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Rebuilding Somalia's Broken Justice System

Fixing the Politics, Policies and Procedures

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Contents

Acronyms

1. A2J	Access to Justice
2. ADR	Alternative dispute resolution
3. BRA	Benadir Regional Administration
4. CCILS	Consultative Committee for Integration of Legal
5. CFI	Systems Court of First Instance
6. DPC	District peace committees
7. FGS	Federal Government of Somalia
8. FMS	Federal Member States
9. GBV	Gender-Based Violence
10. JSC	Judicial Services Commission
11. HJC	Higher Judicial Council
12. HRC	Human Rights Commission
13. IDLO	International Development Law Organization
14. MOJ	Ministry of Justice
15. NGO	Non-governmental organization
16. NSC	National Security Court
17. OAG	Office of the Attorney General
18. PCoS	Provisional Constitution of Somalia
19. CCoS	Constitutional Court of Somalia
20. SCoS	Supreme Court of Somalia
21. PM	Prime minister
22. SBA	Somali Bar Association
23. SLC	Somali Legal Society
24. SRC	Supreme Revolutionary Council
25. SSC	State Supreme Court
26. TFC	Transition Federal Charter
27. TNG	Transitional National Government
28. TFG	Transitional Federal Government

1. Executive summary

"More than 10 years with no judicial system (1990-2000) followed by 20 years of weak statutory courts (2000-2020) have had a deleterious toll on the nation's deeply decentralized judicial branch

Despite recent reforms, the formal justice system in Somalia is broken at the core, depriving equitable access to justice for millions of citizens. More than 10 years with no judicial system (1990-2000) followed by 20 years of weak statutory courts (2000-2020) have had a profoundly deleterious impact on the nation's deeply decentralized judicial branch. As a result, a buffet of justice systems and alternative dispute mechanisms have flourished across the country, leading citizens to shop for the most favorable outcomes. This is compounded by a deep contestation over the interpretation of the provisional constitution and the ambiguous framework to establish the two most important judicial institutions: the Judicial Services Commission (JSC) and the Constitutional Court of Somalia (CCoS). The federal parliament has yet to formally federalize the judicial branch as stipulated by the provisional constitution.

Taking advantage of this situation, the current administration of President Mohamed Abdullahi Farmaajo rushed through a caretaker cabinet and a lame duck parliament a bill to establish the JSC and could well establish the CCoS in the coming weeks. Although this administration had almost four years of largely unhindered authority to establish these crucial institutions, its last-minute effort casts doubt on the impartiality of the judicial branch.

However, that is not the only challenge. Federalizing the justice system is one of the thorniest problems facing the country, which traces its current form back to the dictatorship years of Siyad Barre. Legal plurality and confusion reign, as states—and in some cases districts—use their own justice models and interpret penal codes as they see fit.

Corruption is also a chronic problem at all levels. Citizens are forced to pay to access basic justice as well as to appeal to higher courts. Many citizens instead take their cases to al-Shabaab courts for what they see as a fair, fast and, above all, enforceable judgments. Decisions by statutory courts are routinely ignored as they lack the capacity to enforce their rulings.

"Officials who work in the justice sector are inadequately compensated and are sometimes not paid for months. Many resort to corruption as a means to make ends meet

Officials who work in the justice sector are inadequately compensated and are sometimes not paid for months. Many resort to corruption as a means to make ends meet. Despite the poor wages, justice officials are also exposed to severe security threats as they remain largely unprotected by state and federal authorities. In many cases, they are warned against issuing an adverse decision, and, in some cases, brute force is used to free suspects or change decisions.

In the absence of effective and reliable statutory courts, an alternative dispute resolution (ADR) mechanism is rapidly growing across the country. By some estimates, more than 80% of all civil and criminal cases in Somalia are settled through a traditional Xeer system, which is seen as effective, fast and compliant with Shariah law. However, ADR mechanisms often lack strong enforcement capabilities and rely on the moral authority of traditional elders. Yet ADR is gaining ground, often at the expense of statutory courts, because it is successful in de-escalating conflicts and creating a win-win situation. Currently, there are concerted efforts to harmonize ADR mechanisms within the statutory legal systems. The Federal Government of Somalia (FGS) and at least two federal member states (FMS) have active programs that nurture ADR centers with the aim of systemically aligning them with the regular justice system.

A new leadership at the federal ministry of justice, the office of the attorney general and the supreme court has introduced a raft of new reforms aimed at expanding access to justice and fighting corruption within the federal justice bench and in government institutions. Additional capacity is dedicated to fighting organized crime such as human trafficking and illegal fishing. Gender-based violence (GBV) is also prioritized under a special prosecutor. However, persistent underfunding and lack of specialized expertise such as forensic scientists and criminologists are hampering reform efforts.

To overhaul the country's broken justice system, Somalia's federal and state leaders would need to come together and agree on a modality and finding common ground in order to establish an inclusive and independent Judicial Services Commission and Constitutional Court. The Jowhar Agreement of 2018 provides a foundation, but was set aside as political tensions between the center and the periphery intensified. A return to that framework would be vital to rebuilding a viable, competent and effective justice system.

2. Methodology

Under the supervision of a principal investigator, researchers from the Heritage Institute for Policy Studies (HIPS) have interviewed more than 24 key actors in the justice sector at the federal and state levels. They included current and former senior justice officials at the FGS, as well as the former chief justice and former attorney general. HIPS researchers also traveled to the capitals of all federal member states and conducted key informant interviews with state justice ministers, senior judges and experts. We also interviewed constitutional and legal experts. We selected a qualitative approach for this research to gain a deeper understanding of the complexity of the justice system from current and past practitioners, and to improve the policy recommendations of the report.

HIPS researchers have also done an extensive review of the available literature, including academic articles, reports and multiple government documents relating to the justice sector in Somalia in order to supplement the qualitative interviews. The literature review revealed the enormous challenges confronting the sector and the underlying factors that are complicating access to justice for the vast majority of citizens.

Finally, HIPS researchers did a systemic analysis of the interviews and the available literature to draft this report. As the challenges discovered are too many to cover in one report, we decided to focus on the structural problems and the concrete political, policy and practical actions that could be taken to rebuild the justice system in a way that engenders the trust of the people.

3. Introduction and Historical Context

"The formal justice system in Somalia traces its origins back to the colonial era when Britain controlled the northern part of the country (Somaliland) and Italy controlled the south

The formal justice system in Somalia traces its origins back to the colonial era when Britain controlled the northern part of the country (Somaliland) and Italy controlled the south. Although both systems allowed Somalis to use sharia law and the customary Xeer in family matters (i.e., divorce, inheritance), other cases were subject to statutory courts directly under the control of the colonial authorities.[1]

Notwithstanding the inherent differences between the British Common Law used in Somaliland and the Italian Civil and Penal Code applied in the south, the two colonial authorities have impacted the post-independence justice system in Somalia in three fundamental ways: first, both have established a secular, western law and codified its supremacy for criminal matters; second, both have allowed the Somali customary system of Xeer[2] to remain largely intact insofar as its application does not pose a threat to public safety; and third, and perhaps most importantly, the centrality of Shariah law to the the judicial system was left intact. As Professor Andre Le Sage observed, "this judicial system maintained a formal governance apparatus that was able to regulate, but not displace, the continued practice of Somali customary justice."[3]

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1 Le Sage, A. "Stateless Justice in Somalia. (2005)." HD Center. https://www.files.ethz.ch/isn/20303/Somalia_stateless_justice.pdf

2 A section in this report is dedicated to Xeer and its current status in Somalia,

3 Ibid.

3.1 Post-independence justice model (1960-1962)

“In addition to Islamic Shariah and customary Xeer, courts in the new country were using British Common Law and Italian Continental Law. Not only were the courts dealing with different legal systems, but they were also adjudicating in different languages

After the independence of the former British Protectorate and the Italian colony in 1960 and the formation of the Somali Republic, the new nation inherited four distinct legal systems that were simultaneously used for different matters, deepening the confusion in the judicial sphere. In addition to Islamic Shariah and customary Xeer, courts in the new country were using British Common Law and Italian Continental Law[4]. Not only were the courts dealing with different legal systems, but they were also adjudicating in different languages, with the north (Somaliland) maintaining English as a primary source of litigation, while southern courts were conducting their day-to-day business almost entirely in Italian. This was due in part to the fact that the Somali language was not developed at that point in time, forcing authorities to use a foreign language.[5]

3.2 First judicial reform (1962-1969)

Facing the unique challenge of creating a unified and coherent judicial system after two years of widespread confusion, the new Somali government established a national committee to study the matter carefully and propose actionable options. The Consultative Committee for the Integration of Legal Systems (CCILS) was given a broad mandate by the Council of Ministers. Comprised of legal experts and scholars, the committee traveled the country and eventually helped draft landmark legislation that aimed to address the problem.[6] In 1962, the parliament passed the “Law on the Organization of the Judiciary” which aimed at integrating the various legal systems. To this day, elements of this legislation continue to shape the justice system in Somalia in one way or another.

Remarkably, the new law, while giving the appearance of transformative change, essentially added to the existing confusion. It stipulated that the country’s civil and penal codes were to be based on Italian law, while choosing the Indian Code for criminal procedures. Furthermore, the legislation allowed Shariah law to be used for family cases, such as divorce and inheritance, while Xeer was noted as an optional dispute resolution mechanism among communities.[7] In other words, the new legislation simply removed British Common Law from the system and replaced it with the Indian Code. There are several theories as to why this happened. The most plausible is that the first post- independence chief justice was an Indian Muslim who was brought in to help build the capacity of the nascent justice system of Somalia.

Complimentary laws were also passed including the Constitution and Legislative Decree No. 3 of June 1962, which formally integrated the entire judicial system under the Ministry of Justice and Religious Affairs. Under this law, the structure and hierarchy of the justice system was codified, with a supreme court at the top, an appeals court in the middle and a network of regional and district courts at the bottom.

