

# Pastoral Justice



# Pastoral Justice

A Participatory Action Research Project  
on Harmonization of Somali Legal Traditions:  
Customary Law, Sharia and Secular law

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## Foreword

When I visited the warm and humid coastal town of Bosasso, which lies in Puntland northeastern Somalia, I was immediately confronted by the complexity of the Somali legal context. I was there to meet the newly appointed Chairman of the Puntland Supreme Court and we met one afternoon in his small law firm. It was a hot meeting in both senses of the word. We were two lawyers with totally different views of how to set up a legal system. However, this meeting constituted the basis for an ongoing discussion which was to bear fruit in the months to come. We both realised that we could learn from each other and that dialogue is the key for development. In these discussions the seed of this project was planted.

After more than a decade of civil war, the 'pillars of law' for the great majority of the people throughout Somalia are a combination of Customary law (xeer) and Islamic Sharia. During the war many elements of Customary law were violated. On the other hand, in the absence of an alternative legal system, there was a reversion to customary practices. A significant legal development in Somalia over the past decade has also been the extension of Islamic jurisprudence. The Islamic tradition has a long history in Somalia. But the past decade has seen a revival of Islamic learning and practice throughout Somalia even so. In the legal vacuum left by the collapse of the state, many Somalis have looked to Islam as the main source of law.

The Puntland Regional State of Somalia was founded in a consultation conference in July 1998, arranged both by political parties and by traditional leaders in northeastern Somalia. They decided to form a regional administration in a future federal Somalia. They approved a charter for a transitional three-year period, elected a parliament, appointed a president and set up a judiciary. Although the





# 1

## Background and Context

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### *Cultural Roots and Traditional Legal Institutions of Somali Society*

The Somali nation inhabits a vast semi-arid or arid environment in the Horn of Africa that is more suitable to traditional animal husbandry. In addition to this dry environment and the dominant pastoral life style, they share a common experience shaped by a century of colonial rule; a common language, albeit dialect differences; a common religion, the belief and practice of Islam; a pervasive political culture made up of a highly segmented lineage social order; and also boast a rich oral culture with various styles of oral poetry that act as a powerful tool in influencing public opinion. These common cultural roots of the Somali people created a strong sense of Somali identity and exclusiveness in contrast to others; nonetheless, this has not yet been transformed into a single viable political unit. As such there was no Somali State before the colonial penetration during the late 19th century since independent and rival clans distinguished the political landscape.

Historically, a complex linkage between the pervasive clan-based political culture, economic production dominated by traditional animal husbandry, and judicial institutions characterized the pre-colonial Somali pastoral society. Fundamental cultural elements of the segmentary lineage system, universal Islam, and dominant pastoral life

style together shaped the values and norms that distinguish Somali society and had a great imprint on the traditional legal systems practiced by Somali nomads for centuries, Customary law and Sharia.

An encompassing kinship order divides the total Somali nation in the Horn of Africa into various political groupings. In his classical work on northern pastoral Somali society (*Pastoral Democracy*), Lewis (1961) designated the most important political groupings of Somali society as clan-family, clan, primary lineage, and Diyah-paying group - from the highest political grouping, the clan-family, which consists of more than a million souls whose members trace descent to a common ancestor, to the smallest social unit, the Diyah-paying group, whose members range from a few hundred to a few thousand. In this elaborately segmented social organization, the Diyah-paying group and the clan are the most important functional units.

Each Diyah-paying group usually husband their livestock within a roughly defined territory, and share and maintain wells, grazing land and other communal resources. Except at times of conflict, neighbouring Diyah-paying groups and larger social units often intermingle and congregate in a grazing region, as wider sharing of nomadic resources and mobility constitute a pastoral strategy that encourages the sharing of often scarce pastoral resources, between rival groups, that are variously distributed within a given season and from one season to the next.

Economic cooperation and political solidarity, sanctioned by the force of kinship is most pronounced in the corporate Diyah-paying unit. The Diyah-paying institution reinforces lineage solidarity as each unit has/had a collective obligation to honour certain debts and make claims for restitution for wrong deeds committed against its members. Collective interest in the camels (camels of each lineage bear a distinctive brand -Sumad) and control

of essential productive resources reinforce lineage solidarity.

The Diyah-paying group is the most stable legal and political unit of Somali society. Strong agnatic ties and the Diyah obligation, Xeer, are chiefly responsible for the cohesion and harmony obtaining at this level. The Diyah-paying unit grants each Somali his identity as each and every Somali belongs to such a unit and it also guarantees the protection of his life and property. Above this unit, which lies at the bottom of segmented political groupings at various levels, the most important functional unit is the clan. The clan usually delimits the upper level of political action as members of the clan join forces as the need arises against other clans to protect its vital interests. The clan is associated with a particular territory, which along with water wells and trade villages controlled by the clan defines the range clansmen frequent with their herds in the search for nomadic resources.

In contrast to the flexible but basically exclusive kinship ties, Somali Customary law, Xeer, emphasizes values of interdependence and inclusiveness, and it forms another important basis for the primarily kinship-based social order - it acted as it still does, as an important mechanism in maintaining social relations between often rival groups competing for scarce resources.

Applied parallel with Xeer, Sharia functioned in the past and continues to serve as a vital legal tradition to pastoral Somalis in settling disputes with the force of religious sanction. The symbiosis of Xeer and Sharia (Islamic law) together reinforced the moral uprightness and piety that provided profound meaning and helped refine accepted legal principles and procedures, which were applied and enforced by the traditional leaders, Wadaado and Qaddis (Religious Men and Islamic Judges)

Prior to the colonial occupation of the country (turn of the 19th century), Islamic principles, Sharia, and customary

- Absence of laws regulating operational matters of courts, including territorial and subject competence and specific statutory laws that should be applied. For instance, two versions of Somali civil and penal codes exist, which sanction different punishments for a given crime and even similar secular judges find themselves in a dilemma.
- The above problems are compounded by institutional weaknesses affecting law enforcement organs, such as police, custodial corps, etc.

Given the formidable problems affecting the judicial system in Puntland, Diakonia thought it necessary to conduct this study to identify problems and be able to help Puntland authorities develop viable judicial institutions, taking into consideration the following:

- Formation of standard procedures for law enforcement authorities.
- Identification and amendment of specific statutory laws enacted by previous Somali governments so as to integrate them with the fundamental/organic laws (charter/constitution) of the Puntland Regional State.
- Promoting the harmonisation process of the traditional legal systems that has been taking place since 1960.

### *Methodology*

This study titled "Harmonisation of Somali Traditional Legal Systems: Customary Law, Sharia and Secular Law" is a joint effort undertaken by Diakonia, Swedish INGO, based in the Puntland Regional State of Somalia; and the Puntland Development Research Centre, a local NGO in Garowe. Diakonia sponsored and funded the research project, while the local partner, the PDRC designed and implemented the programme. Diakonia supports various

activities in the Puntland State of Somalia - including social integration of poor returnees and internally displaced persons, rehabilitation of the social and economic infrastructure, and gives support to education, gender and human rights. In addition, the organisation also assists a legal and human rights programme. This study on "Harmonization of Somali Traditional Systems: Customary Law, Sharia, and Secular Law" forms an important component of the Legal and Human Rights Programme supported by Diakonia.

The implementing local organisation, the Puntland Development Research Centre (PDRC), is a research centre established as a successor body to the War-torn Societies' Project (WSP). WSP launched in the former Northeast Regions of Somalia between 1997 and 1999 a participatory action research project on five entry points that have relevance for the economic, political and social reconstruction of Puntland. The PDRC continues to apply participatory action research (PAR), in which concerned actors participate and critically reflect on themes under collective investigation in a neutral space (workshops).

### *Research Objectives*

The PDRC management team, the Director and the Researcher Coordinator formulated with the funding agency, the following broad research objectives of the project:

- Generate relevant participatory data that would enable Diakonia to plan and manage its support to the relevant authorities in Puntland in the development of a viable legal system and enhance their capacity to promote human rights.

the centre, in the capital of Puntland.

During its life span of six months, the project produced four discussion papers and four workshop reports. Data derived from these project documents, has been collated and harmonised into a single document "Harmonisation of Somali Traditional Legal Systems: Customary law, Sharia and Secular Law". To put the findings of the participatory research into perspective as well as fill gaps, this research, in addition, has drawn upon data from existing literature and interviews the research team held with key informants, e.g. traditional leaders, religious scholars, legal professionals, women's groups, and private sector representatives.

## 2

# An Introduction to Somali Customary Law

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### *Historical Evolution of Customary Law*

The participants agreed that the Somali Xeer was formed and used in the pre-Islamic Era. Such Xeer as Xeer Aji, Xeer Ajuuraan, Xeer Ciise and Xeer-Daarood, which are not written but transmitted orally, are thought to have been formed in pre-Islamic times. In addition, it is believed that various kingdoms, which reportedly existed in the Somali territories, had adopted pre-Islamic laws. Some of these legendary kingdoms that are remembered by Somalis are: the Barrow kingdom that allegedly ruled the Qaw area (Bossaso); the Bucur Bacayr and Arraweelo kingdoms that are believed to have ruled part of Northern Somalia; and the Geedi Baabow kingdom in the Upper Jubba, etc.

However, most of the participants insisted that Xeer Daarood could not be considered as pre-Islamic. They claimed that the ancestor of Daarood was born and his descendants proliferated, as a clan-family, after Islam came to Somalia. This claim would assume that Daarood clans did not experience pagan culture.

Xeer developed and advanced over the centuries by absorbing new elements and ideology from Islamic teachings. However, a residue of pre-Islamic customs survived and is still practiced in all Somali inhabited

territories. Workshop participants agreed that, as time went on, Xeer had undergone dynamic evolution in tandem with the changing environment and in response to socio-economic progress and political change.

Since Xeer is transmitted orally, some of the earlier rules might have been lost. Furthermore, as the foreign powers penetrated into the country and enforced the practice of Secular law, Xeer diminished in status and its application became confined to the nomadic areas. The continuous urbanization process, which intensified during the post-colonial era, had also made its imprint on Xeer. For the townspeople, who settled in better-policed urban centres, where the power and authority of the government was exercised, the need for the practice of Xeer has declined.

### *Salient Features of Customary Law*

Somali Xeer has several characteristics that distinguish it from the other two legal systems (Sharia and Secular law) practiced in Puntland and in most other parts of Somalia. These include:

- a) The Customary law is unwritten, remembered by experts and administered in oral form.
- b) It is traditionally inherited and transmitted orally through generations, from the parent generation to the young men of the lineage
- c) It has no formal structure or organised judicial system.
- d) It is male dominated. Participation of women in the formulation and practice of Xeer is negligible, as they do not enjoy equal political rights with men.
- e) It is localized and has no universality in its application throughout Somalia.
- f) Application of its rules is flexible and varies from place



to place depending on circumstances and situations. Its procedures are often drawn from precedent cases and on past decisions, so it has historical validity.

g) Sharia heavily influenced Somali Customary law especially concerning blood compensation and family matters.

h) In Customary law the traditional elders are the legislators, executors and the judges

### *Functions and Roles*

Somali Customary law (Xeer Soomaali) is an unwritten set of codes, which is inherited and passed orally from one generation to the next. The council of elders, who are experts and custodians of Customary law (Xeer-beegti) review and formalize it (Xeer) periodically through the clan elders' assembly (Shir). Provisions of Customary law allow specific elements of coercion (i.e. the highest cost is often paid by those who do not abide by the rules laid down), and legal liability, and describe situations where culprits (Diyah-paying lineage group) are legally responsible for a breach of an obligation imposed by Xeer. Sub-clans and dia-paying groups residing in a given area often use common penalty provisions of Xeer. However, Xeer is localised and it is neither universally applied throughout Somalia nor do neighbouring clans and lineages follow uniform provisions of a common Xeer.

Pastoralists, traditional farmers, fishermen and frankincense collectors use Xeer to regulate socio-economic and political relations. It is also used for conflict resolution and fostering unity and mutual cooperation of the sub-clan and lineage members. It is adopted to maintain peaceful co-existence and cooperation between neighboring sub-clans. Xeer also envisages the protection of the environment and regulates the use of common resources such as water points,

pasture, forests and grazing-land; hence, it has legal (judicial) and socio-economic and political functions. Xeer defines rules and regulations for perpetuating the clan's kinship-based on organizational structure and social order. These include rules and procedures for election/selection of clan chiefs and titled clan leader(s) (Isim), the decision-making process, and the nominating of clan delegates (Ergo) to the clan assembly (Shir).

### *Main Provisions of Xeer-Daarood*

This research focuses on the Customary law practiced in the Puntland regions. Participants highlighted, during discussions, that only Xeer Daarood is/was practiced in the Puntland regions. Hence, other Xeer Soomaali (agricultural areas) are not within the scope of this study. Traditional elders participating in the workshop added that Xeer known as Xeer-Harti is not used in this area, since it was developed and adopted in the Jubbaland region.

Xeer-Daarood is usually evoked in mediation and arbitration for the settling of disputes; its enforcement depends upon the respect and the moral authority that the elders wield. When settling disputes, representatives of the opposing parties are identified or selected and an arbitration/mediation panel is formed. Either of the disputing parties has the right to raise objections against the inclusion of some members in the arbitration panel. Another important feature in the application of Xeer-Daarood is the agreement by which the disputing parties have to accept, in advance, the verdict of elders deciding on the case. The Somalis call this procedure of Xeer "Qoor-dhiibasho-meaning total submission". In the arbitration process, the two parties are given equal chances to present their case and to respond to questions or clarify further points if required. The provisions

of Xeer-Daarood, as practiced in Puntland, may be divided into four categories.

**Category One: All Xeer rules that carry a penalty (material and moral) or involve the collective obligation of the clan could be called category one, and may comprise:**

a) Collective payment and receipt of Diyah (blood compensation): Collective payment of blood compensation is the central pillar that is responsible for the social solidarity of the Diyah-paying group, since a nomadic household or family cannot pay blood compensation on its own. The blood compensation price of a man is a standard 100 camels and that of a woman is half this amount, 50 camels. The hundred standard blood price for a man is apportioned into two: Jifi- 33 camels allotted for the close kinsman of the victim- and -Magdheer- 67 camels for the rest of the entire Diyah-paying group. The Jifi is further sub-divided into Rafiso- amounting to 11 camels given to the household of the deceased man and 22 camels for the remaining members of the extended family or close kinsmen.

The Jifi or 33 of the 100 Diyah camels is designated as 'Muqayadah'-probably originating from the Sharia Arabic word of 'Muqayadah'-meaning 'the strictly defined one'. This portion of the Diyah camels comprises the best and most cherished camels in the herd. One Muqayadah female has been described as: "the she-camel that, when one stands behind it, its ears or neck cannot be seen because of the size of the camel or the height of the hump; or when standing beside the camel and looking across its hind legs, the hind leg of the other side cannot be seen due to the size of the camel's udder . The camel's udder reaches this size on only two occasions: when the she-camel is pregnant and about to calve or when the she-camel has given birth and produces abundant milk. The she-camel is valued on these

two occasions because if it gives birth to a female camel, that will increase the coveted herd, and after calving it produces plenty of the nourishing milk that sustains the camel men

The remaining *Diyah*- *Magdheer*- literally the long compensation, is made up of 67 of the second best quality camels of the herd. This is known as '*sagaalley*'-meaning that each camel in this category is equivalent in value to 9 two-year old ewes - *Sabeen*.

It is always practical to settle the entire *Diyah* in camels although it is possible to pay part of the *Diyah* in small sheep, cattle and in other domestic species. For example, a '*muqayadah*' type of *Diyah* camel (best quality) is equivalent to 12 ewes -*sabeen*- and hence the name: *labo iyo tobanley*. This equivalence between "camel capital" and less cherished ruminants was derived from the number of ewes a *muqayadah* camel could pull. First, 8 ewes were tied to the *muqayadah* camel to pull and if it managed that, the second time, two more ewes were added. Again if succeeded, two more were added bringing the number to 12, and the camel could not manage that. From that the *muqayadah* camel was agreed that equal to the value of 12 ewes, *sabeen*- the biggest load of ewes a *muqayadah* camel can pull at one time. Using similar calculations, two 4-year-old heifers are equivalent to a *muqayadah* camel, as each heifer is equivalent to 6 *sabeen* - the total load one heifer could pull.

The *Magdheer* *Diyah*, which amounts to 67 camels is inferior in quality to the *muqayadah*. The camels exchanged in this portion of the *Diyah* are rated as ordinary camels between the value of *Muqayadah*, which is 12 ewes (*sabeen*), and the *qaalin*, which rates 6 *sabeen*. This makes the actual value of the camel 9 ewes (*sabeen*) and hence the name '*sagaalley*- meaning that which is equivalent to nine *sabeen*'.

Likewise, a donkey is rated 3 *sabeen*, and the ram 2 *sabeen*.

b) *Dalool-Xoor*, compensation for injuries inflicted on the physical body: this rule of *Xeer Daarood* sanctioned originally that one third of the incurred penalty be waived. The participants from the *Sool* region stated that in their area this rule is not obligatory at present and those from the *Mudug* region stated that the ruling has undergone further change in their area, where half of the penalty is waived instead.

c) Theft and banditry acts: the rules for theft and banditry sanction a compulsory return of the stolen property or payment of an equivalent value with heavy moral punishment. The offenders would suffer social stigma (shame) in the community. Very often they leave their community because of the stigma attached to stealing if they become repetitive offenders.

d) Rape: in *Puntland* regions, where *Xeer-Daarood* prevails, rape is considered as a serious crime. Oral history is full of stories of past rape incidents that provoked fighting between clans and sub-clans. Rape is perceived as being more serious than murder. In addition to the normative punishment, the offender is often morally penalized. However, the *Xeer* penalty of rape is much milder than that of *Sharia* and *Secular law*. The *Xeer* penalty varies depending on the location and gravity of the act and magnitude of the damage.

Workshop participants were in agreement that there is no uniform or common application of *Xeer* rules on rape. For example, in *Mudug* and *Nugaal* regions the *Xeer* penalty for rape is a payment of 44 heads of sheep/goats or the equivalent in camels, if the offender had sexual intercourse; while in *Bari* region the penalty is much higher and sometimes may amount to half of the women's blood compensation wealth depending upon the damage inflicted on the rape victim (25 camels). In addition, the offender is

liable to pay three million Somali Shillings if he undressed the woman by force without having sexual intercourse. If, on the other hand, the rapist had sex and the girl becomes pregnant as a consequence of the rape, the penalty is for the offender to marry her and pay an inflated marriage dowry.

When the question of the violation of the woman's human rights was raised, participating traditional elders at the workshop insisted that forcing the woman to marry the man who raped her would not necessarily mean that the woman was humiliated, rather it is a type of punishment for the offender, because the marriage proposal would usually come from the offending party to forestall severe sanction or violent revenge. The offender would also pay an inflated dowry, which is another punishment.

e) Protection of in-laws (xidid) and maternal relatives (reer abti): The Xeer sanctions the protection of and respect for the in-laws and maternal relatives living with the husband's lineage. Violation of the rights of the in-laws and maternal relatives would entail punishment or may even occasion fighting among the hosting community. The same rules apply for the protection of individuals from a hostile clan who are in the custody (magan) of kinsman of the host group.

f) Commuting capital punishment to blood compensation: Prior consultation with the family of the victim and consensus with the clan elders is required in the case of pardoning capital punishment in exchange for blood compensation in a murder case. This would mean that the family alone couldn't exonerate the culprit from capital punishment, as the clan responsibility is collective, not individual.

g) Physical violence, defaming or publicly insulting traditional leaders: This is a grave moral crime. For a per-

son who rejects the verdict of the traditional elders' jury, in such a case, the penalty is to slaughter the offender's burden camel. The burden camel and milking camel are the two animals most valued by the pastoralist as these are essential to the mobility of the nomadic family and sustenance respectively. Slaughtering the burden camel is considered a severe punishment.

**Category Two: Xeer rules that have cultural and moral values.**

a) Sparing the lives of socially respected groups (Biri-magaydo = prohibited from the sword) during inter-clan war is a Xeer provision that should be respected:

These groups who should be spared by the warring parties are: the aged, children, women, religious men, famous wealthy persons, poets, and traditional leaders, and guests given asylum (magan). Violation of this rule is considered morally wrong and it brings great shame on any sub-clan that infringes it.

b) Welcoming and entering dialogue with peace emissaries (Ergo) from an offended party: This is an important part of Xeer. Violating such a fundamental Xeer is tantamount to declaring war. Participants in the workshop emphasized the importance of the courtesy (qaddarin) and moral respect (xushmo) this Xeer accords to a peace delegation sent by an offended party. However, this does not necessarily imply that the two parties will agree on the issues at stake.

c) Women battering: According to Xeer-Daarood battering women is considered bad behaviour but not a punishable crime, unless the injuries wrought on the victim are so grave that they warrant revenge or claim for compensation by the woman's kinsmen. In most cases, the battering of a wife and females in general is brushed off as a minor disciplinary action taken by the husband and close kinsmen

who justify it as a male responsibility for controlling the woman's conduct (husband, father, brother and sometimes male relatives). Some participants said that in their groups if the battering of women becomes frequent and beyond a tolerable limit, then the woman's family can rightly initiate legal action including asking for divorce.

