

THE EXPANDING ACCESS TO JUSTICE PROGRAM IN SOMALIA (EAJ)

ACCESS TO JUSTICE ASSESSMENT TOOL



SOMALIA BASELINE STUDY: 2020

LEGAL REVIEW



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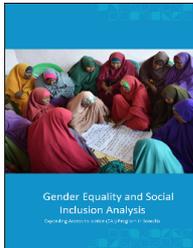
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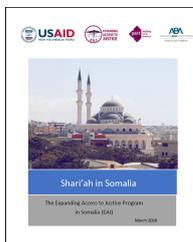
PUBLICATIONS

The Expanding Access to Justice Program produces knowledge products that include research reports on important aspects of Somalia's justice institutions and evaluations, for which this Baseline Study aims to set benchmarks. These publications are available via:

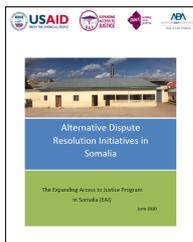
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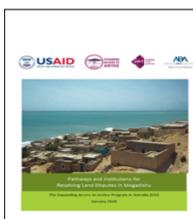
Erica Harper (2020). *Gender Equality and Social Inclusion Analysis*. Expanding Access to Justice Program, American Bar Association & Pact Kenya.



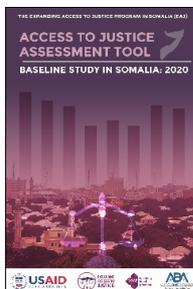
Abdirizak Ahmed, Sagal Ali, Erica Harper, Tanja Chopra & Robin Mydlak (2020). *The Shari'ah in Somalia*. Expanding Access to Justice Program, American Bar Association & Pact Kenya.



Joakim Gundel (2020). *Alternative Dispute Resolution Initiatives in Somalia*. Expanding Access to Justice Program, American Bar Association & Pact Kenya.



Joakim Gundel (2020). *Pathways and Institutions for Resolving Land Disputes in Mogadishu*. Expanding Access to Justice Program, American Bar Association & Pact Kenya.



Robin Mydlak (2020). *Access to Justice Assessment Tool – Baseline Study for Somalia*. Expanding Access to Justice Program, American Bar Association & Pact Kenya.

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INTRODUCTION

Since its establishment in 2012 after a long period in which Somalia lacked central governance, the Federal Government of Somalia (FGS) has aimed to establish peace, law and order, and public institutions. However, bouts of high-intensity conflict and other challenges have strained the capacity of these institutions to uphold their mandates and responsibilities. Ongoing insecurity has hampered efforts to address sexual and gender-based violence (SGBV), urban land distribution and management and conflict resolution. The International Organization for Migration (IOM) estimates that 2.6 million Somalis have been internally displaced by drought, insecurity, and floods.¹ Gender inequality, narrow gender-based roles, and lack of women's representation are prevalent in Somali society. Internally displaced women and girls have been particularly vulnerable to sexual violence.²

Legal infrastructure remains one of the weakest aspects of governance in Somalia. Great efforts and investments are needed to cope with the proliferation of sophisticated social disputes, such as competition over the control and ownership of land. Effective institutions engaged in political reconciliation could better regulate and settle land conflicts and SGBV cases, both of which hold strong potential for inter-clan violence. The FGS faces the challenge of working to harmonize existing statutory and customary dispute resolution mechanisms and enable them to effectively address complex legal issues. Integrating international and Islamic human rights standards into Somalia's legal frameworks could improve current legal practices that aim at the protection of individual rights and provide more effective pathways of supporting survivors of SGBV.

The purpose of this review is to present information on two main issues: the complex position of land reviews in the current legal processes and the status of women in Somalia, specifically in Mogadishu, Baidoa and Kismayo, and the social forces behind the occurrence of SGBV. The analysis provided in this review is based on reporting from the field as well as desk research. This review was drafted to complement the Expanding Access to Justice (EAJ) Program's Access to Justice Assessment Tool (AJAT) Baseline Study on Somalia.

SUMMARY FINDINGS

General

- As is common elsewhere in Africa, Somalia maintains a pluralistic justice system.
- Among the three legal frameworks that exist in Somalia (statutory, customary/*xeer* and shari'ah), *xeer* is dominant.
- Somalia's legal infrastructure is weak and fragmented due in large part to the absence of a functioning central government.
- Women and minority groups are generally excluded from decision-making processes.
- IDPs are vulnerable to many forms of marginalization, including within legal processes.

Land matters

- There is no focused or robust land-related legal framework.
- Approaches to land disputes within and between institutions are incoherent.
- In general, municipal authorities are mandated to manage land distribution while the Ministry of Public Works is tasked with technical planning and design.

¹ "Internally Displaced Persons," IOM, UN Migration, 2019.

² UNDP Somalia, "Gender in Somalia," Retrieved from: www.so.undp.org, Viewed On 29, no. 09 (2013): 2014.

- Formal and Informal institutions engage in resolving land dispute cases, but the government is the only legitimate enforcer of formal outcomes.
- Despite the inequalities engrained in the customary processes, the *xeer* is the strongest and most accessible dispute resolution mechanism in Somalia.

SGBV

- SGBV cases occur at higher rates in South Central Somalia than other regions such as Puntland.
- SGBV legal frameworks are weaker in South Central Somalia than in other regions such as Puntland.
- Women and IDPs suffer from SGBV at higher rates than other societal groups.
- Legal frameworks aimed to address or prevent SGBV are non-existent or weak.
- Somali society places great trust in traditional methods of resolving SGBV cases.
- Shari'ah principles encompass the firmest punitive measures against SGBV violations.
- The UN and the international community expend vast funds and efforts to create better justice platforms to enhance the protection of vulnerable individuals and communities.