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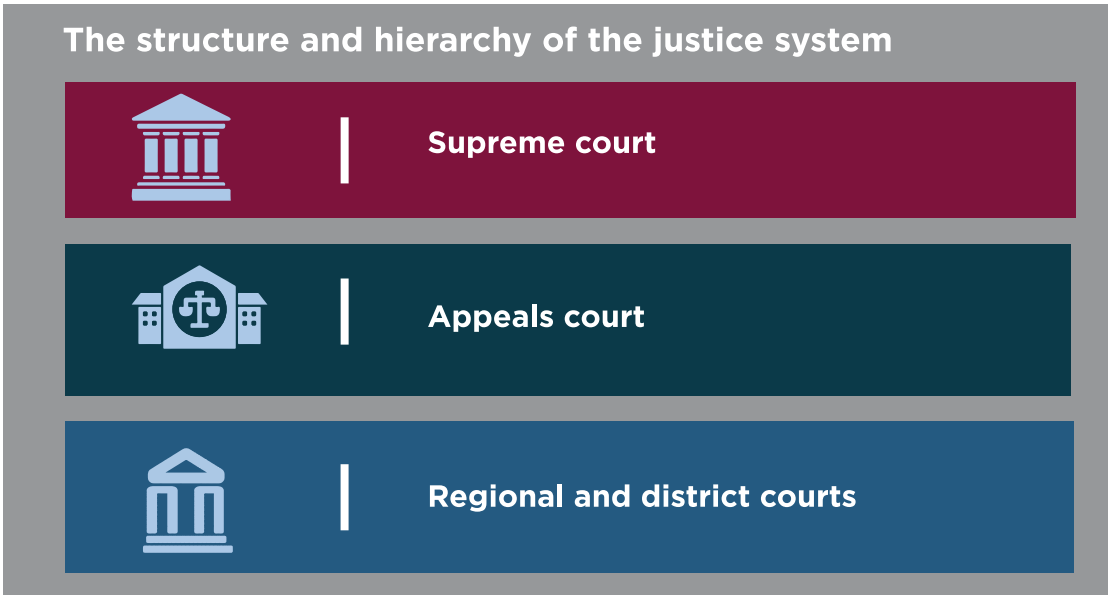
4 Academy for Peace and Development - APD. (2002). “The Judicial System in Somaliland.” https://apd-somaliland.org/wp- content/uploads/2014/12/JUDICIARY-REPORT-FINAL.pdf
5 The Somali language was formally adopted in 1972 under the Siyad Barre dictatorship.
6 Interview with former speaker Mohamed Jawaari. (September 2020). Mogadishu.
7 Le Sage. Ibid.



"While courts in the south, the seat of the capital Mogadishu, enthusiastically embraced the new laws, courts in the former British protectorate of Somaliland bristled and continued using British Common Law for civil and penal cases, with Shariah and Xeer as complimentary systems

The supreme court doubled as the constitutional court when constitutional matters arose.[8] In that process, the law stipulated that the parliament and president each appointed two people who are not members of parliament to the supreme court when it was acting as a constitutional court. The four new justices were interim members hearing the specific case at hand only, with their mandate automatically expiring soon after the case was settled. The position of the Attorney General was also established for the first time to act as the chief prosecutor of the new nation. Perhaps most importantly, the new decree created the Higher Judicial Council (HJC) to protect and promote the independence of the justice system. The HJC was tasked with the recruitment, promotion, demotion and management of the budget of the entire system.[9]

While courts in the south, the seat of the capital Mogadishu, enthusiastically embraced the new laws, courts in the former British protectorate of Somaliland bristled and continued using British Common Law for civil and penal cases, with Shariah and Xeer as complimentary systems.[10] Among other factors, the fact that the British-trained jurists couldn't speak Italian was cited as a reason for continuing to follow British law.

"In October 1969, the military took power in a bloodless coup weeks after the country's president, Abdirashid Ali Sharmarke, was assassinated

3.3 Militarization of the justice system (1969-1991)

In October 1969, the military took power in a bloodless coup weeks after the country's president, Abdirashid Ali Sharmarke, was assassinated. On the false pretense that there was a dangerous power vacuum and a rampant corruption, the new junta, led by army chief of staff General Mohamed Siyad Barre, suspended the constitution and immediately arrested almost all senior officials of the democratically-elected government.

8 Interview with Jawaari. Ibid.
9 Ibid.
10 APD. Ibid.

Predictably, the new military dictatorship moved rapidly to dismantle the entire justice system and immediately established the fearsome National Security Court (NSC).[11] Although certain courts, such as the supreme court, were later reestablished, their powers were usurped by the NSC, which had branches in all districts and regions. Under the direct control of the military junta, the NSC became the most powerful symbol of the justice system, and a potent force to subjugate critics. Its expansive remit included any offense that the junta deemed to be a threat to national security.[12] In reality, the NSC's most important task was to protect the regime by all means possible.

"Judges at the NSC were appointed directly from the ranks of the military and were given wide latitude to arrest citizens and seize property

Judges at the NSC were appointed directly from the ranks of the military and were given wide latitude to arrest citizens and seize property. Crucially, the NSC was given the authority to take cases away from lower courts at will, often conflating national security issues with minor offenses. The only people who were allowed by law to appeal the decisions of the NSC were members of the Supreme Revolutionary Council (SRC), the highest executive body within the military junta.[13]

The military regime went further than anyone else in its determination to remake the country's justice system. Applying its so-called "Scientific Socialism" principles, the junta sharply limited the role of Shariah law and customary Xeer. "The new civil code altered the customary system of diya (blood compensation) payment as compensation for death or injury, in which responsibility was collectively borne by the clan. Any homicide offense was made punishable by death and compensation payable only to close relative."[14]

Perhaps the most durable outcome of Siyad Barre's judicial overhaul was his desire to centralize the justice system, much like the rest of his authoritarian rule. Dozens of decrees issued by the SRC over the years have systemically removed any hint of independence of the judicial branch as the regime packed courts with loyalists and deliberately weakened them (except the NSC). By the time rebel groups ousted Siyad Barre in 1991, the system was a mere shell of its previous existence under the democratic administrations of the 1960s.

3.4 Post civil war reality (1991-2000)

Like the rest of the state architecture, Somalia's justice system crumbled under the weight of the civil war that began in 1991, shortly after Siyad Barre was removed from power. The law of the jungle prevailed across most of the country, although clans continued to practice the traditional Xeer system to settle localized disputes.

11 Interview with former Somalia chief justice Ibrahim Idle Suleiman (September 2020). Mogadishu.
12 APD. Ibid.
13 Le Sage. Ibid.
14 Ibid.

“With the declaration of Somaliland as an independent but unrecognized state in May 1991, the local justice system was reestablished there

With the declaration of Somaliland as an independent but unrecognized state in May 1991, the local justice system was reestablished there. Article 103.5 of the Somaliland constitution clearly stipulates that laws enacted by the Somali government before 1991 that do not contradict with Shariah law and do not infringe upon the rights of individuals should remain in force until new ones are promulgated.[15] This was a pragmatic recognition by Somaliland that, despite its desire to cede from Somalia, it can continue to use the legal infrastructure.

Puntland also took similar steps when it was established as the first of future federal member states in 1998. Unlike Somaliland, Puntland has never sought to secede from Somalia, but in the absence of a national government, its constitution outlined a robust justice system. Law No. 2 of 1999 created a three-tiered court system that put the court of first instance in the districts, the supreme court in the capital Garowe and the court of appeal in provincial capitals. Puntland also established the Higher Judicial Council, similar to the one that existed at the national level in the 1960s, to oversee the judicial branch. The Office of the Attorney General also operates within the judicial branch.[16] Puntland still uses this system and has by far the most advanced judicial branch in the country.

3.5. Reimagination of the justice system (2000-2009)

When the Third Republic[17] was reestablished in Arta, Djibouti in the autumn of 2000, the Transitional National Charter that was endorsed by the thousands of delegates who attended that landmark conference unequivocally called for the reestablishment of a robust and independent judicial branch alongside the legislative and executive branches. Calling it “a co-equal branch of government”, the charter outlined clear steps to reimagine the nation’s erstwhile justice system.[18]

Justice in the 4.5 clan system

As a result of the power-sharing agreement among the Somali clans during the Arta process in Djibouti, key positions of the country were distributed among four dominant clans (Daarood, Hawiye, Rahanweyn and Dir) and a consortium of smaller clans. In the new system, known as 4.5 because it gave four dominant clans artificial equilibrium in the government, the presidency and premiership alternate between Hawiye and Daarood, the speakership of the parliament went to Rahanweyn and the supreme court went to the Dir. In a gentlemen’s pact, it was understood that each clan would dominate its turf, and thus the Dir continues to play a major role in the judicial branch. For 20 years since Arta, the chief justice was from the Dir community, as was the attorney general, until last year. Like everything else in Somalia, this historical reality continues to animate the current dispensation in ways that no one had imagined. It is one of the many unintended consequences of the 4.5 system.

15 APD. Ibid
16 Interview with Puntland attorney general, Mohamud Hassan Osman (October 2020). Garowe.
17 This refers to the revival of the Somali state after 10 years of total absence, and its third version after nine years of democracy (First Republic) and 21 years of dictatorship (Second Republic).
18 See the provisional charter of the Somali Republic (2000).

However, that daunting task faced significant challenges once the leaders of the Transitional National Government (TNG) jubilantly arrived in Mogadishu in late 2000. The city was dominated by multiple faction leaders who each curved a fiefdom for his militia and sub clan. The administration of President Abdulqasim Salad Hassan, a former minister under Siyad Barre, struggled to assert its authority beyond few districts in Mogadishu. Although the TNG enjoyed wide support among the public, especially in Mogadishu, it was virtually powerless to do anything tangible, let alone the mammoth task of reestablishing the justice system.

Other matters, including political negotiations with warlords and securing revenue sources, took priority over the revival of the judicial branch. Still, the TNG appointed a chief justice for a supreme court that practically did not exist, and its justice ministry tried, helplessly, to reestablish some courts in Mogadishu. By 2003, the few courts that nominally aligned with TNG were no longer functioning, because salaries had not been paid for over a year.[19]

"The arrest sent shivers across the judicial branch and was seen as an act of delegitimization and humiliation of the justice system by the president

The TNG was replaced in 2004 with the Transitional Federal Government (TFG). President Abdullahi Yusuf was elected president and a new interim constitution was agreed. A former faction leader and the founder of Puntland, Yusuf also struggled to assert his authority in the country. Once he was able to relocate to Mogadishu nearly two years after his election, he had a major falling out with the chief justice of the supreme court, whom he had appointed. In an unprecedented move, Yusuf ordered the arrest of the chief justice who was held in a prison next to the presidential palace.[20] The arrest sent shivers across the judicial branch and was seen as an act of delegitimization and humiliation of the justice system by the president.

"Al-Shabaab became the most powerful militant group in the country and continues to battle the Somali government to this day

Union of Islamic Courts

In early 2005, the Union of Islamic Courts (UIC) was launched in Mogadishu. Its stated objective was to bring about peace and justice through the strict enforcement of Shariah law among local clans. Comprised of about a dozen clan-based courts, the UIC drew the suspicion of the US intelligence agencies. Fearing that, in the post-9-11 world, the courts were in bed with militant groups, the US bankrolled Mogadishu's most reviled warlords to fight the UIC. However, the courts defeated the warlords and garnered massive popular support across the country for their swift form of justice. They rapidly captured most of south central Somalia, stopping at Puntland. Alarmed, the US supported Ethiopia's invasion of south central Somalia and the installation the TFG in Mogadishu. A brutal, two-year resistance war was born. Al-Shabaab, a previously unknown militant group aligned with the UIC, gained prominence through its anti-Ethiopian resistance. Two years later, Ethiopia was forced to exit Somalia under a negotiated agreement in Djibouti, which saw the former UIC leader Sheikh Sharif Sheikh Ahmed elected as the president. Al-Shabaab became the most powerful militant group in the country and continues to battle the Somali government to this day.

