

THE CLAN SYSTEM AND CUSTOMARY JUSTICE IN SOMALIA

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Cover Photo: Elders and community members participating in the 2014 Gedo Peace Caravan, by DDG

The Clan System and Customary Justice in Somalia: A Brief Introduction

What are clans, and why are they such an important source of identity in Somalia?

The clan (*qabiil*) is a category of social organisation that anchors individual and group identity in Somalia. Not only are Somalis divided into different clans, but each clan is divided into sub-clans, each of which harks back to a common male ancestor. Sub-clans are further divided into sub-groups down to the most basic unit that is responsible for the payment of blood compensation (*diya/mag*) in the event of a killing.

In fact, the *mag paying group* stands at the core of the Somali clan system. It constitutes the most basic unit of association for individual and family alike, and is composed of families that, together, are capable of raising 100 camels or the financial equivalent in case one of its members kills a male member of another group. It is difficult to understate the importance of these groups, for pastoral communities in particular.

The clan system's pervasiveness and endurance are closely linked to the importance of land-based resources. In the past, northern nomadic pastoralists relied on water sources as crucial bases from which to access pastures during dry seasons. This imperative elevated the question of territorial control and ultimately led to clan homelands (*deegaan*). The usage of wells and safe passage had to be regulated among host clans and the clans of highly mobile herders, necessitating the flexible contractual agreements that ultimately became the customary law, or *Xeer* (Cassanelli, 2015).

The clan system is segmentary and agnatic¹ (the segments are defined by a common male ancestor). Somalia's nomadic clans with northern origins –primarily the Dir, Darood, Hawiye, and Isaaq– trace their ancestry to *Samaal* as their common ancestor, whilst the southern and sedentary Digil Mirifle look to *Saab*. Clans bear the name of their ancestor when grouped. The coexistence of common roots and internal divisions renders the clan unifying as an organisational principle but also creates an array of potential fault lines for conflict (Barnes, 2006).

Among the more sedentary and largely agro-pastoralist communities of the south, clan-based systems of social and legal organisation hark back to the Geledi Sultanate, which Gundel and Dharbaxo deem as “amongst the most hierarchical” of socio-political formations in the history of the Somali region (2006: 28). As a result of these origins and the more sedentary livelihoods, clan structures operate alongside identity linked to location of residence. This allows for dual or more fluid patterns of belonging and positions elders centrally in overseeing day-to-day productive processes. These clans tend to be more open to new arrivals, and their members' allegiance is equalled by their allegiance to their place of residence (Mushtag, 2018).

This illustrates the extent to which specific forms of social and legal organisation are grounded in the mode, relations, and circumstances of production. The scarcity of land-based resources continues to underpin socio-political relations across Somalia. Article 43 of Somalia's 2012 Provisional Constitution enshrines land as Somalia's primary resource and the basis for citizens' livelihoods, particularly the nomadic pastoralists of the more arid regions. The article emphasises the importance of equitable and sustainable land management, after decades of migration by northern groups into the fertile inter-riverine areas.

The difference between more nomadic pastoralist and more sedentary agro-pastoralist clans also has a linguistic dimension. The former speak the *Af-Mahatiri* dialect, which is mutually unintelligible with the *Af-Ma'ay* dialect spoken by the Digil Mirifle and Somali Bantu communities between and along the Shabelle

¹ Somali clans are not merely patrilineal, although they are not 'agnatic' in the sense that inheritance is first passed to younger brothers before male offspring is considered. This is further complicated as property is often held collectively. Instead, clan lineages are agnatic inasmuch as different clan groups that hark back to the same male ancestor consider each other as 'brothers', 'cousins', or 'uncles and nephews', depending on their ancestors' relations and proximity to the progenitor. Whether or not nomads, arrivals, or displaced groups are such agnates of locally dominant clans has important implications on whether or not they are able to join the host community, qualify as guests, or need to establish a new *Xeer*.

and Juba rivers. Although both form part of the Cushitic branch of the Afro-Asiatic language family, their precise relationship – among a myriad of other Somali dialects that are of political salience – remains subject to debate.²

The *Af-Mahatiri*-speakers' control over many of the main urban centres, economic hubs, and better-equipped clan militias imbues this linguistic split with a political dimension, reinforced by the military government's language policies of the 1970s and 1980s. The executive – dominated by members of northern pastoralist clans – disavowed calls for wider community consultations as to which dialects should inform the introduction of a standardised written Somali, and instead rendered *Af-Mahatiri* Somalia's language of commerce and office (Mewis, 1975; El-Solami-Mewis, 1984). The repercussions of this policy are manifest in the political exclusion of Digil Mirifle communities and the outright marginalisation of Somali Bantu, along with certain occupational groups.

These occupational groups are traditionally confined to professions historically deemed unworthy by the nomadic 'noble' clans, such as metal and leather working, hunting, and other artisanal occupations (Hill, 2010). Continuing urbanisation (AFIDEP, 2018) and its introduction of new industries and skill requirements may transform this pattern of exclusion, but this remains to be seen. Marginalised groups are likely to remain disadvantaged in accessing political office, financial flows and employment, educational, or business opportunities.

The relative weakness of these marginalised groups – many Digil Mirifle, but especially Somali Bantu and occupational groups – within Somali clan structures has a severe military dimension, as the assumption that “might makes right” pervades clan-based political and customary justice mechanisms (Elmi, 2010, p. 33). The Bantu and occupational groups are referred to by militarily and politically stronger groups as *loomo ooyaan*, which translates as “No one will cry for you” – denoting that they are unable to defend themselves or receive support from justice and security providers. They are usually left out during *Xeer* proceedings, and rarely if ever do their representatives take part in elders' councils or *Guurtis*.

Groups that find themselves outmatched or threatened can be adopted into stronger clans as clients (*shegad*) or purchase protection or safe passage (*abbaan*). Clients can opt out of their *shegad* status when they no longer deem it necessary. In contrast to *Samaal* clans, individuals among the *Saab's* adopted clients have the option to fully integrate and even rise to the rank of elders. Ken Menkhaus notes that upon his arrival in Luuq, he learned that none of the highly influential Mirifle-Moalim Weyne elders had been born Moalim Weyne (Menkhaus, 1999). This would not be possible amongst nomadic clans.