SOMALIA'S LEGAL SYSTEM

Power distribution and clan representation within the FGS is based on a unique system known as the '4.5 Formula,' which emerged from the 2002 Mbagathi Accord.³ The federal system introduced in 2012, which remains politically contested, has allowed federal member states (FMSs) the right to maintain their own policies and pursue regional advancement. Although it is the cornerstone of the Provisional Constitution of 2012, federalism is often poorly understood by both its supporters and its detractors.

Somalia's constitution assigns powers and roles to state and federal functionaries and mandates them to work for the benefit of the Somali people.⁴ The formation of a federal framework began with the Mogadishu Peace Conference in 2002.⁵ Since the FGS was established in 2012⁶, it has focused its efforts on developing laws and regulations and reconstituting institutions that dissolved following the collapse of the central government in 1991.

The Somali legal system is pluralist. In addition to statutory law, the *xeer* represents a complex set of customary norms and rules that govern intra and inter-clan relationships and are used to resolve disputes within and among clans.⁷ Both constitution and some customary institutions are based on Islamic shari'ah. Somalis largely adhere to the Shafi'i school of Sunni Islam. Laws introduced by colonial authorities before 1960 also continue to

³ Ken Menkhaus, "Elections in the Hardest Places: The Case of Somalia", *J. Democr.* 28 (2017):4.

⁴ John O McGinnis & Ilya Somin, "Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System," *Nw. UL Rev.* 99 (2004): 89.

⁵ Jason Mosley, "Somalia's Federal Future Layered Agendas,Risks and Opportunities," Chatham house the royal institute of international affairs/ Africa program 2015, 4.

⁶ United States Agency for International Development (USAID) under the Human Rights Support Mechanism (HRSM), "Rapid Mapping of the Justice Sector in Somalia and Somaliland -Expanding Access to Justice Program (EAJ)," 2019.

⁷ Anna Bowden & Abdikarim Gole James Burman, "Land Tenure in Somalia A Potential Foundation for Security and Prosperity," 2014.

prevail.⁸ The Provisional Constitution accepts shari'ah as the primary legal framework and declares that all enacted laws must comply with shari'ah principles.⁹ The Civil Code of Somalia, which originates from the Egyptian civil code system (1947), was introduced in 1976 along with the Civil Procedure Law, based on the Italian model. The Commercial Law borrows heavily from the previous Italian Civil Code of 1942. Notably, these legal frameworks often fail in the absence of proper guidance or rules of application.¹⁰

The Provisional Constitution sets out the structure of Somalia's judicial system, but it lacks important specifications and details. For example, it mentions that federal courts are the highest courts in Somalia but provides no details beyond the names of courts in each state.¹¹

LAND USE AND OWNERSHIP

Somalia drafted a Land Reform Law in 1960, but it was never adopted. In 1970, Law 67 abolished all personal rights over water or land and all types of concession; all claims over such property were granted to the state. After three years, President Mohammed Siyad Barre signed the Urban Land Disruption Law, which recognized land as public property.¹² Urban lands were then made available for Somali citizens to purchase at a fixed price per square meter, while foreigners were permitted to purchase renewable ownership contracts every 50 to 99 years.¹³

A 1980 amendment to the Urban Land Disruption law divided land ownership into two types: *munishibaale* (temporary ownership) and *duminyaale* (permanent ownership). Individuals who were granted *duminyaale* were required to finish the construction of permanent structures within two years. Individuals who obtained *munishibaale* were required to finish construction of structures within one year. This amendment transferred ultimate authority over land ownership to the Mogadishu municipal government. Article 8 of the law granted all Somalis the right to access land without discrimination, stating that "all Somalis over the age of 18 have the right to equal access to land at a fixed price per square meter unless they already have another plot of land in the city."¹⁴

The national legal framework on land tenure is limited to Article 26 of the 2012 Provisional Constitution, which states, first, that "every person has the right to own, use, enjoy, sell and transfer property" and second, that "the State may compulsorily acquire property only if doing so is in the public interest. Any person whose property has been acquired in the name of the public interest has the right to demand compensation from the State as agreed

⁸ Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City," 2017.

⁹ Provisional Constitution of The Federal Republic of Somalia (2012).

¹⁰ Report commissioned by NRC and UN-HABITAT and funded by UNHCR and UN-HABITAT, "Land, Property, and Housing in Somalia," 2008.

¹¹ USAID under the Human Rights Support Mechanism (HRSM), "Rapid Mapping of the Justice Sector in Somalia and Somaliland -Expanding Access to Justice Program (EAJ)."

¹² Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City."

¹³ "Urban Land Disruption" (1973).

¹⁴ Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City."

by the parties or decided by a court.” The various FMS constitutions differ little. For example, Article 17 of South West State’s constitution states that “every citizen has the right to own property.” Article 23 of Jubaland State’s constitution stipulates that “every citizen has the right to own property, to reside, to enjoy, to sell, and to transfer such property at will.”