19 Le Sage. Ibid.
20 BBC Somalia "Xarigga Guddoomiyaha Maxkamadda Sare". (2007). Accessed at: https://www.bbc.com/somali/news/story/2007/09/070922_muqdisho

4. Rebuilding the Justice System

“Concrete steps were taken to rebuild the country’s justice system for the first time since the civil war

In early 2009, when Sheikh Sharif Sheikh Ahmed, a former UIC leader who gained national prominence for providing Islamic justice to local communities in Mogadishu, was elected president of the TFG, concrete steps were taken to rebuild the country’s justice system for the first time since the civil war. President Sharif’s TFG formed, on an interim basis, the Judicial Services Commission (JSC),[21] a body responsible for overseeing the justice system. It was a vital step in the building blocks of the new justice system. During his term, President Sharif appointed two chief justices for a fledgling but increasingly influential supreme court. His second appointment was Aidiid Abdullahi Ilkahanaf, a widely respected jurist and a former member of the federal parliament. Ilkahanaf left an indelible mark on the justice system in general, and the supreme court in particular. He consolidated power throughout the federal judicial branch and expanded the scope of the court in ways that his predecessors could not. However, his critics say that he was a “judicial activist who weaponized the power of the bench to exert an undue political influence.”[22]

4.1. Disbanding the interim JSC

Despite his enormous power, Ilkahanaf was routinely constrained by the interim JSC which had the authority to recruit or dismiss judges on the federal bench. Using its authority to provide oversight over the judicial branch, the JSC curtailed the chief justice’s desire to unilaterally shape the federal bench. Over the years, he grew deeply frustrated with what he saw as a deliberate attempt to clip his wings.[23]

To overcome the roadblock erected by the interim JSC, Ilkahanaf heavily lobbied the newly-elected president, Hassan Sheikh Mohamud, and his close advisors. He portrayed the interim JSC as both illegal and obstructionist. His argument was not without a merit: the JSC was established under article 63 of the Transitional Federal Charter (TFC), which expired in August 2012, and the new Provisional Constitution of Somalia (PCoS), approved in September 2012, which outlined an entirely different procedure for the establishment of the JSC. Moreover, the JSC was, in fact, obstructing the supreme court in reaction to Ilkahanaf’s desire to unshackle the court from the limitations of the oversight mechanism.

President Hassan Sheikh, who identified justice reform as one of the six pillars of his policy agenda,[24] was convinced that the continued existence of the interim JSC posed a fundamental impediment to the reform agenda he had in mind. He disbanded the interim JSC with the intention of forming a new body that was compliant with the new constitution[25] and consistent with his justice reform agenda. He also knew that his government was no longer transitional and had considerably more discretionary powers at its disposal than its predecessors. That decision would haunt President Hassan Sheikh as he repeatedly failed to establish a new JSC.

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21 Interview with former Somalia chief justice. Ibid.
22 Interview with former legal advisor at the Office of the President (November 2020). 23 Interview with former Somali justice minister (October 2020).
23 Interview with former Somali justice minister (October 2020).
24 Ali, A. “Somalia: An Unconvincing Progress”. (Jan. 2014). Al Jazeera Studies Center. Accessed at: https://studies.aljazeera.net/en/reports/2014/01/201412977476731 10.html
25 Interview with former Somali justice minister. Ibid.

4.2 Justice reform conference

> *"The conference was a significant milestone—the first of its kind," wrote the organizers, who were advisors to the president*

In 2013, President Hassan Sheikh's administration organized a national conference on justice reform with the view to broadening consultations among the Somali people. More than 200 people from across the country and the diaspora stayed at a hotel in Mogadishu for days to discuss the numerous challenges facing the justice system in Somalia. They included members of the judiciary, legal experts, former judges and prosecutors, members of parliament, prominent civil society leaders and sitting justice officials. "The conference was a significant milestone—the first of its kind," wrote the organizers, who were advisors to the president.[26] They added that President Hassan Sheikh understood that reform starts with serious dialogue among the Somali people, an objective that was partially achieved at the conference.

After deliberating for nearly a week, the participants came out with a very ambitious set of recommendations:[27] they urged the government to take 19 concrete policy actions, notably the establishment of a new JSC and the establishment of the Constitutional Court of Somalia (CCoS). They also implored the ninth parliament to support the government and pass five specific legislations, including laws to establish the JSC, the CCoS and the Human Rights Commission (HRC)—three institutions that would have to be established together to meet constitutional requirements.

> *We know that rebuilding a society after more than two decades of violence and instability is, to put it mildly, a challenging long-term project," they wrote, adding that "if its momentum is sustained, the National Dialogue on Justice Reform could be a real turning point in Somali history*

The organizers[28] conceded that the conference, while pivotal to justice reform, was unlikely to fix the many problems confronting it. "We who organized and participated in the conference are not naïve; we know that we have not single-handedly solved all of Somalia's problems just by issuing a set of recommendations. We know that rebuilding a society after more than two decades of violence and instability is, to put it mildly, a challenging long-term project," they wrote, adding that "if its momentum is sustained, the National Dialogue on Justice Reform could be a real turning point in Somali history, something that helps restore the confidence of Somalis in their own ability to put their country back together. International assistance will be an important part of this effort, but it will only succeed if Somalis themselves approach the challenges they face with a can-do spirit."[29]

4.3 Contested justice reform

Soon after the justice reform conference ended, the administration of President Hassan Sheikh, through his advisors at the influential Policy Unit, began preparing a slew of legislation for the cabinet to submit to the parliament. Many of those laws were consistent with the recommendations of the conference. But they were stymied by increasing tension between the president and his prime minister, Abdi Farah Shirdoon "Saa'id". By December 2013, the tension between the two had reached a boiling point, leading to the unceremonious sacking of the prime minister by the parliament on the urging of the president.[30]

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26 Qalinle, A. and Haji, H., "Somali National Dialogue on Justice Reform: A New Beginning in Somalia". (2013). Hiiraan Online. Accessed at: https://hiiraan.com/op4/2013/apr/29058/national_dialogue_on_justice_reform_a_new_beginning_in_somalia.aspx

27 Communique of "Somali National Dialogue on Justice Reform". (2013). Accessed at: http://hrlibrary.umn.edu/research/somalia- justice-reform.html

28 One of the organizers, Hassan Haji, became a justice minister from April 2017-September 2020.

29 Qalinle, A. and Haji, H. Ibid.

30 Hussein, A. & Taxta, I. "Somali Prime Minister Voted Out by Lawmakers". (2013). Reuters. Accessed at: https://uk.reuters.com/article/uk-somalia-politics/somali-prime-minister-voted-out-by-lawmakers-idUKBRE9B-10ML20131202

In early 2014, a new prime minister was installed and Farah Sheikh Abdulqadir, an influential advisor to the president, was appointed justice minister. Given his outsized influence within the key stakeholders of the FGS, Abdulqadir moved rapidly to achieve some of the objectives laid out at the justice reform conference (which he also helped organize). Within few months, he shepherded through parliament the establishment act of a new Judicial Services Commission. A deeply divided parliament passed the legislation with a relatively small margin. Out of the 147 MPs[31] who attended that session on 8 July 2014, only 79 voted for it, 59 voted against it and nine abstained. Although the passing of the legislation in and of itself was celebrated as a huge success for the Ministry of Justice (MoJ), the thin margin with which this landmark legislation was passed raised eyebrows among the legal community across the country which was hoping for a broad-based support for the JSC, given its centrality to the judicial branch.

Procedure to establish the Judicial Services Commission

Two legal frameworks outline the complicated process of establishing the Judicial Services Commission, arguably the most important judicial institution. The first is article 109A of the constitution, which determines the size of the JSC and from where and how each member shall be appointed. The chief justices of the supreme court and constitutional court (currently doesn't exist) as well as the Attorney General and the chair of the Human Rights Commission (currently doesn't exist) are automatic members. The Somali Law Society (SLC) is supposed to appoint two people from among their ranks, and three people of "unquestionable integrity" are supposed to be selected by the council of ministers. Confusingly, article 109A (4) states that the term of the JSC shall be five years, even though the two people from the SLC and the three independent people are said to have four-year terms. In the absence of a constitutional court and Human Rights Commission, and the ambiguity around the legality of SLC, the whole process is deeply confusing and circuitous.

"But the passing of the legislation left a bad after taste and mobilized different political forces in Mogadishu. Some politicians from the dominant clan in the judicial branch, the Dir, felt predictably threatened by what they perceived as the hidden agenda of the reform efforts by the MoJ and were determined to torpedo it

In accordance with articles 109A and 111A of the constitution, the new law gave considerable powers to the MoJ to select the nine members of the JSC and seek the vetting and endorsement of the council of ministers before returning the federal parliament for a vetting of the candidates and final confirmation. Article two of the legislation unequivocally states that the JSC is independent from the executive and legislative branches. Article five outlines the many powers of the JSC, including the recruitment, dismissal and setting the administrative procedures for federal courts and the constitutional court.

But the passing of the legislation left a bad after taste and mobilized different political forces in Mogadishu. Some politicians from the dominant clan in the judicial branch, the Dir, felt predictably threatened by what they perceived as the hidden agenda of the reform efforts by the MoJ and were determined to torpedo it.[32]

31 The minimum quorum of the parliament is 50% +1, which is exactly 138. It's unclear whether it was a pure lack or parliamentary gymnastics that the bare minimum quorum was present in order to rush through the passing of controversial legislation.
32 Interview with former MP and member of the judicial committee (November 2020).

Ilkahanaf was believed to have organized his clan base in the cabinet and the parliament to ensure that the JSC is never formed, because the new law gave it substantial authority to hire and fire justices, and to oversee his work—something he had never experienced.[33] Put another way, Ilkahanaf and his clan members felt that their piece of the pie was being put under the mercy of the MoJ, whose minister was from a less dominant clan and a very close ally of President Hassan Sheikh.

> *Other groups were deeply threatened by what they perceived to be the weaponization of the justice system by President Hassan Sheikh and his allies*

Other groups were deeply threatened by what they perceived to be the weaponization of the justice system by President Hassan Sheikh and his allies.[34] And even some members of the international community, who were disproportionately funding the justice system, were unnerved by what they viewed as an Islamist clique in Villa Somalia[35] assembling the tools of power in order to drive the country's new justice system in a more conservative direction and away from western influence.[36] These groups joined forces and twice voted down names proposed by Abdulqadir to the new JSC. The minister's reform agenda was effectively dead on arrival, before it even reached the parliament.

In September 2014, barely two months after the JSC law was passed by the parliament, and within weeks of the cabinet rejecting proposed names by the MoJ, Prime Minister Abdiweli Sheikh Ahmed unexpectedly removed Abdulqadir from the MoJ docket, and replaced him with a veteran politician, Salim Aliyow Ibrow, a close ally of speaker Mohamed Osman Jawaari. The cabinet reshuffle sent shockwaves through the political landscape of the country, in part because Abdulqadir was thought to be untouchable due to his close association with the president. Abdulqadir argued that the move was a well-coordinated campaign by different stakeholders for the sole purpose of undermining his ambitious reform agenda.[37] The controversy surrounding this reshuffle led to the sacking of Prime Minister Ahmed who was replaced by Omar A. Sharmarke in early 2015.

