

SSJP Learning and Evidence Literature Review

The Social Contract, Social Covenant, Security and Justice in the Somali Context

April 2021

1. Introduction

The purpose of this section of the literature review is to provide a conceptual overview of the terms 'social contract', 'social covenant', 'security and justice', and 'peace and stability' and critically assess how they relate to Somalia, based on a review of the relevant literature.

The terms social contract and social covenant as used in the overall research question for the SSJP research and evidence phase are derived from an article by Seth Kaplan:¹

Social Contract is understood as the 'vertical' process that establishes/reinforces a dynamic agreement between state and society on their mutual roles and responsibilities.

Social Covenant is understood as the 'horizontal' process that brings together various ethnic, religious, clan, and ideological groups within a political community.

These provide working definitions that serve to distinguish vertical from horizontal social processes, but separating the two terms does not seem to conform well with the Somali context.² Although the term social covenant does not really appear elsewhere in the literature on Somalia, the content of Kaplan's definition does capture relevant aspects of "horizontal" processes and could be applied to illustrate how Islamic moral codes bind together members of Somali society, but it appears less meaningful to apply it as distinct from the notion of social contract. Kaplan raises an important point when he states that:

"Too often, international efforts to aid transitions in these places [fragile states] fail because they emphasise the importance of the vertical state–society relationship and social contract while completely ignoring the factors shaping the horizontal dynamics within society that determine how the state–society relationship evolves and whether or not such a contract can even be fashioned. A better approach would address these challenges directly, by developing a "social covenant" that brings together various ethnic, religious, clan and ideological groups to create a more inclusive and sustainable political process and social contract."³

While this in principle is a good analysis, Kaplan's use of the terminology of social contract and, in particular, social covenant may be problematic in the Somali context for a number of reasons.

First, these terms are not explicitly used by Somalis themselves, who in practice have historically applied a code known as *xeer*, which both binds together Somali clans and communities and regulates the relations between them. In the Somali language, *xeer* literally means "there is an agreement between us", and, as highlighted by the key literature, functions as the basic social contract that connects people together in functioning polities, mostly at the horizontal level.⁴

Second, one of the most striking historical and traditional features of Somali society is that it is primarily horizontal in nature, rather than hierarchical with political leaders on top, because all men were considered equal, although this does not include women (see below on gender dynamics).⁵

¹ S. Kaplan, Social Covenants and Social Contracts in Transitions, Report, NOREF Norwegian Peacebuilding Resource Centre, February (2014).

² D. K. Leonard & M.S. Samantar, What Does the Somali Experience Teach Us about the Social Contract and the State? *Development and Change* 42(2): 559-584, (2011).

³ Kaplan, Social Covenants

⁴ I.M. Lewis, *A Pastoral Democracy*, Oxford: James Currey, 1961; J. Gundel & Dharbaxo, *The Predicament of the Oday*, DRC/Novib-Oxfam, 2006; J. Mohamed, Jama Mohamed, *Kinship and Contract in Somali Politics*, *Africa* 77 (2): 226-249, 2007; D. K. Leonard & M.S. Samantar (2011).

⁵ Lewis (1961)

Even the famous “high-level” elders known by titles such as *Ugas* or *Suldaan* were not political leaders or chiefs per se, but “guardians” of the culture and society.⁶ The colonial rulers misunderstood this, and the new nationalist elite-driven modernisers dismissed the traditional structures because they did not fit with their new ambitions of “modernisation”.⁷ Later, the largely top-down international efforts at re-building the Somali state also failed to understand this dynamic properly as they, together with the self-established military and business elites, sought to use elders as “ruler-intermediaries” to establish the appearance of clan based political legitimacy.⁸

Third, academics and analysts have not applied the terms widely in relation to analyses of Somali society. The term social contract has mainly been applied to the traditional Somali *xeer* as a system of governance that provides a social structure for negotiating relationships between the Somali clans, but this has limitations in regard to hierarchical relations at the level of the nation-state.⁹ Since the collapse of the state, social contract has been used occasionally in the context of peace and statebuilding efforts in terms of the wish to re-establish a Somali state.¹⁰ In particular, it has increasingly been applied since 2010 (in a Hobbesian conceptualisation of the term)¹¹ as the “statist project” began to catch on, and especially from 2012 when the transitional government finally became recognised as a full member of the United Nations, and the constitution was no longer considered as transitional.¹²

The international approaches to Somalia changed from 2012 and onwards, as the Somali Compact was entered in which international partners to Somalia, including the World Bank committed to stabilising Somalia and the state and institution building project.¹³ In this context, the notion of social contract has developed in two different trajectories, of which one can be seen as a continuation of the bottom-up processes that was the predominant thinking following the UN withdrawal from Somalia in 1995, and the top-down process that has predominated since the “New Deal” for Somalia

⁶ In a sense, the nationalist modernizers continued the colonial powers’ efforts at bypassing the traditional structures and replace them with new “modern” political structures. However, they did not try to turn the elders into local political leaders, which the elders also were not according to traditional practice. This changed later after the civil war, as elders filled the vacuum after the state collapsed, and due to their trust with the people, the new warlord/political business elites began to bribe and manipulate the elders and turn them into political leaders in contrast to their historical traditional roles. J. Gundel & Dharbaxo, *The Predicament of the Oday*, DRC/Novib-Oxfam, (2006).

