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Centre for
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report

Stateless Justice in
Somalia

Formal and Informal
Rule of Law
Initiatives

Dr Andre Le Sage

“hd | Report

The Centre for Humanitarian Dialogue is an independent and impartial foundation, based in Geneva, that promotes and facilitates dialogue to resolve armed conflicts and reduce civilian suffering.

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Acronyms

APD	Academy for Peace and Development
DRC	Danish Refugee Council
IGAD	Intergovernmental Authority on Development
NSC	National Salvation Council
PDRC	Puntland Development Research Centre
RoLS	Rule of Law and Security project (UNDP)
RRA	Rahanweyn Resistance Army
TFG	Transitional Federal Government
TNG	Transitional National Government
SACB	Somalia Aid Coordination Body
SNM	Somali National Movement
SNRC	Somalia National Reconciliation Conference
SRRC	Somalia Reconciliation and Restoration Council
SRC	Supreme Revolutionary Council
SSDF	Somali Salvation Democratic Front
UNOSOM	United Nations Operation in Somalia

Glossary of Somali Terms

<i>Anno</i>	Revenge killing by one clan or sub-clan against another in the absence of <i>diya</i> payment.
<i>Barax</i>	Broadly translated into English as ‘mixing’, it is a practice not accepted by Somali <i>shari’a</i> courts as the distortion of Islamic law through mixing with other sources of law.
<i>Dhig</i>	Aspects of <i>xeer guud</i> which apply to penal matters, including murder (<i>qudh</i>), aggression (<i>qoon</i>), and thievery (<i>tuugo</i>).
<i>Dhaqasho</i>	Aspects of <i>xeer guud</i> which apply to civil matters, including issues of family (<i>xilo</i>), private property (<i>xoolo</i>), territory (<i>deegan</i>), and hospitality (<i>maamuus</i>).
<i>Diya</i>	A main principle of <i>xeer</i> , this is the ‘blood compensation’ paid by one <i>diya</i> group to another, usually in the form of livestock.
<i>Diya group</i>	Small social units that take collective responsibility for their own security, as well as undertaking an obligation to compensate other groups for any harm committed by one of its members.
<i>Dumal</i>	The practice of forcing marriage between a widow and a male relative of her deceased husband.
<i>Gar dawo</i>	A <i>xeer</i> proceeding that strictly applies customary law in an adversarial manner to determine guilt and innocence.
<i>Godobtir</i>	The practice of forcing marriage between a young girl and an aggrieved clan as part of a <i>diya</i> payment.
<i>Higsian</i>	The practice of forcing marriage between the sister of a deceased wife and the widower.
<i>Madani</i>	Neighbourhood-based ‘vigilant groups’ which arm themselves to provide for local security.
<i>Masalaxo</i>	A <i>xeer</i> proceeding that focuses on mediation to identify a solution that is acceptable to all parties.
<i>Mooryaan</i>	A social category for bandits and uncontrolled militia.
<i>Shahad</i>	Solicitation of financial and material support by Somali traditional elders.
<i>Suluh</i>	Broadly translated into English as ‘resolution’, it is a practice applied by Somali <i>shari’a</i> courts to integrate Islamic, traditional and statutory laws into a single workable decision for a case.
<i>Xeer</i>	Somali customary law.
<i>Xeer begti</i>	Respected and qualified elders who are entrusted to maintain knowledge of applying <i>xeer</i> .

<i>Xeer gaar</i>	Specific aspects of <i>xeer</i> that regulate localised economic production relations for clans and sub-clans specifically involved in pastoralism, fishing, frankincense harvesting, etc.
<i>Xeer guud</i>	Generally applicable aspects of <i>xeer</i> which are generally applicable across all Somali clans, and regulate day-to-day social life, civil and penal matters, and dispute settlement.
<i>Xissi</i>	The most fundamental stipulations of <i>xeer</i> for which unquestioned historical
<i>adkaaday</i>	precedent exists.

Summary and Recommendations

After more than a decade of state collapse, four different justice systems can be identified in Somalia:

- 1 formal judiciary structures in regional administrations and central governments created at international peace processes
- 2 the traditional, clan-based system known as *xeer*
- 3 the growing number of *shari'a* courts in urban areas, particularly Mogadishu
- 4 civil society and private-sector initiatives, as well as ad hoc mechanisms established by Somali militia-factions.

These systems often coexist in the same location. They each have their own strengths and weaknesses, and all have provided a degree of security and redress for Somalis over the past decade. Nonetheless, their application in Somalia today requires review and harmonisation into a complementary whole.

Multiple, overlapping and often contradictory sources of law have made determination of primacy and jurisdiction highly confusing and contentious. This combines dangerously with the lack of formal training of judges and lawyers, widespread public ignorance and distrust of the formal judicial systems (particularly in rural areas), and efforts by some Islamic court leaders to impose fundamentalist beliefs through *shari'a*. Amidst this confusion, the choice of applicable law in any given case is largely driven by two factors: first, where the self-interest of the stronger party to the dispute is served; and second, how a decision that will preserve security and peaceful inter-clan relations can be reached. These factors have limited the equality of all Somali citizens before the law, as well as the degree of protection that the legal system can offer on a personal basis, particularly when powerful clans, politicians or businessmen exercise direct influence over how cases are decided.

The formation of the Transitional Federal Government (TFG) in October 2004 provides a window of opportunity for the task of harmonisation, as well as a legal context for it to take place. Somalis, donor governments and international organisations should take advantage of the political momentum and legal context for a full review of the legal system, possibly using the elaboration of the TFG Charter into a fully fledged, new constitution as a vehicle for doing so. Most Somalis agree that the current practice of *xeer* needs to be reformed, particularly in those instances where it contradicts *shari'a*, as well as in many cases where it contradicts international human rights norms. At the same time, the process of harmonisation would also be a means of increasing Somalis' participation and raising their level of ownership over their emerging government structures. As such, foreign assistance for rule of law projects should be a key pillar of the post-peace-process aid strategy to reconstruct Somalia.

The TFG will need to act quickly to establish legitimate legal channels and principles to deal with immediate conflict resolution problems to forestall renewed conflict. Matters of particular concern will be Somalia's legacy of human rights abuses, the settlement of land and property disputes, and questions arising over the charter of the TFG, its relations with Somaliland and with the international community. Rule of law programmes could target these areas to ensure that transparent and equitable processes are established to smooth the country's political transition. In addition, it is quite certain that Somaliland – and possibly other areas of Somalia – will not be part of the new government for the foreseeable future. However, international assistance through rule of law and other projects must be continued in that area to maintain the consolidating of stable governing institutions until a dialogue with the TFG about options for national integration or secession can begin.

Harmonisation could also be an effective means of checking the rise of Islamic extremism in Somalia. Despite being an almost entirely Muslim people, Somalis remain reluctant to adopt the most severe forms of corporal punishment enshrined in *shari'a* and are concerned that leaders of militant Islamist groups such as *Al Itihad* are simply interested in personal power. If the Somali public – through widespread community-based consultations – would adopt a harmonised view of justice, the space for militant Islamists to assert their authority to interpret the meaning of *shari'a* may be foreclosed. Furthermore, Somalia's mixed judicial history provides the option to include elements of *shari'a* to apply to civil cases in lower courts that will be erected by the TFG. This may provide the best means of tempting moderates and traditionalists from the *shari'a* courts to join the TFG, and undercut support for militants in their midst. Given that the *shari'a* courts are invested with their authority by their relevant clans and sub-clans, power-sharing deals cut between the TFG and traditional religious elders will be an equally important factor in this process.

However, Somalia should not seek to adopt one justice system to the detriment of the others. The multiplicity of systems has afforded Somalis options in responding to their predicament of state collapse, and each form of justice has its own advantages. While state statutory law offers a discrete system of rules and may better reflect international human rights standards, *shari'a* is also a comprehensive justice system that Somalis commonly recognise as legitimate. At the same time, customary *xeer* is the most far-reaching of the Somali justice systems, particularly in rural areas that are commonly beyond the reach of formal judicial systems, and is the most effectively enforced. In addition, the different justice systems have over the past decade served to maintain a modicum of peace and security in various parts of the country. Efforts to force one system across all areas would undermine those systems that function locally, and 'rule of law' assistance could in those circumstances create more conflict by undermining the structures that currently underpin local peace and security arrangements.

In short, efforts towards harmonisation should not be undertaken lightly. Questions of constructing a single, coherent justice system in Somalia involve technical considerations and inputs, but are essentially political ones. In particular, they raise questions of the nature and role of the state, and Somalis'

expectations and fears of any new government that is created – a highly sensitive subject in Somalia given its long history of the abuse of power against specific groups and citizens. Flaunting of state law and modifications of state legal decisions through the continued application of Somali customary law has been a means of resistance to state authorities. Rather than being a benign technical process of drafting a consolidated legal code, it would be a major project of social and political engineering.

It should be recalled that efforts to harmonise Somalia's various justice systems have been attempted before, and failed. Determining how similar efforts can succeed today will be important. The problems affecting previous attempts were two-fold. First, the harmonisation efforts of the first post-colonial Somali governments were interrupted by political turmoil, particularly the coup that brought President Siad Barre to power. Second, earlier harmonisation processes were driven by governmental decision-making alone, with little public involvement. The result was a set of laws that had to be imposed on Somali society from above, without respect for the continued application of the informal justice systems that Somalis actually trusted and utilised.

The risk that a harmonised justice system will fail to take root in Somali society cannot be so easily addressed by technical and intellectual inputs to Somali political authorities. It must be recalled that, after more than a decade of conflict, Somalis place a high premium on the re-establishment of security over more elaborate concerns of justice. As such, it will be important for Somalis themselves to have ownership of the process of merging the various justice systems into a coherent whole that practically assists ordinary people in solving actual problems, and receives widespread public acceptance. To do so will require further efforts to include Somalis in an open dialogue about how harmonisation should take place, and to ensure that efforts to promote justice are not simply a matter left to a professional and governmental elite. In short, while judicial reform, drafting of new laws and institutional capacity building will require using a 'top-down' approach, grounding the new judicial system in the dynamic needs of Somali society will require a simultaneous 'bottom-up' approach.

Strategic recommendations

Increased international engagement to promote the rule of law in Somalia today will need to confront these opportunities and risks. Based on the analysis presented above, a comprehensive international Rule of Law Programme that could support this transformation would contain at least six elements.

- 1 International assistance efforts should be grounded in a broad-based dialogue to reach a consensus between Somali political leaders and the Somali public on the need for harmonization of Somalia's formal and informal legal codes, including previous state laws, clan *xeer* and *shari'a*, in accord with basic international human rights standards, and support to the drafting of new legislation. Activities could include:
 - participatory forums at the district and/or regional level across Somalia (including Somaliland) to support the formation of a National Legal Harmonization Committee

- provision of financial resources, technical legal expertise, and participation to the Somaliland Law Review Committee.
- 2 Once a sufficient consensus is reached through dialogue (which will of necessity be time consuming), it will be necessary to support the structural reform of Somalia’s justice system in accord with the harmonised legal code, including the creation of a Judicial Council, state and non-state monitoring mechanisms, and an independent financial regime.
 - 3 From a ‘top-down’ perspective, it will be essential to build the capacity of Somalia’s judicial system with education, training and infrastructural support, including judicial institutions, public servants, legal professionals and private-sector bar associations. Activities could include:
 - legal training seminars, possibly organised through local bar associations, in Somalia’s regional capitals for professional lawyers and former judges
 - in-country training for *shari’a* court judges in subjects such as evidence and procedure by experts from Arab universities that specialise in *shari’a*, for instance Al Azhar
 - institutional development support, including management training and provision of equipment to formal judicial systems and recognised private bar associations
 - infrastructure development support to court buildings and correctional facilities
 - institutional support to legal education institutions.
 - 4 From a ‘bottom-up’ perspective, legal empowerment and confidence-building of the Somali public is also required, including legal clinics, legal aid, translation and dissemination of laws and judicial procedures, and coordination with community-based justice initiatives (e.g. ‘vigilante group’ community watch groups and local human rights NGOs).
 - Translation and dissemination of all operative Somali legal codes.
 - Utilization of local radio stations – particularly HornAfrik and Radio Shabelle in southern Somalia – to increase public legal awareness, access to justice.
 - Legal clinics at private and public Somali universities, including legal awareness, access to justice, human rights, criminal defence, civil law.
 - Legal aid programmes provided through Somali universities, bar associations and human rights NGOs.
 - 5 The establishment of a stable political environment for justice to evolve should be promoted with the establishment of a plan of action to address priority transitional justice issues that will arise after the conclusion of the Somalia National Reconciliation Conference, including:
 - means of addressing past human rights abuses
 - settlement of land and property disputes
 - interpretation of the charter
 - legal basis for addressing national security issues.



6 Finally, to the extent that the above recommendations mark a break with past rule of law programming in Somalia and an increased commitment by UN agencies, donors and NGOs, it will be required to devote further efforts to mobilize the international community, either through the Somalia Aid Coordination Body (SACB) or a post-peace-process Peacebuilding Task Force, to provide the requisite political and financial support. Key initiatives would include:

- revival of the Rule of Law Task Force within the SACB Governance Committee or its replacement body as a mechanism for UNDP to lead the coordination of various UN and NGO initiatives
- identification of qualified and motivated Somali civil society organizations to assist in the implementation of the points listed above
- representation in the Peacebuilding Task Force, as well as the IGAD Facilitation Committee and the African Union.

Increased international support

The six points above are best viewed as a package, and not as a menu of options. The successful conclusion of the Somalia National Reconciliation Conference and creation of the TFG makes possible their full implementation. Most Somalis agree that it is necessary for one set of laws to become predominant before it is possible to rationalise other laws around it. In this regard, while a small minority of Somalis actively promote gradual change in the rules of *xeer*, the vast majority have been content to wait for the formation of a new Somali government to undertake that process on their behalf. Over the short term, the TFG's accession to the statutory laws of the previous governments appears to be the most agreeable starting point for the re-establishment of a basic rule of law and security. These laws are generally seen as problematic, but as forming a legitimate starting point.

If the TFG fails to establish itself as a functioning government and Somalia remains stateless, most of these six recommendations could still be implemented anywhere in the country that stable regional administrations exist or where security is adequate for the protection of international and local aid workers. However, political divides and persistent insecurity in southern Somalia may make overall application of the six points impossible or impractical. In this case, it may be necessary to select only those points that are feasible. It would be essential to ensure that all interventions lead as coherently as possible towards a harmonised legal system and the creation of a legitimate platform for consensus and decision making that can assist any new government created in the future.

To a large extent, the existing interventions of the international community are already working in the direction of the six points listed above. However, that response still suffers from a number of severe shortcomings that will prevent their assistance to Somali political authorities and civil society groups from achieving an aggregate impact on Somali access to justice. First, although one project may currently address harmonisation, another project may address legal empowerment and a further project may address capacity building, few of these projects are being implemented together with a single group of

Somalis, in a single location. Improved coordination between various UN and NGO initiatives – a constant and familiar source of tension in development work – could make a serious difference in this respect.

Second, none of these various justice projects is being implemented on the scale that is required. UNDP's interventions, for instance, are confined almost exclusively to Somaliland, and have yet to begin meaningful implementation of justice programmes even in Puntland. By contrast, the Danish Refugee Council (DRC) projects continue to focus on one or two regions at a time. Although this allows the NGO to build strong community relations, it will take over five years at this pace to make an aggregate impact on the justice situation in all of Somalia's 18 regions. The level of international investment in justice reform and justice promotion will need to be increased significantly if the small gains made by individual projects are not to be overwhelmed by ongoing political change.

Third, the international community will need to make a major investment in establishing the capacities of the TFG to manage a formal judicial system. In addition to training and infrastructure rehabilitation, specific efforts need to be dedicated to strengthening the judiciary's capacity to exercise its independence, as defined in the TFG Charter, from the executive branch. This will include ensuring adequate investment in human resources and guaranteed access to funding sources that do not require subordination to the president or politically motivated ministers. Parliamentarians at both the central and regional levels should be considered important partners in integrating and rationalising Somalia's various justice systems within a single legal code. They can play a particularly important role in reviewing existing legislation, repealing inappropriate laws, promulgating new laws, raising public legal awareness, and working politically to ensure the independence of the judiciary. In this regard, the international community should ensure that legal training is offered to the TFG MPs generally, but should also focus particular assistance on the establishment of a functioning parliamentary judicial committee.

Finally, it is imperative to note the lack of political engagement by the international community to support development efforts in the justice sector. Where they exist in Somalia, formal judiciary systems often lack significant independence from political decision-making processes and are affected by problems of corruption. Where no administrations exist, militia-faction leaders are held to almost no standard at all, and the international community has wilfully ignored the continuing rise of the country's *shari'a* courts. In short, no political pressure has been forthcoming from international diplomats – either at the Somalia National Reconciliation Conference or during their field missions to Somalia – to pressure Somali political leaders to remain accountable to global standards of justice. While justice reform may indeed be a matter that is best left to Somalis themselves, those Somali professionals, religious leaders and community activists attempting to accelerate change require more significant support in the face of obstruction from self-interested warlords and other militants.

1 Introduction¹

¹ This paper was conducted at the initiative of the Centre for Humanitarian Dialogue in partnership with the UNDP Rule of Law and Security (ROLS) project. It forms part of a comparative study undertaken by the Tufts University Fletcher School of Law and Diplomacy, the US Institute for Peace, and the Centre for Humanitarian Dialogue. This wider study focuses on the roles of, and relations between, formal and informal justice systems in 11 countries across Africa, Asia and Latin America. Field research for this paper was conducted between March and September 2004, and the paper was last updated in January 2005. As a result, developments arising from the return of the Transitional Federal Government (TFG) to Somalia have not been addressed. The author is grateful to Matt Bryden, Gerard Prunier and Mark Bradbury for their contributions and comments on earlier drafts of this paper.