A new justice minister was appointed by Prime Minister Sharmarke. A former general and Puntland minister, Abdullahi Ahmed Jama "Ilkajajiir" was not considered a very partisan figure. Yet the ninth parliament rejected a list of names he proposed for the JSC in 2016 on the grounds that the MoJ submitted for vetting only five out of the nine JSC members, and that the country was already in an election mode.[38] Experts say the process outlined in article 109B of the constitution is circuitous, in that it stipulates the appointment of a nine-member JSC, even though four of those are members of other judicial institutions. "We recommend that an interim procedure be set up to make the initial appointments, so as to form the other [related] institutions. These institutions would then form the JSC to appoint the lower judiciary," said Adam Shirwa Jama, the country director for the International Development Law Organization (IDLO).[39]

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33 Ibid.
34 Interview with former justice minister Farah Abdulqadir (November 2020).
35 Abdulqadir and President Hassan Sheikh were said to belong to "Damjadiid", a moderate Islamist group known for their charitable activities in the education and health sectors.
36 Interview with former MP and member of judicial committee. Ibid.
37 Interview with former justice minister, Abdulqadir. Ibid.
38 SBC "Baarlamaanka Soomaaliya oo Dib u Celiyey Golaha Adeegga Garsoorka". (2016). Accessed at: https://alls-bc.com/baarlamaanka-somaliya-oo-dib-u-celiyay-golaha-adeega-garsoorka/
39 Interview with Adam S. Jama of IDLO. (Nov. 2020). Mogadishu.

Curiously, the tenth parliament approved only five members of the JSC on 17 November 2020, almost exactly four years after the ninth parliament had rejected a similar list,[40] even though the political climate of the country is almost identical to the one in 2016. Somalia is currently going through a highly contested election, and both the ruling coalition and the opposition are battling it out in parliament on virtually every issue. More worryingly for the judicial branch, the names of the JSC members approved by parliament were proposed and initially endorsed by a caretaker cabinet a few days after it lost confidence of the same parliament. Prominent civil society groups in the country have criticized the move, noting that the "JSC is a cornerstone of Somalia's justice system."[41] The MoJ left out the names of the other fourmembers because their membership is automatically secured by virtue of their roles (the chief justices of supreme court and constitutional court, the attorney general and the chair of Human Rights Commission). The HRC did not exist in 2016 (and does not exist in 2020 either).

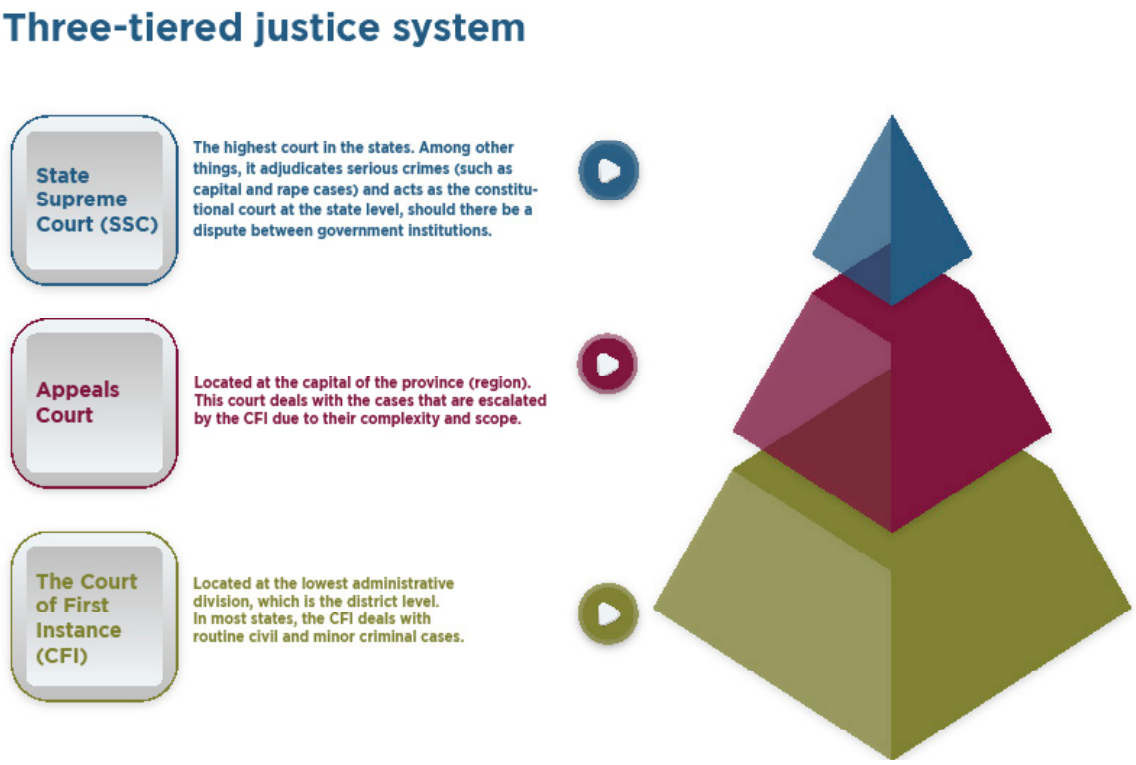
5. Structural and legal ambiguity

"The courts in the five federal member states and the Benadir Regional Administration (BRA) have adopted different structures that align with their sociopolitical realities

The elasticity and ambiguity of the Provisional Constitution of Somalia (PCoS) are primary features of the many challenges confronting the structure of the justice system. Article 105 (2) says that the "judicial structure shall be regulated by a law enacted by parliament."[42] More than eight years after the constitution was drafted, the federal parliament has yet to enact laws clarifying the precise structure of the judicial branch, especially in view of the federal dispensation. And in the absence of that important legislation, the courts in the five federal member states and the Benadir Regional Administration (BRA) have adopted different structures that align with their sociopolitical realities.

Most of the five member states and Benadir use a three-tiered justice system inherited from the Siyad Barre regime. The Court of First Instance (CFI) is usually located at the lowest administrative division, which is the district level. In most states, the CFI deals with routine civil and minor criminal cases. Above that is the Appeals Court, which is typically located at the capital of the province (region). This court deals with the cases that are escalated by the CFI due to their complexity and scope. On top of that pyramid is the State Supreme Court (SSC), which is the highest court in the FMS. Among other things, it adjudicates serious crimes (such as capital and rape cases) and acts as the constitutional court at the state level should there be a dispute between government institutions.[43]

40 Only 140 MPs were present, two more than the minimum quorum, and all voted in favor.
41 BBC Somali "Maxaa walaac looga muujinayaa xubnaha Golaha Adeegga Garsoorka Soomaaliya". (2020). Accessed at: https://www.bbc.com/somali/war-53619526
42 See provisional constitution of Somalia. (2012). Accessed at: http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf
43 Interviews with Puntland, Jubbaland, south west, Galmudug and Benadir justice officials. (September.-October 2020).



5.1 Establishment of the constitutional court

“Nearly everyone we interviewed for this study agreed that incumbent presidents exploited this legal loophole to avoid “creating a monster

One the most complicated aspects of the judicial branch is the establishment of the Constitutional Court of Somalia (CCoS). There are both legal and political reasons as to why this has not happened eight years after the constitution was adopted. On the legal aside, the constitution is contradictory on the process to nominate a chief justice of the CCoS. Article 90 (j) clearly gives the president the power to appoint the chief justice. However, article 109 (b)5 gives judges of this court the power to select from among themselves a chief judge and deputy. Whether that contradiction was by design or by accident is unclear, but this has conveniently worked for successive presidents who loathe the CCoS, because it is the only statutory court that can litigate the impeachment of the head of state. Nearly everyone we interviewed for this study agreed that incumbent presidents exploited this legal loophole to avoid “creating a monster”.[44]

Together with the Judicial Services Commission, the establishment of the CCoS is the single most important step remaining to building a powerful and independent judicial branch as outlined in the constitution. But overcoming the legal and political roadblocks is not easy. International organizations who are assisting the FGS in reforming its justice system propose what they describe as a “pragmatic” approach to solve this problem.

44 Interview with former attorney general, former justice minister, others. Ibid.

They argue that articles 90 (j) and 109 (b)5 must be harmonized through the constitutional review process, but in the meantime, "a pragmatic way to proceed is for the House of the People to make the initial nominations of [CCoS] and Supreme Court.If agreement can be reached with the President on these matters, interim appointments can be made, with the explicit view that they will serve only until the review and implementation period is completed. We recommend this approach, as it would allow the bodies to begin functioning, and would provide for the JSC to be formed in accordance with constitutional provisions."[45]

Another important reason why the establishment of the constitutional court is vital is the need for a dispute resolution mechanism between the federal government and member states. As Professor Cheryl Saunders of Melbourne University correctly observes, "All federal systems require a body to resolve constitutional disputes between the union and the states and regions. The body should be independent so that it is trusted by both levels of government. Usually, it has the authority to enforce the constitution against either the union or a state or region."[46]

Given the fact that the current administration of President Farmaajo has already pushed through the JSC in the cabinet and the parliament in a legally questionable manner, and considering that the end of the mandate of the FGS is in few months, it is highly improbable that the president will move to establish a constitutional court at this late stage of his term. That said, some experts believe that, in the absence of the CCoS, the supreme court can – and should – act as a constitutional court much like it did in the 1960s. Back then, whenever a constitutional crisis arose, the supreme court was transformed into a constitutional court by virtue of adding four individuals to its bench.[47] Two were vetted and appointed by parliament and the others were appointed by the president. The former speaker of the federal parliament, Mohamed Osman "Jawaari", who is a widely respected legal scholar and one of the drafters of the constitution, argues that the principle of "no power vacuum" should apply here, and that, until a CCoS is established, the supreme court should play that vital role, "because, at the moment, citizens have no means to challenge the constitutionality of legislations passed by the parliament a fundamental right."[48]

"*Back then, whenever a constitutional crisis arose, the supreme court was transformed into a constitutional court by virtue of adding four individuals to its bench*

5.2 Legal pluralism

Each of the five FMS has its own constitution, which outlines its justice system, and a set of laws that stipulate sentencing guidelines for crimes. Each state has its own MoJ, attorney general and multiple courts in different jurisdictions. Some states are far ahead of others in terms of clarifying local laws, but the vast majority of the states we studied apply a mishmash of British Common Law, Italian Continental Law, Shariah and customary Xeer in their statutory courts. That speaks to the legal plurality that prevails in the country, which leads citizens to shop for the best justice system where they can obtain most favorable outcome.