⁷ Jama Mohamed, *Kinship and Contract in Somali Politics*, *Africa* 77 (2): 226-249, (2007).

⁸ Leonard & Samantar (2011); Gundel & Dharbaxo (2006); Gundel, J. (2019), *Launching Reconciliation in Somalia*, Chapter 17 in *War and Peace in Somalia: National Grievances, Local Conflict and Al-Shabaab*, edited by Michael Keating and Matt Waldman, Hurst, (2019).

⁹ Brons, M. *Society, Security, Sovereignty and the State in Somalia: from Statelessness to Statelessness?* Utrecht: International Books, 2001; Farah, A. Y. and I. M. Lewis (1997) ‘Making Peace in Somaliland’, *Cahier d’Etudes Africaines* 146(XXXVII-2): 349–77; WSP International (2005) *Rebuilding Somaliland: Issues and Possibilities*. Lawrenceville, NJ: The Red Sea Press, Inc.

¹⁰ Bryden, M., *New Hope for Somalia? The building block approach*, *Review of African Political Economy*, 26 (79 (1999)); Menkhaus, K., *State Failure, State-Building, and Prospects for a "Functional Failed State" in Somalia*, *The Annals of the American Academy of Political and Social Science*, November 2014, Vol. 656, *Aid and Institution-Building in Fragile States: Findings from Comparative Cases* (2014), pp. 154-172, SAGE Publications.; D. K. Leonard and M. Samantar, *Reconstructing Political Order Among the Somalis: The Historical Record in the South and Centre*, *IDS Bulletin* Vol.44, Number 1, January (2013).

¹¹ Hobbes, T. (1939 [1651]), *Leviathan or The Matter, Form and Power of Commonwealth Ecclesiastical and Civil*, in E.A. Burt (ed.), *The English Philosophers from Bacon to Mill*, New York, The Modern Library

¹² Menkhaus, K., *If Mayors Ruled Somalia - Beyond the State-building Impasse*, Policy Note 2, 2014, The Nordic Africa Institute, Uppsala. (2014a)

¹³ Menkhaus, K. *State Failure, State-Building, and Prospects for a "Functional Failed State" in Somalia*, *The Annals of the American Academy of Political and Social Science*, November 2014, Vol. 656, *Aid and Institution-Building in Fragile States: Findings from Comparative Cases* (November 2014), pp. 154-172, SAGE Publications. (2014b),

in 2013.¹⁴ However, a major theme in the academic literature indicates that the common top-down approaches to rebuilding a Somali state have failed to create stability¹⁵ and highlights several elements that should be considered in the social contract perspective if it is to successfully contribute to establishing a lasting social order in Somalia.¹⁶

It is important to note that Somali society, and thus their customary justice processes, are inherently patriarchal. Due to gender-based restrictions on who can become a clan elder, women are often relegated to passive participation and do not have equal political rights with men.¹⁷ An important reason for this, is that because women often marry into a different clan from the one they are born into, unlike men, they are therefore not seen as a fully trusted representatives of their clan's interests.¹⁸ This traditional exclusion of women poses a major challenge to conformity with international human rights standards, but is nevertheless part of the traditional social contract of the Somalis.¹⁹

In light of the above discussion, it may be more useful to use the notion of social contract alone, and drop the term social covenant.²⁰ A key finding from the literature is to emphasise that there can be both a horizontal and vertical aspect to the notion of social contract.

2. The traditional formation of social contracts in Somalia

Following the 1990-1992 civil war, Somalia did not descend into complete chaos, as Westerners thought it would.²¹ One explanation for this is that traditional and religious structures and mechanisms filled the vacuum left by the collapsed state institutions and created some sort of order, social cohesion, and security.²² This may confirm a key argument advanced by Ibn Khaldun – one of the early founders of sociology and historiography²³ – that humans have two basic needs: food (including other necessities), and protection from others, which they cannot achieve without entering into corporate activity with other humans.

