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## Fusing Paradigms: Individual Rights and Customary Justice in Somalia

### Commentary on 'Engagement of Somali Customary Institutions in Justice Programs— Establishing a Knowledge Base'

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Justice is a key building block for stabilization in fragile environments. A 2015 Mercy Corps study in Afghanistan, Colombia and Somalia observed that: 'the principal drivers of political violence are rooted not in poverty, but in experiences of injustice: discrimination, corruption and abuse by security forces.'<sup>1</sup> In Somalia specifically, Saferworld found that: 'Somalis have again and again emphasized the lack of fair justice provision and dispute resolution, and the accompanying lack of enforcement that permeates Somali dispute resolution in both rural and urban settings.'<sup>2</sup>

These observations have been made in a context lacking clarity about what kind of justice would lead to peace and stability. As in most other countries, Somalia is characterized by legal pluralism. In other words, a variety of different justice norms operate simultaneously. This raises the question: what kind of justice and which justice norms are likely to lead to stability?

#### What kind of justice?

The history of international justice sector interventions in Somalia can be traced back to the early 1990s, when the United Nations Operation in Somalia II (UNOSOM II, 1993-1995) was mandated by the international community to 'assist in the reorganization of the Somali police and judicial system' following the efforts of the US-led Unified Task Force (UNITAF) to prop up a police force.<sup>3</sup> In this instance, justice was

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<sup>1</sup> Mercy Corps: Youth and Consequences. Unemployment, Injustice and Violence, 2015, p. 2.

<sup>2</sup> Joanne Crouch, Counter-terror and the logic of violence in Somalia's civil war. Time for a new approach, Saferworld, 2018, p. 24

<sup>3</sup> Somalia – UNOSOM II Mandate, accessed at: <https://peacekeeping.un.org/en/mission/past/unosom2mandate.html>

defined according to international or ‘western’ standards, based on individual rights norms to be administered through a specific set of formal institutions that had to be built. The total withdrawal of UNOSOM II from Somalia in 1995 illustrated the extent of the failure of this approach, which was followed by a renewed dominance of military imperatives over state-building exercises.<sup>4</sup>

After a series of other failed international attempts to build up justice institutions (for example in East Timor and Afghanistan)<sup>5</sup> the UN in its 2004 Report of the Secretary-General on ‘the rule of law and transitional justice in conflict and post-conflict societies’ expressed that ‘we must learn to eschew one-size-fits-all formulas and the importation of foreign models....and due regard must be given to indigenous and informal traditions for administering justice or settling disputes.’<sup>6</sup> This was followed by a wave of unstructured engagements with customary justice systems in a variety of countries.

In Somalia, manifold peacebuilding initiatives have relied on Somalia’s *Xeer*, or customary law.<sup>7</sup> Strategies and approaches have drawn to a large extent on local forms of dispute resolution, reconciliation or other community-based ways and means of pacifying relations between different social units. The *Xeer* has played an important and constructive role as a foundation of locally legitimate norms upon which peace processes can build. The *Xeer* can provide this vantage point vis-à-vis other modes of dispute settlement or justice provision because it entails a normative order that is broadly accepted within society, and thereby provides communities and external actors with more efficient tools to reach solutions between aggrieved parties.

At the same time, justice sector initiatives have tried to incorporate customary law in broader justice sector reform initiatives – often based on the presumption that the customary law system has to be formally linked and integrated with the statutory justice system. The underlying intention is often to overcome certain challenges to customary justice, be they structural or as a result of armed conflict, and to administer it centrally – rather than seeking to understand a fluid reality and normative discrepancy that requires quite different approaches.

Such an approach warrants engagement with different justice institutions and their socio-political environment. Consequently, arguments have arisen over how to deal with the fact of Somalia’s legal pluralism. Justice is underpinned by local customary norms; the *Shari’ah* is a strong culturally-accepted justice mechanism (and legally forms the basis for all justice in Somalia, as per the Provisional Constitution of the Federal Republic of Somalia) whereas the existing statutory laws, many of which originate in the colonial period of Somalia, have little popular legitimacy and are administered by a flawed system.<sup>8</sup>

In order to remedy the lack of justice that fuels instability and violent extremism, people’s grievances need to be clearly defined and more targeted responses identified in such a legally pluralistic scenario.

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<sup>4</sup> “Peace-maintenance in anarchical Somalia” in Jarat Chopra, *Peace-Maintenance: The Evolution of International Political Authority*, p. 153.

<sup>5</sup> Jarat Chopra and Tanja Chopra, “Participatory Intervention”, *Global Governance*, Vol. 10, No. 3, July-September 2004, pp. 289-305.

<sup>6</sup> Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, o.1,12

<sup>7</sup> E.g. Interpeace, the Danish Refugee Council (DRC) and the Danish Demining Group (DDG)

<sup>8</sup> See, for example, World Bank report 2016

## Grievances and instability

Different types of grievances are responsible for instability at different levels of society in Somalia. For example, disputes over land and access to resources are key conflict drivers. They often involve violent assaults that are answered with revenge killings, and thus can quickly escalate and significantly destabilize an area.