### **Category Three: Xeer on family provisions.**

a) Dowry: This is common in pastoral areas and to a limited extent in urban settings. The amount of dowry exchanged for the bride varies from clan to clan and it is negotiated between the would-be in-laws. Xeer-Daarood does not make dowry compulsory as it is not a clan matter, but the families. However, it might involve the sub-clan elders in problems emanating from the marriage itself. Worsening of the couple's relation may encourage the husband to claim the return of the dowry in the case of divorce. In such a scenario, the sub-clan leaders from both sides are involved. Xeer provides rules to settle such cases, which mostly end up in compromise.

b) Widow inheritance: (Dumaal = probably from the Arabic-Thu-Maal-which means property owner) the brother of the deceased husband has the right to marry the widow. The uterine brothers have primacy over half brothers. If these are no bothers, a first cousin or even second cousins may claim the right to marry the widow. If the widow rejects marrying any of the male in-laws, Xeer-Daarood provides a ruling by which the woman loses custody of her children and family property and may also suffer eviction and a sanction barring her marrying outside inheriting families. In some areas, if she marries a non-inheritor, the penalty is five camels or an equivalent value levelled against the new usurper. Religious leaders are against such forced marriage for a woman, because, they say, it violates Sharia



and the woman's right of choice of spouse.

d) Marrying a deceased wife's sister (Xigsiisan = literally: getting closer or second chance): The husband of the deceased wife may request his in-laws to arrange for him the replacement of the lost wife by his marrying her sister or a female cousin to continue the relationship with the in-laws, and also to have a Habar-yar (second mother) for the motherless children (if any). Xeer-Daarood considers Xigsiisan as a strong cultural and moral obligation upon the family of the deceased woman though it is not legally binding. Participants agreed that Xigsiisan (replacement of deceased wife) is simply a courtesy (Qaddarin). However, religious Sheikhs affirmed that forced marriage is illegal (Xaaraam) and contrary to Sharia, while elders view the issue from the perspective of social value and children's welfare.

c) Eloping with an engaged girl (La-bixid): Xeer-Daarood rules provide a penalty varying from five to ten camels applied to the eloping man. However, the application of this rule may vary from region to region. Becoming engaged to a girl is a prelude to the relationship and affiliation between families often belonging to different lineages and sub-clans (future in-laws, xidid = literally meaning roots). The process of the girl's engagement often involves down payment (Gabaati = literally: sheltering) of a sum either in cash or in kind pending the dowry negotiation. Participants have agreed that violation of Xeer on this matter might even cause unnecessary fighting between the offended suitor and the eloper.

#### **Category Four: Rules about Socio-economic issues.**

a) Xeer-Daarood stipulates that the use of and access to common productive resources (water, pasture, grazing-land and environment, etc) is the foundation of clan-family

cohesion and survival: Elders argued that according to Xeer-Daarood, the territories inhabited by a Daarood family of clans is common property and essential resources found there are free for each individual Daarood member regardless of his clan affiliation, in spite of hostilities that may occasionally flare up between clans and large sub-clans. Important resources found in the Daarood territory are water and grazing land.

b) Assistance to a new couple (Kaalo): This is a very important moral and material support to the new household. It provides the nucleus stock for the new family, cements economic cooperation between close kinsmen and the couple and it also reinforces sub-clan solidarity as the offspring of the new family have the potential to increase sub-clan numbers.

c) Support to a married sister/daughter (Dhibaad = literally problem) from agnatic kinsmen (her father's family) is a moral obligation: Participants were in agreement that this kind of assistance carries social value and strengthens relationships between in-laws. In the past, seeking Dhibaad involved travelling on foot many days for the woman to reach her family, which was a tiring enterprise. The volume of the gift received would raise or diminish the status and respect the woman enjoyed among her natal group, as perceived by her in-laws. Seen from this perspective, Dhibaad has social value.

Dhibaad is decreasing in importance along with rapid urbanization and the revolution in communication, allowing more interaction between the married sister and her male relatives. Financial assistance from a brother who remits regularly or occasionally US Dollar assistance from abroad to his married sister is not considered as Dhibaad anymore, but simply as normal assistance. This indicates how the dynamics involved in the evolution of the Dhibaad

as a traditional custom are dwindling.

d) Lending milking animals (camel, cow or goats) to a relatively less well-off relative: This is called *Maal* = literally: animal lending. The system is becoming less frequent according to the elders. As road transportation improves and demand for fresh milk increases with the rapid growth of urbanisation, selling milk has become a major business generating household income for the pastoralist's family.

e) Livestock contribution to the needy: (*Xoolo-gooyo* = literally: Giving away livestock). When a family loses its livestock to man-made or natural calamities, members of his corporate group contribute a nucleus livestock, generally ruminants (goats and sheep), to the destitute family. Another type of livestock and material contribution is the assistance extended to a newly-married couple (*Aqal-dhis* = literally: home building). To the latter, only close relatives contribute.

Participants in the workshop confirmed that many customs and Xeer codes that had strong cultural and moral, as well as economic and political significance are losing ground and gradually disappearing.

Examples of Xeer codes that are losing ground include: frequent violation of *Biri-ma-geydo* (venerated social groups who are spared by the warring parties during a clan war); general *Xushmo* (courtesy) accorded to traditional and religious leaders, parents and the elderly; stigmatisation of criminal acts and criminals; etc.



# 3

## An Introduction to Islamic Sharia

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### *Historical Evolution of Sharia*

The Islamic conquest of more advanced pre-Islamic civilizations, such as the Roman and Persian civilizations encouraged Muslim scholars to do more research on the application and interpretations of Sharia in the light of the newly conquered and relatively advanced cultures, in order to accommodate their acceptable cultural and legal traditions. The development of the application of Sharia as a judicial system can be divided into four phases:

1. Sharia in the Prophet's era (early 7th century AD): The Prophet and his first followers can date the growth of the Islamic judicial system back to the beginning of the emigration from Makka to Medinah, which is known as Hijra (622 AD). During that period, people used to refer their disputes to the Prophet for judgement, he acted as a Qadi (judge) and spiritual saviour. It should be noted that the Prophet laid down the foundation stone of Sharia with the signing of the famous Treaty between the Muhajir (Emigrants from Makka) and Al-ansar community (voluntarily converted residents of Medina) and the Jewish community residing in Medina. In the Prophet's era, there was no judge other than him, as he was the source of Sharia and the only Qadi for the Muslim community. As Sharia

was embryonic at this formative stage, his followers had yet to learn the basics and the necessary knowledge of Sharia provisions to become judges. On the other hand, he was setting an example and a model to be followed in the future by Muslim Qadis, and his followers who were embracing the Islamic faith. The Prophet's procedure was to hear both litigants and before passing judgement, the plaintiff had to prove his claims in front of the Qadi, while the defendant had to take an oath to Allah Almighty, if he denied the charges brought against him/her. Application of the oath usually occurs when the plaintiff fails to present enough acceptable evidence to prove his case (witnesses) before the court. To teach his followers how to avoid unjust judgement he always repeated the following statements:

"I am ordained to judge what appears to me to be right not what is hidden inside - whatever is hidden inside is a secret and the secret is for God's Judgement."

The Prophet also said: "If two litigants come to you to settle their differences do not issue judgement until you hear what each of them has to say to prove his case or defend himself, the proof is for the plaintiff and the oath is for the defendant if he denies the claim". (Taareekh Hadaarat Al-Isaamiya-History of Islamic Civilization- ninth edition Page 99, Girls' Education Department -Saudi Arabia).

Again, to teach the Muslim community the required procedures of Sharia, the Prophet always repeated the following: "I am a human being, when you come to me for judgement, I might be inclined to rule in favour of one of you because of your impressive presentation and good arguing. If I give someone anything, which is not rightfully his/hers, it would be as if I have given him/her a burning coal; it is up to him/her to take or leave it." (Ummu Salma/ Al aslam - Bukhari and Muslim).

This Haddeeth gives evidence of how Al-taqwa (fear of God) is an integral part of Sharia in all aspects.

2. The Caliphate era (7th Century AD): During the Caliphate era, the Muslim community had overwhelmingly increased and as a result, Arabs were compelled to share the faith and the Muslim brotherhood culture with other communities with different cultures and traditions. Therefore, the need for a systematic ruling procedure for the arbitration and settlement of disputes between Muslim individuals with diverse cultures became a necessity. The judicial system was separated from the administration headed by the Imam (executive power). The appointment and selection of Sharia judges was considered more important and it superseded the nomination of the Waalis (Heads of the Regional States).

Sayid Omar is credited as the first leader who started and laid down the legal system for the first time in the Muslim state administration. He instructed judges (Qadis) in the various regions and towns to follow and wrote to them the following ordinance: "Judging is a noble duty and Sunnah (practices of the Prophet) to be performed by any member of the Muslim community. Evidence is required from the plaintiff and the solemn oath is for those who deny the charges (defendant). As such, mediation between Muslim brothers and sisters is permitted only when the mediation does not sanction something forbidden or forbids a sanctioned way of doing things." (Taareekh Hadaarat Al-islamiya-History of Islamic Civilization- ninth edition Page 99 – 100).

3. The Ummawiyah and Abbasiyah eras (7th – 13th centuries AD): As the Islamic state expanded and penetrated into new territories during the reign of Ummawiyah and Abbasiyah, the power base of Sharia as a judicial system was extended to other continents. The establishment of a formal system of procedures for the application of Sharia was the result of territorial and intellectual expansion, which paved the way for structural innovations of the Sharia judicial system.

During the Ummawiyah era, the duty of the Qadi was to settle disputes and administer justice in accordance with the religious tenets. More importantly, specialized courts, such as courts that examine grievances and the inspector/controller judges' office, were established for the first time whereby, the judges became responsible for finding out from the Holy Qur'aan and Sunnah, the legal basis for their judgements and that involved a lot of reflections and in-depth studies of Islamic jurisprudence. During the Abbasiyah era, a Chief Qadi (Chief of Justice) was added into the hierarchy of the Islamic judicial system and Sharia; the courts were established on the basis of four main Mad-habs schools of thought (Shafi'a, Hanafiya, Malikiya and Hambaliya). Judges were required to base their deliberation/sentences on one of the main Mad-habs schools of thought. (Taareekh Hadaarat Al-islammiya-History of Islamic Civilization, ninth edition Page 101, Girls' Education Department -Saudi Arabia).

4. However, as time passed, Sharia had undergone a dynamic evolution in conjunction with the changing environment, as well as in response to the socio-economic progress and political change experienced by the Muslim community. The evolution of Sharia is indicated by the introduction of a new development, that is the introduction of two new sources, Qiyaas and Ijma', that made possible judgement on new cases.

Workshop participants agreed that pre-Islamic Somalis had their own Customary law, where the elder or the titled traditional leader was the judge and solved disputes between the clan members. Decisions reached by the elders or traditional leaders were enforced, and most of the times, if one or all litigants ignored the deliberations of the elders they were penalized. Participants confirmed the existence of non-Islamic residual customs carried over from pre-



Islamic traditions, which are still practiced in all Somali-inhabited territories.

Contrary to Somali Customary law, Sharia requires from the litigants full compliance with the judgement of the Qadi, not out of respect for justice done, but as Sharia is revered as an integral part of Muslim belief and practice. As stated in the Holy Qur'aan with the following verse, Muslims are invited to judge and be judged in Sharia impartially: "God doth command you to render back your Trusts to those to whom they are due; and when you judge mankind, that ye judge with justice, verily how excellent is the teaching which He giveth you! For God is He who heareth and seeth all things." (Suura Al-nisaa verse 58)

### *Salient Features of Sharia Law*

Islamic Sharia has several distinguishing features which separate it from the other two legal systems (Customary and Secular laws) practiced in Somalia. These include:

- a) The Sharia is a comprehensive and universal legal system.
- b) It is laid down by Allah Almighty to regulate the whole life of Muslim society.
- c) It has a formal structure of jurisprudence and the Holy Qur'aan is the Constitution.
- d) The Qadi (the Judge) is directly supervised by the Imam (the Head of the Islamic State), who removes the Qadi from the office if his integrity is questioned.
- e) Sharia laws that are directly derived from the Holy Qur'aan or from the Sunnah/Haddeeth cannot be changed or amended.
- f) Application of its procedures follows the interpretation of Muslim scholars known as Muftis. Its procedures are derived from past decisions of the Prophet's Companions.

- g) Implementation depends mainly on the plaintiff's flexibility and his co-operation with the Qadi or flexibility of his/her representative.
- h) Sharia laws heavily influence other Somali legal systems.

The features shared with the other two legal traditions:

- a) It is a male-dominated legal system, and participation of women in courts as Qadis (judges) is forbidden by law (Xeer is the same). Even though there is no evidence to support this practice in the verses of the Holy Qur'aan, the exclusion of women from the application of Sharia is based on disputed Haddeeth.
- b) It is a universal legal system (so is the Secular law).

### *Functions and Roles of Sharia*

From the perspective of rules and regulations, the Islamic legal system offers unlimited options of approaches. Sharia is a divine constitution with supplementary written by-laws. It teaches a new way of life to its believers and sets the milestones for the road to heaven – it describes in a neat fashion how this universe was administered by the Creator, and like other World religions, Sharia affirms the existence of a supreme judge of the entire universe.

The Islamic faith is a universal religion and it calls for all mankind to acknowledge and submit themselves to the last and complete revealed faith (Islam). Astrology, astronomy, the origin of all beings, the cycle of rainfall changes, as well as the distribution of natural resources are all described in detail in the Holy Qur'aan. It calls its believers to worship the one God only-Allah Almighty who created all humans for the purpose of worshipping only Him.

Sharia is based on the institutionalisation of the main

spirit of Islam, which is the fear and worship of God known in Arabic as "Taqwa" (fear of God). The Taqwa is the bedrock of all Islamic principles and it is the mainstream of Sharia as far as rules and faith are concerned. To substantiate the importance of Taqwa, participants articulated the following verse, in which we can understand implicitly the role of Taqwa and how it relates to Sharia: "To thee We sent the Scripture (the Holy Qur'aan) in truth, confirming the scriptures that came before it, and guarding it in safety; so judge between them by what God hath revealed, and follow not their vain desires, diverging from the Truth that hath come to thee. To each among you have We prescribed a law and an open way."

Sharia is a codified legal system regulating the administration of the Muslim state, as it directly or indirectly governs the behaviour and attitudes of its believers. Voluntary submission under the commands and laws of Sharia is considered as the main pillar of the Islamic faith. Participants stated that, as a judicial system, Sharia laws are based on four main sources. These sources are:

1. Verses from the Holy Qur'aan.
2. The Sunnah/Hadeeth – rules that are based on or derived from what was taken from the sayings and the practice of the Prophet Mohamed-peace and blessings be upon him and are considered to be an integral part of the Holy Qur'aan.
3. The Ijma' – the compiled consensus or agreed interpretation of Muslim scholars about a judgement in any given period.
4. Qiyaas (reasonable guesswork) – this source is used to fill a gap, whenever there is not a specific rule that allows judgement to be passed on a new case. Different from the Ijma', the consensus of the Muslim scholars is not required in the deliberations for Qiyaas, instead one single Qadi's

(judge) opinion or his interpretation is sufficient.

According to most of the participants, Somali pastoral society started to adopt Islam in the early years of the seventh or eighth centuries A.D. The introduction of Islam in Somalia occurred peacefully and it is believed that it first started in the coastal towns and spread gradually to the inland settlements. Muslim societies are required to submit themselves to the judicial system of Sharia not merely as a ruling system but also as a faith. Islam changes the lifestyle of those who adopt it and as a result, it has deeply affected and influenced Somali society. Somali society retained many aspects of pre-Islamic customs and still practices pre-Islamic cultural residues that do not conform to Sharia. However, according to the participants, Somalis borrowed many provisions from Sharia and integrated them with their Customary laws. In addition, some Sharia rules remain as the last resort for solving difficult cases. For instance, in the case of deliberate murder (the standard hundred camels for the male or half of this amount for the female) standard blood compensation was taken from Sharia. Nevertheless, the standard blood compensation is not always exchanged in the case of deliberate murder. Depending upon the circumstances surrounding the murder, e.g. in the case of outrageous murder, Somalis may exchange more than 100 camels and additional marriageable girls or other gifts to appease the aggrieved party and forestall revenge.

### *Main Provisions of Sharia*

The main sources of Sharia are:

1. Verses from the Holy Qur'aan (the main constitution for Islamic legislation).
2. The Sunnah/Hadeeth (Prophet's practice and sayings or

commended and prohibited actions of his followers), which is considered to be an integral part of Sharia, contained in the Holy Qur'aan.

3. Ijma' – the consensus of Muslim scholars in the judgement of Sharia in any given period.

4. Qiyaas – this source is used whenever there is a specific demand to judge a new case, which cannot be found directly in the verses of the Holy Qur'aan and the Sunnah/Hadeeth.

Procedure: Participants explained that, outside Sharia courts, mediation and arbitration in settling legal disputes is permitted by the Islamic religion based on the principle that states: "mediation between Muslim brothers is permitted except when mediation sanctions something forbidden by the Sharia or forbids a sanctioned way of doing things.

Some participants argued that Sharia and secular law might follow the same penal and civil procedures, though they may differ widely in the settlement of disputes. In the Sharia courts, the plaintiff is required to present his statement of accusation clearly to the judge (Qadi) and should also present evidence to prove his case. If the claim is not clear, the judge will disregard the plaintiff's statement. In accordance with these requirements, the Sharia court scrutinizes the witnesses and the Qadi has to be satisfied with their impartiality before proceeding to hearing of the case under consideration. Petition for appeal is accepted only when there is a miscarriage of justice and serious omission of Sharia ruling related to the case concerned. This practice for appealing to higher courts is also valid in Secular law procedures without condition. In Secular law, many courts of different degrees, such as lower courts and higher courts are established. These courts usually allow for an endless procedural appeal of cases and the plaintiff may depart this life before a final verdict is reached on his/her case.

Most of the participants in the workshop stated that Sharia is practiced in Puntland even though the application of those Sharia provisions which may involve severe penalties are not fully practiced by the people in Puntland. The non-practiced Sharia punishments sanctioned for the following crimes/offences are:

1. Highwayman/bandits: Sharia defines a highwayman as one who stations him/herself in the remote sections of a public road for one of the following purposes:

- a) To rob travellers using violence.
- b) Threaten and terrorize travellers only.
- c) To rob and kill travellers. The punishment meted out by the Sharia to these different cases of banditry crimes corresponds to their respective purposes, with each case having a specific judgement in Sharia. However, Sharia requires that the existence of certain conditions has to be ascertained before a verdict is announced by the Qadi (judge) and these conditions are:

- The accused (for highwayman/women bandit) should be a grown an adult and mature person.
- They should possess superior power to rob or to threaten travellers.
- The location of the crime should be remote enough that travellers cannot get help or be rescued if they shout loudly. If the robbery occurs in a location where victims can get help from the nearby area, the robbers will be considered as looters or rustlers not road bandits.
- They should be different from the common thieves who steal the property of the last passer by, who are not considered by Sharia as highwayman because of their inferior power.

However, if a group of people seize a building and prevent the people from going in or out or to seek assistance from

the outside, they are considered highwaymen (road bandits) because of their power of preventing other people from seeking assistance (Sheikh Nawawi - Siraj -Alwahaaj P532, p533 and the Holy Qur'aan).

Participants agreed that the judgement in Sharia courts for this type of criminals would depend on which type of the various crimes they have really committed. For instance, if they only threatened the travellers but they did not rob them of their goods or kill them, they would be subjected to imprisonment or other forms of light punishment, while in dealing with the other two cases – robbery and homicide carry verdicts of seclusion, crucifixion, mutilation of hand and leg from opposite sides, or other forms of capital punishment (execution). Finally, participants cited the following verse in the Holy Qur'aan to support their statement:

”The Punishment of those who wage war against Allah and His Apostle, (interpreted here as the Muslim State because the Apostle is the Head of the Islamic State) and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and heavy punishment is theirs in the Hereafter.” (Holy Qur'aan - Surat Al-Ma-ida verse 36 - Abdullah Yusuf Ali).