Thus, given that Somalia did not plunge into a chaotic form of anarchy, but rather sought various means of survival by applying traditional codes and practices (e.g., *xeer*), does indeed make the use of the notion of social contract relevant. Hence, traditionally, the Somali social contract is connecting

¹⁴ Menkhaus, K. (2014a).

¹⁵ Leonard & M.S. Samantar (2011).

¹⁶ Menkhaus, K. (2018), Elite Bargains and Political Deals Project: Somalia Case Study, Stabilisation Unit, February 2018; Gundel, J. (2019).

¹⁷ Gundel & Dharbaxo (2006) and Le Sage, A. Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives. Centre for Humanitarian Dialogue (2005).

¹⁸ Gundel & Dharbaxo (2006) p.17.

¹⁹ See Mydlak, R., The Clan System and Customary Justice in Somalia - A Brief Introduction, Danish Demining Group (2019b), which extensively references Gundel & Dharbaxo (2006).

²⁰ The term covenant may also raise some sensitivities in the Somali context due to its origin in partly Christian Protestant/Calvinist history and partly in Jewish sources, as stated in the Kaplan sources.

²¹ Durch, W., "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s, 1996, 311-66, pp. 339-350 (1996); Menkhaus, K., Governance without Government in Somalia, International Security, vol. 31, no. 3, Winter 2006/07, 74-106, p. 81 (2007).

²² Gundel & Dharbaxo (2006); Bradbury, M., Living with Statelessness: The Somali Road to Development, in Conflict, Security & Development 3:1 April (2003); CRD (2005), Traditional Governance in South Central Somalia, Brief Report for the World Bank, March 28, (2005).

²³ Referenced by Jama Mohamed (2007).

at the horizontal level. However, unlike the Hobbesian notion of social contract, which emphasises the creation of a socio-political order between individuals, the *xeer* is more about connecting groups together in a socio-judicial order, and as such is much closer to Rousseau's idea of social contract.²⁴

As noted above, physical and food security are fundamental requirements for human survival, and people's most basic corporate activity takes place with their closest kin.²⁵ In the Somali context, genealogical kinship is referred to as *tol*, and the most basic kinship groups are known as *mag*-paying groups.²⁶ The group feeling or consciousness and internal cohesion that develops within kinship groups is known as *tolnimo*.²⁷ But, genealogical lineage does not create kinship feelings by itself, as ancestral reference points can change over time and in response to particular circumstances. The feelings of togetherness are as much a product of social interaction, common defence, familiarity with non-kin members such as childhood companions etc.²⁸ Thus, *tolnimo* is not a static and given factor based on genealogical lineage alone, but also a historical social construction that can change over time. This is reflected in the fact that smaller clans can become co-opted by stronger ones for protection, political influence, or for alliances in war (known as *gaanshaanbuur*). For instance, the *Sheekhal* clan became part of the larger and more powerful *Hawiye* clan family after the civil war, although genealogically they do not share a common ancestry.²⁹

Kinship groups (clans, sub-clans, *mag*-groups) cannot, however, stand alone, and need a "glue" to bind them together in peaceful coexistence and a set of "agreements" to regulate their inter-relations. Hence, clanship (*tol*) cannot be understood without considering the codes of interaction between the clans, which establishes the rules between them.³⁰ These "social contracts" – in plural because they can vary and change – are called *xeer* in Somali, which literally translates to "there is an agreement between us".³¹ How such agreements are created and transform over time are described generally in the literature. See primarily I.M. Lewis (1961), Gundel & Dharbaxo (2006), and more recently Mydlak (2019b), see also Mydlak (2019a) and Gundel, J. et.al. (2020b) which describes the up-to-date work and interventions in the justice and security sector in Somalia that works with the traditional and religious systems and actors in providing alternative dispute resolution and security.³² In the "Predicament of the Oday", it was emphasised that traditional and customary practices make sense as long as the structure of society needs them and makes them meaningful. If society changes, so will the needs of meaningful social contracts, justice and security systems.³³

It is important to note that not all Somalis are pastoralists. For instance, the agro-pastoralist *Rahanwein/Mirifle*, the agriculturalist Bantu groups in the south-central region's riverine areas, and the urban *Benadir* people all had different *xeer* and ways of providing protection and justice.³⁴

Due to the horizontal character of the traditional pastoral *xeer* (social contracts), they tend to be very ill-suited to any top-down imposed types of leadership.³⁵ In this perspective the elite bargained 4.5 power sharing system is in a sense a breach of the Somali social contract, because it was imposed

²⁴ Leonard (D.K.) & M.S. Samantar (2011), quoting Rousseau, J.J. (2001 [1762]), *Du contract social*, presentation par Bruno Bernardi, Paris: Flammarion.

²⁵ Jama Mohamed (2007).

