla cognizione dei conciliatori, che non superino in valore le L. 2000, e di tutti i reati contravvenzionali.*"

above 2,000 *lire* and for all those penal cases outside the competences of the single judge and the Assise Court[268].

Finally, the Assise Court was composed of the judge of the Colony as president, two honorary judges and two assessors[269], chosen among people nominated by the Governor[270].

On the other hand, the judges for the native population were identified among indigenous chiefs, who could decide only on cases involving colonial subjects[271].

For those cases involving indigenous subjects but on which the Assise Court would have competence, a different type of court was competent to decide, composed of the Commissioner, two honorary judges nominated by the Governor, either civil or military fonctionnaires, and local notables, having only consultative vote[272].

A similar system was applied to the Somali colony. The judicial system introduced in Somalia by the Royal Decree of 8 June 1911 adopted the "dual jurisdictional pyramid", providing the possibility to Somali citizens to appeal to the Italian judge. This would happen with the specification that the Italian judge appealed by the

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[268] As per art. 34 of the REGIO DECRETO 2 luglio 1908, n. 325: "*Il tribunale della Colonia e' composto dal giudice della Colonia che lo presiede e da giudici onorari, e decide in prima istanza tutte le cause in materia civile e commerciale di valore eccedente le L. 2000 o di valore indeterminabile, e di tutte le cause in materia penale che non siano di competenza del giudice unico o della Corte di assise.*"

[269] As per art. 39 of the REGIO DECRETO 2 luglio 1908, n. 325: "*La Corte di assise e' composta dal giudice della Colonia che la presiede, da due giudici onorari e da due assessori.*"

[270] See Martone L., *Diritto d'Oltremare. Legge e ordine per le colonie del Regno d'Italia*, op. cit, p. 23

[271] As per art. 72 of the REGIO DECRETO 2 luglio 1908, n. 325: "*I capi indigeni riconosciuti dal Governo giudicano in primo grado delle controversie civili solo fra gl'indigeni sudditi coloniali o assimilati da essi dipendenti.*"

[272] As per art. 77 of the REGIO DECRETO 2 luglio 1908, n. 325: "*Pei reati di competenza della Corte di assise, gl'indigeni sudditi coloniali o assimilati sono giudicati da un tribunale composto dal commissario o residente, che lo presiede, da due giudici onorari nominati con decreto del Governatore fra i funzionari civili, e in mancanza di questi fra gli ufficiali dell'esercito e della marina, […], e de alcuni notabili indigeni, designati dal governatore, che hanno pero' solo voto consultivo.*"

Somali citizen should apply the traditional law, although prevalence was naturally given to the application of Italian law[273].

According to 1911 judicial system for Somali individuals, for civil and penal cases involving Italian or third-countries citizens, the Italian law was applicable; while for cases involving the colonial subjects, both Islamic law and local Customary law (*testur*) were applicable, even allowing modifications to the local law by the Governor, to enable compatibility with the founding principles of the Italian legal system[274].

The colonial power, in addition to the *Residents* (nominated by the Governor, with judicial powers[275]), the judge for Somalia, the Governor, and the Assise Court, recognised as judiciary authority also the *qadi* and the indigenous court[276].

The *qadi* would be competent to judge on those crimes committed by colonial subjects, although if one of the parties happened to be not Muslim, the case could be referred to the (judge) Resident[277].

This organisation was also maintained with the judicial system introduced by Royal Decree of 1935[278].

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[273] See Sacco R., *Le grandi linee del sistema giuridico somalo*, op. cit., p. 42

[274] As per art 3, REGIO DECRETO 8 giugno 1911, n. 937 Che approva l'ordinamento della giustizia nella Somalia italiana: "*Le cause tanto in materia civile che penale in cui siano interessati cittadini o stranieri vengono giudicate in conformita' alle leggi italiane in quanto le condizioni locali lo consentano; le cause in cui siano interessati esclusivamente sudditi coloniali o assimilati, vengono giudicate secondo le norme del diritto mussulmano (sceria) e del diritto consuetudinario (testur), salvo i casi di eccezione stabiliti dal presente ordinamento. Il governatore con decreti motivati puo' introdurre nel diritto indigeno le modificazioni richieste per renderle compatibili con i principi fondamentali delle leggi italiane.*"

[275] The functions of the "Residents" were described in art 11 of LEGGE 5 aprile 1908, n. 161 *Per l'ordinamento della Somalia italiana*

[276] As per art 1, REGIO DECRETO 8 giugno 1911, n. 937

[277] As per art 27, REGIO DECRETO 8 giugno 1911, n. 937: "*Il cadi' e' competente a giudicare in prima istanza dei reati commessi da sudditi coloniali o assimilati, […]. Quando una delle parti sia di religione non musulmana il giudizio, su richiesta di essa, sara' deferito al residente.*"

[278] REGIO DECRETO 20 giugno 1935, n. 1638, Ordinamento giudiziario per la Somalia Italiana

Conversely, several modifications were introduced by the judicial system approved in 1936 and entered into force for the Italian East Africa[279].

In fact, with the 1936 judicial system, in case the Somali citizen would appeal to the Italian judge, it would cease for the latter the possibility to apply the Somali traditional law, whereas the Italian legal system was to be automatically applied[280].

The legal approach changed completely with the end of the colonial regime and the advent of the *Trusteeship* system, that we will see in the next paragraph. In fact, with the beginning of the Italian Trust Administering Authority, the Italian law ceased to be directly applied in the territory of Somalia, while "*territorial laws*" or "*laws in force in the territory*" came into existence, in parallel to the traditional systems of *Shari'ah* and *Xeer*, applicable to Muslim people for personal status matters[281].

Clearly, these "*territorial laws*" were highly influenced by Italian law. The Administering Authority extended to the administered territory the new Italian civil code, civil procedural code, new bankruptcy law[282], that were going to be "*territorial law*", and the different applicability of these laws was to be based on the religious belonging of the individuals, rather than on their citizenship; therefore, the different application of the law where to be based on the distinction between Muslim and non-Muslim individuals, rather than between Italian and Somali individuals.

A key reform was also introduced in the dual judicial system, that was integrated to have a single court of last resort, the Court of Justice, competent to re-examine both the decision of the *qadi* and of the regional judge[283].

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[279] Regio Decreto-Legge 1 giugno 1936, n. 1019, *Ordinamento e Amministrazione dell'Africa Oreintale Italiana*

[280] See Sacco R., *Le grandi linee del sistema giuridico somalo*, op. cit., p. 42

[281] See Sacco R., *Introduzione al diritto privato somalo*, Giappichelli, Torino, 1973, p. 36

[282] According to *Ordinanza* 28 dicembre 1950 n. 146: estensione al Territorio del Codice civile italiano e del Codice di Procedura Civile italiano nonchè di alcune disposizioni integratrici e modificatrici dei predetti Codici, in Bollettino Ufficiale dell'Amministrazione Fiduciaria Italiana della Somalia, 2 Gennaio 1951, Supplemento N. 1 al N. 1, p 21-23

[283] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 36

3.2 The Trust Territory of Somaliland under Italian Administration: historical overview and international perspectives

On the African continent, the Second World War began well before the hostilities in Europe. In fact, the invasion of Abyssinia in 1935 and the subsequent formation of the Italian East Africa Empire were crucial to the campaigns of the Second World War. In 1940 Italy occupied British Somaliland, thanks to the Italian army on the ground in Ethiopia[284]. Britain counter-attacked, through Eritrea, Sudan and Italian Somalia. Allied forces conquered East Africa, forcing the Italian troops to retreat. Meanwhile, Italy was also defeated in North Africa, in Egypt, forced to retire back to Tripoli. Beginning in early 1941, British troops mounted a counter-offensive, recapturing British Somalia in March 1941, Eritrea in April and French Djibouti. In

[284] Although the Italian occupation of British Somaliland lasted only a few months, the General Government of Italian East Africa issued an *ordinamento della giustizia* (order of justice) for the occupied territories of British Somalia at the end of 1940. It is relevant to note that the legislation applicable to Somalis and assimilates were the laws proper *to their religion, their country, and their lineage*. The punishments established by Islamic and customary law could be applied as long as they did not conflict with *Italian public order and the principles of civilisation*. Justice for Somalis and assimilates was administered by the *Qadi*, in relation to civil and commercial disputes between Somalis and assimilates, whose decisions could be appealed against the Sharaitic court, composed of three *Qadi*; by the *Councils of Elders*, recognised as customary judicial bodies. In criminal matters, jurisdiction lay with the District Courts, which were competent for offences committed by Somalis or assimilates, and offences for which Islamic and customary law provided for a prison sentence or fine. Particularly relevant was the provision for collective contributions, which could be imposed on villages or 'rer' within the territories where crimes were committed. Contributions could be for a maximum of two lira for each member of the community or village. and could be replaced with livestock. See Mellana V., L'Italia in Africa, *L'amministrazione della giustizia nei territori oltremare, Volume secondo, L'amministrazione della giustizia nell'Africa Orientale Italiana (A.O.I) (1936 - 1941), con cenni sull'Amministrazione della Giustizia in Somalia sotto mandato Fiduciario Internazionale affidato all'Italia (A.F.I.S.), (1950 – 1960)*, Ministero degli Affari Esteri, Comitato per la documentazione delle attività italiane in Africa, 1971, pp. 432 - 442

November 1941 the Italian troops officially surrendered, but guerrilla warfare continued until 1943, when the Italian forces capitulated[285].

A nationalist spirit grew rapidly in the former Italian colonies and in Somalia following the British reconquest of 1941, which led to the creation of the OETA (Occupied Enemy Territory Administration) and subsequently BMA (British Military Administration), since 1945. The British Administration meant a break with the previous fascist colonial order, which was governed by a rigid racial hierarchy[286].

In this wake, the Somali Youth Club (SYC) was founded in Mogadishu in 1943, upheld by the British, based on an idea of pan-Somali nationalism. In May 1947, the Somali Youth Club became the party of the Somali Youth League (SYL)[287], aiming at unifying all Somali territories and rejecting tribalism, sufi orders and clannism. At the same time, Italy had financed and supported other Somali unions, such as the wider Somali Conference (*Conferenza Somala*), and the Patriotic Benevolent Union (*Unione Patriottica di Beneficienza*) aiming at advocating the return of Italy under a thirty-year trusteeship. Under the BMA, the British used anti-Italian sentiments to their advantage to promote their own political agenda by actively supporting the Somali Youth League. They also implemented a "Somalisation" of local government positions by putting in place liberal policies that deviated from the discriminatory policies implemented by the Italians and

[285] See Malito D. V., *Italy's "Right of Return" to Somalia after the defeat in the Second World War*, in "Political and Legal aspects of Italian colonialism in Somalia", Carpanelli E., Scovazzi T., (edited by), op. cit., pp. 161-162

[286] See Morone A. M., *L'ultima colonia. Come l'Italia è tornata in Africa 1950-1960*, Edizioni Laterza, 2011, pp. 8-10

[287] The Somali Youth League was the main party of the country. The use of the term "Youth" was to emphasise the *transclanical modernity of the league*, openly in contrast with the traditional society and the elders. See Morone A. M., *L'Egitto di Nasser e la formazione dello stato somalo. Influenze politiche, interazioni culturali e identità nazionale*, in "Contemporanea", Fascicolo 4, Il Mulino, 2010, p. 653

facilitating the employment of members of the Somali Youth League into administrative, governmental and military positions[288].

At the end of the Second World War, Italy's defeat meant the dissolution of the colonial empire and losing control over its African colonies, although in 1945 the country still reclaimed sovereignty rights over Somalia, Tripolitania, Cyrenaica and Eritrea, claiming a *right of return* to Africa, that Allies strongly opposed to.

On 10 February 1947 the Paris Peace Treaty was signed by Italy, formalising among other aspects, the end of hostilities, the end of Italian Colonial Empire in Africa and redefining the Italian borders to those that existed before 1938.

According to art. 23 of the Peace Treaty, Italy renounced *all right and title to the Italian territorial possessions in Africa, i.e. Libya, Eritrea and Italian Somaliland*, although - *pending their disposal* - they were to continue under the same administration[289].

The final terms over the future of those territories, was to be decided by the four allied powers (U.S.S.R, USA, France, Great Britain) within one year of the entry into force of the Treaty of Peace. However, the Four Powers did not agree on the procedures of the final disposal of the former Italian territories in Africa, therefore the matter was referred to the General Assembly of the United Stated for a recommendation that would be agreed upon by the allied powers, as foreseen in art. 3 of Annex XI of the Treaty of Peace.

In particular, the decolonisation process of Italian Somaliland became a point for negotiation and partition within the United Nations, where *the British supported the Italian position to merely strengthen their pretences over Libya*[290].

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[288] See Malito D. V., *Italy's "Right of Return" to Somalia after the defeat in the Second World War*, op. cit., pp. 174 - 175

[289] See Art. 23 of the Treaty of Peace with Italy, signed at Paris, on 10 February 1947, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations

[290] See Malito D. V., *Italy's "Right of Return" to Somalia after the defeat in the Second World War*, op. cit., p. 176

Eventually, in April 1949, the British and Italian governments agreed on a compromise plan on the future of the Italian colonies in Africa, known as the "Bevin-Sforza Plan"[291].

The Plan provided that Libya would be divided into three provinces, and all would be granted independence after a period of ten years: Tripolitania to be placed under Italian Trusteeship in 1951, Fezzan to be placed under French Trusteeship, Cyrenaica to be placed under British Trusteeship. Eritrea was instead foreseen to be incorporated to Sudan for the Eastern provinces, while the Western provinces were to be annexed to Ethiopia by a UN Treaty in consultation with Italy. For what concerned the former Italian Somaliland, the Plan provided that it would be placed under Trusteeship with Italy as administering power, without mentioning any specific date for independence[292].

However, the Plan did not take into account the positions and desires of the populations concerned[293].

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[291] Named after the British Foreign Secretary, Mr. Bevin and the Italian Foreign Affairs Minister, Count Carlo Sforza. The plan was signed in London on 4 May 1949.

[292] See Trunji M., *The United Nations and The Somali Question: the Transformation Process from Colony to Independence*, op. cit., p. 181

[293] When the U.N. General Assembly reconvened in New York in April 1949, the First Committee that was dealing with the question of the disposal of the former Italian colonies, accepted the recommendations of Sub-Committee 14 to hear, on behalf of Somaliland, the representatives of two Somali political parties, the Somali Youth League and the *Conferenza Somala*. If the latter supported enthusiastically the plan, the Somali Youth League strongly rejected it. The delegate of the Somali Youth League, Mr. Abdullahi Issa, strongly campaigned against the Italian return in Somalia, focussing on the fact that during the last fifty years of Italian colony, Italy had enslaved the local population, depriving them of basic rights such as education, freedom and political and economic development, pressuring them to forced labour in plantations under inhuman working conditions. Although the post-fascist Italy had acquired the characteristics of a democratic state with the elections that followed the end of the WWII, the Somali delegate persisted that the majority of the Somali people had no trust that the new democratic Italian government could govern the former colony any differently from the fascist state. Therefore, the Somali Youth League programme was based on two main pillars, that were presented to the Four Power Commission on Investigation: a collective trusteeship under the U.N., that would lead to independence in no more than ten years, and strong opposition to any form of Italian return to Somalia. See Trunji M., *The United Nations*

Although the "Bevin-Sforza" Plan had been approved, after lengthy negotiations and despite strong criticism from many sides, from the Sub-Committee 14 and the First Committee, it was rejected in the General Assembly, thanks to the contrary vote of the Haitian delegate. Faced with the defeat of the "Bevin-Sforza" plan, and in order to be able to continue to maintain a minimum of control over its former African territories, Italy changed its approach, declaring itself fully in favour of the immediate independence of Libya and Eritrea, but maintaining its position of interest in continuing the development work started in Somalia, under the aegis of an Italian Trusteeship.

Following the new Italian declaration, the delegates of the Arab and Asian countries declared themselves not hostile to an Italian presence in Somalia. The Latin American states declared themselves in favour of such a resolution, supporting the Brazilian delegate's proposal to link the issue of Libyan independence to the Italian Trusteeship of Somalia.

In this way, the Latin American countries would not vote in favour of Libyan independence unless the General Assembly approved the Italian Trusteeship in Somalia.

At the General Assembly meeting in September 1949, the representatives of the Somali Youth League and the Somali Conference were heard again. The positions of the two sides did not change substantially from the previous interventions, with the Somali Youth League representative stating that the "Bevin-Sforza" plan would mean the survival of colonialism *of the worst type* and accusing the Somali Conference representatives of being subservient to Italian interests, claiming they were promised compensation in case Italy had returned to Somalia[294].

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and The Somali Question: the Transformation Process from Colony to Independence, in "Political and Legal aspects of Italian colonialism in Somalia", Carpanelli E., Scovazzi T., (edited by), Torino, G. Giappichelli Editore, 2020, pp. 182 - 184

[294] Certainly, the Italian return to Somalia was not well perceived by all Somalis, also due to the foreseen return of those Italian personnel to Mogadishu, perceived to be reproducing the old fascist ideology towards the Somali population. See Pandolfo M., *Gli italo-somali dell'Amministrazione Fiduciaria Italiana della Somalia (AFIS): una memoria dimenticata tra le pagine dell'Italia postcoloniale*, in "Diacronie – Studi di Storia Contemporanea", n. 30, 2, 2017, p. 3

A second Sub-Committee (21) was created in October 1949 within the First Committee, to analyse all proposals submitted to resolve the issue of the Italian colonies. Regarding Somalia, the Sub-Committee 21 adopted some key principles: a) *that Italian Somaliland should be accorded independence; b) the principle contained in a proposal of the United Stated of America that Italian Somaliland should become independent after a period of ten years, unless the General Assembly decided otherwise; c) the principle for a single power trusteeship, with Italy as the Administering Power*[295].

The Sub-Committee then decided also in favour of a proposal made by India to include a Declaration of Constitutional Principles, designed to guarantee the rights of the people of Italian Somaliland, to guarantee self-government in the territory.

Finally, after lengthy and strenuous negotiations, the UN General Assembly approved on 21 November 1949 the resolution presented by the First Committee concerning Somalia, with 48 votes in favour, 1 against (Ethiopia) and 9 abstentions, effectively placing Somalia under Italian trusteeship. The resolution provided among other things that the Trusteeship Council *shall negotiate with the Administering Authority the draft of a Trusteeship Agreement for submission to the General Assembly*. Therefore, the Trusteeship Council tasked a special Committee[296] to draft the Trusteeship Agreement, meanwhile, Italy was invited to undertake the provisional administration of the territory.

Eventually, the United Nations agreement established the UN Trust Territory under Italian Administration in Somalia[297], to prepare the former Italian Somaliland for

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[295] See Trunji M., *The United Nations and The Somali Question: the Transformation Process from Colony to Independence*, op. cit., pp. 186 - 190

[296] The Committee was composed of France, Iraq, the Philippines, the Dominican Republic, The United States of America, the United Kingdom. Italy, Egypt, Colombia and Ethiopia were invited to participate without a vote. See Trunji M., *The United Nations and The Somali Question: the Transformation Process from Colony to Independence*, op. cit., pp. 191 - 194

[297] However, in the words of Giorgi and Morone, the "*Italian trusteeship in Somalia was understood as the proof of reparation that Italy had at its disposal to redeem itself from a past that was never condemned*". See Giorgi C., Morone A. M., *Colonie celebrate, colonie dimenticate. L'unità d'Italia e l'Africa*, in "Le Carte e la Storia", Fascicolo 1, Il Mulino, 2011, p. 87. For an in-depth analysis of

independence over a ten-year period[298]. The Italian Trust Administration of Somalia was a *sui generis* agreement, almost perceived to be as a "*testing ground*" for the trusteeship administration system, as a means for the peaceful achievement of independence of the former colonial territories[299].

In fact, a different procedure was followed for the establishment of the Trusteeship system and Somaliland represented a quite peculiar case of former colonial territory which was not going to be administered under the *UN Trusteeship* by the same authority which was already in control of the territory[300].

In addition, the decision to place Somaliland under the Italian administration was not triggered by the voluntary decision of the Administering Authority, while it had rather arisen from the United Nations, placing unusual responsibilities on the U.N. for this process[301].

The Italian Trust Administration over Somaliland was established following the inverse procedure used for other trusteeship territories established ex art. 77 of the Charter of the United Nations and Statute of the International Court of Justice[302],

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Italy's return to Africa with the Trusteeship of Somalia and the failure of the Italian government to condemn its dark colonial past, see also Morone A. M., *La fine del colonialismo italiano tra storia e memoria*, Dossier Storicamente 12, 2016

[298] Besides Somalia, other African territories under UN Trusteeship System were: French Cameron, British Cameron, British Tanganyika, French Togo, British Togo, Belgian Ruanda-Urundi

[299] See Socini R., Fischer G., *La tutelle italienne sur la Somalie*, in "Annuaire Français de Droit International", volume 2, 1956, pp. 572

[300] Since Britain was officially administering the territory since 1941

[301] See Finkelstein L. S., *Somaliland under Italian administration: a case study in United Nations Trusteeship*, Woodrow Wilson Foundation, New York, 1955, p. 6

[302] According to art. 77 of the Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945:

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate; b. territories which may be detached from enemy states as a result of the Second World War; and c. territories voluntarily placed under the system by states responsible for their administration. 2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms. Italy and Japan were considered territories under category b.

for which the agreements for trust administrations are designed by the States involved and approved by the UN General Assembly, in agreement with the Trusteeship Council[303] (or the Security Council in case of strategic territories).

Whilst, in the case of Italian Somaliland, the project was designed by the Council of Trusteeship Administration, the State involved ratified it, and the UN did not only approve it, but was also part of the Agreement.

As ultimate goal, the Charter envisaged the independence of those territories – as occurred for the former mandates of Syria, Lebanon, Iraq, East Bank, Palestine, Libia, Eritrea [304].

At the time when the UN Trusteeship Administration over Italian Somalia was agreed, Italy was the only administering country which was not a member of the United Nations, admitted only in 1955. This specificity confined Italy in a less advantageous position within the Trusteeship Council[305].

To better understand the main spirit of the Trusteeship system implemented in the Italian Somaliland, it is worth noting that the system of UN *Trusteeship* is legally

[303] See Chapter XII of the UN Charter, artt. 86-91. According to art. 86, the Trusteeship Council shall include those members administering trust territories; those Members mentioned by name in Article 23 as are not administering trust territories (The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America); and as many other Members elected for threeyear terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not. Although Italy was initially not part of the UN, it was authorized in 1952 the Italian participation, without voting power, to the meetings of the Trusteeship Council when regarding Somalia. See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* Quaderni della Pubblica Amministrazione, Milano, Dott. Antonino Giuffrè, 1954, p. 10-11

[304] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* Quaderni della Pubblica Amministrazione, Milano, Dott. Antonino Giuffrè, 1954, p. 5

[305] See Socini R., Fischer G., *La tutelle italienne sur la Somalie*, in "Annuaire Français de Droit International", volume 2, 1956, pp. 576

closer to the British institute of private law known as "*trust*", and the French "*tutelle*"[306].

According to art. 76 of the UN Charter[307], the main objectives of the *Trusteeship* system are:

> *a. to further international peace and security;*
> *b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;*
> *c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and*
> *d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.*

A trifold relation was envisaged, with two prominent powers holding duties towards a third power, the Administered Territory. Therefore, the UN had a supervision role for the achievement of the goals established by art. 76 of the Charter, and for the right of the involved States to modify the agreements; the *fiduciary* or Administering Authority, having a limited authority for the scope of the trusteeship;

[306] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.)*, Quaderni della Pubblica Amministrazione, Milano, Dott. Antonino Giuffrè, 1954, p. 6-7

[307] See Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945

the *beneficiary* or Territory under trusteeship, having the safeguarded right to achieve independence or autonomy, as foreseen by art. 76 of the UN Charter[308].

The text of the *Draft Trusteeship Agreement for the Territory of Somaliland under Italian Administration*, as drafted by the Committee and with a few changes introduced by the Trusteeship Council, was approved on 27 January 1950 by the Trusteeship Council[309]; it was made up of 25 Articles and included an annex containing the Declaration of Constitutional Principles. It was approved by the General Assembly on 27 December 1950 and introduced in the Italian legal system in 1951, by the law N. 1301 of 4 November, with disposition of direct implementation[310].

As explained in article 1 of the Annexed Declaration of Constitutional Principles, the Trusteeship was intended to guarantee the sovereignty of the Territory to its people, while the Administering Authority would exercise it on their behalf[311].

In fact, as per art. 3 of the annexed Declaration, the Administrator was the chief executive officer of the Territory, also holding the legislative power, in consultation

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[308] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* Quaderni della Pubblica Amministrazione, Milano, Dott. Antonino Giuffrè, 1954, p. 7-8

[309] As Finkelstein reminds us, the Trusteeship Council had an active role in negotiating the terms of the Agreements with Italy for the Italian Somaliland, giving to the United Nations a greater voice in this process that in other trusteeship agreements. In fact, Italy had presented a draft proposal for agreement, but also the Philippines had presented a draft and the Dominican Republic had presented a *set of suggestions* (these countries were two out of the three non-administering states which were represented in the drafting committee, appointed by the Trusteeship Council). In other cases, the Administering Authorities would draft and submit a proposal for consideration to the General Assembly or the Security Council, retaining full control over its content; in those cases, the United Nations would only have the power to reject it entirely in case of inadequacy. See Finkelstein L. S., *Somaliland under Italian administration: a case study in United Nations Trusteeship*, Woodrow Wilson Foundation, New York, 1955, p. 6-7

[310] See Socini R., Fischer G., *La tutelle italienne sur la Somalie*, in "Annuaire Français de Droit International", volume 2, 1956, p. 573 and Trunji M., *The United Nations and The Somali Question: the Transformation Process from Colony to Independence*, op. cit., p. 194

[311] See Art. 1 of the Declaration of Constitutional Principles, Annex to the Draft Trusteeship Agreement for the Territory of Somaliland under Italian Administration, Special Report of the Trusteeship Council, General Assembly, Official Records: Fifth session, Supplement No. 10 (A/1294), Lake Success, New York, 1950

with the Territorial Council composed of inhabitants of the Territory and representative of the people, until the election of a legislative Assembly (ex art. 4). Moreover, ex art. 7[312], the Administering Authority was to establish an independent judicial system, ensuring that representatives of the indigenous population would progressively acquire additional judicial functions.

The same article even prescribed that the Administering Authority was to apply, as appropriate, territorial legislation, Islamic law, and customary law.

Further reference to the traditional legal systems can be found in article 9 of the annexed Declaration; there, in addition to stating that the Administering Authority was to guarantee full civil rights, as well as such political rights to ensure the political, social, economic and educational development of the inhabitants and of a democratic representative system, it was also stated that due regard was to be paid to the traditional institutions.

The legal aspects of the Trusteeship Agreement for Italian Somaliland recalled in many aspects, other Trusteeship Agreements designed for different territories and agreed with other countries such as the United Kingdom, Belgium, France, Australia, New Zealand, and the US[313], referring for example to the specific dispositions included in Chapters XII and XIII of the UN Charter.

However, as previously mentioned, the Agreement for Italian Somaliland was considered a *sui generis* agreement, mainly due to some specific factors foreseen by the Agreement[314].

In fact, the Italian Administering Authority was to have *full powers of legislation, administration and jurisdiction in the Territory, subject to the provisions of the Charter of the United Nations* and was to apply *temporarily* and with the necessary

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[312] Art. 7 of the Annexed Declaration of Constitutional Principles provided for the following: "*The Administering Authority shall establish a judicial system and shall ensure the absolute independence of the judiciary. The Administering Authority shall also ensure that representatives of the indigenous population be progressively entrusted with judicial functions and that the jurisdiction of courts of first instance be progressively increased. As may be appropriate in each case, the Administering Authority shall apply territorial legislation, Islamic law and customary law*".

[313] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit, p. 15

[314] See Socini R., Fischer G., *La tutelle italienne sur la Somalie*, in "Annuaire Français de Droit International", volume 2, 1956, p. 574

modifications, *such Italian laws as are appropriate to the conditions and needs of the Territory and as are not incompatible with the attainment of its independence*[315].
The mandate of the provisional Italian Administration actually started before the Trusteeship Agreement came into force, and the Trusteeship Council acted swiftly in appointing the drafting committee[316]
In addition, the Agreement was designed with a fixed term of 10 years after the approval of the Trusteeship Agreement by the UN General Assembly, during which the former colony was to build adequate institutions in order to reach its political independence and become a sovereign State[317]. For the other powers, no limit was foreseen until the end of the Trusteeship Agreements.
However, as claimed by Finkelstein, *the ten year limit on the trusteeship period was unique and reflected, not only a political decision which was part of the overall solution of the problem of the Italian colonies, but also a desire to impose special conditions on the administration and special responsibilities on Italy which, as an ex-enemy power and non-member of the United Nations, was receiving a special dispensation by being permitted to administer a trust territory*[318].
The Italian Trusteeship mandate approved by the General Assembly of the United Nations was set to start 2 December 1950, and the end date independence of Somalia was then fixed after exactly ten years, on 2 December 1960. However, the end date was eventually anticipated to 1st July 1960[319].