2. Sharia rules about theft: In Sharia, theft means stealing someone's property and there are three basic conditions for establishing its existence as a crime:

- a) The thief.
- b) The act of stealing.
- c) The existence of stored or safely guarded stolen goods. (This definition is taken from the Siraaaj-al-Wahaaj-Sheikh Nawawi – rules about thefts). If the owner does not ensure the safety of his property, according to Sharia provisions it

will not be considered an act of theft but a case of lost property.

The sentence for the crime of theft as stipulated by Sharia is to amputate the offender's right hand, if the act of stealing is ascertained. Nevertheless, Sharia jurists are not unanimous as to the value of the stolen property which may warrant the cutting off of the hand. However, the majority of the participants believe that petty thefts and acts of theft for survival are exempted from punishment. Instead, the stolen property has to be returned or the value of the property that has been stolen has to be paid back to the owner. The justification for cutting off the thief's hand is based on the following Holy Qur'aan verse: "As to the Thief male or Female, cut off his/her hands: A punishment by way of example, from God, for their crime: And God is Exalted in Power." (Suurat Al Ma'ida, verse 41).

Participants have reiterated that in Sharia, God allowed the Muslim jurists to cut off the hands of thieves convicted of theft. However the judges are not left to abuse this provision or application in Sharia in general. In Sharia all penalties, which may entail capital punishment, body mutilation or lashing for adultery require solid proof regarding:

- Direct confession or acknowledgement of the accused party.
- Witnesses who clearly testify about a crime committed by the accused person.
- Presence of the guilty party (indicted).

In Sharia, each type of crime requires the exhibition of a particular number of witnesses to prove the crime was committed.

Participants agreed that Somalis use rules of Customary law (Xeer) to punish thieves, instead of Sharia because the clan's reputation would be compromised. The rules of Xeer



for theft and banditry (highwayman) sanction only a compulsory return of the stolen property or payment of an equivalent value with heavy moral punishment, as the Customary law is against hand and limb mutilation for the simple reason of safeguarding the prestige of the clan. However, the offenders would suffer social stigma (shame) within their groups without their hands being mutilated.

3. Sharia rules about murder: According to Sharia, just retribution promotes life and social harmony in a wider and more comprehensive sense. Murder and unjustifiable homicides are considered a disruption and violation of life and a criminal act against the Muslim community as a whole, and of acts of retribution are considered as life saving acts: "There is a life for you men of understanding, in this code of just retribution, so that you may remain God fearing." (Verse 179. Surat Al-baqra -In the Shade of the Qur'an Page 177).

- Participants expressed that, according to Islam, murders can be classified into three categories:
- Intentionally performed or executed murder. This act of killing an innocent person is considered the worst crime after that of reneging on Islam. According to the religious men participating in the workshop, the person who kills someone intentionally commits a crime against the Islamic society, and Allah Almighty, by terminating a person's God-given precious life cycle.
- Non-intentional act of killing – this can be identified as the killing that takes place in the following circumstances:
  - a) the original intention of the killer was not to commit an act of murder. This type of killing is called unintentional (Khada').
  - b) The original plan and motivation of the murderer was to kill a particular person but instead of killing the intended

person he mistakenly kills somebody else. This type of murder is similar to intentional murder, but killing for retribution (Qisaas) is imposed by Sharia. In this case and the preceding one, the payment of blood compensation of one hundred camels for men and fifty for women is the prescribed rule. While for intentional murder, the death penalty is the prescribed punishment in Sharia, if the progeny or close relatives of the deceased do not grant their forgiveness. (Taj - Jama Al-usul- Sheikh Mansoor Ali Al-Azahar vol. iii third edition 1962).

However, blood compensation payment of one hundred camels and above is used in the Somali community for men except for some extreme cases. According to Xeer, prior consultation with the clan elders is required before pardoning capital punishment, in exchange for blood compensation for a murder, by the family of the victim. This would mean that the family alone cannot exonerate the culprit from capital punishment as stated in Sharia.

4. Sharia rules about adultery, fornication and rape (Zina). Definition: Adultery, fornication and rape are known as Zina in Sharia, which means having illegal sexual intercourse with a consenting or non-consenting partner. This also includes homosexual acts. After legalizing the marriage and limiting the number of wives for polygamous marriage (4 wives), Islam forbids illicit sexual intercourse and other forms of sexuality, with the following verses of the Holy Qur'aan: "Nor come nigh to adultery: for it is a shameful (deed) and evil, opening the road (to other evils) Surat Isra verse 32. For ye practise your lusts on men in preference to women: are indeed a people transgressing beyond bounds." (Surat Aaraf verse 81).

Although for those who plead guilty, Zina involves punishment of up to one hundred lashes for first-time offenders, and capital punishment stoning for further offences,

solid proof is required and attaining it is very hard. Four male witnesses are required for a valid proof in any given case of Zina crime. These witnesses should be able to testify that they have seen the penetration of the concerned male organ in to the female's vagina. It is hard to prove such a crime with such required conditions. In fact, during the Prophet's and Caliphate eras, convictions for Zina (adultery) were based only on the culprit's voluntary admission. Religious men participating in the workshop stated that when the judge (Qadi) ascertains that all the Sharia prescribed conditions are proved and fulfilled, he has to sanction the execution of the sentence for punishment, based on the verses in the Holy Qur'aan and Haddeeth/Sunnah. For voluntary illegal sexual intercourse, both parties are liable for punishment. When it is ascertained that one of the parties was forced and made to perform the sexual act (rape) against his/her will, only the rapist is liable for punishment and he/she will be punished according to the rules of Sharia for the crime of Zina.

Participants agreed that, at this point in time, the crime cases related to adultery or Zina, are regulated by Customary law in Puntland. The most frequent sexual case, especially during the civil war period was the crime of rape, which is considered more serious than murder in the perception of Somali pastoral society. In addition to the normative punishment, the offender is often morally penalized. However, the Customary law penalty for rape is much milder than that of Sharia and Secular law. Since Customary law is not universal, its penalty varies depending on the location, gravity of the crime committed and the magnitude of the damage.

5. Sharia rules about the family: Participants in the workshop discussions explained that in Islam, the family is the nucleus of the society to which Sharia has given notable

attention and much effort in order to regulate its essential aspects, as well as to ensure its safety and protection against abuses and disintegration. The Sharia social order is familybased by virtue of its being a divinely ordained legal system, that induces society to take full account of human nature and its basic requirements. This important nucleus formation begins with the stipulation of the first act of marriage. During the workshop, participants discussed a number of relative issues addressing the position of Sharia towards the Muslim family:

a) Marriage is the most enduring bond that exists between two humans of the opposite sex. Since Islam considers the family as the foundation stone of Muslim society, Sharia reserves a set of rules and regulations for the unification and separation of couples. According to Sharia, marriage should be contracted on the basis of voluntary and mutual agreement between husband and wife or with the consent of the custodians of the wife. However, in Somalia's pastoral communities and to a lesser extent in urban areas, the two families arrange marriages with a negotiated high dowry (Yarad) to be paid by the groom and his family. This type of dowry is forbidden in Sharia. On the other hand, there are lots of other types of forced marriages (see PDRC Report on Customary law). Participants explained that these forced marriages are not in line with Sharia but they are regulated through Customary law.

b) Divorce: Sharia outlines in full detail the rules governing divorce and other matters relating to it, such as waiting periods, maintenance, the payment of 'Meher' (wedlock price) and child care. All these matters are regulated based on the following verse from the Holy Qur'aan and other instructions from the Hadeeth: "Divorced women shall wait by themselves for three menstrual cycles. It is unlawful for them if they believe in God and the last day, to conceal

what God has created in their wombs. During this period, their husbands are entitled to take them back if they desire reconciliation. Women shall in all fairness enjoy rights similar to those exercised against them...”. (Suurat Albaqra verse 228)

Although there are exceptions, the main ruling is that a divorced woman should not seek another marriage within the waiting period in order to establish with certainty whether she is pregnant or not. In addition to that, the waiting period also acts as a grace period during which the estranged couple can rethink about their feelings and their marriage relationship. If they discover that reconciliation is possible, they can revoke their divorce within the established conditions for reversing a divorce. In Sharia, a divorced woman is entitled to take with her all that she received from her husband, such as gifts, and property and to receive her Meher (wedlock price) in full if the marriage is consummated. If the marriage is not consummated, she will be entitled to half of the wedlock price. Nevertheless, men are not allowed to ask for the return of any gifts or property they might have given to their wives as stated in the following verse: ”It is not lawful for you (men) to take back any of your gifts (from your wives), except when both parties fear...”. (Suura Al-baqra)

On the other hand, if life with a particular husband is no longer tolerable or if it may oblige her to transgress the limits of self decency or in her marriage relationship, in this particular case the woman may ask for a divorce, however she is obliged to compensate the man for the break-up of the marriage.

c) Widow: If the husband dies, in contrast to pre-Islamic Somali Customary law, Sharia sets specific rules and regulations for the widow. Four months and ten days of waiting period are instituted for a non-pregnant woman,

but if she is pregnant, her waiting period extends until she delivers. After this period, the widow is free within the established principles and traditions of the Islamic religion to enter into another marriage if she so decides. In contrast, Somali Customary law prescribes that the widow must marry one of the relatives of her deceased husband (in-laws) and if she declines to do so she will lose part or all her rights such as the custody of children and family property. She may also suffer eviction and the barring of her marrying whom she wants. All these acts are against Islamic principles.

6. Sharia Financial Rules -Riba (Usury): Since Islam is a complete system with rules and regulations that are tailored to manage all aspects of the Muslim community, participants explained that Sharia financial laws exist to regulate trade transactions and business affairs. Thus, the Holy Qur'aan provides broad guidelines governing trade, loan security, borrowing and Riba-free loans (free of usury, interest-free) as well as credit transactions. The Sharia legal provisions first call on the conscience of the individual Muslim trader, as the Taqwa is the bedrock of Sharia. Participants agreed that, in general, commercial contracts regulated by Sharia laws can be divided into two categories:

a) contracts for instant transactions, in this case all potentially concerned conditions are drawn to the attention of the contracting parties. The witnesses and the executors should take great care to consider all eventualities in Sharia. Among other things, the main condition of commercial transaction in Sharia is that it should be an exchange of something that has utility (has use and not forbidden by God) and it should be a Riba free transaction.

b) Transactions based on credit where a written contract with the required number of witnesses is stipulated by Sharia. Business transactions of this nature are sanctioned by the verses in the Holy Qur'aan, which stipulate that

they have to be free of usury (Riba). In Sharia, Riba is defined as the extra value that is added to the normal value or the market price of the item in question. This additional value or price increase is decided during the business transaction between the parties. Its payment can be agreed to fall due at a later date. Then, if the repayment of the loan fails, another extra amount is added again to the original amount. Therefore the participants expressed that, from the Islamic point of view, usury and interest are the two faces of the same coin. Additionally, all gains from prohibited business transactions are considered illegal (Xaraam) by Sharia. According to the participants there are two types of Riba (Usury) :

i) Riba (Usury) Al-Nasee-ah - is like the payment of deferred loan returns. This type of usury was widely practiced during the pre-Islamic era. Normally people would advance money for a fixed term in return for an agreed extra interest monthly fee, keeping the original amount unchanged. At the end of the fixed term, the borrower would either pay back the original loan in full (over the monthly agreed fee) or be granted an extension with higher monthly instalments. In addition to this, Riba also applies to the selling of goods on credit for an agreed term with an extra price charge to be paid by the debtor (in addition to the normal price). The 'qat' retailers, food stores and the money exchange market currently use these illegal Al-Nasee-ah practices of Riba. The use of this type of credit and exchange transactions is based on the following grounds:

- a) To cover risks related to the devaluation of the currency.
- b) To cover the eventual default of a debtor client. Bad debts would be covered by the extra return paid by other borrowers.

Usama Ibn Zayd quotes the Prophet -peace and blessings upon Him- saying Riba Al-Nasee-ah is the only real form of usury (Bokhari and Muslim).

ii) Riba Al-fadli -additional value added to a commodity price by the exchange of the same quantity and same type of goods with goods of lesser quality. In other words this type of usury comes from the value increase of one of two goods of the same type based on the difference of their quality during the transaction. This type of transaction is considered usurious in Sharia because it involves exploitation, which is the rationale of the Islamic rulings on the prohibition of usury. In the situation of 'Riba Al-Nasee-ah' the existence of usury is self-explanatory and is affirmed by the existence of the two essential elements. This type of Riba was primarily used by pre-Islamic businessmen, and constitutes the increased payment and the extension of the fixed term of the loan. Riba is outlawed by the following verse: "Those who gorge themselves on usury cannot rise-up except as may rise up whom Satan has confounded with his touch, that is because they say trade is just usury but God has made trade lawful and usury forbidden. He who receives admonition from his Lord thereupon desists (from usury) may retain his past gains and God shall be his ultimate judge, those who revert to the practice (of usury) are indeed the inmates of the fire, When they shall abide, God blots out usury and makes charitable offerings grow and increase. God does not love confirmed unbelievers who persist in wrongdoing". (Surat Al-Baqra, verse 275)

Most of the participating religious men agreed that any additional price increase of goods, or interests added onto credited amounts, are considered usury and forbidden by Sharia. They stated also that any credit with interest is also another form of usury and it is prohibited with the exception of the following cases: a) A creditor lends his money to someone with zero interest and with fixed term for payment. In this case, if the borrower fails to pay back the loan on time and requests a time extension, the creditor will be



entitled to receive an estimated profit, which the borrower has to pay to his creditor for the use of the money. Participants stated that the ethics of Islam and Sharia – prescribed business practices are in conflict with the Riba-based economics and financial systems used in the West.

Religious men participating in the workshop were of the opinion that interest rates and insurance policies in the Western economic system are based on pure usury, for the simple reason that the recipient does not offer an exchange for the received wealth, while they defined lottery as a pure form of gambling for elicit monetary speculation. On the other hand, all justification - including religious decrees issued by some Muslim scholars and all ideas that are advanced to accommodate interest rates into the Islamic financial and commercial system are pure dishonesty aimed at deceiving the public. (Taj - Jama Al-usul- Sheikh Mansoor Ali Al-Azhar vol. iii third edition 1962). They also affirmed that the Riba-based economic system is based on the concept of the accumulation and enjoyment of wealth, regardless of the means and how the wealth was attained. Most of participants stressed that: the Islamic economic system with its Mudaarabah (profit sharing) is better and can replace the Riba-based western economic system. Another example of a Riba-free option of a financial system cited by the participants was to have an agreement with the bank to invest your money and then share with the bank the realized profit or loss.



## 4

# An Introduction to Somali Secular Law

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### *An Overview of Somali Secular Law*

Many participants asserted that the existence of multiple legal systems in Somalia for the past hundred years did complicate the administration and implementation of laws. Before independence in 1960, the two rival colonial legal traditions (British and Italian) introduced diverse cultural and juridical systems in the Northern and Southern territories respectively. Sharia law with jurisdiction only over family issues (marriage, divorce, child custody, property inheritance, etc) was applied by government-appointed Islamic magistrates (Qadis).

Furthermore, most of the legal disputes and decisions, which directly affected the Somali nomads and agropastorals in rural areas, were usually dealt with by traditional elders through Customary laws and traditional practices of arbitration, mediation and dispute settlement. Besides Somali Customary law, the predominant legal codes used were: The Indian penal code of 1860, in British Somaliland, and Italian civil and penal codes, in Italian Somaliland.

Immediately after independence in 1960, the new Republic of Somalia made up of united former British and Italian Somalilands set up a formal commission which was made up of members of parliament, religious leaders, legal

experts both national and expatriate, with the purpose of preparing a national constitution and integrating multiple legal systems of the new Republic. An amended version of the Italian legal system was adopted which incorporated common features of Somali Customary law.

Listed below are some of the most relevant colonial and post-colonial Somali Secular laws:

- British Common law
- The Indian Penal Code of 1860
- The Italian Fascist Civil and Penal Codes of 1931
- The various special colonial rules and regulations such as emergency and security ordinances enacted during the colonial period.
- The Constitution of 1960 of the Civilian Government
- Organization of the judiciary Law No. 3 of 12 June 1962 (Revised with Law No. 34 of 1974)
- Somali Penal Code – Law No. 37 of 1962
- Penal Procedure Code – Law No. 1 of 1963
- The First and Second Charters of the Military Regime of 1969 and 1970 respectively
- Law No.3 of January, 1970 on the establishment of National Security Courts
- Law No.54 of 2 March, 1972 on execution procedures of jurisdictional competence and judgements of the National Security Courts
- Somali Civil Code – Law No.37 of 1973
- Civil Procedure Code – Law No. 19 of 1974
- The Constitution of 1979 of the Military Regime
- Puntland Charter of 1998 and the draft Constitution of 2001.

### *Classification of Secular Law as Practiced in Somalia*

Many participants agreed that Secular law could be classified in a number of ways, of which the most important are:

1. Colonial and post-colonial Secular laws are:

a) Colonial Secular laws are rules and regulations practiced and introduced into the country, by the British (in ex-British Somaliland) and the Italian colonial authorities (in ex-Italian Somalia) during the last decade of the 19th century and the first six decades of the 20th century, and

b) Post-colonial Secular laws are the body of non-traditional rules and administrative acts having legal functions, enacted by the successive Somali governments throughout the post-independence era (i.e. since 1960). As some participants stressed, it would be more appropriate to call these laws Somali State non-traditional laws or statutes, although they may incorporate elements of Sharia and Customary law provisions.

2. Public and private laws. From another perspective, Secular law can be divided into:

a) Public law (criminal) deals with the relationship between the State and its citizens as well as resident foreigners in the country. These laws consist of specific norms such as criminal law, constitutional and administrative laws; and

b) Private law (civil) is primarily concerned with the rights and duties of individuals towards each other. This comprises branches of the civil laws that regulate: personal/family affairs, commercial laws, various types of contracts, property laws etc.

3. Religious scholars (15 percent of the participants of the workshop) had another opinion: all Somali legal systems can be classified as:

a) Laws of God (Sharia) are those clearly and unambiguously stipulated in the verses of the Holy Quran and Prophet's sayings and practices. These Divine laws are valid and suitable for the regulation of the social, economic, and political aspects of a given Islamic society at any time anywhere. These laws cannot change, regardless of the prevailing

circumstances of the concerned user-society; and

b) Man-made laws (Customary and Secular laws). These are those laws formulated by man and are subject to constant review and legal changes due to the changing moral beliefs, social attitudes, political thought, and economic system of a given society.

#### 4. Sources of law or the law making process

Generally, the “sources of law” refers to the various ways in which law is formulated. In the most democratic governments the main sources of law today are legislative laws (Acts of Parliament), whereby some countries practice common law and equity of the legal systems (e.g. UK, USA). Case law (judicial precedent) is the second source of law. It is also called lawyers’ law and consists largely of the body of rules developed over many years by judges deciding cases according to principles laid down in past cases. Likewise, judicial precedent (Qiyaas in Arabic) and Ijma’ (consensus of the Sharia scholars) are practiced in the Islamic countries.

Somali Secular laws of the post-colonial era can be classified according to their source (in order of importance).

a) Legislative law is law approved by representatives’ decree of the people (Parliament) and promulgated by the President of the Republic. Examples of this are: the Somali Penal and Penal procedure codes of 1962 and 1963 respectively, and the Constitution of 1960 approved through a popular referendum. These kinds of laws were prevalent during the civilian regime (i.e. Somali Republic 1960 – 1969), and have been adopted by the Puntland State since 1998, and Somaliland since 1997 when its National Provisional Constitution was approved.

b) Delegated legislation: the activities of modern governments are so varied. The problems they deal with are so complex and technical, that the parliament does not have sufficient time to deal individually with every piece of

legislation required. Usually, this difficulty is overcome by passing an enabling legislative decree, which often (but not always) sets out the basic structure of the legislation, thereby allowing other bodies or people to draw up vital specific rules. Regulations made through this process are known as: delegated legislation. The main forms of delegated legislation may be divided as follows:

(i) Decrees/laws by the " executive organ" such as those introduced by the Council of Ministers. (i.e. the Somali Penal Code of 1962 and many other decrees/laws) and some specific decrees by the President (i.e. Puntland State).

(ii) Ministerial decrees, rules and regulations having the force of law, made or introduced by a minister in respect of an area of government (with the backing of the Council of Ministers) for which he/she is responsible for example: fiscal laws of the Puntland State, Ministry of Finance or Foreign Investment laws of 1986 by the Ministry of Industry and Commerce.