²⁶ Lewis, I.M. (1961); Gundel & Dharbaxo (2006).

²⁷ Referenced by Jama Mohamed (2007).

²⁸ Mohamed, J. (2007).

²⁹ Gundel, J. & Dharbaxo (2006).

³⁰ Mohamed, J. (2007).

³¹ Gundel, J. & Dharbaxo (2006).

³² Lewis, I.M. (1961); Gundel, J. & Dharbaxo (2006); Mydlak, R. et.al. (2019a), *Engagement of Somali Customary Institutions In Justice Programs – Establishing a Knowledge Base*, Forcier & Danish Demining Group.

³³ Gundel, J. & Dharbaxo (2006).

³⁴ See Gundel, J. & Dharbaxo (2006) for descriptions of the various cultures in Southern Somalia.

³⁵ Samatar, A., *The Somali Challenge: From Catastrophe to Renewal?* Boulder: Lynne Rienner, 1984.

as a top-down solution by a narrow group of elite political leaders without being the result of a bottom-up process of traditional “*shirs*” – that is sub-clan assemblies.³⁶ On the other hand, most “modernisers” view the 4.5 agreement as backwards looking, as it re-inserts clan and tradition into Somali politics. Furthermore, the 4.5 system can be viewed as being biased towards the powerful clans in terms of military strength and wealth rather than numbers.

Thus, the primary socialisations of Somali citizens are first and foremost based on kinship and religious identities, and therefore not ideal for a top-down state-society social contract, based on individualism and national identity, perpetuating sectarian fault lines.³⁷ This may explain why elite bargaining rarely succeeds, as the elite tend to ‘hover’ above society like a balloon, that is kept afloat by external resources and which allow them to operate without due consideration to accountability.³⁸

The literature highlights Somaliland (and, to a lesser extent, Puntland) as successful example of a social contract achieved through negotiated bottom-up processes, combining traditional mechanisms with civic leadership.³⁹ Indeed, how the traditional mechanisms of establishing “*xeer*” (social contracts) actually works, and the extent they can be applied to socio-political processes in Somali today is something that could usefully be subject for more research. This was in fact the emphasis of the first Danish Refugee Council-sponsored, but Somali-driven processes in Somaliland, which are described in the “*Predicament of the Oday*”,⁴⁰ and which more recently have experimented with the “*citizen-directed negotiated accountability project*” in Afmadow District of Jubaland. This applied traditional mechanisms and involved traditional elders in creating community/village associations to develop “*social contracts*” with the District Authorities.⁴¹ These methodologies have more potential that could usefully be explored further, but they also tend to meet considerable resistance from governmental actors from the national, regional and district levels, which sense them as a threat to their authority.

3. Security and justice in Somalia

As noted above, security and justice in the Somali pastoralist societies has traditionally been defined, perceived, and achieved through cooperation between kinship-based *mag*-groups, and delivered by their elders.⁴² Throughout independent Somalia’s history, state structures have failed to establish themselves as the primary or sole provider of justice and security. The literature points to *xeer* mechanisms and sharia courts as playing a greater role in justice and security.⁴³ Even during the

³⁶ Gundel, J. (2019).

³⁷ Leonard (D.K.) & M.S. Samantar (2011).

³⁸ See amongst others: Hyden, G., *African Politics in Comparative Perspective*, Cambridge University Press (2005); Menkhaus, K. (2018); Hagmann, T., *Stabilization, Extraversion and Political Settlements in Somalia*, Rift Valley Institute (2016); De Waal, A., *Somalia Synthesis Paper*, Conflict Research Program, London School of Economics (2017).

³⁹ Gundel, J. & Dharbaxo (2006); Hagmann T. and M. V. Hoehne, *Failures of the state failure debate: Evidence from the Somali territories*, *Journal of International Development* 21/1 (2009): 42–57.; Bradbury, M. 1997. *Somaliland Country Report*. CIIR, London; Kaplan, S., *The Remarkable Story of Somaliland*, *Journal of Democracy* Volume 19, No.3, July (2008).

⁴⁰ Gundel, J. & Dharbaxo (2006).

⁴¹ Allen, S. & Gundel, J., *Enhancing district-level governance & accountability in Somalia - A case study on the citizen-directed negotiated accountability project*, KATUNI Consult & IAAAP, February (2017).

⁴² Mohamed, J. (2007), pp 239; A good new and brief introduction to the Somali justice system can be found in Mydlak, R., *The Clan System and Customary Justice in Somalia - A Brief Introduction*, Danish Demining Group (2019b). This updated account of the Somali justice confirms the continued relevance of traditional practices in security and justice. Traditionally, there was no law information as such in our modern sense. All Somali young men were “warriors” as well as herders.