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[315] See art. 7 of the Draft Trusteeship Agreement for the Territory of Somaliland under Italian Administration

[316] The two former colonial powers, Italy and Britain, were eager to speed up the process before May 1850, avoiding a prolongation of an additional year. However, it was quite uncommon to approve a provisional administration before the actual agreement was approved. See Finkelstein L. S., *Somaliland under Italian administration: a case study in United Nations Trusteeship*, Woodrow Wilson Foundation, New York, 1955, p. 6

[317] As provided by art. 3 and art. 24 of the Trusteeship Agreement

[318] Finkelstein L. S., *Somaliland under Italian administration: a case study in United Nations Trusteeship*, op. cit., p. 6

[319] On this point, Gasbarri reminds us how Italy had even declared the will to bring it forward to 1957 if the Somalis and the UN Trusteeship Council had not expressed a different opinion. See Gasbarri L., *L'AFIS (Amministrazione Fiduciaria Italiana della Somalia – 1950-1960): UNA*

Another specific feature of the Trusteeship Agreement over the former Italian Somaliland was the creation of the Advisory Council, composed of representatives from Colombia, Egypt and the Philippines, with headquarters in Mogadishu, with the purpose of advising and aiding the Administering Authority[320]. This body was absent from other trusteeship agreements, where other Administering States held more discretionary powers.

It had been specifically created for the Italian Trusteeship Agreement and could be considered as a constraint for the Italian Administering Authority.

Another point addressed by the Agreement, representing a turning point from older colonialism approach of "exclusive rights" over a territory, is the provision prescribed by art. 15 related to the equal treatment of other UN Member States and their citizens in the Somali territory, enforcing the "open door" principle strongly claimed by the United States against the resistance of the colonial powers[321].

PAGINA DI STORIA ITALIANA DA RICORDARE, in "Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente", Anno 41, No. 1 (marzo 1986), Istituto Italiano per l'Africa e l'Oriente (IsIAO), 1986, p. 75. Indeed, the possibility of Somali independence occurring even before the official end of the trusteeship had already been affirmed in 1957 by the Somali Administrators, confirming their intention to consider the inspiration of the Somali Legislative Assembly and the Somali government. In fact, in the session of 25 August 1959, the Somali Legislative Assembly deliberated on the motion addressed to the Administrator of Somalia to make representation to the administering power of the unanimous desire of the Somali people for the request to obtain full independence as soon as possible, in derogation of art. 24 of the Trusteeship agreement, which provided for the end of the mandate on 2 December 1960. The Italian government pronounced itself in favour of the motion. The request was approved by the UN General Assembly on 5 December 1959. See Segni A., *L'Amministrazione Fiduciaria della Somalia e rapporti dell'Italia con la Repubblica somala. Relazione presentata al Parlamento Italiano dal Ministro per gli Affari Esteri On. Antonio Segni*, Repubblica italiana, Ministero degli Affari Esteri, Roma, ottobre 1961, pp. 115 - 118

[320] As prescribed by art. 2 of the Trusteeship Agreement

[321] As per art. 15 of the Draft Trusteeship Agreement: "[…] the Administering Authority shall take all necessary steps to ensure equal treatment in social, economic, industrial and commercial matters for all States Members of the United Nations and their nationals and for its own nationals, […]". See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., pp. 18-19

Finally, the main feature peculiar to the Italian Agreement was the Annexed Declaration of Constitutional Principles (with some of its articles already mentioned in this paragraph), considered as an integral part of the trusteeship agreement. The annexed declaration provided that the Administering authority should accept as a *standard of achievement for the Territory* the Universal Declaration of Human Rights and should guarantee human, civil and political rights to everyone, as well as fundamental freedoms and equality for all[322].

3.3 Legal aspects of the Trusteeship Agreement for the Territory of Somaliland under Italian Administration

As mentioned in the previous paragraph, according to art. 7 of the Trusteeship Agreement for Italian Somaliland, Italy had full legislative, administrative, and jurisdictional powers over the former colonial territory, with the power to temporarily apply Italian laws, adjusted to the context as needed, as long as they were not incompatible with the attainment of the future independence of the territory under trusteeship.

The study of the legal system applicable to the former Italian Somaliland under the Trusteeship Administration must therefore take into account its basic principles, based on the temporary timeframe of application of ten years, as well as the parallel increasing development of the Somali legal system, together with the gradual fading of the interference of the Administering Authority over the developing legal system.

In fact, the legal framework applicable to the former Italian Somaliland as articulated by Meregazzi and based on the premise that Somalia was not part of the Italian State, envisioned that the latter would temporarily "lend" its legal system to Somalia, with the necessary adaptations.

The process of legal implementation could be considered similar to what had happened in Italian East Africa and Libya, in which case some general legal

[322] As provided by articles 8-9-10 of the annexed declaration

principles had been identified as part of the general law of the State, hence, to be deemed directly attributable to the African territories without a formal extension.
In the case of Somalia, the general legal principles and the general laws of the Italian legal system were considered implicitly referable also to Somalia, while any Italian law should have been specifically extended to the territory to be applicable in Somalia[323].
This was feasible on the assumption that the more mature Italian legal system should "bridge the gaps" in the legal system in the process of being made, while the progressive development of the Somali legal system would gradually be perfected, decreasing its dependence on the Italian legal support and reaching a point of autonomy with the creation of adequate institutions[324].
Meanwhile, the interference of Italy, who had full responsibility for the formation of the Somali legal system in line with the Agreement and the annexed Declaration of Constitutional Principles[325], in the three spheres of legislative, administrative and judiciary powers, would gradually diminish until it disappeared.
In particular, the legislative power was to be exercised by Italy until the Somali Legislative Assembly was created.
The Italian Administration[326] had initially provided for a transitional arrangement of the legal system, by means of an Ordinance in 1950[327], through which it

[323] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., p. 153

[324] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 27-28

[325] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., *ibidem*

[326] Four Administrators were sent to Somalia: Giovanni Fornari (1950-1953), Enrico Martino (1954-1957), Enrico Anzillotti (1957-1958) and Mario Di Stefano (1958-1960). See Pandolfo M., *Gli italo-somali dell'Amministrazione Fiduciaria Italiana della Somalia (AFIS): una memoria dimenticata tra le pagine dell'Italia postcoloniale*, op. cit., p. 2

[327] Ordinanza 12 Aprile 1950, No.5

abrogated several Proclamations of the British Authority[328], although some others were kept in force, in particular in fiscal matters[329].

This ordinance was mainly necessary to avoid a legislative vacuum that would necessarily occur when the Trusteeship Administering Authority took over the British military occupation.

Art. 1 of the ordinance stipulated that the legal norms in force in the territory at the date of 31 March 1950, including those emanated by the British Administration before and after the Peace Treaty of 1947, although excluding those repealed under art. 4 of the same ordinance, would continue to apply, until they would be repealed, suspended or amended.

This meant that the laws in force in Somalia during the Italian colonial administration, including the modifications brought by the occupying British Administration, would be adopted by the new Somali legal system, allowing in this way the continuity of the legal regime even during the British occupation period and in the aftermath of the signature of the Peace Treaty[330].

With Law No. 1301 4 November 1951[331], the Trusteeship Agreement and annexed Declaration were ratified and entered into force as part of the Somali legal system under Trusteeship Administration. We support the interpretation provided by Meregazzi according to which, since becoming part of the internal legal system, they exercised immediate legal effect, therefore repealing or implicitly amending all provisions of the previous system enforced that were incompatible with them[332].

In line with the provisions of the Agreement, it was extended to the Somali territory the application of the Italian Civil Code, the Civil Procedure Code[333], and

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[328] Which we remember had been formally administrating the territory since 1941 and until the administration was entrusted by the U. N. to Italy in 1950

[329] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 33

[330] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 34

[331] LEGGE 4 novembre 1951, n. 1301: Ratifica ed esecuzione dell'Accordo di tutela per il territorio della Somalia sotto amministrazione italiana, concluso a Ginevra con il Consiglio per l'Amministrazione fiduciaria delle Nazioni Unite il 27 gennaio 1950 ed approvato dall'Assemblea generale delle Nazioni Unite il 2 dicembre 1950

[332] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 34

[333] These codes were introduced by Ordinance No. 146 of 1950

bankruptcy law. According to this principle, the approach therefore shifted from "Italian law applicable to Somalia" to "territorial laws of Italian origin in force in the administered territory", applicable to individuals of Islamic confession, as an alternative to local norms[334].

In addition, as per Ordinance No. 5 1950, the Italian criminal code and criminal procedure code were still applicable in Somalia, as well as the Libyan Merchant Marine Code, that were extended to Somalia in 1936.

However, it is important to mention that in matters related to private law, exclusively for the natives to whom the same personal status law applied, the legislation confirmed the previously applicable one, therefore *Shari'ah* of *Shafi'i* rite, and the customary law (*testur*) were deemed applicable to legal relations between natives, and presumed to be concluded according to these rules. The *qadi* was therefore competent to rule in such cases[335].

The Italian government, differently from what was done for Libya and the Italian East Africa where organic laws and the relative political-administrative set of rules meticulously regulated the activities of the administration, did not issue a complete legal system for Somalia, while it only laid the foundations of the Italian Trust Administration through three Presidential Decrees issued in 1953, based on the delegation contained in Law No. 1301 of 4 November 1951, which marked the beginning of a new phase of the Italian Trusteeship Administration in Somalia.

[334] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., p. 154

[335] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 35 – 36

The Presidential Decrees No. 2357[336], 2358[337] and 2359[338] established the functions of the Administrator and the main bodies of the Trust Administration. They also provided that legislative measures were to be promulgated by the Administrator by means of ordinances and regulations by means of decrees, that an Administrative Committee was to be established as an advisory body to the Administrator and that a judicial system was to be established, including the creation of a Court of Justice. The decrees also established the administrative accounting system of the Administration, providing that the annual budget was to be submitted to the Territorial Council, therefore to the Assembly of Somalis. Finally, they regulated the employment of Italian personnel in Somalia[339].

Adopting the approach of the "*rinvio ricettizio per soli principi generali*" (deferral only for general principles), the government did not directly determine the guiding principles, but referred to those laid down in the *Agreement*, setting a one-year time limit from the entry into force of the above-mentioned Law No. 1301 of 4 November 1951. Thus, from December 1952, the legislative power for the Trusteeship Administration was hold by the Administrator of Somalia[340].

We shall also proceed to analyse the central organisation of the Italian trusteeship in Somalia.

The main authority of the Trusteeship was the Administrator, with headquarters in Mogadishu. He was appointed by decree of the President of the Republic, at the

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[336] DECRETO DEL PRESIDENTE DELLA REPUBBLICA 9 dicembre 1952, n. 2357 Attribuzioni dell'Amministratore e degli altri organi fondamentali dell'Amministrazione Fiduciaria italiana della Somalia (A.F.I.S.)

[337] DECRETO DEL PRESIDENTE DELLA REPUBBLICA 9 dicembre 1952, n. 2358 Ordinamento amministrativo-contabile dell'Amministrazione Fiduciaria italiana della Somalia (A.F.I.S.)

[338] DECRETO DEL PRESIDENTE DELLA REPUBBLICA 9 dicembre 1952, n. 2359 Ordinamento del personale dello Stato italiano in servizio presso l'Amministrazione Fiduciaria italiana della Somalia (A.F.I.S.)

[339] See Ministero degli Affari Esteri, *L'amministrazione fiduciaria della Somalia e i rapporti dell'Italia con la Repubblica Somala: Relazione presentata al Parlamento Italiano dal Ministro per gli Affari Esteri on. Antonio Segni*, Comitato per la Documentazione dell'Opera dell'Italia in Africa, Roma, 1961, pp. 27 - 28

[340] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 37

proposal of the Prime Minister, in agreement with the Italian Minister for Foreign Affairs and in consultation with the Council of Ministers[341]. Although ex. Art 2 of the *Agreement* the Administrator represented the Italian Government, he was in all respects an organ of the Italian State. The Administrator also held a dual function, being both an organ of the Italian state and the supreme organ of the Somali state in the making.

Ex articles 4 and 5 of the Annex to the Agreement, the administrator was to exercise legislative power, while only 'in exceptional circumstances' he had regulatory power, with the possibility to promulgate ordinances after consultation with the Advisory Council. The only limitations encountered by the Administrator were those laid down by the constitutional norms of the Somali legal system[342].

In addition, the Administrator held executive powers[343]. He was the Head of the Administration[344], held the supreme powers of government and lead the armed forces[345], granting pardons and commuting penalties, and appointed the Territorial Council[346]. However, in the field of international relations, the Administrator was subordinate[347] to the Minister for Foreign Affairs of the Italian government and

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[341] Ex Art. 4 of Law No. 1301

[342] An interesting point is raised in this respect by Meregazzi. In fact, arguing that in the Somali legal system there was no Court holding similar powers as the Italian Constitutional Court, in the internal legal system the Ordinances promulgated by the Administrator were not subject to controls of the judicial authority, nor were they contestable before the administrative judiciary bodies. Therefore, in the remote case in which an ordinance of the administrator was contrary to the rules of the annex and the agreement, there would only be a liability of the Italian State in the international sphere, but not of the administration in the domestic sphere because it could not be directly contestable. See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 38

[343] As per art. 3 of the annex, the Administrator *shall be the Chief Executive Officer of the Territory*

[344] Ex art. 9 of the Presidential Decree No. 2357

[345] Ex art. 10 of the Presidential Decree No. 2357

[346] Ex art. 4 of the Annex, composed of inhabitants of the Territory and representative of its people

[347] This was a *sui generis* hierarchical dependency, as argued by Meregazzi, related mainly to the position held by the Administrator as body of the Italian State and since the Italian State was internationally liable for his acts. See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 49

could not entertain diplomatic relations, including with the U. N., except for the U. N. Consultative Council. The Italian Minister for Foreign Affairs exercised managerial and supervisory powers over the Administrator.

Other important roles in the Trusteeship Administration were held by the Secretary General, assisting the Administrator, and the Military Commander. They were both appointed directly under the administrator's authority, while the Secretary General could cover his functions in the Administrator's absence[348].

With regard to financial management, the accounting management was completely entrusted to local bodies, fully implementing decentralisation in view of the country's future independence[349].

The Ministry of Foreign Affairs and the Ministry of the Treasury only received 'in communication' the final balance sheet approved by the Administrator, being only able to carry out audits and inspections.

The bureaucratic organisation of the Trusteeship was then divided into Directorates[350]: Administrator's Cabinet, Directorate of Internal Affairs, Directorate of Financial Affairs, Directorate of Legislation and Judicial Affairs, Directorate of Economic Development, Directorate of Social Development, Directorate of Personnel and General Affairs.

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[348] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 51

[349] The Italian State initially covered a large part of the expenses of the Trusteeship Administration through an annual contribution. However, one of the main challenges of the Trusteeship was to ensure the financial self-sufficiency of the country, considering its economic conditions. Somalia's tax system at the time was based in part on the pre-war regulations, in part on the "Proclamations" introduced by the British Administration, that were kept in force by the Italian Trusteeship, and in part on the Administrator's Ordinances. In particular, the tax system was based on *direct taxation*, which provided for progressive taxes on income, levied by the Central Office, taxes on huts and taxes on 'sciambe', that is cultivated land of the local population, levied directly by the Residents (judges). On the other hand, *indirect taxation* consisted of revenues of various kinds, such as customs duties, sanitary duties, harbour dues, manufacturing taxes on alcohol and sugar, and the monopoly on tobacco and matches. See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.)*, op. cit., p. 71 - 78

[350] See Table 2 - Bureaucratic Organisation of the Trust Territory of Somaliland under Italian Administration

The Trust also provided for advisory bodies with both political-representative functions and technical-administrative ones.

In particular, both the Advisory Council, foreseen in the Agreement and its Annex, and the Territorial Council had political and representative functions.

The Advisory Council, as regulated by Articles 2, 8, 9, 10, 11, 14 of the Agreement and Article 5 of the Annex, was composed of permanent representatives of three States, Colombia, the Philippines, and Egypt[351], and was provided with the task of assisting and advising the Administrative Authority throughout the duration of the Trusteeship.

The opinions developed by the Advisory Council were compulsory without being binding on the Administrator, who was therefore called upon to decide "at his own discretion and on his own responsibility", the Italian state alone being internationally responsible for its obligations on the Administration of the Trust Territory of Somalia.

In several circumstances the Administrator was bound to consult the Advisory Council: for the issuance of Exceptional Ordinances, and also on various aspects concerning the achievement and consolidation of Somalia's autonomy, including the establishment of local and governmental bodies, its economic and financial development, the social advancement and organisation of labour, the transfer of governmental functions to the future independent government of Somalia[352].

The Territorial Council was instead provided by art. 4 of the Annex[353] and intended to represent the inhabitants of the Territory. It was composed of representatives of the population, with various functions, including a legislative role of consultation

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[351] For a very detailed analysis of Egypt's influence in the construction of Somali nationalism, see Morone A. M., *L'Egitto di Nasser e la formazione dello stato somalo. Influenze politiche, interazioni culturali e identità nazionale*, in "Contemporanea", Fascicolo 4, Il Mulino, 2010, pp. 649 - 679

[352] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 60 - 62

[353] Ex. art. 4 of the Annex, in fact: "*The Administrator shall appoint a Territorial Council, composed of inhabitants of the Territory and representative of its people. In all matters other than defence and foreign affairs the Administrator shall consult the Territorial Council. The legislative authority shall normally be exercised by the Administrator, after consultation with the Territorial Council, until such time as an elective legislature has been established".*

with the Administrator until a legislative Assembly was established. The Territorial Council was to be consulted by the Administrator in all matter other than defence and Foreign Affairs.

It was presided by the Administrator or by the General Secretary and its membership was divided among representatives of the various components of the population, serving for one year. The members were appointed by the Administrator, based on a mixed system of elections and nominations on a double list, respecting five types of representation: political, regional, economic, cultural and of the minority groups present in the Territory. One seat was allocated to each party having at least five official sections in the territory, and an additional seat for every twenty-five sections active; for regional representation, one seat was allocated every 70,000 inhabitants, but the number also varied according to the size of the districts and regions; for economic representation, four seats were allocated to Somalis, three to Italians and one to Arabs; one seat was assigned for cultural representation; and finally, three seats were allocated to minorities, divided between Italians, Arabs and Indo-Pakistanis. The only restrictions on the number of members were on the number of political seats, which had to be at least half of the regional seats, and non-Somali members could not exceed one third of the total number of members[354].

Finally, an important aspect to be considered about the Territorial Council was provided for in Art. 14 of the agreement, namely that although the Council's opinions were not binding for the Administrator, the latter could not allow the acquisition of any rights to Somali land by foreigners or companies controlled by foreigners without the consent of a two-thirds majority of the Territorial Council, unless they were in leasehold for a period fixed by law.

Still in accordance with art. 14 of the Agreement, in order to promote the economic and social advancement of the indigenous population, the Administration was supposed to respect the laws and customs of the indigenous population, respect their

[354] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 55 - 56

rights and safeguard their interests when framing laws relating to the holding or alienation of land or other natural resources[355].

With regard to technical and administrative advisory bodies, the Trust provided for the Administrative Committee, the Somali Economic Council, the Health Council, the Technical Council, the Experts' Commission, Consultative Commission, the Prices' Committee and the Central Council for Education.

Among these, the Administrative Committee was considered as an advisory body to the Administrator, having vicarious functions of governance. In the absence of the Administrator and the Secretary General, this collective body could carry out ordinary administration and adopt emergency measures. The Administrative Committee was composed of eight officials chosen directly by the Administrator[356].

At local level, as seen above, the Italian Trusteeship provided for a strong decentralisation in view of the country's attainment of independence at the end of the Trusteeship period. The territorial political-administrative organisation provided for the creation of municipal administrations in the major urban centres, that overlapped with the local tribal structures, following the clan and sub-clan structures, *tol* and *rer* groupings, which we have seen in chapter two.

The territory was subdivided into six Commissariats and 21 Residences, which were responsible for the governance, administrative and financial management of the territory, as well as the coordination of the administrative bodies operating in the district[357]. The Commissioner oversaw the management of the political, economic and social life of the district.

At each Residence there was also a Residence Council, in which the territorial groups, represented by clan chiefs and elders, were called upon to participate, and which gave opinions on matters of agriculture, livestock, transhumance, public

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[355] Ex art. 14 of the Agreement. See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 59 - 60

[356] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., pp. 62 - 67

[357] See Table 3 - Administrative and political territorial organisation of the Trust Territory of Somaliland under Italian Administration. Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., pp. 101 - 103

works, taxation, and education. It is worth to notice that in addition to representatives of the political parties, the Residence Councils also included representatives of tribal chiefs, both hereditary and elected in the customary *scirs*. In contrast, representatives of minorities (Italians, Arabs and Indo-Pakistani), were only provided for in the Municipal Councils, chosen by the administrator from lists proposed by each community. The feature to be noted about the Municipal Councils is the fact that starting from 1953[358], they were reorganised to foresee direct universal male suffrage elections, as the first large-scale elective experiment outside the traditional tribal structures.

3.4 Reorganisation of the judicial system in Somalia under the Trusteeship Administration

With regard to the judicial system in force in the territory of Somalia, with the beginning of the Italian Trusteeship the structure initially in force was based on the 1935 system[359] with relevant amendments made by the Administrator and adaptations to the principles set out in the *Annex*.

Indeed, in order to reform the judicial system looking at the future independence of the country, it was necessary that the jurisdictional functions at local level, previously entrusted to the figures of the Commissioners and Residents[360] holding also governmental functions, be made independent of the executive and entrusted to an independent judiciary.

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[358] See O.A. No. 18 of 20 December 1953. See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., pp. 104 - 109

[359] REGIO DECRETO 20 giugno 1935, n. 1638, Ordinamento giudiziario per la Somalia Italiana

[360] See, *inter alia*, artt. 1, 3, 4 of REGIO DECRETO 20 giugno 1935, n. 1638, Ordinamento giudiziario per la Somalia Italiana

A first adaptation was provided for in art. 14 of the Presidential Decree No. 2357 of 1952[361], in accordance with art. 7 of the Annex.

Ordinance N. 7 of 22 May 1953[362] established a regional judge in the regional capital of each Commissariat, chosen from among the magistrates.

However, in the absence of magistrates, the Ordinance provided that civil servants employed by the Italian Trust Administration could be appointed as regional judges.

Article 4[363] enshrined the independence of the regional judge and, in case a civil servant was appointed in charge of judicial functions, it claimed the incompatibility with any other role in administrative offices.

The regional judge would exercise the functions hitherto attributed to the Resident in criminal matters and to the regional commissioner in civil and criminal matters, as well as presiding over the *Qadi* court in criminal matters[364].

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[361] See art. 14 of the Presidential Decree No. 2357 of 1952: "*L'Ordinamento giudiziario della Somalia previsto dall'art. 7 della Dichiarazione annessa all'Accordo di tutela, sara' istituito con ordinanza dell'Amministratore in armonia con i principi stabiliti in detto articolo. Tale Ordinamento dovra' prevedere: 1) l'istituzione di una Corte di giustizia allo scopo di assicurare l'esatta osservanza e l'uniforme interpretazione della legge, il rispetto dei limiti delle diverse giurisdizioni e di regolare i conflitti di competenza e di decidere tutte le questioni di giurisdizione; 2) l'attribuzione alla predetta Corte della cognizione anche dei ricorsi per incompetenza, eccesso di potere e violazione di legge avverso i provvedimenti definitivi dell'Amministrazione che abbiano per oggetto interessi legittimi di individui e di enti; 3) l'attribuzione alla Corte stessa, in Sezione speciale, della cognizione dei giudizi in conto, di responsabilita', di pensione e degli altri giudizi in materie analoghe; 4) l'istituzione degli organi necessari per assicurare l'indipendenza dei giudici e per vigilare sul funzionamento della giustizia*".

[362] Ordinanza No. 7 rep. del 22 maggio 1953: Istituzione del giudice regionale, in Bollettino Ufficiale dell'Amministrazione Fiduciaria Italiana della Somalia, 20 June 1953

[363] Ex art. 4: "*Il giudice regionale è indipendente. Pertanto i funzionari dell'Amministrazione Fiduciaria Italiana in Somalia che sono incaricati, […], di esercitare le funzioni di giudice regionale, non possono, durante il periodo delle loro funzioni giudiziarie, essere addetti al alcun ufficio amministrativo*".

[364] Ex art. 5, comma 1, 2 and 3: *"Il giudice regionale esercita, nei limiti assegnati dalle leggi, le funzioni attribuite, dal vigente ordinamento giudiziario in Somalia, al residente in materia penale, al commissario regionale in materia civile e penale. Il giudice regionale presiede il tribunale dei Qadi in materia penale, […]. Contro le sentenze del giudice regionale, […], è ammesso appello al giudice della Somalia*".

It should be noted that, pursuant to Article 10[365] of the Ordinance, the regional judge was also called upon to enforce the judgements in criminal matters and within his jurisdiction, while the Resident was called upon to enforce the judgments announced by the *Qadi* in first instance and which had become enforceable.

The *dual judicial system* in place during colonial period, was still applicable, with a judiciary system competent for cases involving Somalis and assimilated foreigners to which the same personal status law would apply, and another one competent to decide on cases involving at least one Italian party, or assimilated foreigners. The *composition of the common judicial bodies changed according to whoever was involved in the dispute*[366].

For Somali citizens and all assimilated foreigners, the legal relations were therefore subject to Islamic and customary law.

The unique civil and criminal judge of first instance was the *Qadi*, competent to solve the disputes using the local procedural rules. The career of the *Qadi* was accessible through a public exam and subsequent appointment by the administrator. Appeals against the *Qadi*'s rulings were allowed to the *Court of Qadi*, a court of second instance presided by the regional judge and composed of the regional *Qadi*, and four other *Qadi*, two experts in civil matters and two in criminal matters.

In matters related to customary law, two additional *Qadis* from among those paid by the tribes, could be called to join the court by the regional judge.

The Resident, on the other hand, was the judge of first instance in civil matters in cases where the parties were mixed, i.e. a Somali or Somali-assimilated and an Italian or foreign party, and for cases whose value did not exceed Lire 10,000.

The regional judge ruled as a single judge in first and second instance, both in civil and criminal matters. In civil matters, his jurisdiction lay in cases up to a value of Lire 100,000.

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[365] Ex art. 10: "*Spetta al giudice regionale l'esecuzione delle sentenze e di ogni altro provvedimento emesso nei procedimenti penali di sua competenza. I residenti provvedono alla esecuzione delle sentenze emesse dai Qadi in primo grado e divenute esecutive*".

[366] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., p. 154

He then acted in second instance against the judgments of the Residents.

In criminal matters, the Regional Judge ruled for cases involving offences committed by Somalis against Italian citizens or assimilated foreigners, or for offences committed by Somali military or administrative personnel, or for offences committed against them by other Somali citizens, and which did not fall within the jurisdiction of the *Qadi*, the Assize Court or the Regional Court[367].

In judgments before the Regional Judge, the defendants were called upon to be assisted by a defender of trust or public defender assigned ex officio, chosen from among the technical-administrative or security corps officials, or from personalities whom the judge recognised as being capable of assuming the task.

Other judicial functions for the Somali judicial system were held by the Regional Court and by the *Judge for Somalia*.

The Regional Commissioner presided over the Regional Court, together with an Italian and a Somali assessor, proposed by the *Judge for Somalia*, and a prominent local person with an advisory role could be included.

The Regional Court's jurisdiction ranged over various issues including collective disputes between clans and tribes or villages, particularly on issues such as access to land for water and grazing; smuggling of weapons; assaults on caravans or armed departments of the Administration; and offences committed by or against local leaders while performing their duties.

Significantly, the Regional Court also had the power to impose penalties in addition to the common ones, such as confiscation of property or collective contribution[368].