² For an excellent assessment of the challenges facing the TFG, see International Crisis Group, 'Somalia: Continuation of War by Other Means?', *Africa Report No. 88*, Nairobi (21 December 2004).

Somalia has been the world's purest example of a collapsed state for over a decade. Despite more than a dozen international peace conferences, the country has had no functioning and internationally recognised government since 1991. Some two dozen different armed factions and regional administrations lay claim to different portions of Somali territory. Traditional clan elders and armed clan militia have wielded authority where organised political groups are absent.

This situation may now be changing. In October 2004, after two years of deliberations, the Somalia National Reconciliation Conference in Nairobi, Kenya, concluded with the election of Colonel Abdullahi Yusuf as the president of a Transitional Federal Government (TFG). He was chosen by a clan-based Transitional Federal Assembly of 275 MPs, and his election was followed in December and January by the appointment of Ali Mohamed Geedi, a political newcomer but long-time civil society activist, as the country's new prime minister.

While the TFG is preparing to return to Somalia, a large number of hurdles will need to be overcome before the TFG can be considered a functioning government, and before it receives significant diplomatic recognition or support from the international community.² One of the most challenging aspects for reconciliation within Somalia's divided society and the establishment of a new Somali government will be the re-establishment of the rule of law in Somalia and the complete reconstruction of the human and physical infrastructure required to safeguard and administer it.

Despite over a decade of statelessness, however, this process will not be starting from scratch. Notwithstanding the prevalence of violent crime, particularly in urban areas, and regular armed clashes between the factions, Somalia does not exist in a state of anarchy or chaos. Although lacking an effective central government, the country has had no lack of *governance* over the past decade. The latter has been established both top-down by powerful political interests seeking to entrench control over particular towns and regions, and bottom-up by Somali religious leaders, businessmen and local communities, attempting to establish basic security conditions for the normalisation of social life and the expansion of trade.

A major aspect of Somalia's local processes of 'development without a state' over the past decade has been the re-emergence of justice systems across the country. A mixture of modern, traditional and religious systems now provide for a modicum of social order. These systems regulate a wide variety of affairs, from constitutional crises in regional political administrations to the enforcement of business contracts to the settlement of marital disputes and divorces. Less often, the informal justice sector is involved in clan reconciliation and the settlement of political disputes. Although this trend has not provided for the fully fledged 'rule of law', it has facilitated the

development of Somalia's booming private-sector economy, a dynamic civil society, the re-growth of the country's social fabric, and local efforts to promote peace.

This paper explores how justice systems – both formal judiciary systems established by local political authorities, and informal justice systems crafted from customary clan law and Islamic *shari'a* – function in Somalia's 'stateless society'. Rather than being an anthropological study, it is intended as an introduction to the complexities and challenges of promoting justice and the rule of law in Somalia for members of the international community. Four different justice systems – which often coexist in the same location – can be identified, as follows.

Formal judiciary structures in regional administrations – Some regions of Somalia have come under the control of formal administrative structures which grew out of militia-factions that took control over significant territory. The 'Republic of Somaliland', which controls most of the territory of the former British Somaliland protectorate in the northwest of the country, has voted to secede from the rest of Somalia. By contrast, the 'Puntland State of Somalia' declared the country's northeast regions to be a federal state-in-waiting for the return of a national authority. Both have succeeded in establishing relatively safe and stable security conditions. Although no such durable administration emerged in southern Somalia since 1991, a Transitional National Government (TNG) was established in Mogadishu in 2000, after a year-long peace process in Djibouti. The TNG never took control over the capital city, let alone other parts of the country. However, it did provide an example of Somali efforts to establish a formal judiciary structure to administer the rule of law, and can be seen as laying some foundations for the new TFG.

Traditional, clan-based systems – *Xeer* can roughly be translated as the customary law that exists between Somali clans. It is an unwritten agreement that has evolved within and between Somali clan communities over generations. Although it bears no formal institutional structure, the implementation of *xeer* is overseen by traditional elders. It is particularly important in rural areas of Somalia where the presence of modern political institutions is weak. However, even in urban areas with local administrations, *xeer* is usually the first recourse in dispute management, settlement and reconciliation.

Shari'a courts – Although Islamic law has existed in Somalia in one form or another for hundreds of years, it was usually incorporated as an element within the traditional *xeer* system. The application of Islamic law as a separate, but complementary system to modern judicial institutions persisted through both eras of colonial administration and independent government. However, since the mid-1990s, independent *shari'a* courts emerged in various parts of Somalia, but particularly in urban areas. Often administered on a clan-by-clan basis, these courts managed militia forces capable of establishing basic law and order in their immediate area of operation, and enforcing court decisions. While these *shari'a* courts are an indigenous response to persistent insecurity to which neither factions nor traditional *xeer* could effectively respond, concerns exist with regard to their affiliation with fundamentalist elements.

Civil society initiatives and ad hoc mechanisms established by Somali militia-factions – In certain locations in southern Somalia, well-established and well-organised militia-factions have established ad hoc mechanisms to regulate and resolve local disputes. While these initiatives are often temporary, and break down when armed conflict erupts, they are instructive in understanding the similarities between Somali efforts to restore justice across different regions. In the midst of these initiatives, Somali civil society is also agitating for change. Local universities offer degree courses to fee-paying students in secular and Islamic *shari'a* law; human rights organisations provide legal training and pressure politicians and militia-factions to respect human rights; Somali legal professionals offer private arbitration services to businesses; and local communities have established 'vigilant group' militias to police their neighbourhoods.

It is essential that Somalis and the international community alike now take stock of the successes achieved and limitations reached by these local justice efforts over the past decade. The future of the TFG and President Yusuf will depend to a great extent on how rapidly and effectively the rule of law can be re-established in Somalia, and the extent to which ordinary Somalis perceive that the new government's efforts to improve security and establish its authority are underpinned by standards of justice and fairness. Without such foundations, the TFG is unlikely to overcome the remaining hurdles on Somalia's road to peace, including reconciliation between clans and political leaders, redress for past human rights abuses, demobilisation of militia, and the development of recovery plans.

As a contribution to deliberations on how Somalis and the international community can identify better means of supporting the country's return to peace, this paper provides an assessment of each of the justice systems identified above, and makes recommendations on how the international community's development initiatives can best contribute to their success in delivering the rule of law. Before analysing each of these justice systems, the paper begins with a brief introduction to Somalia's social and political context in 2004, and a historical review of the development of the Somali legal system. The paper concludes with an analysis of the strengths and weaknesses of the various justice systems, the common challenges faced by international aid efforts to support them, and a set of recommendations for future engagement.

2 | The Somali Context

To understand Somali society, one must grapple with the importance of the country's 'segmentary lineage structures' or clans. In the words of Bernard Helander, the clan structure forms 'a completely encompassing social grid that organises every single individual' from the time of their birth.³ Genealogically, Somali society can be divided into four major clan-families that comprise the vast majority of the country's population – the Darod, Dir, Hawiye, and Rahanweyn – as well as a nominal 'fifth clan' of minority Arab and Bantu

³ Bernard Helander, 'Is there a civil society in Somalia?', Summary of Remarks to SIDA Conference, Nairobi: UNDOS, September 1997.

⁴ The classic exposition of Somalia's segmentary lineage system is found in I.M. Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics Among the Northern Somali of the Horn of Africa*, Reprint Edition, London: James Currey, 1999.

groups.⁴ Each clan is comprised of varying levels of sub-division that descend hierarchically from clan-families to clans, sub-clans, varying numbers of sub-sub-clans, primary lineage groups, and *diya*-paying groups. The latter are the smallest social units, including an undefined number of families bound by the closest kinship ties. *Diya* groups take collective responsibility for their own security, as well undertaking an obligation to compensate other *diya* groups (traditionally with the payment of livestock) for any harm done by one of their members.

Clans and their sub-divisions have traditionally been the key mode of social organisation for pastoralist and agro-pastoralist communities in Somalia, as well as the building blocks for inter-community alliances and conflicts. As neighbouring clans competed, often violently, over scarce environmental resources – particularly land and water for either livestock grazing or agricultural cultivation – a customary code of conduct, known as *xeer* (pronounced roughly as 'hair' in English) was developed to settle disputes and guard the peace. *Xeer* is also not a strictly 'rule-based' system. A clan's political and military capabilities relative to its rivals – a factor traditionally based primarily on the size of the opposed clans – has always been a factor in reaching an acceptable and enforceable consensus.

The provisions and operations of *xeer* will be described in detail in Section 4 below. However, it is important to note at the outset that *xeer* is not a written legal code, but rather a tradition that has been passed down orally from one generation to the next. The sources of *xeer* date back centuries and are generally considered to be the agreements reached by elders of various clans that lived and migrated adjacent to one another. The role of the clan elders in *xeer* cannot be overstated, as they are simultaneously considered its 'legislators, executors and the judges.'⁵ Decision making was led by male clan elders on the basis of consensus – factors which both subordinated the interests of individuals to the interests of the clans, and severely marginalised women.

Islamic *shari'a* law was a significant influence on the development of *xeer*. Somalis are almost entirely Muslims from the *Shafi'i* school of Sunni Islam. It is popularly believed by Somalis that their ancestors 'descended from the household of the prophet Mohamed, so that all Somalis belong to the Hashimite stock of the Qurayshi clan.'⁶ However, the precise history of Islam's penetration into present-day Somalia is not known. Arab traders had already established a presence along the Somali coast in pre-Islamic times. Yet, the penetration of Islam is usually dated to successive waves of Arab emigration and conquest between the 7th and 13th centuries, originating from Arabia, Persia, Yemen and Oman.⁷

Shari'a law was not adopted by Somalis in full. Rather, a significant number of *shari'a* precepts and practices were assimilated within *xeer*. As a result, many points of *shari'a* have often been subordinated to clan tradition, particularly in matters of collective responsibility taking precedent over personal liability, and the nature of punishments and family issues. Somali sheikhs and religious leaders, known as *wadaad* and *ulema*, did not play a direct role in Somali political affairs, which were the domain of the elders. Rather, they undertook *qadi* or judicial functions, including the conduct of marriage rites and divorce

⁵ Puntland Development Research Centre (PDRC), *Pastoral Justice: A Participatory Action Research Project on Harmonization of Somali Legal Traditions*, Garowe: PDRC, 2002, p. 25.

⁶ Mohamed Haji Mukhtar, 'Islam in Somali History: Fact and Fiction', in *The Invention of Somalia*, Ali Jimale Ahmed (ed.), New Jersey: Red Sea Press, 1995, p. 2.

⁷ Maria H. Brons, *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Utrecht: International Books, 2001, p. 96.

proceedings, and at times they supported the efforts of the elders to promote peace between warring clans. However, according to I.M. Lewis, ‘they do not themselves settle disputes, or judge between disputants, for this is the work of elders in council, and of informal courts of arbitration’.⁸

⁸ Lewis, *Pastoral Democracy* (see Note 4 above), p. 217.

2.1 The colonial experience

Xeer remained the only foundational system of justice and public order for Somalis until the arrival of European colonists in the late 1800s. After nearly a century of trade ties stemming from European exploration and maritime access to the Indian sub-continent, direct colonial rule of northern Somali territory was established by the British Somaliland Protectorate in 1886, and in southern Somalia by Italy in 1893.

The two colonial authorities imposed their own national legal systems on their subjects. ‘The degree of structural integration of the Somali clans into the colonial structure varied depending on the purpose and aim of the colonizing country. The British, who were interested in the regular flow of cattle supplies to Aden [the main British port serving onward travel to India] were satisfied to rule indirectly, while Italians settled in significant numbers in the south.’⁹

⁹ Yohannes Kassahun, ‘*The Courts: Problems, Prospects and Role in Somalia’s Emerging Regions*’, Nairobi: European Commission Somalia Unit, March 1997.

In British Somaliland, the judicial system included the Protectorate Court responsible for all penal matters, first- and second-class district courts, and Kadis Courts. Colonial rule there imposed a more coherent set of laws by explicitly distinguishing between the various jurisdictions of customary, *shari’a* and state statutory legal systems. The 1898 Principal Order-in-Council recognised that Somalis were bound by customary law. The 1937 Kadis Court Ordinance and the 1947 Subordinate Court Ordinance recognised the application of *shari’a* to issues including marriage, divorce, family relationships, personal material responsibilities, and inheritance. By contrast, cases in which the British administration held particular interest were subject to the jurisdiction of the Common Law, Somaliland Ordinances, applicable UK laws, and the Indian Penal Code, as applied at the high court and district courts. Together with limited legal training for Somalis, this served to instil adherence to a common law judicial system in the northern Somali regions.

By contrast, in the Italian colonial administration in Somalia, the Italian civil and penal codes were adopted. However, at first they were applied particularly to foreign nationals rather than Somalis. According to Law No. 161 (5 April 1908), the Italian authority recognised Somalis as subject to customary law and *shari’a*, and Royal Decree No. 937 (8 June 1911) established separate *shari’a* courts to preside over Somali family and inheritance matters. By the end of the colonial era, however, both Somalis and foreign nationals were subject to a judicial system in three parts. Civil cases were heard by district, regional and appeals courts; penal cases were addressed by assize courts of first-instance and of appeal; and Somalis and other Muslims had access for family matters and minor civil disputes to be heard by qadi courts of first-instance and appeal. The supreme court heard appeals issuing from each of these subordinate courts, as well as deciding matters of jurisdiction between them.¹⁰

¹⁰ Kassahun (see Note 9 above), pp. 15–17.

Despite the obvious differences in the content of their laws and the distinctions between the British common law legacy in the north and the Italian civil law legacy in the south, the development of the judicial system in both areas was remarkably similar on three fronts. First, both colonial administrations established the supremacy of codified and secular Western law, particularly for significant criminal matters. Second, however, both administrations allowed affairs between Somalis to be settled through customary *xeer*, at least when threats to the general public order were not concerned. Third, independent judicial mechanisms were established to apply *shari'a* to family and minor civil matters. Overall, this judicial system maintained a formal governance apparatus that was able to regulate, but not displace, the continued practice of Somali customary justice.

2.2 Independence and national unification

Somalia's independence from colonial rule resulted from the amalgamation of Italian Somalia and the British Somaliland Protectorate in 1960. Attempts were made by the Somali government to craft a single, coherent judicial system. The challenge was a daunting one: 'At independence in 1960, when British Somaliland and Italian Somalia were united to form the Somali Republic, four distinct legal traditions – British Common Law, Italian (Continental) law, Islamic *Shari'a*, and Somali customary law – were in simultaneous operation.¹¹' The Somali government established a Consultative Committee for Integration of the Legal Systems to recommend how to create a unified justice system. Further deliberations resulted in the 'Law on the Organisation of the Judiciary' by the National Assembly of Somalia in 1962, which elaborated a somewhat confusing amalgamation of laws and jurisprudence. The country's civil and penal codes were based on the Italian legal system, while criminal procedure was based on the Indian Code. In addition, *shari'a* was maintained for family, inheritance and minor civil matters, and *xeer* was recognised as a legitimate option for the settlement of clan disputes.

The Constitution and Legislative Decree No. 3 of June 1962 formally integrated the judiciary system under the Ministry of Justice and Religious Affairs, including a supreme court overseeing a court of appeals, and a system of regional and district courts. The position of Attorney General was established as part of the judiciary according to the civil law system, and a Higher Judicial Council was created to ensure independent judicial examinations, appointments and human resources management. In addition, judicial integration resulted in the promulgation of a series of codes, including the Penal Code (1962), Criminal Procedure Code (1963), Military Criminal Law (1963), Traffic Code (1962), and others regulating labour and maritime affairs.

Despite this progress on a formal level, however, these reforms did not have a strong nationwide impact in practice. Questions of jurisdiction, conflicts of law, and procedure abounded. For example, northern courts continued to rely on precedent, while southern courts applied civil and penal codes. Legal practice required knowledge of the Italian system and the Italian language – factors which disadvantaged many northern legal professionals. As a result,

¹¹ Academy for Peace and Development, 'The Judicial System in Somaliland', Workshop Report, Hargeisa, April 2002.

courts across Somalia continued to apply different laws according to their region's legal history. In addition, the shortage of qualified jurists and lawyers meant that the state judicial system was rarely applied outside urban areas.

The new courts attempted to be active in interpreting how these various laws should be applied coherently, and in supporting the legislature in drafting new laws to govern banking, credit, foreign trade, cooperative societies, natural resources, communications, taxation, etc. However, the development and application of a functional judicial system was forestalled by a series of Somali political crises. Decolonisation had yielded an independent Somali state, but also left behind a number of destabilizing political legacies.¹² Among these, a political and bureaucratic class, including those individuals who had benefited most in terms of education and employment during the period of colonial rule, emerged to control the post-colonial state. To bridge the gap between traditional and modern institutions in their favour, the new elites used state resources to create patronage networks wherein the delivery of funds and investment was used to cultivate a loyal constituency. At the level of national politics, clans were essentially transformed into constituencies and platforms for aspiring elites.

¹² See John Markakis, *National and Class Conflict in the Horn of Africa*, Cambridge: Cambridge University Press, 1987.

2.3 The Siad Barre dictatorship

Using the corruption and instability of the civilian government's patronage system as a pretext for action, the military took over the Somali government in 1969, bringing General Mohamed Siad Barre to power. Aligned with the Soviet Union, his government promoted the modernisation of Somalia through a strategy of Scientific Socialism that would generate a pan-Somali ideology to supersede and possibly replace clan identity. As part of this strategy, Barre promoted claims to be the rightful rulers of Somali-inhabited areas in Kenya and Ethiopia. The military government met with initial success, particularly in organising students and other groups for public works and education, developing a written form for the Somali language and, to some extent, empowering women to undertake higher-profile roles in politics and economics outside the household.

Shortly following their coup, President Siad Barre and his Supreme Revolutionary Council (SRC) sought to reform the Somali legal system again. In theory, it was to be brought in line with socialist principles as the Somali government became politically aligned with the Soviet Union. In practice, however, the changes were more authoritarian in nature.

