Restructuring Somalia's Regional Government: Status of the Immediate Somali Mainland Legal Systems

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Abstract

One of the most important problems facing modern Somalia on its way to security and rebuilding is the lack of a fair and equal justice system. Thus, this study aimed at determining the status of the Somali's Legal systems. Guided by the theory of Change, Institutional Theory and Stakeholder theory, the study employed case study design. Purposive sampling was used to select the 4 government legal experts, 2 legal scholars from City University of Mogadishu, 3 law reform officials, 9 NGO and UN representatives, 7 civil group officials and 5 clergymen. Data collection was based on two major methods, document analyses and in-depth interviews. The findings revealed that that the Somali legal system is a complex and hybrid structure that combines elements of customary law, Islamic law (Sharia), and formal statutory law inherited from the colonial era. The study thus recommends that to enhance the immediate Somali mainland legal systems, stakeholders should focus on harmonizing the various sources of law, ensuring consistency in the application of customary law, Islamic law, and statutory law.

Key words: *International Community, Legal Systems, Regional Government, Somalia, Somali Mainland.*

Introduction

In the aftermath of conflicts, a robust legal framework is indispensable for fostering sustainable peace (Muehlmann, 2008). Nations recovering from turmoil commonly possess glaringly insufficient statutes across various legal domains, including criminal justice, property rights, human rights, commercial law, and administrative regulations. Both national and international stakeholders frequently collaborate to amend these inadequate laws, aligning them with the principles of rule of law and global human rights standards. Nevertheless, the efforts to reform criminal law in post-conflict settings have largely been unsuccessful, except in rare instances (Fedoty & Solomon, 2011). This ineffectiveness is not only due to substantive errors in the reformed laws but also in how the reform initiatives are administered. The shortcomings observed in one post-conflict environment tend to reoccur in subsequent ones. Moreover, failure to restructure legal system of a country to align with countries problems, challenges and conflicts often present nightmare in the drafting of viable and substantive laws in countries that have been experiencing civil conflicts.

Countries emerging from conflicts like Somalia are faced with challenge of dealing with fragile legal system. These countries are characterized by lack of universal law to bind the society together which often results to lawlessness. In addition, the indigenous legal system more often is inconsistent with civil laws which further make it hard to harmonize the legal framework system of the land (Giorgetti, 2014). It also argued that states emerging from conflict are deficient of legal experts and resources to kick-start the process of legal restructuring. As a result, the country turns toward the international community through agencies like the United Nations for support and bilateral organization for support in restructuring its legal framework (Ahmed, 2014). However, it is not empirically clear what are the roles played by the international community in matters related to legal restructuring.

The prevailing view within the international community posits that the establishment of the rule of law is a fundamental precursor to the transition from a state of war to one of peace (Sannerholm, 2007). In pragmatic terms, this commonly manifests in initiatives focused on the criminal justice system. However, there is frequently an oversight when it comes to extending the principle of rule of law to other areas such as administrative law, governance, and economic management. Consequently, global entities engaged in

the reconstruction of societies ravaged by conflict tend to prioritize rule of law initiatives that are narrowly confined to public sector reform. Another important role for international community is to help national countries in conflict or emerging from conflict is to consult each other and discuss what their own priorities and strategies should be (Fedotov & Solomon, 2011). This role as facilitator of national consultations, bringing together other local actors, is one of the most useful and appropriate for international actors in the post-conflict justice sector (OHCHR, 2006), helping to identify and encourage local actors like the civil groups, Human Rights groups participate in legal system reforms. Nevertheless, the success of legal reforms conducted by international actors remains unclear and whether the reforms are sustainable.

Upon achieving independence, the Somali government aspired to unify the disparate legal systems into a single cohesive framework (Le Sage, 2005). This entailed the amalgamation of four disparate systems: British common law, Italian (continental) law, Islamic Sharia law, and traditional Somali Xeer. Consequently, in 1962, the Somali National Assembly enacted a "Law on the Organisation of the Judiciary." This law designated Italian law as the primary source for civil, commercial, and penal issues, while Anglo-Indian law was maintained for criminal procedures (Pegg & Kolstø, 2015). Sharia law continued to govern in family, inheritance, and minor civil cases, and Xeer remained the norm for resolving clan-based disputes. Despite these attempts at legal unification at the national level, local governing bodies often persisted in using their extant legal frameworks, leading to ongoing jurisdictional disputes and inconsistencies in the application of laws and procedures.