"*That speaks to the legal plurality that prevails in the country, which leads citizens to shop for the best justice system where they can obtain most favorable outcome*

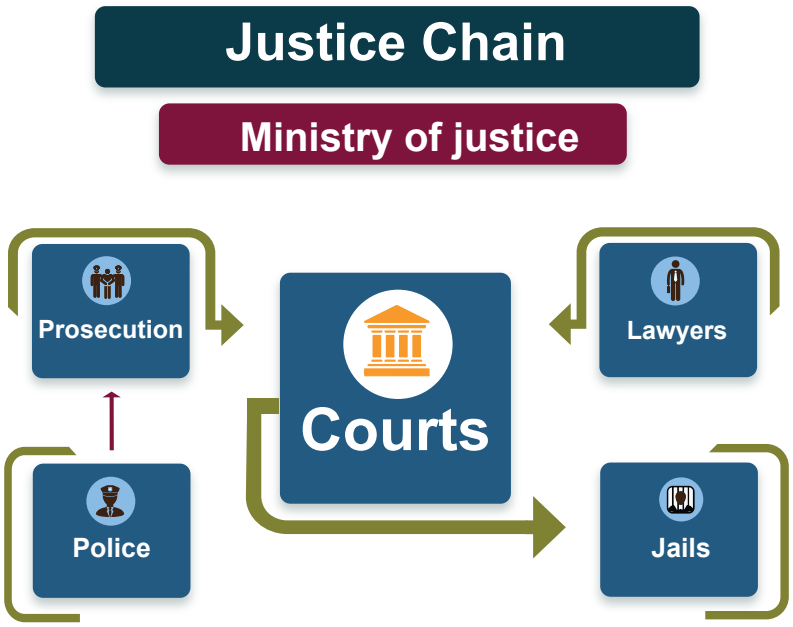
45 Interview with Mr. Jama, IDLO official. Ibid.
46 Saunders, C., "Courts in Federal Countries" for IDEA. (2019). Accessed at: https://www.idea.int/sites/default/files/publications/courts-in-federal-countries.pdf
47 Interview with former speaker Jawaari. Ibid.
48 Ibid.

Some states, like Puntland, have done comparatively well in harmonizing their local laws and ensuring consistency and integration among its judicial branch. Others, like Galmudug and Hirshabeelle, are far behind in institutionalizing their judicial branch. In fact, the Galmudug president only appointed a chief justice to the supreme court in August 2020,[49] six months after he was elected. And the supreme court, like other courts in the state, does not even have offices.

Based on our study, no state has made a concerted effort to harmonize its constitution with the federal constitution to ensure complementarity of the justice system. Most argue that they are waiting for the end of the review process before they embark on harmonization. Puntland's constitution predates the federal constitution, but the rest of the states have been established since 2013, a year after the constitution was adopted. The justice system in the states is perhaps one aspect where this misalignment is most acutely felt by the citizens.

5.3. Broken justice chain

In most states, as in the federal system, the justice chain is comprised of the police, prosecution (typically the attorney general's office), the local bar association, statutory courts, the corrections division and the state ministry of justice.



49 Goobjoog: "Madaxweyne Qooqoor oo Magacaabay Guddoomiyaha Maxkamadda Sare ee Galmudug". (2020). Accessed at: https://goobjoog.com/madaxweyne-qoorqoor-oo-magacaabay-guddoomiyaha-maxka-madda-sare-ee-galmudug/

> *There is a minimal level of policy integration when it comes to standard operating procedures of the police, prosecution, courts, corrections and ministries of justice*

Although the chain works together in a horizontal fashion, there is very little interaction at the vertical level where cooperation is most essential.[50] In practice, that means that a suspect in police custody is likely to be prosecuted and taken to a local court with an attorney in tow. If convicted, the suspect is likely to end up in a state prison facility overseen by the local ministry of justice. However, there is a minimal level of policy integration when it comes to standard operating procedures of the police, prosecution, courts, corrections and ministries of justice. The same crime could be prosecuted entirely differently from one district to another, and many judges use (and interpret) local laws with very minimal oversight.[51]

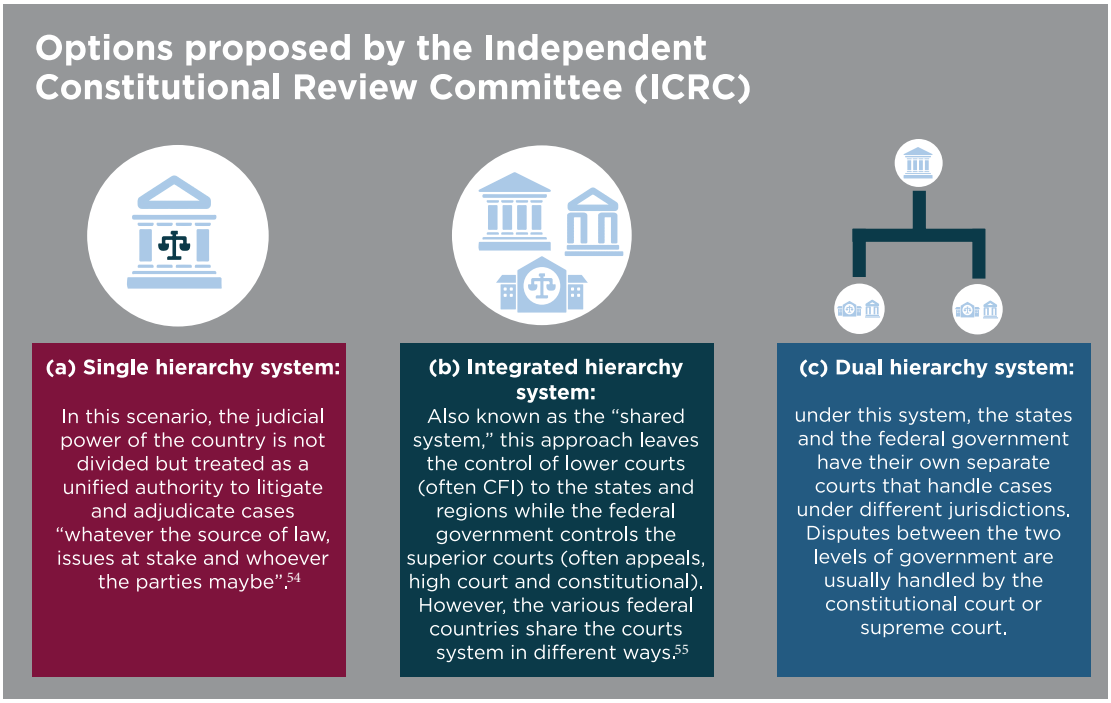
Still, the courts around the country process thousands of civil and criminal cases annually. The table below shows the cases processed by federal and FMS courts in 2019.[52]

Jurisdiction	Civil Cases	Criminal Cases	Others	Total
Federal Supreme Court	78	8	5	91
Benadir (16 courts)	1667	756		2423
Puntland (34 courts)	4705	2430		7135
Jubbaland (5 courts)	787	349		1136
Southwest (14 courts)	425	249		674
Galmudug (4 courts)	1930	249		2179
Hirshabeele (12 courts)	1501	437		1938

6. Federalizing the Justice System

Although Somalia formally adopted a federal system of governance in 2004, the application of that system on the ground is still a work in progress. Of all the aspects of the federal dispensation in the country, the justice system is one of the most fragmented across state, regional and even district lines. The federal parliament has yet to enact laws that would officially federalize the judicial branch in compliance with article 105 (2) of the constitution. This is in part because the parliament is beholden to the constitutional review process which was designed to propose policy options for lawmakers to decide. After years of exhaustive study, the Independent Constitutional Review Committee (ICRC) proposed a menu of three structures that are common around the world, especially in federal countries.[53] The three options are:

50 Interview with former Somalia attorney general. Ibid.
51 Ibid.
52 See "2019 National Justice Report".
53 Interview with former speaker of parliament Jawaari. Ibid.



"During our data collection phase, no one advocated for a single court system in which the central government in Mogadishu is in control of everything. Almost all of the interviewees discounted that model, as it conjures up strong emotions about the dictatorship of Siyad Barre

Although ICRC did not advocate for one option over the other, the constitution is very clear in this regard. Article 108 stipulates that there should be three levels of courts: "(a) The Constitutional Court. (b) The Federal Government level courts. (c) The Federal Member States level courts." It adds that the highest court at the FGS level should be the supreme court, and that FMS should have their own high courts.[56]

6.1. Which justice model is best for Somalia?

During our data collection phase, no one advocated for a single court system in which the central government in Mogadishu is in control of everything. Almost all of the interviewees discounted that model, as it conjures up strong emotions about the dictatorship of Siyad Barre. However, judicial officials we interviewed at the FMS strongly advocated for a dual court system in compliance with article 108. They argue that, in addition to the interim constitution, which is unequivocal in their view, the reality in post-civil war Somalia necessitates separate justice systems for each state. They note that the military regime's systemic dismantling of the justice system in 1969 and the creation of the National Security Court set the tone for a 21-year brutal dictatorship. These officials also point out that, in the absence of a federal implementation mechanism, the use of an integrated system is a moot point.[57]

54 Saunders, C. IDEA. Ibid.
55 For a detailed treatment, please see the IDEA paper cited above.
56 See PCoS article 108.
57 Interviews with Puntland, Jubbaland, south west and Galmudug officials. (2020).

However, almost all other officials and experts in Mogadishu and elsewhere favored amending the constitution and adopting an integrated court system. They argued that a dual system is simply unimplementable in the country because: (a) it is too costly for a poor country like Somalia where the current judicial branch is inadequately funded (b) the human capacity required to run multiple parallel courts is nonexistent (c) the similarity of the legal systems used across the country is so striking that changing them would undo a lot of justice (d) and Somali society remains largely borderless, making it exceedingly difficult to demarcate legal jurisdictions.[58]

"These experts argued that the justice system should be depoliticized and decoupled from the raging debate on the larger federalism questions, such as power and resource sharing, because those matters are inherently political

Furthermore, these experts argued that the justice system should be depoliticized and decoupled from the raging debate on the larger federalism questions, such as power and resource sharing, because those matters are inherently political. Even the former speaker of parliament, Jawaari, who is considered a federalist,[59] said that an integrated system was easily implementable, "because the penal code used across the country is exactly the same one, and thus I do not see why cases would have to be adjudicated by two different courts."[60] But he nuanced his statement with the need for a national reconciliation among the Somali people for the purpose of healing and cohesion that would lead to a consensus on the future justice modality of the country.

6.2 The Jowhar Agreement

In January 2018, a three-day justice conference was held in the interim capital of Hirshabeelle state. It was billed as an opportunity to bridge the gap between the FGS and FMS on the most suitable justice model for Somalia, with the stated objective of influencing the constitutional review process. All FMS were represented by ministers of justice and the FGS minister of justice, though not the Benadir Regional Administration. The conference made four important declarations: first, they urged the constitutional review committee to include their political agreement as a compendium to the constitutional review process as it relates to the justice system of the country; second, they declared that, until the constitution is reviewed, amended and finalized, each state (and district) should continue to discharge its judicial services under its existing system; third, the BRA should maintain its existing courts until its status is clarified through the constitutional review process; and fourth, they declared that a federal judicial organization act should be passed through parliament, which would regulate the nation's justice system.[61]

The most important outcome of the Jowhar Agreement was to essentially adopt a fully-fledged integrated courts system for the country, giving the three-tiered FMS courts the authority to litigate local and federal cases at the district and provincial levels (at courts of first instance), at the appeals courts and at the state supreme court. Crucially, the supreme court at the federal level was given the exclusive authority to make a final, unappealable adjudication of all cases. In doing so, the agreement made two important changes to the status quo: first, all state courts were allowed to hear federal cases as part of the integrated system; and second, the state supreme courts lost the finality of their decisions.