(iii) By-laws or internal rules and regulations: are laws that are created/made by local authorities such as: municipalities, autonomous agencies, LNGOs, co-operatives and certain other public bodies. Generally, this form of legislation requires the consent of the appropriate ministry.

c) Special laws or ordinances: these are enacted by the President of the Republic or his representative(s) such as the "Security Committee" or governors of regions, in specific cases or situations expressly stipulated by the fundamental law of the country. For instance, these non-legislative laws were enacted during the rule of the Military regime (1969 – 1990) through enacting emergency and public order/security laws. Also, as stipulated in Article 12.5 xii :- of the Puntland charter, the President has the power to declare a state of emergency and enact the relative law subject to the approval/ratification of the parliament within 30 days.

### *Major Secular Law Components Focused*

Participants of the workshop focused on review and discussion of the legal contents of the following documents, which, they considered, are the fundamental Secular laws of Somalia: The Constitution of the civilian government of 1960. Law No.3, on the organization of the judiciary, of 1962 and revised with Law No 4 of 1974. The Penal and Penal Procedure codes of 1962 and 1963, respectively. The Civil and Civil Procedure codes of 1973 and 1974, respectively. Law No.3 of January, 1970 on the establishment of National Security Courts. Law No.54 of 2 March, 1972 on execution procedures of jurisdictional competence and judgments of the National Security Courts The Constitution of 1979. Puntland Charter of 1998 and the Draft Constitution.

#### *Constitution of 1960*

Participants in the workshop have made the following comments on the first constitution: Immediately after independence and the Act of Union, legislative activities were commenced and intensified gradually with the aim of applying the principles of the constitution of 1960, and also of unifying the two different legislations inherited from the British (in the northern regions) and Italian colonial administrations. To this end, the first constitution of the new republic was approved through a popular referendum in 1961 and put into force provisionally on 1st July 1960. It comprised 105 Articles and is divided into the following five parts:

Part One: General provisions

This part defines general provisions (Articles 1-7). For



instance, Article 5 defines supremacy of the law and Article 7 human rights: (Somali law shall comply with the principles of the universal declaration of human rights of UNO of 1948).

#### Part Two: Fundamental rights and duties of the citizen

This part guarantees basic political and social rights of every citizen (Articles 8-15).

#### Part Three: Fundamental rights and duties of the person

Fundamental rights and duties of the individual (Articles 16-30) define and concern guarantees of personal freedoms and other socio-economic rights, as well as judicial protection against acts of the public administration. Article 39 states the non-retroactive nature of the penal law and that penal liability is personal. Thus, any kind of collective punishment shall be forbidden and the accused person shall be presumed innocent until he is proved guilty – the conviction has become final. In spite of this, the Customary law continued to function through the application of *Diyah*, collective payment of blood compensation. The reason for the coexistence of Secular law and *Xeer* was to maintain law and order in pastoral areas, where district commissioners were authorized to apply Customary law wherever government could not do otherwise.

#### Part Four: Organization of the State

This part (Articles 49 – 97) defines the separation of the three branches of the State (legislative, executive and judiciary) and stresses their independence from each other. These provisions highlight the democratic nature of the constitution whereby checks and balances between the three powers of the State are guaranteed by the fundamental law of the country. Article 50 stipulates the doctrine of Islam in the legislation as being the main source of law in the

State. Article 86 is about administrative decentralization. Whenever possible, administrative functions shall be decentralized and performed by the local organs of the State and by public bodies. Article 95 "Unity of the Judiciary" stipulates that: No extraordinary or special courts shall be established, the jurisdiction of the military tribunal in time of war shall be established by law; in time of peace, they shall have jurisdiction only in respect of military offences committed by members of the armed forces. Article 96 "judicial guarantees": (1) in the exercise of their judicial function, the members of the judiciary shall be subjected only to law (2) the police and armed forces shall be directly available to the judicial organs for the performance of the acts pertaining to their functions.

#### Part Five: Constitutional guarantees

This part defines various constitutional guarantees such as those in Article 97 "constitutionality of laws", which states that laws and provisions having the force of law shall conform to the Constitution and the general principles of Islam. Article 99 "Constitutional Court" stipulates that: constitutionality of laws shall be decided by the Supreme Court, which constituted the Constitutional Court with the addition of two members appointed by the Government (Executive Branch) and two members elected by the National Assembly. Articles 101 – 103 define modalities, organization (higher court of justice) and legal implications for conducting criminal proceedings against the President of the Republic as well as members of the government (impeachment process approved by the National Assembly under Article 76 or Article 84 of the Constitution).

However, some participants, mainly representatives of the judiciary stressed that, although this Constitution was the fundamental law of the country during the first nine years of independence, the above-mentioned Constitutional

Court was not established. According to some participants, the reason was that the Government was not willing to set up such mechanisms of control, which could strengthen the power of the Supreme Court (i.e. highest judicial organ).

In fact, in line with the provisions of Decree Law No.3 of 12 June 1962, on the organization of the judiciary, Article 1, both civil and criminal jurisdiction organs (ordinary courts) comprised the following:

- a) District courts with criminal and civil sections
- b) Regional courts with criminal and civil sections (primary courts)
- c) Courts of appeal
- d) Supreme Court

According to Article 8 of the above - mentioned Law no.3 of 1962, the office of the Attorney General exercises the enquiring functions of the courts and supervises the application of the rules in line with provisions of the Constitution and other laws of the land and exercises other functions conferred by law. This office comprises a General Prosecutor who resides in the capital city and his deputies (including police officers who are specifically nominated/ delegated to represent the office of the Attorney General) before the primary and appeal courts.

According to most of the participants, the Constitution of 1960 not only emphasizes the following fundamental democratic principles but these were also fairly applied and respected by the civil governments of 1960 – 69. These principles included:

- a) Fundamental rights and duties of the citizens (Articles 8 – 15)
- b) Fundamental rights and duties of the person (right to liberty) (Articles 16 – 30)
- c) Judicial guarantees (Articles 38 – 48)

d) Organization of the State based on separation and independence of the three branches: legislative, executive and judiciary (Articles 49 – 97).

e) Constitutional guarantees (Articles 98 – 100)

### *Law on the Organization of the Judiciary*

This law regulates the administration and the operational matters of the judiciary. The law has undergone several amendments; the first version was enacted in 1956 by the Italian trusteeship administration in Somalia (southern regions). During the post-independence period, the said law was subject to two successive amendments in 1962 and 1974 respectively. However, almost all the participants in the workshop have focused their comments on the organization of the judiciary of June 12, 1962 (legislative decree or Law No.3 of 1962). This law provides the structure for a system of ordinary courts that consist of district and regional courts (primary courts), Courts of appeal and supreme courts that operated during the last seven years of the post-independence civilian government rule (1962 – 1969). Likewise, Puntland State's judicial branch based the courts on the above-mentioned law. Even though the primary courts have been combined and established in some major towns (i.e. Garowe, Bosaso, and Gal kayo), due to lack of adequate human (qualified judges) and financial resources there have been many setbacks as far as the practical functions of the judiciary process is concerned. Participants also pointed out that Somaliland in its draft constitution of 1997 has established a judicial system based on the British colonial codes prior to 26 June 1960.

Provisions of the law on the organization of the judiciary spell out the jurisdiction of the aforementioned courts of which the legal composition and power of the magistrates in various courts is based on the resolutions of conflicts between the application of laws and other relevant aspects of administrative justice such as: the appointment of, trans-

fer and/or removal of judges. For instance, Article 9 of the law on the organization of the judiciary stipulates that: subject to the provisions of the Constitution and this law, the courts shall apply:

- a) Sharia or Customary law in civil controversies where the cause of action has arisen under the said law.
- b) Statutory law in all other matters (Secular laws).

This provision has been criticized by some Somali jurists as being rather vague, while according to other participants it represented a compromise between two schools of thought which consist of: Muslim scholars and Secular law jurists. The former stated that the application of Sharia should not be restricted; the latter stated that it should apply only to matters of personal statutes and the parties should be given the choice of law. This difference of opinion (which also reflected the positions that existed within the two ex-colonial territories of the republic) exists to the present date, between the supporters of the two antagonistic views. Nevertheless, participants have noted that the decree gives the litigant parties some freedom of choice between Sharia and Customary law. The forced co-existence of these two judicial options continues to undermine the development of a unified legal system in Somalia.

### *The Somali Penal and Procedure Codes*

#### **Somali Penal Code**

Here below are highlighted comments of the participants on provisions of the penal code. The Somali penal code was based on Italian criminal law. It was approved by legislative decree of December 16, 1962. Some participants thought that although many provisions of this law were incompatible with Sharia, nevertheless, they were enacted on April 3, 1964. Others stated that, though the Somali penal code is based on alien criminal law and legal systems, it was considerably adapted to the Somali customs and

traditional legal systems. To this end, it provided a new system of crimes and punishments and is divided into three books comprising 565 articles.

Book One concerns offences in general which are defined in Articles 1 – 216, Book Two concerns crimes in particular, articles 217 – 504, and Book Three concerns contraventions in particular, Articles 505 – 565.

### Book One

Workshop participants have agreed that Book One of the Somali Penal Code describes and distinguishes the offences, crimes and types of punishments.

#### (i) Offences and crimes:

- Offences committed: when the act or omission of the offender has caused a harmful or dangerous event indicated in the Penal Law (Articles 16 – 20).
- Crimes attempted (Articles 17 – 19 PC): when the act or omission of the offender unequivocally directed towards causing the event has not been entirely completed or where the intended event has not resulted. For example according to Article 125, attempted murder is punished with imprisonment for 20 – 30 years.
- Offences are divided into crimes and contraventions (Article 15): according to the different nature of the punishments respectively prescribed by this code in Article 90. As per Article 24 and Article 434, crimes and contraventions are committed with criminal intent, which means when the offence is foreseen and desired by the offender. This matter also includes the case described in Article 441 PC i.e. The offence is more serious than the one intended by the offender (beyond the intent or unintentional).
- With the culprit without intention: when the event/offence, even if it might be foreseen, is not desired by the

offender and thus occurs as a consequence of negligence, imprudence, lack of skills or non-observance of by-laws, regulations, or orders or instructions.

(ii) Kinds of punishments in general

Article 90 (Principal Punishments)-1. The principal punishments prescribed for crimes shall be:

- a) Death (Article 16 Const, and 94 PC)
- b) Imprisonment for life (Article 95 PC)
- c) Imprisonment (Article 96 PC)
- d) Fines (Article 97 PC)

The principal punishments prescribed for conventions shall be:

- a) Imprisonment (Article 98 PC)
- b) Fine (Article 99 PC)
- c) Article 91 (Denomination of the principal punishments).

The term detentive punishment or punishments restrictive of personal liberty [44 Const.] shall include imprisonment for life, imprisonment for crimes and imprisonment for contraventions [95,96,98 PC].

The term pecuniary punishments shall include fines for crimes and fines for contraventions [97,99 PC].

Article 92. (Accessory Penalties)-1. The accessory penalties for crimes shall be:

- a) Interdiction from public offices [101,102 PC]
- b) Interdiction from a profession or trade [103,104 PC]
- c) Legal interdiction [105 PC]

The accessory penalty for contraventions shall be suspension of the right to practice a profession or trade [107PC]

The penal law shall specify the cases in which accessory penalties prescribed for crimes shall also apply to contraventions.

Article 93. (Application of Principal Punishments and

Accessory Penalties) – The principal punishments [90 PC] shall be imposed by the judge on conviction. Accessory penalties [92 PC] shall follow by the operation of the law as the consequence of conviction.

### Book Two

Book Two of the PC defines various types of crimes and describes specific punishment for each crime:

- Crimes against the integrity of the state (Articles 184 – 237 PC) such as an attempt to alter the constitutional order Article 217 PC.
- Crimes against the administration of justice (Articles 181 – 312) (interdiction from public offices) Article 302 PC.
- Crimes relating to abuse of the faith of the public (Articles. 348-386 PC such as: introduction into the state of counterfeit currency (Articles 348 – 349).
- Crimes against morals and decency (Articles 398 – 417 PC). These crimes include carnal violence Article 398 PC, prostitution, Article 405 PC, the supply sale or consumption of alcoholic beverages Article 411 – 413 PC.
- Crimes against the family (Article 425-433), illegal marriage (Article 425 PC), adultery (Article 426 PC), incest (Article 427 PC).
- Crimes against the person and the safety of individuals (Articles 434 – 450 PC.)murder (Article 434 PC.) insult (Article 458).
- Crimes against property, Articles 480 – 504 PC) theft (Article 480).

### Book Three

Book Three of the PC deals with the contraventions (Article 505-565).

Contraventions are usually consequences of the crime, for instance: a husband who injures his wife by battering



her intentionally/frequently who is sentenced to say four years of imprisonment may also be sentenced to pay damages (blood compensation) to the wife and a fine to the court. In addition he may lose marital rights and be obliged to divorce her (if she requests so), while in Customary law woman battering is considered to be a kind of disciplinary act to correct the woman's conduct to conform with the husband's wish and moral code. The issue may become problematic only when the injuries inflicted on the woman are beyond tolerable limit, which may warrant intervention from the woman's family. Therefore, the introduction of the penal code has theoretically challenged the husband's perception about battering women.

The basis of the Somali penal code is the set of constitutional principles relating to the subject, the absolute effectiveness of which is guaranteed by the Constitution of 1960. Among other things, these fundamental principles include:

- The principle of legality, which is expressly guaranteed by Article 5 of the constitution. This principle is inflexible in the penal code, as is apparent in Articles 16, 17, 19 and 42-45 PC. The Somali penal code is one of the most important sets of rules in the judicial system. The principle of legality is emphasized by the principle of legal reservation (Article 42 of the Constitution). Article 1 of the penal code states that: No one shall be punished for an act, which is not expressly an offense by law, nor with a punishment, which is not prescribed therefore. In other respects, the principle of legality is bound up with the principle of the general compulsory character of penal law (Articles 3 and 4 PC) and the provisions of Articles 5 and 28 PC on ignorance of the penal law which states: "No one may allege/claim ignorance of the penal law as an excuse" in other words the offender (who violates a rule of the

criminal law shall be indicted regardless whether he/she knows or not about the existence of a rule of the PC that prohibits his/her criminal act.

- In spite of articles that made 'penal responsibility' personal (Article 43 Const. and Articles, 16, 20, 23, 24 and 71 of the Penal Code), for the sake of security in the pastoral zones, murder continued to be collective. District commissioners were authorized, through 'public order law' to collectivize murder, punishing a whole sub-clan for murders committed by one member.

- The principle of the social rehabilitation character of the punishment – (Article 44 of Const.), which applies detention punishment (even in the case of imprisonment for life). The only real exception is in case of capital punishment (death by execution) whereby social rehabilitation of the condemned (sentenced criminal) cannot be carried out. However, the death penalty (Article 16 of Const.) is the final punishment for the most serious crimes against human life, or against the integrity of the State such as in cases of high treason (Article 184 PC) – bearing against the State.

- (Article 184) The right to set limits is prescribed by law according to Book Two of the PC Social interests which are protected by law include:

- a) Rules and offences related to the integrity of the State, especially to the activity of the administrative and judiciary organs.

- b) Rules relating to the protection of the society as a whole such as in cases of public order, public safety, public loyalty and national economy.

- c) Rules related to the moral values of the society, such as religious sentiment and reverence for the dead, moral decency, and public health.

In addition, individual interests protected by the PC include:

- a) Those provisions related to persons with respect to the essential right to life, individual safety, honour, liberty, work, privacy and domicile.
- b) Those provisions related to the protection of property or crimes against property by violence or fraud.
- c) Judicial guarantees (Article 38v Const.1960) such as judicial protection against acts of the public administration and redress of judicial error

In close keeping with the legal traditions and the Sharia of the Somali people, the penal code defines crimes against public morality as acts, which violate religious rules relating to the consumption and sale of alcoholic beverages. (Articles 411 – 416 PC); crimes against families such as illegal marriages (Article 425 PC), adultery (Article 426 PC), incest (427 PC), crimes against the person: murder (Article 434 PC), unintentionally caused death (Article 441 PC), and death caused by negligence (Article 445 PC).

### **Criminal Procedure Code**

The Somali Criminal Procedure Code was approved with legislative Decree No.1 of 1st June 1963 and comprises the following five books:

**Book One** outlines general provisions (Articles 1 – 95 CrPC) such as courts and parties, police investigations, methods of securing the appearance of accused person(s) in court, procedure for safeguarding personal liberty, recording of procedures etc.

**Book Two** (Articles 96 – 134) proceedings of the first instance, the burden of proof, evidence, the judgement, decision on the request of an offended party (claims for damages) etc.

**Book Three** (Articles 135 – 207) relevance of facts, production and effect of evidence, examinations of witness's evaluation of evidence and decisions on admissibility of evidence.

**Book Four** (Article 208) deals with general provisions on appeals and execution of punishment.

**Book Five** (Articles 275 – 288) regulates provisions on judicial relations with foreign authorities, recognition of foreign criminal judgement and final provisions.

Somalia's Criminal Procedure Code is also based on the Italian Penal Procedure Code, which was adequately revised so as to take into consideration the legal needs as well as the aspirations of the communities it serves. It comprises 288 Articles and concerns procedural matters for the application of the Penal Code rules. A good number of participants stressed that most of the procedural practices sectioned in this code are contrary to the procedural applications of Sharia, particularly in the types and modes of application of punishments concerning grave crimes such as murder, robbery, theft etc.

Finally, provisions of the Somali Penal Procedure Code though heavily influenced by the Italian Criminal Procedure Code, seems to have drawn inspiration from the judicial and religious traditions of the Somali people. At the same time, the need to conform to moral progress, the protection of human rights and the legal relations with foreign countries and international organizations was considered, and fully taken into account in the process of their formulation.

On the basis of the provision of law No. 3, of January 10th 1970 enacted by the Supreme Revolutionary Council (SRC), the jurisdiction of the crimes stipulated in this law are applied by the National Security Court (of Mogadishu) and its branches.

Article No. 87 of the Criminal Procedure Code stipulates that: the Minister of Grace and Justice may issue the necessary regulations for the implementation of this code. Article 288 CrPC of the criminal procedure states that the following laws are hereby abrogated:

- a) The Italian Criminal Procedure Code
- b) The Criminal Procedure Ordinance
- c) The provisions regarding criminal procedure contained in Ordimento Giudiziario (law on the organization of the judiciary) approved by ordinance No. 5 of 1956 and in the Indian Evidence Act 1872.
- d) Regulations regarding the Criminal Records Office approved by decree No. 32 of 1956.
- e) Any other provision contrary to or inconsistent with this code.

### *The Somali Civil Codes*

#### **Somali Civil Code**

The Somali Civil code was approved and enacted with the introduction of Law No. 37 of June 2 1973, and is based on the Egyptian Civil Code. Some participant magistrates noted that Somali Customary law and Sharia heavily influenced this code. It comprises 958 Articles and is divided into the following five books and a preliminary chapter of general provisions:

#### General Provision

Articles 1 – 87 of the Civil Code (CC) deal with the civil laws and their applications, the persons (physical and juridical: Associations, Foundations) classification of goods and other general issues such as fixed assets (capital goods) and floating assets.

**Book One:** Articles: 88 – 445 CC define various aspects of personal rights and obligations (duties) with emphasis on the elements of the contracts.

**Book Two:** Articles 445 – 680 CC concern specific types of contracts such as: contracts regarding the transfer of property rights (sale contracts, donations), contracts on the formation of companies, contracts regarding the use of facilities (i.e. rents, leases etc), employment and service contracts, contracts concerning rules on gains and betting, in addition to contracts dealing with insurance.

**Book Three:** Articles 681 – 820 define fundamental legal claims/rights such as the right to have property. Limitations and modalities of acquiring property (i.e. through donations, occupation, heredity and contract etc). This part of the Civil Code contains rules on the loss, transfer and access to the use of tangible and non-tangible property.

**Book Four:** Articles 821 – 937 CC contain specific rules on securities, guarantees, rights for the repayment of loans to creditors, including mortgages etc.

**Book Five:** Articles 930 – 958 CC concern rules on the protection of public access rights to the ledgers for registration of fixed assets.

In addition to rules contained in the Civil Code, several specific and supplementary laws regulate cases concerning civil law matters such as: Law No. 23 of January 1975 regulates the personal statute (family affairs) matters such as marriage, divorce, wedlock price (marriage contract price), childcare, and adoption of children's inheritance. Participants strongly criticized this law as incompatible with the principles of Sharia provisions. Provisions of Article 13 of this law restrict the right of a husband to marry a second wife, Article 24 limits the maximum value of payable wedlock price to So. Sh. 1000 only, and Article 158 stresses the equality of males and females with regard to property.

Furthermore, participants pointed out that the Civil Code incorporates many provisions of Sharia such as the

rules on personal statutes, which were under the jurisdiction of Qadis during the colonial era. However, the civil courts regulated these cases in accordance with the Sharia provisions, except during the period of 1975 – 1980 when the Military government applied the above law No 23 of January 1975.