This does not imply that territories are neatly divided among clan groups, occupational groups and Somali Bantu (known in different locations as *Shiidle*, *Makane* and *Gosha*). Instead, the negotiation of different groups in the same location forms the basis of both agreements on customary justice and socio-political conflict. However, the dominant group in a region has historically been expected to act as host (*guri*) towards their guests (*galti*), arrivals or passers-by from other areas (Cassanelli, 2015).

² During the last period of wide linguistic study in Somalia, prior to state collapse and civil war, most scholars argued that both dialects emerged from a proto-*Saam* language. Others speculated that these dialects stem from initially somewhat distinct Cushitic languages that converged via sustained communal interaction and exchange. In the absence of direct evidence for either, there remain enough similarities among the current dialects to support a common origin, strong geographical similarities that suggest gradual confluence via proximity (such as those between the *Af-Ma'ay* of the Mirifle in Bay region and the *Af-Tunni* of the Digil in Afgoye and Barawe), and sufficient divergences to hamper mutual intelligibility (Lamberti, 1986).

What is the difference between “clan” and “clannism”?

As land-based resources become more embattled in an increasingly arid and drought-ridden climate and political positions promise access to plentiful external financial assistance, allocation of these positions and of economic opportunities along clan lines has become engrained in Somalia’s political-economic systems. This practice is commonly referred to as clannism (*qabaa’ilka*).

Clannism is not a new phenomenon. Whilst the Italian colonial administration in the South sought to suppress traditional structures and battled inter-riverine clans to seize their fertile farmlands (Mukhtar, 1996), the British administration in the North favoured Isaaq communities over Darood clans. This enabled the Isaaq to lay claim to land in the Haud and northern Ogaden and to enforce these as armed auxiliaries to British colonial rule, thereby dividing potential Somali opposition (Cassanelli, 2015). Unsurprisingly, Ogadeni communities enacted revenge under a Darood-led central government, especially as Somali forces were retreating from the Ogaden.

Despite the military government’s initial attempts to suppress the political relevance of clan, it reversed this policy as its stability faltered during the 1970s and 1980s, implementing widespread *clannist* patronage systems that have largely remained in place up to the present (Weberisk, Hansen, & Egal, 2018).

A Somali perspective on clannism and its escalation during the 1990s-era civil war among clan-based militia groups is evocatively presented in Cumar Cabdinuur Nuux’s poem “Clan & I (*Aniga iyo Qabiil*)”.³

How has clannism affected state-building and stabilisation in Somalia?

In the 1990s, the civil war elevated clannism to a core principle of governance throughout Somalia. Peace processes that targeted warlords (leaders of clan-based armed factions vying for territorial control) only deepened the political influence of clannism and, in a bitter irony, sidelined clan elders. Participation in these processes was predicated upon a prominent and active role in the ongoing conflict, which sparked further violence in the lead-up to conferences and generated incentives for faction leaders to continue clan-based warfare rather than risk losing access to resources at its conclusion (Menkhaus, 2003).

The effects have been pervasive. Militarily weaker clan groups lament that they have been further marginalised by their non-participation in high-profile talks, as one of their representatives put it, “because of the ‘crime’ that we did not kill” (Elmi, 2010, p. 37). Inter-clan conflict has historically been rare for the largely sedentary Digil-Mirifle community. Especially Mirifle communities derived as much of their identity from their location of residence as from their lineage, and marriage did not alter a woman’s clan affiliation as much as it added a second one. As a result of these manifold ties among clans and their sedentary livelihoods, Digil and especially Mirifle did not maintain armed militias as their nomadic neighbours did. As the civil war brought clan cleansing and land grabbing to the inter-riverine area, farmers and agro-pastoralists were thus decidedly less well-armed than the northern militias who laid claim to fertile land after ousting the central government in Mogadishu (Helander, 1996).

Even humanitarian and developmental organisations were unwittingly co-opted into these patronage systems due to a lack of information, which only deepened social divides (Bradbury, 1994). Successive central administrations have not merely failed to suppress the political salience of clan but have consistently strengthened its importance as a default option for communities with no other credible representation and protection, and enshrined clannist patronage as a *modus operandi* for governmental institutions.

The centrality of clannism, notwithstanding the many grievances it evokes and perpetuates among those whose options or perspectives it curtails, simultaneously sustains and challenges the centrality of *Xeer*.

³ The poem is annexed.

Engagement with *Xeer* has become essential to state-building and stabilisation in Somalia due to its reach and legitimacy among the population, its predominance over other justice mechanisms and its central role in the marginalisation of disadvantaged groups.

What is *Xeer*?

The term *Xeer* literally translates as “agreement.” Rather than one cohesive and universally applicable code, *Xeer* largely consists of bilateral or multilateral contracts entered into by clan groups in a particular locality. Rather than a foundational constitution, *Xeer* represents a convention of legal practice among Somali clans (Elmi, 2010) based on collective responsibility and compensation rather than individual punishment.

Xeer shares the main features of most customary justice systems: in the event of an offense, the parties involved have a choice either to launch retaliation or avoid it through negotiation toward compensation;⁴ collective liability outweighs individual responsibility and compensation and retaliation are equally collective (Schlee, 2013). Due to its rejection of the hegemony of state institutions, *Xeer* has been romanticised by what Schlee terms the libertarian “lunatic fringe of the far right” of the Western political spectrum (2013: 258; see as example: MacCallum, 2007). Regarding appraisals of *Xeer* as horizontal and participatory, Schlee cautions that *Xeer* is “not necessarily pacifist or non-violent” (2013: 258).

Xeer comprises an assortment of rules and localised agreements among clan groups, giving shape and form to inter- and intra-clan relations, and relies upon acceptance by all parties and a persuasive threat of force to compel negotiations. *Xeer* is not traditionally written down but passed on through oral traditions via song, poetry, or stories. It is held, taught, and implemented by elders (*xeer begti* in relation to direct application, otherwise known as *odayaal*, singular *oday* [*Malaqyada/Malaqis* and *Malaq* among Mirifle]).

What does *Xeer* entail?