58 Interview with former justice minister Abdulqadir. Interview with Adam S. Jama of IDLO (2020).
59 See "Dysfunctional Federalism". (2020). Heritage Institute for Policy Studies.
60 Interview with former speaker Jawaari. Ibid
61 See communique "Heshiiska Mideysan ee Hannaanka Caddaaladda". (2018).

That said, another potentially complex element was introduced in the agreement: the creation of a branch within state supreme courts that would act as the constitutional court of the state (even though the agreement reaffirms that the country will only have one official constitutional court in Mogadishu). Confusingly, the decisions of the branch of the state constitutional courts are also unappealable except as is relates to human rights cases.

Amid intense political upheaval between the FGS and FMS, the Jowhar Agreement was a rare accord carefully negotiated at the technical level. "It was the culmination of three years and a few months process of deliberations, [and it] signified for me a milestone for reforming the justice and corrections model for a country in transition," said one minister.[62] Despite the appearance of a breakthrough on justice modality, the Jowhar Agreement was ultimately torpedoed by the leadership of the FGS, which felt that their minister easily acquiesced to the intense pressure of his FMS counterparts.[63] The chief justice of the federal supreme court also objected to the outcome, citing incompatibility with the constitution.[64] The leaders of the FMS also never fully embraced the outcome, citing constitutional violation. In the end, the Jowhar Agreement became yet another casualty of Somalia's zero-sum game political system.

"Galmudug also recently deported to Mogadishu a high-profile suspect who was accused of leading a brutal gang rape and murder

Still, courts around the country cooperate, especially on serious crimes such as murder and rape. The attorney general of Puntland has noted a specific case where a suspect accused of rape fled to Mogadishu. "We notified the office of the federal attorney general, and the suspect was nabbed in Yaakhshiid district and flown back to Puntland, where he faced justice."[65] Galmudug also recently deported to Mogadishu a high-profile suspect who was accused of leading a brutal gang rape and murder.[66]

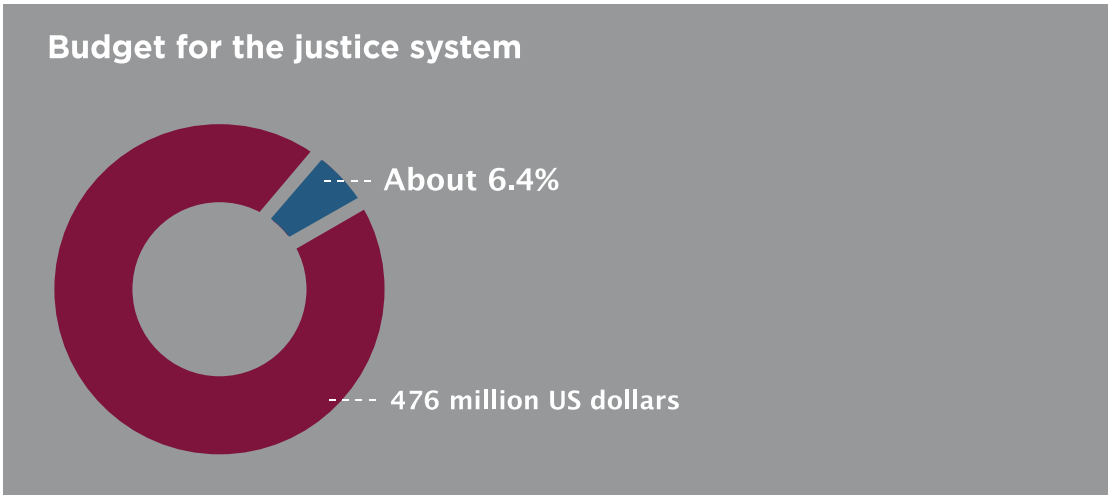
7. The (In)dependency of the Justice System

Article 106 of the constitution clearly and strongly states the independence of the justice system from both the executive and judicial branches of the government. "No civil or criminal proceedings shall be instituted against a judge in respect of the exercising of any judicial function," says the article, adding, "The home or person of a judge cannot be searched without the authorization of the Judicial Service Commission."[67] Currently, only about 200 judges and 70 prosecutors who would qualify for this protection[68].

"Only $13.4 million was allocated for the entire justice system, including the Ministry of Justice, Office of the Attorney General and all courts operating in Mogadishu (supreme court, appeals court and Benadir courts). That is about 6.4% of the total budget of $476 million

Notwithstanding these constitutional protections, almost all officials interviewed for this study said that judicial officials are at the mercy of politicians for two reasons: first, political leaders retain the power to appoint—and sack-- judicial officials both at the federal and state levels; second, the judicial branch of the government is not only poorly financed, but the leaders use the so-called "power of the purse" to cudgel justice officials into line.[69] A review of the 2020 federal budget allocated for the judicial branch reveals the priorities of the government. Only $13.4 million was allocated for the entire justice system, including the Ministry of Justice, Office of the Attorney General and all courts operating in Mogadishu (supreme court, appeals court and Benadir courts). That is about 6.4% of the total budget of $476 million.[70]

62 Interview with Minister Adam Aw-Hirsi, former justice minister of Jubbaland.
63 Interview with former MoJ official. (November 2020). Mogadishu.
64 Interview with former chief justice of supreme court. Ibid.
65 Interview with Puntland attorney general. Ibid.
66 BBC Somali "Kufsigii Xamdi: Eedeysane Baxsad Ahaa oo Galmudug Lagu Qabtay". (2020). Accessed at: https://www.bbc.com/somali/live/war-54158712
67 See article 106 (1) & (2) of PCoS. (2012). Accessed at: http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf
68 See World Bank report "Somalia Security and Justice Public Expenditure Review". (2017). Accessed at: https://openknowledge.worldbank.org/handle/10986/26030?show=full. Page 48
69 Interviews with former Somalia chief justice, former Somalia attorney general and Jubbaland supreme court. Ibid
70 Ministry of Finance "Supplemental Budget Act for 2020". (2020). Accessed at: https://mof.gov.so/publication/supplemental- appropriation-act-2020-budget



Experts say judicial independence can be achieved only if the executive limits its power by creating—and implementing—frameworks that reinforce absolute autonomy. Adam S. Jama, a lawyer who spent over a decade helping Somalia improve its legal and justice systems, noted that "Judicial tenure, selection of judges, and control over salaries are key areas which can increase independence or, conversely, increase the influence of the executive vis-à-vis the judiciary."[71]

7.1 Inadequate compensation

"Compensation for federal judicial officials, including senior judges and prosecutors, is astonishingly low

Compensation for federal judicial officials, including senior judges and prosecutors, is astonishingly low—a point stressed by several officials interviewed for this report. A district judge is paid $900 a month while justices of the supreme court receive $2000 a month because of an archaic grading system used by the FGS.[72] By comparison, members of parliament and cabinet receive substantially higher salaries.[73] A former attorney general said that he had received $1,840 as a salary and allowance for years.[74] This is demonstrably insufficient for Mogadishu, where the cost of living has skyrocketed in recent years.[75] One of the most expensive aspects of holding a senior post for the FGS is the security detail. Most senior officials travel with at least half a dozen armed guards who expect to be paid by the person they are protecting.

If justice officials at the federal level are complaining about inadequate wages, their counterparts in the FMS are, at times, not paid for months. Judges and prosecutors in Jubbaland, south west and Galmudug have told us that they have not been paid for extended periods of time.[76] In Puntland, where a state salary is a lot more predictable, the challenge is a very low budget for the justice system. One official said that if something breaks in his office, like a chair or a desk, he will have to pay to repair it, because there's no budget for maintenance.[77] In Galmudug, the situation is even more dire.

71 Interview with Adam Jama of IDLO. Ibid.
72 See World Bank report "Somalia Security and Justice Public Expenditure Review". (2017). Accessed at: https://openknowledge.worldbank.org/handle/10986/26030?show=full. Page 49
73 A minister receive $5,000 plus allowances while MPs receive $3,800 including allowance
74 Interview with former attorney general, ibid
75 Burke, J., "Three Tales of Mogadishu: Violence, Booming Economy and Now a Famine". (2017). Accessed at: https://www.theguardian.com/cities/2017/may/15/mogadishu-violence-booming-economy-famine
76 Interviews with justice officials in Jubbaland, south west and Galmudug. Ibid.
77 Interview with a justice official in Puntland. Ibid.

The supreme court and the attorney general do not even have offices in the new capital of the state, Dhuusamarreeb. They often do their business in makeshift courts at police stations.

"The minister of justice of south west state, Mohamed Hussein Hassan, said, "It is very difficult to trust a judge who is struggling financially

Officials, including the federal justice minister, recognize that chronic financial problems can compromise the integrity of judges and prosecutors. The minister of justice of south west state, Mohamed Hussein Hassan, said, "It is very difficult to trust a judge who is struggling financially. By definition, that person should not be allowed to adjudicate on cases."[78] Yet he admitted that many unpaid judges in his own state are making potentially life-altering decisions. He said that they are trying to address this problem in cooperation with the FGS and some international organizations.

Despite the financial challenges, the judicial branch brings in substantial revenue for both the FGS and FMS. The former Somalia attorney general estimates that the courts in the capital alone can cover their own expenses if the revenue they bring is managed properly. He said that, in some civil cases such as land disputes, which are the most frequent cases, court fees are proportional to the value of the property in dispute.[79] This practice generates a substantial amount of revenue for the FGS.

7.2. Lack of protection

"On more than one occasion, armed people have stormed our courts and freed suspects in the middle of the hearing."80 He added that these transgressions sometimes go unpunished, because the perpetrators are very powerful people

Judicial officials across the country are exposed to incalculable risks, including to their own lives. The attorney general of Puntland said, "On more than one occasion, armed people have stormed our courts and freed suspects in the middle of the hearing."[80] He added that these transgressions sometimes go unpunished, because the perpetrators are very powerful people. And that is Puntland, which is by far the most stable state in the union.

Many officials interviewed for this report underlined that the chronic lack of protection for judicial officials is a strategy by political leaders to leverage that vulnerability for political gains. A former senior judge said that when he lobbied the prime minister for an increased budget for a special police unit dedicated to protecting judicial officials, he was told that his request crossed a red line.[81] However, a former justice minister, whose job it was to lobby for an increased budget for the judicial branch, said that shoe string budgets of the FGS made it almost impossible to allocate adequate amounts. He added that there was a general lack of appreciation for the important job of the judicial branch and poor understanding of how it works.[82]

7.3 Lack of enforcement

One of the most frustrating challenges confronting the justice system is the chronic lack of enforcement of decisions, both civil and criminal. Many federal and state officials have grudgingly noted that the problem is so normalized in society that ignoring a court order is worn as a budge of honor.[83]

78 Interview with Mohamed Hussein Hassan, south west minister of justice. (2020). Baidoa.
79 Interview with former Somalia attorney general. Ibid. 80 Interview with Puntland attorney general. Ibid.
81 Interview with former senior judge,
82 Interview with former Somalia justice minister. Ibid.
83 Interview with south west justice minister. Ibid.
84 Interviews with justice officials in Puntland, Jubbaland, south west, Galmudug and the FGS.
85 Interview with Galmudug chief justice, Abdullahi Mohamud Ga'al. (2020). Galkayo.