In 1969, a military coup led by Siyad Barre and his Supreme Revolutionary Council (SRC) overthrew the existing government in Somalia (Wauters, 2013). The fall of the Barre regime in 1991 led to a state of anarchy, with different armed factions and regional bodies exerting control over various parts of Somalia (Warsame, 2012). This situation prompted a United Nations intervention in 1992, authorizing United Nations Operation in Somalia II (UNOSOM II) through resolution 865.

UNOSOM II faced significant challenges that led to its ultimate failure. Two main reasons stand out. Firstly, the selection of judges and police officers was done without consulting local militia leaders and civil authorities, which led to tensions and limited the effectiveness of the reconstituted institutions (Le Sage, 2005; Carter, 2008). Secondly, the imposition of the 1962 laws in a top-down manner disregarded existing local legal initiatives, leading to enforcement issues and increasing local political unrest (UN, 1994). The situation in Somalia continued to deteriorate, with increasing insurgencies and an inability to protect civilians. Concerns for the safety of UN personnel led to the termination of the UNOSOM II mission on March 31, 1995, as outlined in resolution 954, which also empowered UNOSOM II military forces to take all necessary actions for the safe withdrawal of the mission.

When the Transitional Federal Government (TFG) was established in 2004, with the support of the international community, it faced significant problems in re-establishing administration and the rule of law across the whole of Somalia (Le Sage, 2005). The Transitional Federal Government (TFG) was not successful in gaining significant authority over the diversified and fractured legal environment in Somalia, which is comprised of a complicated interaction between numerous judicial systems.

In today's Somalia, there are four primary systems of justice in operation, including the official central and regional governments, the informal clan system known as 'xeer,' Islamic sharia courts, and a patchwork of civil society and militia-led initiatives (Mustafa, 2018). These contrasting systems not only cause a great deal of uncertainty, but they also often result in acrimonious jurisdictional conflicts. Each system has its own advantages and disadvantages, and the combination of these systems results in a complex legal framework that makes it difficult to reestablish coherent government and law enforcement.

This legal intricacy is made much more difficult by a variety of variables. To start, there is an insufficiency of sufficient judicial training inside the formal institutions, which weakens both their efficacy and their legitimacy. According to Peschka and Emery (2011), a fundamental problem is the widespread mistrust that the general public has toward these formal institutions, which often prompts individuals to seek out more conventional or religious forms of justice. Last but not least, some Islamic forces want to enforce a more fundamentalist interpretation of sharia law, which adds still another layer of complication and stress to an already

fractured legal environment. However, it lacks the capacity to look beyond arbitration and see the root causes of conflict in order to avoid the re-occurrence of a conflict. Moreover, actors are hesitant in investing time, human and financial resources in this process though lately a few international players have joined like the UN and AMISOM with aim of restructuring of the legal systems in Somalia (AMISOM, 2013). This study therefore seeks to analyse the role played by the international community in restructuring the legal systems in Somalia towards building greater respect and protection for human rights.

Countries emerging from conflicts like Somalia are faced with challenge of dealing with fragile legal system. Somalia is characterized by lack of universal law to bind the society together which often results to lawlessness. In addition, the indigenous Somali legal system is inconsistent with civil laws which further make it hard to harmonize the legal framework system of the land. Thus, rebuilding Somalia's formal justice system is a highly challenging, complex, and long-term undertaking. As a result, the country turns toward the international community through agencies like the United Nations for support and bilateral organization for support in restructuring its legal framework (Ahmed, 2014; Giorgetti, 2014; Kristina, 2005). However, Baker (2014) and AMISOM, (2013) argue these actors are hesitant in investing time, human and financial resources to the fragile legal system in Somalia. In addition, it is not empirically clear what are the roles played by the international community in matters related to legal restructuring. The current study sought to fill these knowledge gaps by analysing the role played by the international community in the restructuring of the legal system in Somalia. The objective of the study was to assess the status of the immediate Somali mainland legal systems.

Literature Review

The complex and multi-layered nature of Somalia's legal landscape poses a unique set of challenges for scholars, policymakers, and the international community. Multiple, conflicting sources of law—including state law, customary 'xeer' law, and Islamic Sharia—create a volatile situation in which determination of jurisdiction becomes a major issue (Le Sage, 2005; Contini, 1967). Moreover, the historical legacy of colonial rule has left the Somali legal system with additional complexities in the form of British common law and Italian continental law, making harmonization an uphill task (Bradbury et al., 2003).