⁴³ Le Sage, A., *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*. Henry Dunant Centre for Humanitarian Dialogue (2005); Hagmann T. and M. V. Hoehne (2009); Leonard (D.K.) & M.S. Samantar (2011).

Siad Barre era, state security and justice institutions themselves evolved into threats to the safety of numerous citizens and often did not provide “justice”.⁴⁴ Apart from Somaliland and Puntland, the most successful post-collapse experiences regarding law enforcement remains the various Islamic courts, and particularly the Islamic Courts Union in 2006 which succeeded in establishing a monopoly on coercion throughout the capital city for the first time since 1991. The law-enforcement issue is a field that needs more research, because currently the “modern” or secular justice sector also fails in terms of law enforcement.⁴⁵

Since the state collapse, traditional elders and religious sheikhs, together with various other civil actors such as women, businesspeople and NGOs have collaborated to provide security and justice.⁴⁶ Their success has mostly been at a localised level, with the exceptions of Somaliland and Puntland that developed their own independent hybrid governance systems.⁴⁷

In South-Central Somalia, traditional leaders and practices have had less impact beyond the immediate local level, and have often been hampered by the inability of enforcing decisions.⁴⁸ Enforcement and corruption have continued to be significant problems for the statutory courts that have gradually been re-established since 2010.⁴⁹ Informal and alternative dispute resolution therefore remain a major component in providing local justice and security, while the formal justice system largely remains corrupt, slow, manipulated and dysfunctional.⁵⁰ Recent studies by USAID’s Expanding Access to Justice (EAJ) programme, and the Danish Demining Group (DDG), show that people still seek justice through the traditional or alternative dispute mechanisms or sharia courts – not at least Al Shabaab courts – as statutory courts are viewed as serving the interests of the powerful with resources or influence over security forces.⁵¹

The *xeer* continues to dominate the handling of crimes and disputes.⁵² The core principles of the *xeer* are based on collective, not individual responsibility for crimes committed and compensational rather than punitive justice.⁵³ This deeply ingrained cultural practice of collective responsibility makes it difficult to level charges against an individual without the entire lineage feeling that it is accused, a mentality that also transfers to other justice providers.⁵⁴ Efforts to pursue transitional justice will have to deal with this important contextual factor, simply dismissing it as irrelevant is not an option.⁵⁵

⁴⁴ Samatar, A. (1992), Destruction of State and Society in Somalia: Beyond the Tribal Convention, *Journal of Modern African Affairs* 30(4); Kapteijns, L., *Clan Cleansing in Somalia: The Ruinous Legacy of 1991*. Philadelphia: Pennsylvania University Press (2013).

⁴⁵ See Gundel et.al., *Political Economy of Justice in Somalia*, World Bank Working Paper (2016); Gundel, J. et.al., *Pathways and Institutions for Resolving Land Disputes in Mogadishu*, The Expanding Access to Justice Program in Somalia (EAJ) (2020a); Mydlak, R. (2019a) and Gundel, J. et.al., *Alternative Dispute Resolution Initiatives in Somalia*, The Expanding Access to Justice Program in Somalia (EAJ) (2020b).

⁴⁶ Le Sage, A. (2005); Menkhaus, K. (2009), *Traditional Conflict Management in Contemporary Somalia*, in I.W. Zartman (ed.) *Traditional Cures for Modern Conflicts*, Boulder: Lynne Rienner; Oker, I.A.A. & Habibullah, S., *Community-Based Peace Processes in South Central Somalia*, Interpeace (2010).

⁴⁷ Bradbury, M., *Becoming Somaliland*, London: James Currey (2008); WSP International (2005); WSP International, *Rebuilding Somalia: Issues and Possibilities for Puntland*, London: HAAN Associates (2001)

⁴⁸ Gundel, J. & Dharbaxo (2006); Menkhaus, K. (2014b).

⁴⁹ Gundel et.al. (2016).

⁵⁰ Mydlak, R. (2019a); Gundel, J. et.al. (2020b).

⁵¹ Gundel, J. et.al. (2020b); Chopra, T. et.al., *The Shari’ah in Somalia*, The Expanding Access to Justice Program in Somalia (EAJ) (2020).

⁵² Gundel, J. et.al. (2020b). See Mydlak (2019b) for a brief overview of the crimes and disputes traditionally handled by the Somali customary justice.

⁵³ Le Sage, A. (2005); Gundel, J. & Dharbaxo (2006); Menkhaus, K., *Somalia Conflict Analysis*, Mogadishu: UN Mission in Somalia, February (2014c)

⁵⁴ Sharia may be more efficiently pursued by those seeking justice for the individual Tanja Chopra et.al. (2020).