Under the Somali Civil Law, a landlord can only evict tenants who violate their leases or other mutual agreements, but this assumes that such agreements exist. It is common in Somalia for formal agreements to be avoided due to the costs associated with the process, which leaves both parties – property owners and tenants – unprotected. Landlords are known to exploit this loophole to take advantage of tenants, evicting them without cause or increasing their rent. The lack of written rental agreements is one reason why lease terms are insecure and tenants are prone to mistreatment in the form of eviction without prior notice.¹⁵

Land in Somalia is often subject to illegal grabs or occupations due to ineffective formal laws, the weak capacity of courts, inconsistencies in the implementation of customary rules and the lack of adequate legal frameworks. Formal rules of land ownership have not been properly applied since the collapse of the central government in 1991. Land disputes are resolved according to their complexity and what type of legal pathway—civil, customary or Shari’ah—is most readily available in the specific situation. The practical integration of these multiple legal frameworks has caused many setbacks due to a lack of mutual understanding.¹⁶

TYPES OF LAND DISPUTES

Land disputes are at the crux of many conflicts, especially in the southern regions of Somalia.¹⁷ The nature of traditional practices has meant that land possession and management is not straightforward.

Land grabbing is a common practice in rural and urban areas. In rural areas, conflicts and institutional weaknesses have eroded many of the customary agreements relating to land use and ownership.¹⁸ Abusing their power, government officials have grabbed public land, often land that is occupied by minority, poor or vulnerable groups who are unable to defend themselves due to their status.¹⁹

The basis of land disputes varies widely. Many cases involve Somali citizens from the diaspora, whose absence from the country attracts others to illegally occupy their land. Upon returning from their homes abroad, many diaspora members who fled violence and conflict attempt to restore their ownership and occupation of the lands they lost during the civil war.

¹⁵ Charlotte Bonnet, Mohamed A. Mohamoud, Erik Bryld and Christine Kamau, “Accessing Land and Shelter in Mogadishu: A City Governed by an Uneven Mix of Formal and Informal Practices-Shelter Provision in East African Cities: Understanding Transformative Politics for Inclusive Cities: City Briefing,” 2019.

¹⁶ Report commissioned by NRC and UN-HABITAT and funded by UNHCR and UN-HABITAT, “Land, Property, and Housing in Somalia.”

¹⁷ Legal Action Worldwide and the Norwegian Refugee Council, “Housing Land and Property Issues in Somalia: Persons of Concern in Somaliland and South-Central Somalia,” 2014.

¹⁸ USAID under the HRSM, “Gender Equality and Social Inclusion Analysis-Expanding Access to Justice (EAJ) Program in Somalia,” 2017.

¹⁹ USAID under the Human Rights Support Mechanism HRSM, “Pathways and Institution for Resolving Land Dispute in Mogadishu- Extending the Justice Program in Somalia (EAJ),” 2020.

Some landowners take advantage of the weak legal system in South Central Somalia and withdraw at will from agreements with international organizations who are utilizing land to settle internally displaced persons (IDPs).²⁰ IDPs residing in host communities often make informal agreements with landowners, which puts them at risk for illegal eviction.²¹

Although civil laws grant land ownership rights to women, *xeer* often does not comply with these rights and, so, women face difficulties in exercising them at the community level.²²

LAND DISPUTE SETTLEMENTS

Land disputes are managed through the statutory or customary justice system, though consistency is lacking within both justice mechanisms. For land cases related to inheritance, Shari'ah is the primary resolution framework employed.

STATUTORY DISPUTE SETTLEMENT

As stated previously in this report, Somalia lacks an effective legal framework for settling land disputes. The federal Provisional Constitution of 2012 guarantees an equal right to property ownership and states that "property will not be expropriated unreasonably."²³ Article 43 of the Constitution calls for the development of a national land policy that should be subject to constant review.²⁴ However, laws concerning land and land ownership are still inadequate.

Statutory institutions for dispute settlement are weak and the judicial infrastructure has remained underdeveloped since 1991. Access to courts has largely been limited to the cities of Mogadishu, Kismayo, Baidoa, and Beledweyne. The number of cases filed in these courts is low, and the vast majority of cases are resolved through the customary institutions.²⁵ Eighty percent of the disputes brought to the High Court in Mogadishu are land-related, and most are brought after customary processes have failed to resolve them, or after the involved parties have failed to settle them through negotiation.²⁶

CUSTOMARY DISPUTE SETTLEMENT

Ideally, communities should have access to consistent dispute resolution mechanisms. On paper, Somali government authorities have the power and the mandate to provide such services to the communities they represent. However, engaging formal systems often results in protracted case processes, so customary justice practices continue to play a significant role.

The collapse of the Somali central government reinforced the place of *xeer* in Somali society as a means of regulating relations among clans. *Xeer* norms vary from region to region and are constantly evolving based upon precedent set by previous outcomes

²⁰ USAID under the Human Rights Support Mechanism (HRSM), "Gender Equality and Social Inclusion Analysis-Expanding Access to Justice (EAJ) Program in Somalia."

²¹ Report from USAID under the Human Rights Support Mechanism (HRSM).

²² Report from USAID under the HRSM, "Gender Equality and Social Inclusion Analysis-Expanding Access to Justice (EAJ) Program in Somalia."

²³ The Provisional Constitution of The Federal Republic of Somalia.

²⁴ The Provisional Constitution of The Federal Republic of Somalia.

²⁵ USAID under the HRSM, "Rapid Mapping of the Justice Sector in Somalia and Somaliland - EAJ."

²⁶ Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City."

among Somali clans. *Xeer* consists of three main processes for dealing with disputes: negotiation, mediation, and arbitration. Negotiation is the starting point for dispute resolution; mediation proceeds as misunderstandings between parties are clarified; arbitration allows the parties to reach solutions.²⁷ It is essential that all parties engage in customary processes of dispute resolution on a consensual basis.