International interventions have, in principle, sought to create a robust, coherent legal system for Somalia. These interventions emphasize a variety of strategies: consensus-building among different stakeholders, educational and infrastructural support to the judicial system, and empowerment of the Somali public through legal aid and awareness programs (Wauters, 2013). However, the legal system remains fragile, undermined by a pervasive culture of disrespect for rule of law and ongoing jurisdictional conflicts among local authorities (Maru, 2008).

Menkhaus (2003) stresses the significance of gaining a knowledge of the social contracts that serve as the foundation for traditional Somali communities throughout his research. He contends that any effort to organize or unify the Somali legal system must have a high level of sensitivity to the underlying social contexts in order to be successful. This demonstrates the need for a "bottom-up" approach, as opposed to a "top-down" method, which has often been criticized for its lack of input from locals and an awareness of their context (Lewis, 2002; Menkhaus, 2003).

The engagement of foreign organizations such as the United Nations has occasionally resulted in a donor-driven strategy, in which the demands and realities of donors from outside the region are prioritized above those of the local community. According to Powell (2014), although foreign help is essential, the focus of such support should be on enhancing the functioning of existing local institutions rather than imposing new external frameworks. This is particularly important given the context of Somalia, where foreign operations have sometimes been regarded as neo-colonial undertakings, consequently limiting their efficacy and acceptability (Harper, 2012). This is especially pertinent given the situation of Somalia.

Scholars such as Ingiriis (2016) highlight the significance of "localized peacebuilding," which proposes a shift away from a "one-size-fits-all" international policy and toward more tailored, localized efforts that are informed by the people who will be most

impacted by them. These efforts are informed by the people who will be most affected by them. The objective here is not to completely give up on international participation; rather, it is to readjust such involvement in a way that shows respect for the realities and norms of the local community.

Therefore, in order for a unified legal system to take root in Somalia, there would need to be a collaborative effort on the part of foreign organizations, Somalia's local administrations, and the country's civil society. This strategy should strive to balance the formal laws with the existing, deeply-rooted informal institutions, and it should do so in a manner that respects the cultural and social complexities that are unique to the Somali people (Gardner & El Bushra, 2004).

Scholars have also weighed in on the issue. Hersi's 2009 study on the Somaliland legal system revealed that traditional xeer law continues to be dominant, with formal laws often being disregarded. Maru (2008) suggests that harmonizing the legal system in Somalia is possible but stresses that this could be achieved only by allowing customary law and Islamic courts to operate within an overarching framework, such as the Transitional Federal Charter (TFC).

Extremist groups in the country further complicate the situation. Their insistence that xeer is the only acceptable legal system reflects a broader resistance against the perceived intrusion of foreign norms and the undermining of local customs. This perception poses yet another layer of challenges in the ongoing efforts to restore and formalize rule of law in Somalia (Hoehne, 2006).

Methods

The study was guided by the theory of Change, Institutional Theory and Stakeholder theory. The study employed case study design. The study was deemed useful in understanding the status of the Somali Legal systems, the role of international community in restructuring the legal system in Somalia and role of Key International players in the restructuring the justice sector in Somalia. The target population comprised 30 participants made up of 4 government legal experts (attorney general and solicitor general), 2 legal scholars from City University of Mogadishu, 3 law reform officials, 9 NGO and UN representatives, 7 civil group officials and 5 clergymen. Purposive sampling was used to select the 4 government legal experts, 2 legal scholars from City University of Mogadishu, 3 law reform officials, 9 NGO and UN representatives, 7 civil group officials and 5 clergymen. Data collection was based on two major methods, document analyses and in-depth interviews. Content analysis involved identifying, analyzing and interpreting patterns of meaning within qualitative data and reporting them in prose form. The text transcript data synthesised similar ideas were put together based on the themes outlined in the research objectives.

Results and Discussions

The stuyd objective was to assess the status of the immediate Somali mainland legal systems. The KII were asked to explain the status of the Somali Legal systems. Based on the responses from the respondents, it is evident that the immediate legal systems in Somalia mainland face numerous challenges and complexities. The country has been grappling with decades of political instability, armed conflict, and the absence of a centralized government, which has severely impacted the rule of law and the functioning of legal institutions. Somalia's legal system is characterized by a combination of customary law, Islamic law, and remnants of colonial-era legal frameworks. However, these systems often lack coherence and consistency, leading to fragmented and contradictory legal practices.