⁵⁵ Menkhaus, K. (2014c).

Traditional perspectives may therefore come into tension with international norms and standards on human rights, and pose a challenge for external actors working to reform the *xeer* in accordance with international legal frameworks. Another weakness for formal justice and security is that governments in weak states, such as the FGS, lack the ability to protect themselves and cannot risk alienating elite-clan leaders, businessmen, and warlords who control or command substantial numbers of armed militias, for fear of sparking violent reprisals and renewed conflict.⁵⁶

The FGS cannot fully count on the loyalty of any Somali armed forces within or outside the government.⁵⁷ These forces essentially still follow their sub-clans if called upon by clan leaders, leaving the FGS exceptionally vulnerable to armed spoilers. Furthermore, the FGS with all the international support to security and police forces has not significantly improved the security situation.⁵⁸ The most significant improvements in security are found locally in cases involving a hybrid collaboration between various actors and systems, involving community policing, elders, religious sheikhs, women, businesspeople, the local police and the local district leaders and authorities.⁵⁹

National justice institutions are better pursued after a deep reconciliation process which establishes a wide and inclusive correspondence between the Somalis with the idea (constitution) of the new state and its governmental institutions, including security forces and judiciary.⁶⁰ It should be noted that there has not been any deep-rooted reconciliation process in South-Central Somalia, and donor implemented justice reforms have not significantly improved access to justice over the past four to six years, except for some exceptions within the field of alternative dispute resolution.⁶¹

4. Social change and institutional reform

Somalia has undergone major social changes over the past century,⁶² however most of the limited literature deals with this indirectly by focusing mainly on the changes in social and political institutions and organisations and less on changes in value systems, social norms, or behaviours. This is a very wide subject, but in the context of the more recent transitional justice processes in Somalia, institutional reform is understood as the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents.⁶³

While in principle the provisional constitution lives up to international human rights standards, it is not a product of an inclusive and bottom-up process resulting in wide support and identification from the general population.⁶⁴ Furthermore, in contrast to the intention and wordings of the constitution, the formal justice and security institutions have been largely dysfunctional and corrupt,⁶⁵ and there

⁵⁶ Menkhaus, K. (2014c).

⁵⁷ Based on a security assessment in Menkhaus, K. (2014c). That this is largely still the case was confirmed by former high level security officials that speak on the basis of anonymity, interview by the consultant in December 2020.

⁵⁸ See for instance <https://acleddata.com/2020/05/21/cdt-spotlight-al-shabaab-in-somalia/>

⁵⁹ Mydlak, R. (2019a); Gundel, J. et.al. (2020b).

⁶⁰ Gundel J. et.al. (2016), Political Economy of Justice in Somalia, World Bank Working Paper; Gundel, J. (2019).

⁶¹ Contrast Gundel et.al. (2016) with Gundel et.al. (2020a), Mydlak, R. (2019a) and Gundel et.al. (2020b) for observations on the lack of change over the 4-year period.

⁶² Based on given definitions in www.britannica.com/topic/social-change social change may refer to the notion of social progress or sociocultural evolution, the philosophical idea that society moves forward by evolutionary means. It may refer to a paradigmatic change in the socio-economic structure, for instance the transition from feudalism to capitalism, or hypothetical future transition to some form of post-modern society.

⁶³ www.ictj.org/our-work/transitional-justice-issues/institutional-reform

⁶⁴ See critique of the constitution mentioned in Gundel, J. et.al. (2016).

⁶⁵ Gundel, J. et.al. (2016).

is not much that indicates any major progress.⁶⁶ An important reason for this is that the Somali political dispensation is still not sufficiently based on a wide and inclusive 'common ground' that creates a strong level of correspondence between the three bases of the state, the idea (constitution), institutions and population.⁶⁷ This essentially means that the existing elite bargain, or political settlement, in Somalia is too narrow, and not sufficiently inclusive of different Somali communities. As a result, it does not enjoy adequate legitimacy or buy-in, and it could therefore be argued that the Somalia social contract remains incomplete.

The most successful international interventions in the justice and policing sectors have instead focused on trying to support the most functional justice systems in Somalia, which are largely based on the revival of the *xeer* and the various versions of Islamic sharia courts that have been implemented over time in different parts of the country.⁶⁸ Recent donor-funded research carried out by organisations involved in implementing justice and security programmes in Somalia have found that people still generally approach either the traditional *xeer* or Sharia courts – even Al Shabaab courts – as their first preferred option in seeking justice, and only chose the formal court system as a secondary option.⁶⁹

5. Peace and stability

In retrospect, international peacekeeping and peacebuilding operations in Somalia have not been particularly successful, and have only achieved limited moments of peace or the cessation of direct violent conflict.⁷⁰ As mentioned, only Somaliland can claim long-term peace and stability, although even here there is a territorial conflict in the eastern disputed parts of the territory, which Puntland claim. The latter has also been relatively successful in achieving internal peace and stability. It should be noted that both Somaliland and Puntland achieved relative peace and stability without external intervention.