In judgments before the Regional Courts of other districts, as in cases before the Regional Judge, the defendants were called upon to be assisted by a defender of trust or public defender assigned ex officio, chosen from among the technical-administrative or security corps officials, or from personalities whom the judge recognised as being capable of assuming the task. In proceedings before the

[367] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., pp. 122 - 123

[368] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 124

Regional Court of Mogadishu, the defendants had to be assisted by a lawyer of their choice or assigned ex officio.

Appeals against judgments of the Regional Court could be submitted directly to the Administrator, who could request the opinion of the *Judge for Somalia*.

The *Judge for Somalia*, a single civil and criminal judge centralised in Mogadishu, was conceived as a judge of first and second instance.

As a judge of first instance, he had the same jurisdiction in civil and criminal matters as the Regional Judge, but only for cases with a value of more than Lire 100,000; in that case, his judgements were appealable directly to the Court of Appeal in Rome.

As a judge of second instance, he was responsible for appeals against the judgements of the Regional Judge, both in civil and criminal matters.

In judgments before the Judge for Somalia, the defendants had to be assisted by a lawyer of their choice or assigned ex officio.

The Judge for Somalia could also act as *Magistrate for economic disputes*, in cases of refusal of permits by the Trusteeship Administration for the exercise of an economic activity for which it was necessary to submit an application to the Trusteeship Administration, for example for the establishment of industries with at least 30 employees, for trucking companies with at least 10 vehicles, for import and export companies and for wholesale trade[369].

In criminal matters, the *Assise Court* and the *Assise Court of Appeal* were competent, both collegiate criminal judicial bodies.

The *Assise Court*, a judicial body of first instance, was presided over by the *Deputy Judge for Somalia* and six assessors, both Italian and *indigenous*, four of whom were Somali if the defendants were all Somalis or assimilated, or only two Somali if one of the parties was non-Somali. The Assise Court was called upon to judge crimes outside the jurisdiction of the Regional Judge and within the jurisdiction of the Assise Court. In judgments before the Court, the defendants were required to be assisted by a lawyer they trusted or assigned ex officio.

[369] Ex Ordinance 15 September 1951 No. 17. For further information on the controversial functions of the Judge for Somalia as Magistrate for economic disputes, see Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 124 - 126, 148 - 149

The *Assise Court of Appeal*, a collegiate penal judicial body of second instance, with a structure similar to the Assise Court, was presided over by the Judge for Somalia together with six assessors. The sentences of the Assise Court of Appeal were appealable directly to the Court of Cassazione in Rome.

Other bodies with jurisdiction to decide cases in Somalia were the Administrator, the Court of Appeal in Rome and the Court of Cassazione.

The Administrator had jurisdiction to review ex officio the sentences of the *Qadi*, the *Court of Qadi*, and the Regional Court, and in second instance decided appeals filed against the judgments of the Regional Court and the *Court of Qadi*.

Finally, the Court of Appeal in Rome had jurisdiction to decide in second instance on civil judgments of the Judge for Somalia for cases where Italian citizens were also involved.

The Court of Cassazione was competent to decide in civil matters on cases involving Italian citizens and in criminal cases in second instance for judgements of the *Assise Court of Appeal* of Somalia[370].

It should be noted that, ex Organic Law No. 1019 of 1936, in civil matters it was maintained for Somalis the option *to resort to the jurisdiction set forth for the Italian citizens*, excluding cases related to their personal status law.

In criminal cases, the Trusteeship Administration replicated art. 50 of the organic law to adapt criminal punishments in cases involving Somali citizens or assimilated foreigners with the same personal status law. Therefore, the judge *could determine a punishment lower than the minimum provided for by the law*, as well as he could opt for either the detention or the fine in case the law would foresee both punishments for specific crime[371].

The judicial bodies called upon to decide cases involving Italian citizens or assimilated foreigners were in first instances the *Resident* in civil cases and the

[370] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., pp. 126 - 127

[371] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., p. 154

Regional Judge in criminal cases, as well as also a judge of first and second instance in civil matters, for those cases attributed by law.

For judgements pronounced by the Regional Judge in contravention matters, the Administrator could proceed to ex officio review, in the same way as it was provided for the judgements of the Regional Judges, *Qadi* and *Qadi* Courts in the case of Somali or assimilated citizens. Pursuant to article 11 of Presidential Decree No. 2357 of 1952, the Administrator was also competent to grant pardons and commute sentences, both for Somali and assimilated citizens and for Italian and assimilated citizens.

The *Judge for Somalia* acted in civil matters as a single judge in first and second instance, in criminal matters in first instance for crimes falling under the jurisdiction of the Tribunal and in second instance for appealed judgements of the Regional Judge. Its rulings were appealable directly to the *Court of Appeal* in Rome.

The already envisaged jurisdiction of the *Assise Court*, as a collegiate criminal judicial body of first instance, of the *Court of Appeal*, as a collegiate criminal judicial body of second instance, of the *Court of Appeal* of Rome, as a second instance body for rulings issued by the Judge for Somalia in both civil and criminal matters, and of the *Court of Cassazione*, with jurisdiction in both criminal matters, for appeals against rulings of the Assise Court of Appeal, and civil matters, were also applicable[372].

As we have seen above, an amendment to this Judicial Order was already provided for in Article 14 of Presidential Decree No. 2357 of 1952, which, based on Article 7 of the Annex, established a Court of Justice, whose functions included ensuring the independence of judges and supervising the functioning of justice, as well as those functions that in the Italian system were attributed to the Court of Cassazione, and for their judicial functions, to the *Council of State* and to the *Court of Auditors*[373].

[372] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 128

[373] See Meregazzi R., *L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.),* op. cit., p. 128 - 130

A key reform in the *dual judicial system*, was introduced by the Italian Administering Authority with the adoption of the *Judicial system of Somalia* in 1956[374], which also clarified the different jurisdiction of "Territorial law" and Islamic and local law. The new justice system was based on three levels of jurisdiction, differentiated between religious and ordinary. The differentiation based on the citizenship (Italian vs. Somali) was replaced by the religious categorisation (Muslim vs. non-Muslim), with a unique jurisdictional structure[375].
The new judicial system for Somalia, in fact, redefined the framework for the application of customary law and territorial laws.
Articles 35[376] and 36 of Ordinance n. 5 of 1956, provided that customary law and Islamic law were only applicable for those cases in which both parties were Muslim, while in all other cases, territorial law was applicable, meaning both when at least one of the parties was non-Muslim, or both non-Muslim.
This was presumed by law, however there was always the possibility to prove that *the parties created their legal relation under a different normative order*[377], allowing trespassing of territorial law in cases involving Muslim individuals.

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[374] Ordinanza 2 febbraio 1956 n. 5, Approvazione dell'Ordinamento Giudiziario per la Somalia

[375] See Mancuso S., Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., p. 155

[376] In addition, art. 35 Heading II, Part II of the *Ordinamento Giudiziario della Somalia* provided that: "*Le cause in cui [...] siano interessati esclusivamente musulmani sono giudicate secondo le norme del diritto musulmano e del diritto consuetudinario, salvo le eccezioni stabilite dalla legge. Le parti possono in qualunque modo provare l'esistenza della consuetudine della quale chiedono l'applicazione ed il Giudice può anche d'ufficio disporre i mezzi più idonei per accertarne l'esistenza*". (My translation: "The parties may in any way prove the existence of the custom whose application they request and the court may also of its own motion order the most appropriate means to ascertain its existence")

[377] Art. 36 Heading II, Part II of the *Ordinamento Giudiziario della Somalia* provided that: "*I rapporti giuridici tra i musulmani si presumono conclusi secondo le norme del diritto musulmano e del diritto consuetudinario, salvo la prova del contrario con qualunque mezzo. I rapporti giuridici tra musulmani e non musulmani si presumono conclusi secondo le leggi vigenti nel Territorio, salvo la prova del contrario con ogni mezzo. Negli atti e nei contratti stipulati tra musulmani e non musulmani, il pubblico ufficiale rogante deve dichiarare quale legge le parti intendono seguire*".

The new system introduced a single court of last resort, the Court of Justice, that could decide on both the decision of the *qadi* and of the regional judge[378].

The Court of Justice, in addition to the Ordinary Section, and the Special Accounts Section, was composed also of the *Shari'ah* section, including the President and two *qadi*[379].

Art. 4 claimed that the Regional Judge was competent for all cases of civil matter, excluding those falling under the competence of the *Qadi*; while in penal matter all cases excluding those falling under the competence of Assise Court and the *Qadi*.

The *Qadi* was competent for all those civil matters involving Muslim individuals, although the plaintiff had the option to bring an action before the Regional Court, excluding for matters related to personal status law.

In penal law cases, the *Qadi* was competent for those felonies committed by Muslim individuals against other Muslims, and punishable with maximum one year of imprisonment; as well as for those acts not recognised as offence by the Territorial law, punishable with *ta'zir* sanctions according to Islamic law, although they should be compatible with the applicable governing principles of penal law, and not exceed the aforementioned maximum punishment of one year imprisonment[380].

However, as per art. 16, the Public Prosecutor (*pubblico ministero*) could take over the investigation also for offences withing the jurisdiction of the regional court and the *qadi*, referring the proceedings to the regional court[381].

(My translation: "Legal relations between Muslims are presumed to be concluded in accordance with the rules of Muslim law and customary law, unless proved otherwise by any means. Legal relations between Muslims and non-Muslims shall be presumed to have been concluded in accordance with the laws in force in the Territory, unless the contrary is proved by any means. In deeds and contracts concluded between Muslims and non-Muslims, the notarial officer shall state which law the parties intend to follow")

[378] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 36

[379] See art. 9, Heading I, Part I of the *Ordinamento Giudiziario della Somalia*

[380] See art. 2, Heading I, Part I of the *Ordinamento Giudiziario della Somalia*

[381] Art. 16 explains the functions of the public prosecutor: *"[…] rappresenta l'Amministrazione, di cui tutela gli interessi finanziari e patrimoniali dinanzi la Sezione Speciale della Corte di Giustizia. Inizia ed esercita l'azione penale per i delitti di competenza della Corte di Assise; interviene e conclude in tutte le udienze penali della Corte di Giustizia […]. Può intervenire nei processi civili*

It is therefore clear the willingness of the Administering Authority to encourage trespassing of Territorial law in cases involving Muslim individuals.

It is worth recalling at this point that the distinction between civil and criminal liability was alien to customary law, and that criminal liability lay with the clan and *diya-paying group*. This concept was distant from the principles of criminal Italian law based on Western standards, in which criminal liability is exclusively personal. Therefore, such customary principles were only considered applicable to the extent that they did not conflict with the general principles of territorial law, and provided that an Italian judge was competent to decide on the aforementioned compatibility. In addition, even with the dual system in place, the Assise Court was in the end competent to judge the most serious crimes in penal law, applying territorial law[382]. The Italian Administration also extended the application of the Italian Civil Procedure Code, thus abrogating the general rule of the previous judicial order of 1911, which only prescribed to the judges to apply the general principles of Italian procedural law adapted to the local context[383].

As Mancuso points out, the Italian colonial administration, and later the trusteeship administration, extended Italian law or produced specific laws based on Western legal standards of law, with relative ease to those areas in which neither customary nor Islamic law had competence. This was in fact the case of the administrative, commercial, and labour sectors[384].

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avanti ai Giudici regionali, al Giudice di Appello e alla Corte di Giustizia in ogni caso in cui ravvisi un pubblico interesse. In tali casi può anche proporre impugnazione a norma di legge. Il Giudice regionale e il Cadi iniziano ed esercitano l'azione penale per i reati di loro competenza, fanno eseguire i propri provvedimenti e compiono tutti gli atti che rientrano nelle funzioni del Pubblico Ministero. Il Pubblico Ministero può evocare a sé l'istruzione anche per i reati di competenza del Giudice regionale o del Cadi. In quest'ultimo caso rimette il procedimento dinanzi al Giudice regionale. […]".

[382] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., p. 156

[383] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., p. 155

[384] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., p. 156

Chapter IV – Independent and Revolutionary Somalia: results of a controversial independent process

The fourth chapter studies the legal implications of the Somali independence of 1960, its Constitution and justice systems. It also touches upon elements of British colonial administration and the influence of common law over Somali customary and Islamic law systems. It finally analyses the evolution and legal consequences of the revolutionary regime established by Siyad Barre in the early 1970s. A special focus will be on the evolution of land law under the regime, of fundamental importance for the Somali pastoral populations dependent on natural resources and access to land for survival, which continues being the cause of violent conflicts in Somalia.

4.1 The Somali independence: reunification and the 1960 Constitution

In 1956 Italian Somaliland was granted international autonomy and renamed Somalia. The Italian Trusteeship Administration ended on 1st July 1960[385] with the formal independence and the unification of the country, merging the former U. N. Trust Territory of Somalia under Italian Administration and the independent State of Somaliland, formerly a British Protectorate, and forming the independent Somali Republic[386], with Aden Abdullah Osman Daar as first president[387].

[385] The year 1960 is considered the "Year of Africa" as 17 African countries became independent, and in that same year, the General Assembly of the United Nations approved the Resolution n. 1514 for the self-determination of colonised countries and peoples. See Morone A. M., *La fine del colonialismo italiano tra storia e memoria*, Dossier Storicamente 12, 2016, p. 3

[386] However, the legal position was clarified only six months after the new State had been formed, thanks to the introduction of an Act of Union, which had retroactive effect as from July 1, 1960. See Cotran E., *Legal problems arising out of the formation of the Somali Republic*, in "The International and Comparative Law Quarterly", Vol. 12, No. 3, July 1963, p. 1011

[387] See Norton G., *Land, Property and Housing in Somalia*, UN-Habitat, Norwegian Refugee Council, UNHCR, 2008

The new Constitution of the Republic of Somalia was approved in 1960 and came into force in 1961, when it was accepted and ratified by the people of Somalia, following a popular referendum[388].

The constitution was modelled on the European – mostly Italian - model, while providing a suitable position for Islam. It was therefore a rigid constitution, that placed the parliament in a dominant position, proclaimed the equality of citizens, and guaranteed the civil and social rights of Somalis[389]. The Constitution conferred the judicial function to the judiciary (ex art. 92), exercised independently from the other two powers, legislative and executive (ex art. 93). However, the Charter did not specify the competences of the various organs of the Judiciary, except for the Supreme Court, but merely referred to the provisions of ordinary law[390].

The provisions of the Constitution for Somaliland, which was already adopted by the British protectorate authorities, came into force as ordinary laws, but were superseded by the provisions of the Constitution for the united territories[391].

Islam had a special role in the constitution, becoming state religion (Art. 1).

Islamic teaching with the study of the *Quran* was made compulsory in primary and secondary schools (Art. 35). According to art. 50, Islamic law was envisaged as the supreme source of state laws, while in personal status law, the *Shari'ah* was officially declared exclusive source of law for Muslims. Requirement to be President of the Republic was to be Muslim (Art. 71) and in 1963, art. 29 of the constitution, concerning freedom of religion, was amended to prohibit the dissemination and propaganda of religions other than Islam[392].

We shall see that with the Revolution and the abrogation of the constitution this special place of Islam will not be lost. In fact, art. 3 of the Constitution of the Somali Democratic Republic of 1979 provided that Islam shall be the State religion[393].

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[388] See Angeloni R., *Diritto Costituzionale Somalo,* Giuffrè Editore, Milano, 1964

[389] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 48

[390] See Angeloni R., *Diritto Costituzionale Somalo,* op. cit., pp. 165 - 168

[391] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 47

[392] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., pp. 87 - 88

[393] See The Constitution of the Somali Democratic Republic, 1979, as approved by decree of the President of the S.D.R No. 46 of 16 September 1979

With independence, the scope of application of Romanistic rules increased, starting with the Constitution, the navigation code, the labour code, as well as the penal code, which started being used by the unified country. At the same time, the civil and procedural codification was meant to build a purely Romanistic civil code project, based on the Egyptian civil code model, derived from the French one. Although the Romanistic layer is destined to be eroded by independent, revolutionary and modern legislation, the Romanistic model will continue to play a role in the formation of Somali legal instruments[394].

The unification of the two Somali territories inevitably resurfaced an important issue related to the unification of the different legal systems applied in the two territories. Independent Somalia represented an important example of *"applied laboratory of comparative law*", in which coexisted three different legal systems, if not even four. Hence, the legislator was required to be familiar with all legal concepts in the three main systems of reference, and accordingly choose the best principle applicable in a given situation, always taking into account the local context and minimising preconceptions regarding the superiority of one or the other legal system[395].

Indeed, the unitary elements of the two former colonies were very few, mainly brought about by the provisions of the new constitution, such as a single President of the Republic, the National Assembly, which included members from the legislative assemblies of former British Somaliland and Italian Somalia, a Cabinet of Ministers which included members from the two territories, and a unique Supreme Court with jurisdiction on the entire country. *Shari'ah* was the only law equally applied throughout the unified territory. All the main elements of a functioning country were split in two, presenting two currencies, two armies and police forces, different languages spoken and used in the legal world[396], two

[394] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., pp. 41 - 42

[395] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1093

[396] We will see that the official written alphabet of Somali language will only be created in the Revolutionary period under Syad Barre government. Until then, the lack of an official written language in legal matter created complications in managing a unified legal system, as three were the main written languages used in somalia: Italian, English and Arabic. The official language of the

education systems, local and central institutions, and two legal systems, whereby in the Northern Somaliland the law was influenced by English common law, statute law, Indian law applied to British Somaliland and local ordinances, while in the Southern part, the law was influenced mostly by Italian law, colonial and Trusteeship Administration legislation[397].

Firstly, in order to avoid a legal vacuum, it was decided that the legislations in place at the time of unification would remain valid until they were replaced by integrated laws. A Consultative Commission for Integration was established[398] to support the government towards the integration of legislations and institutions of the two territories, and its members included *lawyers and judges trained in Italian law, lawyers trained in the Anglo-Saxon legal system, and Somali officials and judges trained in Islamic and customary law*[399].

The main step towards the unification of legislation and institutions was to establish the constituent elements of the new state, hence the definition of Somali citizenship and population.

The law on citizenship was inspired by two basic principles, that are the citizenship by *ius sanguinis*, and favouring the acquisition of citizenship by irredentist Somalis.

National Assembly was Italian, used in the verbatim records. Moreover, the laws published in the official Bulletin were translated both in Italian and English, although neither of them were official languages. For an interesting overview of the practical consequences of bilingual legislation and the working arrangements between translators and lawyers familiar with both English and Italian legal languages, see Contini, P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1090 - 1091

[397] See Contini, P., *Integration of Legal Systems in the Somali Republic*, in "The International and Comparative Law Quarterly", vol. 16, no. 4, 1967, p. 1088

[398] By Decree of the President of the Republic 13 October 1960

[399] As Contini stresses, since the formation of the Consultative Commission, its members could not *settle in a legal ivory tower, or impart advice distilled from pure legal* theory. They instead worked in close collaboration with the Ministries concerned, making the approval process by the Ministry and subsequent submission to the Council of Ministers and National Assembly swifter. See Contini, P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1089 - 1090

In addition, a law from 1961[400] strengthened the constitutional principle of equality by abolishing *'ethnic designations'*, including personal or family names influenced by caste.

Another important area that had to be unified as soon as possible to ensure the proper functioning of the legislative power of the new state was the electoral system, which had hitherto followed separate mechanisms in the two territories: the English model based on the uninominal system and the Italian model based on the proportional system[401]. The criteria were chosen in 1963[402] and in the political elections law of 1964[403], in favour of the latter[404].

Since Somalia was divided into several local administrations, regions, districts, and municipal districts, their functions needed to be standardised. The regions were thus entrusted to the management of general governors appointed by the government, while districts were entrusted to commissioners, also appointed by the government and subject to the general governors. The law of 1963 ministered to the municipal administrations and their elections. In this case, they opted to use the approach in force in the northern territories of Somalia, where municipal councils extended their jurisdiction to suburban areas as well, without limiting it, as in the south, to urban centres alone. In addition, a unified system close to the one in place in Northern Somaliland was extended to the entire country, providing that the municipal secretary, a career civil servant, with broader responsibilities and executive powers than the mayor, for whom a formal representative role and pure presidency of the municipal council were envisaged. However, the same law also provided for the Minister of the Interior and the regional governor the power of control over local

[400] Law No. 14 of 23 May 1961. See Sacco R., *Introduzione al diritto privato somalo,* op. cit., p. 55

[401] It is noteworthy that ex art. 70 of the Constitution, the system of parliamentary election was adopted for the President of the Republic, whereby the election of the president was entrusted to the National Assembly. See Angeloni R., *Diritto costituzionale somalo*, op. cit., p. 87

[402] Law No. 19 of 14 August 1963 on local administrations and elecetions. See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 50

[403] Law No. 4 of 22 January 1964. See Contini, P., *Integration of Legal Systems in the Somali Republic*, op. cit. p. 1091

[404] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 49

councils, as well as the electoral system based on the proportional principle, following the Italian model[405].

Similarly, a unified currency and banking systems were established, and a financial and accounting procedures of the State were unified. At the same time, the defence of public order was regulated by law No. 21 of 26 August 1963, establishing the limits and responsibilities of the police forces in the protection of public order and security, and the National Army and police forces of the former British Somaliland and Italian under Trusteeship Administration were merged[406].

In addition, it is interesting the fact that law No. 21 on public order included elements closely related to a particular aspect of customary law, namely the necessity to mitigate the right to revenge and reprisal and the ensuing warfare between clans. In fact, as we have seen above, in the case of injury or killing of an individual by a member of another clan, customary law admits the payment of the *diya* as blood-price, compensation agreed by the clans involved or decided by the judge to avoid triggering the cycle of revenge and subsequent bloodshed. However, it could occasionally happen that, in order to avoid paying the *diya*, the offender's group would take their animals (the payment instrument usually used in such transactions) to distant lands. Such behaviour naturally risked triggering reprisals cycles, undermining public order. Therefore, the 1963 law stipulated that in case of *a crime against the life or safety of a person, […] the police or other public order authority may order the sequestration of animals or other property belonging to the persons who are presumably liable to pay compensation*[407]. In this case, the group of the victim would be reassured by the presence of the property or animals and would be less likely to resort to violence.

In fiscal area and tax system, new laws extended to the whole Republic the previous territorial rules on income tax in force in Southern Somalia, while a tax code was built up adopting in different phases the major components of a tax system, starting with the adoption of the Customs Act in 1961, the provisions on the administrative

[405] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., pp. 50 - 51

[406] By law No. 5 of 31 January 1961. See Contini, P., *Integration of Legal Systems in the Somali Republic*, op. cit. p. 1091

[407] See Contini, P., *Integration of Legal Systems in the Somali Republic*, op. cit. p. 1095

duties of statistics and manufacturing tax on sugar and alcohol. On monopolies, the exclusivity for tobacco and matches adopted by the Italian Trusteeship Administration, was extended to the Republic in 1963[408].

During this period, several legislations were also codified, such as the criminal and criminal procedure codes, including the military versions, and the labour code.

The influence of Italian-derived law on the Somali system was most visible in the Somali Criminal Code, whose Chapter IV related to the circumstances of the offence listed aggravating or extenuating circumstances applicable to any crime. This prompted the judge to determine in each case whether aggravating or extenuating circumstances were applicable to the specific case. In addition, the Somali Criminal Code provided less discretion to the judge in setting a punishment, as the Somali Code often prescribed the maximum and minimum punishments for a specific offence[409].

Although the criminal and military penal codes of 1962 and 1963 were based to a large extent on the Italian codes, Islamic as well as Customary law elements can be found within its main pillars, such as the Islamic principle of *talion* was *decisive in the choice of the penalty to be applied to the intentional murderer*, as well as in the prohibition to drink alcohol, applicable to all Somali citizens and Muslim individuals, and the provision of death sentence in case of murder[410].

On the other hand, the Criminal Procedure and Military Criminal Procedure Codes were subject to both the British (Indian) and Italian influences[411]. British influence

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[408] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 54

[409] Differently from the Indian Penal Code implemented in Northern Somaliland, in which the aggraving or extenuating circumstances were clearly specified for the judge, and where no minimum punishment was specified. See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1093

[410] This sentence was however converted to imprisonment between ten and fifteen years, in case the murderer was the parent of the victim and had full parental authority on the victim. The rationale of this law was rooted in Islamic law, although it was clearly discordant with Somali customary law, according to which the murder of one's father or child is punishable as *the right vengeance does not apply between members of the same group*. See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1094

[411] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 56

was for example exercised on the prohibition on trying the accused *in absentia*, the *habeas corpus* and the prohibition on using the results of police investigations as evidence, taken from the Indian Evidence Act. The Italian influence was instead clear in the judge's power of initiative, or the inclusion of the civil trial in the criminal proceeding, unknown in English law, whereby the injured part in a criminal proceeding may request the court *to recover the civil damages arising from the offence committed*[412].

With regard to civil and civil procedural law, however, attempts to unify Somali law were not completed before the beginning of the revolutionary period. The judicial system adopted in 1962, although it constituted "*real progress on the previous situation*", was not followed by further substantial reforms[413].

The 1962 reform of the judicial system attempted to unify the two existing systems in Somalia, articulating the judicial pyramid into District Courts, Regional Courts, Courts of Appeal, and the Supreme Court. We shall see in more detail in the next paragraph that the 1962 Reform established the principle of independence of the judiciary, regulated the functioning of the Supreme Court as a Constitutional Court and as the High Court of Justice, and set out procedural rules applicable to the whole territory of the Republic, while at the same time clearly marking the dividing line between traditional law, including both Islamic and customary law, and modern state law[414].

Also, the maritime code that was applicable to Southern Somaliland formerly under Italian Trusteeship Administration, was extended to the territory of the Republic of Somalia.

Finally, it is noteworthy that in matters generally regulated by Somali customary law, there have not been many attempts at codification, for example in Personal Status law. Some studies were initiated on land law and the use of water resources, but generally, as Contini also confirms, *the Somali legislator seems to have generally escaped the temptation to overcodify*[415].

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[412] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1094

[413] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 58

[414] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 58 - 59

[415] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1092

4.2 The judicial system of Independent Somalia

With the end of the Italian Trusteeship Administration and the Independence of Somalia since 1 July 1960, the judicial system followed the general principles of the system already in place.

The justice sector was still administered using the *Judicial system of Somalia* of 1956, whereby as we have seen in the previous chapter, the justice system was based on three levels of jurisdiction, differentiated between religious and ordinary. The religious belonging of Muslim and non-Muslim replaced the citizenship differentiation of Italian and Somali, with a unique jurisdictional structure and a single court of last instance. This setting was largely maintained in the new *Somali Judicature Act* approved by the Legislative Decree n. 3 of 12 June 1962[416].

With the Independence, unity and the judicial system of 1962, four main achievements were realised: the unification of the secular and Sharaitic judicial systems; the unification of structures in the North and the South; the establishment of a supreme body competent for the entire territory of the State; and the independence of the Somali justice system from foreign bodies[417].

This meant that, until the integration proposed by the *Somali Judicature Act* of 1962, both the North and the South of the country presented the dual system based on *Shari'ah* courts and State courts.

This clearly represented a crucial aspect of the unification process and integration of the judicial systems in the north and the south. Those in favour of the unification advocated the formation of a class of judges familiar with both Islamic and state law, encouraging the *Qadi* to study state law and the secular judges to study Islamic law, which would lead to the *development of a national consciousness*. The

[416] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, in "Political and Legal aspects of Italian colonialism in Somalia", op. cit., pp. 155 - 156

[417] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 167

integrative approach eventually prevailed, resulting in the abolition of the *Qadi* courts[418].

Under the new system of independent Somalia, the judiciary was administered by the District Court, the Regional Court, the Court of Appeal and the Supreme Court, which was the final instance in civil and criminal matters.

The former judge *Qadi* became the new District Judge, unique judge acting as judicial body of first instance with a civil and a criminal section. The civil section dealt with disputes adjudicated according to *Shari'ah* or customary law, and with any other civil disputes, the value of which did not exceed Lire 250,000 (3,000 shillings). The judge or the party had also the option to request to the president of the Court of Appeal to transfer the case to the Regional Court.

The criminal section dealt with offences under the Criminal Code punishable by a prison sentence not exceeding three years or with a fine not exceeding Lire 250,000 (3,000 shillings). As Contini highlights, with the abolition of the *Qadi* courts, many of the former *Qadi* became District judges serving mainly in its civil section, and competent in judging on *Shari'ah* and customary law matters, while lay judges working as District judges were mainly competent on other civil controversies and criminal cases[419].

The Regional Court was also a judicial body of first instance, differing from the District Court only on the basis of respective competences. It had a General section, with a single judge competent for all offences which did not fall within the jurisdiction of the District Court, an *Assise* section, competent for the most serious crimes punishable by death or imprisonment of at least ten years, a tax section, only for some courts, and a military criminal section, before being replaced by the Special Military Court[420].