“The military regime that seized power in 1969 suspended the Constitution of 1961, assigning all legislative, executive, and judicial powers to the Supreme Revolutionary Council. In 1973, the regime introduced a unified civil code. Its provisions pertaining to inheritance, personal contracts and water grazing rights sharply curtailed both the *Shari'a* and Somali customary law. In particular, the new civil code altered the customary system of *diya* payment as compensation for death or injury, in which responsibility was collectively borne by the clan. Any homicide offence was made punishable by death and compensation payable only to close relatives.”¹³

¹³ Academy for Peace and Development, ‘The Judicial System in Somaliland’, Workshop Report, Hargeisa, April 2002.

In general, the SRC continued within the Italian legal system, but modified laws to suit top-down, authoritarian rule. Under Law No. 1 (21 October 1969), the SRC was given authority for all judicial functions, as well as executive and legislative ones. Decree No. 12 (25 October 1969) temporarily abolished the constitutional court and supreme court, as well as placing restrictions on the functions and jurisdictions of the remaining courts. Most importantly, Decree No. 12 also established the National Security Court with jurisdiction over:

- 1 offences under the Somali penal code, including crimes against the state and crimes affecting public order
- 2 offences under the law of preventative detention (10 January 1970)
- 3 offences under Public Order Law No. 21 (26 August 1964)
- 4 any other offence that the SRC declares to be a violation of national security.

Members of the National Security Court were appointed from within the military, and had broad powers of detention, arrest and seizure. They had the liberty to take jurisdiction away from all subsidiary, lower-level courts, and there was no right of appeal (except to the SRC itself). From the mid-1970s, political decision making overtook any appearance of judicial independence. The Public Order Law of 1964 – essentially an amalgamation of many colonial anti-resistance laws – was used to suppress dissent and civil society mobilisation.

Law No. 67 (1 November 1970) abolished ‘tribalism’ and key elements of *xeer*, including tribal land, water and grazing rights, as well as collective responsibility and *diya*-payment (e.g. blood-money compensation). Despite rancour between the SRC and Islamic leaders, Siad Barre expounded on his government’s respect for Islam. *Shari’a* courts were allowed to function as before so long as their operation did not contradict the political and economic directives of the SRC. However, due to lack of viable alternatives through political parties, civil society movements and clans, Islam became a source of anti-government resistance in urban areas. Matters were brought to a head in January 1975, when Islamic clerics publicly rejected the government’s new Family Law for its recognition and promotion of the legal and economic equality of women, specifically in matters of inheritance. Public protests were eventually put down with the execution of ten prominent clerics and the long-term imprisonment of 23 others.¹⁴

¹⁴ I.M. Lewis, *A Modern History of the Somali* (4th edition), Oxford: James Currey, 2002, p. 213.

Despite existence of an official police force under the Ministry of Interior, real repressive and enforcement power was wielded by the ‘people’s militia’ which were organised as an arm of the Somali Revolutionary Socialist Party and reported directly to the inner circle of Siad Barre. All land not owned by a group recognised as legitimate by the SRC was nationalised in 1972. Rather than being allocated for the public good, Siad Barre’s government parcelled it out as political patronage on a 50-year-lease basis.

Abandonment of socialism as the basis for the government, in 1988, did little to divest judicial authority from the executive branch of government.

Corruption and repressive practices were rife. The legacies of Siad Barre's rule remain to this day, including public perceptions that the judiciary system is a tool in the hands of governing elites and their clan patrons to promote personal interests, repress opposition leaders and groups, dispossess non-governing clans and non-elites of their land and property, and otherwise dominate other clans.

2.4 Civil war and state collapse

However, on the heels of severe drought in 1977, it was the failure of a massive military campaign into eastern Ethiopia to re-take the Haud grazing lands (combined with a massive refugee influx) that was the death knell of Somali public support for Barre. After an unsuccessful military coup, the Barre regime insulated itself from popular dissent and began to pursue a strategy monopolising political and economic power. The distribution of patronage was circumscribed as Barre sought to limit access to power outside his direct control. To guarantee the security of the regime, key political and military positions were allocated predominantly to members of Barre's family in the Darod:Marehan clan, although members of other clans were used when their appointments would cause splits and fuel divisions within the opposition. Likewise, the economic benefits of aid, agriculture and industry were centralised. This led to the pauperisation of the vast majority of Somalis, particularly the dispossession of riverine populations from the limited arable land in the south of the country, in favour of a new class of wealthy mercantopolitical elites that had emerged.

'By the mid-1980s, 100% of Somalia's development budget was externally funded, and 50% of its recurrent budget was dependent on international loans and grants. At the height of Somalia's foreign aid dependence... total development assistance constituted a stunning 57% of Somalia's GNP.¹⁵ The rest of Somalia's GNP was highly unstable given dependency on remittances from the Somali diaspora in oil-producing countries whose wages varied with international markets. Nevertheless, Somalia maintained one of Africa's largest standing armies, and the civil service was enormous, with both institutions serving as patronage opportunities for Siad Barre to coopt his domestic opposition. 'All domestic structures that could have provided some pressure for accountability were crushed, so that for those who were excluded from power the only option was armed rebellion.'¹⁶

Political and military leaders who had been marginalised by Siad Barre returned to their clans to mobilise resistance movements. With the end of the Cold War, foreign support to maintain the Somali army – mostly from the United States at that point – was reduced dramatically and Siad Barre could no longer hold back the militia-factions. After ten years of struggle, the militia-factions took control of Somalia in January 1991, when President Siad Barre fled Mogadishu under their attack. The militia-factions that overthrew him then turned their forces against one another in violent competition for political supremacy.

In southern Somalia, the ensuing battles to control Somalia's commercial centres, arable countryside and productive infrastructure created a human

¹⁵ Ken Menkhaus and Lou Ortmayer, 'Somalia: Misread Crises and Missed Opportunities', in Bruce W. Jentleson (ed.), *Preventative Diplomacy in the Post-Cold War World: Opportunities Missed, Opportunities Seized, and Lessons to be Learned*, Maryland: Rowman and Littlefield, 1999, p. 4.

¹⁶ Alex De Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, London: James Currey, 1998, p. 161.

tragedy. Indeed, these were the images seen worldwide from the early- to mid-1990s, when militia-factions which overthrew the dictatorial government of President Mohamed Siad Barre turned their guns against each other in an effort to capture the capital city and claim sovereign control of Somalia. The result was a multi-faceted humanitarian crisis, including food shortages and cholera outbreaks that claimed some 400,000 lives, and displaced millions of Somalis into refugee camps in Kenya, Ethiopia, Djibouti and Yemen.

In northern Somalia, the situation was quite different. Political control over substantial, contiguous territories was quickly established by two former militia-factions – the Somali National Movement (SNM) and the Somali Salvation Democratic Front (SSDF) – which created the autonomous regional administrations of ‘Somaliland’ and ‘Puntland’, respectively. Each has achieved a significant degree of peace, security and public support in the territory under its administrative control. The SNM leadership in Somaliland declared its area’s secession from the rest of Somalia in May 1991, and has since refused to participate in international peace conferences to reunite Somalia under a single authority. Although no country has recognised Somaliland as an independent or sovereign entity, international organisations and donor governments have been working with both Somaliland and Puntland as *de facto* governments to negotiate access for emergency and reconstruction projects there and have supported the development of their administrations since the mid-1990s.

2.5 International intervention

The collapse of the Siad Barre government was accompanied by rampant criminality and rule of the gun. The response by the international community – including the United Nations Operation in Somalia (UNOSOM) and the US-led Operation Restore Hope – succeeded in relieving the famine, but failed to restore security. All judicial infrastructure was either destroyed or rendered useless; police and other public security services were disbanded, and a significant number of legal professionals fled the country. UNOSOM made an attempt to re-establish the legal system of the post-independence, pre-socialist governments. This included:

“... a three tier judicial system modeled on the prior existing court structure to operate under the 1962 Criminal Procedure and Penal Codes.... This system, considered to be temporary, will be adjusted on the basis of decisions to be taken by the Transitional National Council when it comes into being. Judicial selection committees will be set up in each region to select judges and magistrates, and will oversee issues of ethics and discipline in the judiciary. Courtrooms will be renovated and provided with necessary equipment. The cost for supporting these operations for calendar year 1994 is estimated at US\$3.5 million, including salaries, renovation, supplies, equipment, and training.”¹⁷

¹⁷ Multi-Donor Task Force, ‘Somalia: Framework for Planning of Long-Term Reconstruction and Recovery’, 12 October 1993, p. 23.

However practical in conceptualisation, the UNOSOM plan fell foul of numerous contradictions. First, UNOSOM implemented the selection of both judges and police officers without consulting local militia-faction leaders and civilian authorities. ‘Judges were appointed by UNOSOM II through the

¹⁸ Ameen Jan, 'Peacebuilding in Somalia', IPA Policy Briefing Series, New York: International Peace Academy, July 1996, p. 11.

recommendations of a thirteen-member judicial committee that was based in Mogadishu and traveled very infrequently to the regions where those judges were supposed to operate.¹⁸ Second, the top-down re-implementation of the 1962 criminal and penal laws undermined local rule of law initiatives that drew more eclectically on traditional clan law and *shari'a* law. The overall result, in short, was the top-down imposition of a formal judicial system with little local enforcement capacity. Further, this system actually upset the local balance of power in many regions and resulted in increased political tension.

“At the strategic level, UNOSOM II’s plans in this regard suffered from a significant contradiction. On the one hand, the police was supposed to report to District and Regional Councils until a Transitional National Council was established. On the other hand, the establishment of the Somali police was tied into the military concept of UNOSOM II’s operations, which required the establishment of a Somali national police force before the withdrawal of peacekeeping forces. In the event, the second imperative of withdrawal quickly superseded the first, causing UNOSOM II to hastily embark on the establishment of police forces across Somalia.”¹⁹

¹⁹ Jan (see Note 18 above), p. 10.

In the end, political decisions eventually undermined UNOSOM’s reconstruction efforts. The international peacekeeping mission culminated in mid-1993, with the unsuccessful US-led manhunt for the warlord General Mohamed Farah Aideed, and the ‘Black Hawk Down’ episode in which two US helicopters were shot down and eighteen US soldiers were killed. In response to this crisis, the international community largely withdrew from Somalia, leaving behind a small and slowly dwindling number of United Nations humanitarian agencies and non-governmental organisations.

2.6 Stateless Somalia

Following the withdrawal of foreign peacekeeping troops, new rounds of conflict between Somalia’s militia-factions began across southern Somalia. However, by the late-1990s, the worst of the humanitarian emergency in Somalia had abated. Most of the frontlines had stalled, clan-based factions had split into competing sub-clan militias, and their leaders became entrenched in increasingly localised political and economic issues. Conflicts between the militia-factions remained serious affairs, cost large numbers of lives, and continued to disrupt chances to form a government of national unity. However, at the same time, military conflicts became increasingly sporadic and short-lived skirmishes. An uncertain stalemate came to prevail in Somalia. While militia-factions regularly shifted their alliances, frontlines between them rarely moved and a prevailing balance of power prevented any one militia-faction from imposing its rule over another.

According to Ken Menkhaus, this altered the fundamentally predatory relationship between many faction leaders, their militias and the communities which hosted them: ‘As the symbiotic relationship between gunman and villager evolves, the line between extortion and taxation, between protection racket and police force is blurred, and a system of governance within anarchy is born.’²⁰ The overlap between community interests and militia interests

²⁰ Menkhaus, Ken, ‘Somalia: The Political Order of a Stateless Society’, *Current History*, No. 97, 1998, p. 222.

meant that popular pressures for social stabilisation began to influence and even circumscribe some militia activities. It appeared as though an arduous, locally driven process of re-establishing 'grassroots' governance in Somalia began to emerge.

The large clan-based militias – the basis for the worst fighting in Somalia in the early and mid-1990s – became difficult to maintain. A new generation of 'young Turks' began to emerge within the militia-factions and challenged the authority of their original leaders. Nearly all of Somalia's militia-factions began to split internally as leaders from different sub-clans competed for supremacy. Although 'civil society' organisations – primarily local NGOs seeking to deliver humanitarian services and promote human rights on behalf of the UN – never mounted any serious challenge to the faction leaders, clan elders effectively reasserted their authority in community decision making. Public support for the factions also decreased as average Somalis tried to get on with living their lives and became more concerned with securing access to employment, education and healthcare, than they were with the wrangling of their obviously self-interested political leaders.

The power base of Somalia's warlords declined further as a result of the limited resources at their disposal. Opportunities for plunder gradually disappeared and the amount of foreign aid available for diversion dwindled. Funds accumulated by the faction from taxation at checkpoints and airstrips were largely consumed by the overhead costs of salaries for standing militia and payments required for the settlement of local disputes. At the same time, a booming private sector also emerged with Somalia effectively serving as East Africa's premier duty-free port. Fortunes were made on the import-export trade in everything from cigarettes to narcotics, from sugar to scrap metal, and from petrol to coffee. Businessmen came to control much of the country's productive infrastructure for their own personal enrichment.

2.7 Reconstructing Somalia

The international community responded to these trends in two contradictory ways. On the one hand, it adopted a 'building blocks' strategy that supported the 'bottom-up' realities of grassroots governance and the emergence of decentralised political authority structures, particularly in Somaliland and Puntland. The building blocks strategy anticipated that Somalia's militia-faction leaders and other civil society actors could be supported to take control slowly of discrete territorial enclaves across Somalia and create clan-based, regional administrations that would over time become organic federal units of a reunified Somali state.²¹ To this extent, the strategy was formally adopted by the seven-member Intergovernmental Authority on Development (IGAD), the UN and Western governments as the most appropriate political strategy for state reconstruction in Somalia between 1996 and 2000.

On the other hand, the international community continued to hope that a quick fix could be found to Somalia's conflict by recreating a national government from the 'top down'. Primarily, this strategy focused on negotiating an elite-level power-sharing agreement between the country's competing warlords. During 1999 and 2000, the Somalia National Peace Conference was

²¹ See Matt Bryden 'New Hope for Somalia? The Building Block Approach', *Review of African Political Economy*, Vol. 26, No. 79, March 1999.

held in Arta. Sceptics bemoaned the so-called Arta Process as another round of meaningless reconciliation initiatives. At that point, over a dozen other peace conferences for Somalia had reached conclusions over the past decade, but none bore fruit. Such dismissals were significantly wide of the mark. In August 2000, the peace conference drew to a close with the election of the President of the Transitional National Government (TNG). Less than two months later President Abdiqasim Salad Hassan and the majority of his 245-member parliament left Djibouti for Mogadishu. Following nearly a decade of 'state collapse', the TNG became the first Somali political initiative to achieve a significant degree of international recognition. The TNG took Somalia's long-empty seats at the United Nations, Organisation of African Unity, IGAD, and League of Arab States.

In the end, the Arta Process did little to resolve the Somali conflict and the TNG never came to control a significant amount of territory in Somalia. The vast majority of Somalia's militia-factions had refused to participate in the peace conference since they were denied any special status in the negotiations by comparison with clan elders, businessmen and civil society representatives. Thus, their potential to come out of the talks controlling senior government positions was limited. Immediately after Arta, these militia-factions organised themselves to oppose the TNG.

As a result, Somali politics remained highly polarised and Somali territory is divided between over two dozen militia-factions and regional administrations. These were split into four primary groups.

- 1 The Somalia Reconciliation and Restoration Council (SRRC), acting in alliance with the Puntland State of Somalia, controlled the northeast of the country and much of the southern, inland countryside.
- 2 The Transitional National Government (TNG), acting in alliance with militia-factions in the National Salvation Council (NSC), operated in sections of Mogadishu and across the coastal areas of southern Somalia.
- 3 A third group of militia-faction leaders and civilian politicians attempted to position themselves as the 'swing vote' willing to negotiate between the SRRC/Puntland and the TNG/SNRC alliances. The actors in this group have labelled themselves as the 'Group of 8', although the number of allied factions changes on a regular basis.
- 4 The 'Republic of Somaliland' in the northwest remained committed to secede from the rest of Somalia, and refused to participate in the peace conference.

The most recent attempt to reconstruct a Somali government got underway in January 2002, when heads of state from across the Horn of Africa and East Africa began to plan the Somalia National Reconciliation Conference in Kenya. Despite the signature of a Cessation of Hostilities agreement during the first month of the conference deliberations in October 2002, the country's security situation remained precarious. Serious armed clashes have taken place in at least half of the country's 18 regions over the past two years. In addition, attempts to gain substantive agreements on how any future government would address key peacebuilding issues – including disarmament and demobilisation, restoration of stolen property and occupied land, redress for past human rights abuses, management of key economic resources and trade infrastructure – was largely a failure.

However, after nearly two years of negotiations in the central Kenyan town of Eldoret and the Nairobi suburb of Mbagathi, the participants agreed in mid-2004 on the Charter of a new transitional and federally structured government – the TFG – and proportionally selected 271 Ministers of Parliament according to clan membership. With newfound unity, Somalia's neighbouring states, including Kenya, Ethiopia and Djibouti, cooperated in a final push for the election of a president, appointment of the prime minister and establishment of a cabinet that shares power between the country's competitive clans and militia leaders. With this accomplished in the last quarter of 2004, it will be determined during 2005 whether the TFG will successfully complete the process of reconciliation started in Kenya, and actually begin an arduous processes of national reconstruction.

3 Formal Judicial Systems

Even in the absence of a recognised central government in Somalia from 1991 to the present day, formal judicial systems have been established in those areas, such as Somaliland and Puntland, where autonomous regional administrations have been established, and in the case of the Transitional National Government (TNG) and the newly created Transitional Federal Government (TFG), when an international peace conference has created a new structure. Despite major political divides between them, all of these administrations have adopted similar structures for their judicial systems, based on the structures and laws of previous Somali governments.