Xeer is used to settle land disputes based on the concept of belonging to an area of land, which is called *deegaan*. Over the past 50 years, *deegaan* has evolved to define the area of land within which one lives, runs a business, or feels secure due to the presence of his or her clan. Traditional Somali concepts of land rights based on *deegaan* are shaped by the principles of *u dhashay*, *ku dhashay* and *ku khaqmay*.

- *U dhashay*, meaning 'born for', defines the right of individuals to the earth inhabited by one's kin. The principles concern individual right to land, which does not contradict the conceptual frame of *deegaan*, collective homeland, for other parts of the *xeer*.
- *Ku Dashay*, meaning 'born in a place', defines the right to one's place of birth, which extends to the descendants of adopted strangers who may gain full possession by becoming integrated into the host community clan.
- *Ku dhaqmay* applies to individuals who hold a national identity and recognizes property rights for all Somalis regardless of clan or place of birth. It refers to both national and global Somali citizenship.²⁸

Traditional elders play a central role in the application of *xeer* and customary dispute resolution. For example, in Mogadishu, elders are usually the 'entry point' for all legal disputes related to land, meaning elders are the first justice actor approached to begin negotiation over land disputes. However, elders lack the mandate and the power to enforce the decisions that are reached.²⁹

Xeer is the primary mode of justice for Somalis living in rural areas because statutory courts usually are not available or do not function in these areas. The World Bank has estimated that 55.6% of the Somali population is located in rural areas.³⁰ Most of these are dominated by a single clan and cases brought forward to be resolved through *xeer* are processed based on local elders' knowledge of precedence related to that case. Due to a lack of legal land registration systems, and drawing on shari'ah norms and precepts, elders heavily rely on witness testimony when resolving these cases.³¹

Judicial precedents are the basis of all *xeer* cases, and *xeer* branches into more universally applied precepts on what could be called criminal cases (*xeer Guud*) and regulations for local economic production and livelihood assets (*xeer Gaar*). Due to communal acceptance of the principles and precedents within the *xeer* as interpreted by elders, the enforcement of most land dispute cases is easiest when community and clan leaders are involved as compared to when verdicts originate from the courts. The degree of acceptance of verdicts depends on the clans' composition and cohesion.

²⁷ Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City."

²⁸ USAID, "Pathways and Institution for Resolving Land Dispute in Mogadishu- Extending the Justice Program in Somalia (EAJ)," 2020, 11.

²⁹ USAID.

³⁰ USAID under the HRSM, "Rapid Mapping of the Justice Sector in Somalia and Somaliland - EAJ," 10.

³¹ USAID, "Pathways and Institution for Resolving Land Dispute in Mogadishu- EAJ."

There is a degree of coexistence between the statutory and customary justice institutions, and elements of shari'ah prevail in both. Cases are typically brought to the statutory courts after *xeer* fails to settle them, and shari'ah is typically applied to inheritance cases. While some elders such as the *malakh* in Baidoa stress that they apply shari'ah in their decision-making pertaining to all issues including land disputes, in practice they do not use Islamic law to resolve land issues. Instead, they utilize general Qur'anic principles such as the importance of trustworthy witnesses. Within the tenets of Islam, land is owned by Allah and the Imam or government is responsible for managing it. No individual can use a piece of land unless permitted by the Imam.

Courts or judges may refer cases to elders if they feel they are unable to manage the case, or if both parties agree that the decision made in a customary setting would be more beneficial to them.³² There are risks to this type of cooperation and there are sometimes inconsistencies as cases are bounced between different justice systems. Depending on the legal setting of a case, its outcomes might fall within a wide range of possibilities.

In order for communities to access justice, many have organized conflict resolution committees made up of community members.³³ For example, in Baidoa, a land dispute resolution committee comprising individuals from different divisions of the municipality was formed by the mayor in 2018 in response to a growing number of land-related cases that had exhausted all other informal communal processes without resolution. There are also communal committees that include a representative sample of traditional elders, youth, women, sheikhs, and IDPs. Communal committee members have been given the task of identifying and resolving different cases that arise among community members.

The communal committee utilizes Somali customary law. If it is unable to resolve a case, the municipal land dispute committee takes over the process, renders a final verdict, and ensures the execution of the desired outcome at the local government level. However, the outcome of this committee has no legal basis, and the disputants may be referred to participate in a statutory litigation process at the courts. Community representatives interviewed for this study found that the community is satisfied with this interconnected process where cases usually do not end up in the statutory courts.³⁴

Case Study – dispute settlement committee

On 17 August 2014, a gatekeeper in an IDP settlement in Baidoa unlawfully expelled six women who had received shelter from the Norwegian Refugee Council (NRC) because they refused to pay rent. One of the women reported the case to the NRC office. Both parties ultimately agreed that the dispute settlement committee consisting of community elders and IDP leaders should investigate the case. After hearing the arguments of both parties, the committee decided that the gatekeeper had violated the collective land agreement and failed to protect the housing, land, and property

³² Report commissioned by NRC and UN-HABITAT and funded by UNHCR and UN-HABITAT, "Land, Property, and Housing in Somalia."

³³ USAID, "Pathways and Institution for Resolving Land Dispute in Mogadishu- EAJ."