The role of the assessors in the *Assise* courts differed in the two parts of the unified Somali territory. In fact, in Northern Somaliland, following the British influence, the assessor was mostly an advisor to the judge, familiar with local customs. Instead, in Southern Somalia, the assessor was part of the Bench, holding a similar

[418] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1095 - 1096

[419] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1097

[420] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 168 - 169

function to the popular judges of the Italian system, thus participating in the decisions. A compromise was eventually agreed upon as solution to the function of the assessors, which were then participating only in the decision on questions of fact, while the judge was the sole subject deciding on questions of law and punishments to be applied. The number of assessors was also decreased from six to two in the Regional Courts, and to three in the Court of Appeal[421].

The *Court of Appeal*, a judicial body of second instance, followed a structure similar to the one of the Regional Court, with a General section of appeal, an Assize section of appeal, a tax section of appeal only for some courts, and a military criminal section of appeal, afterwards replaced by the Superior Military Court.

Its jurisdiction was competent to hear appeals against judgements of the District Courts and the General Section of the Regional Courts. The Court of Appeal consisted of a single judge in the General section, and a collegial body in the Assise section, which consisted of both professional judges and assessors, competent to hear appeals against judgements of the Assise section of the Regional Courts.

The *Supreme Court* was the last degree of appeal in civil and criminal cases, the unique organ of administrative justice and could be constituted into a Constitutional Court or High Court of Justice, depending on the members it was made up of. With two additional members appointed by the President of the Republic and two appointed by the National Assembly, the Supreme Court formed the Constitutional Court, competent to judge over the constitutionality of laws, with effect *erga omnes*. The Supreme Court acted also as the highest administrative tribunal, being even authorised to perform executive powers to ensure the enforcement of its judgements[422].

The new judicial system of independent Somalia also provided for the Office of the Public Prosecutor, composed of the Attorney General and police officers, and with competencies concerning the prosecution of criminal cases and the promotion of civil action in public interest.

Magistrates in the new Somali judiciary system were independent, irremovable and apolitical, and recruited through public competition. However, although Somali

[421] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1097 - 1098

[422] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1100

citizens holding a diploma in legal subjects were eligible, it became difficult in the new Somali state to recruit the judiciary, hence the implementation of the rule was postponed by transitional rules and for a long time it was allowed that foreign technicians could sit as judges, just as the former *Qadi*, without a valid university degree, could continue to serve as judges in the district courts[423].

In this chapter, we will have the possibility to see that the system discussed above remained in place until the Revolution and the Syad Barre's regime, which, with Law N. 19 of 9 March 1971, excluded the extension of the jurisdiction of the Regional Court in civil litigation within the jurisdiction of the district judge, for cases involving Somali citizens or foreigners residing in Somalia. In addition, it established that magistrates were to be chosen by public competition and had to have a degree in law[424].

Another crucial issue linked to the unification process of independent Somalia was related to the extent of application of *Shari'ah*, which in Northern Somaliland was applied in personal status law, including marriage, divorce, family relations, *waqf*, gift, succession and wills, while in the Southern territories, the *Qadi* had exclusive jurisdiction on personal status, family law and succession, other controversies between Muslims, insofar as the plaintiff did not chose to resort to the Regional Court[425]. The solution adopted for the unification was rather vague, enshrined in art. 9 of the Decree No. 3 of 12 June 1962, providing that the courts shall apply *Shari'ah* law or customary law *in civil controversies where the cause of action has arisen under the said law*, while statutory law was to be applied in all other matters[426].

Eventually, we shall investigate the impact of the judicial unification on Customary law.

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[423] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., pp. 168 - 169

[424] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 170

[425] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1098 - 1099

[426] This formulation provided for a compromise, whereby the provision entitles the courts to apply Islamic law not only in personal law matters, but in all civil disputes arisen under that legal system. See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1099

With the judicial integration of a formerly dual judicial system, customary law was only set to survive partially, subject to the careful scrutiny by judges.

Contini reports on a Supreme Court case[427] from 1964 in which the Somali Supreme Court upheld a rule of customary law. The case arose out of an unfortunate accident involving a girl, who was run over and killed by a truck in Hargeisa, whose brother claimed the payment of *diya* from the driver. What strikes us from the Supreme Court's decision is the interpretation of the concept of *diya* by a State body. The elements analysed by the Supreme Court were three, namely:

> *(a) whether the payment of "dia" is consistent with the Somali Constitution and public policy; (b) whether "dia" is applicable to motor-car accidents; (c) whether "dia" for motor-car accidents is applicable in urban as well as rural areas*[428]

The ruling was aimed at analysing the case in light of art. 43 of the Constitution, which prescribed personal criminal liability and the prohibition of imposing any collective punishment.

In relation to point (a), the Court considered two elements, the first relating to the civil or criminal liability from which the *diya* derived, the second on whether the collective liability of a clan was contrary to the Constitution.

Interestingly, the Court analysed the concept of *diya* both under Islamic law and Somali customary law, observing that, even though in Islamic law the payment of blood money is a personal punishment, the principles of *Shari'ah* law applicable in Somalia have been modified by the customary law, therefore on this aspect Islam *did not produce any effective change in the tribal customs relating to compensation*. In fact, the Islamic law of the talion was never fully implemented in Somalia *for there was no supreme authority to enforce it*. The explanation continues further:

> *"When the Colonial powers took over the administration of criminal law, the Indian Penal Code was made applicable in the former Somaliland Protectorate and the Italian Penal Code in Somalia. Under the above Codes, homicide became an offence against the State; the tribe of the victim, however, continued to exercise a right to claim civil damages, apparently as compensation for the loss of one of its members.*

[427] The case is *Hussein Hersi and Another v. Yusuf Deria Ali*, Civil Appeal No. 2 of 1964

[428] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1101

> *Thus "dia", which is a penal punishment under Shariat law, is considered civil damages in this country"429.*

On the collective liability of the clan, the Court claimed that the constitutional prohibition applied only to collective punishment. Since the collective responsibility for the *diya* was not a collective punishment, that responsibility was not abolished by the Constitution:

> *The Constituent Assembly which adopted the Constitution and the National Assembly both appear to approve the collective responsibility of the tribe regarding the payment of "dia". […], the Supreme Court cannot hold that the collective responsibility against the public policy of the State*[430].

Regarding the point on whether the *diya* is applicable to car accidents, the Court decided that Customary law does not differentiate between *deliberate and accidental homicide*, therefore *diya* is applicable to both cases. Here, even more attentively, the Supreme Court referred to the Islamic principle of *qiyas*[431], the analogy. Indeed, being traffic accidents typical of modern era, they cannot be accounted for by either Islamic or Customary law for this reason, in absence of specific provisions to cover a specific matter, *Shari'ah* provides that the judge must resort to analogy. The rule of analogy was considered applicable also to customary law[432], therefore the Court extended the payment of *diya* also to cases of car accidents[433].

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[429] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., pp. 1102

[430] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., *ibidem*

[431] *Qiyas* is one of the sources of Islamic *fiqh* and is comparable to the principle of analogy. See Sacco R., Gambaro A., *Sistemi Giuridici Comparati*, op. cit., p. 344

[432] The application of *qiyas* to *xeer* was already expressed by the Court of Justice of the Italian Trusteeship Administration, in ruling 11 March 1957 *Dahabo Abdi v. Haleima Abdulla*. In that case, the Court ruled that: *"[…] in the absence of provisions in customary law for the payment of damages under Shariat law, the judge can apply by way of analogy the criteria applied in similar cases"*. See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1103

[433] To further support its argument, the Court quoted another judgement of the Court of Appeal of Hargeisa, which compared the payment of *diya* to the liability compensated by compulsory car

Finally, on the latter point on whether the application of *diya* was valid also in urban settings, the Court's response was affirmative also in this case, arguing that the acceptance of the principle of collective responsibility of the tribe should be considered valid regardless of where the offence took place.

4.3 The British way: British Somaliland and common law

Northern Somaliland, which was under British Protectorate since 1894, was briefly captured by the Italians during the Second World War in August 1940 and then reconquered by the Allies in March 1941, which re-established civilian rule after a short military administration in 1948[434]. Northern Somaliland had in place a different legal system than the Italian Romanistic one, which was based on the English common law model. Therefore, common law was one of the three legal layers in action in Somaliland, along with *Shari'ah* and customary law. The judicial order was based on the Protectorate Court assisted by the District Courts, the *Qadi*'s Courts, and the Subordinate Courts[435].

The *Qadi* judge had only jurisdiction over Somali individuals on personal status law matters, applying Islamic law. The judgment of the *Qadi* could be appealed against the Court of the Chief *Qadi*.

The Subordinate Courts applied the local customary law and had jurisdiction in civil and criminal matters for Somali subjects in matters outside the personal status law,

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insurance in other contexts than Somalia. Since in Somalia car insurance was not compulsory, the Court argued that the *xeer provided a form of insurance*. See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1104

[434] See Contini P., *The Somali Republic. An Experiment in Legal Integration*, Frank Cass and Co. LTD, London, 1969, p. 4

[435] These last two Courts derived from the former Akil's Courts, established in 1921. See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 42

and for small value cases[436]. However, the customary law could be applied provided that it did not conflict with *natural justice* or *morality*.

The judgment of the Subordinate Court could be appealed against the Subordinate Court of Civil Appeal (in civil matters) or to the Protectorate Court (in criminal matters).

Finally, the Protectorate Court applied English law, or other laws extended to Somalia, and had jurisdiction in all other cases. It was a court of appeal for judgements of the first- and second-class District Courts.

In 1950, the Protectorate Court was replaced by a High Court. The decisions of the High Court in Hargeisa could be appealed to the Court of Appeal for Eastern Africa, based in Nairobi, and from there to the Judicial Committee of Privy Council[437].

A differentiation was present even in the kind of normative acts that were produced in the two territories, due to the previous different colonial administrations. Therefore, before and during the Italian Trusteeship Administration, the typical normative acts used under the Administration in Italian Somaliland were laws, legislative (delegated) decrees, decrees-laws, and regulations, very much based on the same instruments used by the Italian legal system. Instead, Somaliland, in addition to matters governed by common law or equity, could produce three forms of normative acts: ordinances, statutes, and acts or orders[438].

In relation to the role of customary law for the British administration, we shall consider the role of the British Administration soon before and in the aftermath of the Independence.

The British government progressed rather slowly towards the achievement of self-government of Somaliland, as no plan was foreseen to grant early independence to the territory. However, in the second half of the 1950s, the pace of the

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[436] It is worth noting that the colonial administration recognised collective responsibility through the Collective Punishment Ordinance, which remained on the *statute books of the protectorate until the day of independence. The courts prosecuted people as individuals when they committed minor crimes, and sometimes when they committed murder. But more often than not, punishment was approportionated to the whole "tribe"*. See See Mohamed J., *Kinship and Contract in Somali Politics*, op. cit., pp. 245 - 246

[437] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 43

[438] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 101

administration accelerated, considering the approaching date of the independence of Italian Somalia under Trusteeship Administration[439]. If the Governor had, until then, full executive and legislative powers, a Legislative Council was established in 1957, to include the participation of local inhabitants in the administration of the territory[440]. The progress towards self-government accelerated even more after that step.

In order to regulate the future independent Somaliland, the British Administration adopted an *order in council*, considered at the same level of a Constitution of Somaliland, applicable only to the Northern part of the country.

The Charter made reference to the sources of law and in so doing enshrined an important fusion of customary law with Islamic law. In its Section 43, it *renounced to the rigid distinction* between *Shari'ah* and customary law, providing that in cases in which only Somali individuals were involved, each court was to be guided by *Somali customary law* - which, as prof. Sacco points out, included also Islamic law - insofar as it did not conflict with *justice, equity and good conscience*. Insofar as customary or Islamic law did not apply, the Charter provided for the application of English common law and other relevant sources[441].

The adoption of laws and ordinances by the British administration for Somalia, for example in matters related to procedure, criminal law, contracts and commercial law, followed two different approaches: in some cases, ordinances were adopted specifically for Somalia, in others, laws that had been adopted for India were extended to the Somali colony[442].

The *Constitution of Somaliland* rationalised the compilation of organic rules introduced in India and applicable to the Northern Somaliland, while at the same

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[439] See Contini P., *The Somali Republic. An Experiment in Legal Integration*, *op. cit.*, pp. 4 - 5

[440] The Council was initially made up of only six unofficial Somali members, while in November 1959, thirty-three unofficial Somali members were elected. See Contini P., *The Somali Republic. An Experiment in Legal Integration*, *op. cit.*, p. 5

[441] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 44

[442] This is for example the case of the Criminal Procedure Ordinance, in force until 1963, and other regulations such as the Indian Companies Act of 1913, the Ordinances on copyright, trademarks, patents, the provisions on cultivation and use of land, and land expropriation. Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 44

time providing that any legislative gaps were to be filled in compliance with the fundamental principles of common law, equity and the statutes of general application in force in England on 16 March 1900.

According to this approach, in Northern Somaliland were applicable the Indian Penal Code of 1860, the Code of Civil Procedure of 1908, the Indian Succession Act of 1865 and the Indian Divorce Act of 1869, among others[443].

When Somalia became independent, the new united country accepted its Constitution and the system of normative acts inherited from trusteeship Somalia.

A different approach was instead applied with the revolution, when the law depended directly on the will of the main authority, the Supreme Revolutionary Council, with legislative and executive powers.

Indeed, the new legislative body simplified the typology of regulatory acts by reducing them to only three types, law, decree, and regulation[444].

4.4 Scientific socialism, legal aspects and the role of customary law under Barre's regime

Peace in the new Republic of Somalia was far from being easily reachable.

[443] Other organic rules extended to Somalia included the Indian Post Office Act of 1898, the Bombay Civil Courts Act of 1869, the Indian Evidence Act of 1872, the Indian Contract Act of 1872, the Indian Oaths Act of 1873, the Indian Majority Act of 1875, the Indian Limitation Act of 1908, the Transfer of Property Act of 1882, the Land Acquisition Act of 1894. Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 44

[444] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 101

As Balthasar argues, *already the post-independence decade of the 1960s entailed seeds of state fragility and social fragmentation – sown, not least, during colonialism*[445] [446].

Indeed, starting from the 1960s there were disputes and hostilities with Ethiopia due to non-well-defined borders. In 1967 Abdi Rashid Ali Shermake, the former prime minister, defeated Aden Abdullah Osman Daar in the national elections, becoming the new president. However, in 1969, the president Shermake was assassinated and five days after, the army guided by General Mohamed Siyad Barre took power by a *coup d'état*, on 21 October 1969. Somalia was declared a Socialist State[447] in 1970[448].

The General immediately abrogated the constitution, announcing the drafting of a new Chart, dissolved the governmental institutions in place, suspended the National Assembly and the Supreme Court, and abolished all political parties.

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[445] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, in "International Journal of African Historical Studies", Vol. 51, No. 1, Boston University, 2018, p. 142

[446] Indeed, the attempt of the Italian trusteeship in Somalia to build *in just ten years a set of democratic institutions that would form the structure of the new independent Somali state and to negotiate the progressive transfer of powers and competencies to the Somalis*, was already rather complex. Italy, in fact, *failed to transplant functional institutions for the new Somali state,* which were probably too administratively burdensome and sophisticated. See Morone A. M., *La fine del colonialismo italiano tra storia e memoria*, *op. cit.*, p. 11

[447] Although genuine Marxist sympathies were not deep-rooted in Somalia, the "*ideology was acknowledged partly in view of the country's economic and military dependence on the Soviet Union — as the most convenient peg on which to hang a revolution introduced through a military coup that had supplanted a Western-oriented parliamentary democracy*". See Chapin Metz H., *Somalia, a country study,* Area handbook series, US Library of Congress, May 1992, p. 42

[448] On the one-year anniversary of the Revolution, 21 October 1970, President Barre announced the adoption of the scientific socialist model. It is clear that Barre had waited for the Revolution to become mature, when the wing of the pro-Western revolutionaries who had initially taken power were replaced by a more explicitly left-wing ruling group. See Pestalozza L., *Somalia, cronaca della rivoluzione*, Dedalo Libri, Bari, 1973, pp. 17-18

Since the *coup* had taken place, an *institutional tabula rasa*[449] was created, bringing about radical administrative and institutional changes.

In addition, a standardisation of the dominant *rules of the game* and *rules of the mind* was registered, aiming at demolishing the *underlying institutional plurality*, inherited partly by the colonial era, perceived as a *significant obstacle to state making*[450].

The newly formed Somali Republic witnessed high internal fragmentation, above all due to the distinctive inherent features that the two territories, united for the independence of the country, had inherited from their colonial pasts, differing from one another at the institutional, legal, linguistic and identity levels. In fact, the British occupation of the northern regions entailed that the pastoral forms of organisation of life and the hierarchies of the tribal system were kept unspoiled by the administration. Conversely, the southern regions which had mainly been occupied by the Italian colonial power, were subjected to a different colonial administration, by which part of the agricultural territory had witnessed heavy exploitation and form of slavery of the local populations[451].

Moreover, the modern urbanisation trends taking place in the 1960s contributed to increase the Somali social stratification, as well as, Balthasar argues, the fact that the Somali society developed into a *semi-anarchy of clan-based camps further indicates how the 1960s were marked by a pluralisation rather than standardisation of rules*.

[449] See Compagnon D., *Ressources politiques, régulation autoritaire et domination personnelle: le régime Siyyad Barre en Somalie (1969-1991)*, 1995, as cited by Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 148

[450] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 148

[451] In particular, forms of feudal servitude on banana plantations. The Italian colonial administration had in fact relied on *particularly brutal forms of exploitation by forcibly relocating large masses of the population brought to the plantations and there reduced to a state of feudal servitude*. See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 35

In such a context, the *order* proposed by the military regime stroke out the *disorder* of the previous republican system[452], also by implementing a fierce battle against tribalism and the system perpetuated by them, as a means to achieve the socialist change.

Indeed, during the Barre regime, a form of "*scientific socialism*"[453] was pursued, with nationalisation of the economy.

The centralised administrative structures were reorganised, and the Supreme Revolutionary Council (SRC) was established, substituting the cabinet and the National Assembly. The SRC was composed of twenty-five high-ranking members of the security forces, ruling in the form of a committee, complemented by the Council of the Secretaries of State[454], with executive powers, responsible for day-to-day administration.

The institutional and ideological framework of the Revolution was set out by the First Charter of the Revolution of 1969, published by the Supreme Revolutionary Council on the day of the Revolution, which extolled *freedom, social justice,*

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[452] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 149

[453] According to Siad Barre's view, although the country had no history of Marxist class conflict, *tribalism was equated with class in a society struggling to liberate itself from distinctions imposed by lineage group affiliation. At the time Siad Barre explained that the official ideology consisted of three elements: his own conception of community development based on the principle of self-reliance, a form of socialism based on Marxist principles, and Islam. These were subsumed under scientific socialism, although such a definition was at variance with the Soviet and Chinese models to which reference was frequently made*. See Chapin Metz H., *Somalia, a country study*, op. cit., p. 42. To stimulate economic development, the government launched a series of *wasteful crash programmes* and development projects in infrastructure, health and education. The socialist regime also sought to improve the status of women and minorities and, after introducing a writing system for Somali in 1972, launched a nationwide literacy campaign. See Putnam D. B., Noor M.C., *The Somalis: Their History and Culture*, op. cit., p. 8

[454] The Council of the Secretaries of State was composed of the police commissioner and vice-president of the SRC, and thirteen young civilian technocrats, *chosen for their ability rather than with an eye to achieving an even representation of the country's traditional clan and lineage division*. See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 149 and Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 208

equality, progress, and national unity. The same Chart deprecated *tribalism, corruption, colonialism, and anarchy*[455].

The Supreme Revolutionary Council proclaimed the takeover of the legislative, judicial, and executive powers of the Somali republic, assuming the functions that were previously vested in the president, the parliament, the government, and the Supreme Judicial Council, while the constitution in place was suspended.

The First Charter of the Revolution and Law n. 1 of 21 October 1969, concerning the legal organisation of the newly formed Somali Democratic Republic, dissolved the National Assembly, deposed the government and abolished the Higher Judicial Council, centralising these powers into the Supreme Revolutionary Council as well as those of the President of the Republic, the Council of Ministers, the Constitutional Court and the High Court of Justice[456]. The Supreme Court, initially dissolved, was soon reinstated in its functions[457].

Since April 1972, the Supreme Revolutionary Council was at the top of the jurisdictional pyramid, with the power to review civil and criminal judgements pronounced by any judicial authority, to confirm, modify or annul them, to ensure that *judicial decisions were faithful to the revolutionary principles of equality and justice*. The Supreme Revolutionary Council had also the power to appoint or dismiss magistrates, as well as to decide on administrative and disciplinary measures concerning them.

Article 2(3) of the *Ordinamento giudiziario* of 1962 was reformed to prohibit the tendency of foreign nationals residing in the territory of the State to evade the jurisdiction of the district court[458].

At the beginning of 1970, a law was approved introducing life imprisonment on anyone who committed an act aimed against the revolution was introduced, by law n. 2 of January 1970. Law n. 3 established the National Security Court, with

[455] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 81

[456] See Noor Mohammed H. N. A., Somali Democratic Republic, Annual Survey of African Law, (edited by) Rubin N. N., Cotran E., Volume III-1969, 1973, Published 2014 by Routledge, Taylor and Francis, Kindle Edition, p. 12029

[457] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., pp. 61 - 63

[458] See Sacco R., *Introduzione al diritto privato somalo*, op. cit., p. 68

competence to judge crimes against the State, while the SRC maintained the power of annulment. An additional law suspended the remedy of *habeas corpus* for those detained in relation to cases within the jurisdiction of this Court[459].

At regional and district level, regional and district revolutionary councils were set up, replacing the previous ruling figures. Law n. 9 of 9 August 1972 reformed local governments, establishing these local councils to advise the government on the situation at local level, as well as to strengthen the implementation of government's decisions, made up of military administrators and personnel appointed by the SRC[460].

The regional decentralisation and the autonomy of local authorities were part of the administrative restructuring, aimed at reforming the State in order to open it to the participation in the reconstruction of the country of all layers of society, in particular of the most marginalised ones, wishing to build a system that would overcome the unbalances in regional development.

For there to be no more regions predestined for development and others for the maintenance of the status of underdevelopment, and for the Revolutionary government to keep its promises, it was seen as necessary the renewal of the bureaucratic system and the presence of a fully functioning executive power[461].

Meanwhile the administrative apparatus was under modification, the Ministry of Justice and Religious Affairs started the drafting of a civil code and civil procedure code. The draft civil code was based on the Egyptian code, having its model in the Code Napoléon of 1804, although subsequent influences of Italian and Swiss law may have modified the Egyptian model. However, since the main features of the Code Napoléon which inspired the Egyptian code could be found in the Somali draft, Sacco points out that *these features cannot fail to be of weight when assessing the quality and defects of the project*[462].

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[459] See Sacco R., Introduzione al diritto privato somalo, op. cit., p. 65

[460] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 150

[461] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 84-85

[462] Prof. Sacco highlights that the Code Napoléon did not regulate personality rights, the rights to industrial inventions and intellectual works, public property, nor concessionary property, public

The Revolutionary government took also on a battle against the public administration in place at the time of the *coup*, accused of having been set up by the former colonialist and neo-colonialist powers. In this sense, it was willing to *purge the state apparatus of dishonest managers and employees*, as well as of *the plethora of parasites brought into offices through the tribal patronage channel*[463].

Indeed, it was the entire hierarchical system on which the previous regime had been based that was called into question, including in particular the tribal system as the background value to be *defeated* and *repudiated*, seen as the cause of inequality and of a system based on a few strong tribes that had subordinated the smaller ones, *especially in the struggle for survival for grazing and access to water*, which we have seen was a determining factor for a pastoral economy.

In fact, the president based his socialist ideology on the battle against dishonesty and inequality, both perceived as perpetuated by the *false values* of the traditional Somali society[464].

In order to truly involve and mobilise the masses, there was a need for a political organisation that was truly responsive to the scientific socialism ideology supported and emphasised by the revolutionary government, and for the revolutionary party to respond compactly to this socialist ideology, from the grassroots to its leadership.

In this regard, from the revolutionary perspective it was necessary to neutralise the social, political, and ideological counterpowers that were still present and operating in the country, which started with the battle against tribalism during the first years of the revolutionary government.

Indeed, the government denounced tribalism using an official slogan, according to which tribalism *divided* people where Socialism *united* them[465].

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enterprise, repress the abuses of private enterprise, speak of state intervention in the economy, of imposed prices, of obligations to contract, of planning. *In other words, the planned code will be able to fulfil the task of unifying large areas of Somali private law* but *it will not provide the Somali jurist with an instrument suited to the times, the social and cultural trends of this century, and the socialist orientation* (my translation). See Sacco R., Introduzione al diritto privato somalo, op. cit., p. 78

[463] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 76.

[464] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 80.

[465] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 209

In September 1970, the so-called *Twenty-six Articles Law*[466] was promulgated, on crimes against the Nation and State Security, aimed at targeting *certain typical tribal activities*[467]. In particular, this law, purporting to target corruption and agitation considered to be based on tribalism, provided for strict and harsh penalties, including the death penalty or life imprisonment, for new crimes against the state and the public administration. It provided for imprisonment from two to ten years for the crime of spreading *tendentious information* against the republic, the government, and revolutionary politics[468].

It also provided for the death penalty for the crime of *exploiting religion to create national disunity or subvert the powers of the state*, and ten to twenty years' imprisonment for the crime of embezzlement. The law also punished by death penalty all strikes with specific counterrevolutionary aims, such as strikes aimed at subverting or weakening the powers of the state[469]. The National Security Court was the competent body to judge these crimes[470].

Control over public opinion became very strict, rights of assembly were limited, and even visits to foreign embassies or nationals required special permits, as those who were fraternizing with foreigners could undergo strict controls and questioning. Indeed, this oppressive climate created a marked *brain drain* of those Somalis who had played a prominent role in Somali politic under the previous republican period[471].

In addition to this first step towards weakening and undermining tribalism, the revolutionary government gradually deprived the clan leaders and *aqils* of all powers, introducing a new figure to act as the official representative of communities

[466] Law n. 54 of 10 September 1970

[467] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 135

[468] This crime was called *afmiishar*. See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 333, note 21 and

[469] While rivendicative strikes were apparently not considered at the same level and not punishable in the same way. See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 333, note 21

[470] See Sacco R., Introduzione al diritto privato somalo, op. cit., p. 66

[471] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 213

and villages and as an intermediary with the authorities, the *nabad-doon*[472]. These elders, formally known as peace-seekers, were appointed to replace the former *government-stipended local lineage headmen*[473].

An open and strong campaign was then waged against tribalism, harshly attacking its negative aspects, corruption, and oppression, and blaming its services to colonialism. Indeed, the accusations ranged from the systems of land and natural resources distribution, which under the clan system was still a main cause of conflict, where the strongest clan would always win out over the others, grabbing the best land for grazing and access to water; to servility to the colonial and neo-colonial powers, which had adopted a system whereby tribal chiefs were paid salaries *to legitimise all the plunder they carried out*[474].

The tribal system, which perpetuated the traditional rules of life and crystallised customs, morals, social relations, and rules of life through customary law, was perceived as tending to maintain the *status quo* of the interests of privileged groups who benefited from the underdevelopment of the rest of the country.

The Revolution, as Pestalozza points out, aimed to overcome tribalism through the path of socialist development[475]. To this end, the revolutionary state had implemented a certain number of measures and changes, such as the construction of infrastructures like wells and new pastures, the condemnation and punishment of raids, with the aim of emphasising how much the revolutionary democratic state could guarantee compared to the clan system, inspiring confidence in the Revolution to be able to replace the clan logic.

The *crash programme* that the revolutionary government started against tribalism at national level reached its peak in early 1971 when *effigies representing 'tribalism, corruption, nepotism and misrule' were symbolically burnt or buried in*

[472] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 136

[473] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 209

[474] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 136

[475] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 137

the Republic's main centres[476]. When Somali nationalism reached its highest point, with the replacement of the *plural clan identities* with the *singular* (socialist) state one, the government sought to achieve *standardization of its institutions and identity systems*[477], regardless of specific shortcomings and the means and social consequences to achieve it.

The decentralisation law of 1974 reorganised the territory and its regional and district boundaries. It redrew the borders of the hitherto existing eight regions and forty-seven districts into fifteen regions and seventy-eight districts, redrawing them in such a way as to cut the traditional clan boundaries, while instead focusing on the *digmo*, the settlement as the basic unit of association, seeking to strike directly at the clan system and clan identity[478].