Xeer is organised into two strands: *Xeer Guud* and *Xeer Gaar*. In its locally negotiated form, *Xeer Guud* is universally applied throughout Somalia and Somali communities in the Horn of Africa.⁵ It applies to what could be summarised as criminal cases (*dhig*), for which it lays out guidelines for offences and their standard compensation. The categories encompass killing (*qudh*), divided into premeditated murder (*kas*) and accidental killing (*kama*); aggression/assault (*qoon*), which also addresses cases of non-physical injury such as spitting, verbal abuse, hitting with shoes (*qadaf/dallil*);⁶ and theft (*tungo*).

For each category, the *Xeer Guud* provides guidelines for appropriate levels of compensation, adjusted by who the victim was, how the crime was perpetrated and the history of relations between the aggrieved and accused clan groups as well as pre-existing agreements (as far as the elders involved can recall). The *Shafi'i* school of Islamic jurisprudence (*madhab*) that has historically been dominant in Somalia figures most prominently within the tradition of *Xeer* – in *Shari'a* precepts of levels of compensation. The most often cited example is that of 100 camels in compensation for a killed man and 50 camels in compensation for a killed woman. The age of the victim tends not to matter. Payments are usually raised among the perpetrator's appropriate level of kinship group – according to the severity of the crime – in livestock or its monetary equivalent, and paid to the victim's kinship group.

In recent years, allegations have emerged that many payments no longer reach victims' kin and instead are distributed amongst the elders involved. Stipulated levels of payment have also been adjusted downwards

⁴ This tends to be more pertinent among traditionally nomadic pastoralist clans, for reasons outlined above. The *Xeer* amongst the historically more sedentary Digil Mirifle clans has accordingly more geared towards regulating relations of production and everyday interactions in specific locations.

⁵ Further research is necessary to establish the extent to which Somali diaspora communities practice or conserve *Xeer* traditions.

⁶ These are often treated as more severe than physical injury or sometimes even as killings.

to accommodate clan groups' capacity to pay as well as the number of casualties involved in conflicts fought with semi-automatic rifles and heavier weaponry.

The *Xeer Guud* sets out rules for what could be described as civil cases (*dhaqan*) including those that concern domestic affairs and those that straddle the Western or internationalised demarcations of civil, criminal and other matters, such as territorial issues (*deegaan*) and violations of hospitality (*maamuus*). Domestic issues concerning affairs within the family (*xilo*) or involving private property (*xoolo*) are often referred directly to adjudication according to *Shari'a*. Property cases are sub-divided according to whether the property in question is the direct possession of the aggrieved person or party⁷ (*milki*) or someone else's possession that the plaintiff held in their custody (*magan*) (Abdile, 2012).

Disputes concerning territory and hospitality are illustrative of the importance of land and home territory. They translate into obligations and rights for hosts (*guri*) and guests (*galti*) concerning the appropriate way of entering another group's territory or of hosting guests who are economically and militarily weaker than their hosts.

Finally, *Xeer Guud* sets out some non-negotiable components (*xissi adkaaday*). One such component provides an element of *jus in bello* by designating *biri mageydo* (literally "spared from the spear") groups that are to be protected from violence. These include children, the elderly, women, in-laws, the sick, religious leaders, poets, guests and clans' highest elders. This component also stipulates procedures for the death of a spouse, which generally entail a marriage with the next of kin of the deceased, and family obligations such as dowry payment and material support for newlyweds. Finally, *Xeer Guud* echoes the *Shari'a* obligation to give alms to the poor.

Xeer Gaad regulates local relations of production, which encompass pastoralism, fishing, frankincense harvesting and other locally important livelihood activities. These are negotiated bilaterally or multilaterally among clans in each location, and often focus on usage of water sources and access to pastures (Cassanelli, 2015).

What is the role of elders in implementing *Xeer*?

Elders are central to the process by which *Xeer* is negotiated, agreed upon and applied. They are mostly selected by male clan members on the basis of their reputation for fairness, rhetorical aptitude, knowledge of *Shari'a* and *Xeer* precedence and commitment to supporting their communities. Some others inherit their positions. They are exclusively male and often elderly.

Elders meet both *ad hoc* in specifically convened councils to preside over a dispute, usually called *Guddi*, and in permanent councils. These councils are called *Guurti* in most places, *Duubab* or *Nabadoons* (peace seekers) in some others, and *Malaq* or *Akhyaar* among the Mirifle.⁸ The most important type of meeting is the *shir* or peacetime meeting, traditionally held under the shade of a tree, in which groups of elders and other mostly male community representatives negotiate or review *Xeer* agreements.

What are the different types of elders?

Differentiation amongst elders corresponds in part to political systems and in part to the policies of colonial and subsequent military administrations. At the highest political level, elders (*duub*) represent the legacy of past Somali sultanates, operating under the title of *Suldaan* among Isaaq and many Dir, Digil, and Darood

⁷ Although the role here resembles that of a plaintiff or claimant, previous research has found no such Somali term, which suggests that the collective frame of reference renders such individualised role description redundant. Property is likely taken to be communal, especially when in the form of land or livestock. Scholars such as Gundel and Dharbaxo thus tend to refer to aggrieved or accused parties, not to individuals.

⁸ These *Guurtis* should not be confused with the *Goolaha Guurtida*, the Somaliland Upper House, which is composed of elders or their nominees. The House is named after *Guurtis* and often abbreviated as such, but does not itself engage in implementing *Xeer*.

clans; *Imam* for most Hawiye; *Boqor* (king) for other Darood. These elders are influential in political decisions, where they represent their entire clan including all sub-clans, even if these are at odds with one another.

Some elders operate as a bridge between communities and governments, known as *Caqiil* in Somaliland, *Issimo* (singular: *Issim*) in Puntland, and *Nabadoons* and *Samadoons* in southern and central Somalia. Many of these structures were installed for political reasons by the military government. The titles *Nabadoon* and *Samadoon* translate as “peace-seekers” and “well-wishers” respectively. These are apt descriptions of their primary duties and main sources of legitimacy. They apply *Xeer Guud* and *Gaar* when disputes arise, prevent their escalation into violence or halt violence once it has erupted.

How do elders resolve conflicts and disputes?