### **Civil Procedure Code**

The Somali Civil Procedures Code (CPC) was enacted with law No 19 of 27/7/1974. The said law was effectively based on the Egyptian Civil Procedure Code and was thoroughly adjusted to the local conditions and needs of the multiple legal systems of Somalia. Participants expressed that procedural elements of the Somali traditional laws and the Italian Civil Procedure Code have fairly influenced the Somali Civil Procedure Code.

Provisions of the Civil Procedure Code are spelled out in four books comprising 444 Articles that define and describe procedural rules for applying the Civil Code and related legal matters.

**Book One:** Articles 1 – 46 CPC define general provisions including judiciary organs, competence by territory, value and subject matter (Jurisdiction of the ordinary courts in civil cases/disputes).

**Book Two:** Articles: 271 CPC concern regulations on the proceeding modalities such as inquiring about the case, processing and decision-making process of the case. This includes the supervision, interruption and cancelling of the case process, appeals and judgments.

**Book Three:** Articles 272 – 337 CPC deal with the special proceedings of civil cases. These include proceedings on injunction, preventative measures, recognition of foreign judgments, and arbitrations (Articles 514 CPC and 317 – 337 CP).

**Book Four:** Articles 338 – 444 CPC concern proceedings on civil case executive deeds and titles (such as bill of exchange/promissory note charges; transcripts of judiciary reconciliation, judgments and other similar acts of judgment, (Articles 338 – 345 CPC) and enforced confiscations. Articles 346 – 359 CPC deal with the confiscation of floating assets of the borrower (Articles 360 – 390 – 431 CPC) and proceedings of the opposition (right to contest the confiscation) and of the suspension and extinguishing of the execution process (Article 432 – 444 CPC).

(v) Law No.3 of January 1970 and Law No. 54 of 2 March 1972 on Establishment and Execution of National Security Courts.

The military coup of 21 October 1969 brought to power the military, which proceeded to develop a highly centralised State along totalitarian lines. Immediately after seizing power, the military government enacted the First and Second Charters, highlighting guiding political principles of the Revolutionary Government at domestic and foreign levels and stipulating supremacy and absolute power of the Supreme Revolutionary Council (SRC). However, General Mohamed Siyad Barre, the chairman of the SRC acquired uncontested political and military powers. According to the two Charters, the SRC had the power to establish special courts (National Security Courts) and enacted Law No.3 of 10 Jan. 1970 on the establishment of National Security Law and Law No.54 of 2 March 1972 on execution procedures of jurisdictional competence and judgements of the National Security Courts (NSC). These laws put all relevant criminal cases, especially crimes against the State, public property, and individual (physical and property) under the jurisdiction of the National Security Courts. These were special courts operating and functioning parallel to the ordinary courts.



Participants expressed unanimously that, during the military regime, Governors, District Commissioners and party officers exercised unlimited authority. As a result, people were subjected to arbitrary arrests, unwarranted detentions without trials, and were indicted and accused of wrongdoing simply because of their opinions or they belonged to a particular sub-clan. Entire villages were burnt down and turned to ashes, critical water sources for pastoral communities were mined and destroyed; individual human rights and personal liberties were violated or ignored.

### **Constitution of 1979**

Theoretically, laws and acts having force of law enacted after 1979 were supposed to be based on the provisions and principles of the constitution of 1979. However, these were rarely practiced. Participants recalled that, a general who was a member of the Revolutionary Council, the Central Committee of the party and Minister and who had no background or familiarity in legal matters headed the highest court, the National Security Court. In other words, he was exercising all the three powers of the state simultaneously. The Constitution was approved through a doubtful "popular referendum". It comprised 114 Articles and was divided into six parts:

#### **Part One: General Terms**

This constitution was written after the Ogaden War debacle with Ethiopia, when the regime started declining and the Communist countries abandoned Siyad Barre. The general terms defined in (Articles 1 – 19) provisions of this part follow a similar pattern to those defined in the constitution of 1960. The aim was perhaps to attract the Western countries to Somalia, which badly needed foreign aid. This idea worked as many Western countries poured substantial amounts of aid packages and development

programmes into Somalia. The constitution of 1979 differed from that of 1960 with the following relevant points: Article 7 states that the Somali Revolutionary Socialist Party is the only political party of the country that has the supreme leadership function of the political, economic and social life of the country. Article 10 defines complementarities of the Party and the State duties; Article 14 stipulates that the organization and activities of the Party and the State are based on Democratic Centralism. The important principle of supremacy of the law (Article 5 of the 1960 constitution) is completely ignored in the constitution of 1979.

#### Part Two: Fundamental Duties and Rights

Fundamental duties, rights and the freedom of the citizen and the person (Articles 20 – 39) stipulate that most provisions concerning freedoms (i.e. Article 26, duty to protect public property) can be exercised according to terms defined by this constitution and other laws. According to the prevalent opinion of the workshop participants, the guarantees of this constitution were vague and the military regime often did not apply or define statutes (political and civil rights guarantees) in the laws.

#### Part Three: Socio-Economic Foundation

This part (Articles 40 – 59) stresses the rhetoric of scientific socialism and the centrally planned economic system which focuses on the role of the State, as the leading actor of the relevant socio-economic activities. It is worthwhile noting Article 52, which stipulates that: while the State favours the maintenance of valid traditional values and rejects the outdated ones or those inherited from colonialism (sic) especially such as: tribalism, nepotism and regionalism. Article 47 is based on the compulsory education of primary/intermediate level students (8 years). Article 48 deals with the eradication of illiteracy of all school aged children.

Although the government policy was to expand compulsory education up to grade 8 levels, budgetary allocation to the sector was grossly low (2.5% in 1986).

#### Part Four: Structure of the State (Articles 60 – 107)

Article 60 states that the legislative power of the popular assembly and the Permanent Committee is the managing organ of the assembly. Articles 79 – 83 provide extensive powers to the President such as power to nominate up to six members and to appoint or dismiss the Ministers, President of the Supreme Court and the General Prosecutor of the State, in consultation with the Central Committee of the Party. Presidential decrees had the force of law to declare war and a state of emergency. Article 86 states that the Council of Ministers is the supreme executive organ of the government, which is chaired by the President. Other powers of these organs may be determined by special laws, which were "de facto" issued and promulgated by the President. However, the final decision on political, economic, social and security matters rested with the Party's Political Bureau, which consisted of five generals headed by the President.

Articles 96 – 107 concern the jurisdiction of courts of the Republic, special courts may be set up with functions and structures to be determined by the law.

Article 102 – the organisation of the judiciary and the nomination of the judges are regulated by special law. During the military regime, judges were appointed and dismissed by the President. So, the judges were not different from any government functionary or military officer.

#### Part Five: Security and Defence (Articles 108 – 110)

This part concerns the security and defence of the country as well as the role of the armed forces, whose administration and structure is determined by special law. In order to

maintain internal security, the police force, party militia and party youth organization and military personnel had powers enabling them to take security action, sometimes in a chaotic way.

#### Part Six: Various

Articles 111 – 114 concern various rules such as the provisions of Article 111 which define the constitution as the fundamental law and stipulates that laws, decrees and administrative acts of the State must be based on it.

The history of Siyad Barre's regime from a social justice point of view was a history of repeated abuses, injuries, usurpations (concentration of executive legislative and judiciary powers) and violation of the basic human rights. The few political rights and legal guarantees sanctioned in the Constitution of 1979 were continually violated by the repressive machinery of the State (i.e. National Security Service, intelligence of the army police, Pioneers, special courts). Practically, laws were considered as mere "scraps of paper" between October 21 1969 and December 31 1990.

During the first decade of the military regime (1969 – 79) the legislative power was vested in the Supreme Revolutionary Council. However, *de facto* its chairman/president had absolute power in the country, and ran the country through his ordinances. As per Article 100, the President of the Republic can establish special courts and promulgate special laws.

#### (vii) Puntland Charter and Draft Constitution

Selected representatives of Puntland communities/clans adopted the Puntland Charter in July 1998 at the Garowe Consultative and Constitutional Conferences. It consists of 35 Articles, divided into two parts: part one defines State religion, general policy and principles, fundamental individual rights, federal terms and democracy (Articles 1 – 6). This

ecutive branches to the Islamic principles/Sharia (Article 19.1).

The Charter has a duration of 3 years and expires on June 30, 2001. It envisages the preparation of a constitution during its term. The Puntland Government has prepared a draft constitution consisting of 100 Articles. At the moment, the Puntland Parliament is reviewing the draft constitution. The new draft constitution, like its precedents, follows the 1960 Constitution. It once more asserts that Islam is the fundamental source of all laws, guarantees rights of the citizen, fundamental human rights and specifically women's rights to all social, economic and political opportunities.

section states that Islam is the State religion and all laws and acts having the force of law shall conform to the provision of the Charter and the principles of Islam (Article 2.1). Article 6 of this section guarantees the fundamental rights and freedom of the individual. It recognises the Universal Declaration of Human Rights and guarantees against discrimination on the basis of race, origin, language, religion, sex, and freedom of thought, ownership, and adherence to political, social, and economic organizations. This Article also recognizes private ownership and an open market economic system encouraging and guaranteeing foreign investment. Part two deals with the organizational structure of the Puntland State (Articles 7 – 35). It defines the organization of the regional State as consisting of three branches: the legislature, the executive, and the judiciary (Article 7.1) The Puntland Charter recognizes the legal validity of all laws promulgated by the previous Somali governments except those in contradiction to Sharia and the Puntland Charter (Articles 32.1).

According to workshop participants, the charter generally replicates the provisions of the 1960 constitution, however, the following main differences can be noted:

- a) The Charter gives more powers and prerogatives to the President of the State because the position is that of executive president, whereby the President as head of the State functions not only as president but also as head of the executive branch
- b) The 1960 Constitution proclaims officially that Islam is the religion of the country and that all laws should conform to it. The Puntland Charter places even more emphasis on conformity/issuance or emanation of all laws from Islamic principles/Sharia.
- c) Total subordination and conformity of judiciary and ex-

## 5

# A Comparative Analysis of the Three Legal Systems

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*This chapter discusses a comparative analysis of the three traditional legal systems. It covers the main specific features and principal source of each tradition, explores the main areas of agreement and difference and looks at how the three legal systems interact(ed).*

### *Specific Features, Sources and Structures*

The table below summarizes the main features that distinguish each of the three legal systems:

#### *Distinguishing Features:*

**Customary Law:** Unwritten, male dominated, influenced by Sharia, has civil liability only

**Secular Law:** Formally written and codified, includes penal and civil liability

**Sharia:** Universal, male-dominated, broadly accepted by the people, heavily influences other Somali legal systems, contains penal and civil liabilities

#### *Scope:*

**Customary Law:** Very limited. Designed for a simple nomadic way of life

**Secular Law:** Comprehensive

**Sharia:** Comprehensive

*Type of punishment:*

**Customary Law:** Moral Punishment, compensation for damage or return of property

**Secular Law:** Fine, imprisonment or death penalty

**Sharia:** Fine, imprisonment or death penalty

*Principal Source for Legislation:*

**Customary Law:** Deliberated by elders

**Secular Law:** Romano-Germanic Jurisprudence, and Islamic principles and Somali customs

**Sharia:** The Holy Qur'an, Hadeeth, Ijma' and Qiyas

*Structure:*

**Customary Law:** Informal Traditional authority

**Secular Law:** Structured Judicial system

**Sharia:** Structured Judicial system

*Enforcing organs:*

**Customary Law:** The Diyah-paying group

**Secular Law:** Government law-enforcing Agencies

**Sharia:** Muslim State law-enforcing Agencies and religious Scholars

*Legislative Organs:*

**Customary Law:** Clan Elders/Xeer-beegti

**Secular Law:** Parliaments and other state organs

**Sharia:** God, the Prophet's Hadeeth and practices, and Islamic Schools of Thought(Madhabs)

### *Sharia v/s Customary Law*

Islam made a remarkable impact on Somali Customary law (Xeer) as pointed out in the text. Islam calls for a radical change in the lifestyle of those adopting it. They have to align their customs, traditional norms with the Islamic teaching, which means any part of Xeer or cultural traits



that do not conform to Islam and its Sharia should be automatically abandoned. Islam brought radical change to Somali culture, especially in practicing the major precepts of Islam. e.g. the five pillars of Islam.

Even though Somali society had adopted Islam very early in the spread of Islam, there are still residuals of the old pre-Islamic Customary law practiced by the Somali society as noted below. Customary law (Xeer) denies women rights that Sharia sanctions for them. These include free choice of spouse, and rights to property ownership. Some participants viewed such practices as widow inheritance (Dumaal), obligatory marriage of the sister of the deceased to the widower husband (Xigsiisin) or bride-wealth as having positive aspects, e.g. protecting the social, economic and security interests of the children and the widow.

Another point that was raised was that, although the Somalis profess Islam, adherence to this faith does not prevent them from engaging in clan warfare and camel rustling, as well as continuing the Somali clan and sub-clan loyalties, which are always stronger than obeying religious teachings. A considerable number of interviewees and workshop participants were of the opinion that Somalis do allow the execution of severe Sharia penalty rulings, when they are not the subjects; in other words, they require or wish for the implementation of Sharia rulings only when the ruling applies to the opposing party or when it is advantageous to their side as evidenced by the Somali wisdom "Somaligu marka laga gardaran yahay waxa uu ku dhawaaqaa: xaqey, xaqey!!! Oo macnaheedu yahay Shareecadda hana loogu gar qaado, marka xukunka Shareecadu dan u yahay, marka uu gar daran yahayna waxa uu ku dhawaaqaa xeerey, xeerey!!! 'oo ah Xeerka hana loogu gar qaado."

Other Sharia provisions, which Customary law does not put to use are:

a) arm and limb mutilation (Gacan iyo isdhaaf -goyn) for

grave crimes such as theft, extortion, banditry;  
 b) killing by stoning or lashing for adultery or rape crimes,  
 c) execution for deliberate murder (Qisaas), and women's rights as defined by Sharia in many matters. Participants also noted that most often, even in many cases, in which Customary law claims to have adopted Sharia provisions, it contrasts at the implementation stage, as execution is not carried out in accordance with Sharia.

According to the views of the majority of participants, this is because of the absence of formal Islamic state institutions, which have never been established in this country. Others attribute this to the fact that implementation of Sharia entails abandoning some Xeer practices, which do not conform to, or contradict Sharia.

A third view expressed by elders at the workshop was that the application of severe Sharia penalties for crimes mentioned above requires a substitute authority for clan elders, with strong law enforcement organs whose criminal indictment and prosecution can be effective in pastoral areas. Otherwise, the clan elders have the alternative option that is continuing the practice of Xeer. In addition to that, almost all participants of this study had unanimously consented that the prevailing conditions do not allow in Puntland or Somalia in general the implementation of severe Sharia penal provisions. The Puntland Prosecutor General Mr. Bashir Yuusuf Nur gave a good example: just recently, in Garowe, the capital of Puntland, the Sharia District Court condemned a youth to an arm mutilation penalty for theft. The ruling could not be executed and to save the prestige of the court, the case was taken to the Court of Appeal, which commuted the penalty to an imprisonment sentence.

Another reason given for the lack of applying Sharia provisions instead of Xeer is that the majority of the nomadic society, though they venerate Sharia, are not conversant with legal interpretation of Sharia. This is due,

some believe, to the fact that Moslem scholars have fallen short of preaching in a vocal and public way that many of Xeer provisions are against Sharia. On the same footing, the government takes a mute attitude towards applying Sharia as it requires adopting unprecedented policies that might alienate the government from the clanbased population and its traditional leaders whose power rests with the application and preservation of Xeer. The issue of Xeer versus Sharia creates a difficult political environment whenever the matter is raised. It remained so in all past administrations.

The following sections shows the fundamental difference between Sharia and Customary law on some of the issues treated above. While the interpretation of Customary laws gives priority to social, cultural and economic interests, Sharia strictly stipulates that all customs, whether social, cultural or economic, that are in clear contradiction to Islamic precepts, are illegal (Xaaraam). Some examples are given below:

*1. Arranged Marriage and Negotiated Dowry*

**Customary Law (Yarad khasab ah):** Xeer permits an arranged marriage without the consent of the bride. It also permits a negotiated payment of an agreed amount of wealth received by the bride's family and relatives from the groom's family and relatives. Clan elders believe that dowry raises the social value of the girl and makes the marriage durable, as the husband may not take the decision to divorce the wife lightly. The dowry is also said to represent an economic return on the wealth spent on the bride's upbringing and ensure further assistance to the girl in times of economic distress (Dhibaad).

**Sharia:** Sharia prohibits guardians of the prospective bride and groom from seeking a negotiated dowry and considers it an illicit earning (xaaraan, unclean in a religious sense),

because this violates the principle of Islam and the Sharia rules that regulate the marriage process and a woman's choice in marriage. Sharia also holds the view that raising one's children is not an investment for economic return, but a duty sanctioned by Sharia. Therefore, any profit obtained through compulsory negotiated dowry is prohibited.

*2. Widow Inheritance (Dumaal) and Marriage of the Sister of the Deceased to the Widowed Husband (Xigsiisin)*

**Customary Law:** This is an old traditional rule based on the social interests of the families concerned, such as child welfare, and the continuation of the in-law relationship (Xidid) and property protection

**Sharia:** Sharia is against any type of forced marriage and considers these acts unjust. Women are free to make their choice and have God-given rights within the limits of Sharia.

*3. Collective Payment and Sharing of Blood Compensation*

**Customary Law (Diyah):** According to Xeer, blood compensation is collectively paid and shared among the Diyah-paying group. As the culprit's family alone cannot afford to pay blood compensation, it is the duty of the Diyah-paying group to settle it collectively. Clan elders maintain that collective payment of the Diyah is the central pillar that ties the clan together; it also fosters the collective defence and political solidarity of the clan against others.

**Sharia:** Sharia prescribes that blood compensation is purely an inheritance matter and it belongs to the rightful inheritors as sanctioned by the Qur'aan. Any deviation from what Sharia prescribes on this issue is illegal and contrary to Islamic practice. The utilitarian value of the collective blood compensation advocated by elders has no religious or Islamic validity.

#### *4. Rape*

**Customary Law:** Xeer considers rape to be a grave crime, and an insult to the honour of the victim and her lineage. It may compel the affronted lineage to fight and nourish hatred and rancour. The offender is penalized heavily. If the girl becomes pregnant, she may be forced to marry the rapist upon the request of the offending family to avoid further revenge and hostility. The rapist would pay a relatively large dowry

**Sharia:** rape is an aggravated adultery crime in Sharia, and the penalty is capital punishment if the culprit has been married at least once (Zaani-muhsin) or 100 lashes if he is a bachelor. In both cases, the offender must repair the damage by paying Meher (wedlock price) on the victim's terms. Xeer penalty for rape is much milder than both Sharia and Secular law.

#### *5. Collective Responsibility*

**Customary Law:** Xeer legalizes the collective responsibility of a Diyah-paying group or sub-clan for the offences committed by a member, as indicated by case no. 3 above.

**Sharia:** Islam and Sharia are against collective responsibility. According to Islamic teachings, every person is responsible for the crime he/she commits, as sanctioned in the Holy Qur'aan. However, Sharia does not reject community voluntary contribution to assist the culprit in the payment of the Diyah instead of capital punishment (Qisaas).

### *Secular Law v/s Customary Law and Sharia*

**Colonial Secular Law:** Participants recalled that from the advent of the colonial powers up until the collapse of the Somali State in January 1991, Secular law dominated the other two. The judicial structure formally remained secular,

and Sharia and Customary law played a marginal role. Participants expressed that the introduction of the colonial Secular law into Somali society had more negative effects than positive on the Somali traditional legal systems (Xeer and Sharia). The negative effects include:

1. The Secular law practiced by the colonial authorities has directly or indirectly undermined the traditional legal systems. It restricted their use and validity to the districts and remote rural areas, to the regulation of minor legal disputes and family affairs among the local population. Secular law regulated almost all criminal cases and important civil disputes and had replaced Sharia and Customary law provisions. In the urban centres, where Secular law was dominant, Sharia was limited to family statutes only.

2. The application of Secular law hindered the development of the traditional legal systems. Extensive application of Secular law has interfered with and violated important provisions of Sharia, Islamic teachings and Customary law through the application of the following provisions:

- a) In cases of conflict between provisions of the traditional legal systems and Secular law, the latter had pre-eminence over the other two and thus assumed the legal position of a fundamental law. For instance, Secular law abolished the Customary law rules regulating the land tenure system and access to communal resources (pastures and water).