The 1975 Land Law can be considered as an attempt to harmonise the administrative management of land permits and allocation. Although it was in fact adopted to regulate Somalia's agricultural economy, it was designed in a way that could be used to manage land allocation and hereditary claims through a process of state registration. That, in turn, *challenged customary institutions of inheritance and land allocation, seeking to abolish customary ownership in rural areas, and withdrew those traditional authorities charged with adjudicating customary land tenure cases the economic basis to maintain their set of rules and, thus, power*[479]. Such an approach could be easily interpreted as an attempt of the Revolutionary government to gradually harmonise rules across the country, *shifting rule-making powers from the sphere of kinship/clan to the state*[480].

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[476] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 209

[477] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 155 - 159

[478] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 150

[479] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 151, and Duherez D., *The scarcity of land in Somalia: Natural Resources and their role in the Somali conflict*, as cited by Balthasar D. *op. cit.*, note 74

[480] See Balthasar D., op. cit., p. 151

However, it will become evident how this neglect which translated into open opposition to the clan institutions, structures, and authorities during the Revolutionary regime of Siyad Barre with the scope of pursuing *a socialist version of the modernisation project of state-building,* in the end *heralded the complete collapse of the nation state-building project in Somalia*[481].

Indeed, the state's control over the legal and political functions of elders and *aqils* increased substantially, and the powers of traditional institutions was further undermined in March 1971 by the establishment of the Regional Courts of Appeal and by the subsequent Supreme Court's decision according to which the *aqils*, *Shari'ah* practitioners and judges would no longer be able to represent the parties before the Supreme Court[482].

The militarisation of the public administration provided the revolutionary government with control power over its citizens, to such an extent that for almost every level and type of conflict that arose between two parties, even among nomads of the hinterland, there was state control, and the parties were obliged to resolve conflicts at the central government level. This administrative apparatus reflected the extensive power of control actually held by the state through military presence at administrative level across the country[483].

In addition, the government also retained direct control over the instruments of customary law for conflict resolution applied by the clan elders.

In fact, to discourage *the interminable blood feuds between lineages which had done so much to undermine national solidarity in the past*, the death penalty was introduced to replace the traditional *diya* as blood compensation provided as payment from one clan to another in the event of murder or injury[484].

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[481] See Bereketeab R., *Rethinking State-Building in the Horn of Africa: Challenges of Striking a Balance between Traditional and Modern Institutions*, in "African Studies", Routledge, Taylor and Francis Group, vol. 70, n. 3, December 2011, p. 379

[482] See Balthasar D., op. cit., p. 153

[483] See Balthasar D., op. cit., p. 151

[484] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 208

Besides, the revolutionary battle against clannism and tribalism also affected the social aspects of the traditional Somali society, when President Barre decreed that social events that had hitherto taken place in traditional family clan contexts, were to take place within the *orientation centres*[485], bringing even those aspects of social interaction such as weddings and funerals that had more traditionally taken place in a clan-family setting, under state control[486]. However, such state control over topics like marriage, which traditionally involved hostility and conflict between clans, had much less of an impact on nomadic populations than on those in urban centres, where the resident community of the orientation centres were to replace the kin of the groom and the bride. Indeed, there was a considerable difference in practice in the political life of the nomadic majority of the population[487].

In close cohesion with the tribal organisation of traditional society there was also religion, Islam, part of the existing social order and deeply rooted in the society and in the popular consciousness.

Inevitably, the revolutionary logic had to address the religious discourse, as it could have represented a factor of resistance to revolutionary transformations, with the rise of a potential Muslim opposition to the Revolution, headed by religious leaders linked to the interests of the previous social order[488].

Although President Siyad had shown reticence towards Islamic socialism, he supported the absence of contradiction between Islam and socialism, understood as scientific socialism as advocated by the revolutionary government.

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[485] Established in all permanent settlements throughout the country to first germinate and then firmly entrench the structural and identity elements of scientific socialism underpinned by the new revolutionary set-up. Citizens were expected to gather in these centres to study the Revolution and its methods and goals, with the aim of maintaining revolutionary fervour at local level, under the surveillance of the *'Victory Pioneers'*, an organisation of vigilantes established in 1972, recruited largely among the unemployed with a leading role in organising local support. See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 211

[486] See Balthasar D., op. cit., p. 153-154

[487] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 214

[488] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., pp. 140-141

However, the religion to which the Revolution opened up was a different type of religious order than the one that was in place until then, "subservient" to the powerful and wealthy colonialist administrations, but an Islam of the poor, of the peasants. By referring to the very basic values of religion, in particular those of equality and justice among men, the President distanced the socialist ideology of the revolutionary government from the religious hierarchy then in place, stressing on the non-contradiction[489] of the socialist and the Islamic values. According to such an ideological discourse, the opposition to the revolutionary socialism was automatically translated into opposition to the principles of Islam and its own social and life systems. As a matter of facts, there were cases in which religious leaders were arrested for counter-revolutionary propaganda or for opposing Islam to socialism[490].

An even stronger message will then be passed to religious leaders and scholars of Islamic law, urging them to *actively participate in the construction of the new socialist society*, indirectly criticizing the Quranic schools and their management by some *Ulama'* who "considered religion as a source of profit".

Following the revolutionary objective of creating a new society based on freedom, equality and justice under the system of scientific socialism, it was reiterated even more strongly that *this system was perfectly in accordance with the same Islamic objectives*, since Islam *consecrates unity, cohesion, cooperation and understanding among citizens, to better serve the country*. Comparing the objectives of the Revolution with the principles taken from the *Qur'an* of *condemnation of exploitation, exaltation of work, denunciation of those who hoard gold and silver*

[489] Thanks to an analysis of the President's speeches carried out by Pestalozza, it is quite clear how Barre used subtle nuances of meaning to support his ideological discourse. Always with a cautious reference to scientific socialism, from the work of Pestalozza it should be highlighted that the President founded the principle of non-contradiction between Islam and socialism starting from a verse from the *Qur'an* in which it was stated that Allah created the world for the use and benefit of men, and continuing reiterating the non contradiction, hence the full compatibility, between this principle and the building process undertaken by the nation and based on socialism, considered as the only possible way to achieve the objectives of political, justice and economic and social development. See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 143

[490] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 141

and do not use them in favour of others, such Islamic principles were interpreted as *consistent with revolutionary measures aimed at the elimination of exploitation, tribalism, favouritism, nepotism*. Therefore, the final interpretation and warning that were indicated as the right way to follow were that the Islamic religion should be placed *at the service* of the Revolution and its socialist choice[491].

In such a context, Islam maintained and even enhanced its official position in the Somali world. Islamic religion was officially taught in all schools in the Republic and the state took under its mandate the construction of mosques and *Qur'an* schools[492].

However, starting in the second half of the 1970s, some of the policies implemented by Barre's revolutionary government failed, or better triggered a reverse process, sowing the seeds of dissent within a segment of the population. An obvious example was the Family Law of 1975, which Barre announced to enhance the role of women in Somali society. The law, in fact, provided that inheritance law was extended also to women[493], in this way *meddling with religious institutions*[494].

To fully understand the context in which this event unfolded, it is first of all important to note that in the early 1970s, a number of small Islamist movements began to emerge in the wake of similar groups that had sprung up in Egypt and Saudi Arabia, actively promoting a regime that was more openly founded and more strictly adherent to *Shari'ah* law. However, such movements were nor rooted nor strong enough in Somalia to pose a real threat to Barre's revolutionary government. The more traditionalist leaders in the north interpreted it as further evidence that the

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[491] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., pp. 222-223

[492] See Sacco R., Introduzione al diritto privato somalo, op. cit., p. 89

[493] In particular, although the law contained several principles contrary to Islam, the most controversial point was on the right of inheritance. The President stated that the new law *would change the "unjust law of inheritance" ordained by the Qur'an*, which provides for different shares of inheritance depending on whether it is a man or a woman, inducing outrageous reactions by a part of the population, subdued by the repressive and merciless measures of the regime. See Abdullahi (Baadiyow) A. M., *Recovering the Somali State. The role of Islam, Islamism and Transitional Justice*, Adonis and Abbey Publishers Ltd, London, 2017, p. 52

[494] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 160

SRC was again attempting to undermine the Islamic aspect of Somali society. The government's response to such criticism was very harsh, sentencing ten of these leaders to death. Such an event contributed greatly to the radicalisation of the Islamic groups active in Somalia, who, by joining forces with those supporting clannism, gradually strengthened internal dissenting forces in favour of a regime change. Some of these Islamic groups, Balthasar points out, would re-emerge in new Islamic movements during the period of civil war in Somalia[495].

Another important *crash programme* implemented by Barre's revolutionary government to root more directly revolutionary ideals was the rural and urban literacy campaign, one of the SRC's most ambitious projects, implemented in 1973 and 1975.

Already in 1972, on the anniversary of the Revolution, President Barre announced the nationalisation of public schools and school buildings, including teaching material and the expropriation of printing presses; at the same time, he proclaimed the adoption of Latin characters for the written Somali language and that Somali would become the official language of the Republic, imposing teaching in Somali in schools. This manoeuvre was certainly aimed at achieving mass schooling and literacy, but at the same time it allowed *a study appropriate to the ideological motivations, as the Revolution defined its own objectives*[496].

Education was seen as a necessary condition for the political education of the people, and the Socialist doctrine had to be disseminated to politicise the people in a short time. Therefore, orientation courses, the newspaper, the radio, were deployed to make every effort in that direction. School teaching was 'in accordance with the principles of socialism', and all schools tought the philosophy of revolution and the principles of scientific socialism[497].

The decision to discard the Arabic alphabet and use the Latin characters at state level, definitely confirmed the road to secularisation, to the detriment of pro-Arab

[495] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, op. cit., p. 160

[496] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., pp. 214-215

[497] See Sacco R., Introduzione al diritto privato somalo, op. cit., p. 84

Somali forces. The main goal of the massive "Cultural Revolution" was to extend adult literacy also to the nomadic populations[498].

While during the first phase of the military rule, in the early 1970s, the Somali government was mainly concentrated on internal development, and consolidation of power and authority, the second phase was mostly focussed on external and international affairs, seeking *a more prominent and forceful role in African affairs* and trying to place Somalia as a *natural mediator between the Islamic world and sub-Saharan Africa*, thanks to its geographical position[499]. The government sought growing involvement of Somalia in African issues, actively supporting independence movements against colonialism and imperialism, as in the case of Angola and Mozambique. The military regime also showed growing interest and commitment in the liberation of those parts of the *Somali nation which still languished under foreign rule – the French Territory of the 'Afars and Issas (Jibuti); the Ogaden (Ethiopia); and the northeastern region of Kenya*[500].

Dating from this period are the conflicts over Djibouti's independence from France, in which Somalia played a role, tensions with Ethiopia, whose imperialist aspirations in the region hardly matched Somali ambitions, and the ensuing Ogaden War of 1977-78. Indeed, when unrest began to spread in Ethiopia in 1975, Somalia, which had previously sought to maintain good and balanced relations with Kenya and Ethiopia, began to sympathise with Ogaden aspirations for autonomy. The Western Somali Liberation Front supported the Oromo leader in a campaign against the Ethiopian government and General Siyad sent emissaries to negotiate the independence issue with the government. However, the negotiations with Ethiopia bore no fruit. On the contrary, in July 1977, after the Oromo guerrilla began to regain ground and the Western Somali Liberation Front began to gather its forces

[498] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 216

[499] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., 1988, p. 226 - 227

[500] For a detailed historical overview of the Somali engagement in foreign independence war in those years, including for the Ogaden war, see Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., pp. 228 - 242

to plan attacks on the Ethiopian garrisons in the Ogaden, and claimed the liberation of some territories from Ethiopian control, the Ethiopian Government accused Somalia of having mounted a "full-scale war of aggression", appealing for external help. Despite General Barre's attempts to discuss the issue with the Russian administration, the lack of interest in the Ogaden independence led Barre to turn towards Saudi Arabia, which promised economic support to Somalia. In September of the same year, clashes escalated, resulting in Ethiopia breaking diplomatic relations with Somalia, condemning the Somali aggression along with the Kenyan government, while the Western Somali Liberation Front forces took control of the main Ethiopian outpost in the Ogaden, Jigjiga. In November of the same year, relations and the friendship treaty with the Soviet Union, which until then had financed and supported the Barre regime, broke down, as did diplomatic relations with Cuba. The break with the Soviet regime was received quite positively by the Somali public, as the "*Soviet friend*" was directly associated with the most violent and oppressive aspects of the Barre regime. Somali nationalist sentiment grew considerably after that and all internal efforts focussed on the Ogaden war, in the *fight against the Ethiopian usurper*. The growing preoccupation for the Ogaden diverted the attention of the Somali public from the *cult of the Glorious Leader, who was quietly allowed to subside*[501].

Although the Somali government found no support or backing from Western or Arab countries for the recognition of Ogaden independence, the country declared war in February 1978 and announced a general mobilisation. With Soviet and Cuban support, Ethiopia recaptured the areas that had previously been occupied by the Western Somali Liberation Front, leading the President to declare on 9 March the withdrawal of troops from Ogaden and the victory of Ethiopia.

The Somali defeat in the Ogaden war brought back strong criticism of both the foreign policy conducted by Siyad Barre and the tactical errors made in the conduct of the war itself, criticising also the President's inability to forge friendly relations with other allies after the break with the Soviets, such as the Western powers or the Arab countries. Furthermore, the battle against tribalism waged by the

[501] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., pp. 230 - 236

revolutionary government made it impossible to conduct studies or publish documents to support and recognise the presence of Somali clans in the Ogaden.

The situation was certainly not made any easier by the long-standing conflicts between the Ogaden and Isaq clans in the north, which competed for access to land for pastoralism. Nevertheless, an attempted *coup* on 9 April 1978 initiated by rebels in the south was thwarted[502]. The need for a change of government was felt more than ever after the failed attempt to overthrow the regime, especially by those majority clans who attempted the coup and had been more powerful during the parliamentary rule.

Also aggravating the internal tensions was the copious influx of refugees following the Ethiopian reconquest of Ogaden, to which the Somali government responded by setting up a National Refugee Commission and creating several refugee camps throughout the country. The funding received in the form of humanitarian aid from Western countries and the United Nations to finance the refugee camps[503], as well as some Western influence in Somali internal affairs, allowed the Barre regime to continue its public mandate, which was indeed formally extended by the elections held in December 1979, in which all new members of the Parliament belonged to the Somali Revolutionary Socialist Party, while the President reorganised its cabinet and almost abolished his three Vice-Presidents. However, widespread discontent with the oppressive Barre regime continued to grow strongly, taking a more organised form in two political movements backed by Ethiopia in the early 1980s, the Somali Salvation Democratic Front, established by the Majerteen clans based in Mudugh who had already attempted the *coup* in 1978, and the Somali National Movement, supported by the Isaq clans in the Togdher region, who felt severely affected by inadequate political representation and saw their economic and commercial interests undermined by the government's decisions.

There were several attempts and military operations by the two opposition movements in the 1980s, but they were harshly attacked by the government,

[502] Resulting in the death of almost 500 rebel soldiers in the battle against the forces loyal to the president. The rebel leaders, mainly colonels of the Majerteen clan, escaped to Kenya. See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., p. 242 - 245

[503] Which for some amounted to a refugee relief economy

attempting to discredit them as mere tribalist and also unpatriotic organisations, having connections with Ethiopia. As a consequence, the president singled out the Majerteen clan retaliating with brutal reprisal, imprisoning some of its leaders, starting a *cycle of nepotism, as a government once based on broad clan support began to rely on a limited number of clans considered loyal*[504].

When the president was later involved in a car accident in 1986 that kept him out of the country for a few months, tensions within his own clan increased and the discussion on his succession was openly brought up. His authority suffered a severe blow, which forced him to return to the country to re-establish control over his clan. Although power was in the meantime held by his loyalists, mainly family members belonging to the same clan, there were widespread tensions within his clan upon his return. Nonetheless, the elections held in December 1986 reconfirmed Barre's presidency for another seven years, with a claimed 99.9 per cent of support from the electorate.

In those years, the President also consolidated the presence of close clansmen within the Ministry of Defence and the armed forces, to the extent that by mid-1987 it was estimated that about half of the senior officer's corps belonged to the President's clan or close clans[505]. The presence of officers belonging to the President's clan within ministries or governmental departments constituted an informal monitoring service which also influenced administrative decisions.

In the last years of his regime, Barre implemented strong and violent repressions of internal opposition, retaliating with brutal reprisals the territories believed to be controlled by the opposition. When in 1988 the Somali National Movement attached Burco and Hargeisha, the government regained control over the two cities causing high civilian casualties.

Although the government attempted several reforms, reintroducing a multi-party system, adopting a new constitution the opposition forces continued their fight in the north and the centre, eventually reaching Mogadishu in December 1990.

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[504] See Putman D. B., Noor M. C., The Somalis. Their History and Culture, op. cit., p. 10

[505] See Lewis I. M., *A modern History of Somalia*: *Nation and State in the Horn of Africa*, op. cit., p. 246 - 255

In January 1991, the regime collapsed, forcing the President to flee the country in 1992, after two failed attempts to regain his power[506].

4.4.1 Land ownership under the regime

In land ownership some practices tend to be similar all over the country.
Since very little field research can be conducted in South Central Somalia, due to the increasingly insecure conditions and intense violence, it is assumed that the legal framework applying in Somaliland would be similar to the one applying in South-Central Somalia[507].
In land disputes, differences between practices in rural and urban areas, can be observed[508].
Although in Somaliland and Puntland there was an attempt to create a formal legal framework to manage land tenure, in South-Central Somalia informal practices have always been more used, which may involve a degree of violence towards minority clans especially in rural areas[509]. In precolonial times, practices concerning land property rights were based on traditional claims and interclan bargaining[510], involving customary conflict resolution practices.
During Italian colonial times, the colonial administration attempted to formalise land ownership, between "land for permanent development" or *daminyaale* and "land for temporary use" or *munishibaale*. In the latter case, although the applicant

[506] See Putman D. B., Noor M. C., The Somalis. Their History and Culture, op. cit., p. 11

[507] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia*, op. cit.

[508] See Burman J., Bowden A., Gole A., *Land Tenure in Somalia A Potential Foundation for Security and Prosperity*, Shuraako, ONE EARTH FUTURE FOUNDATION, 2014

[509] See Burman J., Bowden A., Gole A., *Land Tenure in Somalia A Potential Foundation for Security and Prosperity*, op. cit.

[510] See Chapin Metz H., *Somalia, a country study*, op. cit.

was granted permission to utilise the land after payment of a fee, the local government was still entitled to reclaim it for public use, without necessarily providing compensation nor a different piece of land[511].

In the field of land property, the doctrine of scientific socialism was enforced with the concentration of state farming and the creation of the "cooperative movement" in 1973. The government aimed at hampering land sales and private property leasing the privately-owned lands to cooperatives, trying in this way to become the main owner of small-scale production in all sectors[*512*].

However, things did not really proceed as planned, as in rural areas the traditional clans' rights were preserved, while in urban areas a *de facto* land market developed anyway[513].

Between 1973-75 Somalia was plagued by the most severe drought, which created the conditions for a national catastrophe, resulting in massive losses and affected populations migrating in mass to camps created by the government[*514*].

In a country like Somalia, whose social system - we have seen - is based on hierarchical clans and tribes still relying on pastoralism and agro-pastoralism forms of living in which their size and strength is decisive to ensure its own security and dominion, access to land is crucial for the survival of the clans and nomadic population as it can produce longer-term economic benefits derived from the use of land during wartime[515].

However, the deterioration of conflicts and violence, state policies of rangeland closure, the abrogation of *traditional use rights* have exacerbated the conditions of the pastoralist society, creating in turn instability. As pastoral communities are obliged to migrate to find grazing land such as in case of drought, they move to

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[511] See Gundel J., Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program, American Bar Association & Pact Kenya, 2020, p. 4

[512] See Norton G., *Land, Property and Housing in Somalia*, UN-Habitat, Norwegian Refugee Council, UNHCR, 2008

[513] See Chapin Metz H., *Somalia, a country study*, op. cit.

[514] See Lewis I. M., *ABAAR: The Somali Drought*, International African Institute: Emergency Report N0. 1, February 1975

[515] See Norton G., *Land, Property and Housing in Somalia*, UN-Habitat, Norwegian Refugee Council, UNHCR, 2008

areas which might be already occupied by other herders and farmers, leading, on one side, to increased vulnerability to drought, as the rangeland deteriorates due to overcrowding, and, on the other side to conflict between clans and lineages over land use[516].

After the independence and the subsequent *coup d'état* in 1969, the implementation of the doctrine of scientific socialism induced the nationalisation of land. Land Law of 1975[517] attempted to abolish customary property on agricultural land, overriding local customary tenure practices, and considered all land a public asset managed by the Somali government. A form of "managing" property could be granted for 50 years, by registering the leasehold titles. However, the effectiveness of this system was very low[518], since only 0.6% of the total land area was registered by 1988[519]. Meanwhile, in 1973 the Urban Land Distribution Law had been approved, providing that all urban land was public property but could be bought at a fixed price per square metre. Somali nationals were allowed to permanently own land, while foreigners had to renew the lease every 50 to 99 years[520].

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[516] See Unruh J.D., *Pastoralist Resource Use and Access in Somalia: A Changing Context of Development, Environmental Stress and Conflict*, in J. Sorenson (ed.) "Disaster and Development in the Horn of Africa", Basingstoke: Macmillan Press Ltd, London, 1994

[517] It is not clear whether this law is still enforced today, see Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia,* op. cit.

[518] According to Besteman, widespread corruption in tenure reform programmes, particularly relevant in the case of Somalia, has contributed to its low success rate, together with barriers to the participation of local farmers, including the costs of obtaining the titles, lack of knowledge on how to pursue the registration procedures, and the restriction imposed by the law to only one parcel of land per family. For a more in-depth analysis of the evolution of land tenure in Africa, its tendency towards individualisation, and the role of tenure reform and title registration in agricultural development, see Besteman C., *Individualisation and the Assault on Customary Tenure in Africa: Title Registration Programmes and the Case of Somalia*, in "Africa: Journal of the International African Institute", Vol. 64, No. 4, Cambridge University Press, 1994, pp. 485 and 497

[519] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia,* op. cit. and Norton G., *Land, Property and Housing in Somalia,* op. cit.

[520] See Rift Valley Institute (RVI), Heritage Institue for policy studies, *Land Matters in Mogadishu – Settlement, ownership and displacement in a contested city,* Naiobi, 2017

The civil code introduced by Barre in 1973[521] had a very limited role in the evolution of land law in Somalia[522]. The system created by the regime was extremely unstable and disputes were frequent even before the collapse of the government.

The importance of landownership was fundamental in the stateless period following the demise of Siad Barre regime, when conflicts over access and possession of land were crucial in the struggle for power[523].

In the Southern part of the country conflicts over access to land are still recurrent, in particular after the collapse of the formal legal system, when the majority of the documentation of land property got destroyed or lost making it difficult to demonstrate property rights, and to build up their regional power warlords carried out land grabbing [524].

With the outbreak of the civil war, conflicts over land were widespread partly as a consequence of the displacement of the population fleeing from clans' fighting.

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[521] In fact, it ignored the concession, public ownership, the allocation of means to the state enterprise, and *exhausted its function in multiplying detailed rules on the acquisition and transfer of ownership, neighbourhood relations, possession, limited real rights, and real estate publicity*. After the entry into force of the Civil Code, the Somali legislator decided to systematise the matter enacting the two mentioned laws aimed at land for construction and agricultural land. The law of 1973 provided that all land was state property. The Minister of Public Works could issue *perpetual concessions* to public administrations, autonomous bodies, cooperatives or private individuals. The Law on Agricultural Land of 1975 reaffirmed that all agricultural land belonged to the State, except for concessions to cooperatives, autonomous corporations or local administrations, private farmers or companies, fixed at 50 years for private individuals and perpetual for corporations. Hence, agricultural cooperatives were the privileged subjects of this concessionary mechanism implemented by the state. See Sacco R., *Fonti e caratteri della proprietà somala*, in "Proceedings of the Third International Congress of Somali Studies", 1988, Il Pensiero Scientifico Editore, p. 428

[522] See Norton G., *Land, Property and Housing in Somalia,* op. cit.

[523] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia,* 2014

[524] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia,* op. cit.

Indeed, according to a study conducted in 2014[525], internally displaced people and returnees can face big challenges in claiming land and property rights when trying to integrate in a new territory or returning to their lands, including lack of civil documentation, logistical difficulties of returning home, and discrimination in their host environment.

[525] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia*, op. cit.

Chapter V – Customary legal practices in contemporary Somalia. Current trends in legal pluralism: what role for a traditional legal system as conflict resolution tool in a post-conflict country?

The fifth chapter focuses on the post-revolutionary period, following the fall of the regime of Siyad Barre in 1991, and the subsequent attempts to democratic transition. It highlights the difficulties arising from the lack of a centralised state and law enforcement, and the current challenges in different pathways of application of the several legal systems available, depending on the geographical area, social status, clan affiliation and social category. It explores two of the main causes of conflict in Somalia in modern times, namely conflicts related to land ownership and violence against women and gender-based crimes.

5.1 Somali civil war and Democratic transition

The collapse of Siyad Barre's regime in 1991, paved the way for institutional collapse and the re-emerging of clannism, affecting in particular the southern regions. Indeed, clan hostilities did not end their competition for power and the subsequent power struggle created an escalation of violence, tearing the country apart.

In the two decades that followed the end of the Barre regime, Somalia remained a country without a central authority, characterised by armed conflicts between clans as well as the presence of extremist religious groups such as *Al-Shabaab*[526].

The civil war started a terrible phase with disastrous results for the civilian population, triggering a huge wave of migration and a humanitarian disaster.

[526] See *Constitutional history of Somalia, A Brief Background Constitutional History,* available at constitutionnet.org, Last updated in August 2018

With the outbreak of the civil war, *tradition was reinvented, and new roles emerged in the power configuration of the clan structure* and, as observed by Baadiyow, some traditional institutions integrated with the political elites[527].

Chaos spread throughout Somalia, with armed factions taking control of different parts of the country. Meanwhile, one faction of the United Somali Congress, the opposition movement backed by the Hawiye clans established in 1989 and headed by Ali Mahdi Mohammed, formed an interim government without previous consultations with other parallel forces or armed groups.

Outraged by these events, the Somali National Movement, based in the northern regions, after a two-month regional conference declared the independence of the northern Somaliland Republic, which began restoring a local government.

At the same time, the United Somali Congress split into a second faction in the South, headed by the USC military leader General Mohamed Farah Aidid.

The southern and central regions of the country, and in particular Mogadishu, fell into anarchy, with a high rate of violence and disastrous consequences for the people, to the extent that an estimated 45 per cent of the population was internally displaced or left the country, and the remaining part was severely affected by famine and disease[528].

The hardest hit areas were the coastal areas and farming communities, which saw their commercial activities disrupted due to widespread violence and attacks by armed groups.

Despite the presence of the UN and the efforts of the international community in finding an agreement on the implementation of the ceasefire between the two opposing factions, the situation in Somalia continued deteriorating, plunging the country into a serious crisis and a humanitarian catastrophe,

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[527] For a deeper analysis of traditional institutions and authorities within the state framework and Somali national state, see Abdullahi (Baadiyow) A. M., *Reconstructing the National State of Somalia: The Role of Traditional Institutions and Authorities*, in "State Building and National Identity Reconstruction in the Horn of Africa", Bereketeab R. (edited by), Palgrave MacMillan, 2017, pp. 25 - 48

[528] It is estimated that by 1993, approximately half of the children under five years old had died. See Putman D. B., Noor M. C., The Somalis. Their History and Culture, op. cit., p. 12

The United Nations peacekeeping forces that were in sequence deployed in Somalia (UNOSOM I, UNITAF and UNOSOM II[529]) since 1992, withdrew completely from the country in 1995, following the shot down of US helicopters and subsequent fights, in which hundreds of Somali civilians lost their lives. In that period, the emergence of the private sector in Somalia, becoming the main duty-free port of East Africa, brought private businessmen to control the productive infrastructures of the country[530].

In 2001, some warlords announced their intention to form a national government in direct opposition to the transitional administration[531].

In 2004 a new transitional parliament was inaugurated in Kenya, where the government was still based before moving back to Somalia in 2005.