Common attributes of all Somali formal judicial structures include:

- 1 that each justice system is sanctioned by a charter which proclaims the supremacy of Islamic *shari'a* law, even though *shari'a* is applied primarily for family matters, including marriage, divorce and inheritance issues, and minor civil matters
- 2 that a three-tier judicial system has been established, including a supreme court, a court of appeals, and courts of first instance (either a single court per region, or divided between Regional and District Courts)
- 3 that commitments are enshrined in the charter guaranteeing universal standards of human rights to all subjects of the law, and the independence of the judiciary (to be guarded by a judicial committee)
- 4 that the laws of the Somali government until the time of the military coup of Siad Barre remain in force until the laws are amended.

3.1 'Republic of Somaliland'

As happened across Somalia, the formal judicial system in Somaliland was entirely destroyed during the civil war to oust Siad Barre. In 1993, a clan conference in Boroma agreed that reconstruction of the legal system would begin with the constitution of a judicial system based on laws passed by the Somali government before Siad Barre's military coup of 1969. In 1997, a provisional constitution was adopted. The constitution, which was eventually ratified by public referendum in

2001, states that all laws in Somaliland will be based on *shari'a*, and that any existing law that conflicts with *shari'a* will be rendered void.

The Somaliland judiciary was established as a three-tier system, including a supreme court, courts of appeal, and regional and district courts:

“The district courts deal with claims up to Sl.Sh. 3 million [approximately US\$600] and offences punishable by sentences of less than three years. The regional courts deal with claims that are more than Sl.Sh. 3 million and jail terms in excess of three years. Six district courts and six regional courts are functioning, namely those at Hargeysa, Gabiley, Boorame, Burco, Ceerigaabo, and Berbera. There are also five appeal courts, located Hargeysa, Boorame, Burco, Ceerigaabo, and Berbera. Most of these courts have only one judge.”²²

²² Academy for Peace and Development (APD), ‘The Judicial System in Somaliland’, Hargeisa, 2002.

That said, the Somaliland legal code remains a contradictory mixture of laws and procedures drawn from both the British common law and Italian civil law heritage, as well as *shari'a* and clan *xeer*. ‘In reality... the application of diverse legal codes continues, and interpretation of the laws remains *ad hoc*, non-uniform, and highly subjective.’²³ A survey conducted by the Hargeisa-based Academy for Peace and Development (APD) in 2002, identified the following problems: the incoherent amalgamation of overlapping and at times contradictory legal principles and laws based on British common law, Italian civil law, traditional clan *xeer*, and Islamic *shari'a*; lack of professionally trained staff, including judges, lawyers, clerks and civil servants; limited number of functioning courts across the region; poorly equipped offices and courts where they exist; regular interference in court matters by both politicians and influential clan communities, leading to a lack of judicial independence; and lack of public knowledge of the role and functioning of the judiciary, as well as lack of public access and trust.²⁴

²³ APD, 2002 (see Note 22 above).

²⁴ APD, 2002 (see Note 22 above).

The primacy of customary clan justice over the formal judicial system is ubiquitous across Somalia:

“For instance, someone guilty of homicide may be brought before court for trial under positive law, but if settlement is reached outside the court in accordance with *xeer* (traditional social contracts), he or she may be set free without punishment. This is particularly so where law enforcement and the courts are weak or non-existent, where warrants cannot be enforced, and relatives apprehend the offender. When the relatives settle an offence according to customary laws outside the judiciary system, judges and law enforcement officers cannot prevent the release of the offender brought to them by the relatives who now insist on his release. Women can be particularly vulnerable to the substitution of customary law for positive or *shari'a* law. Elders routinely exert pressure on women to settle out of court through traditional channels and thus forfeit their legal rights.”²⁵

²⁵ APD, 2002 (see Note 22 above).

According to APD, ‘Of 35 practising judges in June 2002, only 19 possessed law degrees, while the rest have some basic education and experience in administering the *shari'a*.’²⁶ In part, this can be explained by the ‘brain drain’ of Somali professionals during and after the Siad Barre dictatorship. Additionally, following independence, most Somali judges and lawyers were

²⁶ APD, 2002 (see Note 22 above).

drawn from and concentrated in southern Somalia. This was due to their experience with Italian-language legal training and practice that was adopted by the independent Somali governments, as well as the fact that Mogadishu was the capital city and the site of the country's university system.

However, not all the shortcomings of Somaliland's judicial system can be blamed on the past; lack of government action in addressing these problems is a major factor. Despite the ability of the Somaliland administration to maintain a remarkably higher degree of law and order than any other part of the country, the development of the justice system in Somaliland faces a large number of limitations. A recent report by the International Crisis Group concluded that 'Somaliland's judiciary has spent most of the past decade mired in incompetence, corruption and political indifference.'²⁷ The report called on the Somaliland administration to begin 'an independent judicial review, with a view to introducing reforms strengthening both the capacity of the judiciary and its independence from political influence.'²⁸ While the Somaliland administration has appointed an official Law Review Committee, since 2002, to assess all existing laws and propose changes where necessary, the committee has neither moved quickly, nor is it tasked to pay any significant attention to aspects of *xeer* or *shari'a* that are not already included in formal state law.

In the meantime, public perception of the Somaliland justice system is that the courts are too problematic, uncertain and prone to corruption. Without an agreed set of laws and without formal guidelines for determining who qualifies to sit on a court, 'Judges differ in their application of the law according to their backgrounds, specialties, philosophy, and pragmatism. Since there are no written guidelines, judges often base their verdicts on individual assumptions and beliefs.'²⁹ One lawyer interviewed for this paper stated that, "'Guilt and "innocence" are not operative concepts in Somaliland. The focus of any legal decision is to arrive at a "win-win" solution that the parties to the dispute are willing to implement. Thus, the strain on government mechanisms to enforce legal decisions is as low as possible.' Accusations of inefficiency, lack of transparency and corruption were exacerbated by political controversy between the Minister of Justice and Chief Justice over leadership of the Justice Committee, which ostensibly exists to ensure the impartial appointment, monitoring and management of judges.'³⁰

3.2 Puntland State of Somalia

Upon its creation in 1998, Puntland 're-established the judicial system based on the law on the judiciary, adopted by the National Assembly of Somalia in 1962.'³¹ The charter made the standard caveat, however, that no earlier laws would be applicable if they contradicted either *shari'a* or other articles of the charter. According to the Puntland charter, 'laws and regulations legally enacted by the previous governments provisionally remain in force until they are replaced by new legislation'. As elsewhere in Somalia, this meant that the Puntland judicial system is initially composed of three levels: the supreme court located in the Puntland capital of Garowe, the courts of appeal in each region, and courts of first instance at the regional and district levels. In addition, a separate constitutional court was established. The Puntland charter identifies that state interests are served by: the Ministry of Justice and

²⁷ International Crisis Group, 'Somaliland: Democratisation and its Discontents', *Africa Report No. 66*, Nairobi / Brussels, 28 July 2003, p. 27.

²⁸ International Crisis Group, 2003 (see Note 27 above), p. ii.

²⁹ APD, 2002 (see Note 22 above).

³⁰ The Somaliland constitution recognises the independence of the judiciary, and public knowledge of the importance of this principle has led the matter to become a heated public debate. However, judicial independence is constrained by the fact that it is the Ministry of Justice that administers the courts, salaries and budgets. The constitution also gives the president the power to appoint and dismiss judges to the supreme court. Although any such decision should be taken in consultation with the judicial commission and parliament, in practice this gives the president virtually unchecked influence over the judiciary. The author is grateful to Mark Bradbury for stressing the importance of this fact.

³¹ Alessandro Campo and Hagi Ahmed Tahlil, 'The Judicial System of Puntland: A Preliminary Assessment', Nairobi: UN Development Office for Somalia, February 2002, p. 2.

Religious Affairs which oversees both public prosecution and custodial services; the Higher Judicial Council, which is responsible for judicial appointments and dismissals; and an Office of the Attorney General, including the General Prosecutor, Assistant Prosecutor General, and local-level prosecutors.

In April 1999, however, the Puntland parliament adopted Law No. 2, which streamlined the structure of the judiciary by replacing the regional and district courts with a single court of first instance that hears both civil and criminal cases. Seven courts now exist in Puntland, including the supreme court in Garowe, three courts of appeals in the regional capitals of Garowe, Bosasso and Galkayo, and three courts of first instance in the same cities. Rural areas are served by a large number – in the dozens – of Justices of the Peace, who are mandated to settle minor civil disputes.³² Following the procedure from 1962, *shari'a* law is used for personal civil matters dealing with marriage, divorce, inheritance, etc. Three judges (including a mix of secular and *shari'a* jurists) were expected to sit on each court, and to rule by majority.

³² Campo and Tahlil, p. 3.

According to assessments conducted in 2003, only 45 judges are currently serving in Puntland. Of these, approximately 18 (about 40 per cent) have a university degree in either secular or *shari'a* law. The remainder generally have 'traditional' and 'non-formal' qualifications, including locally acquired knowledge of *shari'a* and 'on-the-job' experience in the courts system under previous Somali governments.³³

³³ See Richard Sannerholm, 'Legal and Judicial Reform in Puntland State of Somalia: Alternative Approaches for Legal Restructuring', Örebro University, Spring 2003, p. 13.

3.3 Transitional National Government (TNG)

As described above, the TNG aspired to become Somalia's first internationally recognised government since the state collapsed in 1991. According to the TNG's charter, adopted at the Arta peace conference, 'The system of the new state of the Somali Republic is transitional and it shall be based on sharia...'. Article 38.12 states that 'the Somali constitution which was adopted in 1960 and other laws of that period which are not contrary to this charter shall have the force of law in the Somali republic.' Articles 4.3 and 5.1 adopted the 'generally accepted rule of international law', recognised the UN Declaration on Human Rights and the Conventions on civil, political, economic, social and cultural rights, and established a Higher Judicial Council to maintain judicial independence.

Officially, the TNG judiciary system was structured ambitiously to provide for law and order across Somalia. However, since the TNG was never able to expand its presence outside Mogadishu, the system grew to comprise only the following elements: the Minister of Justice, Attorney General, police force, supreme court (including four judges), the regional court for the Benadir / Mogadishu area, six district courts (all operating in Mogadishu), the Mogadishu Central Prison and its custodial police force. If the TNG had secured control over other parts of Somalia, other regional and district courts would have been established as required.

TNG judges interviewed for this report stated that the new TNG justice system had stopped receiving any financial support from the TNG and, as a result, its

level of activities has decreased to the point of hardly functioning by 2003 and 2004. Nonetheless, the judges maintained offices in the old Somali court buildings in Hamar Weyne district – the same locations that the Siad Barre government maintained. In addition, a nominal TNG police force continued to function in select districts of the city, and placed prisoners in the Central Prison.

Immediately after the creation of the TNG, its judiciary system merged with informal *shari'a* courts that were created in Mogadishu during the civil war. The TNG assimilated approximately 70 *shari'a* judges, including a small number of militant Islamic clerics who had been leaders of *Al Itihad al Islami*, a group listed by the United States as a Specially Designated Terrorist Entity.³⁴ However, this merger lasted for a period of only one year. Even during that time, many of the *shari'a* courts refused to integrate their militia fully under the command and control of the TNG police or military.

³⁴ See Andre Le Sage, 'Al Itihad and Prospects for Islamist Radicalism in Somalia', *Review of African Political Economy*, Winter 2001.

The accommodation came to an end in early 2002, when all judges in the TNG system were forced by a new law passed by the TNG parliament to take an exam to demonstrate their legal qualifications. Many former *shari'a* judges who had joined the TNG refused to take these exams – either due to their pride, due to the fact that they could not read/write, or because they were just likely to fail – and thus quit the TNG judiciary system. Those judges who left the TNG system either returned to work with their former *shari'a* courts, which will be addressed in a later section of this paper, or stopped doing any judicial work altogether.

After the judicial exam was implemented, a large number of vacant posts existed within the TNG judicial system. The TNG appointed people with a secular law background – mostly people who worked in the judicial system of the Siad Barre government. The lack of coordination between the TNG and *shari'a* systems was demonstrated by the fact that the decisions of the *shari'a* courts were neither registered nor considered legally binding by the TNG. To the extent that they functioned, the TNG courts essentially followed the old canon of Somali law as it existed under the Siad Barre regime. For the TNG judges, this provided an adequate merger between a secular legal system and the *shari'a* system. However, no space or mechanism exists for articulation with the traditional clan law or *xeer*.

3.4 Transitional Federal Government (TFG)

At the time of writing, the TFG had yet to relocate to Somalia from the venue of the Somalia National Peace Conference in Nairobi, Kenya. Further, while Sheikh Aden Madobe – a militia commander from the Rahanweyn Resistance Army in Somalia's central Bay and Bakol regions – has been appointed the TFG Minister of Justice, there has been little time for the TFG to make any detailed plans for the reconstruction of the country's formal judicial system. Although it remains possible that TNG President Abdiqasim and other warlords may refuse to join the TFG and may establish themselves in opposition to it, it is likely that the TFG will slowly attempt to take over the judicial infrastructure left behind by the Siad Barre government. In addition, it is likely that judges who served under the now-defunct TNG will seek to have their posts integrated into the new TFG administration.

There is a strong possibility that this will happen, as the judicial structure and laws of the TFG, as detailed in the government's charter adopted at the peace conference in Kenya, are remarkably similar to those described above. The final charter, agreed by participants at the negotiations in February 2004, includes the following stipulations. Article 8.2 of the charter states that, 'The Islamic *sharia* shall be the basic source for national legislation.' Article 60 details the courts system, to include a transitional supreme court, transitional appeals court, and 'other courts established by law'. The latter apparently provides space for the creation of courts that reflect the as yet undecided federal arrangements between central and regional governments.

Article 12 establishes the office of Attorney General, and Article 55 guarantees the independence of the judiciary. It also creates a Judicial Service Council to undertake the appointment and management of judges, who are required to have been judges in previous Somali governments or have achieved a minimum of five years experience as an advocate in previous Somali courts. Articles 14–27 of the charter provide explicit guarantees for human rights, equality before the law, and rights to personal liberty, legal proceedings, presumed innocence, the formation of political parties, labour, education, social welfare, information, assembly and protest.

3.5 Limitation of the formal judiciaries

A full comparison of the various formal judicial systems across Somalia is complicated by the fact that the TNG did not function for a substantial period of time, and that the TFG has only recently been created. However, all of these systems are very similar in their structure, and it is possible to assess more deeply the performance of the judicial systems of Somaliland and Puntland. Both of these should indeed be lauded. 'Violations of human rights... are neither systematic nor widespread... The most common violations include arrest without warrant and detention without trial of government critics, human rights activists and journalists.'³⁵ At the same time, each of these systems faces almost identical problems and limitations that must be overcome before the judiciary can be said to function effectively. The limitations are as follows.

³⁵ APD, 2002 (see Note 22 above).

- There is a lack of qualified legal professionals, including judges, lawyers, clerks and civil servants, and lack of enforced qualifications to become a judge and inadequate performance reviews, as well as an overabundance of unqualified staff appointed for nepotistic or patronage purposes.
- Courts, as well as professionally trained judges and lawyers, are predominantly based in regional capitals. Rural populations are thus marginalised from using the formal judicial system, and rely on the mediation of traditional elders and religious leaders.
- There is a lack of knowledge of existing laws on the part of both Somali judges and the Somali public, partly resulting from the lack of public knowledge of the existing legal codes and newly enacted laws. This, as well as the long time required for any formal court case to reach a result, has severely undermined public trust in the formal judicial system.
- Judicial independence is formally protected by the law, but not applied in practice, due to interference in court matters by politicians, wealthy individuals and influential clan communities. The problem is exacerbated

by the courts' reliance on the executive branch for financing and administration.

- Alternative dispute-resolution mechanisms, including the application of customary law and *shari'a*, lack an official enforcement capacity and do not have a structured, sanctioned relationship to the formal judicial system.
- Little new legislation has been enacted by the parliaments to give the judicial system adequate means to address issues of private property, commerce and trade, public administration practice, crimes committed by holders of public office, including judges, crimes committed by juveniles, and other matters arising from urban growth.
- There is a lack of resources for existing offices and courts, including basic legal texts, essential infrastructure or technology, and access to training, as well as poor remuneration for judges.
- There are poor conditions in the correctional services, including overcrowded and unhygienic prisons that do not have the capacity to provide specialised care for juvenile and mentally impaired prisoners.³⁶

³⁶ APD, 2002 (see Note 22 above).

4 | Traditional Clan Law³⁷

³⁷ This section benefited extensively from the input of Mohamed Mohamed Abdi 'Ghandi', who acted as a consultant for the author, and whose own research on traditional Somali clan law provides the basis for much of the analysis that follows. His own findings are published in *Recherches sur une Société Riche d'une Structure Complexe: La Société Somalie*, Volume 2, Université de Franche-Comté, 1998.

³⁸ PDRC, *Pastoral Justice* (see Note 5 above), pp. 24–25.

³⁹ Puntland Development Research Centre (PDRC), *Somali Customary Law and Traditional Economy: Cross Sectional, Pastoral, Frankincense, and Marine Norms*, Garowe: PDRC, 2003, pp. 19–20.

⁴⁰ For a detailed analysis, see International Committee of the Red Cross, *Spared from the Spear: Traditional Somali Behaviour in Warfare*, Nairobi: ICRC Somalia Delegation, February 1997.

In areas outside the immediate control of Somalia's regional administrations, Somali customary law or *xeer* continues to be the predominant justice system. As described above, *xeer* is the set of rules and obligations developed between traditional elders to mediate peaceful relations between Somalia's competitive clans and sub-clans. The universality of *xeer* is contested. According to one point of view, all *xeer* is 'localised', emanating from specific bilateral agreements between specific sub-clans that traditionally live adjacent to one another, and 'application of its rule is flexible and varies from place to place depending on circumstances and situations'.³⁸ According to others, however, it is possible to refer to a single, general Somali *xeer* given that the most significant principles of *xeer* are common across all Somali clans.