³⁴ Legal Review interview with the former Mayor of Baidoa and Director of durable solution and urban resilience

This model of community mobilization effectively allows the wider community access to justice in land disputes.³⁵ In addition to the settlements these committees reach, they also contribute to land design and planning processes and community needs assessments, and cooperate with funding agencies to avoid duplication in land development and distribution for vulnerable groups.³⁶

VULNERABLE AND MARGINALIZED GROUPS

The use of *xeer* in settling disputes may deprive the most vulnerable populations, such as minority groups, women, and IDPs, of justice, as they have limited access to representation – especially influential elders – in order to negotiate fair deals on their behalf.³⁷ According to a 2013 UN survey, poor people were the most affected group in terms of land ownership issues, followed by minorities and IDPs. Although women as a category did not appear to be among the most affected, they formed the majority of those who were listed as ‘other group’ within the affected categories.³⁸

Both *xeer* and statutory courts are known to protect the interests of adult males in Somalia. Most marginalized people, including members of minority clans and women, are protected under both shari’ah and statutory law, but the application of these laws is insufficient. Judges, prosecutors, attorneys, and police are not trained and lack sufficient resources. Their ability to implement the laws is wanting.³⁹ There is steep competition among powerful stakeholders over control of land.

The FGS calls upon district administrators and commissioners to ‘closely cooperate’ with the Federal Ministry of Interior in land planning and implementation. However, in September 2013, the Benadir Regional Administration (BRA) enacted a temporary legal framework (BRA Law 3.3) to assert responsibility for the development of policies and laws protecting the rights of vulnerable groups and improving access to urban land for these groups, namely the poor, youth, women, IDPs, and people with disabilities.⁴⁰

Powerful individuals, including major clan elders and those with connections to power, often abuse the rights of marginalized groups. The three primary obstacles for such groups in accessing justice are:

- discrimination due to group status,
- corruption within statutory and customary institutions, and
- a lack of enforcement of judicial decisions.

The customary system also renders it difficult for minority clans and ethnic groups to assert their rights. Minorities make up 30% of the Somali population. Within the 4.5 power-sharing formula that the federal government follows, the four largest clans (Hawiye, Darood, Dir, and Digil-Mirifle) each take an equal share of positions. Other clans and groups fall within the 0.5 designation. Minority groups include IDPs who are not part of a dominant clan and

³⁵ USAID, “Pathways and Institution for Resolving Land Dispute in Mogadishu- EAJ.”

³⁶ Legal Review interview with the former Mayor of Baidoa and Director of durable solution and urban resilience

³⁷ USAID under the HRSM, “Rapid Mapping of the Justice Sector in Somalia and Somaliland - EAJ.”

³⁸ supported by USAID under the HRSM.

³⁹ USAID under the HRSM, “Gender Equality and Social Inclusion Analysis- EAJ Program in Somalia.”; USAID, “Pathways and Institution for Resolving Land Dispute in Mogadishu-

⁴⁰ Rift Valley Institute and the Heritage Institute for Policy Studies, “Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City.”

clans that are large in population but own less land in a particular settlement. Other methods of determining such belonging are based on residence in a specific district, meaning that the majority and minority label can change based on location. Most minorities in South Central Somalia belong to IDP settlements in Mogadishu and other urban centers.⁴¹

Compared to majority clans in South Central Somalia, minorities face widespread land and property looting. Somali Bantu, Arab descendants, and the Midgaan are among the main marginalized minority groups.⁴² Minority clans, especially the Bantus and Arabs, are subjected to severe discrimination in *xeer* decision-making processes. Sometimes, minority landowners whose land or property was illegally grabbed in Mogadishu must pay a fee to the looters who occupy their property before an order is made for this land to be returned to them.⁴³

Somali culture, religion, and political structures are also male-dominated and male-controlled. Women depend upon male relatives and usually need a man to support, represent and accompany them to the courts. Within Somali customary laws, the inheritance rights of women are often ignored and greater credibility is given to inheritance claims made by men.⁴⁴

Women in South Central Somalia are discriminated against and have little access to justice. For instance, women in Dollow district must bring their cases to be resolved through customary means, because if they go to statutory courts, elders and clan chiefs often intervene. It is a standard occurrence for women to be prevented from taking cases to court unless the *xeer* process has failed three times to resolve the case.⁴⁵ Some women are also subjected to violations of housing, land and property ownership laws, especially as relates to illegal land grabbing and inheritance deprivation.⁴⁶ Educated women from well-known or wealthy families, including women associated with powerful individuals holding political office, usually face fewer obstacles. However, the vast majority of women are uneducated or do not come from strong clans, so they have few options for accessing justice.⁴⁷ Women's treatment also varies from region to region, as different regions maintain different practices, attitudes, and rules as pertains to women's land cases. For instance, practices in South West State are often harsher on women than in other regions.

Statistics from 31 December 2017 show over 825,000 Somalis as internally displaced by conflict or environmental hazards.⁴⁸ In Mogadishu live about half a million IDPs – the largest concentration in Somalia and 20% of all IDPs in the country. The study shows that areas of Mogadishu occupied by IDPs increased by 16% between 2013 and 2017, while in Kismayo

⁴¹ Report from USAID under the HRSM, "Gender Equality and Social Inclusion Analysis- EAJ Program in Somalia."

⁴² Information Commissioner's Office, "Guide to the General Data Protection Regulation (GDPR)," *iso*, 2018, n/a, <https://doi.org/10.1111/j.1751-1097.1994.tb09662.x>.

⁴³ Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City."

⁴⁴ Christine Kamau, "Accessing Land and Shelter in Mogadishu: A City Governed by an Uneven Mix of Formal and Informal Practices-Shelter Provision in East African Cities: Understanding Transformative Politics for Inclusive Cities: City Briefing."