However, the situation continued to worsen as fighting and violence was tearing the country apart. In 2006, the militias loyal to the Union of the Islamic Courts took control of Mogadishu[532], fighting against clan warlords and seeking to establish order in the capital. From this situation, the Islamist movement *Al-Shabaab* was created[533], as an Islamic militia with military training that managed to overcome the clan system. The implementation of *Shari'ah*[534] was perceived as a valid alternative

[529] UN missions

[530] See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law* Initiatives, op. cit., 2005

[531] In August 2000, Abdulkassim Salat Hassan is elected president of Somalia by clan leaders meeting in Djibuti, and Ali Khalif Gelayadh is appointed Prime Minister of the first government in Somalia after 1991. See Norton G., *Land, Property and Housing in Somalia*, UN-Habitat, Norwegian Refugee Council, UNHCR, 2008

[532] The new name of the Union of Islamic Courts was Supreme Council of Islamic Courts (SCIC). See Taddele Maru M., *The future of Somalia's Legal System and its contribution to peace and development*, op. cit., p. 6

[533] The *al-Shabaab* movement, which in the past had represented *the armed and most virulent soul of the Union of Islamic Courts*, was born since the fall of the Union of Islamic Courts after the Ethiopian intervention in 2007. See Guglielmo M., *Somalia, le due facce della ricostruzione*, Il Mulino, Bologna, Fascicolo 3, maggio-giugno 2013, p. 500

[534] The rise of *Al-Shabaab* can be placed in a context of gradual Islamic revival that had already developed in the 20th century, in which interest in Islam had steadily increased in many secularised

to the inexistent law of the national government and the form of justice of warlords[535].

Indeed, as previously seen in Chapter 2, in personal status law and private property issues, *Shari'ah law* had always influenced the customary practices the most. Since the colonial era and until the collapse of the regime, *Shari'ah* was incorporated into the State law, applied to civil cases and personal status law. However, after 1991, with the collapse of the government, a new form of Islamic law was implemented by *Shari'ah* courts controlled by the militias. In a social situation lacking a formal judicial system, *Shari'ah* courts were acting both as criminal and civil judges, with the advantage of being able to physically enforce the courts' decisions, through the formation of a security militia[536]. Since 2006, several territories of Southern and Central Somalia fell under the authority of the Islamic Court Union (ICU), especially in Mogadishu[537]. Other areas under their control included Belaide, Jowhar, Burakabana and Mahday, as the Islamic Courts intended to control the whole of Somalia establishing a unitary government[538].

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countries. The failure of those *secularist States either to provide for their people or to guarantee their rights contributed to a reaction against secularism*, whereby an ever-increasing number of Islamists demanded that *States recommit to the ideal of legislating in accordance with shari'ah*. For further details on the subject, see Lombardi C. B., *Designing Islamic constitutions: Past trends and options for a democratic future*, in "International Journal of Constitutional Law (I-CON)", Vol. 11 No. 3, 2013, pp. 615-645, p. 620. For a more in-depth analysis of political Islam in Somalia and the rise of political Islam from the mid-1970s as an *underground movement* under the regime, see Menkhaus K., Political Islam in Somalia, in "Middle East Policy", Vol. IX, No. 1, March 2002, pp. 109 - 123

[535] Chatham House, *Al Shabaab in Somalia*, Summary of the interview and meeting with Stig Jarle Hansen, June 2013.

[536] See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law* Initiatives, op. cit., 2005

[537] The first *Shari'ah* courts in Mogadishu were created with the joint agreement of clan elders, businessmen, community, and religious leader. See Gundel J., *The predicament of the 'Oday' - The role of traditional structures in security, rights, law and development in Somalia*, op. cit.

[538] See Taddele Maru M., *The future of Somalia's Legal System and its contribution to peace and development*, op. cit., p. 7

As a result, the legal system governing the country presented changing characteristics from region to region and from person to person, according to the parties involved, the clan membership and economic possibilities of the actors involved.

Although the Supreme Council of Islamic Courts had brought some legal stability with the imposition of one Islamic law above the others, some of the Courts were quite radical and imposed drastic measures such as the imposition of the *hijab* for women, the closure of cinemas, the press and radio. Some Courts also allowed *hadd* punishment, that is death by stoning, or flogging and amputation. With Ethiopia's intervention in Somalia in 2007, the Islamic Courts were dissolved and those which remained active have a limited mandate and decreasing influence[539].

The attempts to restore peace after the demise of the regime were also conjoined to attempts to re-establish a form of constitutional order. One of the main achievements was the adoption of the Transitional National Charter in 2000, establishing a Transitional National Government, as well as a power sharing arrangement with political representation of the main four clans and the minority clans, and *decentralised unitary state based on regional autonomy*[540].

The latter provision was replaced by a federal system subsequently established in 2004 by the Transitional Federal Charter, establishing also a Transitional Federal Parliament and a Federal Constitutional Commission mandated to draft the Federal Constitution.

The Federal Constitutional Commission was established by the Somali Constitutional Commission Act in 2006, renaming itself after the first meeting as the Independent Federal Constitutional Commission. Although the commission was supposed to draft a constitution in about two years' time, due to security concerns and widespread violence, the Commission could only produce by August 2010 a Consultation Draft Constitution to stimulate public debate and inform a more concrete document. Public consultations took place between 2010 and 2011, amidst continuing political instability, leading to further delays in the work. The Federal

[539] See Taddele Maru M., *The future of Somalia's Legal System and its contribution to peace and development,* op. cit., *ibidem*

[540] See *Constitutional history of Somalia, A Brief Background Constitutional History,* op. cit.

Republic of Somalia adopted its provisional Constitution in 2012 by the National Constituent Assembly made up of 825 representatives of Somali society. The Constitution was considered provisional as some critical matters remained unresolved, including the division of powers between the Federal and State governments, the status of the city of Mogadishu and the structure of the federal legislature, executive and the judiciary[541]. Furthermore, the Constitution could not be approved by public referendum due to the insecurity conditions and continuous violence in the territory. The same Constitution provided in Chapter 15 for the continuation of the constitutional revision process, linked to the first term of the Somali Federal Parliament, and scheduled to end after four years, in August 2016[542]. The Constitution also provided for two institutions with the task of supporting the Parliament in finalising this process, the Provisional Constitution Implementation and Oversight Committee, as a parliamentary body, and the Independent Provisional Constitutional Review and Implementation Commission, as an independent expert body. Once again, delays in the organisation of these bodies and continuing difficulties related to the country's instability caused the failure to meet the deadline by which the public referendum of constitutional approval should have been held, and the Somali Federal Parliament decided to defer the review process presented by the two bodies to the second term of the Somali Federal Parliament.

Delays and challenges in the state building process were also due to the failure to create all the planned Federal States, as only the state of Puntland had been officially formed, while the state of Hir-Shabelle was only created in late 2016, merging the regions of Hiiraan and Middle Shabelle[543].

[541] See *Constitutional history of Somalia, A Brief Background Constitutional History*, op. cit., *ibidem*

[542] See Schmidt J. A., *The Somali Constitutional Review Process. Taking Stock.*, available at constitutionnet.org, 8 March 2017

[543] The Government was heavily criticised for not having consulted properly the new federal structures. See See Schmidt J. A., *The Somali Constitutional Review Process. Taking Stock.*, op. cit.

Meanwhile, other two terms of the Parliament have passed, but the awaited Constitutional amendments have not been approved yet[544], hence the Provisional Constitution of 2012 remains still in place in Somalia[545]. One of the main features of the Constitution is the provision in art. 2 of Islam as the state religion, the *Qur'an* and *Sunna* as sources of law and all laws must be in compliance with it. Art. 35 provides for personal criminal liability[546]. In addition, while it provides for the independence of the judiciary, it does not create a centralised judicial system, outside matters of constitutional interpretation, and it remains unclear whether the intention is to create an integrated system of courts or a dual system with different jurisdictions of federal and state courts[547]. Art. 105 provides that the judicial structure shall be regulated in a law enacted by the Federal Parliament.

The parliamentary and subsequent indirect Presidential elections, that were supposed to be held in early 2021 were extended to 2022, postponed by the president hitherto in charge, amid fears of instability and arising violence especially in the capital Mogadishu[548]. The new President was elected on 15 May 2022[549] and clarity is still awaited on the future developments of the Provisional Constitution.

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[544] In December 2020, the President of the Federal Republic of Somalia Mohamed Abdullahi Farmajo signed a Presidential Decree postponing the approval of the Amendments to the Provisional Constitution of the country, as new Parliamentary elections were to be held. See Mukami M., *Somali leader signs law delaying constitution amendment*, 24 December 2020, available at Anadolu Agency aa.com.tr and constitutionnet.org

[545] However, as pointed out by author Mary Harper: "*the constitution appears to exist in a parallel universe, a fantasy land, when compared with the reality on the ground in Somalia, with universal access to education and the end of female genital mutilation unlikely to happen anytime soon*". See Zeldin W., *Somalia: New Constitution Approved*, Web Page Retrieved from the Library of Congress, 9 August 2012

[546] Art. 35: "Criminal liability is a personal matter and no person may be convicted of a criminal offence for an act committed by another person"

[547] See Constitutional history of Somalia, *A Brief Background Constitutional History*, op. cit.

[548] See APN, *Somalia's leaders agree to hold delayed election by February 25*, 9 January 2022, available at constitutionnet.org and aljazeera.com

[549] See *Somalia elects Hassan Sheikh Mohamud as new president*, 15 May 2022, available at aljazeera.com

5.2 Legal systems in the Federal Republic of Somalia

The domestic legal system of the Federal Republic of Somalia retained the characteristics of a pluralist system where the three main sources of law, State law, *Shari'ah* and Customary law overlap. The State system continues the implementation of a combination of both elements of English common law and Italian civil law, although its enforcement still differs from region to region[550], while *Xeer* continues to be the predominant legal system in those rural areas outside the control of regional administration, governing those aspects such as social and political relations, and economic transactions[551].

However, the customary structures in force in South-Central Somalia differ from those implemented in Northern Somaliland, as the Southern part of the country turned out to be more fragile and fragmented, due to the different colonial paths, the different developments due to the civil war, and to the more heterogeneous population of agro-pastoralists, pastoralists and old urbanised cultures[552].

Furthermore, the attempt of the Barre regime to delegitimise the traditional tribal social structures had a far bigger impact in the Southern part of the country.

Despite the fact that under the revolutionary regime the battle against tribalism reinforced the regime's structures and almost outlawed customary law, *Xeer*

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[550] See UNDP United Nations Development Programme Publication, *Somalia. Gender Justice & The Law. Assessment of laws affecting gender equality and protection against gender-based violence*, UNDP in collaboration with the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United Nations Population Fund (UNFPA) and the United Nations Economic and Social Commission for West Asia (ESCWA), New York, 2018, p. 10

[551] See Taddele Maru M., *The future of Somalia's Legal System and its contribution to peace and development*, in "Journal of Peacebuilding and Development", Vol. 4, No. 1 (March 2008), Sage Publications, Inc., p. 1

[552] See Gundel J., *The predicament of the 'Oday' - The role of traditional structures in security, rights, law and development in Somalia*, Danish Refugee Council, Oxfam Novib, Nairobi, 2006

maintained its grasp in the periphery of the state administration, while an increasing interest was emerging at the same time in favour of a wider application of Islamic law[553].

After the collapse of the revolutionary government, customary rules were rediscovered and revitalised, even in urban areas like Mogadishu and Kisimayo, with the negative effect that corruption of elders emerged as warlords were willing to control the justice system[554]. Indeed, clan authorities and Sharia courts are found to be used as guarantors of the private sector's contracts and transactions to fill the legal vacuum[555].

Meanwhile, the northern regions followed a different path. After its declaration of independence in 1991, although it was never internationally recognised, Somaliland approved in 1993 a National Transitional Charter, supported by all clans in the territory.

The initial phase of reconciliation initiatives culminated in 1991 in the Burco conference. Other crucial topics such as the adoption of a political system of government and the division of power for the independence of Somaliland were discussed during the 1993 Booroma national conference and included in the Somaliland National Charter, which was passed at the Borama Grand Conference of the Somaliland Communities in 1993. The current judicial system of Somaliland was implemented by a 1993 law on the organisation of the judiciary[556].

Although the 1993 Charter was to be in force for a period of two years when it had to be replaced by a Constitution, the House of Elders had to extend the period of the operation of the Charter. Other efforts to build a stable democratic order were made, with the adoption of a transitional Constitution in 1997, multi-party municipal elections in 2002, and presidential elections in 2003. Indeed, at the Grand Conference of Hargeisa in 1996 - 1997 attended by delegates representing all

[553] See Battera F., *State Building e diritto consuetudinario in Somalia*, op. cit. p. 33

[554] See Gundel J., *The predicament of the 'Oday' - The role of traditional structures in security, rights, law and development in Somalia*, op. cit.

[555] See Taddele Maru M., *The future of Somalia's Legal System and its contribution to peace and development*, op. cit., p. 3

[556] See Battera F., *State Building e diritto consuetudinario in Somalia*, op. cit., p. 33

Somaliland communities, an Interim Constitution was drafted and adopted in 2000. It was finally endorsed by the Somaliland people at the referendum on 31 May 2001[557]. The Constitution provides, among other aspects, for the independence of the judiciary (Art. 97[558]) and the principle of equality of citizens before the law (Art. 8[559]).

After Booroma, the customary legal tools were embraced in a new political system, where the function of the assembly of elders was emphasised, with a key role to guarantee the application of the law and controlling stability and social peace.

In Somaliland, but also in Puntland, customary law is often informally applied in criminal matters outside the official court system, mainly due to weaknesses in the overall judiciary system and subsequent challenges in enforcement of formal law. Islamic law has instead been kept as part of the official apparatus, applied by the district courts on personal status law.

It is interesting to note the analysis conducted by Battera on the Somaliland Awdal region and the interaction between the customary and the formal legal systems. In fact, in the Awdal region, an area rich of agricultural settlements, the assembly of elders acts as an executive committee, also wielding some jurisdictional power, settling disputes through arbitration between the parties and representing all *diya-paying* groups.

In this context, the so-called *xeerbeegti*, experts in traditional law who do not sit in the assembly of elders, play an important role.

In a murder case, the choice to request the intervention of the assembly is left to the offended party and/or his family members. This passage is crucial as deciding to appeal to the assembly of elders also implies accepting the resulting judgement,

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[557] For the English text of the Constitution of Somaliland adopted in 2000, see The Constitution of the Republic of Somaliland, available at somalilandlaw.com

[558] Art. 97 of the Constitution of Somaliland provides that: "*The Judicial Branch shall fulfil its duties in accordance with the Constitution, and shall be independent of the other branches of the state*".

[559] Art. 8 of the Constitution of Somaliland provides that: "*All citizens of Somaliland shall enjoy equal rights and obligations before the law, and shall not be accorded precedence on grounds of colour, clan, birth, language, gender, property, status, opinion etc.".*

whatever it may be. Should this not occur, the *Guurti* may impose fines, however social pressures have often encouraged the parties to respect the elders' decisions.
Since the forms of arbitration under customary law are intended to maintain social equilibrium and peace between communities, if the injured party accepts compensation, the murderer may go free. The *Xeer* in fact does not provide for punitive measures such as preventive detention, whereas in modern times it is possible for the Police to proceed with preventive detention to allow the legal times, for the assembly of elders to have time to meet, avoiding cycles of revenge in the meantime.
If the mediation of the elders is not accepted by the parties, the case is referred to the ordinary Courts, with the subsequent possibility of implementing the death penalty, provided for in the Somali penal code and also applicable in Somaliland.
From Battera's study and the interviews conducted, it appears that forms of arbitration decided through customary law tend to prevail over judgments rendered by ordinary courts, but that there is also much confusion among elders themselves between *Xeer* and *Shari'ah*, very often perceived as the sole source of *Xeer*, when customary rules in fact predate Islamic waves. The concept of *diya* itself we have seen takes on two different connotations, in that for Islamic law it represents a sanction with penal value, whereas for customary law the *mag* is effectively economic compensation for an injury caused, possessing both criminal and civil connotations, with the final goal of keeping peace among clans[560].
Peacebuilding, security, and access to justice are highly intertwined and key concerns in nowadays Somalia.
Justice and rule of law are vital to peace and stability at community level, while *mistrust of security forces may exist as a result of legacies of security force abuses,*

[560] Battera also reminds us that in the five years following the Booroma Conference, murder cases were very low in the Awdal region and most criminal cases were solved through customary mediation outside the official courts system. See Battera F., *State Building e diritto consuetudinario in Somalia*, op. cit., p. 35 - 37

perceptions of institutional corruption, and frustration with slow responses to crimes[561].

Indeed, the lack of rule of law and a universally functioning justice system in many locations across the country is compromising both the population's access to justice and security, pushing citizens to seek alternative systems of justice rather than no justice at all. Specifically, from a study[562] conducted on the gap between access to justice and community security, four areas of intervention were prioritised towards which is perceived crucial to direct community efforts to address insecurity issues and avoid exacerbation of conflicts into violence: gender inequality and gender-based violence, land conflicts, youth gang violence and ineffective law enforcement. We shall have a closer look at some of these aspects.

5.2.1 Land conflict and traditional dispute resolution tools

The Somali land tenure system envisaged two types of ownership, the collective lands and the individually owned lands. Disputes arising from its access and usage are generally managed respectively through *xeer* law and the formal state system[563]. However, very few are the reliable sources confirming the laws implemented in land tenure in Somalia, and legal practitioners both in Somaliland and in the South-Central regions may be often unaware of which law can be applicable to the specific cases[564].

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[561] See Kelly C. L., *Justice and Rule of Law Key to African Security*, in Africa Center for Strategic Studies, 25 May 2021

[562] See Saferworld, preventing violent conflict. Building Safer Lives, *Briefing: The missing link. Access to justice and community security in Somalia*, August 2020

[563] This paragraph draws upon research conducted by the author on involuntary mobility and access to land in Somalia

[564] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia,* op. cit. and Norton G., *Land, Property and Housing in Somalia,* op. cit.

After the end of the regime, fighting for control over land became a war within the war, in particular for the control over the riverine and inter-riverine areas, dominated by the United Somali Congress with Hawiye majority in the southern and central parts of the country. When the Hawiye clans entered Mogadishu in 1991, they expelled from the city or killed the other clans, taking over the land they left behind, with the aim of getting control of Mogadishu, thought to be the key to control the resources of the entire country as well as to represent the state. This idea channelled subsequent waves of groups and IDPs moving to Mogadishu, hoping to get access to resources as well as international aid, and increasing the number of IDPs camp in the urban area of Mogadishu, very often controlled by "gatekeepers", individuals from powerful clans[565].

Since 1991 in South central Somalia there have been no laws on land nor Land Dispute Tribunals, as in the case of Somaliland[566].

The current Government of Somalia has inherited elements of the three different legal systems in land tenure matter, resulting in even more unclear applicable legislation, with the possibility of applying norms from the different legal frameworks, depending on the personal preferences of the judicial actors[567].

At regional level, no institutions deal with land management, while at the local level, decisions are made by governors or by informal authorities. There is very little information on the actual application of Land Laws in Somalia, while customary norms are widespread, and *ownership could be acquired through developing a piece of land by building on it or planting trees*[568].

Mogadishu represents a peculiar case as some formal courts are present, dealing with land disputes, while at the same time local community members are entitled

[565] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, American Bar Association & Pact Kenya, 2020, pp. 4 - 5

[566] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia*, op. cit.

[567] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, American Bar Association & Pact Kenya, 2020, p. 11

[568] See Norton G., *Land, Property and Housing in Somalia,* op. cit.

to take decisions on land allocation for public purposes[569]. The civil war has only worsened the status of the justice system, especially with the rise of Mogadishu's district commissioners, security providers or *gatekeepers to justice and its enforcement*, fuelling a situation where *former powerholders with influence and armed backing continue to issue land deeds and allocate plots, further adding to the confusion*[570].

However, proceeding through formal courts (mainly in urban areas) requires the possession of legal documents and the payment of court fees, making it often inaccessible for disadvantaged groups. In addition, the formal judiciary system is often perceived as highly corrupted, lacking at the same time enforcement capacities towards more powerful groups. Therefore, those lacking formal documents or money, tend to turn to the customary system, where disputes are solved through mediation or arbitration[571] between clan authorities and elders. The conflict is addressed in a collaborative way, seeking a solution acceptable to both parties[572]. However, *xeer* decisions may also experience problematic enforcement of decisions especially when the outcome is in favour of minority clans, often showing a bias towards the most powerful clans[573].

Parties can also decide to resort to Alternative Dispute Resolution (ADR) mechanisms, generally cheaper and faster than the formal courts, which rely on the traditional system and activate a committee of elders. The parties can settle disputes outside the statutory court system with the help of third-party mediators or

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[569] See Burman J., Bowden A., Gole A., *Land Tenure in Somalia A Potential Foundation for Security and Prosperity*, op. cit. and Bruyas, as cited in Norton G., *Land, Property and Housing in Somalia*, op. cit.

[570] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., *ibidem*

[571] As already presented in chapter 2, there are two forms of *xeer* processes, the mediation (*masalaxo*) and the arbitration (*gar dawe*). Mediation is often preferred since the final decision usually satisfies both parties

[572] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia*, op. cit.

[573] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, American Bar Association & Pact Kenya, 2020, p. 11

arbitrators, involving elders and agreements stipulating the procedures and framework for dispute settlement[574].

A good example of these ADR is the Alternative Dispute Resolution Unit (ADRU) established in 2018 and implemented by the Ministry of Justice (MoJ), with several centres ADR Centres in various regions across the country, including three branches in Mogadishu[575].

In Mogadishu, the Benadir Regional Administration (BRA) has control over land administration. The mayor of the city, between 2010 and 2014, established a Land Disputes Committee, to deal with cases of land disputes. After 2014, the procedures have become slightly clearer as the Banadir Court refers cases to the Land Disputes Committee, which has the role to verify legal documentation and make non-binding recommendations to the Court[576]. However, the proper functioning of the state justice system is hindered by the shared perception that corruption is endemic to the system.

The urban areas are the main places where the majority of land disputes tend to arise. The findings of the research conducted by Law and NRC in South-Central Somalia in 2014 showed that, for the IDP's population, several challenges contributed to their unstable and insecure social situation[577]. Among these, there are forced evictions of IDPs living in camps without warning from the government, as well as other forms of abuses perpetrated by camp gatekeepers, who may request a taxation to allow access to the camp and to the humanitarian assistance provided.

Conflicts with private owners or landlords may also arise when IDPs rent a piece of land from local people as, according to traditional customs, the agreements can

[574] For a more torough analysis of the ADR system, see also Expanding Access to Justice Program, *Alternative Dispute Resolution Initiatives in Somalia*, Nairobi, Kenya: Pact and the American Bar Association Rule of Law Initiative, 2020

[575] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., p. 19

[576] See Rift Valley Institute (RVI), Heritage Institue for policy studies, *Land Matters in Mogadishu – Settlement, ownership and displacement in a contested city*, op. cit.

[577] See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia*, op. cit.

and are mainly oral, therefore there is lack of legal guarantees. These conflicts have also been observed arising between local owners and international organisations. Similar conflicts can arise also between returnees[578] and the IDPs occupying an abandoned property, often translating into eviction of the IDPs.

Another challenge is land grabbing, occurring both in urban and rural areas by warlords, businesspeople, clan militias, corporations, diaspora, or powerful clans. Land grabbing by warlords were more frequent between 1991 and 2012, while more recently businesspeople and corporations are perpetrating land grabbing at the expenses of minority clans, which are sometimes displaced or given a portion of their land in lease agreement. These practices are often implemented on the basis of the traditional Somali notion of *deegaan*, which explains the concept of home territory, identity and belonging. As Gundel reminds us, in Somali tradition, it is the *place where those who share a common clan affiliation can claim ultimate authority over the land and its natural resources*, and in the last fifty years *deegaan has started defining the area where one lives, operates a business, and feels secure enough because of the presence of one's clansmen. Nevertheless, clansmen who have settled in other parts of the country, live in cities, or have moved abroad will still identify with their deegaan and can still be called upon to help defend the collective rights of their clan's resources*[579].

[578] As reported in a study by the Rift Valley Institute (2017): "*A further example of the problematic nature of neighbour testimony arose in a case where one large hawala (money transfer) company attempted to purchase a property on the city's prestigious Maka al-Mukarama Road. While conducting due diligence on the question of the building's ownership, the company established from neighbours that the vendor had inherited the property from his father and that the family had lived there for many years. Several months after the company had exchanged contracts on the property and started developing it, the seller's brother returned from the diaspora with the original title deeds, informing the company that he had bought his brother's share of the inheritance and was, in fact, the true owner of the property. This case demonstrates that diaspora returnees may not always be the victims of property appropriations. They may themselves also exploit the weak legal framework surrounding land and property in the city to their own advantage*".

[579] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., p. 12

Other consuetudinary concepts related to the right to land are *u dhashay*, the blood rights of those born in a *deegaan*; *ku dhashay*, birth right, which extends land rights to the descendants of adopted outsiders; and finally, *ku dhaqmay*, which expresses the concept of universal Somali citizenship, recognising the property rights to land of all Somalis, regardless of clan or place of birth. This concept was particularly present in the coastal towns of pre-colonial Somalia, which were made up of people and families from different origin.

However, strong clans can also disregard these traditional rules and claim *deegaan* over rural lands not belonging to their clan to expand their power.

Traditionally, there is also the possibility that smaller clans may ally with stronger clans to take advantage of the natural resources of the territories where the stronger clans reside. The approval of the majority clans is necessary for outsiders to settle within the recognised boundaries of another clan's *deegaan*.

Although land grabbing and forced transfers of land to more powerful *galti* or outsiders was taking place in the past, they were usually legitimised by customary means, for example through marriages to local lineages, by setting up businesses in the local economy. Armed land grabbing is no longer legitimised by customary norms or by the renegotiation of resource rights between local parties, by new *xeer* agreements or by reformulations of local collective histories to recognise the new balance of power[580].

One of the main limits in the implementation of traditional dispute-resolution decisions is the lack of an official enforcement of the decision[581]. Being based solely on voluntary submission to the elders' decisions, the risk lies often on the side of the offender who, when put in a less favourable position, might decide to disregard the decision of the elders and resort to the state justice system, if considered more favourable for the specific case[582]. Indeed, the entrenched legitimacy of elders had

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[580] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., p. 13

[581] See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law Initiatives*, op. cit.

[582] As Harper suggests; "*Pluralism offers […] the option of ignoring customary norms and asserting their right to refer disputes to the formal legal system in an attempt to avoid traditional*

already been gradually eroded at first under colonisation and then the authoritarian regime, which had removed them as the primary source of law and mediation, especially in Mogadishu. After the civil war, the appointment of false elders biased towards the more powerful parties, undermined even more the authority of the figure of the elders and the concept of integrity attached to the institution. In addition, with the introduction of national land titling in the 1970s, customary practice has been rendered increasingly irrelevant, in favour of state-backed elites and armed militias[583].

Nevertheless, research have confirmed that most cases of land disputes are still managed by elders, and they tend to be in favour of the stronger clans to the disadvantage of minorities, women IDPs, members of weaker clans and those without connections with the stronger clans[584].

Alternative approaches to achieving justice can also be pursued, less biased by the belonging to a certain social group, or simply for reasons related to the cost of access to justice.

Among them, we can find community mobilisation, in which the parties can turn to their communities to help them pursue justice.

Often, as research in the Mogadishu area have showed, having a support group such as community organisations and networks, local women's organisations, a religious network, can serve the function of supporting a vulnerable individual or group in cases of illegal land grabbing. Although this instrument is considered an effective tool to combat illegal land grabbing, it can be seen more as a tool to empower the community's interests.

Another alternative means of conflict resolution arising from land disputes is the use of *Al-Shabaab* courts, which seem to have played a bigger role in land disputes in recent years, particularly in the Mogadishu area. Although the authorities have

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responsibilities, to 'get a better deal' or when seeking revenge", see Harper E., *Engaging with Customary Justice Systems*, op. cit.

583 See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., p. 13

584 See Legal Action Worldwide (LAW), Norwegian Refugee Council (NRC), *Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia*, op. cit.

warned citizens against resorting to this court system, it has been noted that in some cases the justice officials themselves refer to them, for instance if a case cannot be concluded in the formal court, so that an *Al-Shabaab* judge can close the case. The Al-Shabaab system consists of the local *deegaan* courts, composed of 2 to 4 judges appointed for their knowledge of Sharia law, a Court of Appeal located in Lower Shabelle, and a special court called *Radul Madaalim* that deals with cases involving powerful individuals, groups or clans. The trials are held in the secret locations of the mobile courts, to which litigants are brought without notice[585].