These generally accepted principles of *xeer* are referred to as *xissi adkaaday*. This is the name given to the most fundamental, immutable aspects of *xeer* that have unquestionable hereditary precedents. They appear to be the same as *jus cogens* in international law, and include the following:³⁹

- 1 collective payment of *diya* (blood compensation, usually paid with camels and other livestock) 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' (including the elderly, the religious, women, children, poets and guests), entering into negotiations with 'peace emissaries' in good faith, and treating women fairly without abuse⁴⁰
- 3 family obligations including payment of dowry, the inheritance of a widow by a dead husband's brother (*dumal*), a widower's rights to marry a deceased wife's sister (*higsian*), and the penalties for eloping

- 4 resource-utilisation rules regarding the use of water, pasture and other natural resources; provision of financial support to newlyweds and married female relatives; and the temporary or permanent donation of livestock and other assets to the poor.

In addition to these general principles, it is commonly agreed that *xeer* can be divided into two broad categories: *guud* and *gaar*. *Xeer guud*, which will be the focus of the description in this paper, includes the general aspects of traditional clan law that regulate common, day-to-day social interactions, civil affairs, and means of dispute settlement within a clan and between different clans. *Xeer gaar* includes specific laws that regulate localised economic production relations for clans and sub-clans specifically involved in pastoralism, fishing, frankincense harvesting, etc.⁴¹

⁴¹ For a detailed analysis of *xeer gaar*, see PDR.C, *Somali Customary Law* (see Note 39 above).

Xeer has never been fully codified and remains an oral law passed down through generations. Although *xeer* is both guarded and implemented by respected elders, known as the *xeer begti*, it is widely open to interpretation. That said, *xeer guud* can be broken down into a penal section (*dhig*) and a civil section (*dhaqasho*). *Dhig* can be broken down further into matters of murder (*qudh*), aggression (*qoon*) and thievery (*tuugo*). Each of these categories has many sub-divisions of degree of the crime. For instance, *qoon* can be either a moral harm (e.g. defamation) or a physical harm. Then, within physical harm, there are some 12 degrees of harm done – each having a corresponding level of *diya* remuneration – for incidents ranging from torn clothing to injuries ranging from fractured bones and open wounds, to the loss of a limb.

In terms of *diya* remuneration, the benchmark for compensation is the penalty apportioned for wrongly taking someone's life. In the case of a male, the *diya* is valued at 100 camels, while the life of a female is valued at 50 camels. In the case of a male, the 100 camels are sub-divided into approximately one dozen camels that must be paid immediately to the household of the victim and two dozen camels that must be paid immediately to the closest relatives of the victim. The remaining sixty or so camels must be paid over an agreed period of time to the victim's wider *diya* group. Payment for the crime of an individual is made by that person's entire *diya* group. Although this is by far the most typical application of *xeer* for murder, the exact *diya* obligation varies for different types of violations of clan law and may vary relative to the size and wealth of the clans involved in a dispute.

Dhaqasho – the civil code of *xeer* – can similarly be broken down into four categories regulating issues of family (*xilo*), private property (*xoolo*), territory (*deegan*) and hospitality (*maamuus*). Each of these aspects of *xeer* has multiple sub-divisions. For instance, *xeer* relating to private property includes rules for the maintenance, allocation and utilisation of live animals, land and inanimate materials, as well as rules governing inheritance, the giving of gifts and the status of 'lost and found' properties. *Xilo* and *xoolo* – respectively, matters of family relations, including marriage and divorce, and matters of private property – are the areas of *xeer* where *shari'a* has been absorbed most completely. Interestingly, this creates a parallel with the use of *shari'a* in secular, state judicial systems to regulate primarily family, inheritance and minor civil dispute issues.

There are two major decision-making criteria within *xeer*. Precedent is used when deciding on all common problems that a clan community has faced in the past, while jurisprudence – the informed reasoning of elders – is used to solve new problems for which no applicable precedent exists. The recourse to jurisprudence is governed by the proverb that, ‘If something happens that we have never seen or heard before, we will make a judgement in a way that has never been seen or heard before.’ In particularly challenging cases, elders traditionally opt to refer for advice to their clan’s most respected religious leaders. By contrast, for common cases, although precedents are not written down, elders cannot just create it. It is widely accepted that all precedent has been ‘orally codified’ in well-known proverbs. Knowledge of these, as well as personal abilities in patient mediation, traditionally served as the basis for an individual’s selection as *xeer beegti* by other elders.

Attempts to formalise and codify *xeer* have been made. ‘In 1968, the government established a National Advisory Council made up of traditional leaders and other knowledgeable individuals, with members drawn from all regions and districts of the country, to advise it on constitutional matter and application of laws, particularly customary law.’⁴² The Council reported on those aspects of *xeer* that contradicted state law, and argued that practices such as collective clan responsibility and *diya* payment should be abolished. In their place, personal responsibility, including the application of the death penalty for capital crimes, was recommended. However, political turmoil – particularly the 1969 military coup which brought Siad Barre to power – prevented the government from considering and acting on the Council’s suggestions.

⁴² PDRC, *Somali Customary Law* (see Note 39 above), p. 25.

Nonetheless, in 1971, the Siad Barre government did attempt to outlaw collective responsibility as part of its doctrine of scientific socialism. ‘Strong public resistance and weak application of the law in nomadic areas forced the government to effectively drop the law in 1974.’⁴³ When the government relented, it began formally to register, incorporate and enforce the settlements reached in informal *xeer* proceedings. According to Law No. 19 of July 1974, the Somali civil code was amended as follows:

⁴³ PDRC, *Somali Customary Law* (See Note 39 above), p. 29.

The extra-judicial conciliations concluded between the parties spontaneously or through the representatives of the political offices of the city, the villages and settlements, do acquire legal validity and executive efficacy via the chancery of the District Tribunal of the place in which the conciliation occurred.⁴⁴

⁴⁴ Article 333 of Law No. 19 of the Somalia Civil Code, issued on 27 July 1974. Quoted from PDRC, *Somali Customary Law* (see Note 39 above), p. 152.

Xeer ‘holds the entire *Diya*-paying group collectively responsible for a crime committed by one or more of its members’.⁴⁵ One rationale for collective responsibility may be that nomadic individuals have too few personal resources to pay a given obligation. In such a case, if *diya* is not paid, the aggrieved clan may opt to kill the criminal or members of that person’s clan. The result would be both for a clan to lose a valued (and economically valuable) member, and to create a cycle of revenge killings and persistent insecurity. However, another convincing rationale for collective responsibility is that the very notion of ‘private property’ has always been subordinate to a notion of ‘collective property’ that is shared within various levels of a clan and between clans. It is not uncommon for members of a *diya* group to resist paying their

⁴⁵ PDRC, *Somali Customary Law* (see Note 39 above), p. 26.

obligation for another member's infraction. Accordingly, 'splinter groups can sometimes break off from a *Diya*-paying unit as a result of frequent *Diya* violations'.⁴⁶

⁴⁶ PDRC, *Somali Customary Law* (see Note 39 above), p. 28.

4.1 The *xeer* process

Xeer is applied after a violation of customary laws has taken place. Once an incident has occurred, a delegation of elders, known in Somali as an *ergo*, is dispatched by one or both of the concerned clans, or a neutral third-party clan, to begin mediating the dispute and preventing it from spreading.⁴⁷ 'The emissaries' sole mission is to convey a message to the other side and to prepare the ground for holding a [*xeer*] court or jury council to settle the case.'⁴⁸ According to *xeer*, it is incumbent upon the aggrieved clan to make the necessary investigations into an incident and determine the harm committed before presenting their case to other clans.

⁴⁷ 'In extreme cases, where fighting has erupted and the men of the two contending sides cannot approach each other without a clash taking place, women play the role of emissaries.' PDRC, *Somali Customary Law* (see Note 39 above), p. 127.

⁴⁸ PDRC *Somali Customary Law* (see Note 39 above), p. 126.

A *xeer* case is always heard at the lowest and most genealogically recent level of the clan that is possible. This ranges from the *qoys* (nuclear family), up through the *reer* (closest relatives), *jilib* (first *diya* group), and *laaf* (sub-clan) to the *qolo* (clan). As described above, the elders chosen to decide in a *xeer* dispute are known as *xeer beegti*, which is essentially a group of elders acting as judges. The most senior *xeer beegti* within a *qolo* or clan becomes the personal legal adviser of the sultan or chief of the clan. For a given case, however, the *xeer beegti* are usually are a mixed group drawn from the aggrieved clan, the offending clan and possibly a neutral, third-party clan.

Xeer cases take one of two different forms – either a 'mediation' process (*masalaxo*) or an 'arbitration' process (*gar dawo*).⁴⁹ In the former, the exact laws and punishments prescribed by *xeer* are set aside in order to reach a final judgment that satisfies both parties. In the latter, which is primarily used for the most grievous crimes and the most recidivist criminals, *xeer* is strictly applied in a 'winner takes all' manner. Most clans choose to opt for the mediation process. In it, the settlement obligation incurred by the accused is usually reduced significantly by comparison with the outcome of an arbitration process for the same case. Hence, mediation is highly advantageous to the accused, if that party is likely to lose the case. Despite the loss of compensation, mediation is often preferred by the aggrieved party. This is because the aggrieved party 'is aware that a ruling reached on mediation has the group's blessing [and will therefore not be contested or rejected by the accused] and also guarantees speedy execution of the judgment'.⁵⁰

⁴⁹ PDRC, *Somali Customary Law* (see Note 39 above), p. 133.

⁵⁰ PDRC, *Somali Customary Law* (see Note 39 above), p. 134.

Clan *xeer* cases have a traditional, ceremonial procedure. During the case's oral presentations, they are open to the public and usually outdoors under a tree. A very structured seating arrangement exists for the principal parties, which includes both parties, their representatives in the case, elders and guarantors of the claims to be awarded. *Xeer* 'does not recognise a professional group defined as lawyers. In practice, any adult who has the required merits in the eyes of his clan, including speaking and negotiating skills, and a reputation of propriety can act as a lawyer.'⁵¹ Pleas of guilt and innocence, oral presentations of the case, the use of witnesses and evidence, and cross-examination are employed as in any

⁵¹ PDRC, *Somali Customary Law* (see Note 39 above), p. 130.

secular court case. Once the *xeer beegti* are chosen, they are forced to sit apart from their communities to avoid biasing their decisions. One person is employed to memorise, repeat and summarise the oral proceedings for the elders. After a decision is reached, the case's protagonists and their clans hear the elder's decisions, take a few minutes to discuss, and give their reply as a clan group. It is possible either to agree, or to disagree and seek a new hearing. If a group rejects the decision of the elders, they call for an appeal or new hearing by stating, 'I wish to choose another tree'. A total of three 'trees' or hearings can exist using different *xeer beegti*. Only in the most extreme circumstances are appeals taken to the highest level of a clan and its most senior elders for appeal.

Xeer cases prevent four different types of individuals from participating in dispute adjudication. On the positive side, persons who have close family relations with the parties, persons who have personal grievances against either party, and persons who have previously sat in judgment of the same case, are all excluded. On the negative side, women are discriminated against and are neither allowed to sit as *xeer beegti* nor to act as an advocate for either party.⁵² In short, *xeer* 'is male dominated. Participation of women in the formation and practice of [*xeer*] is negligible, as they do not enjoy equal political rights with men.'⁵³

⁵² PDRC, *Somali Customary Law* (see Note 39 above), p. 131.

⁵³ PDRC, *Pastoral Justice* (see Note 5 above), p. 24.

4.2 Limitations of *xeer*

A series of limitations – both traditional and contemporary – now affects the application of *xeer*. First, the lack of impartial enforcement mechanisms may present problems when a militarily strong clan openly refuses to comply with a judgment that favours a militarily weak clan. As a result, Somali minority groups – particularly those of Bantu and Arab origin – are heavily discriminated against through *xeer* decision making. However, in cases involving clans of relatively equal standing, a number of factors work to ensure that the decisions of the *xeer beegti* are respected, including: 'avoiding a future cycle of revenge; community or clan pressure; respect for the jury members; and the relative strengths of the opposing parties', as well as 'awareness that similar previous cases have been solved by the same ruling' and the threat of additional individual and collective punishments that the *xeer beegti* may apply to persons who ignore their ruling.⁵⁴

⁵⁴ PDRC, *Somali Customary Law* (see Note 39 above), pp. 147–150.

Second, the role and status of Somali elders has changed. Traditionally, their role was paramount in: (i) pressuring conflicting parties to adopt a ceasefire; (ii) initiating negotiations between the parties; and (iii) passing a judgment according to *xeer*. However, their role was undermined and the elders themselves began to be perceived as corrupted when Somali governments, beginning in the colonial era, started to pay the elders to serve state interests in maintaining public order. By contrast, Somali religious leaders were not paid. They are often from wealthy families and never depended on external sources of income. Their role in conflict resolution is presently more influential than that of most elders since they are: (i) seen as impartial and unopen to financial influence; and (ii) a higher moral authority with the ability to 'curse' non-compliant clansmen.

Elders know that their social role and public image have been compromised. However, they stand ready to assist any new government in ensuring the application of laws and maintaining peace. However, to increase their

effectiveness, elders want an independent source of revenue – possibly from the government or from business groups – that will reduce their need to undertake *shahad*, or solicitation of personal financial contributions from their clan members. Many elders are reliant on *shahad* as their primary source of household income, although such ‘begging’ demeans them in the eyes of their clansmen and compromises their impartiality in settling disputes. Elders also seek training to understand the workings and principles of secular legal systems, and to enhance their ability to fashion new elements of *xeer* that would apply to new urban problems. Finally, some elders are willing to undertake an inter-clan dialogue on *xeer* reform, but require facilitation to begin.

Third, *xeer* has not continued to develop as quickly as Somali society has changed. In particular, *xeer* is especially weak in urban contexts, where the new social mix of clans and sub-clans generates problems where no bilateral *xeer* exists between the opposed groups. In addition, while the number of criminal acts has increased substantially during the civil war, elders who used to make decisions based on detailed knowledge of local events now do not know many of the individuals that sit before them or what activities those individuals have been involved in across the city. Adaptations of *xeer* have been rudimentary. For instance, collective *diya* adjudication is now applied when a series of militia clashes result in large-scale killing. Accordingly, elders calculate that if Clan A killed 50 men of Clan B, while Clan B killed 75 men of Clan A, then Clan B is obliged to compensate for only the additional 25 dead.

In addition, everyone from militia leaders and *mooryaan* (bandits) to secularised, Westernised returnees from the diaspora often rejects their clan’s authority. And new problems have arisen for which no *xeer* code exists, including the irredentism of warlords seeking to take control of another clan’s land, militia clashes over checkpoints and their revenues, the increasing prevalence of drugs, premarital sex and unsanctioned marriages. For some clans, the death toll from the civil war has resulted in enormous *diya* obligations that virtually no group is willing or able to pay. *Xeer* has also failed to adapt to the modern economy. Explicit provisions exist for traditional, subsistence production relations, and they govern access to and use of land, water and forestry resources, as well as farming, livestock rearing and fishing. However, *xeer* is largely undeveloped in terms of the recognition of private property and lacks standards to regulate commercial activities.

Fourth, many of the more progressive elements of *xeer* that help to maintain social order and a cohesive and supportive family structure are being undermined. Militia routinely kill indiscriminately and make no effort to protect the lives of important social groups, including women, children, elders and religious figures. Rampant criminality has led to the acceptance of criminal activity as a means to earn a living. Arranged marriages are ignored by Somali youth – a factor Somalis see as resulting in higher divorce rates. Finally, after the pauperisation that accompanied the civil war, the commitment of sub-clans and *diya* groups to provide material assistance to relatives and the poor has also diminished.

Fifth, while it is simultaneously a force for justice and social cohesion, *xeer* has also come into conflict with both international human rights standards and

⁵⁵ PDRC, *Somali Customary Law* (see Note 39 above), pp. 36–37.

⁵⁶ PDRC, *Somali Customary Law* (see Note 39 above), p. 41.

Islamic *shari'a* law. In general, the collective responsibility imposed on *diya* groups by *xeer* is seen as removing responsibility from individual perpetrators of crimes. However, more specific contradictions arise when one considers the differential treatment of women by *xeer*. A number of practices stand out for the most criticism: *dumal*, or the forced marriage of a widow to a male relative of her deceased husband; *higsian*, or the forced marriage of the sister of a deceased wife to the widower; and *godobtir*, or the forced marriage of a girl into an aggrieved clan as part of a *diya* payment.⁵⁵ A woman who is raped is often forced to marry her attacker. This is ostensibly to protect the woman's honour, but serves to ensure full payment of her dowry by the attacker's clan to the victim's clan. As marriage also solidifies a bond between the clans of the man and woman involved, further violence is also prevented. Women are also traditionally 'denied the right to inherit capital assets such as camels, horses, buildings, seagoing vessels and frankincense plantations', and domestic abuse by a husband against his wife is generally tolerated unless the harm becomes so physically damaging or persistent that it is socially disruptive.⁵⁶

5 *Shari'a* Courts

As described above, Islamic *shari'a* law has been a traditional feature of Somali society. Throughout the colonial era, as well as the post-independence era until the collapse of the Siad Barre government, *shari'a* was officially incorporated into the Somali state. In principle, according to all Somali constitutions, *shari'a* has supposedly been the basis for all national legislation – a factor which has provided symbolic religious legitimacy to the government. However, in practice, *shari'a* has always been relegated within the formal justice system to the level of courts of first instance, and applied only in common civil cases, including family matters, marriage and divorce, and inheritance.