⁴⁵ Syn, Housing, Land and Property rights for Somalia's urban displaced women.

⁴⁶ Report from USAID under the HRSM, "Gender Equality and Social Inclusion Analysis- EAJ Program in Somalia."

⁴⁷ USAID, "Pathways and Institution for Resolving Land Dispute in Mogadishu- EAJ."

⁴⁸ Report from USAID under the HRSM, "Gender Equality and Social Inclusion Analysis- EAJ Program in Somalia."

the IDP population increased sevenfold and in Baidoa increased threefold.⁴⁹ Although the Somali government and international actors are developing policy solutions for IDPs, they have yet to come up with durable and permanent solutions.⁵⁰

Although host communities generally tolerate the presence of IDPs because they benefit from the pool of cheap and unskilled labor, they treat IDPs as outsiders and grant them only limited rights. IDPs are usually allowed to settle on land owned by individuals, groups, or private companies. They face pressures from landowners and are not party to customary dispute settlements.⁵¹ Growing demand for land in Mogadishu has increased IDPs' vulnerability and the rate of mass evictions from settlements.⁵² Due to corruption in the courts, IDPs' rights are often ignored and they are subject to unjust treatment. Most of the time, IDPs rely on gatekeepers from powerful clans to provide them with legal protection.⁵³

The FGS is making progress on the development of legal regulations for IDPs. A National Policy on Refugees, Returnees and IDPs was adopted on 14 November 2019. These regulations were developed with the support of the International Development Law Organisation (IDLO), which has been working with the FGS and FMSs since 2017.⁵⁴ For the first time, the FGS has recognized its responsibility to find durable solutions for returnees and IDPs. This new law restricts landlords from conducting arbitrary and unlawful evictions of IDPs, which have become common practice in recent years.⁵⁵

SEXUAL AND GENDER BASED VIOLENCE

Somalia's decades of protracted conflict severely damaged most public institutions including the justice infrastructure, caused massive physical and emotional tribulations and enabled countless predatory acts toward women. Though Somalia's customary practices contain a number of protective features related to women's rights, circumstantial and dynamic-driven vulnerabilities remain, especially for women who belong to marginalized communities. Somali women face acute and persistent challenges in many aspects of their lives.

Globally, Somalia ranks poorly on measures of gender equality and exhibits elevated levels of maternal mortality, rape, female genital mutilation (FGM), violence against women and girls, and child marriage. Additionally, Somali women have a low level of participation in decision making processes and weak political representation.⁵⁶ Somalia is still dealing with

⁴⁹ Report Regional Durable Solutions Secretariat (ReDSS) and the World Bank Urbanization Review, "Somalia Urban Review Land Administration and Governance Challenges of Rapid Urbanization and Forced Displacement in Somalia (Kismayo, Mogadishu, Baidoa)," n.d.

⁵⁰ Mark Yarnell, "Durable Solutions in Somalia MOVING FROM POLICIES TO PRACTICE FOR IDPS IN MOGADISHU," 2019.

⁵¹ USAID, "Pathways and Institution for Resolving Land Dispute in Mogadishu- EAJ."

⁵² Rift Valley Institute and the Heritage Institute for Policy Studies, "Land Matters in Mogadishu Settlement, Ownership and Displacement in a Contested City."

⁵³ USAID, "Pathways and Institution for Resolving Land Dispute in Mogadishu- EAJ."

⁵⁴ International Development Law Organization (IDLO), "Somalia launches first policy on displaced persons, refugee-returnees," n.d.

⁵⁵ International Development Law Organization (IDLO).

⁵⁶ UNDP Somalia, "Gender in Somalia," *Retrieved from: W/vw. so. Undp. Org, Viewed On 29, no. 09 (2013): 2014.*

conflict, and mass rape and other violent acts against women are commonly used as weapons to intimidate opponents.⁵⁷

SGBV constitutes a breach of the fundamental rights to life, liberty, security, and dignity, as well as the principles of equality between women and men, non-discrimination, and physical and mental integrity.⁵⁸

SGBV is rooted in gender inequality and is often tolerated or condoned by laws, institutions, and communal norms.⁵⁹ Somali legal frameworks pertaining to sexual and gender-based violence (SGBV) differ greatly from international standards, and they are weak and incoherent. From a legal perspective, Somali approaches to SGBV give little attention to international standards of human rights and gender equality. Rather than viewing sexual violence as a violation of the victim's bodily integrity, community and family dignity are emphasized.⁶⁰

Despite the combined efforts of national and international stakeholders to ease the suffering SGBV causes vulnerable individuals and groups, SGBV continues to pose risks to the lives, safety, and dignity of groups, such as IDPs in Mogadishu and surrounding areas. Vulnerable groups such as IDPs, women and unaccompanied children are at a disproportionate risk of experiencing human rights abuses.⁶¹ Displaced Somalis who have fled to Mogadishu are continuously subjected to a wide range of human rights abuses including SGBV, ethnic discrimination, physical violence, and restrictions on access to food, shelter, and freedom of movement.