Prevention of retaliatory violence is a key function of *Xeer*. If an incident occurs concerning *Xeer Dhiig*, which deals with violent transgressions that require blood compensation, elders enter one of three possible modes (negotiation, mediation or arbitration) for settling conflicts (which include killings, physical attacks or insults) or disputes (over property, territory or rules of hospitality). In each case, the groups involved first appoint a committee of envoys (*ergo*), composed of elders, religious leaders, and business persons with established ties across the clans (Abdile, 2012).

Where groups are largely symmetric in power and enjoy good relations, or when the case is fairly straightforward, committees are likely to initiate direct negotiations. If these fail or if the aggrieved and accused parties deem it necessary from the onset, they can call upon elders of a neutral third party to mediate (*masalaxo*) or arbitrate (*gar dawo*). Whereas mediators prioritise mutual satisfaction over the letter of the law with non-binding verdicts (Gundel & Dharbaxo, 2006), arbiters implement relevant aspects of *Xeer* or *Shari'a* applicable to the case.

This is followed by a hearing of evidence, in which it is forbidden for any party to interrupt even the most offensive or insulting presentation. Only the most serious and egregious offences involve senior *odayaal*. Most minor issues are settled within families or by local elders. In each case, one selected elder (*war gure*) presides over a committee of elders from the aggrieved and accused clans as well as neutral parties where it is deemed necessary. Decisions are derived from precedents familiar to the elders present (*xaajo curad*), or from their knowledge of *Xeer* and *Shari'a*, as well as proverb and analogy, and rhetorical construction of counterfactuals where cases are unfamiliar to them (*xaajo ugub*). Arbiters are usually *xeer begti*, chosen for their reputation and knowledge of proverbs, precedent, scripture and *Xeer*.

Elders can render a variety of sentences:

- Compensation payments, especially blood compensation (*mag* [Arabic: *diyya*] *bixin*)
- Fines (*xaal maria*)
- Apologies (*raali gelin*)
- Public guilty pleas (*qiirasho*)

In case of killings, elders of an offending party that is found guilty must offer their condolences to the victim's family, bring a white shroud (*karfan*) and cover burial expenses (*duug*) and other nominal expenses or losses (*xaal*). A rejection of these by the aggrieved family is likely to be seen as a preference for retaliation.

Xeer should not be misunderstood as purely oriented to collective liability in a way that invites individuals to commit crimes with impunity. Traditionally, collective responsibility has had a strong prevention function. If an offender repeatedly incurs costs that their kinship group must pay, the group can decide to exile and ostracise the offender (*dayro*), openly curse them (*habaar*), impose a fine or seize their property. Each of these is designed to put pressure on individuals to avoid losing their group's protection.

What are the main challenges to effective *Xeer*-based justice?

Political leaders' tactic of appointing elders to key positions to secure clan allegiances has served to undermine elders' legitimacy within many communities – the very legitimacy upon which a well-functioning customary justice system hinges (Gundel & Dharbaxo, 2006). The anchorage of security forces in clan affiliations has been similarly counter-productive. Following the collapse of the central government, Somalia's armed forces sundered along clan lines into rival factions seeking to protect their clan heartlands or expand into those of others. Current state-building efforts are struggling to bring together an array of security providers who often shift between allegiances to government and clan at ease. The deployment of forces thus risks reigniting inter-communal grievances or abuse of local communities (Menkhaus, 2016).

The immense death and displacement produced by the Somali civil war and its aftermath has posed further challenges to *Xeer*. Large-scale displacement has undermined elders' ability to speak on behalf of their communities, whose members they no longer know (Gundel & Dharbaxo, 2006, p. iii). Economic distress and ever more frequent droughts have hollowed out communities' capacity to pay compensation.

There are widespread allegations that elders are taking increasingly large cuts of compensation payments or even seeking to maintain a certain level of conflict to retain their relevance and income. Such allegations are especially salient in contexts such as Galkayo, where inter-clan conflict has been elevated to inter-state conflict via clan-based state building (Interpeace & PDRC, Galkacyo Conflict Assessment, 2017). This undermines the legitimacy of elders and thereby creates incentives for perpetrators to take advantage as long as they command privileged positions.

How inclusive is the administration of *Xeer*?

Even though *Xeer* extends liability and retribution to the entire kinship groups of both offenders and victims, not all members of these groups can participate equally. In fact, like most customary systems, *Xeer* reflects the socio-political inequalities within which it emerged – and which are often part of its very *modus operandi*. Until the emergence of fully formed, legitimate and functioning alternatives, these inbuilt inequalities are likely to remain an integral part of conflict resolution in Somalia.

Somali society, and Somali customary justice processes, are inherently patriarchal. Gender-based restrictions on who can become a clan elder reflect gender roles within this society, which relegate women to passive participation. The centrality of dowry, marriage, and spousal death exhibits the delicate relations between social groups, often said to be anchored in a woman's divided ties to the clan of her husband and that of her father, which are often different. This is often a pretence for influential male actors to avoid complying with constitutional gender quotas or shift the task of meeting such quotas to less influential clans and groups.⁹

“Women in this system are often disadvantaged; because the male elders will prefer a man who they trust is fully loyal to their clan.”

(Gundel & Dharbaxo, 2006, p. 17)

In this patriarchal system, whilst male clan members can bring cases to the *odayaal*, women are prohibited from doing so and can only be heard in the company of or via a male representative. This clashes significantly with international concepts of rights and gender equality. In this respect, *Xeer* is more discriminatory towards women than *Shari'a*.

The primacy of collective responsibility and exclusion of women pose major challenges to conformity with international human rights standards, with which the Provisional Constitution nominally conforms (Sheikh

⁹ With the above-noted exception of the Mirifle. Helander (1996) tells of observing the incredulity of a nomadic pastoralist as a woman explains that she defines as a member of both her father's and her husband's/children's clan.

Ahmed, 2016). Limitations to individual punishment are particularly glaring in cases of sexual and gender-based violence (SGBV), in which perpetrators can hide behind their clan groups' strength and forego individual accountability (UNOHCHR, 2016).

The strength of armed clan groups is often the deciding factor as to whether customary justice mechanisms render binding and ultimately accepted verdicts. Whereas negotiation and mediation depend entirely on the parties' voluntary compliance with decisions, in cases of arbitration the duty of enforcement lies with the arbitrating *xeer begti* elders.