Conflict resolution through these courts can be perceived as a fairer instrument particularly for individuals belonging to more vulnerable groups, which *al-Shabaab* claims to support, openly against traditional clan systems. Access to *al-Shabaab*'s courts is free of charge, decisions are deliberated on the same day as the trial, and unlike other formal and customary systems, verdicts are harshly enforced immediately by the same courts. It is also reported that the parties tend to accept the rulings because they fear repercussions, to be killed or arrested.

Notwithstanding the possible benefits, resorting to *al-Shabaab*'s Islamic courts is often unappealing for those groups who do not want to be associated to such a radical Islamic group. In addition, the prohibition of traditional practices, such as weddings, wedding dances and women's gatherings by these courts, has contributed to a climate of terror.

Furthermore, there is a perception that Al-Shabaab has corrupted Islam, as a radical neo-Salafi jihadi Islamist organisation, which follows strict interpretations of the Islamic Hanbali school, conforming mainly to the policies of *Al-Shabaab*. In addition, having infiltrated governmental institutions, the group threatens security in particular in Mogadishu, with repeated attacks against the Benadir Regional administration. Despite this, al-Shabaab continues to be a powerful presence in Mogadishu and other parts of Southern Somalia, *launching attacks, infiltrating*

[585] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., p. 15 - 17

areas and institutions, and operating mobile courts with harshly implemented verdicts[586].

5.3 Contemporary legal aspects: violence against women and the Sexual Offences Bill

As highlighted in the second paragraph, in addition to conflicts over land, gender-based violence is identified as another of the main causes and consequences of insecurity in Somalia, with a significant number of cases of rape, sexual assault and domestic violence. Widespread is the practice of allowing perpetrators of sexual abuses to marry the victims/survivors, which stems from gender conceptions that encourage violence and impunity, denying survivors the right to pursue justice[587]. The prolonged conflict in Somalia and the lack of rule of law and continued insecurity have contributed to the exacerbation of violent social structures, where women and girls in particular lack protection and are subject to various forms of sexual and gender-based violence, including conflict-related sexual violence and sexual exploitation and abuse. In particular, women and girls from minority groups may suffer from inadequate protection mechanisms, lack of or limited access to available formal and informal justice mechanisms, and weak clan protection[588].

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[586] See Gundel J., *Pathways and Institutions for Resolving Land Disputes in Mogadishu. Expanding Access to Justice Program*, op. cit., p. 14

[587] See Saferworld, preventing violent conflict. Building Safer Lives, *Briefing: The missing link. Access to justice and community security in Somalia*, August 2020, p. 4

[588] See 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia', UN Office of the High Commissioner for Human Rights, United Nations Assistance Mission in Somalia, 10 December 2017, p. 22, as cited in Australian Government, Department of Home Affairs, Q&A Report: Somalia: Women - Separated Women - Divorce - State Protection - Support organisations - Clan Protection - People who have lived overseas, 3 March 2020

The legal systems to which women may seek access to are dominated by discrimination and injustice, perpetuating the exclusion of women from decision-making.

Indeed, although some attempts have been made to improve women's access to decision-making mechanisms, there is still a lack of effective participation of women in key decision-making positions. In addition, especially in rural areas, discrimination against women is greater, even with respect to access to economic resources, which are still mainly controlled by men, as are decisions of public interest. The presence of women in peacebuilding and conflict management mechanisms is almost non-existent, especially in higher-profile decision-making processes. Despite the fact that some avenues have been promoting a greater role for women within the main state decision-making systems, social dynamics largely continue to reinforce gender inequality[589].

The legal framework that regulates gender-based violence and sexual offences in Somalia consists of the Penal Code of 1962 and the Criminal Procedure Code of 1963.

Although the Penal Code of 1962, based on the Italian Penal Code of 1930, provides punishments for some sexual offences[590], it is an outdated code which does not consider sexual crimes as crimes against the person, but as crimes against morality and decency, failing to adopt a victim-centred approach prosecuting the perpetrators of sexual offences. While the Criminal Procedure Code of 1963, based on outdated Indian legislation from the 1800s, provides for the procedure of prosecution and sentencing of sexual offences. No comprehensive legislation criminalising gender-based violence or protecting the rights of the victims/survivors had existed in Somalia until 2018.

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[589] See Saferworld, preventing violent conflict. Building Safer Lives, *Briefing: The missing link. Access to justice and community security in Somalia*, August 2020, p. 4

[590] The offences criminalised by the penal code include sexual intercourse using threat or violence, without the consent of the second person, and instigation, facilitation or aiding of prostitution, or compelling prostitution through violence or threats. See Legal Action Worldwide (LAW), *Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia: Report and Recommendations*, commissioned by the United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA), October 2014, pp. 13 - 14

The Somaliland constitution of 2001 provides at art. 36 for some economic, social and cultural rights of women, at the same time claiming that it is the government's role to legislate for *the right of women to be free of practices which are contrary to Sharia and which are injurious to their person and dignity*[591].

In Puntland, the 2012 Constitution provides for the right to protection of his/her body and right against torture, whilst specifying that the government has the duty to protect and promote the rights of women.

Nonetheless, due to the lack of specific laws that regulate such cases, at local level the management of conflicts arising from gender-based violence or sexual offences is mostly addressed by customary law and elders.

Especially in the southern and central regions of Somalia, the percentage of this category of cases that are handled through the traditional law system is quite high, on average 72%, the highest figure when compared to Puntland (at least 50%) and Somaliland[592] (average of 32%)[593]. These figures can be considered in line with the general prevalence of traditional courts in the south-central regions where there is a big gap in the functioning of the state justice system. Although we have seen that the customary system can represent in many cases a valid alternative to the lack of a formal justice system, it lacks adequate tools to be able to handle cases of sexual offences.

In fact, since the main goal of customary law mechanisms is to maintain peace through compromise, it tends to reach agreements between the parties disregarding the recognition of individual responsibility for perpetrators and the respect of the rights of the victim/survivor. In order to avoid shame for the family and the subsequent outbreak of violent conflicts, such a system, if used for the resolution of sexual crimes, shows major shortcomings.

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[591] See Legal Action Worldwide (LAW), *Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia: Report and Recommendations*, op. cit., p.15

[592] This seems to be in line with what expressed in one of the testimonies collected in Hargeisa at the end of 2019, where a cultural leader claimed that there were times when customary law used to get involved solving rape cases, but at that time women's rights were neglected and not considered, but they do not interfere with such cases anymore.

[593] Data reported in Legal Action Worldwide (LAW), *Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia: Report and Recommendations*, op. cit., p. 12

By emphasising compromise and the achievement of a solution perceived as fair by the two groups of close kin, in a male-dominated context the solutions provided by customary law, such as forcing the victim to marry the perpetrator, are not survivor-centred and do not guarantee adequate protection for women and vulnerable groups.

A concrete attempt to bring formal legal regulations in line with international standards was made with the Somalia Sexual Offences Bill, a comprehensive law to regulate sexual offences drafted by Legal Action Worldwide in collaboration with the Ministry of Women and Human Rights Development of the Federal Government of Somalia, developed following five years of consultations with women, civil society, religious leaders, and the international community. The organisation assisted also Somaliland and Puntland in preparing their equivalent bills[594], involving a wide range of experts, judges, prosecutors, investigators and police officers, to provide guidance on the Bills.

The Bill provided for specific protection for vulnerable people, children, persons with disabilities, IDPs, and was based on a victim-centred approach prioritising the rights of the victims/survivors, including right to free medical care, right to privacy and housing and livelihood support.

The Sexual Offences Bill was adopted by the Federal Council of Ministers in south central Somalia in 2018 and was supposed to be debated in the Parliament for final adoption, and eventually passed to the President for assent.

However, discussions were stalled for two years, when in August 2020 it was rejected by the Parliament, as a new parliamentary bill known as the Sexual Intercourse and Related Offences Bill 2020 was presented for debate[595]. The new Bill is considered to be less advanced in regard to protection of the victim/survivor and women's rights, legalising adolescent marriage (child marriage), omitting the age of consent, and the necessary consent to marriage is interpreted as the consent of the family rather than the person concerned. In addition, it removes procedural provisions foreseen in the Sexual Offences Bill setting out the responsibilities and

[594] See *Sexual Offences Bill*, Legal Action Worldwide, accessible at this link https://www.legalactionworldwide.org/where-we-work/somalia/somalia-sexual-offences-bill/

[595] See Somali Public Agenda, *Governance Brief 11: A comparative review of Somalia's controversial Sexual Offences Bills*, January 2021

obligations of institutions to enforce the law, criminalises conduct protected by international law, such as flirting, dating and homosexuality, as well as specifying that sentencing and punishment should be in line with the Somali Penal Code and *Shari'ah*[596]. The new Bill may pose a high risk of violation for the rights of girls and women.

Claims were raised on the fact that content and implications of each bill have not been adequately explained to the public allowing informed discussions and no awareness-raising campaigns were organised, leading to public and social tensions around the bills.

At the time of writing, a solution on the Bills has not been reached yet, confirming once again how challenging the process of setting up a legal system in a legal pluralism context can be.

5.4 Access to Justice: what role for Shari'ah and traditional law? Xeer for the reconciliation process in Somali society

The topic of access to justice in Somalia, and in general in African post-conflict contexts, is rather complex.

The trend in literature is nowadays focussed on the harmonisation of legal systems, being the formal legal frameworks preferred in contexts like Somalia as they better reflect international human rights standards. However, as Le Sage highlights, Somalia should not seek to adopt a single system to the detriment of the others. This is especially due to the fact that the peculiar pluralist justice systems, even in the past, have allowed Somalis to respond in different ways to the challenges and the developments of the society[597]. Indeed, the State law is formally in compliance with

[596] See Legal Action Worldwide, *Briefing note on the Somalia Sexual Offences Bill (2018) and the proposed Sexual Intercourse Bill (2020)*, August 2020

[597] See Le Sage A., *Stateless Justice in Somalia. Formal and Informal Rule of Law* Initiatives, op. cit., 2005

human rights law, but *Shari'ah* as well as the *Xeer* system are still legitimised by the population. Especially in rural areas, the customary system is perceived as being closer to the community values and more accessible and affordable if compared to the formal system. It may result beneficial to improve the parts of the system which actually function, seeking to reduce the conflicts between the formal and the customary frameworks, rather than imposing a new uniformed legal system[598].

On the other side, some authors recognise that supporting the traditional legal structures could slower the restoration of a formal national system[599]. In addition, UN agencies and other actors find it unacceptable to support or even engage with traditional systems that implement discriminatory treatments against women, minorities, weaker clans, disregarding the international legal framework of human rights standards[600]. It is undeniable that a customary law system might never meet international standards to the full, as corruption may find room in case the elders are economically supported by the stronger clan[601]. However, most importantly, it is necessary to take into account the perception of the local population in regard to justice and start working on the systems that appear acceptable to the local people. In fact, in the case of Somalia, the *xeer* is mainly a reconciliation system detaining a huge potential in achieving social harmony, especially in a post-conflict setting like Somalia[602].

Another important aspect to consider in regard to access to justice in a context like Somalia is the cost of access to justice institutions. This aspect is indeed a primary element in explaining the barriers to access to justice. Unaffordable costs may constitute a barrier for access to justice institutions for those groups who cannot afford paying both the expenses for justice and all unofficial payments that may be

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[598] See Burman J., Bowden A., Gole A., *Land Tenure in Somalia A Potential Foundation for Security and Prosperity*, Shuraako Review Paper, One Earth Future Foundation, 2014

[599] See Gundel J., *The predicament of the 'Oday' - The role of traditional structures in security, rights, law and development in Somalia*, op. cit.

[600] See Harper E., *Engaging with Customary Justice Systems*, op. cit.

[601] See Thorne K., *Rule of Law through imperfect bodies? The informal justice systems of Burundi and Somalia*, November 2005

[602] See Harper E., *Engaging with Customary Justice Systems*, op. cit.

linked to them. Comparatively, cost barriers reflect clannism and clan divisions, therefore stronger clans holding more economic power, are more likely to have better access to justice institutions.

At the same time, rural populations find it more difficult to access statutory courts, relying more on elders[603] and ulama to get access to a form of justice.

Several international organisations have supported initiatives to review customary institutions towards a greater inclusion of those groups who are traditionally excluded or discriminated against by traditional processes, mitigating rights-abrogating practices[604].

An interesting attempt at promoting a greater access to justice engaging with the customary justice system was supported by the Non-Governmental Organisation *Danish Refugee Council* in the early 2000s. The research was mainly triggered by a group of traditional leaders from the *Toghdeer* region in Somaliland, who requested support from the organisation to review their system of customary justice practices to possibly bring it more into line with both Islamic law and International Human Rights Law[605]. Recognising the importance of *xeer* as a widely and locally

[603] The testimony of a cultural leader at the end of 2019 in the city of Burao confirmed that they normally do not charge money when solving cases between people, but the only expense that takes place is the food and the drinks given to the elders during the meetings. He also added that there is no such difference between rich person and poor in customary law, everyone contributes what he/she can, there is no obligation. Cultural leaders cover their own expenses most of the time, working voluntarily for their services. Another leader replied along the same lines, adding that there is no difference in cost because they do not charge, but there is difference in time, some cases are longer while others take only hours to be solve, depending on the nature of the case, and the commitment of the counterparts to reach an agreement, by being on time when meetings are set and to respect the outcome of the decision. However, a female testimony in Hargeisa, claimed that in the case of land dispute over inheritance of a large piece of land with her siblings, the local leader asked to get access to a small portion of the land they were going to inherit.

[604] See Expanding Access to Justice Program, *Access to Justice Assessment Tool: Baseline Study*. Nairobi, Kenya: Pact and the American Bar Association Rule of Law Initiative, November 2020, p. 20 and 62 - 65

[605] See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, in "Enhancing legal empowerment. Working with Customary Justice

accepted, widespread method of conflict resolution, the organisation supported a pilot project that would, after the initial identification of the main weaknesses within the operational application of *xeer*, enhance those aspects of the customary system to ensure higher protection of vulnerable groups.

Dialogues were facilitated among elders from five clans in the region. The elders involved committed themselves into curbing the main causes of inter-clan conflicts, with a Regional Declaration which set some points for revision of the local customary practices that were not in line with *Shari'ah* and human rights standards, in order to enhance the protection of vulnerable groups, as well as ensuring greater access to justice to all members of the community.

The phenomenon of revenge killing was identified as one of the main sources of conflict among clans and weaknesses of the customary system, threatening peace and stability in the community.

For this reason, one of the main points identified for possible modification by the Declaration to trigger change in the local system was the identification of criminal responsibility, and in particular in case of intentional and revenge killing.

As seen in chapter II[606], Somali customary law provides that the criminal responsibility lays on the *diya-paying* group, a wide group of people close to the victim or the perpetrator, set to pay the blood money or to receive it as compensation for the loss or wound of any one member of their group. In case of homicide, the group of the victim could choose to either agree on a compensation or kill the perpetrator or another member of his/her clan. The criminal responsibility is therefore shared rather than individual.

The elders involved in the dialogue committed *to refrain from immediate execution of the alleged perpetrator and instead to hand him or her over to the state authorities. In such cases, the compensation payment would be limited to 100*

Systems: Post-Conflict and Fragile States", Working Paper Series, Paper No. 2, IDLO, International Development Law Organisation, 2011, p. 2

[606] Section 2.4: Penal section in Somali customary law: *Dhig* and the blood-money

camels and would be paid directly to the family of the deceased, as opposed to being shared by the membership of the clan[607].

Therefore, to foster greater alignment with international standards, the mentioned Declaration aimed to encourage a *transition* to individual criminal responsibility *by encouraging the payment of compensation directly to the family of a victim*, providing that the elders would yield some of their jurisdiction to the formal justice system for more serious crimes (such as rape and murder).

Other customary aspects were discussed and agreed upon by the elders, including more equal rights for widows, as well as for internally displaced persons and minority groups. In particular, these included addressing the practice of *dumaal*, therefore ensuring the right of the widow to re-marry per her choice; foster greater protection of vulnerable people, including orphans, street children, internally displaced persons and people with disabilities. Furthermore, the discussion included the readiness to create committees for the resolution of conflicts that could jeopardise peace and stability among clans[608].

Interestingly, other regions of Somaliland[609] fostered such a dialogue which in turn triggered the establishment of similar Declarations on *Xeer*.

In 2006, a 'National Declaration' was called for by the proponents for Somaliland[610], with the goal to unite them all under a single document.

Such a dialogue triggered a spill over effect in other regions of Puntland, where a similar process of reformation of *xeer* was brought about by the elders, culminating in a National Declaration on *Xeer* in 2009. In both cases, a process of dissemination and awareness raising among the population took place, but the ratification of these documents by the government has resulted being extremely problematic.

These revision processes triggered a discussion on the use of customary law to promote better access to justice for vulnerable groups, contextualised into a pluralist

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[607] See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit., p. 9

[608] See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit., pp. 2, 9

[609] These included the regions of *Awdal, Maroodi Jeex, Sahel, Sool and Sanag*

[610] As Somaliland is not formally recognised as indipendent from the Republic of Somalia.

legal system. The parties involved in the process deemed it critical for the success of the process itself to create a network among the elders. This could facilitate a connection that, in turn, could improve the contact between clans to be able to achieve positive results in the implementation of the revised aspects of customary law. In the case of Somaliland, the "Elder Houses" were created, supported by a visiting lawyer who would advise the elders on legal matters. In Puntland, the inter-clan connection was facilitated by the creation of the "Elders Network". Although the first evaluations conducted by the organisation a few months after the signing of the Declaration showed a decrease in the revenge killings[611], difficulties in access to justice were still recorded for vulnerable groups. This was found to be linked mainly to the fact that traditional leaders would tend to continue mediating the most serious cases, such as rape, rather than referring them to the national justice authorities. The main reason seems to be connected to the social pressure on the survivors/victims of rape to solve the case according to the customary rules; therefore, the rape cases would rarely be reported to the formal authorities, as the survivor/victims themselves might request to discontinue the proceedings.

In addition, subsequent evaluations found out that the majority of the population was not very much aware of the whole process initiated by the elders.

An important aspect worth to note from the above-mentioned research is that, even after the Declarations on *Xeer* were widely disseminated, most of the population who was aware of their existence, was still confused by the exact judicial process that cases would follow when referred to other systems, be it the *Shari'ah* court or the State justice system. This lack of clarity on which specific legal system would apply to a certain case, either *Shari'ah* or State law, was recorded both among the

[611] The data was collected in 16 villages. In the city of *Burco*, the Mayor had reported that 250 inter-clan conflicts were resolved, 5 widows had free choice in re-marrying the man of their choice, and several community members had stated to fully support the attempt of the elders to ensure peace. In addition, the number of cases referred to the formal justice system in Somaliland was reported to be considerably increased, almost tripled from 2006 to 2008 (1852 cases – 3833 cases, according to UNDP data). See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit., pp. 10-11

elders and the local population[612]. All the more, for some elders even the process of referral to the formal justice system was quite uncertain, in particular on whether they would need to refer the cases directly to the formal courts, or to report them only to the police[613].

Another critical aspect highlighted by the research that should always be borne in mind within the possible modifications and adaptations of specific features of the customary law in a context like Somalia, is the security concern. The ultimate goal driving case decisions in the traditional conflict resolution tools is conflict prevention and maintenance of peace and stability in the community.

As noted, *conflicts that might lead to inter-clan clashes will be resolved according to xeer because this is perceived to be the most effective means of preventing armed conflict*[614].

Considering this aspect, it is still quite evident the large legal gap to be filled in a context where there is a high degree of plural legal systems which do lack exchange of information and subsequent awareness-raising among the local population, without providing specific reference points to the individuals.

In addition, one must not forget that a legal system such *xeer*, being somehow driven by the influence and power of clans of different sizes and strength, would very likely tend to maintain the *status quo* in terms of discriminatory practices in access to justice for minority groups. Although minority clans might have elder representatives within the *xeer* system, their rights are not necessarily respected since elders from the minority may not have the same power of negotiation as majority clans, very often resulting in unfair decisions for the minority groups.

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[612] As recorded by the author, one of the persons who was interviewed noted how the applicaton of state law or Islamic law depended on the legal background of the judge, as a judge trained in Islamic law would only apply that, rather than the formal state law. See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit., p. 11, note 58

[613] Some of the elders involved in the research claimed that they were reporting serious cases to the police, but afterwards they had no obligation to ensure that cases were actually adjudicated by the courts

[614] This was clarified by a Chief Justice in Puntland. See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit., p. 12, note 62

The result of the research explained above is quite coherent with this reasoning in that formal law is often more used by minority clans or internally displaced persons because access to customary conflict resolution tools results being more problematic, or sometimes even impossible for them. Therefore, these groups have often no other option than to access the formal justice system.

Unfortunately, this attempt to overhaul the traditional legal system and integrate more elements respecting human rights standards, did not produce the desired effects, either because of the difficulties involved in applying changes to an oral legal system that was itself very flexible, or because of the lack of efficient dissemination of the National Declaration, probably also due to the fact that accountability mechanisms may have not been adequately included in the dissemination process. Moreover, as argued by Vargas, although the intervention attempted to create a connection between the formal and customary court system, it did not take into account the reasons why the formal system does not take hold in the territory, for example the lack of security and protection for victims, or the lack of authority and legitimacy, but also the problems related to the difficulties in prosecuting certain cases through the formal system, such as sexual offences cases. Although greater access to the state justice system may or may not have been ensured, restrictions and difficulties encountered in the functioning of the formal system would still challenge the achievement of fairer results. In this context, referring the case to the *xeer* may be the only way for the victim to obtain some measure of financial and social protection, albeit at the expense of international human rights standards[615].

A one-size-fits-all solution for the creation of a stable and more accessible legal system in a context such as Somalia would be difficult to achieve through pre-packaged top-down approaches. Certainly, any solution should not ignore underlying structural issues, such as processes of discrimination against vulnerable groups or legislation that prevents courts from presenting viable alternatives to customary justice. However, as seen in the previous chapters, the strict

[615] See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia,* op. cit., p. 19 - 21

implementation of top-down approaches, especially during colonial times and the regime, did not provide the expected results.

On the other hand, attempts to codify and harmonise the various legal systems have also not, over time, proved to be straightforward exercises, including attempts to align customary law with formal legislation or international standards.

For any attempt to have success and to result in a legitimized regulatory system, careful planning should be foreseen, built through extensive consultation with the most affected parties, but especially with those traditionally most discriminated ones, such as women and minority groups, along with effective controls that can provide the appropriate legitimacy basis for the effective application of a national legal system[616]. The reform of the customary justice system should therefore be complemented by strengthening the formal courts, in particular by extending their reach to rural areas, but also by supplementing it with awareness-raising campaigns, free legal aid and paralegal support[617].

It will be crucial to foster the role of women in peacebuilding processes.

Finally, it is clear that customary laws and clan institutions will continue to play a role in filling the gaps in the country's legal system. Therefore, as highlighted also by Taddele Maru, reforms to *Xeer* norms and *Shari'ah* courts to align their practices to international human rights standards should be implemented gradually, to ensure effectiveness of the institutions and compliance with peacebuilding goals, until an effective rule of law and unified judicial system can be established throughout the country[618].

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[616] See Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit., p. 22 - 23

[617] Such as that provided by international or local organisations to strengthen access to justice. One example is the project "Expanding Access to Justice in Somalia", a five-year associate award (2018-2023), funded by the United States Agency for International Development (USAID) via the Freedom House-led Human Rights Support Mechanism (HRSM) and implemented in partnership between Pact and the American Bar Association Rule of Law Initiative (ABA-ROLI). https://www.eajprogram.org/index.php

[618] See Taddele Maru M., *The Future Of Somalia's Legal System And Its Contribution To Peace And Development*, op. cit., p. 9

Conclusions

In this research, we have attempted to analyse the different interactions of Somali legal strata. Somalia is characterized by legal pluralism, which refers to a situation where a number of formal and informal legal systems exist within one state. In the case of Somalia, a multi-layered system of State law, Islamic law and Customary law, defined with the term *xeer* which pre-existed the formal legal system and any legal transplants that occurred[619], overlap creating a versatile legal system.

Our journey has started with the early waves of Islamisation in the Horn of Africa and in the Somali region, which have contributed to the cultural Islamisation of Somali people. We have seen that the Somali society is quite homogeneous both from the cultural and religious points of view and presents a tripartite identity: the national Somali identity, the Islamic identity and the clan identity. Indeed, clan organisation underlies Somali society and defines community living and those situations that would normally be ruled by the law.

Somali customary law is an unwritten system of rules, founded on this type of clan-based social organisation. It is extremely flexible, as it is oral, and is mutable according to location and the clans involved. This characteristic has made it extremely elastic and resistant to different waves of conquest and colonisation.

We have indeed seen how *Shari'ah* has permeated customary law in many aspects, although not all. There are in fact some customary practices that deviate from Islamic law. One example is the payment of the blood price, the Islamic *diya* or Somali *mug*, which entails two different concepts of responsibility: the former individual criminal punishment, the latter collective responsibility of the *diya*-paying group, to avoid the cycle of revenge killing between the offended and the offender's clans.

[619] See Burke R., *Somalia and Legal Pluralism: Advancing Gender Justice Through Rule of Law Programming in Times of Transition*, Loyola University Chicago International Law Review, Volume 16, Issue 2, 2020, p. 193

Xeer has, over time, been influenced by various factors, such as successive waves of Islamisation and colonisations, which have often failed to grasp its main principles. When in fact the European colonial administrations have come in contact with the local population and their norms, they could not easily distinguish between Islamic law practices and customary law practices. Often the better-known Islamic principles were imposed on any other customary form due to the lack of in-depth knowledge of the different legal layers.

The Italian administration in the East African colonies introduced from the very beginning a double-track system whereby Italian citizens and assimilates were subject to Italian law, while the local populations were subject to their local law enforced by the *qadi*. However, the formal coexistence of the different legal systems could not completely be implemented, since if a conflict between applicable rules arose, the law brought in by the Italian administration tended to prevail over local law, as it was considered more evolved and 'civilised' than the other. The colonial power created the *Tribunale dell'indigenato* aiming at judging all cases that could create an obstacle to the activity of the Italian government. Customary law was reduced to the role of a *legal formant* in the application of the rules of metropolitan law[620].

With the end of the second world war, Somalia was put under Italian Trusteeship, formally known as the Trust Territory of Somaliland under Italian Administration, according to which Italy had full legislative, administrative, and jurisdictional powers over the former colonial territory. It had the power to temporarily apply Italian laws, adjusted to the context as needed, as long as they were not incompatible with the attainment of the future independence of the territory, set to be achieved in ten years time. In this timeframe, the legal framework applicable to Somalia envisioned that Italy would temporarily "lend" its legal system to Somalia, with the necessary adaptations. This was done on the assumption that the more mature Italian legal system should "bridge the gaps" in the legal system in the process of being made, while the Somali legal system would gradually be developed, until it could reach a level of autonomy to create adequate institutions.

[620] See Mancuso S., *Interaction among Customary law, Islamic law and Colonial law during the Italian Administration of Somalia*, op. cit., pp. 145 - 146

In regard to the judicial system, a key reform in the dual judicial system, was introduced by the Italian Administering Authority with the adoption of the Judicial system of Somalia in 1956, based on three levels of jurisdiction, in which the differentiation based on the citizenship (Italian vs. Somali) was replaced by the religious categorisation (Muslim vs. non-Muslim), with a unique jurisdictional structure.

The Italian Trusteeship Administration ended on 1st July 1960 with the creation of the Somali Republic and the unification of the country, merging the former U. N. Trust Territory of Somalia under Italian Administration and the independent State of Somaliland, formerly a British Protectorate.

The constitution of the newly formed republic was a rigid constitution modelled on the Italian model, providing a significant role for Islam, which became state religion. Islamic law was envisaged as the supreme source of state laws, while *Shari'ah* was the exclusive source in Personal Status law for Muslims.

Independent Somalia represented an important example of "*applied laboratory of comparative law*", in which coexisted three different legal systems, if not even four, since in the Northern Somaliland the law was influenced by English common law, Indian law applied to British Somaliland, while in the Southern part, the law was influenced mostly by Italian law, colonial and Trusteeship Administration legislation[621]. Hence, the legislator was required to be familiar with all legal concepts in the different systems of reference, and accordingly choose the best principle applicable in a given situation, always taking into account the local context and minimising preconceptions regarding the superiority of one or the other legal system.