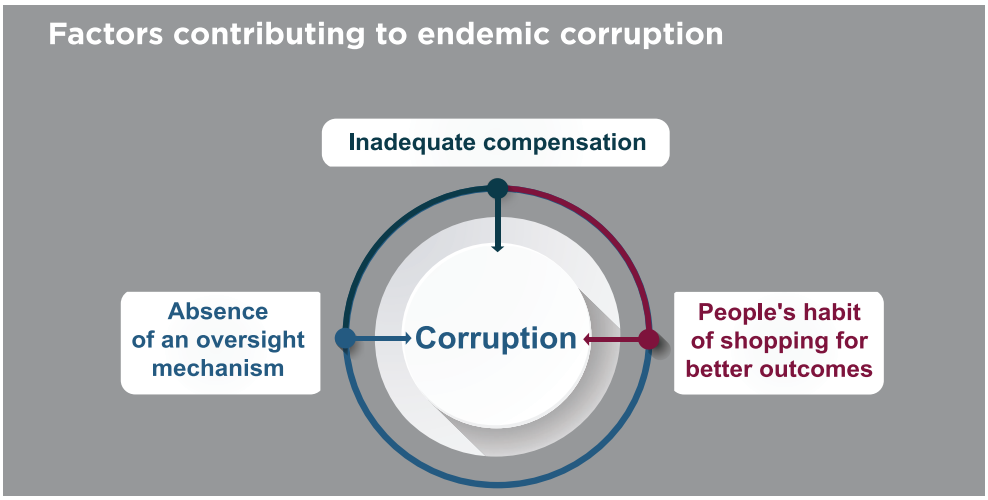
As the new chief justice of Galmudug supreme court aptly noted, "We are dealing with a society that has not known the rule of law for nearly 30 years.

There are several factors contributing to this: first, most jurisdictions do not have the policing capacity required to enforce the myriad of court orders that happen daily; second, many people who lose a court case shop for a better outcome, either through traditional Xeer courts or Shariah law courts; third, there's often very little consequence to ignoring court orders as there are few legal tools available to prosecute violators; and fourth, it is socially acceptable—if not celebrated—to ignore court decisions.[84] As the new chief justice of Galmudug supreme court aptly noted, "We are dealing with a society that has not known the rule of law for nearly 30 years."[85]

8. Corruption and Mismanagement

Somalia has been ranked at the bottom of Transparency International's Corruption Perceptions Index since 2006, which infuriates many Somalis

Somalia has been ranked at the bottom of Transparency International's Corruption Perceptions Index since 2006, which infuriates many Somalis."[86] A significant contributor to that stain is the graft that has become a normative practice in the justice system. The new federal justice minister conceded that endemic corruption is ruining the country's justice system and is breeding impunity.[87] Recent reforms by the newly installed young attorney general and chief justice have tamed overt corruption within the federal and Benadir courts, and have improved access to justice. However, almost all officials and experts interviewed as part of this research did not dispute that the judicial branch is suffering from endemic corruption coupled with systemic mismanagement. They have attributed that to several factors: first, as we noted above, the poor compensation of judicial officials incentivizes corruption and even outright theft. Second, many officials have noted that the plaintiff's habit of shopping for better results is perpetuating the problem, because many justice officials are playing along and sometimes deliberately forcing litigants to seek an appeal, where they would be forced to pay additional bribes to another set of officials. Third, the absence of an oversight mechanism, such as the JSC (or equivalent bodies at the FMS level) is making it easy for officials to steal systemically and sometimes out in the open.[88]



84 Interviews with justice officials in Puntland, Jubbaland, south west, Galmudug and the FGS.
85 Interview with Galmudug chief justice, Abdullahi Mohamud Ga'al. (2020). Galkayo.
86 Transparency International "Corruption Perception Index: Somalia". (2019). Accessed at: https://www.transparency.org/en/countries/somalia
87 Interview with federal justice minister, Abdulkadir Mohamed Nur. (2020). Mogadishu.
88 Interviews with former justice minister, current officials in several states. Ibid.

> *In that study, a former chief justice of the supreme court said that 50-70% of all judges on the federal bench were corrupt—an astonishing admission by the nation's highest judge*

The problem is most acutely felt in courts litigating civil cases, such as land disputes in Mogadishu. A 2017 seminal study by HIPS and the Rift Valley Institute on "Land Matters in Mogadishu" found that corruption was so rife in these courts that a term was created for it: "ku qabso, ku qadi meyside" (loosely translated as: lay your claim, for sure you won't be left empty handed).[89] In that study, a former chief justice of the supreme court said that 50-70% of all judges on the federal bench were corrupt—an astonishing admission by the nation's highest judge.[90]

Reform at the Office of Attorney General (OAG)

In November 2019, president Farmaajo appointed Suleiman Mohamed Mohamud to become the new federal attorney general on the suggestion of the chief justice.[91] Since taking over, Mohamud has introduced a raft of reforms aimed at expanding access to justice and fighting corruption. In an interview,[92] he said his office ensures that citizens are able to open new cases at no cost. Under a new strategic plan, his office is now tackling previously ignored crimes, such as human trafficking, for which he's now investigating members of parliament, money laundering and illegal fishing off the coast of Somalia. Crucially, his office has appointed a special prosecutor on gender-based violence (GBV) at a time when the country is facing 'rape epidemic'. He also appointed another special prosecutor on crimes against journalists. Somalia is considered to be one of the most dangerous countries to be a journalist in the world.[93]

Since taking over a year ago, the caseload at the OAG more than doubled, from 997 cases in 2019, to more than 2300 cases in 2020. Human trafficking tops the list with about 200 cases, followed by rape (about 100). Injuries resulting from rickshaw accidents in Mogadishu are also very high and corruption case notably increased to 40, including senior officials in the FGS.[94]

However, many challenges are hampering the reform efforts of the OAG. Chief among those is chronic understaffing. Currently, the office has only about 18% of the prosecutorial staff it requires to meet demands. Moreover, the office is lacking critical capacity such as forensic expertise, a dedicated lab and specialized experts on finance and other fields. Jurisdictionally, the OAG is limited to Mogadishu only.

8.1 Al- Shabaab courts

For years, it was a well-established fact that many people in Somalia who live in government or state-controlled territory seek justice by going to Shariah law courts run by the militant group al- Shabaab. This phenomenon became so brazenly common that the chief justice of Somalia, Bashe Yusuf Ahmed, warned citizens who lose cases not to seek justice in these courts. "Those seeking justice from al-Shabaab are the ones who lost their case in Mogadishu and had counterfeit documents. We will not accept this to continue anymore," he said.[95] The federal justice minister observed that "al-Shabaab is gaining momentum because even people who live in government controlled areas are seeking justice in their courts and believing their slogan that their courts are better than our courts."[96]

89 Rift Valley Institute and HIPS, "Land Matters in Mogadishu". (2017). Accessed at: https://riftvalley.net/publication/land- matters-mogadishu
90 Ibid,
91 See "Madaxweyne Farmaajo oo Xeer Ilaaliye Cusub Magacaabay". VOA Somali. (2019). Accessed at: https://www.voasomali.com/a/5179900.html
92 Interview with Somalia attorney general, Suleiman Mohamed Mohamud. (2020). Mogadishu
93 See, for example, the ranking of Reporters Without Borders. Accessed at: https://rsf.org/en/somalia
94 Interview with Somalia attorney general, ibid
95 Garowe Online "People Warned Against Seeking Justice in Al-Shabaab Courts". (2018). Accessed at: https://www.garoweonline.com/en/news/somalia/somalia-people-warned-against-seeking-justice-in-al-shabaab-courts
96 Interview with federal justice minister, Abdulkadir Mohamed Nur. (2020). Mogadishu.

Although cases differ in scope and complexity, the vast majority ending up in those al-Shabaab courts are civil, according to a Jubbaland official.[97] Most of are related to land and business disputes that are very complex given the paucity of reliable government documents. Notably, with the exception of people who live under permanent al-Shabaab control, most people never choose their courts as the first stop. Instead, they operate like an appeals court. Officials we interviewed also noted that the majority of the people litigating cases in those courts live in FGS or FMS-controlled territory, and do not necessarily believe in the justice system of al-Shabaab but have given up on the other courts available to them which are seen as corrupt and slow.[98]Al-Shabaab courts are comparatively fast and efficient. They enforce their decisions with intimidation and threats, even in the areas they do not control. Those who lose cases are ordered to abide by the outcome of a divine order, or just the full force of al-Shabaab.[99]

"Al-Shabaab courts are comparatively fast and efficient. They enforce their decisions with intimidation and threats, even in the areas they do not control. Those who lose cases are ordered to abide by the outcome of a divine order, or just the full force of al-Shabaab

In recent years, al-Shabaab have started to accept FGS and FMS documents as admissible evidence in their courts.[100]This is a stunning development "aimed at incentivizing more people to seek justice in al-Shabaab courts so that the group can maximize its revenue and present itself as an alternative to the corrupt and unreliable courts of the FGS and FMS."[101] By all accounts, this would upend the dynamics of the justice system in Somalia in ways no one had imagined before. Although we do not have a data to show that people are giving up on the FGS and FMS courts, we can extrapolate from the relatively small size of the caseloads at courts in big regions like Benadir and Puntland, that a considerable number of people are seeking justice from al-Shabaab.

9. Alternative Dispute Resolution

For centuries, Somalis used the traditional Xeer system as a dispute resolution mechanism. Since the formation of the modern state in 1960, Xeer was recognized as an alternative dispute resolution (ADR) mechanism. Xeer is inherently based on Shariah law jurisprudence but it is enhanced with social norms that do not contradict the basic tenets of Islam.[102] "ADR comprises of processes in which parties settle disputes with the help of third-party mediators or arbitrators, often out of court."[103] The system has evolved over the centuries and has gained particular prominence since 1991 as statutory courts collapsed with the breakout of the civil war. Xeer is not a written set of legal doctrines, but an informal system that is carefully calibrated to settle disputes among segmented clan communities.

"Xeer is inherently based on Shariah law jurisprudence but it is enhanced with social norms that do not contradict the basic tenets of Islam

The rise of traditional dispute resolution mechanism can be attributed to deepening public mistrust of the formal justice system. A review by the World Bank found that "The formal court system is perceived as expensive, inaccessible and prone to manipulation, with Somalis relying primarily on traditional or clan-based forums to resolve disputes."[104]

97 Interview with Jubbaland attorney general. Ibid.
98 Ibid.
99 Interview with south west justice official. (2020). Baidoa.
100 Interview with former judge at a Benadir court. (2020). Mogadishu.
101 Ibid.
102 Zuin, M. "A Model of Transitional Justice for Somalia". (2008). Tufts University. Accessed at: https://sites.tufts.edu/praxis/files/2020/05/5.-Zuin.pdf
103 PACT for USAID. "Alternative Dispute Resolution Initiatives in Somalia". (2020). Accessed at: https://www.usaid.gov/sites/default/files/documents/1860/ADRReport.pdf
104 See World Bank report "Somalia Security and Justice Public Expenditure Review". Ibid. Page 47

> *Many Somalis find the Xeer system easy to access, simple to navigate and, most importantly, expeditious in its judgments*

> *By some estimates, between 80-90% of all legal cases in Somalia are settled through the informal justice system,100 of which Xeer is the most prominent*

Customary structures have remained dominant over the past decades as statutory courts waxed and waned in different parts of the country. At the center of that structure is the Xeer system which was used in parallel with statutory courts and Shariah courts. Traditional elders of the clan often litigate cases through the Xeer system and oversee its enforcement. Many Somalis find the Xeer system easy to access, simple to navigate and, most importantly, expeditious in its judgments.[105] That does not mean it is always a successful way of settling disputes, in part because clan cultures evolve.