- b) Secular law legalized some attitudes and behaviour, which are considered illegal acts/crimes according to the provisions of Sharia and Islamic teachings e.g. it legalized prostitution. Secularists abolished traditional judicial institutions such as Qadi courts and Xeer assemblies that practiced the rules of the traditional legal systems in the Somali sultanates after the colonial conquest.

- c) Somali scholars and experts in Islamic jurisprudence and

Somali Customary laws were not recognized as professionals like their counterparts in the Secular law sector. Thus, they could not appear before the formal courts as lawyers and could not release or validate legal documents such as certificates, and public notary acts. In this context, while the English and Italian languages were the only official languages in British Somaliland and the Italian colony of Somalia respectively, the colonial powers discouraged the establishment of schools for learning the Arabic language and Islamic teachings.

d) Likewise, the introduction of Secular law adversely affected the social standing and governance role of elders as Qadis /chief Qadis, and traditional leaders operated in a subordinate position under the district commissioner or even under a simple expatriate registrar/clerk.

e) Pre-colonial Islamic teaching centres in Harar, Brava, Bardera and the various Darwish Centres in the North were considered dangerous institutions and were closed or suppressed by the colonial administrations.

The only positive aspect of the introduction of Secular law that participants cited is the colonial administration's institutionalization of Sharia courts at district levels, limited to family matters, and recognition of the power of traditional leaders in the clan hierarchy as the makers and upholders of Xeer. Given this important role that elders play, the colonial administrations strengthened those parts of Xeer, which were not against their interests, by supporting clan leaders' decisions and providing them with Ilaalo (a type of local police under district officers' jurisdiction dealing only with clan related matters) to enforce law and order in the nomadic areas. Seen from this perspective, some participants believed that elders had more power in the colonial and post-colonial periods than nowadays.

**Somali Secular Law:** Participants informed that, during

the post colonial era, most of the Somali fundamental Secular laws, such as the constitutions of 1960 and 1979, the Puntland Charter and the Draft Constitution, stipulate that Islam is the State religion and recognize the important role of Sharia and Customary law within the multiple legal systems of the country. In addition, these laws expressly state that enacted laws in the country should conform to the general principles of Islam and Sharia. Furthermore, provisions contained in most Secular laws enacted by successive Somali civilian governments are not in contradiction to Islamic Sharia. As such, some provisions of Sharia are embodied in the Somali civil- and penal codes. Both had undergone basic reform and review to conform to Islamic principles and Sharia. Participants found out that Somali Secular law generally does not contradict Sharia with the exception of the Xuduud rulings in the case of the Penal Code and Riba and insurance policies in the case of the Civil Code.

### **Comparative views of the Traditional Legal System on certain issues:**

#### *1. Arranged Marriage and Negotiated Dowry (Yarad khasab ah)*

**Customary Law:** Xeer permits an arranged marriage without the consent of the bride. It also permits a negotiated payment of an agreed amount of wealth given to the bride's family by the groom's family and his relatives. Clan elders believe that dowry raises the social value of the girl and makes the marriage durable, as the husband may not take the decision easily to divorce the wife. The dowry also represents an economic return on the wealth spent on the bride's upbringing and secures further assistance to the bride from her kinsmen in times of economic distress (Dhibaad)



**Sharia:** Arranged Marriage and Dowry. Sharia prohibits guardians arranging a marriage without the consent of the prospective bride. It also prohibits the guardians negotiating a dowry and considers it an illicit earning (xaaraam, unclean in the religious sense). Because this violates the principle of Islam and the Sharia rules that regulate the marriage process and the woman's choice. Sharia also holds the view that the upbringing of one's children is not an investment for economic return to the father, but a duty sanctioned by Sharia. Therefore, any earning obtained through negotiated dowry is prohibited.

**Secular Law:** According to Secular law, Yarad (dowry) cannot be considered an obligation, because the bride is free to choose the man she wants to marry. Therefore, any payment made by the groom to the family of the bride is a courtesy (Xushmad) and voluntary.

## *2. Widow Inheritance*

**Customary Law (Dumaal):** Obligatory marriage of the widow to the brother of the deceased husband. This is an old tradition based on the social interest of the families concerned such as child welfare, continuation of in-law relationship (Xidid) and property protection

**Sharia:** Obligatory marriage of the widow to the brother of the deceased husband (Dumaal). Sharia is against any type of forced marriage and considers such acts unjust. Women are free to decide on their choice of a partner and have God-given rights within the limits of Sharia.

**Secular Law:** this type of marriage is considered a crime against the legal rights of the citizen. Punishment for this crime is a prison term from one to five years (Articles 226 and 401 PC).

## *3. Murder:*

**Customary Law:** According to Xeer, in most of the cases, blood compensation is collectively paid and shared among

the Diyah-paying group. As the culprit's family alone cannot afford to pay blood compensation, it is the duty of the lineage to settle compensation. Lineage elders maintain that paying Diyah is the central pillar that keeps the group together; it also fosters the collective defence shield of the clan against other clans.

**Sharia:** For murder, Sharia prescribes three options depending on the choice of the victim's rightful inheritors: death, (Qisaas) Diyah-payment or pardoning. Any deviation from what Sharia prescribes on this issue is illegal and contrary to Islamic teachings. The utilitarian value of the collective blood compensation advocated by elders has no religious or Islamic validity.

**Secular Law:** According to Secular law, murder cases are normally divided into three categories which are: capital punishment for intentional murder, imprisonment of 10 – 15 years for manslaughter and imprisonment from 6 months to 5 years for death caused by negligence (Articles 434 – 436 PC).

#### *4. Rape*

**Customary Law:** Xeer considers rape a grave crime, and an insult to the honour of the victim and her lineage. It may cause sub-clan fighting and nourish hatred and rancour. The offender is penalized heavily. If the girl becomes pregnant, she may be forced to marry the rapist upon the request of the offending family to avoid further revenge and hostility. He would pay a large dowry. The Xeer penalty for rape is much milder than both Sharia and Secular law.

**Sharia:** rape is an aggravated adultery crime in Sharia, which stipulates capital punishment, if the culprit has been married at least once (Zaani-muhsin) or 100 lashes if he is a bachelor. In both cases the offender must repair the damage by paying Meher (wedlock price) on the victim's terms. However,

Sharia is strict in ascertaining the proof of rape as it requires four male witnesses to prove the occurrence of actual sexual intercourse or a consenting adulterous sexual act.

**Secular Law:** Rape is considered a grave crime by Secular law and the punishment is five to fifteen years of imprisonment. (Article 498 PC) – For the purposes of Penal Code Articles, penetration of the male sexual organ is considered sexual intercourse. This is ascertained by employing modern methods of investigation, witnesses or oath undertaken by the accused.

### *5. Collective Responsibility*

**Customary Law:** Xeer legalises the collective responsibility of the Diyah-paying group or sub-clan for the offences committed by a member. Any member of the Diyah-paying group is liable for compensation as they collectively pay and receive blood compensation.

**Sharia:** Islamic Sharia is against collective responsibility. According to Islamic teachings, every person is responsible for the crime he/she commits, as sanctioned in Qur'aan. However, Sharia does not reject community voluntary contribution to assist the culprit pay Diyah in exchange for capital punishment (Qisaas)

**Secular Law:** Secular law is against collective responsibility and crime is personal but it does not reject voluntary contributions to assist the culprit. No collective punishment is allowed by the penal code.

### *6. Theft, Extortion and Banditry*

**Customary Law:** for these crimes Xeer requires the return of property or the payment of an equivalent value with a heavy moral penalty.

**Sharia:** For theft, Sharia sanctions arm mutilation; and for extortion and armed banditry opposite arm and foot mutilation, hanging, imprisonment or deportation

according to the level of the crime committed.

**Secular Law:** as per the provisions of Article 480, generally these crimes are punished by imprisonment up to three years and with a fine from 300 to 5,000 Som.sh. (1974 value). However, with concurrence of aggravating circumstances set out in Articles 39, 481, 240 and 541 PC, imprisonment is three to ten years, and with a fine of 2,000 to 15,000 Som.sh. (1974 value). For the crimes of robbery and extortion, as stipulated in Articles 484 and 485 PC, the punishment is imprisonment from three to ten years and a fine of Som. sh. 2,000 to 5,000.

#### *7. Loans/Credit*

**Customary Law:** On issues concerning usury or interest charges on credit or loans, Xeer generally conforms to Sharia and considers these business transactions illegal. However, there are exceptions in some local communities.

**Sharia:** According to Sharia, interest, surcharge or usury on loans or credit are considered illicit gains and are prohibited.

**Secular Law:** Within the framework of Somali Banking Law N0.18 of 1963 and the provisions of the civil code, inter-est rates are legal and broadly practiced by the business communities.

#### *8. Communal Property*

**Customary Law:** Xeer has prescribed penalties for the misuse or damage of communal property such as grazing land, or acts detrimental to public interests such as public health. For these acts, Customary law affords moral punishment and public cursing.

**Sharia:** Sharia urges the safeguarding of communal property and anything of public interest or concern. The Sharia penalty for damage to communal property ranges between fines and detention depending on the magnitude of the damage.

**Secular Law:** Secular law prohibits damage to communal property and anything of public interest or concern and sanctions fines or detention penalties

*9. Apostasy*

**Customary Law:** in Xeer is criminal. A Moslem cannot change his/her religion and Xeer does provide punishment.

**Sharia:** In Sharia apostasy is a grave crime. A Moslem cannot change his or her religion Sharia prescribes the death penalty for apostasy.

**Secular Law:** In Somali Secular law apostasy is not mentioned, because the constitution allows freedom of religion- Articles 29 – 30 Const. 1960.

*10. Selling, buying and using illicit products (alcohol, etc)*

**Customary Law:** Xeer prohibits the use, purchase and sale of illicit drugs. However, apart from the moral punishment of social stigma, there is no penal punishment in Xeer for these acts.

**Sharia:** Sharia prohibits the use, purchase or sale of illicit drugs and sanctions lashing penalties.

**Secular Law:** Secular law took different positions on this issue at different times: the 1960 Constitution follows Sharia and prohibits the use, purchase or sale of illicit goods- Articles 411 – 417. However, the 1979 Constitution abolished the articles prohibiting these goods. As the Puntland Charter and Draft Constitution follow the 1960 Constitution, they prohibit these items.

*Position of the Three Legal Systems on  
Gender and Human Rights.*

**Customary Law (Xeer)**

Somali society is male-dominated, as the all-encompassing

patrilineal kinship order, which traces descent through the male line, and devotion to Islam together lower the social status of women and their responsibilities. Participants confirmed that Xeer does not consider women as equal partners with men. Xeer is more restrictive of women's rights as it even denies them rights provided by Sharia, such as free choice of spouse, inheritance of property or ownership of property in general, or decision-sharing in household matters. Sharia also prohibits women from being beaten harshly, an act which might be considered as simply disciplining according to Xeer. Xeer does not allow women to participate in the politics of the clan and the decision-making process. Women's ideal role in the society is to fulfill reproduction and household management. All other activities that women may undertake in the community are valued and appreciated as an additional input, and seen through the prism of biological reproduction, raising children and managing housewife chores.

Men participants in the workshop agreed on women's domestic and reproductive responsibilities as right and natural, while their women counterparts decried it by affirming that beyond the biological and household roles, women should have additional roles in social, political and economic affairs. Women and religious-men insisted that literal application of Sharia would allow women more rights than Xeer does at present. The conceptual dichotomy between men and women on gender and human rights was wide, yet both raised their arguments in a sincere manner. There has not been heated dispute, but reasoned discussion on this sensitive matter.

### **Somali Secular Law**

The United Nations General Assembly approved the adoption of the first human rights declaration on December 10, 1948. The definition and clarity of the individual's human

rights and freedom were unprecedented. This declaration became the main source of reference for the individual human rights and freedoms that were promulgated by the first Somali Republic. Participants noted that the new Republic recognized the equality of all citizens regardless of their sex, race, national origin, birth, social status, and so on (Article 3 of the Constitution of 1960). These fundamental rights and freedoms were acknowledged and incorporated in the new constitution. In fact, Articles 7, 16, and 17 spell out the individual rights and freedoms as they are stated in UN Human Rights Universal Declaration – the laws of Somalia shall comply, in so far as they are applicable, with the principles of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948 (Article7).

To emphasize precisely and legalize the different aspects of these rights and freedoms, the constitution dedicates approximately 29 Articles to this issue. For example, Article 16 stipulates: Right to Life and Personal Integrity:

1. Everyone has the right to life and personal integrity.
2. Arbitrary limits may not be established.

Participants commented that, while Article 17 describes the various types of personal liberty, these noble concepts of human rights and individual freedoms in Somali Secular law lasted only nine years. The military coup d' état, which took over power in 1969, suspended the rather liberal constitution and revoked human rights and personal liberties. However, after a decade of emergency rules that culminated in 1979, the Military government promulgated the second constitution of the Democratic Republic, which recognized the Universal Declaration of Human Rights (Articles 20 – 35), dismissed in 1969 with the entire constitution. But this legislation remained on paper, as some of the Secular law workshop participants stated. They also

explained that presidential decrees and administrative rules took precedence over the constitutional rights of the Somali citizen during the Military government.

Participants in the Somali Secular Law Workshop acknowledged that it is the best secular legal system, theoretically, for the promotion of gender and human rights. It recognizes the equality of all citizens (Articles 3, 7, 16, 17 of 1960 Constitution, and Articles 20 and 21 of the 1979 Constitution). Even though Somali Secular law does not prohibit the participation of women in the decision making process (i.e. politics and socio-economic domains), the limitation of women in playing a leading role in the society is mainly due to the emphasis on patriarchy in the Somali culture and the low educational standard.

In the post colonial era, women began to get access to opportunities, take part and participate in the leadership and assume administrative positions in the independent Somali governments. This was made possible because of their achieved high level of education. Equal salary payments and equal labour rights were also acknowledged and stated in secular law. In addition to that, in 1975 the Military government passed a law prescribing women to have equal rights with men concerning inheritance. This violated the Sharia inheritance regulations, and caused popular indignation, which resulted in the execution of eleven Muslim scholars, who publicly came out against this law.

Secular law recognizes additional rights for women in the working environment because of their natural role in the family: maternity leave, allocation of lactation hours for one year and exemption of night shifts from 10 pm to 5am (Labour Code Articles 88 to 92 -Arabic version). However, Somali Secular law deprived women of part of their formerly recognized rights. It required them to pay 50% of the family bill and marriage expenses as part of the



equality of the sexes. The new law set an upper ceiling of 1000 shillings for the "Meher" – wedlock price (Article 24 (3) of the Law for Family Affairs), in contrast to the previous norms, where the "Meher" was open for bargaining and negotiation and the women made the final decision.

### **Sharia**

Participants explained that in Muslim Jurisprudence (Sharia), equitable and fair relations, with regard to human rights, are cultivated and regulated among individuals and social groups in the community. Individual rights and liberties are guaranteed and protected in order to encourage innovation, production and growth in a manner that will serve the common good without infringing on the rights of the other individual, or endangering the society as a whole. Individual, as well as collective rights and obligations are clearly defined in Sharia.

Participants agreed that Sharia guarantees the basic rights of women in general but they differed on whether Sharia bars women from taking part in public/social activities and the decision-making process. Religious men attending the workshops-Wadaado- and many ordinary participants had insisted that Sharia does not permit women to take part in public/social activities and decision-making, suggesting that women should obey the Islamic teachings and confine themselves to reproductive roles, childcare and household management. Women participants strongly countered this view, arguing that Sharia does not bar them from participation in social, economic and political activities and decision-making. They mentioned that they have five members in the present Puntland Parliament, which is token representation, and vowed to continue their struggle until they gain all their rights.

In spite of this, women showed optimism and welcomed the Puntland Charter and its replacement by the formulated

Draft Constitution, as both of these legal documents guarantee women rights in social, economic and political arenas.

*Impact of the Civil War on the Three Legal Systems  
in the Puntland Regions*

The civil war did not penetrate deep into the territory administered by the Puntland State of Somalia; and the 1991 – 1993 border conflict was confined to the frontier town of Galkayo in central Somalia and its surroundings. The rest of Puntland remained unaffected. However, the effects of the civil war that ravaged throughout the country had tremendous impact on the region politically, socially, and economically. Public institutions of government, including the judicial and security apparatus, disintegrated with the collapse of the national state in January 1991, paving the way for anarchy and general lawlessness and disorder. The rule of the law was replaced by the rule of the gun. The ensuing anarchy made its mark on all walks of life: the rapid increase of incidents violating Customary law and threatening social harmony, and the degradation of traditional values and social norms.

In the 8 years preceding the establishment of Puntland State in July 1998, the population of Puntland maintained a fragile peace through various traditional conflict resolution institutions, including the use of Sharia and Customary law and the good will of clan leaders. People resorted to legal traditions, Sharia and Customary law that had previously played a minimum role in the Somali judicial system. For the first time, Customary law began to be practiced extensively in urban and rural areas, in effect replacing Secular law in the previously better policed urban setting. Thus, Xeer assumed a prominent position in

the multiple legal systems of the country in the prolonged transition period. The most important effects of the civil war on the legal systems are:

### **Customary Law**

- i) Increase in the incidence of rape cases as the nominal authority of traditional leaders failed to effectively punish the perpetrators and control the crime.
- ii) Erection of unlawful road check points along the Boosaaso-Gaalkacayo highway by armed clan militias: This not only restricted the flow of trade traffic frequenting the highway, it also involved extortion of trade traffic, and destabilizing acts of banditry including hijacking vehicles by clan militias.
- iii) Senseless killing, looting and banditry, which the application of Xeer could not handle due to generalised lawlessness and disorder and social malfunction,
- iv. Murder of relatives from the mother's side (Reer Abti) and sister's (in-laws-Xidid) which violates the basic principle of Xeer.
- v) Increased prostitution, and ever-expanding use of and trade in drugs and alcohol. Xeer became unable to curtail such imported alien habits, as it has no provision to control or even contain them.
- vi) Compensation for injuries or deaths in road accidents became the responsibility of the Diyah-paying group. In the past, insurance companies were liable to pay such compensation. As Xeer did not envisage compensation for road accidents, the matter became problematic to solve, so each region has devised its own value system for settling road accident cases. Elders have strongly complained at the workshop over the burden resulting from road accident cases, and hoped the government would either establish traffic rules or encourage the development of an insurance system.

Extension of Xeer application beyond Puntland:

a) Payment of blood compensation by the clans living in Puntland for murder cases committed by their members residing outside Puntland e.g. Kismayo. Many people (Harti clan) originally residing in other regions of Somalia fled to Lower Juba regions particularly Kismayo. Some sub-clans in Kismayo could not afford to pay *Diyah* for murder committed by their militia. Members of the same clan in Puntland had to pay the *Diyah* to avoid retaliation and revenge. This geographical extension of the *Diyah* institution beyond Puntland represents the most unique phenomenon that the civil war produced in the application of Xeer.

b) Participation of some wealthy businesswomen in the payment of blood compensation. Many women have raised their status in the clan because of access to wealth. Sometimes these wealthy women are now consulted on important issues they were never invited to talk about in the past.

### **Secular Law**

In addition to the absence of effective law enforcement government organs, workshop participants attributed other reasons for the non-use of Secular laws and the revival of legal traditions (Xeer and Sharia) in the post-war period:

a) Most Somalis, particularly rural communities, tend to view Secular law as an alien tradition imposed upon them. Secular law was associated with colonialism and thought to serve its interests and therefore epitomized as a tool of oppression.

b) Secular law does not, in any form, emanate from Somali culture and beliefs nor does it reflect the historical background of the society. Therefore, it is not surprising if Somalis perceive Secular law court rulings as illegitimate. Since

the inception and imposition of Secular law by foreign powers on Somalis, there was a prevailing sense of unease about the judgment and dissemination of Secular law. Family and friends would usually resort to all means available to enable a detained person to regain his liberty, and this view prevails to the present day.

c) The negative attitude toward Secular law is reinforced by the fact that the credibility and prestige of secular courts was heavily eroded during the post-colonial period. Secular courts lost public trust due in part to their improper dispensation of justice and their frequent manipulation of the law, and corruption and nepotism.

d) People are not knowledgeable in Secular law provisions, which in turn creates an environment of uncertainty and mistrust in the process of Secular law proceedings.

e) Scarcity of Secular law practitioners in the Puntland regions restricted the application of Secular law in those regions.

f) The traditional nomadic culture cherishes boundless freedom, and rebels from coercion and subordination, control or imprisonment, which are associated with the State. Thus, it is not surprising that Somalis view both Secular law and the State as intruder bodies infringing on their liberty.