Clan groups in stronger positions than their opponents or the *xeer begti*'s clans can choose to reject or ignore the outcomes of customary dispute resolution. Whilst the necessity of backing up sentences with force permeates not only *Xeer* but all justice systems, the ability of an accused group to reject unfavourable verdicts is particularly divisive in a society with deeply entrenched communal conflicts and security forces that maintain allegiances to their clans (Menkhaus, 2016).

Customary justice mechanisms' reliance on governmental security forces or compliant clan militias to enforce their verdicts can be problematic when state administrations are limited and security forces are tied to clan affiliations.

What are the contrasting dynamics of *Xeer* and *Shari'a* norms?

Shari'a is the compendium of practical rules for Muslims derived from the *Qur'an* as the word of Allah, and from the *Sunnah*, the collection of *hadiths* representing the behaviour and expressions of the Prophet Muhammad. The *Shari'a* is central to Islam in practice, rendering it a 'religion of the law' (David & Jauffret-Spinosi, 2002, p. 350). Interpretations of the *Shari'a* differ among schools of Islamic jurisprudence (*madhab*). In Somalia, the *Shafi'i* school is prevalent, although the *Hanbali* school demanding an almost literal adoption of scripture has become increasingly more influential.

Customary and Islamic practices and norms are intertwined. They co-evolved in Somalia, with elements of *Shari'a* filling gaps in Somali customary regulation, whilst *Xeer* contains particular provisions for issues *Shari'a* treats at a more general level. *Xeer* predates *Shari'a* in Somalia, and it is composed largely of "truly indigenous" Somali terms and concepts (Abdile, 2012, p. 88). Past internal and external attempts to quell *Xeer*'s influence have never fully succeeded. Customary legal practices have remained prevalent in Somali society and have underpinned and informed state-building processes. The Somali Federal Government formed in 2012 maintains an Alternative (formally 'traditional') Dispute Resolution Unit (ADRU) and pursues a strategy of building up local governance that explicitly includes customary dispute resolution.

Xeer coexists with *Shari'a*, and the two frameworks draw upon one another. The *Qur'an* and *Sunnah* explicitly allow for customary justice traditions to cover the minutiae of legal precepts and the concrete application of their principles in specific contexts. Moreover, their calls for forgiveness and provision of appropriate compensation payments are central to *Xeer*-based customary justice (Schlee, 2013, p. 260).

The roots of Islam are embedded deeply within Somali society. Many Somali communities trace their lineages to the Qurayshi clan – the pre-Islamic wardens of the Kabaa in Mecca and the merchant clan into which the Prophet Muhammad was born. Somali sultanates and communities also had extensive dealings with Arab traders in pre-Islamic times, which likely facilitated the convergence of justice systems and the pre-eminence of Islam in Somalia (Le Sage, 2005, p. 16).

The socio-political importance of Islam in Somalia and the synergy between *Xeer* and *Shari'a* are likely reinforced by Somalia's colonial history and continued politico-cultural tensions with former colonising societies. *Xeer* has traditionally been set in contrast to *Gaal Cad*, the Christian way of life (Abdile, 2012, p. 107). Western countries' haphazard and poorly coordinated state-building interventions in Somalia, their

support for corrupt politicians and their uninformed collaboration with warlords at the expense of unarmed groups have likely entrenched this opposition more deeply.

The immense influence of conservative Sunni Islam, both in its Sufi and Salafi forms,¹⁰ has elevated sheikhs (*wadaad*) and other religious leaders (*ulema*) as irreproachable authorities across most of Somalia. Although their primary role under *Xeer* remains oversight of family issues such as marriage and divorce (*qadi*), they also ceremonially bless bilateral or multilateral agreements and validate verdicts. *Shari'a* has officially been incorporated into the constitution as the foundation of statutory law, complicating the cooperation and coordination among different justice frameworks, institutions, and actors (Schlee, 2013).

How has the Al Shabaab insurgency affected customary justice?

The Harakaat Al Shabaab Al Mujahedin (Al Shabaab) insurgent group operates an intricate and somewhat transparent system of taxation as well as courts known for swift and effectively-enforced judgements that are considered by many to be fairer than those resulting from inter-clan negotiations or statutory courts (Anonymous, 2016; Crouch, 2018). Al Shabaab's capacity to provide justice and security thus sustains an opening for it to 'out-govern' Somalia's state administrations (Jones, Liepman, & Chandler, 2016).

Despite Al Shabaab's efforts at adjudication, *Xeer* determines the principal justice norms across Somalia (UNSOM & World Bank, 2017), and the "most far-reaching" ones in rural areas (Le Sage, 2005, p. 8). Al Shabaab recognises this and has geared its activities to local customs and existing grievances in each locality. The group offers its own elders in the Mirifle-dominated Bay region, for instance. The group exploits grievances among sub-clans with limited access to political representation and less-well-armed clan militias, reducing their elders' ability to obtain fair treatment in customary justice procedures.

Why do Somalia's international partners support customary justice in Somalia?

External actors frequently engage with customary authorities in peacebuilding operations, based on a recognition that engaging so-called "track 2" actors (Böhmelt, 2010) as mediators or liaisons between government officials (track 1) and communities (track 3) is appropriate in fragile states and post-conflict environments (Lederach, 1997).¹¹ The United Nations formally acknowledged this in the 2004 Report of the Secretary-General on 'the rule of law and transitional justice in conflict and post-conflict societies'.¹² Recognising and harnessing the role of customary justice mechanisms may also be crucial to counterinsurgency efforts in Somalia where militarised stabilisation approaches have yielded little, or even reversed previous gains (Crouch, 2018).

In the absence of resources, a substantive tax base and a coherent and established civil service apparatus, Somali governing authorities and their international partners have largely focused on providing security first and foremost. These efforts have been hampered by the slow progress of state-building, the limited reach of graft-ridden government authorities and their inability to enforce decisions or even provide regular pay to security forces and justice officials. Such shortcomings have not only undermined the viability of the emerging state structures but have also provided violent extremists with an avenue to garner legitimacy by

¹⁰ Sufism and Salafism are two movements that propagate different interpretations of Islam. This part of this report also mentions schools of Islamic jurisprudence (*madhab*). For more information on Islamic movements, jurisprudence, and the role of both in Somalia, see: Expanding Access to Justice program (forthcoming). *The Shari'ah in Somalia*. Research Report.; Afyare A. Elmi (2010). *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding*. London: Pluto Press.; or Ken Menkhaus (2002). Political Islam in Somalia. *Middle East Policy*, 9(1), 109-123.