Despite ten years of military intervention by the UN-backed African Union peacekeeping operation (AMISOM), South-Central Somalia is still mired by insecurity and military conflict with the radical Islamist group Al-Shabaab.⁷¹ The FGS still does not have the monopoly of coercion throughout the territory, which is a key definition point for a sovereign state, following Max Weber's famous definition.⁷²

As noted above, the closest to achieving a full monopoly on coercion in South-Central Somalia by a state entity, was the success of the alliance behind the Islamic Courts Union (ICU) in 2006, which defeated one group of business-warlords in Mogadishu and created full security in the city for the

⁶⁶ Gundel et.al. (2020b).

⁶⁷ Gundel, J. (2019).

⁶⁸ For an overview of some of these key interventions, see Mydlak, R. (2019a) and Gundel et.al. (2020b); See also Gundel, J. et.al. (2016); Chopra, T. et.al. (2020) and Gundel J. & Dharbaxo (2006).

⁶⁹ See Wasuge, M., Barnes, C. and Tymon Kiepe, Land Matters in Mogadishu Settlement, ownership and displacement in a contested city, Rift Valley Institute (2017); Mydlak, R. (2019a); Gundel, J. et.al. (2020a); Gundel et.al. (2020b); and Chopra, T. et.al. (2020).

⁷⁰ Interpeace, A History of Mediation in Somalia Since 1998. Nairobi (2009); Menkhaus, K. (2019).

⁷¹ <https://acleddata.com/2020/05/21/cdt-spotlight-al-shabaab-in-somalia/>

⁷² Max Weber, Economy and Society, Berkeley: University of California Press (1978)

first time since the civil war broke out.⁷³ The ICU quickly spread throughout South-Central Somalia, until they were stopped by the Ethiopian army, which intervened on behalf of the internationally backed Transitional Federal Government (TFG).

Although there has been some progress in negotiating and establishing Federal Member States (FMS) in South-Central Somalia, their stability remains fragile as they are largely products of top-down processes,⁷⁴ and although there were elements of peacebuilding and reconciliation consultations in some of them (for instance Galmudug),⁷⁵ the FMS resulted primarily from elite bargaining. They therefore fell short of being established on the basis of inclusive and bottom-up reconciliation processes, which characterised the relative successes of Somaliland and Puntland. Hence, most of the peacebuilding efforts in Somalia have been based on the outcomes of what essentially amounted to elite bargaining, rather than being based on actual reconciliation processes – although though they often were called peace and reconciliation conferences.⁷⁶

Somaliland is the exception, as this north-western part of the former Republic of Somalia, underwent an internal peace process from 1992 to 1997 based on traditional peace negotiation mechanisms led by their clan elders, intellectuals, and politico-military leaders together, funded by their own business communities with no external involvement.⁷⁷

In contrast, South-Central Somalia never succeeded in a similar process, as the politico-military elite were largely able to maintain their dominance, thanks to the resources and power they were able to extract and manipulate from external actors.⁷⁸ Rather than engaging in clan-based reconciliation, they reached elite power-sharing arrangements while claiming to represent their clan bases, although very few of them could claim to have been given a mandate from their sub-clans through traditional assemblies (known as *shir* in Somali).⁷⁹

Despite claims that the FGS has achieved some progress in terms of constitutional, legislative and institutional development in recent years,⁸⁰ the current political and electoral crisis is a reflection of the unresolved problems with the state-building, peace and stabilisation approaches since 2012,⁸¹ which stem from the processes being based on statist and centralised power sharing and elite bargaining rather than from more profound bottom-up peace and stability processes.

The most successful efforts at creating peace and stability, have been based on local processes involving combinations of traditional and religious practices and customs, led by a variety of social actors such as the traditional elders, religious sheiks, civil society actors, businesspeople, women, and youth.

Security and justice interventions in Somalia have been able to contribute to peace and stability primarily at the local level, and even there only to a limited extent. The most successful interventions worked in collaboration with traditional and alternative dispute resolution mechanisms. Programmes

⁷³ Barnes, C. & H. Hassan, *The Rise and Fall of Mogadishu's Islamic Courts*, Briefing Paper, London: Chatham House (2007)

⁷⁴ Muhumed, et.al., *Dysfunctional Federalism – How Political Division, Constitutional Ambiguity and a Unitary Mindset Thwart Power Sharing in Somalia*, Mogadishu: Heritage Institute for Policy Studies, July 2020 (2020).