Due to the absence of law enforcement institutions in the transitional period, cultural factors contributed to the diminishing role of Secular law and the revival of the other legal traditions, such as unequal powers of contending parties. In the event the sub-clan of the culprit is stronger than that of the victim, the former would raise objections against execution and/or severe penalisation of its member, and would coerce the replacement of a more lenient ruling. The reverse is true when the offending party is weaker and cannot afford retaliation. This could lead us to conclude that the only institution Somalis give binding loyalty to is the clan.

## **Sharia**

Participants reported that the degradation of the social and moral values of Somali society had the following impact on the application of Sharia:

- a) Increased use of Sharia application
- b) Formation of religious groups and Islamic organisations providing social and legal help
- c) Increase in number of Qur'anic Schools.
- d) Sharia became unable to challenge some social habits brought about by the civil war.
- e) Sharia courts at regional levels with minimal functions had flourished.

### *Future Roles of the Legal Systems*

#### **Customary Law (Xeer)**

Participants stated that large groups of Puntland pastoralists and their traditional leaders trust and adhere to Xeer. Clan elders at the workshop highly recommended the continuation of its practice and preservation. Yet, upon careful scrutiny, it was found that some provisions of Xeer contradict Islam and Sharia provisions. When this issue was raised, the participants instantly withdrew from their previous position and admitted that many Xeer provisions may be against Islam, and that these should be abandoned. Islam being a heavenly revelation it is not subject to change or alteration, the logic is, therefore, that Xeer should be adjusted to Sharia. Moreover, a number of Xeer rules are also in contradiction to Secular law and human rights conventions.

What emerged from this participatory research is that continued use of Xeer provisions is necessary until an alternative legal system is found and applied by the pastor-

al population. Xeer, in the present circumstances, has greater chances to survive as it enjoys the support of the clan and traditional leaders. The future of Xeer very much depends on if it can be adjusted to other laws. This process needs time and effort but the view of the participants was that steps in that direction should be taken sooner rather than later. Participants suggested launching a large-scale awareness-raising campaign, spearheaded by the religious scholars, to explain to the pastoralists that many Xeer provisions are not permitted by Sharia and are against the teachings of Islam.

### **Secular Law**

Given the negative attitude Somali pastoralists hold about Secular law, some of the problems, which may negatively affect full application of the Secular law in the future in Puntland, are:

- The language of Secular law and the methods of its application are foreign and therefore difficult for ordinary Puntlanders to comprehend. Thus, the accused nomad thinks that he is being subjected to an unknown judicial system, which he finds difficult to understand during court proceedings.
- The deeply ingrained popular belief of Somali citizens that Secular law is formulated to safeguard the interests of the ruling elite, who always twist and distort its rulings according to their desire.
- Some ordinary Somalis believe that Secular law is not based on the Somali pastoral culture, religion or their Customary law.
- The nomadic culture of Somali society is highly democratic and does respect legal restrictions and limitations of movement and expression of opinion.

- The high illiteracy rate, particularly of the nomadic community and the availability of alternative legal traditional systems together conspire to offer limited opportunity for the application of Secular law. The future of Secular law in Puntland will depend to a great extent on whether it can be adapted to Sharia, which has been chosen to be the foundation of all laws.
- Participants admitted that use of Secular law will be required in the future and concluded that those parts of it which are not contrary to the Sharia should continue to be applied. They suggested a review, rectification and amendment of those provisions contradicting Islamic teachings.

### **Sharia**

Sharia is the collection of Islamic laws that all Muslim communities are required to accept and comply with as their judicial system. Participants underlined during the workshop discussion, that application of Sharia is the only viable option for the Puntland judicial system as people are quite willing to accept the practice of Sharia. However, there is much controversy as people rhetorically demand application of Sharia while they tend to prefer to solve most of the disputes involving heavy penalties through Customary law rather than by Sharia. Participants differed as to why the Sharia rules are not fully implemented by Somali society. Some thought that, although Somali society professes and staunchly believes in Islam, nevertheless, their adherence to the faith does not prevent them from having strong loyalty to the clan ties and Customary law. Some Sharia provisions such as those for theft, highway robbery, murder, adultery and rape, certain rules on family affairs and Riba-free based businesses, have never been put into practice. In conclusion, there is no doubt about the future use of Sharia in Puntland but it needs to be introduced



gradually and slowly. For Sharia to play a prominent role in the Somali legal systems, participants proposed the translation of Sharia into the Somali language to enable the large segment of the population literate in Somali to learn Sharia provisions. A large-scale Sharia education campaign for the nomadic group is also needed.



## 6

# Harmonization of the Three Legal Systems

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*The preceding chapters have presented an introduction to the specific features and main provisions of each of the three legal systems under study - Customary, Secular and Sharia laws as well as a comparative analysis of the three legal systems. This concluding chapter addresses harmonization possibilities for the three legal systems, relevant strategies for harmonization, appropriate implementation strategies, actor roles, anticipated challenges and recommendations on harmonization.*

### *Harmonization Possibilities*

The primary objective of this study was to explore harmonization possibilities for the three legal systems and relevant strategies to achieve this. These three legal systems functioned in parallel in Somalia for more than a century. The Puntland Development Research Centre (PDRC) conducting the research saw that, among other things, the determinant factor in harmonization is the views of the actors concerned. Thus, the research targeted ensuring bringing together the different actors interested in the subject and sought their opinions on harmonization of the three legal systems. This chapter summarizes and sets out the views and opinions of the different actors concerned.

The majority of the participants unanimously agreed that harmonization is possible. A small number of participants in the religious group had insisted that, rather than concentrating on harmonization of the three legal systems, Puntland should focus on full application of Sharia, since its laws are comprehensive. According to this view, the two other legal systems, Customary and Secular law, are man-made and therefore liable to human error and cannot compare with the flawless preordained Godly laws applicable every time and everywhere.

The majority of participants who tend to support the harmonization process give the following reasons to substantiate their opinion:

a) Each of the three legal systems has its vitality and followers and no tradition can simply be thrown away or abandoned. Customary law constitutes an essential element in the social fabric, it operates at the various levels of political grouping, e.g. at the level of the *Diyah*-paying group the most important legal and political unit in the pervasive social organization of Somali society; it is a power-base for the traditional leaders, and a simple, informal and easily applicable judicial system for the frequently migrant nomads. Customary law court hearings require no formally trained or specialized jury. Any adult nomad with rudimentary knowledge and experience of the tradition can act as a jury member for a Customary law court (dispute-resolving meeting). The other two legal systems need specialists, who are not available in rural areas. In such cases that warrant Sharia, for example, distribution of a deceased's property among inheritors, the nomad may trek several days to secure a sheikh. On the other hand, Sharia represents an integral part of Islam, in essence the foundation of the moral values of Somali society; above its value as a source of laws that can not be changed. Secular law is the legislation of the

modern Somali State. Politicians, government officials, urban courts, secular jurists and most of the educated elite are the supporters of Secular law. Secular law application bears important implications for the state and its political, economic, diplomatic and legal relations with other states and international organizations.

b) Harmonization of the three legal systems started long ago. Since independence, colonial Secular law has undergone an extensive review and changes/amendments to adapt it to Somali culture and legal traditions. The present Somali Secular law is quite different from the previous colonial law and to a large extent it is in harmony with Sharia and Islamic principles in many aspects.

c) The three legal systems already share harmonized laws pertaining to certain areas, including:

i) Major controversies, especially cases concerning judgement on family affairs of the Muslim community are exclusively regulated in accordance with provisions of Sharia, for Customary and Secular laws have no significant competence in this area.

ii) What is stipulated as a crime in Secular law is also considered a crime in Sharia and a civil liability in Customary law. Nevertheless, Customary law has no penal punishment but sanctions only moral punishment and compensation for damages or the property of the offended party.

iii) the three legal systems employ the same or similar proceedings in many ways, for instance, the accused is considered innocent until she/he is proved guilty on the basis of hard evidence or the confession of the plaintiff.

iv) Sharia and Secular legal systems both consider and recognize the subjective condition of the accused at the time the crime is committed, and aggravating or extenuating

circumstances regarding punishment or damage. Customary law differs in that it does not consider the age of the offender or victim or if the crime is committed intentionally, by accident or in self-defence.

v) Sharia and Secular law both sanction personal responsibility for the crime. However, Customary law most often considers crime as collective and its punishment is only moral punishment or compensation for damage to personal integrity or property.

vi) In Sharia and Secular laws most offences are not only committed against the victim but also against the State/Muslim community.

vii) Apart from the Sharia 'Xuduud' crimes, and interest rates charged on credit for goods or money and services (Riba), Sharia and Secular law provisions agree on the types of punishment: fines, imprisonment, and the death penalty. The Sharia Xudud crimes include: theft, murder, rape, adultery, armed banditry, etc.

viii) Sharia and Secular law have formally structured courts and procedures, whereas the Customary law courts are ad hoc, informal and flexible.

ix) Each of the three legal systems has territorial jurisdiction or limitation.

x) Both Sharia and Secular law recognize fundamental human rights, particularly womens rights. On the other hand, Customary law, being male-dominated, recognizes the fundamental liberties of men but limits the rights of women.

xi) all three legal systems recognize informal forms of dispute settlement and arbitration, mediation, and agreements between the contestants outside the court.

Some participants concluded in their deliberations that Sharia is a heavenly law, constitutes the belief of the people

and is not subject to amendments. This leads to the conclusion that Sharia assumes pre-eminence over the other two. Thus, to harmonize the three legal systems what comes out of this study is that Secular and Customary laws have to adapt to Sharia to the largest extent possible. Participants noted the absence of a Moslem State that truly implements Sharia and this constitutes an obstacle for the implementation of particular Sharia provisions to the international relations.

However, participants concluded that harmonization is achievable and realistic, and has been in progress since independence. What is required is further research that could find out which Secular and Customary laws are compatible with Sharia and which are not.

### *Harmonization Strategies*

Participants suggested the following sequence for harmonization of the three legal traditions:

- PDRC plan and prepare the second and final phase of this preliminary research project.
- Seek external technical and financial assistance for the proposed in-depth main research work on the harmonization of the legal traditions.
- Involve local experts in conducting the main research phase.
- Involve all actors concerned actors in the research, both local and international, to ensure success of this participatory research work by PDRC and be able to translate the findings into action (PDRC and Government).
- Collect and compile unwritten Customary law as part of the proposed in-depth main research
- Engage traditional leaders and religious men in the process of carrying out comprehensive review and identification

of Customary law provisions that do not conform to Sharia; giving special consideration to Xeer provisions obstructing the equality of the sexes and the promotion of women's rights.

- Call in international experts in Sharia and Secular law to conduct comparative research and study of the subject.
- Conduct extensive research on the three legal systems by screening article by article Secular and Customary laws to determine their compatibility or non-compatibility with Sharia provisions.
- Consider the implications that could ensue from the final output and its implementation, a harmonised hybrid legal system that is in harmony with the culture and history of the Puntlanders and Somali society in general.

### *Implementation Strategies*

- Submit and share final research output with the Puntland authorities concerned for review and approval.
- Submit research final output to traditional leaders and religious groups for approval.
- Train law enforcement organs in Puntland about the final legal document approved by the key local actors.
- Conduct public awareness raising, particularly targeting adults and nomads, on the legal document produced.

### *Actor Roles*

#### **Puntland Government**

- Political will on the part of the Puntland Government to implement the final document. As the key political actor, the Puntland Government must show support and



commitment to the programme.

- Encourage and engage all interested actors in the research and play a central role at all stages of the research programme.
- Provide a financial contribution
- Monitor and evaluate the progress of the research work.
- Approve the final research product.
- Implement the approved final legal document.

### **Puntland Development and Research Centre (PDRC)**

- Plan and conduct the harmonization programme, and conduct more research on Customary law as applied in different regions.
- Involve all actors in the research work.
- Seek external technical and financial assistance for the harmonization research.
- Advocate the programme.

### **Religious Scholars**

- Actively participate in the research
- Play a major role in raising public awareness of the research programme as they are the guardians of religion and enjoy public trust.

### **Traditional Leaders**

- Actively participate in the research and implementation of the programme.
- Endorsement of the outcome of the programme.
- Raise public awareness.

### **Private Sector**

- Provide a financial contribution for more research and investigation.
- Participate in awareness raising.
- Participate in the implementation process.

### **Women**

- Participate in the research.
- Participate in the implementation.

### **International Actors**

- Give technical assistance.
- Advocate the programme.
- Funding.
- Assist the implementation of the programme.

### *Challenges to Harmonization*

- Absence of strong law enforcement government bodies and generalized lawlessness
- Customary law provisions are not written.
- Possible resistance or lack of cooperation from Somali nomads concerning the implementation of the programme as they might stick to Customary law, which they have practiced for centuries and which is an essential part of their political culture.
- Although this is an interesting and relevant experimental project, its outcome is difficult to predict.
- Lack of resources for harmonization work and its implementation.
- Each of the three legal systems has its supporters and adversaries.
- Although Somalis are devout Muslims and show very strong attachment to Islam, nevertheless they are reluctant to execute severe Sharia penalties.
- Most nomads are not familiar with Sharia law and are not aware that many Customary law provisions they practice are contrary to Sharia and the spirit of Islam.
- Customary and Secular laws do not prescribe severe Sharia penalties.

- Scarcity of local human and financial resources for running the harmonization programme.

### *Recommendations on Harmonization*

- Implementation of the main phase of the research work.
- Collection and compilation of the unwritten provisions of Customary law.
- Review and suggest changes to the Customary law provisions that do not conform to Sharia, giving special consideration to Xeer provisions that obstruct the promotion of women's rights and the equality of the sexes.
- Translate Sharia and Secular laws into the Somali language to enable the populace to learn and understand the law.
- Upgrade women's education.
- Train law enforcement organs in Puntland about the final legal document. Diakonia's current programme for training police and judicial personnel boosts the capacity-building of these organs.
- Continue the research work on self-effort as far as circumstances allow and do not always wait for external assistance.
- Involve all actors including women's groups at all stages in the research process and its implementation.
- Seek external technical and financial assistance for the harmonization research.
- Consider international impact on the selection of the final product- the harmonized hybrid legal system.
- Adopt international laws that do not contradict Sharia.
- Adopt Customary and Secular laws that do not contradict Sharia and Islamic principles.



# Appendix

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*Appendix II : Glossary*

|                             |  |
|-----------------------------|--|
| <b>Al-Ansar</b>             | He voluntary converts to Islam resident in Medina                      |
| <b>Aqal-dhis</b>            | Support for marrying couples in building a home                        |
| <b>Biri-ma-geydo</b>        | Respected social groups who should be spared in inter-clan war         |
| <b>Buuhoodle</b>            | District of Puntland   |
| <b>Bukhari &amp; Moslem</b> | The two most distinguished scholars who compiled the Prophet's Sayings |
| <b>Caaqil</b>               | Salaried Diyah-paying group elder                                      |
| <b>Caliphates</b>           | Dynasty  |
| <b>Dalool-xoor</b>          | waiving of one-third of actual compensation for physical injury        |

|                        |   |
|------------------------|---|
| <b>Dhibaad</b>         | Occasional support of a married sister or daughter by her close kin's people  |
| <b>Diyah</b>           | Blood compensation collectively paid and received by the diyah-(Arabic) paying group  |
| <b>Dumaal</b>          | traditional practice of widow inheritance   |
| <b>Ergo</b>            | Emissaries  |
| <b>Gabbaati</b>        | Down payment for engagement from the groom's group (gage)   |
| <b>Gacan iyo</b>       |   |
| <b>Isdhaaf Goyn</b>    | Arm and limb mutilation   |
| <b>Garowe</b>          | provisional capital of Nugaal region  |
| <b>Godob-tir</b>       | Additional gift, in this case a marriageable girl, to the blood compensation to appease, and as a healing token to an aggrieved party |
| <b>Habar yar</b>       | Second mother, mother's sister  |
| <b>Haddeeth/Xaddis</b> | The Prophet Mohamed's Sayings   |
| <b>Haraam</b>          | illegal   |
| <b>Harti/Xeer</b>      | Customary law named after social groups residing in different parts of the country  |
| <b>Hudud/Xuduud</b>    | Penalty rulings of Sharia on seven grave crimes   |
| <b>Ijma'</b>           | Consensus of Muslim scholars on a given case  |
| <b>Isim</b>            | Head of a clan or large sub-clan  |
| <b>Jifi</b>            | A portion of Diyah (33 camels) allocated to the close kinsmen of the victim   |
| <b>Kaalo</b>           | Assistance given to the marrying couple   |
| <b>Kismayo</b>         | Regional capital of Lower Jubba region  |

|                       |   |
|-----------------------|---|
| <b>La-bixid</b>       | Eloping   |
| <b>Maal</b>           | Lending of milk animals (camel, cow, or goats), literally asset lending   |
| <b>Magan</b>          | Protection of individuals from a hostile clan who are in custody of a kinsman   |
| <b>Mag-dheer</b>      | Portion of the Diyah (67 camels) allocated to the wider Diyah-paying group  |
| <b>Mecca</b>          | The holiest city and site of pilgrimage in Saudi Arabia   |
| <b>Medina</b>         | The second holiest city, where the Prophet migrated to and died, in Saudi Arabia  |
| <b>Meher</b>          | Specified amount of wealth required in Islam that married women are entitled to, to validate a marriage                                     |
| <b>Mudaarabah</b>     | profit-sharing  |
| <b>Muhajir</b>        | Emigrant from Mekka to Medina to convert to Islam   |
| <b>Muqayadah</b>      | The 33 first Diyah camels- Jifi   |
| <b>Puntland</b>       | Self-declared federal state of Somalia comprising Bari, Nugaal, Mudug, Sool regions, the Eastern part of Sanaag, and the Buuhoodle District |
| <b>Qaalin</b>         | 4-year old heifer   |
| <b>Qaddarin</b>       | Moral respect   |
| <b>Qadi</b>           | Sharia judge  |
| <b>Qisaas</b>         | Capital punishment for deliberate murder  |
| <b>Qoor-dhiibasho</b> | To accept judgement humbly  |
| <b>Qur'aan</b>        | The Moslem Holy Book  |
| <b>Rafiso</b>         | The smallest portion of Diyah (11 camels out of the 33 jifi camels) allocated to the family of the victim                                   |



|   |  |
|---|--|
| Reer Abti   | relatives from mother's side   |
| Riba  | Usury  |
| Sabeen  | A two-year old female sheep or ewe   |
| Sagaalley   | Average Diyah-camel equivalent to nine ewes- literally means rating nine                     |
| Sharia  | Islamic law  |
| Sheikh  | Moslem scholar   |
| Shir  | Gathering of adult men organized to deliberate matters of common interest as the need arises |
| Sool, Sanaag, Bari,<br>Nugaal & Mudug   | Regions of Puntland State  |
| Sunnah  | The Prophet's Sayings and Practice   |
| Suurah  | Chapter of the Holy Book   |
| Taqwa   | Fear of God  |
| Tol   | Agnatic kins   |
| Ummawiyah &<br>Abbasiyah  | The two dynasties that ruled the Islamic World between the 7th and 13th centuries            |
| Wadaaddo  | religious men  |
| Xaraam  | Illegal (unclean in a religious sense)   |
| Xeer Aji, Xeer<br>Ajuuraan, Xeer<br>Ciise, Xeer<br>Daarood, Xeer<br>Xeer-beegti | Experts on Customary law selected to arbitrate disputes                                      |
| Xeer, Xeer Soomaali   | Unwritten Somali Customary law   |
| Xigaalo   | Relatives from mother's side   |
| Xidid   | In-laws (literally means roots)  |
| Xigsiisin   | Getting closer or second chance, practice of marrying the sister of the deceased wife        |

|                     |  |
|---------------------|--|
| <b>Xoolo-gooyo</b>  | Livestock contribution to the needy<br>(literally means giving away livestock) |
| <b>Xushmo</b>       | Courtesy   |
| <b>Yarad</b>        | Bride wealth   |
| <b>Yarad/Dowry</b>  | Bride wealth/gifts paid by the groom's<br>family to the bride's family         |
| <b>Zaani-muhsin</b> | An adulterer who had married at least<br>once                                  |
| <b>Zina</b>         | Adultery, fornication, rape, etc   |

### *Appendix III: Human Rights Treaties*

#### **Human Rights treaties to which the former Somali Republic was a party:**

- 1949 Geneva Convention I for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field.
- 1949 Geneva Convention II for the Amelioration of the condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea.
- 1949 Geneva Convention III. Relative to the Treatment of Prisoners of War.
- 1949 Geneva Convention IV. Relative to the Protection of Civilian Persons in Time of War.
- 1950 Convention Relating to the Status of Refugees.
- 1965 International Convention on the Elimination of All Forms of Discrimination.
- 1966 International Covenant on Civil and Political Rights.
- 1966 Protocol Relating to the Status of Refugees.
- 1966 International Covenant on Civil and Political Rights.