Since the early 1990s, however, a new form of *shari'a* has been organ and implemented in a number of different cities and towns across Somalia with the establishment of *shari'a* courts. In the absence of a government, varying combinations of Somali militia-faction leaders, businessmen, clan elders and community leaders have worked with Somali religious leaders from within their sub-clans to establish these courts in attempts to improve local security conditions. Somalia's new *shari'a* courts play three roles: first, they organise a militia to apprehend criminals; second, they pass legal decisions in both civil and criminal cases; and third, they are responsible for the incarceration of convicted prisoners.

A variety of motives lies behind the establishment of these courts. First, improved local security conditions became a means for faction leaders to maintain public support. Second, faction leaders found the courts to be useful mechanisms to prevent internal factionalism and the outbreak of conflict with neighbouring clan communities. Third, the courts provided a secure environment for Somali businessmen who could profit from local and regional trade without concern that they would be attacked by uncontrolled militia and bandits – thus reducing their need to pay high overhead costs for their

own security forces. Fourth, they served as institutional vehicles for a small number of Islamic radicals to promote the adoption of *shari'a* as the basis for a theocratic state in Somalia.

According to Matt Bryden, the mandates given to the *shari'a* courts are derived from agreements reached within or between specific clans and sub-clans, and typically include:

- the recognition of the *Shari'a* law as the one law common to all Somalis
- establishment of the court to implement the *Shari'a*, and description of the punishments it may impose
- formation of a security militia under the auspices of the court, and financed by contributions from signatory communities – ordinary police may or may not be included in this agreement
- agreement that actions taken by court militia or police are the collective responsibility of the court, and not the individuals concerned.⁵⁷

⁵⁷ Matt Bryden, 'Interim Report to the EU Somalia Unit on Support to Local Administrative Structures in Somalia', 7 October 1996.

The structure of Somalia's *shari'a* courts tends to be simple, but effective. They include a standard hierarchy of a chairman, vice-chairman and four judges. A small but well-equipped militia were formed into a 'police force' that reported to the court and supported the implementation of the judges' decisions, but also functioned independently to intervene in community disputes and arrest suspected criminals. A separate finance committee was established to collect and manage a proportion of tax revenues levied on regional traders by the local administration.⁵⁸ The courts often maintain separate detention areas for men, women, youth and violent criminals, and any one court incarcerates up to 300 prisoners at any one time.

⁵⁸ UNDOS, 'Situation Analyses and Assessment Report on Hiran Region', Nairobi: UNDP-Somalia, March 1998.

The political role of *shari'a* courts has generally been limited. Most legal functions performed by the *shari'a* courts are concerned with civil matters, including sanctifying marriages and divorces, determining inheritance rights, and settling business disputes. With a small number of exceptions, primarily from the courts in Mogadishu, the courts have been much more reluctant to involve themselves in political issues and large-scale security problems. Court officials state that they prefer to hear cases from individuals who are already committed to the authority and Islamic precepts of the courts. They are rarely involved with the settlement of clan conflicts, which include the payment of *diya* or financial compensation for harm done by one clan against another. These matters are left by the *shari'a* courts for the fighters, families, clans and clan elders to address.

Shari'a judges assert that there is no conflict between Islamic law and traditional Somali clan law (*xeer*). They state that Somali culture was fully integrated into Islam and thus no conflict was possible. Decisions are made according to the legal reasoning of the court judges, as informed by their educated understanding of the Qu'ran – no formal legal code is written down. Most *shari'a* judges were educated solely through informal religious studies in Somalia. However, a small number have formal training from Sudan, Egypt and Saudi Arabia, as well. Despite their commitment to a synergy between Somali culture and Islam, the chairmen stated that none of the judges were members of the Sufist *turuq* or brotherhoods.

⁵⁹ Abdulahi A. 'Xirey' Osman, 'Islamic Courts: Panacea for Somali Salvation?', Commentary in *Arlaadi News*.

⁶⁰ Ahmed Farah, 'Sharia Courts in Somaliland', UNDP-Emergency Unit for Ethiopia, April 1996.

Some commentators suggest that it is more appropriate to think of the courts as 'security providers', not 'justice providers'. This has led to an assessment of the courts as one clan's mechanism to solidify and justify control of occupied lands that have been usurped from the historical control of another clan.⁵⁹ Others have described *shari'a* courts as a clan's defensive response to the antagonisms of other clans who are slowly encroaching on their lands and prompting a rise in insecurity.⁶⁰ Such disputes are often reflected in arguments over which, if any, secular authorities the *shari'a* courts should be responsible to. Each clan fears that the courts and their militia may become the tools of a governor for repression, clan favouritism, or personal income and patronage. Such disputes usually favour the creation of independent Islamic courts that appear to stand apart from any secular authority.

Court funds are raised through a variety of sources within the court's sub-clan community and the area that they control. This includes contributions of different sizes from large-scale traders and small-scale shopkeepers, taxes levied by court militia at checkpoints, and fees charged to individuals appearing before the court. In addition, further funds may be raised through private-sector initiatives. For instance, at least one court in Mogadishu was involved in the 'protection and sale' of vehicles either seized in court operations or put up for sale by their owners.

The *shari'a* courts are invested with authority by the clan elders. Hence, the court is able to take security actions against individuals from that clan. However, unless the courts are able to develop political, military and financial autonomy, this limits the ability of the courts to reach decisions that go against the interest of the clan. At any time, a clan can remove the authority of the court or simply recall the clan's militia from the court. *Shari'a* courts play a very limited role in mediating inter-clan disputes, which remain the prerogative of the clan elders. At most, they will seize and incarcerate offending militia in the court's area of operation, until a dispute can be settled by the elders. As a result, while the presence of a *shari'a* court may improve security in their immediate zone of operation, the utility of the courts is mostly confined to private, family matters, business disputes, and minor crimes due to banditry.

The courts generally lack support from a clan's religious leaders. They generally believe that the *shari'a* judges, while devout, are uneducated and often illiterate individuals. In fact, none of Somalia's *shari'a* courts appear to follow a specific *madhab* or school of Islamic jurisprudence – they simply apply their personal reading according to their existing knowledge of the Qu'ran and Islam.⁶¹ Due to the judges' lack of formal training, the *shari'a* courts do not operate according to any formal procedure. Judges hear cases by asking questions of the claimant and defendant, calling any witnesses that the judges themselves deem necessary, and then pass their decision. Professional Somali lawyers who have appeared before the courts argue that rules of evidence and procedure are the most required form of development and training that is required to prevent the *shari'a* courts from causing harm.

In reaching decisions that will satisfy their various constituents, the *shari'a* courts have adopted the guiding principle of *suluh*, which roughly translates to 'resolution'. According to *suluh*, *shari'a*, *xeer* and relevant state laws can be combined to find a workable, 'win-win' resolution to a case that all parties will

⁶¹ Somalis are almost entirely Sunni Muslims within the Shafi'ite school. In theory, the operative legal code of their *shari'a* is the four-volume *Menhaj*.

accept. Interestingly, at the same time, any overt request for *barax* or ‘mixing’ of different laws is flatly rejected as a corruption of *shari’a*. However, by not questioning the religious ‘base’ of decision making, *suluh* means that the courts and their security initiatives are legitimised in the eyes of many Somalis.

Law faculties exist in three different universities in Mogadishu, but each has a different focus. Mogadishu University teaches both Islamic *shari’a* and secular state law, drawn from the curriculum of the former Somalia National University. Meanwhile, Hamar University focuses more strictly on secular state law, and Islamic University addresses only *shari’a*. The law faculty of Mogadishu University is by far the most developed. At present, some 60 students have graduated and another 150 students are now enrolled in their four-year programme.

That said, *shari’a* graduates from local universities are more likely to find work as teachers in local secondary schools or managers of local businesses, than they are to join the *shari’a* courts. The graduates are viewed sceptically by the *shari’a* judges because: (i) the graduates may pose an intellectual challenge to the less qualified sitting judges; (ii) the graduates are more likely to decide cases according to the standards of the written *shari’a* code of their *madhab* rather than clan *xeer*; and (iii) the graduates do not reflect the interests of Islamist fundamentalists within the courts. For similar reasons, as well as lack of funds, the university law faculties have not met with much success in providing on-the-job legal training for the sitting *shari’a* judges.

One recent case involving medical treatment at the SOS Hospital in Mogadishu is an illustrative example of the confusion that besets the application of *shari’a*. A woman from the relatively powerful Habr Gedir:Suleiman clan was being treated by a medical doctor from the less powerful Sheikhal sub-clan. The woman had life-threatening infection at the time of delivering her first child. The doctor successfully delivered the baby, treated the infection, and advised the woman not to become pregnant again. However, seven months later, the woman was brought back to the hospital, pregnant with her second child. The doctor determined that her unborn child had already died in the womb, that her infection had returned and spread, and that removal of the woman’s uterus was required to save her life. After seeking formal authorisation from the woman’s family, the doctor performed a hysterectomy, and the woman began to recover. However, when the woman’s family finally understood that the removal of the uterus would prevent her from having more children, they decided to take the doctor to court.

The case was heard by the Circolo Court, which has authority from the woman’s Suleiman clan. The doctor was brought to the court by the *shari’a* militia, without legal representation and without any notice. Initially, the court found in favour of the doctor who performed his medical duties appropriately. A short time later, however, the doctor was again summoned to the court since the woman’s clan had rejected the court’s initial decision. This time, the doctor was summarily fined \$2000, in a judgment made according to *xeer* principles of mediation. Given that the doctor was from a smaller, less powerful sub-clan, he was forced to pay the fine out of fear that non-payment or appeal would result in a serious risk to his life from the Suleiman clan militia.

5.1 North Mogadishu court

One of the first *shari'a* courts to be established in Somalia after the collapse of the Siad Barre regime emerged in north Mogadishu – an area controlled by the militia-faction leader Ali Mahdi Mohamed from the Hawiye:Abgal clan. As sub-clan rivalries within his Hawiye:Abgal community, and rising insecurity in his territory, threatened to undermine his political status, Ali Mahdi supported the creation of a *shari'a* court system to curtail the activities of former militia who became uncontrolled *mooryaan*, or bandits. In mid-1994, the faction leader issued a statement nominating a three-person supreme court, as well as 15 'religious judges' under the chairmanship of Sheikh Ali 'Dhere' Sheikh Mahamud. The court was known as the North Mogadishu court, and also the Ali Dhere court and the *Karrar* court. It was stated by Muhaydin that, in the absence of any commonly accepted government, the *shari'a* system was the only legal framework to which all Somalis were bound as Muslims and could not contest on political grounds.⁶²

⁶² Kassahun (see Note 9 above), p. 39.

Differences in interpretation over the court's objectives existed from the start between Ali Mahdi and Ali Dhere. While the former saw the court as a tool to re-establish security in his area of Mogadishu, the latter believed that the court was 'the first step towards establishing an Islamic state in Somalia'.⁶³ To this end, Ali Dhere began implementing his court's judgments with zeal. 'Between August 30, 1994 and September 1996, 6000 criminal cases and 2000 civil cases were decided.'⁶⁴ While North Mogadishu did become an increasingly secure location for local residents, it was also one of the very few places in Somalia where a *shari'a* court implemented both corporal and capital punishment. A statement of punishments meted out by the court as of 31 July 1996, included the amputation of both a hand and a leg for 17 convicts, amputations of hands alone for another 12 convicts, the amputation of a leg alone for one convict, the execution of 11 prisoners, beatings for 431 prisoners, 980 jail sentences and 527 orders for payment of compensation.⁶⁵

⁶³ Kassahun (see Note 9 above), p. 39.

⁶⁴ Kassahun (see Note 9 above), p. 40.

⁶⁵ Ali Omar Ma'ow, 'Report of Punishment Office', Islamic Supreme Court of Somalia, 31 July 1996, reprinted as Attachment 3 in Kassahun, 1997 (see Note 9 above).

However, the court collapsed when the division of funds between the court and the secular authorities in Ali Mahdi's militia-faction, and differences in political objectives between the two groups, led to conflict. In 1996, Ali Mahdi feared the rising political and financial independence of Ali Dhere, and issued a decree for the sheikh to relinquish his chairmanship of the court. When this was rejected, the matter was then settled by force when militia loyal to Ali Mahdi forcibly disbanded the court. As a result, Ali Mahdi maintained his authority in north Mogadishu in an uncontested but far weakened position. Street-level violence again increased, and internal, sub-clan-based schisms eventually tore the militia-faction apart. The relative calm of north Mogadishu, by comparison with other parts of the capital city, was undermined for years to come.

5.2 The Belet Weyne court

After the example set in north Mogadishu, a series of other *shari'a* courts emerged in Hiran, Middle Shabelle, Mudug, Nugal and Bari regions. However, rather than representing any militia-faction's political agenda, these courts generally resulted from a common interest among key actors in the community, who were willing to sacrifice a portion of their local revenue in

order to improve local security conditions. For instance, a more moderate *shari'a* court was established in Belet Weyne town, Hiran region, between 1995 and 1998. Matt Bryden notes that the creation of the *shari'a* court originally may have been intended to prevent the outbreak of local conflict between competing clan militia in Hiran:

The establishment of *Shari'a* courts has been described by some [clansmen of the] Xawaadle as a measure originally intended to prevent retaliation by Xawaadle militia against non-Xawaadle groups, following the withdrawal of the SNA.... Instead, the early imposition of *Shari'a* law provided a deterrent to revenge killing and feuding, offering the non-Xawaadle some assurance that genuine reconciliation would eventually be possible.⁶⁶

⁶⁶ Matt Bryden, 'Interim Report to the EU Somalia Unit on Support to Local Administrative Structures in Somalia', Nairobi: EU Somalia Unit, October 1996.

Bryden's account of the creation of the court reflects a process approximating the emergence of a local 'social contract' within a situation of anarchy:

Formation of the courts appears to have followed a standard pattern, where resident clans of major towns... have formally endorsed the establishment of the courts and their maintenance, through consultation between delegated elders of the concerned clans. The courts appear to have no alternative source of support, nor any social or political agenda beyond that determined by lineage elders.⁶⁷

⁶⁷ Bryden, 'Local Administrative Structures' (see Note 66 above).

A United Nations field mission described the functioning of the courts:

They are multi-clan in composition and have had considerable popular support; they have exercised the right to collect taxes, allocating revenues to pay for the running of the courts, provide small stipends to elders managing disputes, operate the prison, and maintain and control a sharia militia estimated at 500 men. The courts in Hiran base their deliberation on the Qoran, but do not impose sharia law – parties to a dispute or crime are entitled to opt for traditional (blood money) compensation or sharia.⁶⁸

⁶⁸ UNDOS, 'Hiran Regional LAS Study: Executive Summary', Nairobi: UNDP-Somalia, January 1999.

The success of the court in preventing communal conflict was, however, only one of its functions. According to a UN study, 'The traders took a great role in the establishment of the Islamic Courts with the intention of bringing back the basic law and order which allowed them the preparation of a conducive business atmosphere that can carry out business transaction from side to side.'⁶⁹

⁶⁹ UNDOS, 'Situation Analyses and Assessment Report on Hiran Region' (see Note 58 above).

The *shari'a* court system in Hiran was an eminently successful experiment, and the court was never involved in Islamist political activities, nor was it even seriously accused of being such. However, its tenure did not last beyond 1998, when clan and factional politics eventually took over. In particular, once the secular political leadership in Belet Weyne, under Colonel Omar Hashi of the USC-PM militia-faction, fell into dispute with the Ethiopian government, the latter opted to equip and empower a new militia-faction to replace Hashi. At the same time, an attempt in Belet Weyne to hold a reconciliation process within the Hawiye clan brought such a large number of foreign militia into the region that the activity of the *shari'a* court was suspended to prevent the eruption of inter-clan feuds. Rising insecurity, political uncertainty, and eventually the inability to pay the court's militia (due to the court's inability to impose tax collection) led

the court to disband. While a number of attempts have been made by Hiran's political leadership over the subsequent years to revive the court, none have been successful in uniting the necessary political and clan leadership behind a single initiative that can govern the entirety of Belet Weyne town, let alone the region.

Courts in other parts of Somalia faced similar problems and have often closed. Although popular with local communities for re-establishing a semblance of law and order, few *shari'a* courts in Somalia have survived over time. The very creation of the courts, in fact, creates a number of fault lines for conflict. First, as mentioned above, some Islamic courts are seen as one clan or sub-clan's mechanism to solidify and justify control of occupied lands that have been usurped from the historical control of another clan, while others have described *shari'a* courts as a clan's defensive response to the antagonisms of other clans who are slowly encroaching on their lands and prompting a rise in insecurity.

Second, an additional set of disputes can emerge over the choice of secular authorities to which a *shari'a* court should be responsible. Each clan fears that the courts and their militia may become the tools of a governor for repression, clan favouritism, or personal income and patronage. Such disputes usually favour the creation of independent Islamic courts that appear to stand apart from any secular authority. However, as demonstrated above by the case of the North Mogadishu court, this strategy can also generate conflict when a court expands its authority and becomes a political challenger to a faction leader. Finally, the management of financial resources can become another source of disputes. Bryden notes that in some instances, 'revenues tend to exceed court costs, leading to dispute between the religious and secular leaders as to how the extra revenue should be managed.'⁷⁰

⁷⁰ Bryden, 'Local Administrative Structures' (see Note 66 above).

5.3 South Mogadishu's courts

After 1996, a new round of *shari'a* courts emerged in south Mogadishu and later in Merka. This set of courts contained individuals and had financial supporters who were integrally connected to the militant Islamists in *Al Itihad*. The courts were organised according to different sub-clans of the Hawiye communities in the capital city. They either took the name of their sub-clan or the name of the building that they occupied. The most prominent courts were the Habr Gedir:Ayr or *Ifkahalan* Court, the Muroside or *Harariyale* Court, the Habr Gedir:Suleiman or *Circolo* Court, the Habr Gedir:Duduble or *Washeda Anaha* Court, and the Abgal:Daud or *Medina* Court.