LEGAL PERSPECTIVE ON SGBV

Somalia's pluralistic legal system has contributed to a lack of coherent legal and technical interoperability regarding SGBV, leading to uncertainty regarding outcomes. Somalia's unsystematic, heterogeneous, and fragmented legal norms and practices, combined with deep-rooted internal antagonisms, jeopardize the current efforts of the FGS, various UN and international agencies, activists, and other stakeholders in addressing SGBV crimes. Due to the weakness and corruptibility of the formal justice system, SGBV victims typically seek justice from traditional elders who apply patriarchal norms.⁶²

Somalia's statutory and customary institutions are in permanent competition, but elders prevail with regard to SGBV. The extent of their interaction and the roles each should play in a given jurisdiction complicates the process of handling SGBV cases. In the existing pluralistic system, *xeer* is the most widely accessible dispute resolution mechanism.⁶³ Violence against women and girls is generally addressed through *xeer*, though it has become clear that customary procedures do not address the individual rights of the survivor and the individual criminal responsibility of the perpetrator.

⁵⁷ Margareth Etienne, "Addressing Gender-Based Violence in an International Context," *Harv. Women's LJ* 18 (1995): 139.

⁵⁸ UN General Assembly, "Universal Declaration of Human Rights," *UN General Assembly* 302, no. 2 (1948).

⁵⁹ Sarah Bott, Andrew Morrison, and Mary Ellsberg, *Preventing and Responding to Gender-Based Violence in Middle and Low-Income Countries: A Global Review and Analysis* (The World Bank, 2005).

⁶⁰ CISP, "The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia," 2017.

⁶¹ Ifrah Ahmed et al., "4.12 Somalia-Sexual Violence in Mogadishu: Ending Impunity Is Far from Reality—Research," *FEMICIDE*, 2015, 114.

⁶² Ugaaso Hussein Barre, "Sexual and Gender Based Violence against Internally Displaced Women in the Camps of Mogadishu, Somalia" (OsloMet-Oslo Metropolitan University, 2018).

⁶³ CISP, "The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia," 2017.

Article 34:1 of the Somalia Federal Provisional Constitution gives every person the right to file a case before a competent court, yet many women only have access to *xeer* practitioners, which violates this right. Article 34:3 reads that “every person is entitled to defend him or herself from the case he or she is party to, whatever the level or stage of the proceedings may be,” and outlines the right to a legal defense. Furthermore, the Constitution in Article 39:3 grants any third party (individual or organization) the right “to protect the rights of others who are unable to do so for themselves.” Though the Somali Penal Code of 1962 criminalizes rape (“carnal intercourse”), sexual violence, and forced prostitution, it does not align with international law in addressing SGBV.

In response to the need to address SGBV cases, on 30 May 2018 the Somali Council of Ministers approved and adopted the Sexual Offences Bill, which provides more rights-based redress to SGBV violations. The bill covers sexual offences against adults and children, abuses of trust and authority, proper investigative steps, sentencing, and implementation of the bill. It proposes the formation of a joint inter-ministerial committee and production of a national framework— neither of which have come to fruition at the time of this writing.

In a press statement regarding the approval of the Sexual Offences Bill, the Council of Ministers displayed pride in what had been accomplished:

“This Bill is the first piece of legislation in Somalia which criminalizes a wide range of sexual offences including rape, gang rape and sexual assault. It prioritizes the protection, rights and needs of survivors of sexual violence; comprehensively criminalizes all sexual offences; provides clear sentencing guidelines for judges; re-enforces human rights already guaranteed to all Somalis under the Provisional Constitution; and it transforms the current procedure for taking sexual offences cases in Somalia, which leaves most survivors without tangible legal avenues for accessing justice.”⁶⁴

Article 29 of the Provisional Constitution stipulates the rights of children, albeit abstractly, and requires the FGS and FMSs to adopt more specific laws regarding the protection of children’s rights. Article 16:1 of the Jubaland Constitution specifies that women are granted human rights, economic rights, political rights, and freedoms stipulated in the Islamic Shari’ah. Article 16:3 prohibits FGM. Beyond these articles, there are no specific laws or bills relating to SGBV in Jubaland or South West State.

These commitments notwithstanding, Somalia continues to utilize long-practiced customary norms for SGBV violations. *Xeer* commands a high level of social authority, although statutory and shari’ah courts are better suited to cases requiring rights-based solutions. Sexual offences in the statutory framework constitute criminal cases that are punitively punishable only under criminal litigation for going against the public interest.

In IDP camps, obtaining legal remedies has become a consistent issue for women and girls due to the lack of access to statutory institutions at these sites.⁶⁵ The statutory courts are weak, particularly in Jubaland and South West State. They suffer from a lack of professionally trained legal practitioners and a variety of other challenges.

Awareness of SGBV crimes and how to report them is relatively low. Many survivors are reluctant to report rape or sexual violence due to social stigmata and norms that disincentivize reporting and speaking about suffering, which cause women to fear

⁶⁴ Legal Action Worldwide, ‘Press Statement: Bill Criminalising Sexual Offences approved by the Council of Ministers in Somalia’

⁶⁵ Somalia, “Gender in Somalia.”

retaliation from perpetrators. In order to institutionalize a justice system that adequately addresses these violations, it is essential to foster an environment that incentivizes community members to report crimes and unlawful activity and to support the shaping of apt legal instruments for the integration and harmonization of different justice mechanisms.