- 1966 Optional Protocol to the International Covenant on Civil and Political Rights.
- 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.
- 1981 African Charter on Human and Peoples' Rights.
- 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

*Appendix IV: List of Participants  
of Conclusion Workshop*

Yusuf Moalin Ibrahim, *DG of Interior Ministry*, Puntland

Yusuf Haji Noor, *Chief Justice*, Puntland

Bashir Yusuf Noor, *General Prosecutor*, Puntland

Col. Ahmed Mohamed Muse, *Police Commander*,  
Puntland

Ahmed Abbaas, *Professional*, Garowe

Adan Shiekh-don, *Professional*, Garowe

Mohamed Khayre Ganbol, *Elder*, Garowe

Mohamud Shiek Hamud, *Local NGO*, Garowe

Shukri Salad Weyrah, *Woman MP*, Garowe

Ardo Said Mohamed, *Women's Org.*, Garowe

Safiyo Sugulle Gashan, *Women's groups*, Garowe

Said Ahamed Farah, *Judge*, Garowe

Ahamed Yusuf Noor, *Teacher*, Garowe

Mohamud Shire Samater, *Religious Shiekh*, Garowe

Ali Haji Mohamed, *Elder*, Dangoryo

Abdullahi Abdulle Elal, *Elder*, Burtinle

Shiekh Ahmed Dahir, *Religious Shiekh*, Bossaso  
Sallaado Ismail Mirood, *WAWA Women's Org.*, Bossaso  
Hawa Ali Jama, *WAWA Women's Org.*, Bossaso  
Farah Hassan Ibrahim, *Elder*, Bossaso  
Abdi Osman Muse, *Elder*, Bossaso  
Ahmed Adan Dheere, *Elder*, Mudug  
Abdirahman Abdille Dirrir, *Judge*, Mudug  
Hussien Mohamed Khalif, *Judge (Shiekh)*, Mudug  
Ibrahim Elmi Gaab, *MP*, Mudug  
Farah Haji Mohamud, *Elder*, Sool  
Abdi Elmi Farah, *Religious Shiekh*, Sool  
Sahra Isse, *Woman MP*, Sool  
Jama Mohamud Duale, *MP*, Saanag  
Mohamed Omar Hash-hash, *Professional*, Sanaag

### **Organizations**

Abdirahman Abdille Shuke, PDRC  
Abdullahi Abdirahman Ahmed, PDRC  
Said Adan Mohamed, PDRC  
Abdulkadir Sheik Mohamud, PDRC  
Prof. Abdi Hassan Jimale, Diakonia  
Gen. Abdinuur Yuusuf Axmed, Diakonia  
Pat Johnson, UN Focal Point  
Abdullahi Shiekh Ahmed, LPI  
Adan Mohamed Mato, UNESCO

*Appendix V: Discussion Paper for  
the Concluding Workshop*

**Harmonization of Somali Legal Systems, Somali Customary Law, Secular Law and Sharia:**

**1. Introduction**

The Swedish NGO, Diakonia, supports the social integration, rehabilitation, education and gender and human rights in the Puntland State of Somalia, in addition to the Legal and Human Rights Programmes, which are carried out in collaboration with UNDP Civil Protection Programme. This is in order to contribute to the on-going search by the Puntland Administration for development of a viable judicial system, which is in conformity with Somali culture and traditions, and which at the same time would not hinder the national aspiration of creating a modern society. To this end, the harmonization of Somali legal traditions (Somali Customary law (Xeer-Soomaali), Sharia, and the Secular laws) of Puntland is a prerequisite.

To achieve its programme objectives for the Legal and Human Rights Programme, Diakonia requested the assistance of the Puntland Development Research Centre to conduct interactive participatory research on the "Harmonization of Somali Legal Traditions (Sharia and Xeer) and Secular law". For the purpose of research, this was subdivided into three separate sub-themes, namely: Somali Customary law, Sharia and Secular law. PDRC has already conducted three workshops lasting for three days each. This concluding workshop is intended to highlight the outcome of the three workshops and summarise the main findings as well as to make final recommendations/draw conclusions.

## 2. The Objectives of the Research

- a) To contribute to the on-going search by the Puntland administration for the development of a judicial system that is in conformity with the culture, religion and tradition of Somali society, and which at the same time does not hinder the national aspiration of creating a viable modern society.
- b) To provide a dialogue for the diverse actors who are interested in the research theme - Religious and traditional leaders, other representatives of civil society, the Puntland Government and the donor community;
- c) To generate relevant data that could help Diakonia plan and manage effectively the organizations' legal programme;
- d) To foster the working relationship between PDRC and Diakonia, in which the latter organization would assist the former in institutional development.

## 3. Methodology: Main Research Instruments

The Puntland Development Research Centre has employed a participatory action research (PAR) methodology in conducting and organizing these workshops on Somali Customary law (Xeer Soomaali), Secular laws and Sharia. The methodology was based on a participatory process where the actors concerned had opportunity to freely discuss, raise questions and give answers on each sub-theme-governed issue. They were also encouraged to express and formulate their ideas and make recommendations on the topics under review.

The objectives of each workshop sub-theme were defined, and a discussion paper with research questions was produced to guide the participants in maintaining the research objectives.

Within the scope of this methodology the following activities were carried out:

a) Formulation of workshop plan and definition of objectives (a brief work-plan was produced, workshop objectives formulated, and an outline of activities and sequence of order of their implementation was drafted).

b) Data collection:

1) review of available literature,

2) individual interviews with relevant informants i.e. traditional elders, religious sheiks, legal professionals, women's groups and private sector representatives.

3) identification of discussion groups. Before conducting these workshops, a preliminary two-day discussion group meeting was organized for each sub-theme.

c) Identification and selection of workshop participants. Based on the recommendations of the discussion groups, discussion papers were drafted as a guide to stimulate interest in participating in the discussion and create an ideal atmosphere for the participants to share information and exchange experiences.

d) Recording workshop proceedings. The workshop sessions included: brainstorming, plenary sessions, working group discussions and reviewing the summary of the daily outcome by the participants on the following day.

#### **4. The Objectives of this Workshop**

To identify areas of compatibility and differences between the three traditional legal systems practiced in Puntland.

To explore the possible areas of harmonization.

The workshop was held between the 29th and 31st of May 2001 in Garowe. This discussion paper highlights the main topics for discussion and research questions. It also presents the various recommendations of the previous workshops.

Invited participants were expected to study the discussion paper carefully, before the convening of the workshop and put together their views concerning the

harmonization of the three legal systems. The intention was to enable them to have time to organize their thoughts and come to the workshop prepared.

### **5. The Findings of Previous Workshops**

The focus of the workshops was to identify and define the areas of difference and compatibilities of the three legal systems.

When it came to analysing the areas of concurrence in these three legal systems the opinion of the participants varied and diverged, though in each workshop they exchanged ideas and respected each other's opinions.

However, it has been realized that the three legal systems went through different historical evolution, and for this reason their features are also different. Sharia and the Secular law have structured judicial systems, and a codified system of rules, and when applying these, Sharia and Secular law assume the penal responsibility to be personal, while Customary law has no formal judicial structure and sanctions collective responsibility and collective punishment, especially in relation to Diya-payment and its distribution, most of the rulings on personal statutes in Customary law are taken from Sharia.

Sharia and Xeer are broadly accepted by the Somali communities, particularly the nomads and agro-pastoralists in rural areas, because these traditional legal systems are based on the local beliefs and moral values.

A group of workshop participants, who mostly constituted Secular law practitioners and senior police officers, stressed that the Somali penal code is quite different from the original Italian and British colonial codes, it had undergone a number of changes during the post-independence era and present-day Somali Secular law does not confront Sharia. What is considered a crime in Secular jurisprudence is also considered a crime in Sharia. The



difference lies only in the type of penal and procedural rules and the type of punishment sanctioned for the seven grave crimes (known in Sharia as 'hudud'). Another area of congruence is that all three legal systems recognize and consider aggravating and extenuating circumstances.

In line with the three legal traditions of the Somali people, the penal code defines crimes against public morality as acts which violate religious rules relating to the consumption and sale of alcoholic beverages (Articles 411-416 PC). Crimes against the protection of families such as illegal marriages (Article 425 PC), adultery (Article 426 PC), incest (427 PC), crimes against the person: murder (Article 434 PC), unintentionally causing death (Article 441 PC), and death caused by negligence (Article 445 PC). Nevertheless, each of the three legal systems has its own specific features that distinguish it from the others.

According to the majority of the participants, the main areas of disagreement of these three legal systems can be classified: Divine laws (Sharia), which are clearly and unambiguously stipulated in the verses of the Holy Qur'aan and principles of the Islamic religion. These laws are valid and suitable for regulating every social, economic and political aspect of a given Islamic society at any time anywhere. These laws are not subject to changes regardless of the prevailing circumstances of the user-society concerned. However, when there is a difficulty in judgment, two other sources are employed by Sharia:

a) The Ijma' – which is the consensus or agreed interpretation of Muslim scholars about a judgment in any given period. Their interpretation becomes permanently part and parcel of Sharia rulings. This kind of ruling is adjusted in many Western legal systems.

b) Qiyaas (yardstick or index) – this type of source is used whenever there is not a specific definition of ruling to judge

a new case. Unlike the Ijma', the consensus of Muslim scholars is not required in the deliberations of Qiyaas, instead one single Qadi -judge's opinion is sufficient.

Voluntary submission to the commands and rulings of Sharia is considered the main pillar of the Islamic faith.

- Man-made laws (Customary and Secular laws). These are subject to constant reviews and legal changes due to changing environments, moral beliefs, social attitudes, and political as well as economic conditions.
- Women are not allowed to become Qadis in Sharia or to be included in Xeer-beegtida -traditional elders, while in Secular law, women are allowed to assume higher responsibilities in the judiciary.

Some participants, mostly Moslem Sheiks, expressed the view that Secular law is an expression and perpetuation of the 16th century European materialistic school of thought that separated religion and politics. The events that led to this school of thought are detailed in the European history books. On the other hand, the Sheiks argued, penal rulings of Secular law cannot match up to Sharia: secular penal rulings often sanction imprisonment, while such is not the case in Sharia. For instance, Secular law rules on rape and theft differ from Sharia; a number of years of imprisonment are sanctioned in Secular law, while Sharia sets forth execution by stoning, or other capital punishment, or limb and arm amputation. In addition to this, Xeer sets aside specific rulings, which are different from both Sharia and Secular law, such as Diya-payment or other compensations. In the context of Xeer, rape is considered as a grave crime and it might cause the confrontation of two clans.

Other points of difference raised by the participants in the previous workshops were that the Somali governments promulgated several Secular laws (1960 – 1990), which were contrary to Sharia teachings and Customary law, such

as the civil code concerning the family and the special laws for emergencies. These laws were promulgated during the period of the military government era (1969 – 1990). Here below are listed the basic Secular laws which do not contradict Sharia and the customary rulings according to the view of some participants:

- The Constitution of 1960 of the Civilian Government
- Somali Penal Code – Law No. 37 of 1962
- Penal Procedure Code – Law No. 1 of 1963
- Somali Civil Code – Law No. 37 of 1973
- Civil Procedure Code – Law No. 19 of 1974
- Puntland Charter of 1998

Most of the participants were of the opinion that, since Sharia is not subject to changes, those rules of the secular and Customary laws, which are in contradiction to Sharia should cease to exist. However, it would be appropriate to identify or specify these rules and then abrogate them.

Additional main areas of difference between the legal traditions are summarized in the table below:

### **Summary of the Main Features and Areas of differences between the Somali Traditional Legal Systems**

#### *Somali Traditional Legal System:*

##### *Features*

**Customary Law:** Unwritten, male dominated, influenced by Sharia, has civil liability only

**Secular Law:** Formally written and codified, includes penal and civil liability

**Sharia:** Universal, male-dominated, broadly accepted by the people, heavily influences other Somali legal systems, contains penal and civil liabilities

##### *Principal Source for Legislation*

**Customary Law:** Deliberated by elders

**Secular Law:** Romano -Germanic jurisprudence and Islamic principles and Somali customs

**Sharia:** The Holy Qur'aan, Hadeeth, Ijma' and Qiyaas

*Structure*

**Customary Law:** Traditional structure

**Secular Law:** Structured judicial system

**Sharia:** Structured judicial system

*Enforcing organs*

**Customary Law:** The Diya-paying group

**Secular Law:** Government law enforcing agencies

**Sharia:** Government law enforcing agencies and religious Sheiks

*Legislative Organs*

**Customary Law:** Clan elders/Xeer-beegti

**Secular Law:** Parliaments and other State organs

**Sharia:** Allah, the Prophet's traditions and Islamic schools of thought

## **5. Past Attempts at Harmonization of the Three Legal systems**

The workshop participants stated that the introduction of the colonial legal system has blocked the development and improvement of Customary law into a modern legal institution and its natural process of transformation. When the Western colonial powers (Italy and Britain, France and Ethiopia) occupied Somalia at the turn of the 19th century, they apportioned the Somali nation and drew arbitrary clan boundaries, and different colonial administrations applied different legal systems to the same sub-clans within the artificially created borders. The colonial laws became dominant over the traditional laws (Xeer and Sharia), especially in the area of indictment and prosecution of criminal acts. However, they allowed the use of three parallel legal systems: Secular law, which was applied mainly in the urban cent-

res, Sharia and Xeer. The practice of Xeer was left to function in the outlying villages and rural/ pastoral areas, where the colonial administrative power was limited, while Sharia was confined to the judicial administration of the family statutes.

The colonial administrations had strengthened those parts of Xeer which were not against their interests by supporting clan leaders' decisions, and provided them with Ilaalo (a type of local police under district officers' jurisdiction dealing only with clan related matters), to enforce the deliberations of the elders and to maintain law and order. Seen from this perspective, some participants argued that elders had more power in the colonial and post-colonial periods than today. As for the post-colonial Somali governments, participants agreed that the successive Somali governments applied the same multiple legal system that existed in the colonial period. However, in 1960 a new democratic and modern national constitution was formulated based on Sharia. The constitution, which was approved in 1961 through a referendum, emphasized and cleared the status of Islam and Sharia. Article 5 of the Constitution stipulates that: Islam is the fundamental main source of the Constitution and all laws to be enacted should conform to Sharia and Islamic principles. An attempt at harmonization was the unification of the three different courts in Somaliland – Aqil, Sharia and the Secular law courts and the two courts in the South (Sharia and Secular law courts) plus the unification of the two Secular laws inherited from the former colonial administrations (Italian and British) by the new Republic in 1962. Local Qadis were briefly trained in the application of the penal code and subsequently, penal and procedural codes were translated into the Arabic language to facilitate their application by judges of various courts who were former Sharia Qadis.

Another tentative step towards harmonization of the

corpus juris mentioned by the participants was a conference held in 1968 at Mogadishu. The purpose of the conference was to unify and codify the different Customary laws applied by Somali society. Participants of that conference were the traditional leaders, elders and religious sheiks from all regions of the country. At that conference, participants from all regions exchanged views on Customary law and its communal points were screened. However, the recommendations of the conference were not implemented, as the armed forces took over the country's political leadership the following year and the role of elders and traditional leaders was abolished.

The Military government (Oct.1969 – Jan.1991) challenged Xeer by abolishing the legality of Xeer, the function of traditional leaders, and revoked Xeer as a tool for collective responsibility. The Diyah-paying system was brought to an end; the crime was confined to the culprit, yet the policy could not be fully implemented, especially in the remote pastoral areas.

The workshop participants stated that during this period, as the military government adopted the Scientific Socialism theory, which professes the abolition of all religious beliefs, the use of Sharia as a judicial system was almost ended and the role of the religious leaders was downgraded to a bare level of prayer leading and preaching.

During the Community Constitutional Conference held in Garowe in July1998, delegates from the five regions of Puntland and Buuhoodle district unanimously endorsed Sharia to be the foundation stone of the Puntland Regional State Judicial system (Article 2.1 of the Charter).

## **6. Available Options for Harmonization**

Having studied the evolution and the past relationships of the three legal systems in Somalia for the last forty years, the participants of the last three workshops found that:

Despite the various efforts invested in revising the inherited colonial Secular laws, the Somali Secular laws are far from being in conformity with Sharia. Somali Secular law has not adopted basic Sharia provisions such as rules on theft, deliberate murder, adultery, rape and the business rules in Sharia (see the comparative table).

According to some participants, most of the Somali community still consider Secular law as an alien legal system and have no confidence in it, for the simple reasons that it has been imposed first by colonial administration and that they do not know enough about it.

Participants raised the issue that, when harmonization of the laws is considered, Sharia is not liable to amendments; however, the other two legal systems, Secular and Customary law, can undergo partial or total changes to match the Sharia rulings. Sharia procedures and the penal and civil codes do not always coincide. The Customary law provisions do not match with some basic Sharia rules. Therefore, we, as participants of this workshop have to deliberate on this very complicated issue:

- a) Is the harmonization of the three legal systems possible? If so, how it can be done? If not, what are the possible ways out of using three parallel legal systems?
- b) Having seen all the recommendations of the previous workshops, what are the obstacles to, and challenges for harmonization?
- c) What are the resources needed?
- d) What will be the role of each actor (Government, community, religious leaders, traditional and titled elders, business community, the international actors, PDRC and Diakonia) in the harmonization process?

Within the framework of the globalization trends, access to donor support is increasingly being conditioned by the

presence or lack of democracy and pre-set standards of human rights; how can this be incorporated in the Puntland legal system?

### **7. Recommendations of the Previous Workshops**

During the previous workshops, the participants made the following recommendations:

#### *Recommendations of Customary law (Xeer-Soomaali) Workshop:*

1. The abolishment of all Xeer provisions that are incompatible with Sharia and human rights.
2. The promotion of public awareness-raising based on the position of Islamic teachings and Sharia concerning Xeer provisions, especially those Xeer provisions contrary to Sharia, such as collective payment and sharing of blood compensation, the violation of women's rights, rape, conditional marriage prices, forced marriages and the denial of women's legal rights on property in Sharia, etc.
3. Strengthening provisions of Xeer that are not contrary to Sharia, and that are useful for conflict resolutions.
4. Religious leaders should, in their regular preaching, promote and spread education of the people on Sharia by highlighting that some Xeer practices are not in accordance with Islamic teaching and violate its principles.
5. The Puntland Government should record, formalize and institutionalize (integrate into formal laws) Xeer provisions that do not violate Sharia.
6. The Government of Puntland should enhance Xeer practices on environment protection by:
  - a) Promoting the establishment of civil society organizations on environmental protection and the strengthening of Xeer application on this issue.



b) Formulating policies on the burning of forest, felling shading and fruit-bearing trees for charcoal production, enclosures of rangeland reserves for private grazing or commercial purposes.

c) Prohibiting the burning of trees for charcoal export trade;

7. Participants strongly recommended the importance of this type of participatory research on Xeer and wished that more time and resources should be allocated to such programmes.

*Recommendations of the Secular Workshop:*

- The Puntland Government, with donors' assistance should recruit and avail the technical assistance and expertise inputs of specialized experts, both in Sharia and Secular laws to harmonize the traditional legal systems as well as to explain to the people of Puntland the importance of the Secular laws for establishing and running a modern system of State administration.

- To strengthen law enforcement institutions for an effective, efficient and impartial application of the Secular laws.

*Recommendations of the Sharia Workshop*

1. Full research and in-depth study on the compatibility area of Sharia and Secular laws is recommended. Participants also suggested that scholars in Secular jurisprudence and experts in Customary law and Sharia consisting of Somali residents as well as expatriates should carry this out. The task of these experts should be to recommend the best way of applying Sharia in the Somali pastoral and clan-based society of Puntland

2. The promotion of public awareness-raising, based on Islamic teachings and Sharia, especially concerning those Xeer and Secular law provisions contrary to Sharia, such as collective payment and sharing of blood compensation which

are in contradiction to women's legal rights in Sharia, such as rape, conditional marriage prices, forced marriages, etc.

3. The administrative authority and civil society should unite their efforts for the application and implementation of Sharia provisions in Puntland. This idea is supported by the women's groups and religious men participating in the workshop because they believed that Sharia provisions are best suited and most appropriate for protecting the legal rights of women, children and other vulnerable groups.

4. Religious leaders should, in their regular preaching, promote and spread the education of the people regarding Sharia by highlighting that some Xeer and Secular law practices are not in agreement with Islam and violate its principles.

5. The Government should define its role and responsibility in the process of the implementation of Sharia.

6. Participants strongly recommended the importance of this type of participatory research on the application of Sharia and suggested that more time and resources to be allocated to such programmes.

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