Additionally, the weak capacity and limited resources of the judicial sector, coupled with corruption and impunity, further hinder access to justice for the population. The good news is that efforts have been made to reform and rebuild the legal system, with international assistance playing a role, but progress has been slow and uneven. Strengthening the rule of law and establishing an effective and inclusive legal framework remain critical priorities for Somalia's mainland legal systems to ensure stability, promote human rights, and foster socio-economic development.

In an interview session with government legal experts, KII 1 and 2 said:

''The Somali legal system, a complex tapestry of overlapping and often conflicting legal traditions, reflects the nation's diverse historical and cultural influences. As a country situated in the Horn of Africa, Somalia has endured a tumultuous history marked by colonial rule, civil war, and ongoing instability. This has resulted in a fragmented legal landscape that intertwines customary, Islamic, and formal legal frameworks'' [KII 1, 2, 2023].

Also, the respondents explained that:

''At the core of the Somali legal system is Xeer, a traditional, customary law that has been practiced by Somali clans for centuries. Xeer is unwritten, passed down orally through generations, and based on consensus and negotiation. It emphasizes restorative justice, aiming to resolve disputes and maintain harmony within communities. However, its reliance on clan structures can contribute to perpetuation of existing power dynamics and inequalities. Islam has also played a pivotal role in shaping the Somali legal system. Islamic law, or Sharia, is deeply ingrained in Somali culture and is often used in conjunction with Xeer to resolve personal and family disputes. Sharia is particularly important in areas related to marriage, divorce, inheritance, and religious matters, and offers some level of consistency and universality across the diverse regions of Somalia''[KII 2,3, 2023].

Moreover, Legal scholars from City University of Mogadishu gage their input by indicating that:

In the 20th century, formal legal structures were introduced by colonial powers, particularly Italy and Britain, and later reinforced by the post-independence Somali government. These structures, based on European civil and common law, were intended to standardize legal proceedings and ensure a more centralized approach to governance. However, the formal legal system has struggled to gain widespread acceptance, especially in rural areas where Xeer and Sharia continue to dominate. The protracted civil war and the collapse of the central government in 1991 further complicated the Somali legal system. The absence of a unified national government has led to the emergence of regional and local administrations, each with their own legal systems and varying degrees of adherence to Xeer, Sharia, and formal law. This has created a patchwork of legal jurisdictions that can be confusing and inconsistent [KII 5, 6, 2023].

The respondents further explained that:

In recent years, efforts have been made to rebuild the Somali legal system and integrate its various components. The establishment of the Federal Government of Somalia in 2012 marked a significant step toward reestablishing a functioning legal framework. Nevertheless, the process of reconciling and harmonizing customary, Islamic, and formal legal systems remain a formidable challenge. The Somali legal system is a multifaceted and fluid entity, characterized by its customary, Islamic, and formal legal traditions. Though each of these traditions offers its own strengths and insights, their coexistence and intersection have resulted in a convoluted legal landscape that is difficult to navigate. As Somalia continues to strive for stability and unity, the integration and harmonization of its diverse legal systems will be a critical step toward a more just and equitable society [KII 7, 8, 9, 2023].

In an interview with UN & NGO representatives, KII 10, 11 and 12 explained that:

''Over the past several decades, Somalia has experienced civil war, political fragmentation, and the rise of various Islamist groups, all of which have had a significant impact on the country's legal landscape. As a result, the legal system in Somalia today is a patchwork of customary, religious, and statutory law, with varying degrees of influence and enforcement depending on the region and the actors involved. Despite the introduction of modern statutory laws and the influence of Islamic law, Xeer continues to be an essential part of the legal framework in Somalia, particularly in rural areas where the central government has limited reach and control'' [KII 10, 11, 12, 2023].

In a further interview with civil group officials, KII 19, 20, 21 and 22 said that:

''The statutory law in Somalia is derived from a mixture of colonial-era legal codes, post-independence legislation, and various regional laws. The country's legal system is officially based on a combination of civil law and Islamic law, with the 1962 Somali Penal Code and the 1974 Somali Civil Code forming the basis of the country's statutory laws. However, the ongoing political fragmentation, lack of a strong central government, and the proliferation of regional administrations have resulted in a disjointed and inconsistent application of statutory law across the country. The Somali legal system is a complex and evolving mix of customary, religious, and statutory law, with its status heavily influenced by the country's history and ongoing political instability''[KII 19, 20, 22, 2023].