GLOBAL INSTRUMENTS AND THE SOMALI PERSPECTIVE

In 1985 Somalia signed and ratified the African (Banjul) Charter on Human and People's Rights, and in 2006 it signed – but did not ratify – the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol. Somalia has also signed and ratified the following international instruments:

- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- The Optional Protocol to the International Covenant on Civil and Political Rights
- Convention of the Rights of the Child
- International Convention on the Elimination of all forms of Racial Discrimination

Somalia is not a signatory to the following instruments:

- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1981 (stipulating a basis for realizing equality between women and men by ensuring women's equal access to opportunities in political and public life – including the right to vote and to stand for election – as well as education, health and employment).
- The United Nations Declaration on the Elimination of Violence against Women, adopted in 1993 (covering physical, sexual and psychological violence as well as violence suffered by women both at home and elsewhere in society).
- The United Nations Security Council Resolution 1325 (2000) (emphasizing the responsibility of states to end impunity for crimes against humanity and war crimes, including sexual and other forms of violence against women and girls. SCR 1325 was followed by a number of UN resolutions reaffirming it).

WOMEN IN ISLAM AND THE “UNPRACTISED PRINCIPLES”

Islam is solicitous of the wellbeing and development of women. The Prophet Muhammed (PBUH) was explicit that women should be treated well. In the Bukhari – amongst other works – he said: *“fear Allah in respect to women and concern yourselves with their welfare.”* Islam was of the earliest religions to advocate for women and forbid the killing of infant girls. Affected communities murdered the female children, often by live burial, as they saw them as bringing disgrace. The Qur'an's earliest revelations state that Islam forbids infanticide and warns that such crimes will be answered for on Judgment Day: *“On this, Allah, the most exalted, said, ‘and when the buried girl will be asked for the crime she committed to deserve murder.’”* In the time of the Prophet (PBUH), soldiers often sought to humiliate male enemy soldiers by raping their wives and daughters – a practice that continues in conflicts today.

In shari'ah, sexual violence is defined within the framework of *zina*, which covers sexual intercourse outside of the confines of marriage. Surat An-Nur, verse 2, explains the punishment of *zina* as follows:

Those who fornicate – whether female or male – flag each one of them with a hundred lashes and let not tenderness for them deter you what pertains to Allah's religion, if you do truly believe in Allah and the Last Day; and let a party of believers witness their punishment. (24:2)

Islamic Shari'ah is drawn from two main sources: the Qur'an and Sunnah/Hadith. If an incident of rape is proven, the Qur'an and the Hadith call for a capital sentence for the individual (*muhsan*) who commits such an act. Men who falsely accuse women of *zina* are subjected to 80 lashes and should be flogged as per 24:4.

Islam also specifies equality between men and women in the Qur'an (4:1):

Oh Mankind, keep your duty to your Lord who created you from a single soul and from it created its mate (of same kind) and from them twain has spread a multitude of men and women. (4:1)

Muslim scholars who have contemplated this verse argue that there is no text, old or new, that deals with the humanity of women with the same brevity, eloquence, depth, and originality as this decree.

Women have long been mistreated around the world, including the Islamic world. Though Islam and the text of the Holy Qur'an advocate for the rights of women in every possible sense, including their wellbeing and development, many Muslim traditions discriminate against girls in favor of boys. In many Muslim countries, some schools are only for boys, and boys attend school at higher rates than girls. The wife of the Prophet was not only educated, but an educator within the companies of the Prophet and especially in family matters. Equally, the other wives of the Prophet were turned to within society for their knowledge. Since these days, a number of female scholars have greatly contributed to knowledge of shari'ah in early Muslim societies.

In Islam, women are considered equal to men in all religious obligations such as prayers, *Haj*, *Zakat*, and fasting. Moreover, women are exempt from the burden of such obligations as they need. For example, women are exempt from their daily prayers and from fasting during their menstrual periods and for forty days after childbirth. Women are also exempt from fasting during pregnancy and while they are nursing infants if this threatens their health or the health of their infants. If women miss obligatory fasts during the month of Ramadan, they are permitted to make up for the missed days whenever they can. They do not have to make up for prayers missed for any of the reasons mentioned.

Women have always been excluded from *xeer* decision-making processes in Somalia's patriarchal society.⁶⁶ Yet, the inclusion of women, youth and other marginalized groups can be promoted and inequalities limited with reference to shari'ah in order to increase these groups' access to justice.

⁶⁶ Natasha Leite, "Reinvigoration of Somali Traditional Justice through Inclusive Conflict Resolution Approaches," *Conflict Trends* 2017, no. 3 (2017): 46–53.

CONCLUSION

Somalia's pluralistic legal environment has led to inconsistencies in dispute resolution. Somali authorities in cooperation with international stakeholders have invested immense efforts into settling conflicts and strengthening statutory and customary justice institutions. Though the importance and prevalence of *xeer* in Somali society is indisputable, there exist shortfalls and gaps in this framework that marginalize vulnerable groups, and especially women in view of their individual rights.

Somalis are predominantly Muslim, and Islamic principles are solicitous of women's rights. However, there is a lack of strict adherence within society to shari'ah values that favor and support women. Especially IDP communities suffer from social exclusion and oppression. Women are generally excluded from decision-making processes and political representation due to cultural stigmas and practices. Rape and other sexual crimes are primarily committed against women and girls, especially in IDP camps. Violence and exclusion are also practiced between majority and minority clans and have contributed to inequality. Societal knowledge of justice issues is low and victims are often unaware of their rights or where to turn for justice.

RECOMMENDATIONS

Based on this legal review, the following recommendations are made.

- Enact and adopt national laws and policies that are compatible with international legal frameworks regarding SGBV and land matters.
- Use an inclusive approach to build awareness of the rights of individuals in Somali communities.
- Strengthen formal justice institutions as 'alternatives' to *xeer* processes based on patricarchical and communal values.
- Foster the application of the Shari'ah to promote the rights of women and vulnerable groups.

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