Most south Mogadishu *shari'a* courts were community-backed law and order initiatives similar to their predecessors in north Mogadishu and Belet Weyne. The courts' jurisdictions were primarily restricted to their sub-clan, unless other clans' members brought a case to the court and formally accepted its jurisdiction. All court leaders agreed that to take action against members of other clans without prior agreement with their elders would be to invite a conflict. However, instead of being initiated by a faction leader or regional administration, these were initiated almost exclusively by businessmen.

As an alternative means of establishing a stable environment for their business interests without the need to pay protection money to the feuding warlords,

the elite of the Mogadishu business community supported the establishment of a series of local *shari'a* courts founded on independent, clan-based agreements and operating only in particular quarters of the city.⁷¹ This business elite included large-scale import/export traders, transporters of food aid for international relief agencies, and owners of remittance companies.

⁷¹ Indian Ocean Newsletter, 'Somalia: Islamist Militia Offensive', Issue 879, 1999.

The south Mogadishu court leaders consider it one of their strengths that militia-faction leaders did not play a role in the formation of these institutions since they could then not be accused of being a divisive political institution and be attacked by militia from other sub-clans' militia. In fact, in many instances, the South Mogadishu courts were widely resisted by the faction leaders from within their own sub-clan community. However, only rarely did the two groups come into conflict with one another. For instance, once it became prominent within the community, the *Harariyale* court was attacked twice by the faction leader Mohamed Qanyare – also from the Murosade clan – first in 1996 and second in 1997, although neither attack was successful and the court continues to function until this day.

The courts in south Mogadishu did practice capital punishment in cases where 'intentional murder' can be proven, but did not practice corporal punishment in the form of amputations.⁷² Members of the courts explain that corporal punishment is indeed mandated by the Qu'ran and should be carried out by the courts. However, to do so, they said they required more funds, since the Qu'ran also requires courts to meet the personal and family responsibilities of a criminal after an amputation is implemented. In addition, they are aware that such punishment would upset the international community, and potentially bring problems for the court.

⁷² Other levels of murder judgments for which capital punishment is not applied include 'accidental murder' (for which a payment of 100 low-grade camels is acceptable punishment) and 'semi-intentional murder' (for which 100 high-grade camels is acceptable punishment, including 40 pregnant female camels and 30 young camels). An example of 'accidental murder' is when militia members are sitting together and an AK-47 accidentally fires and kills a person. An example of 'semi-intentional murder' is when a man is trying to shoot one person, but accidentally hits another person.

According to Roland Marchal, 'one should emphasise that those Islamic Courts were not fundamentalist by nature, though key figures of radical Islamic groupings played an important role in coordinating them and making them more efficient'.⁷³ In particular, after the *Ifkahalan*⁷⁴ or Ayr Court was initiated by a sheikh from the Ayr:Habr Heji sub-clan, Hassan Dahir Aweis – the military commander of *Al Itihad* – used his Ayr clan ties to become associated with it. Aweis was brought into the Ayr Court not only because of his conservative religious credentials, but also due to the need for sub-clan balance between the Ayr sub-clans. Using his identity as an Ayr:Ayanle clan member, Aweis then became one of the court's leading figures.

⁷³ Roland Marchal, 'The outcomes of US decision on al-Barakaat', author's manuscript, December 2001.

⁷⁴ The name *Ifkahalan* is a combination of two words – 'ifka' meaning light, and 'halan' meaning clean. The name was adopted from the Ifkahalan shampoo factory, which used to be housed in the court complex before the civil war.

⁷⁵ Reported in Mogadishu's *Xogogal* newspaper, 14 November 2000.

In October 2000, the independent courts in north and south Mogadishu came together to create a Joint Islamic Courts Council, led by Hassan Dahir Aweis as Secretary General, and Sheikh Ali Dhere as Chairman.⁷⁵ Once their militia forces were amalgamated under a single command structure, the Joint Islamic Courts Council became the largest single military force within Mogadishu. The prominence of individuals, such as Aweis, provided ample evidence for many observers to conclude that the intention of the *shari'a* courts was to use force to impose Islamic rule on the country. If this was their intention, however, they failed to realise their political vision. In fact, the Joint Islamic Courts Council had only one success in extending its remit beyond south Mogadishu, into Lower Shabelle region. This move resulted in the establishment of a new *shari'a* court based in the port town of Merka. It was

led by Hassan Dahir Aweis and militia from his *Ifkahalan* court, which had the same Hawiye:Habr Gedir clan identity as the dominant businessmen operating in the region. However, rather than succeeding in imposing an *Al Itihad* administration in the region, the court simply removed militia roadblocks and established a central taxation system.

No attempt was made to impose an *Al Itihad* mayor for Merka town or regional governor for Lower Shabelle. Further, the Islamic law the courts applied was not overly strict, and the court proved willing to guarantee the security of humanitarian aid workers from the UN and Western NGOs. In fact, the establishment of the Merka court was financed by the same major Mogadishu traders. Their interest in the region and the *shari'a* court remained a corporate rather than religious or political one. They simply sought to reduce the risk to their trading activities and investments by incarcerating a large number of uncontrolled militia and pacifying the region.

5.4 Demise of the courts?

Before the influence and power of the Joint Islamic Courts Council could be tested further, however, the TNG was created in 2000. As described above, many of the *shari'a* judges and militia were amalgamated into the TNG judicial system. Despite outsiders' perceptions that the two groups held common interests in Islamising Somalia, the TNG in fact attempted to undermine the *shari'a* courts in an effort to eliminate organised challengers to their legal supremacy. To do so, the TNG hired *shari'a* judges (but then removed them), hired a percentage of their militia (but not all of them) and integrated them into a cross-clan force, and convinced businessmen to withdraw their armed 'technical' battlewagons from the courts and sell them to the TNG (for a future payment that rarely arrived). As a result, the *shari'a* courts lost their implementation capacity and popular support.

The intentions of the TNG towards the courts were expressed clearly in mid-2001 by Sheikh Hassan Muhammad, a former chairman of Mogadishu Islamic courts and a member of the TNG. He told journalists that 'most of the Islamic court militias were being trained as part of the TNG security forces, and the judges would function as Islamic qadis, under the justice ministry. Qadis under the previous administrations dealt mainly with family issues, such as divorce, marriage and inheritance.'⁷⁶ However, as described above, the *shari'a* judges in the TNG were forced by a new law either take an exam to demonstrate their legal qualifications or to resign. Most of the *shari'a* judges opted for the latter. Hassan Dahir Aweis, the *Al Itihad* leader who previously worked as Deputy Chair and then Chair of the Ifkaxalan Court and then became a representative on the TNG Regional Court, was one of the judges who refused to take the TNG exam.

⁷⁶ UN-IRIN, 'Somalia: Dealing with the Islamic courts', 22 June 2001.

In short, the history of their association with and then departure from the TNG left behind a smaller number of *shari'a* courts in Mogadishu in 2002 and 2003 than had existed before the Arta peace conference. Further, these remaining courts were weaker and less coordinated. UN-IRIN confirmed that in Mogadishu by mid-2001, 'the Islamic courts had ceased to function in most areas, apart from areas of Medina District, southwest Mogadishu, which is

⁷⁷ UN-IRIN, 'Somalia: Dealing with the Islamic courts', 22 June 2001.

controlled by the faction leader Muse Sudi Yalahow' who opposed the TNG and supported Ethiopia's position against Islamic fundamentalism.⁷⁷ In south Mogadishu, only the Murosade clan's *Harariyale* Court and the Habr Gedir:Ayr's *Ifkahalan* Court survived. However, the departure of key judges into the TNG, and the shift in loyalties of the *shari'a* militia from the courts back to the TNG and businessmen, meant that the courts were only shells of their previous selves.

5.5 Revival of the courts

Since the beginning of 2004, the *shari'a* courts in Mogadishu have returned to prominence. Sheikh Sharif Sheikh Mohiadin from the Abgal sub-clan was appointed chairman, and Sheikh Abdi Hashi from the Murosade, and Hassan Dahir Aweis from the Habr Gedir were appointed deputies. In addition to being a relatively representative group of the leading sub-clans of the Hawiye in contemporary Mogadishu, it is significant to note that the Joint Courts administration includes representatives of different Somali Islamic movements. While Aweis is from the militant *Al Itihad* group that seeks to establish a theocratic state in Somalia, Sheikh Sharif is associated with an anti-fundamentalist, Sufist group known as *Ahlu Sunna wal Jama'a*. To settle disputes of religious interpretation between them, the Joint Courts administration is to be overseen by a *shura* or 'consultative group' consisting of 63 different Somali religious leaders, as well as clan elders and businessmen who contribute to the court, drawn from various clans and Islamic movements.

By May 2004, when five *shari'a* courts had been re-established in Mogadishu, the decision was taken to pool a proportion of the courts' militias within the Joint Courts administration. According to interviews, each court contributed 80 militia to create a 400-strong militia for the Joint Courts. Meanwhile, each court determined to retain direct command over an additional 40 militia within their own system as a reserve. In addition, each court agreed to contribute between 3 and 5 'technical' battlewagons, giving the Joint Courts an initial security force of 19 technicals. Since that time, the number of *shari'a* courts in Mogadishu has continued to grow. At present, 11 different courts exist across the city (see Table 1).

Table 1: *Shari'a* courts in Mogadishu

No.	Name of court	Clan basis
1	<i>Harariyale</i>	Hawiye:Murosade, primarily the Septi sub-clan
2	<i>Ifkaxalan</i>	Hawiye:Habr Gedir:Ayr, primarily the Ayanle sub-clan
3	<i>Huruwa</i>	Hawiye:Habr Gedir:Ayr primarily the Absiye sub-clan
4	<i>Suuq Xoolaha</i>	Hawiye:Habr Gedir:Ayr
5	<i>Circolo</i>	Hawiye:Habr Gedir:Suleiman
6	<i>Dabaqayn</i>	Hawiye:Habr Gedir:Duduble
7	<i>Towfiq</i>	Hawiye:Abgal:Waescle
8	<i>Karan</i>	Hawiye:Abgal:Wacbudan, primarily the Daud sub-clan
9	<i>Medina</i>	Hawiye:Abgal:Wacbudan, primarily the Daud sub-clan
10	<i>Sisii</i>	Hawiye:Abgal:Harti, primarily the Agonyar sub-clan
11	<i>Polytechnic</i>	Bantu:Jareer

While these courts certainly do not contain all of the various clans present in Mogadishu, the courts do represent a significant number of the city's most powerful clans. And, a court can take actions against militia from other clans with the support of their elders. For instance, in one high-profile case over the past year, elders from the Habr Gedir:Saad sub-clan reached an agreement with the *Harariyale* and *Ifkaxalan* courts for *shari'a* security forces to remove a group of Saad militia from a prominent checkpoint in south Mogadishu. The elders disapproved of the banditry and violence committed by their clan's militia, and were no longer willing to continue paying *diya* for their actions against other clans. Interestingly, once the *shari'a* courts' action was successful, the Saad and the courts took over the management of the checkpoint, and are said to be using the profits generated to fund the creation of new *shari'a* courts in Somalia's central regions, from where all of the concerned clans originally hail.

The revival of the courts in Mogadishu has prompted communities and militia-factions in other parts of the country, particularly in Kismayo and Belet Weyne, to try to establish their own courts as a measure to increase local security. Local political disputes, however, have kept these new courts from becoming operational. In Kismayo, for instance, although over 100 militia have been drafted into the city's *shari'a* court militia, external security threats against the Juba Valley Alliance (JVA), and internal clan-based disputes over revenue-sharing of proceeds from the seaport, have both created problems that are too large for the *shari'a* court to handle. If the court is to become effective, these problems will need to be resolved in advance.

However, not all Mogadishu residents support the courts. Foremost, a significant number of Mogadishu's clan-based militia-faction leaders – particularly those that are members of the new TFG administration, and have been cooperating with US-led counter-terrorism efforts in the Horn of Africa – reject the courts as a vehicle for Islamic extremists such as *Al Itihad* to take power in Somalia. Indeed, members of the Joint Courts administration such as Hassan Dahir Aweis have publicly stated that they would physically resist any foreign peacekeeping forces sent to assist implementation of a new government agreed at the Somalia National Reconciliation Conference. Alternatively, more moderate members of the Joint Courts are expecting to negotiate with the new government to provide security services in exchange for appointments to control the judiciary branch.

Further, not even all of Somalia's Islamic movements support the courts. In particular, they are rejected by the reformist *Al Islah* group.⁷⁸ According to its Secretary General, Dr Ibrahim Dusuqi, *Al Islah* objects to the current practice of the courts and is not a member of the Joint Courts administration. Their rejection stems from the courts' reliance on the personal judgments of poorly educated sheikhs. By contrast, Dr Dusuqi states that *Al Islah* would promote a similar *fiqh* or 'jurisprudence' as has been adopted in Kuwait. To his reasoning, this places a strong emphasis on *ijtihad* or 'interpretation' – particularly the Prophet's saying, 'You know better your worldly life.' However, this is likely to be rejected by both traditionalists and fundamentalists within the existing courts.

⁷⁸ For further information on *Al Islah* and other Islamist movements in Somalia, see Andre Le Sage, 'Somalia and the War on Terrorism: Political Islamic Movements and US Counter-Terrorism Efforts', PhD Dissertation, Faculty of Social and Political Sciences, Cambridge University, 2004.

Other Justice, Legal and Security Initiatives

In addition to the formal judiciary systems, traditional clan *xeer* and *shari'a* courts described above, a number of other initiatives have evolved in Somalia to promote justice, security and the rule of law. While these initiatives are often temporary and aspirational, and break down when armed conflict erupts, they are instructive in understanding the similarities of Somali efforts to restore justice across different regions.

6.1 Warlord administrations

In general, Somalia's militia-faction leaders are not usually involved in justice matters, which remain left to clan elders in their area. However, when elders are unable to address a problem – possibly because it involves an uncontrolled militiaman who rejects the clan's authority, or a case directly bears on the interests of the faction – a militia-faction leader may get involved. In such cases, the militia-faction leader usually dispenses justice personally through their militia – but only when a local person can get access to the warlord (usually when a clan elder intercedes to represent the complainant), and when dealing with the problem will make the warlord look good and not cause him too many problems.

More rarely, some militia-factions controlled enough contiguous territory to endeavour to establish formal judicial administrations along the lines of Puntland and Somaliland. Two examples include the administrative structures created by the Rahanweyn Resistance Army (RRA) in Bay and Bakol regions from 1999 until fighting broke out within the RRA ranks in 2002, and the Lower Shabelle Administration proclaimed by its 'governor', Yusuf Inda Adde, since 2003. In both cases, the systems adopted have been modifications of the post-independence judicial structures, including courts of first instance applying secular laws for penal and commercial cases, and *shari'a* law for private civil matters. These courts are overseen by an appellate court reporting directly to the militia-faction's executive. However, no matter the extent to which these institutions and procedures were used to address straightforward family, business and penal cases, ultimate judicial authority – particularly for important cases with a bearing on factional politics – has remained personally vested in the militia-faction's leadership.

6.2 'Vigilante groups' or *madani*

Second, a small but growing number of community-based 'vigilante groups' or *madani* have been created to prevent crime in residential neighbourhoods of Mogadishu. They operate by arresting local criminals, responding to local distress calls, and chasing away roaming militia that come from other clans and neighbourhoods. *Madani* are not a totally new phenomenon. The existing groups date back to the weakening of militia-faction control in Mogadishu

around 1998, when *madani* were first created in the Black Sea area and Hared Hospital area of Mogadishu. Originally, they were organised by local businessmen. However, the majority of *madani* were created in mid-2003, as the result of a media campaign by local civil society organisations. According to their local supporters, over 50 such groups now exist in Mogadishu; although independent sources put the number of functioning *madani* at approximately 10.

They differ substantially in organisation and effectiveness. For instance, the establishment of the *madani* in Hawataqo was a community-driven initiative based on *xeer*, wherein local residents committed themselves to joint defence, raised local money and hired an independent militia. By contrast, in Shibis area, a local militia leader established a *madani* by soliciting funds directly from the diaspora. Another example is the *madani* near the former Bank of Somalia, where a group of former professionals and ex-civil-servants police their neighbourhood streets personally. Overall, it appears that the higher the level of community mobilisation and self-financing, the higher degree of success that a *madani* will have. None are able to operate where a militia-faction leader exercises direct control.

According to their promoters, each *madani* is supposed to be based on a ‘neighbourhood unit’ of 300 households. (This is certainly the ideal, and not always realised in practice.) Each household is expected to pay SSh1,000 per day (approximately US\$0.10) or SSh30,000 per month (approximately US\$3) to the ‘vigilante group’ scheme. The money is used to employ 90 militia to guard the ‘neighbourhood unit’ – including 60 militia for daytime duty, and 30 militia for nighttime duty. The resulting monthly salary for a militia member is SSh100,000. However, the militia are paid on a daily basis to ensure their continued motivation.

If a criminal is caught by the militia, he is put into a small cell that the *madani* has built on the side of a main road. By publicly exposing the prisoner on the main road, the *madani* is hoping to shame him, his family and his clan, and force them to control the prisoner’s behavior in the future. After a first offence, a prisoner is released free of charge in the custody of his family members and clan elders. If nobody comes to claim the prisoner, he is taken by the *madani* to a *shari’a* court for longer-term imprisonment. If the prisoner is released to his family but commits a second crime, then he is immediately taken to the *shari’a* court for longer-term imprisonment. At the moment, the scheme is suffering for lack of funds required to pay the courts to hold a growing number of longer-term prisoners.