But there are also less public grievances that do not risk immediate instability. For example, crimes of sexual and gender-based violence (SGBV) only run the risk of causing instability if the perpetrator and the survivor originate from different social groups. If they are from the same group, the survivor often silently endures the consequences and the case is never really addressed. Other day-to-day grievances related to business transactions, property disputes or inheritance questions can remain 'silent' grievances when the victim is from a minority group or when there is a significant power imbalance between the two disputing parties that renders it impossible for the weaker party to seek redress for fear of violent reprisals and with little hope for institutional support.

Some practitioners have pointed out that a lack of redress for such silent grievances can lead to long-term instability, even if it does not cause immediate conflict. This point has been made strongly by gender equality and women's empowerment practitioners, who have lobbied for rape and other SGBV crimes to be placed on the agenda of peace negotiations in post-conflict scenarios, and have argued that such cases threaten long-term stability and can undermine the results of peace negotiations.<sup>9</sup>

It is therefore important to disentangle the types of grievances practitioners aim to address - as different types of grievances warrant different approaches.

## The DDG Experience

The Danish Demining Group (DDG) has been at the forefront of peacebuilding and justice initiatives at the local level in Somalia since 2008. Its interventions were based on a 2006 DRC study of customary law<sup>10</sup> and the identification of specific challenges that hampered the effectiveness of customary justice. The challenges identified by the study included the following: clans in conflict do not share a common *Xeer* upon which peace negotiations can be based; difficulties exist in enforcing *Xeer* solutions; the *Xeer* mainly caters to those who are powerful; and the *Xeer* has a clear gender bias.

The interventions under DDG's current program, '*The Time is Now: Strengthening Police Accountability and Access to Justice in Somalia*,' aim to counter these challenges through the establishment of more inclusive councils of elders (*Guurti*) by ensuring that women and minority group members are represented; that a range of trainings on conflict mediation is provided to *Guurti* members; that participatory documentation is drafted on local justice norms and agreements; and that there is greater collaboration between *Xeer* authorities and other justice chain actors.

The recent evaluation of the DDG programme entitled '*Engagement of Somali Customary Institutions in Justice Programming*' shows that people in the targeted districts of Somalia have broadly appreciated

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<sup>9</sup> See, for example, UN Women, Women's meaningful participation in negotiating peace and the implementation of peace agreements. Report of the Expert Group Meeting, New York, 2018.

<sup>10</sup> Interventions were based on a study by Joakim Gundel and Ahmed A. Dharbaxo in 2008, 'The Predicament of the Oday', Danish Refugee Council and Oxfam Novib. The study was conducted upon request by elders and mayors to identify and help address challenges to customary justice and reconciliation at the time.

greater inclusiveness in the *Guurti* as this can muster community relations beyond those of elders, and that the enhancement of cooperation with other actors was useful in improving enforcement. DDG's general engagement with customary justice mechanisms was also widely praised as sensitive and adaptive to context. However, the review also showed that with regard to certain issues, such as the aforementioned conflict drivers SGBV and land grievances, customary justice mechanisms are not well-suited to adjudicate these conclusively – which interviewed elders admitted forthrightly.

SGBV and land grievances sit at a critical point where customary justice mechanisms – even those with greater inclusiveness – are difficult to reconcile with rights-based approaches. The review showed that in SGBV cases, elders (as guardians of the *Xeer*) remain the first port of call, especially as in some scenarios SGBV cases can trigger further conflict. These cases were subject to customary processes and rarely proceeded to statutory justice institutions that could guarantee individual rights-based outcomes.

The greatest challenge is the lack of an available institution that represents an individual rights-based paradigm as enshrined in international rights standards in a widely legitimate, trusted and functioning manner. The *Xeer*, as with most customary justice institutions, is built upon communal concepts of justice and peace. It is promoted as an instrument that can help establish peace among social units, but it exhibits fundamental defects when tasked with individual rights-based justice provision.

The review further showed that most elders do not want to be involved in land disputes. When resource issues have become complex through multiple title deeds or unclear documentation, politicized via patronage and mixed with claims made on a statutory law basis as well as based on customary norms, and when land has risen in value, customary authorities have been limited in their ability to deliver effective and enforceable verdicts on each of these elements.

### **Rights-based justice versus communal-based justice**

Experience in the last two decades has shown that promoting customary practices can counteract important principles and foundations of the rule of law. Local justice mechanisms have always been subject to inherent contradictions. They are usually based on communal peacebuilding, holding social groups and units responsible for the actions of individuals and not necessarily redressing individual victims. Meanwhile, justice standards imported by international statebuilding exercises usually focus on individual rights-based justice as expressed in global justice and human rights standards.

Forcier's review of DDG's experiences, which demonstrates the limits of engagement with customary institutions, can be taken as an entry point and should help to encourage the development of well-grounded next steps in building justice services at the local level that cater to all types of grievances.

SGBV cases provide a good example of the need to introduce individual rights-based justice into existing communal justice processes. Rather than attempting to change customary institutions to deliver individual rights-based justice, it may be more effective to establish or support other institutions – those that represent the *Shari'ah* or statutory laws - that can provide this kind of justice to the aggrieved, but that are still legitimate within Somali society.