However, peace was far from being reached easily, and already the post-independence decade of the 1960s entailed seeds of state fragility and social fragmentation[622], also due to the distinctive features that the two territories had inherited from their colonial pasts. The British colonisation of the northern regions

[621] See Contini P., *Integration of Legal Systems in the Somali Republic*, op. cit., p. 1093

[622] See Balthasar D., *State Making in Somalia under Siyad Barre: Scrutinizing Historical Amnesia and Normative Bias*, in "International Journal of African Historical Studies", Vol. 51, No. 1, Boston University, 2018, p. 142

entailed that the pastoral forms of organisation of life and the hierarchies of the tribal system were kept unspoiled by the administration, while the Italian occupied southern regions had witnessed heavy exploitation and forms of slavery of the local population and the agricultural territory[623].

The *coup* of 1969 and the regime of Siyad Barre brought about radical administrative and institutional changes, implementing a fierce battle against tribalism and the system perpetuated by the clans, with the first Charter of the Revolution of 1969 deprecating tribalism, corruption, colonialism, and anarchy. The revolutionary government gradually deprived the clan leaders of all powers, introducing a new figure to act as the official representative of communities and villages and as an intermediary with the authorities, the *nabaddoon*[624].

We have seen how, despite the fact that under the revolutionary regime there was a strong fight against customary traditions, *Xeer* maintained its grasp in the periphery of the state administration.

Since 1991, the post-revolutionary period was characterised by a civil war which paved the way for institutional collapse and the re-emergence of clannism, affecting in particular the southern regions. The clan hostilities triggered an escalation of violence, tearing the country apart and leaving Somalia without a central authority. The lack of a centralised state and law enforcement proved very challenging in establishing a democratic transition.

In 2006, the militias loyal to the Union of the Islamic Courts took control of Mogadishu, seeking to establish order in the capital[625].

From this situation, the Islamist movement *Al-Shabaab* was created, as an Islamic militia with military training that managed to overcome the clan system. The implementation of *Shari'ah* through the Islamic Courts was perceived as a valid

[623] See Pestalozza L., *Somalia, cronaca della rivoluzione*, op. cit., p. 35

[624] See Pestalozza L., Somalia, cronaca della rivoluzione, op. cit., p. 136

[625] See Taddele Maru M., The future of Somalia's Legal System and its contribution to peace and development, op. cit., p. 6

alternative to the inexistent law of the national government and the form of justice of warlords[626].

The resulting legal system governing the country in the post-regime era presented changing characteristics from region to region and according to the parties involved, the clan membership and economic possibilities of the actors involved. The Islamic Courts were dissolved by Ethiopia's intervention in Somalia in 2007[627]. Only in 2012 a provisional Constitution was adopted by the Federal Republic of Somalia, considered provisional as some critical matters remained unresolved, including the division of powers between the Federal and State governments, the status of the city of Mogadishu and the structure of the federal legislature, executive and the judiciary[628]. However, it could not be approved by public referendum due to the insecurity conditions and continuous violence in the territory.

The domestic legal system of the Federal Republic of Somalia retained the characteristics of a pluralist system, with three main sources of law, State law, *Shari'ah* and Customary law. Different parts of the country see the implementation of different laws, with the State system continuing implementing both elements of English common law and Italian civil law, with different enforcement depending on the region[629].

Customary law is however the predominant legal system in rural areas outside the control of the regional administration[630].

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[626] See Chatham House, Al Shabaab in Somalia, Summary of the interview and meeting with Stig Jarle Hansen, June 2013

[627] See Taddele Maru M., The future of Somalia's Legal System and its contribution to peace and development, op. cit., p. 7

[628] See Constitutional history of Somalia, A Brief Background Constitutional History

[629] See UNDP United Nations Development Programme Publication, Somalia. Gender Justice & The Law. Assessment of laws affecting gender equality and protection against gender-based violence, UNDP in collaboration with the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United Nations Population Fund (UNFPA) and the United Nations Economic and Social Commission for West Asia (ESCWA), New York, 2018, p. 10

[630] See Taddele Maru M., *The future of Somalia's Legal System and its contribution to peace and development*, in "Journal of Peacebuilding and Development", Vol. 4, No. 1 (March 2008), Sage Publications, Inc., p. 1

The northern regions followed a different path, with the declaration of independence of Somaliland in 1991, although without international recognition. An Interim Constitution was adopted in 2000 and finally endorsed by the Somaliland people at the referendum on 31 May 2001. Customary legal tools were embraced in a new political system, where the function of the assembly of elders was emphasised, with a key role to guarantee the application of the law and controlling stability and social peace.

We have seen how the lack of rule of law and a universally functioning justice system across the country compromises access to justice and security, pushing citizens to seek alternative systems of justice. In particular, two of the main causes of conflict in Somalia in modern times were analysed, namely conflicts related to land ownership and traditional dispute resolution tools, and violence against women and gender-based crimes with the missed adoption of the Sexual Offences Bill.

Customary systems can often continue regulating societies during conflict, as *they are often considered legitimate, understood and are integral to the lives of local populations, including females*[631].

The role of customary law in Somali society has been and remains undoubtedly important, particularly in a context characterised by the absence of the rule of law and a central authority that is effectively in control of the country.

However, several are the limits of applying informal justice systems, above all the fact that in many aspects they do not align to international human rights standards, and may often violate the rights of marginalised groups, including those for which power imbalances exist, such as women, minorities, weaker clans, etc. We have indeed seen the shortcomings of customary law in relation to women's rights and the protection of the rights of victims/survivors of gender-based violence, and the attempts to address those in the Sexual Offences Bill of 2018.

Nonetheless, although the formal State law may be in compliance with human rights law, Somali customary law system still holds legitimacy within the population,

[631] See Burke R., *Somalia and Legal Pluralism: Advancing Gender Justice Through Rule of Law Programming in Times of Transition*, *op. cit.*, p. 193

especially in rural areas, perceived as being closer to the community values and more accessible and affordable if compared to the formal system.
Indeed, as explained by Burke, in the aftermath of conflict the formal legal systems *are often not trusted, and/or may have been implicated in rights abuses and used as an instrument of oppression*[632].

Certainly, a one-size-fits-all solution in a context such as Somalia will be difficult to achieve through pre-packaged top-down approaches for the creation of a unified legal system. In fact, as seen in our analysis, the strict implementation of top-down approaches, especially during colonial times and the regime, did not provide the expected results, as well as attempts to codify and harmonise the various legal systems have also not, over time, proved to be straightforward exercises.
It is also clear that customary laws and clan institutions will continue playing a role in filling the gaps in the country's legal system. A possible option could be to improve the parts of the system which do function, seeking to reduce the conflicts between the formal, the Islamic and the customary frameworks, rather than imposing a new legal system[633].

To this extent, to ensure effectiveness of the institutions and compliance with peacebuilding goals, gradual reforms of *Xeer* norms and *Shari'ah* courts to align their practices to international human rights standards should be implemented, until the establishment of an effective rule of law and unified judicial system[634].
In fact, any proposed solution should not fail to take into account the underlying structural issues, such as the processes of discrimination against vulnerable groups or legislation that prevents courts from presenting viable alternatives to customary justice. In the last few years, several attempts have been made to reform the

[632] See Burke R., *Somalia and Legal Pluralism: Advancing Gender Justice Through Rule of Law Programming in Times of Transition, op. cit., ibidem*

[633] See Burman J., Bowden A., Gole A., *Land Tenure in Somalia A Potential Foundation for Security and Prosperity*, Shuraako Review Paper, One Earth Future Foundation, 2014

[634] See Taddele Maru M., The Future Of Somalia's Legal System And Its Contribution To Peace And Development, op. cit., p. 9

customary law, using bottom-up approaches that involved its leadership and communities[635]. In a continued effort to reform the justice system, it will also be crucial to take into account the rights of vulnerable groups to improve their access to justice, either via the formal or the customary system. For example, it will be crucial to foster the role of women in peacebuilding processes. Indeed, the reform of the customary justice system should be complemented by strengthening the formal courts and extending their reach to rural areas, but also by supplementing it with awareness-raising campaigns, free legal aid and paralegal support.

Finally, legal pluralism should be regulated by the state, aiming to achieve fairness of justice and impartiality of legal norms.

In the future it will be interesting to assess how and if the Somali customary law will be able to adapt once more to the challenges of time and needs of modern societies, potentially also contributing to the restoration of peace in Somalia.

[635] See for example the approach adopted by the Danish Refugees Council in Somaliland and Puntland, and analysed by Vargas Simojoki M., *Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia*, op. cit.

Glossary

Arabic terms

‘urf = custom

arkān an-nikāḥ = fundamental elements of the marriage

‘idda = period equivalent to one hundred days that a widow or a divorced woman must observe, during which she cannot marry another man

Mahr = amount of money or other form of property gifted by the husband to his wife at marriage

Nikāḥ = marriage

Diya = blood-money

Somali terms

Daminyaale = land for permanent development

Deegan = land

Dibaad = dowry

Dumaal = the wife of the brother or of a patrilineal cousin, and also the sister or cousin of the wife

Haal dumaalleed = bride-wealth, compensation for widow inheritance

Higsiisan = sororate

Jilib = *diya*-paying group

Maamuus = hospitality

Munishibaale = land for temporary use

Shir = political council

Toghdeer = region in Somaliland

Waa la dumaalay = widow inheritance

Yarad = bride-wealth, marriage payment from the groom’s kin to the bride’s kin

Xeerbeegti = law council

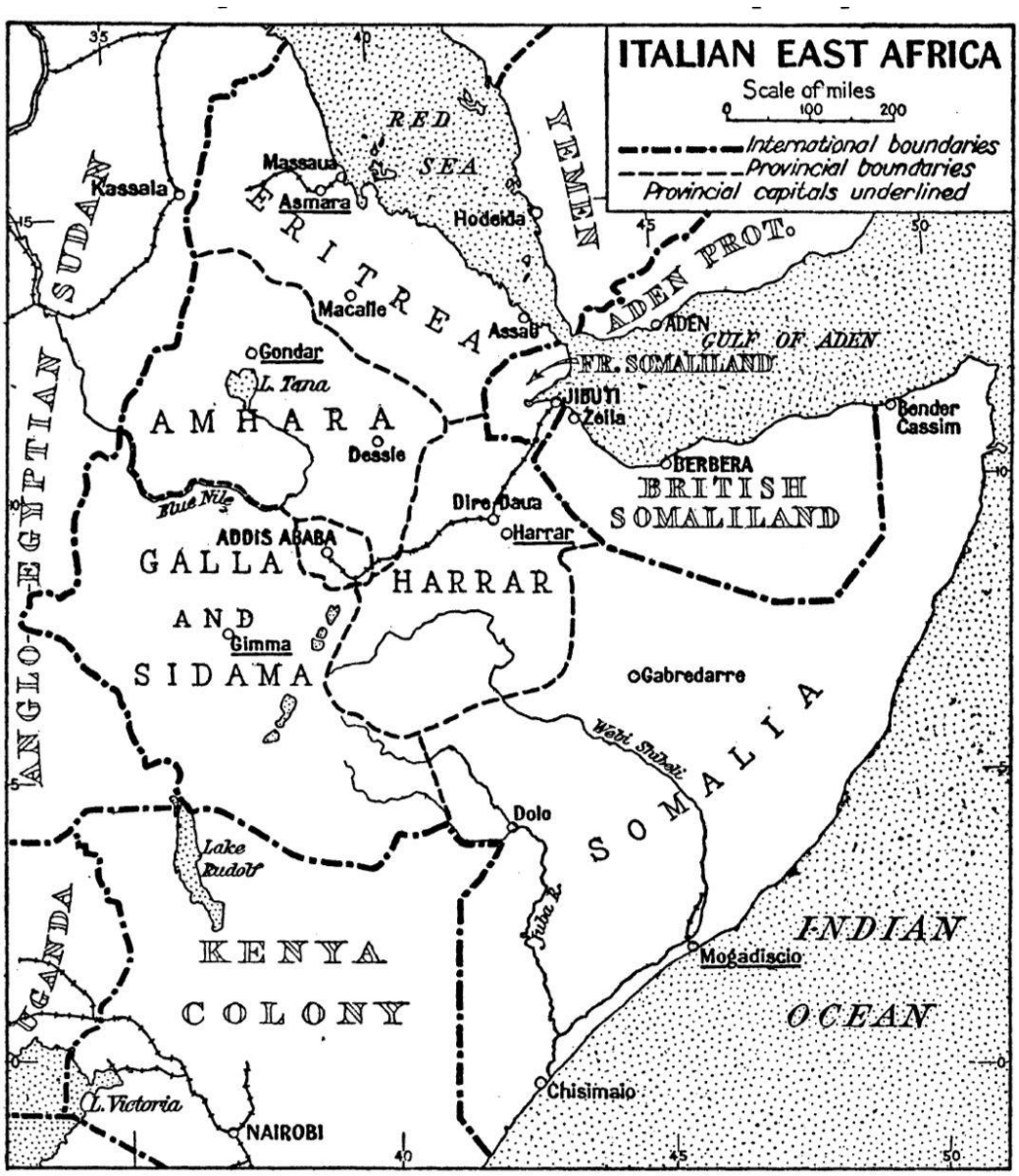
Xoolo = private property

Maps

Map 1 – Somalia, Clan distribution

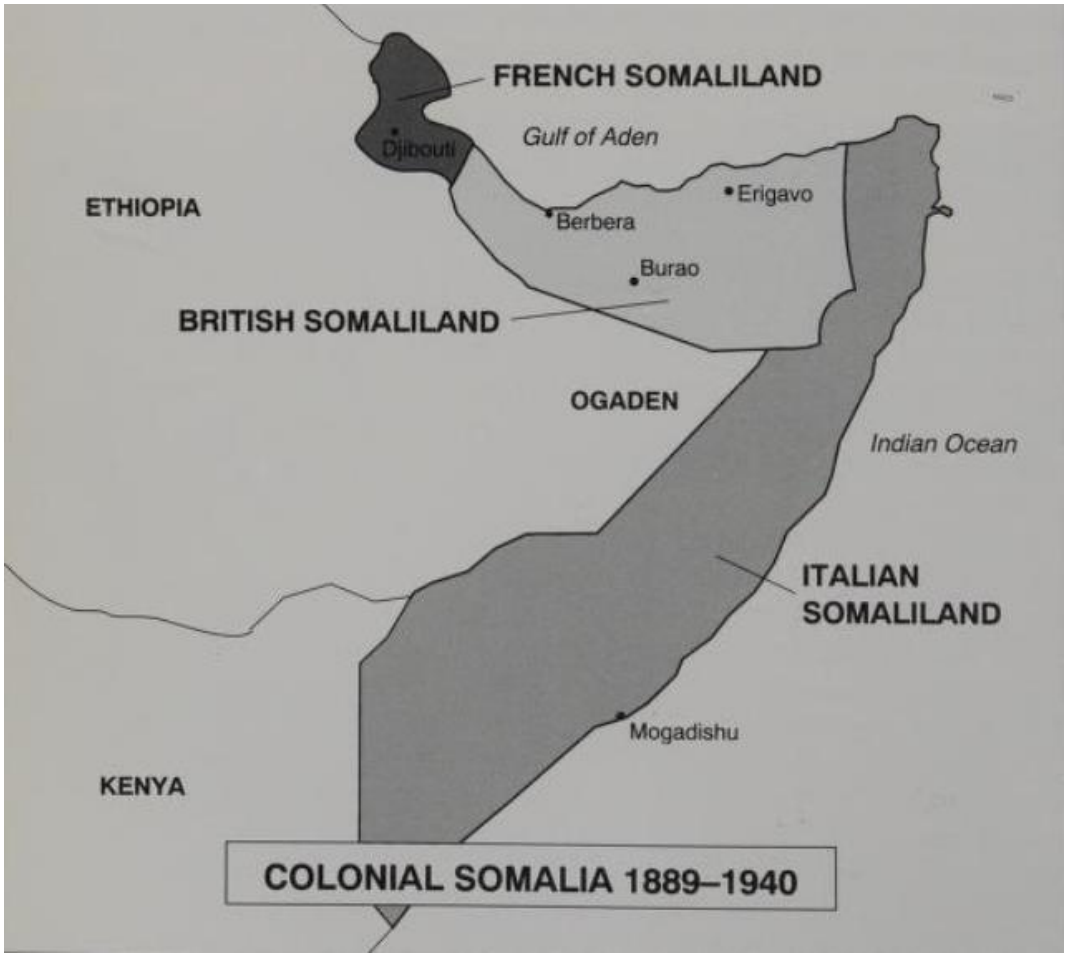
Source: University of Texas, Libraries. Map produced by the U.S. Central Intelligence Agency. **Clan Distribution** From Somalia Country Profile, 2012, available at http://legacy.lib.utexas.edu/maps/somalia.html, last consulted 11.07.2020.

Map 2 – Italian East Africa



Source: **Zoli C.**, *The Organization of Italy's East African Empire*, in "Foreign Affairs", vol. 16, no. 1, Council on Foreign Relations, Oct. 1937, pp. 80-90.

Map 3 – Colonial Somalia 1889 - 1940



During the second half of the XIX century, European powers such as Great Britain, France, Italy and other African powers, such as Ethiopia. The Europeans gradually expanded into the territory that today constitutes modern Somalia, while Ethiopia grabbed a piece of land west of Italian Somalia.

Source: **Ricciuti E. R.,** *Somalia. A Crisis of Famine and War*, The Millbrook Press, Brookfield, Connecticut, 1993, p. 14

Tables

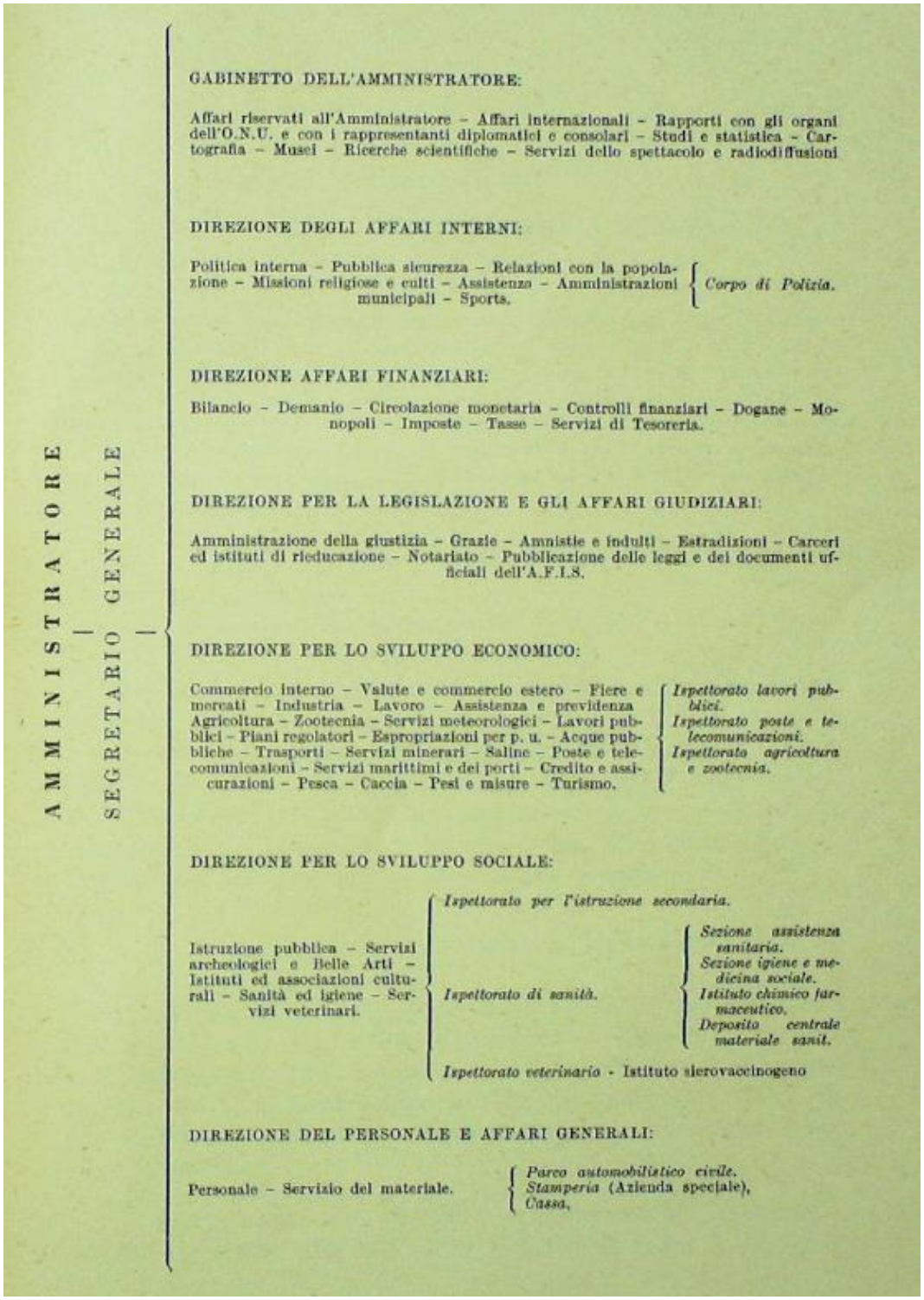
Table 1 – List of marriage exchange gifts in Northern Somaliland nomadic population

Yarad	*Dibaad*
22 camels and 1 rifle	10 camels, 2 burden camels with equipment, and 1 rifle
20 camels	6 camels and 2 burden camels with equipment
40 camels and 1 rifle	20 camels and 3 laden burden camels
26 camels	12 camels and laden burden camels
20 camels	3 camels and 3 laden burden camels (poor exchange)
15 camels	5 camels and 2 burden camels
20 camels	10 camels and 2 laden burden camels
10 camels	2 laden burden camels (poor exchange)
9 camels	2 laden burden camels (poor exchange)
20 camels	6 camels and 2 laden burden camels (poor exchange)
40 camels	20 camels and 4 laden burden camels
32 camels	15 camels and 3 laden burden camels
24 camels	12 camels and 2 laden burden camels
28 camels	13 camels and 3 laden burden camels
18 camels	9 camels and 2 laden burden camels
30 camels	15 camels and 4 laden burden camels
10 camels and 40 sheep and goats	4 camels, 1 laden burden camel, and 20 sheep and goats
30 camels and 1 rifle	15 camels and 3 laden burden camels
40 camels and 7 cattle	20 camels, 4 laden burden camels, and 60 sheep and goats
40 camels and 6 cattle	20 camels and 4 laden burden camels
4 camels	Very poor marriage
20 camels and 5 cattle	7 camels and 3 laden burden camels
10 camels (elopement)	4 camels and 1 laden burden camel
3 camels	Very poor marriage
30 camels	15 camels and 4 laden burden camels

20 camels and 30 sheep and goats	10 camels and 2 laden burden camels
5 camels	Very poor marriage
12 camels and 600 Rs	5 camels and 2 laden burden camels
24 camels and 70 sheep and goats	7 camels, 70 sheep and goats, and 2 laden burden camels
50 camels and 2 horses	30 camels, 4 laden burden camels, and 1 rifle
40 camels and 1 rifle	20 camels, 3 laden burden camels, and 30 sheep and goats
12 camels, 1 rifle, 600 Rs	2 laden burden camels, and 100 sheep and goats
40 camels, 1 horse, 20 cattle, and 500 Rs	25 camels, 5 laden burden camels, and 10 cattle
24 camels	12 camels, and 2 laden burden camels
6 head of livestock (camels and cattle mixed)	2 head of livestock and 2 laden burden camels
13 head of livestock	5 head of livestock and 2 laden burden camels
4 head of livestock	2 laden burden camels
23 head of livestock	12 livestock inclusive of camels with equipment
40 head of livestock	10 camels, and 100 sheep and goats
10 head of livestock	70 sheep and goats
9 head of livestock	4 head of camels and cattle
15 head of livestock	7 head of camels and cattle
12 head of livestock	2 head of camels and cattle
10 head of livestock	3 laden burden camels
8 head of livestock	2 laden burdle camels
3 head of livestock	24 Rs
25 head of livestock	7 camels and 70 sheep and goats
15 head of livestock	6 camels

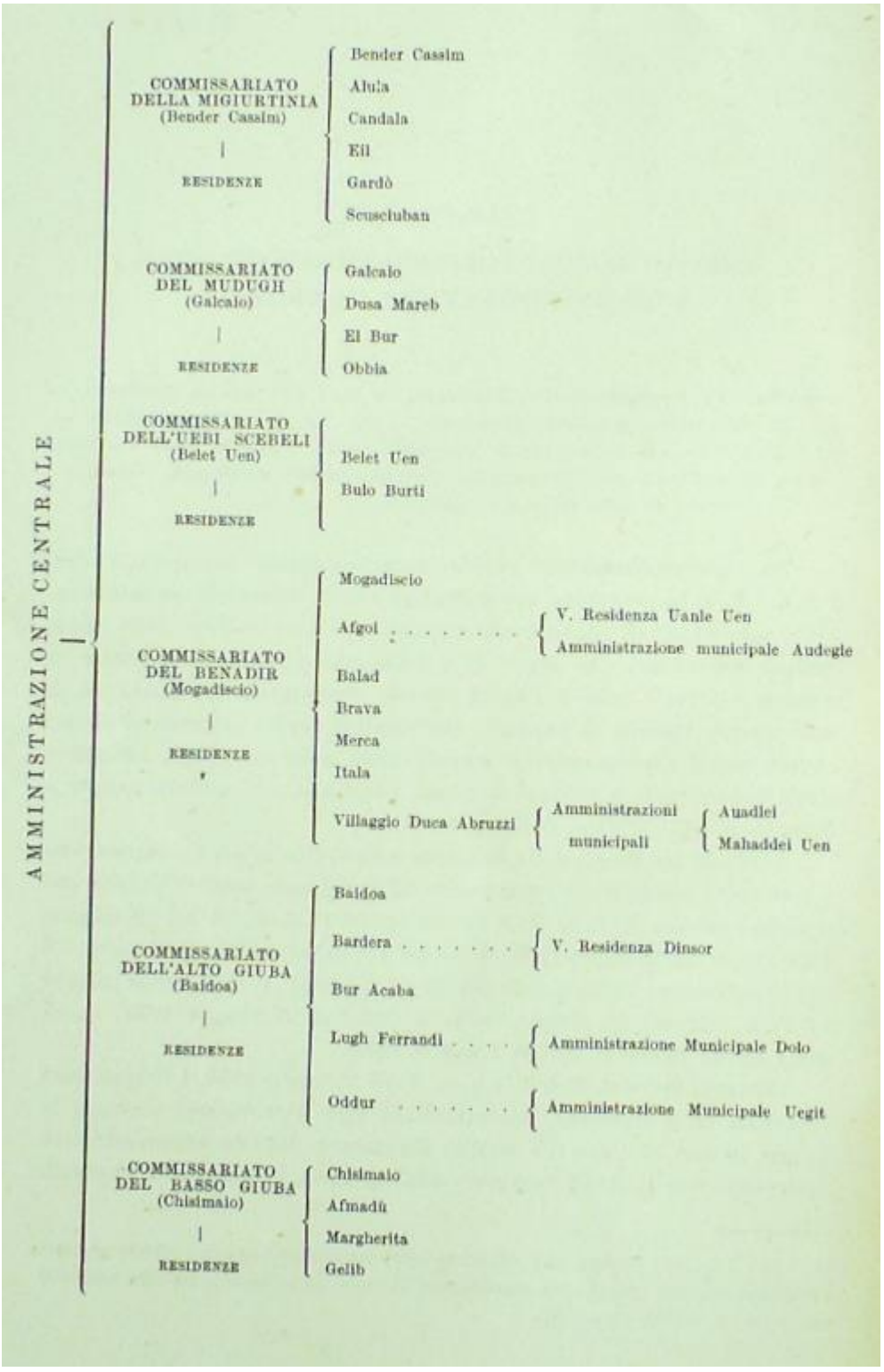
Source: **Lewis I. M.,** *Marriage and The Family in Northern Somaliland*, East African Studies, No. 15, East African Institute of Social Research, Kampala, Uganda, 1962, p. 15-16.

Table 2 – Bureaucratic Organisation of the Trust Territory of Somaliland under Italian Administration



Source: Meregazzi R., L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.), Quaderni della Pubblica Amministrazione, Milano, Dott. Antonino Giuffrè, 1954, p. 53

Table 3 – Administrative and political territorial organisation of the Trust Territory of Somaliland under Italian Administration



Source: Meregazzi R., L'Amministrazione Fiduciaria Italiana della Somalia (A.F.I.S.), Quaderni della Pubblica Amministrazione, Milano, Dott. Antonino Giuffrè, 1954, p. 102

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