¹¹ It is debatable to what extent

¹² 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

offering governance and adjudication, thereby contributing to the aforementioned reversal of gains (Anonymous, 2016; Jones, Liepman, & Chandler, 2016; Crouch, 2018).

This echoes what experts such as David Kilcullen have insisted on: a distinction between militarised counterterrorism and more holistic counterinsurgency. To illustrate this point, Kilcullen quotes the late Bernard Fall: "a government that is losing to an insurgency isn't being out-fought, it's being out-governed" (2010, p. 149). Here, repeated failed attempts at imposing a top-down state structure underscore the importance of working with locally viable structures. As Afyare Elmi puts it:

"With respect to the theories and concepts of conflict resolution and peacebuilding, it is clear that peacebuilders heavily depend on a particular European worldview. I hope that the current calls for inclusion of other ways of seeing the world will be heeded. The indigenous values involved in the case of Somalia have their own conflict-resolution mechanisms that resonate with Somalis."

(Elmi, 2010, Preface)

Customary justice mechanisms in Somalia have retained their primacy in part because they correspond to the social needs of many Somali communities, and in part because fledging statutory institutions either fail to do so or are compromised through partiality, corruption or sheer lack of capacity. Until the wider conflicts and political obstacles are addressed, justice sector reform efforts that avoid engaging customary structures do not engage with the social reality of Somali communities. International actors who eschew them because they are at odds with aspects of international human rights standards moreover run the risk of establishing more avenues by which political power can be projected and patronage practiced – two elements that perpetuate instability in Somalia. (Harper, 2011) (IDLO, 2019)

Rather than attempting to supplant customary practices with statutory institutions, an approach that has failed time and again as communities have rejected the imposed structures, justice sector reform efforts would do well to abandon pre-conceived models, acknowledge the existing legal pluralism, and facilitate the emergence of an institutional environment that is appropriate to its context and encompasses all its elements. Despite overwhelming evidence to this effect, many international actors are reluctant to engage with local customary justice institutions.

Lending support to customary structures implies dealing with homegrown dynamics that express and often contribute to power asymmetries and patterns of discrimination and marginalisation. Actors who lack a nuanced understanding of often highly localised complexity risk reinforcing these patterns – and in contrast to statutory justice institutions, international guidelines on customary institutions hardly exist.¹³ Moreover, achieving meaningful results through work with such long-established structures requires a commitment to long-term engagement, which posits a challenge to often short and mid-term project and funding cycles. Yet external involvement in customary structures is not always unwelcome. The seminal 2006 study by Gundel and Dharbaxo occurred upon the invitation of elders and authorities who found their practice of *Xeer* inadequate to deal with new challenges and sought external support to rectify this. Much attention has been devoted to fostering better collaboration with emerging statutory justice institutions, which proffers scope for aligning customary conflict resolution and rights-based justice provision.

¹³ The International Development Law Organization (IDLO) provides some lessons learned, contributing to a growing evidence base, to which this background paper and the associated report (see footnote 15 below) also add. See: Erica Harper (2011). *Working with Customary Justice Systems: Post-Conflict and Fragile States*. IDLO: Rome.; IDLO (2019). *Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems*. Practitioner Brief / Policy & Issue Brief.

Among the most extensive international programmes to work with customary institutions in Somalia as an entry point to peace and state building is the Danish Demining Group (DDG)'s efforts, which followed directly from the Gundel and Dharbaxo study. Since 2008, DDG has been working to establish more inclusive customary justice structures, known as “*Guurti+*” (*Duubab+ or Malaaq+* in some areas). Working with multiple donors and multiple projects over time has provided scope for unpacking the nuances and accounting for environmental factors. For instance, DDG has undertaken efforts to identify ‘genuine’ community elders as opposed to those who are politically appointed and politically-minded, and has avoided introducing financial incentives to fulfil duties traditionally mandated by virtue of elders’ role within the community, which risk eroding their legitimacy.

This initiative aims to augment existing councils of elders with greater involvement by marginalized groups such as women, youth and minority clan members. DDG has also provided capacity building for these councils in areas such as conflict management and mediation based on international human rights standards, as well as supported the documentation and adaptation of traditional conflict resolution processes into cooperation with statutory and religious justice mechanisms to reinforce the role of rights-based justice and transparency.

Much of this work derives from appreciative inquiring, a process of facilitating communal insight into what already works well and is seen as legitimate and can therefore provide a foundation for justice sector reform processes to build on. Insights gleaned from such consultations include an acknowledgement by elders themselves that working with youth and women could help them handle cases that fall outside their sphere of competence, such as SGBV and issues concerning social media.

Another aspect of this programme involves supporting the documentation of town-wide *Xeer*. This has followed requests by local elders for such documentation in order to resolve deadlocks between competing *Xeer* agreements as a result of displacement and counter impunity via referenceable and accessible codes. The improvement of customary institutions to resolve disputes and deescalate conflict lays the foundation for further justice sector reform.

What are the wider implications for stabilisation and state building in Somalia?

Statutory law has struggled in modern Somalia due to the country’s nascent and brittle judicial infrastructure as well as extreme paradigmatic differences between local norms and international standards. Before the central government collapsed in 1991 and Somalia descended into civil war, its statutory law was largely drawn from the Italian civil code and British common law – two colonial legacies drawn from two different European legal traditions. Recent attempts to restore a statutory legal framework resulted in a rudimentary, convoluted and often inconsistent Provisional Constitution in 2012 and a rushed 2016 roadmap for a constitutional review (Bryden & Thomas, 2015). The constitutional review remains unfinished, and even when it is completed the constitution will predominantly apply to statutory institutions, which are still restricted to major urban centres and often incomplete even in those contexts.