By some estimates, between 80-90% of all legal cases in Somalia are settled through the informal justice system,[106] of which Xeer is the most prominent. In Somaliland, for example, the Xeer system and Shariah courts "are almost equally engaged".[107] Experts say this is due to trust issues with the formal legal system. "Despite the enormous efforts to improve the formal justice system, the path to a fully functioning and efficient formal justice system is still long. The formal system is not yet trusted by the population, [is] costly and perceived as highly corrupted, as well as politicized," said Adam Jama of IDLO, whose organization is one of several working towards strengthening ADR in Somalia.[108]

That being the case, there are genuine questions about ADR's value in solving cases. One study found that ADR "is primarily a de-escalation mechanism" designed to bring about a win-win situation for the parties in dispute. Furthermore, this study found that ADR lacks concrete enforcement authority as clan elders are not entirely equipped to oversee implementation.[109] However, other experts dispute this assertion. Morgherita Zuin argues that "Xeer is more enforceable because social pressure compels compliance to judgments."[110] Adam Jama of IDLO says, "ADR builds on the relevance that negotiation and mediation already play at a cultural level in Somalia since they are ancestral mechanisms adopted by elders and sheiks to restore peace among clans and communities. Therefore, the mechanism is easily understandable and applicable at community level. Enforcement is also easier when decisions are endorsed or taken by traditional leaders through ADR."[111]

9.1. ADR centers

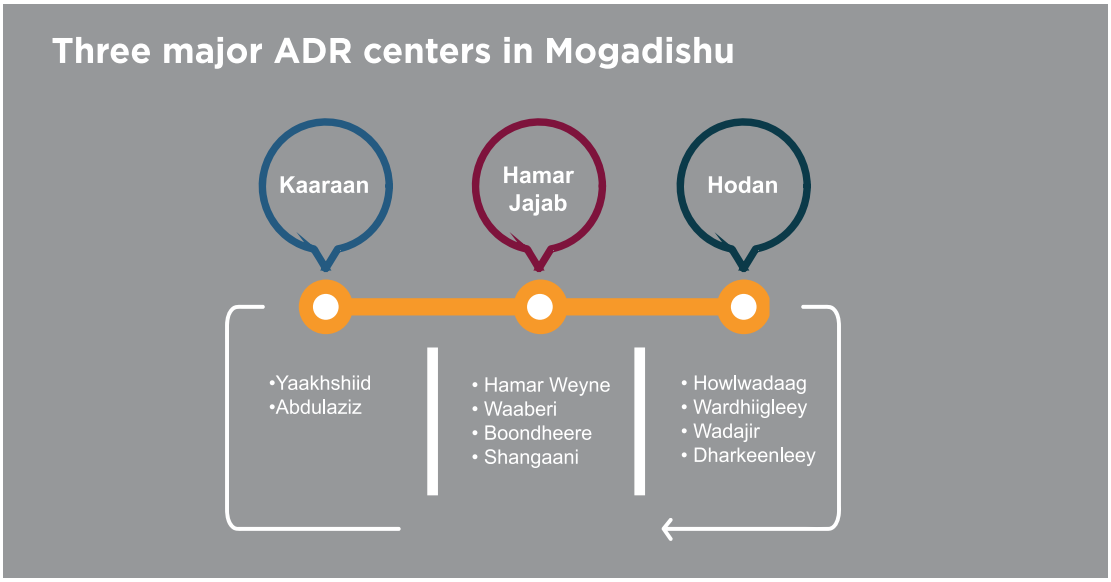
The first ADR center was established in Mogadishu in 2013 by the federal MoJ in collaboration with the UNDP. The initiative was expanded in 2014 when the ministry established the Transitional Dispute Resolution Unit (TDRU) with the help of IDLO. The MoJ went even further by drafting a seminal policy paper aimed at providing guidance on the "evolution of customary dispute settlement into mechanisms that operate in line with the [Provisional] Constitution and international human rights standards" and to deepen its linkages to statutory institutions."[112] The MoJ also opened three pilot ADR centers in three Mogadishu districts: Hamarweyn, Hamar Jajab and Wadjir.[113]

105 Zuin, M. "A Model of Transitional Justice for Somalia." Ibid.
106 Interview with Adam S. Jama of IDLO. Ibid.
107 PACT for USAID. "Shariah in Somalia". (2020). Accessed at: https://www.usaid.gov/sites/default/files/documents/1860/Shariah-in-Somalia.pdf
108 Interview with Adam Jama of IDLO. Ibid.
109 PACT for USAID. "Shariah in Somalia". Ibid.
110 Zuin, M. "A Model of Transitional Justice for Somalia". Ibid.
111 Interview with Adam Jama of IDLO. Ibid.
112 See MOJ policy paper on customary justice. (2014).
113 PACT for USAID. "Alternative Dispute Resolution Initiatives in Somalia. Ibid.

The MoJ policy brief was innovative in its intent to gradually modernize the traditional Xeer system by systemically removing barriers to access for women and marginalized groups. Moreover, it highlighted the need to harmonize the Xeer system with the provisional constitution and international human rights principles. All this was done in a participatory fashion led by the MoJ to minimize cultural sensitivity and negative community reaction.[114]

"Today, there are three major ADR centers in Mogadishu covering 15 out of the 17 districts109 of the capital

Today, there are three major ADR centers in Mogadishu covering 15 out of the 17 districts[115] of the capital. The center in Kaaraan covers Yaakhshiid and Abdulaziz districts. The one in Hamar Jajab covers Hamar Weyne, Waaberi, Boondheere and Shangaani. The one in Hodan covers Howlwadaag, Wardhiigleey, Wadajir and Dharkeenleey[116]. Run by the MoJ, each ADR center has a 10-member district peace committee (DPC), comprised of two women and civil society members. Each center has three employees who work for the MoJ to support the work of the ADR. Members of the ADR select among themselves a chair, a deputy and a secretariat to undertake the enormous task of solving disputes in the community.[117]



Beyond Mogadishu, other cities have their own ADR centers. There are currently five centers in Baidoa, run directly by the MoJ of south west state. The centers closely collaborate with the district commission of Baidoa which provides logistical support. In Jubbaland, Kismaayo has three ADR centers, also run by Jubbaland's MoJ. In both cases, local ADRs are very similar to the ones in Mogadishu in that they also have their own elders and peace committees that support their work by providing legitimacy and credibility. In Baidoa and Kismaayo, clan representation is strictly balanced to reflect the local communities and ensure inclusion. However, the ADRs in Mogadishu are far less rigid about clan representation and include almost all Somali clans.[118]

114 Ibid.
115 Dayniile and Kahda do not appear to be covered by ADR, though they have DPCs.
116 PACT for USAID. "Alternative Dispute Resolution Initiatives in Somalia. Ibid.
117 Ibid.
118 Ibid.

10. Conclusion

Somalia's broken justice system requires a systemic overhaul that takes into account the multiple impediments confronting the judicial branch of both the federal government and member states. As aptly noted by the federal justice minister, both the FGS and FMS need to prioritize the justice system by providing additional resources and building stronger capacity in order to strengthen the quest for good governance in the country.[119]Among other things, the many challenges facing the justice system include constitutional, legal, socio-political, structural and financial issues that are collectively making it difficult for the country's estimated 15 million people to get access to justice. Efforts by the new attorney general and chief justice are commendable, but fall short of the extraordinary challenges confronting the sector. Fixing those problems will surely be an extraordinarily an arduous process, but it is not an impossible undertaking. It will, however, require principled and determined leadership at the federal and state levels, to cooperate and comprise for the sake of the country.

11. Recommendations

With a political will, federal and state officials can—and should—overhaul the justice system in Somalia for the purpose of creating a competent, coherent and independent judicial branch by taking the following steps:

First, the Jowhar Agreement should be revived as it was a major attempt to seek a political consensus between the FGS and FMS on the justice modality that the country needs to adopt. The integrated court system that was proposed was a pragmatic and practicable step given the meager financial and human resources of the nation. We urge the leaders of the next FGS and FMS to revisit that agreement and jointly send their proposal to the ICRC, the constitutional review committee. In doing that, the leaders would settle one of the most vexing articles of the provisional constitution.

Second, assuming that the first step was taken, the incoming federal MoJ, in collaboration with state MoJs, should draft a law organizing the nation's courts system and transforming them into an integrated court system. This Federal Justice Act would be vital to streamline the nation's judicial branch at all levels. The next federal parliament should pass this legislation immediately. Soon after that, state legislatures should also pass similar legislation to harmonize the new court system.

Third, President Farmaajo should not sign into law the proposed members of the Judicial Services Commission who were hastily confirmed by the parliament on 17 November 2020 for the following reasons: (a) these members were initially endorsed by a caretaker cabinet that did not have legal authority to establish such a consequential body (b) the timing of the appointment raises serious questions about the motivation for such a hastily arranged process, a few months before national elections (c) and the contradictory nature of the constitution necessitates that the appointment of the JSC is approached diligently and in a way that engenders confidence to all stakeholders.

Fourth, working within the framework of Jowhar Agreement, the next FGS and FMS should come up with a clear process to select, vet, appoint and confirm new members of the JSC, as well as members of the constitutional court and Human Rights Commission. These three entities are joined at the hip by virtue of the constitution, and neither can be established separately. For that reason and given the centrality of the JSC and the constitutional court to the independence of the judicial branch, a well-thought-out political process is required to arrive at an amicable solution. Failure to do that would further weaken the country's justice system and any entity established unilaterally would lack credibility and legitimacy in the eyes of the Somali people.

Fifth, once a new JSC and constitutional court are established, the federal parliament should allocate all funding to judicial institutions to the JSC so that it can regain its independence from the executive branch. Moreover, the FGS should at a minimum increase the budget of the justice system to 10% of the national budget for the next five years, with proportional increases annually thereafter. The new JSC should revisit compensation schemes for judicial officials and ensure that they are adequately paid. However, the JSC should recruit and train additional justice staff and scrutinize the entire system and hold corrupt officials accountable. The impunity within the judicial branch is not only a stain on the nation, but a huge incentive for some citizens to seek justice in al-Shabaab courts.

Finally, there needs to be a strong federal enforcement mechanism so that court orders are no longer ignored. Robust federal police with strong enforcement capability, should be established. Legally, this could be done as part of the Federal Justice Act. Federal police would not only have enforcement capability, but would also provide protection to justice officials and be equipped with cutting-edge investigatory technology and prosecutorial capacity.

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