This can be done by providing advice and influencing ongoing local justice processes. Rather than trying to change the role of customary actors, other actors such as community-based paralegals can provide knowledge and advice regarding individual rights-based norms in ongoing justice processes – and on how to navigate the institutionally pluralist landscape. For example, they can advise aggrieved parties or elders as to what the rights of a domestic violence survivor would be under different justice norms. This

knowledge alone can impact local justice processes and possibly influence their outcomes. The power and standing of community-based paralegals can alter the existing power balance between the aggrieved party and the perpetrator's group. Such processes can also gradually shift social norms towards a more rights-based understanding of some grievances.

Other approaches can entail support to institutions that are able to promote rights-based justice, such as *Shari'ah* and formal statutory courts. The current informal *Shari'ah* courts and dispute resolution mechanisms are culturally legitimate and enjoy broad-based popular acceptance (See EAJ, 'The *Shari'ah* in Somalia,' forthcoming). Support can be given to such institutions, enabling them to deliver interpretations of the *Shari'ah* that are sensitive to the needs of women and vulnerable groups. Increased popular knowledge of such interpretations can go a long way towards providing women and vulnerable groups with the means to seek redress through rights-based justice via broadly respected institutions, while also handling communal aspects of SGBV (see EAJ, 'Guidance Note on Women and Vulnerable Groups-Friendly Interpretations of the *Shari'ah*,' forthcoming).

Statutory courts can also be conduits for individual rights-based justice, but they still have a lot of challenges to address. At present, they are still subject to kin, religious and business networks that span across Somalia, and to power divisions along clan lines that hinder the formal judiciary from striving for independence.<sup>11</sup> The laws applied in courts are a mixture of different sources of jurisprudence with judges trained in one or another, which renders approaching the courts an unpredictable prospect (see EAJ 'Gender Equality and Social Inclusion (GESI) Analysis, 2019). Furthermore, judges' technical incapacities and their reputation as largely corrupt dissuades justice seekers from opting for statutory courts. Statutory justice sector reform therefore needs to embrace and enhance the social and political underpinnings of the courts, and needs to better integrate statutory institutions into wider coordination, accountability and normative responses within society at large.

All justice institutions must take into account social concepts and values or risk losing their legitimacy – particularly as Somali state legitimacy is still pending. They also have to consider customary processes, which remain central to addressing communal aspects of conflicts that do not disappear if individual rights are handled by different systems.

### **Legitimate authority**

Regarding more complex disputes – such as land disputes – that are dominated by power relations, especially (para-)military wherewithal and access to offices and the drive for access to resources, strong alternative authorities need to be developed. Customary authorities lack the capacity and influence to handle and enforce these types of grievances. In some instances, elders have come together to form committees, which has expanded their scope and authority to oversee cases. However, as the DDG review shows, this has not been sufficient. A strong and legitimate authority needs to encompass and preside above the aggrieved parties and provide means for conflict mitigation.

In Somalia's segmentary society, it has proven difficult to put in place a single authority that is broadly acknowledged. Interventions could start focusing at the local level, where local officials are appointed by administrations in Mogadishu or regional capitals and are often quickly contested, as they do not represent the full landscape of power in a district. Consequently, people turn to Al-Shabaab courts for justice and

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<sup>11</sup> World Bank Report 2015, EAJ Land rights report forthcoming

redress. It is at this level where broadly legitimate powers can be negotiated and can start servicing local populations in an improved manner; consequently, it is at this level where interventions must focus.

### **Next steps**

In addition to working with customary institutions, as actors such as DDG have done, justice sector actors should support institutions and mechanisms that promote rights-based justice, such as *Shari'ah* courts that are based on jurisprudence that is more accommodating to women and vulnerable groups or well-functioning statutory courts that can present reasonable alternatives to customary institutions. Community members will be better able to select justice mechanisms that promise the best solution for them – whether individual rights-based or communal rights-based.

Providing a choice of institutions can better cater to a society that is fluid and always subject to change in its norms or more fundamental paradigmatic shifts. At the same time, community members should be supported with sound advice and should be guided to navigate legal pluralism with a view to the best solution in their case. Furthermore, civil society organizations can play a significant role in shaping the normative environment, as they can assert pressure on justice institutions and authorities towards less clan-based and communal justice. All three approaches can have important impacts on reshaping social norms that can resonate with a more rights-based approach to justice and peace.

In the long term, Somali society will develop institutions that reflect its basic norms and are internationally compatible. Only in close cooperation between peacebuilding and justice practitioners can the whole environment be seen as one continuum. There should be acknowledgment that both communal and individual rights norms need to be embedded in flexible systems that allow society to change. This will allow 'justice' to be established in fragile environments in a more granular way, based on an in-depth understanding of context, countering fragility and violent extremism.

A clear roadmap is needed in every district that delineates differing justice needs and considers how to fulfil those needs through approaches that are deeply embedded in the local socio-political reality.

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