Somalia is frequently described as the epitome of a ‘failed’ state. However, scholars have pointed out that this depiction imposes a state-centrism not appropriate to multi-faceted political systems and in particular segmentary social orders such as Somalia’s. Nicole Stremlau has argued that Somalia is more aptly characterised as incorporating “concepts of multiple sovereignties and institutional multiplicity” – a description that is arguably applicable to most societies, to differing extents (Stremlau, 2018, p. 76). Anthropologist Günther Schlee describes Somalia as a ‘regulated anarchy’ (Schlee, 2013, p. 258).

Though Somalia lacks fully functioning state institutions, this does not mean that there are no functioning institutions at all in Somalia. With regard to justice provision, Somalia exists in a state of legal pluralism

(Leite, 2017). Multiple justice mechanisms, normative frameworks and institutions are available to Somalis, with differing histories, capacities and levels of legitimacy.¹⁴

During Somalia's colonisation by British, Italian and French forces, colonial administrations unsuccessfully attempted to suppress legal norms other than the codified law they sought to impose. Most recently, Somalia's legal pluralism endured shifts from colonial administration (late 1800s to 1960) to a brief and chaotic period of democratic governance (1960-69) to an outwardly socialist military dictatorship (1969-91) to authoritarian and repressive policies along clan lines. Throughout, colonial and state structures coexisted uneasily with customary and religious institutions. (Abdile, 2012).

Notwithstanding the immense challenges outlined here and above, *Xeer* is not likely to cede its primacy across communities anytime soon. Nor will it be possible for other institutions to govern without acknowledging and incorporating customary practices. In order to engage with and support reform of the security and justice sectors, it is necessary to understand not only Somalia's pluralist legal landscape and extraverted political order (Hagmann, 2016), but especially the inner workings of *Xeer* and the intricacies of clan and clannism. The Danish Demining Group's engagement with customary institutions presents one of the longest-term external approaches,¹⁵ and feeds into a landscape of justice sector reform actors that is as pluralist as Somalia's justice sector itself.

¹⁴ The fact of legal pluralism in many societies at different stages of industrialisation or recovery from violent conflict has received increasing attention by rule of law practitioners as a condition to be incorporated in justice sector reforms (cf. Tamanaha, 2011).

¹⁵ This introductory piece accompanies a review of DDG's 13-year engagement with Somali customary institutions, which is available on <https://somhub.org> or upon request to DDG.

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Glossary¹⁶

<i>Abbaan</i>	Protector of guests (<i>magan</i>)
<i>Anno</i>	Revenge killing by one clan or sub-clan against another in the absence of <i>mag</i> payment
<i>Aqal</i>	Nomadic hut
<i>Aroos</i>	Wedding
<i>Baaho</i>	Not having food, being hungry, or not having means
<i>Barigooyo/badigooyo</i>	Handing a man's property in its entirety over to the next of kin of the deceased
<i>Birimageydo</i>	Untouchable group, "spared from the spear"
<i>Bud-dhigeyaal</i>	Guarantors
<i>Cod</i>	Vote
<i>Colaad</i>	Hostility
<i>Dabaaldeg</i>	Celebration
<i>Daqar</i>	Usufruct
<i>Deegan</i>	Home territory
<i>Dhaqan</i>	Culture
<i>Dhaqasho</i>	Aspects of <i>Xeer Guud</i> that 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>Dheere (Laan Dheere)</i>	Long (Long branch)
<i>Dhibbane</i>	Victim
<i>Dhig</i>	Aspects of <i>xeer guud</i> that apply to penal matters, including murder (<i>qudh</i>), aggression (<i>qoon</i>) and thievery (<i>tuugo</i>).

¹⁶ With a few minor amendments, this glossary is taken verbatim from (Gundel & Dharbaxo, 2006), which constitutes the basis for DDG's engagement with customary justice mechanisms. Seeing as this essay results from a study that is a continuation of Gundel's and Dharbaxo's initial investigation, the glossary is reproduced here for consistency or terminology.

<i>Dhiig</i>	Blood
<i>Dibaad (Diiqo)</i>	Bride wealth (dowry)
<i>Dibuheshiisiin</i>	Reconciliation
<i>Diya</i>	Same as <i>mag</i>
<i>Diya group</i>	Same as <i>mag</i> paying group
<i>Duco</i>	Blessing
<i>Dumaal</i>	Forcing a widow to marry the brother of her deceased husband
<i>Duq</i>	Elder
<i>Duubab</i>	Same as <i>Guurti</i> , used in Jowhar
<i>Ergo</i>	Envoy
<i>Gaab (Laan Gaab)</i>	Short (short branch)
<i>Gaashaanbuur</i>	Pile of shields
<i>Galti</i>	Guests
<i>Ganaax</i>	Fine
<i>Gar</i>	Making a judgement or decision, or filing a complaint
<i>Gar cadaawo</i>	Cruel judgment
<i>Gar dawo</i>	A <i>xeer</i> proceeding that strictly applies customary law to determine guilt or innocence
<i>Gar sokeeye</i>	Brotherly court
<i>Garniqis</i>	Arbitration
<i>Garo</i>	To understand / to know
<i>Gob</i>	Loosely 'aristocrat,' or 'royal lineage'; also applied as a term of praise to honour those who accomplish admirable deeds that sustain the ideals and values of pastoralists

<i>Godobtir</i>	Forcing a girl to marry the brother or next of kin of a murdered man as an additional asset to <i>mag</i>
<i>Guddi</i>	Committee or <i>ad hoc</i> panel of arbitrators
<i>Guddoomiye</i>	Chairman
<i>Guri</i>	Hosts
<i>Guurti</i>	Council of elders
<i>Hoola tiris</i>	Animal stock counting
<i>Jiffo</i>	Closer lineage, literally the metal ferule at the base of a spear
<i>Jiffo Wadaag</i>	Of the same Jiffo
<i>Khilaaf</i>	Conflict
<i>Ku daghmay</i>	Right by citizenship
<i>Ku dashay</i>	Right by birth
<i>Laan</i>	Branch
<i>Madani</i>	Neighbourhood-based 'vigilante groups' which arm themselves to provide for local security.
<i>Mag</i>	A main principle of <i>xeer</i> , this is the 'blood compensation' paid by one <i>mag</i> group to another, usually in the form of camels.
<i>Mag paying 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>Mag Dheere</i>	The 'greater blood wit'
<i>Magan</i>	Protected guest
<i>Mahar</i>	Husband's personal gift to his bride
<i>Malaq</i>	Elder / council of elders for Digil Mirifle (plural: <i>malaqyada</i>)