6.3 Private arbitration

Third, the private sector is attempting to play an increased role in Somali justice matters. In some important legal disputes, factions, communities or businesses will hire former government judges and lawyers to establish an arbitration committee to reach a decision based on a pre-agreed combination of state law, clan *xeer*, and/or *shari’a*. *Shari’a* is often a preferred modality to solve business disputes for two reasons. First, its jurisdiction is unquestionable by Somalis. Second, unlike traditional clan law, it explicitly recognises private property. That said, in most arbitration cases, it is common for the parties to

the dispute to bring forward clan elders or other businessmen to act as guarantors who promise to abide by and assist in implementing the arbiters' decisions. Arbitration is not confined to Mogadishu, but takes place even in those parts of Somalia with formal administrations. For instance, in Somaliland, a judge named Sheikh Dirir has created a private arbitration tribunal in Hargeisa that uses *shari'a* law to settle civil disputes, primarily business-related. His services are in demand due to fears of local businessmen that the formal Somaliland justice system is open to corrupt influences.

6.4 Lawyers' associations

In Mogadishu, the Somalia Lawyers Association continues to exist under Chairman Abdullai Moalim. Admission requirements are strict – a candidate must have qualified for a law degree, spent two years as an assistant doing training with an established lawyer, and received a certificate after a high court exam. Thus, in the absence of a Somali government, no new lawyers have been admitted to the association since 1990. A short-term effort to revive the association took place after the Arta peace conference. Now, approximately 30 remaining lawyers (all older men now) show up to association meetings. However, they admit that its primary function is that of a social club. Advisory opinions are given to participants at international peace conferences on a private, voluntary basis. Private lawyers sometimes get limited work – drawing up contracts for private companies, doing arbitration for land/commercial disputes. They do not, however, attend the *shari'a* courts since the courts do not accept representation by secular professionals.

The Somaliland Lawyers Association, which was created in 2002, is more active and is attempting to become the legally recognised professional association to set standards for the Somaliland administration. At present, the association provides limited training for lawyers, and legal aid services to the poor. The association has approximately 40 members, 17 of whom have degrees in law. Others have on-the-job experience or some formal training in *shari'a*. Only two members are women but, according to the association's chairman, only three lawyers in Somaliland are not members.

6.5 Civil society and international support

Finally, there are a number of important Somali civil society initiatives that are seeking to establish a more functional justice system.⁷⁹ The formal judicial education provided by Mogadishu University and others was already identified above. In addition, Somali NGOs are also working in increasingly novel ways with funds and advice provided by the international community. One of their greatest challenges is to break free of the technocratic mindset – one that depends almost solely on getting the institutional structures correct and providing training and technical resources to professionals – that has dominated 'rule of law' aid programming for decades. As stated by one senior UN official interviewed for this paper, 'The institutional and structural focus of rule of law programmes must be to get at the heart of the justice issue. We should be working on social, cultural and political levels to overcome clanism, corruption and factionalism.'

⁷⁹ This section is intended as an overview of some of the more innovative Somali civil society activities and the support given by the international community to their efforts. It is by no means a comprehensive review.

In Somaliland specifically, the UNDP Rule of Law and Security (ROLS) programme is: providing substantive training on subjects such as legal analysis, trial practice and evidence standards to judges, lawyers, prosecutors, court personnel and custodial corps; giving financial support to the Law Review Committee in its ongoing efforts to harmonise the secular legal code; providing legal training and developing legal clinics at the University of Hargeisa Faculty of Law; supporting the Somaliland Lawyers Association; and providing funding to other international NGO efforts in the justice sector.

NOVIB has begun supporting local human rights NGOs to document human rights abuses, including country-wide training on investigation, report writing, lobbying and the creation of an incident archive. The first report was completed and distributed in Summer 2004, and consideration is being given to the establishment of an NGO-based National Human Rights Commission. It is anticipated that this commission could develop a supportive role towards any new government created at the Somali peace talks, and help promote both progressive legislation and public legal education and human rights awareness.

However, the most innovative projects in this sector to date are probably those of the Danish Refugee Council (DRC) which has, since mid-2003, begun implementing justice system reform efforts in Somaliland's Togdheer region. With only limited funds, the DRC began a series of 'dialogues' with over 100 elders and community leaders from five different clans living in the region. Their discussions focused on aspects of traditional clan *xeer* that were perceived as ineffective in conflict management and contradictory to basic concepts of justice and fairness, as enshrined in both *shari'a* and international human rights standards. Community interests expressed during the dialogue included ensuring the protection of the accused, fair treatment of women, orphans and minority groups, problems associated with *diya*-payment and collective punishment, and property rights.

After a series of deliberations, the participants issued a declaration modifying the local *xeer*, and travelled throughout the region to disseminate the new laws. The declaration made particularly important changes to the *xeer* governing revenge killing (*anno*) and forced marriages of a widow to her dead husband's brother (*dumal*). According to a monitoring study after five months, the region experienced a 90 per cent reduction in murder cases.⁸⁰ In two killing incidents that did take place, the individual attackers were quickly prosecuted. It is hoped that the meetings have started a sustainable dialogue between local elders that will help in solving further problems. A local NGO called *Haqsoor* has also been established to monitor and follow up on this initial progress. Opportunities exist to work with the Togdheer police command to form a Community Policing Initiative through which local elders will have a formalised relationship with the police. The project has now started in eastern and southern areas of Hargeisa, as well as Belet Weyne in south-central Somalia.

Both the Puntland Development Research Centre (PDRRC) in Garowe, and the Academy for Peace and Development (APD) in Hargeisa – with support from the War-torn Societies Programme (WSP) and Diakonia – have held workshops with local jurists, lawyers, elders and civil society representatives to discuss how to respond to the weaknesses of the present justice systems in

⁸⁰ Interview with DRC project manager in Hargeisa.

Puntland and Somaliland, and mobilise various constituencies for action. The work of PDRC, the outcomes of which are published in two volumes entitled *Pastoral Justice* and *Somali Customary Law*, has gone the furthest by identifying the main tenets of *xeer*, *shari'a* and secular Somali state law which are in conflict with one another, and proposing a regional process to integrate the laws into a single system. This strategy would go well beyond that of the DRC in Togdheer region both on a geographical level and by addressing not only *xeer* and international human rights standards, but also *shari'a* and secular law.

7 Conclusions

That Somalia's various justice systems – both the formally structured judicial systems and the informally applied *xeer* and *shari'a* – require review and harmonisation is clear. Multiple, overlapping and often contradictory sources of law have made determination of primacy and jurisdiction highly confusing and contentious. This combines dangerously with the lack of formal training of judges and lawyers, widespread public ignorance and distrust of the formal judicial systems (particularly in rural areas), and efforts by some Islamic court leaders to impose fundamentalist beliefs through *shari'a*. Amidst this confusion, the choice of applicable law in any given case is largely driven by two factors: first, where the self-interest of the stronger party to the dispute is served; and second, how a decision that will preserve security and peaceful inter-clan relations can be reached. These factors have limited the equality of all Somali citizens before the law, as well as the degree of protection that the legal system can offer on a personal basis, particularly when powerful clans, politicians or businessmen exercise direct influence over how cases are decided.

The formation of the TFG provides a window of opportunity for the task of harmonisation, as well as a legal context for it to take place. Somalis, donor governments and international organisations should take advantage of the political momentum and legal context for a full review of the legal system, possibly using the elaboration of the TFG Charter into a fully fledged, new constitution as a vehicle for doing so. Most Somalis agree that the current practice of *xeer* needs to be reformed, particularly in those instances where it contradicts *shari'a*, as well as in many cases where it contradicts international human rights norms. At the same time, the process of harmonisation would also be a means of increasing Somalis' participation and raising their level of ownership over their emerging government structures. As such, foreign assistance for rule of law projects should be a key pillar of the post-peace-process aid strategy to reconstruct Somalia.

The TFG will need to act quickly to establish legitimate legal channels and principles to deal with immediate conflict resolution problems to forestall renewed conflict. Matters of particular concern will be Somalia's legacy of human rights abuses, the settlement of land and property disputes, and questions arising over the charter of the TFG, its relations with Somaliland and with the international community. Rule of law programmes could target these areas to ensure that transparent and equitable processes are established to smooth the country's political transition. In addition, it is quite certain that

Somaliland – and possibly other areas of Somalia – will not be part of the new government for the foreseeable future. However, international assistance through rule of law and other projects must be maintained in that area to continue consolidating stable governing institutions there until a dialogue with the TFG about options for national integration or secession can begin.

Harmonisation could also be an effective means of checking the rise of Islamic extremism in Somalia. Despite being an almost entirely Muslim people, Somalis remain reluctant to adopt the most severe forms of corporal punishment enshrined in *shari'a* and are concerned that leaders of groups such as *Al Itihad* are simply interested in personal power. If the Somali public – through widespread community-based consultations – would adopt a harmonised view of justice, the space for militant Islamists to assert their authority to interpret the meaning of *shari'a* in a fundamentalist manner may be foreclosed. Furthermore, Somalia's mixed judicial history provides the option to include elements of *shari'a* to apply to civil cases in lower courts that will be erected by the TFG. This may provide the best means of tempting moderates and traditionalists from the *shari'a* courts to join the TFG, and undercut support for militants in their midst. Given that the *shari'a* courts are invested with their authority by their relevant clans and sub-clans, power-sharing deals cut between the TFG and traditional religious elders will be an equally important factor in this process.

However, Somalia should not seek to adopt one justice system to the detriment of the others. The multiplicity of systems has afforded Somalis options in responding to their predicament of state collapse, and each form of justice has its own advantages. While state statutory law offers a discrete system of rules and may better reflect international human rights standards, *shari'a* is also a comprehensive justice system that Somalis commonly recognise as legitimate. At the same time, customary *xeer* is the most far-reaching of the Somali justice systems, particularly in rural areas that are commonly beyond the reach of formal judicial systems, and is the most effectively enforced. In addition, the different justice systems have over the past decade served to maintain a modicum of peace and security in various parts of the country. Efforts to force one system across all areas would undermine those systems that function locally, and 'rule of law' assistance is likely to create more conflict by undermining the structures that currently underpin local peace and security arrangements.

In short, efforts towards harmonisation should not be undertaken lightly. Questions of constructing a single, coherent justice system in Somalia involve technical considerations and inputs, but are essentially political ones. In particular, they raise questions of the nature and role of the state, Somalis' expectations and fears of any new government that is created – a highly sensitive subject in Somalia given its long history of the abuse of power against specific groups and citizens. Flaunting of state law and modifications of state legal decisions through the continued application of Somali customary law has been a means of resistance to state authorities. Rather than being a benign technical process of drafting a consolidated legal code, it would be a major project of social and political engineering. Harmonisation of *xeer*, *shari'a* and secular laws would involve highly sensitive political choices regarding the

⁸¹ PDRC, *Somali Customary Law* (see Note 39 above), p. 161

primacy of Islamic and Western values. Harmonisation would also force or require a number of major socio-economic changes for Somalia, including ‘economic transformation of the pastoral system; decentralisation of the political and administrative powers of the government; a strong capacity to enforce the law; an education system that reaches all sections of society; and a reduction in the power of the clan as a political entity with strong traditional roots.’⁸¹ Additionally, a harmonisation effort would risk provoking tensions if different groups perceive the outcomes as creating winners and losers, or if harmonisation is seen to weaken the authority of the new administration.

It should be recalled that efforts to harmonise Somalia’s various justice systems have been attempted before, and failed. Determining how similar efforts can succeed today will be important. The problems affecting previous attempts were two-fold. First, the harmonisation efforts of the first post-colonial Somali governments were interrupted by political turmoil, particularly the coup that brought President Siad Barre to power. Second, earlier harmonisation processes were driven by governmental decision-making alone, with little public involvement. The result was a set of laws that had to be imposed on Somali society from above, without respect for the continued application of informal justice systems that Somalis actually trusted and utilised.

The risk that a harmonised justice system will fail to take root in Somali society cannot be so easily addressed by technical and intellectual inputs to Somali political authorities. It must be recalled that, after more than a decade of conflict, Somalis place a high premium on the re-establishment of security over more elaborate concerns of justice. As such, it will be important for Somalis themselves to have ownership of the process of merging the various justice systems into a coherent whole that practically assists ordinary people in solving actual problems, and receives widespread public acceptance. To do so will require further efforts to include Somalis in an open dialogue about how harmonisation should take place, and to ensure that efforts to promote justice are not simply a matter left to a professional and governmental elite. In short, while judicial reform, drafting of new laws and institutional capacity building will require using a ‘top-down’ approach, grounding the new judicial system in the dynamic needs of Somali society will require a simultaneous ‘bottom-up’ approach.

Increased international engagement to promote the rule of law in Somalia today will need to confront these potentials and risks. Based on the analysis presented above, a comprehensive international rule of law programme that could support this transformation would contain at least six elements.

- 1 International assistance efforts should be grounded in a broad-based dialogue to reach a consensus between Somali political leaders and the Somali public on the need for harmonisation of Somalia’s formal and informal legal codes, including previous state laws, clan *xeer* and *shari’a*, in accord with basic international human rights standards, and support to the drafting of new legislation.
- 2 Once a sufficient consensus is reached through dialogue (which will of necessity be time consuming, and should not be rushed), it will be necessary to support the structural reform of Somalia’s justice system in

accord with the harmonised legal code, including the creation of a Judicial Council, state and non-state monitoring mechanisms, and an independent financial regime.

- 3 From a 'top-down' perspective, it will be essential to build the capacity of Somalia's judicial system with training and equipment, including judicial institutions, public servants, legal professionals, private-sector bar associations and legal education institutions.
- 4 From a 'bottom-up' perspective, legal empowerment of the Somali public is also required, including legal clinics, legal aid, translation and dissemination of laws and judicial procedures, and coordination with community-based justice initiatives (e.g. 'vigilante group' community watch groups and local human rights NGOs).
- 5 The establishment of a stable political environment for justice to evolve should be promoted with the establishment of a plan of action to address priority transitional justice issues that will arise after the conclusion of the Somalia National Reconciliation Conference, including:
 - means of addressing past human rights abuses
 - settlement of land and property disputes
 - interpretation of the charter
 - legal basis for addressing national security issues.
- 6 Finally, to the extent that the above recommendations mark a break with past rule of law programming in Somalia and an increased commitment by UN agencies, donors and NGOs, it will be necessary to devote further efforts to mobilise the international community, either through the Somalia Aid Coordination Body or a post-peace-process Peacebuilding Task Force, to provide the requisite political and financial support.

The six points above are best viewed as a package, and not as a menu of options. The successful conclusion of the Somalia National Reconciliation Conference and creation of the TFG makes possible their full implementation. Most Somalis agree that it is necessary for one set of laws to become predominant before it is possible to rationalise other laws around it. In this regard, while a small minority of Somalis actively promote gradual change in the rules of *xeer*, the vast majority have been content to wait for the formation of a new Somali government to undertake that process on their behalf. Over the short term, the TFG's accession to the statutory laws of the previous governments appears to be the most agreeable starting point for the re-establishment of a basic rule of law and security. These laws are generally seen as problematic, but as forming a legitimate starting point.

If the TFG fails to establish itself as a functioning government and Somalia remains stateless, most of these six recommendations could still be implemented anywhere in the country that stable regional administrations exist or where security is adequate for the protection of international and local aid workers. However, political divides and persistent insecurity in southern Somalia may make overall application of the six points impossible or impractical. In this case, it may be necessary to select only those points that are

feasible. It would be essential to ensure that all interventions lead as coherently as possible towards a harmonised legal system and the creation of a legitimate platform for consensus and decision-making that can assist any new government that is created in the future.

To a large extent, the existing interventions of the international community are already working in the direction of the six points listed above. However, that response still suffers from a number of severe shortcomings that will prevent the assistance to Somali political authorities and civil society groups from achieving an aggregate impact on Somali access to justice. First, although one project may currently address harmonisation, another project may address legal empowerment and a further project may address capacity building, few of these projects are being done together with a single group of Somalis, in a single location. Improved coordination between various UN and NGO initiatives – a constant and familiar source of tension in development work – could make a serious difference in this respect.

Second, none of these various justice projects are being implemented on the scale that is required. UNDP's interventions, for instance, are confined almost exclusively to Somaliland, and have yet to begin meaningful implementation of justice programmes even in Puntland. By contrast, the DRC projects continue to focus on one or two regions at a time. Although this allows the NGO to build strong community relations, it will take over five years at this pace to make an aggregate impact on the justice situation in all of Somalia's 18 regions. The level of international investment in justice reform and justice promotion will need to be increased significantly if the small gains made by individual projects are not to be overwhelmed by ongoing political change.

Third, the international community will need to make a major investment in establishing the capacities of the TFG to manage a formal judicial system. In addition to training and infrastructure rehabilitation, specific efforts need to be dedicated to strengthening the judiciary's capacity to exercise its independence, as defined in the TFG Charter, from the executive branch. This will include ensuring adequate investment in human resources and guaranteed access to funding sources that do not require subordination to the president or politically motivated ministers. Parliamentarians at both the central and regional levels should be considered important partners in integrating and rationalising Somalia's various justice systems within a single legal code. They can play a particularly important role in reviewing existing legislation, repealing inappropriate laws, promulgating new laws, raising public legal awareness, and working politically to ensure the independence of the judiciary. In this regard, the international community should ensure that legal training is offered to the TFG MPs generally, but should also focus particular assistance on the establishment of a functioning parliamentary judicial committee.

Finally, it is imperative to note the lack of political engagement by the international community to support development efforts in the justice sector. Where they exist in Somalia, formal judiciary systems often lack significant independence from political decision-making processes, and are affected by problems of corruption. Where no administrations exist, militia-faction leaders are held to almost no standard at all, and the international community has

wilfully ignored the continuing rise of the country's *shari'a* courts. In short, no political pressure has been forthcoming from international diplomats – either at the Somalia National Reconciliation Conference or during their field missions to Somalia – to pressure Somali political leaders to remain accountable to global standards of justice. While justice reform may indeed be a matter that is best left to Somalis themselves, those Somali professionals, religious leaders and community activists attempting to accelerate change require more significant support in the face of obstruction from self-interested warlords and other militants.

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