⁷⁵ Majid, N., Theros, M. & Abdirahman, K., *Finding Peace in Somalia: the Galkaio 'local' Peace Agreement*, Policy Brief, Conflict and Research Programme, London School of Economics (2020).

⁷⁶ Menkhaus, K. (2018); *Interpeace* (2008).

⁷⁷ Bradbury, M. (2008).

⁷⁸ Hagmann, T. (2016); De Waal, A. (2017); Menkhaus, K. (2014c).

⁷⁹ Menkhaus, K. (2018); *Interpeace* (2008).

⁸⁰ Gundel, J. (2020c), *Debt Relief and the Political Marketplace in Somalia*, Research Memo, Conflict Research Programme, London School of Economics, 29 October 2020.

⁸¹ Matt Bryden, *Somalia's Fragile Constitutional Order Faces Collapse*, Editor's Pick, *The Somali Wire*, Sahan, Issue No.53, December 11, 2020 (2020).

such as the DDG driven “*The Time is Now: Strengthening Police Accountability and Access to Justice in Somalia*” and the past DRC driven programme on justice and peace did produce some positive localised effects, which often involve local peace building and community involved policing.

At the national level, the impact of security and justice interventions has been far more limited, because as long as the political field at the national level lacks sufficient inclusive agreement if not consensus – a social contract – in which there has been established a clear correspondence between the three key points of a stable state, which is the institutions, the physical base and the idea of the state, then they are unlikely to have any major effect on peace and stability, let alone on security and justice.⁸²

6. Conclusion

Regarding the conceptual use of the terminology of social contract and social covenant in the Somali context in general, the recommendation is to drop the word covenant, but maintain the notion of horizontal processes as one of two dimensions within the framework of the concept of social contract – the other dimension being the vertical. Having noted this, however, this literature review also cautions against a direct application of Seth Kaplan’s terminology of social contract and social covenant to the context of a development programme such as the SSJP, for several reasons.

As much as Kaplan’s analysis regarding the need to bind society together on a ‘common ground’ at the horizontal level is desirable in Somalia, applying it to the context of a donor programme focusing on security and justice may be futile, because the covenant Kaplan refers to goes beyond the scope of any one programme. The known applications have been at local levels only, and positive outcomes often fail in the long run due to national level or external impacts on the given local contexts, which are out of the control of the local community.

The overall position is that the solution to solving the dysfunctionalities of not only the justice and security sectors in Somalia, but likely most other sectors as well, cannot be solved within one sector alone and separate from the national and general societal level. Hence, the need for a deep reconciliation process, which lead to a new common ground for all Somalis, a new correspondence with the idea of the state, resulting in a new constitution with a foundation in its moral basis such as a clarification of the Islamic basis the Somalis can agree on. This is like Kaplan’s notion of a social covenant, but goes beyond the scope of donor programming, because it must be the result of an organic Somali process.

Nevertheless, the methods of the *xeer*, however, can be applied to processes reaching from the local levels and scaled up to the national level, and could potentially lead to stability in Somalia. However, such an ambition would fit a more comprehensive peace programme. Yet, the same methodology can be applied in the meantime to assist communities in maintaining and developing localised dispute resolution and justice mechanisms combined with localised security and “law enforcement” measures, such as those mentioned in the ADR analysis published by the EAJ, or for the purpose of the “citizen driven negotiated accountability” type of intervention that aims at mobilising communities to self-organise, and which eventually could lead to localised “social contracts”.

⁸² Gundel, J. (2019).

It is therefore recommended that the SSJP programme formulation effort clarifies with itself what its main objectives are. Is it improving justice and security, or is it reconciling Somalis in a common and much wider project?

To that end. The notion of a social contract is useful to the extent that you talk about an “agreement” between the members of a given society – whether horizontal or vertical. However, often vertical social contracts are imposed upon a majority in hierarchically structures societies – rather than entered voluntarily. If we are talking about the traditional Somali society, the xeer is the closest you get to a social contract.

Furthermore, the application of the social contract may not be particularly useful in terms of programmatic planning, because it is not as if you can say “we want to make a social contract, and then make a plan for that” – because a social contract is the outcome of an organic socio-political process. If you still try to do it within a partial societal context such as “justice sector” or “security sector”, then you risk running into immense problems because you cannot establish new arrangements within the justice or security sector without involving the political or economic processes, and certainly not as technical interventions.

Unfortunately, if you want to improve the justice sector, in the present Somali context, you will have to engage much wider, and that entails a much wider reconciliation process than what Somalia has seen so far since the state collapse in 1992, and that goes beyond the scope of a SSJP programme.