<i>Markhaati</i>	Witness
<i>Masalaxo</i>	A <i>xeer</i> proceeding that focuses on mediation to identify a solution that is acceptable to all parties
<i>Maslixid</i>	Mediation
<i>Mooryaan</i>	Bandits or uncontrolled militia
<i>Muddo iyo Madal</i>	Date and venue
<i>Nabadoon</i>	“Peace-seeker”, community elder
<i>Oday</i>	An elder or elderly person
<i>Qaadi</i>	Judge
<i>Qabiil</i>	Clan
<i>Qabno</i>	To have something...
<i>Qnac</i>	Acceptance of a verdict
<i>Qoordhiibasho</i>	Commitment to accept whatever will be the jury’s judgement
<i>Qoys</i>	Sets of families
<i>Reer</i>	Settling and moving together
<i>Samadoon</i>	“Well-wisher”, community elder among Digil Mirifle
<i>Shahad</i>	Solicitation of financial and material support by Somali traditional elders
<i>Shir</i>	Council, meeting
<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>Tol</i>	Not so close lineage, agnatic kinship, lineage
<i>Tub</i>	Path

<i>Tub Fur</i>	“Opens a new path/new way, takes the initiative” – to elect a new elder not from the father’s lineage
<i>Tub Haye</i>	“Keeps going on the same path”- To inherit authority, taking experience from one’s father
<i>Tub Xir</i>	“Closed path”—Refers to a situation in which one’s father was an elder, but the son cannot lead because his personal attributes do not meet expectations and criteria
<i>U dashay</i>	Right by blood
<i>Ulema</i>	Religious leader
<i>Wadaag</i>	Together, in concert
<i>Waxgaraad</i>	Wise men
<i>Xaajo yaqaan</i>	Man with good problem-solving skills
<i>Xaal</i>	Payment of nominal material penalties
<i>Xaas, Raas,</i>	Nuclear family
<i>Xarig</i>	Rope
<i>Xeer</i>	Customary law, contract, treaty
<i>Xeer Beegti</i>	Jury, those who are expert in <i>xeer</i>
<i>Xeer begti</i>	Respected and qualified elders who are entrusted to maintain knowledge of applying <i>xeer</i>
<i>Xeer dhaqan</i>	Social (civil) code
<i>Xeer dhiig</i>	Blood (criminal) code
<i>Xeer gaar</i>	Specialised norms 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> that are generally applicable across all Somali clans and regulate day-to-day social life, civil and penal matters and dispute settlement

<i>Xiddo</i>	Tradition
<i>Xidid</i>	Affines (relatives by marriage)
<i>Xididtinimo</i>	Marriage link
<i>Xigsiisan</i>	Forcing a sister of a deceased wife to marry the widowed husband
<i>Xilo fur</i>	Swearing to divorce one's wife
<i>Xissi</i>	The most fundamental stipulations of <i>xeer</i> for which unquestioned historical precedent exists.
<i>Yarad</i>	Bride wealth (dowry) given to affines

Poem on Clan and Clannism

Cumar Cabdinuur Nuux 'Nabbaddoon'¹⁷

Clan and I (*Aniga iyo Qabiil*)

Clan and I had a discussion and disagreed with each other.
I am without a nation because of what you have caused: collapse, flight, and disaster.
In the continents I reside now, I am naked because of you.
Do you not acknowledge that I have been set back a century and a half?

A Muslim people sustains a nation with education and the pen,
but writing and arithmetic have lost their importance a long time ago.
The gun has replaced them, children no longer have pens.
Do you not acknowledge that I have been set back a century and a half?

When you undermined the economy and destroyed its value
and you locked some people up together, forcing others to go elsewhere,
you took for yourself the role that Nation would have played.
Do you not acknowledge that I have been set back a century and a half?

Of our beautiful centuries-old cities,
some you destroyed while other ones suffer from neglect.
I am lucidly aware of what I am against,
but I am no longer sure whether I am watching a movie or am already in my grave.

The city has no regulations and no one does any work.
For quite a while its garbage and rotten-smelling trash have not been removed.
Tuberculosis and typhus have befallen its pretty girls.
Do you not acknowledge that I have been set back by a century and a half?

Because of you, Clan, paternal and maternal relatives have come to hate each other.
Because of you a family sleeping peacefully is blown up
and a kin group that has done no wrong slaughtered.
Will you not go to hell for this? I will not join you there.

Then Clan said: Now I, who loves clan, take the word.
I do not mean to wrong you, but to tell the truth and stop you in your tracks.
You are ranting and digging yourself into a hole.
While you destroyed the nation, you are blaming me.
Let me explain your mistakes to you, take my advice.

Except for your clan, you despise and hate everything.
You are the one carrying the guns and bombs.
You are the one who follows the lead of warlords and accept what they say.
Do you not admit that you are Clan?

An eye for an eye, and this is true,
is mentioned in the Qur'an and is not clan talk,
but you reject God's law and go another way.
"I must punish you for your wrongdoing," you say, "and cut your throat."

¹⁷ Taken from Kapteijns, 2013, p. 45-47.

You go abroad, to rotten foreign lands.
You help the warlords and send them supplies.
You are collecting clan payments and contributions that cause havoc.
Do you not admit that you are Clan?

A nation without strong leadership,
which discriminates on the basis of clan and
without guiding laws is a shambles.
Once, you content yourself with such a flawed set up and important anger,
what can I do your you?
Do you not deserve bad things?

...

You, who come after me, take this wisdom as legacy.
Keep nation and clan separate; do not surreptitiously mix up the two.
Discern what is wrong and evil, and do not deceive yourselves.
Do not look for a logic that can render light and dark the same.

Follow God's word and value peace.
Take guidance from the law laid down by Abu Qaasim.
Ask for God's forgiveness and stop this agitation.
At the time of Judgement, there will be a reckoning in scorching flames.
Listen, all of you! When your soul will be taken to its grave,
your lips will form only one sound: laughter or lament.