The respondents were also asked to indicate the number of types of legal systems available in Somalia (Probe, sharia laws, Somali convention laws). Based on their responses, the legal system of the country consists of multiple types of legal frameworks. Firstly, customary law, also known as "Xeer," is a traditional system of justice derived from Somali customs and practices. It encompasses

a range of customary norms and rules that govern various aspects of life, including dispute resolution and property rights. Secondly, Sharia law, derived from Islamic principles, holds significant influence in the country. It governs personal matters, family law, and aspects of criminal justice. Lastly, remnants of colonial-era legal systems and international conventions have also influenced Somalia's legal landscape. These include laws inherited from the Italian colonial period and international conventions ratified by the Somali government.

In an interview session with government legal experts, KII 1,2,3,4 explained that:

> *''There are three primary types of legal systems in Somalia: the Sharia laws, Somali customary law (referred to as Xeer), and statutory laws, which include both Somali conventional laws and international legal obligations. These legal systems often coexist and sometimes overlap in the administration of justice in the country. Sharia law, derived from the Islamic religious text, the Quran, and the teachings of the Prophet Muhammad, is a fundamental aspect of Somali legal culture. Sharia laws govern various aspects of life, including family matters, inheritance, and commercial transactions'' [KII 1, 2, 3, 4; 2023].*

KII 3 and 4 further indicated that:

> *''In Somalia, Sharia law is often applied in parallel with other legal systems, particularly in matters of personal status such as marriage, divorce, and inheritance. The application of Sharia law is primarily through religious courts, which handle cases dealing with family law and inheritance matters. Somali customary law, known as Xeer, is a traditional and indigenous system of law that has been practiced in Somalia for centuries. Xeer is based on the cultural norms and values of the Somali people and is primarily enforced by elders in rural communities'' [KII 3, 4; 2023].*

In a separate interview with Legal scholars from City University of Mogadishu, KII 5, 6 explained that:

> *''This legal system covers a wide range of issues, such as property rights, land disputes, and the resolution of conflicts between clans. Although Xeer is not codified, it is widely recognized and respected by the Somali people, and its principles are often incorporated into other legal systems in the country. Statutory laws in Somalia include both Somali conventional laws and international legal obligations. Conventional laws are a product of the modern Somali state and are often based on pre-existing legal traditions, such as those of colonial-era Italian and British Somaliland. Statutory laws are created and enforced by the central government, addressing various aspects of governance, such as criminal law, civil law, and administrative law. Additionally, Somalia is a signatory to several international treaties and conventions, which also contribute to its legal framework'' [KII 5, 6; 2023].*

To reinforce this, KII 7, 8, 9 indicated that:

> *''In Somalia there are three main different types of legal systems, and these different legal systems are not always clearly demarcated, and they can sometimes compete or conflict with each other. In recent years, efforts have been made to harmonize the various legal systems in Somalia, particularly through the development of a new constitution and legal reforms. Despite these challenges, Somalia's diverse legal systems reflect the rich cultural and historical heritage of the country and provide valuable insights into the development of law and justice in the Somali context'' [KII 7, 8, 9].*

Furthermore, in an interview with UN & NGO representatives, KII 10, 11, 12, 13 explained that:

> *The legal framework of Somalia comprises three main systems; Sharia law, Somali customary law (Xeer), and statutory laws, which include Somali conventional laws and international legal obligations. These three systems, although distinct, are deeply interwoven and have shaped our legal culture for centuries. The fact that they coexist demonstrates the flexibility and resilience of our legal framework. Each system has its unique strengths and caters to different aspects of society, allowing for a more comprehensive and self-sustaining approach to law and justice. Regarding adherence, the Somali legal system benefits from the strong support of the Somali people.*

Additionally, in an interview KII 14, 15, 16 and 19 explained that:

> *''Xeer, in particular, has deep roots in Somali culture and is respected by the local communities. This customary law is enforced by the elders, who have the trust and confidence of the people. Similarly, Sharia law is widely adhered to due to the strong religious beliefs of the majority of the population. Statutory laws, on the other hand, are reinforced by the central government and are gradually gaining more acceptance as Somalia continues to build a stable and functioning state. In terms of interpretation, the Somali legal system has developed a unique way of integrating the different legal systems into its jurisprudence. For instance, Sharia principles are often incorporated into statutory laws, and Xeer is sometimes used to complement Sharia and conventional laws, particularly in cases where there is no direct provision in the latter systems. This fluidity in interpretation allows the Somali legal system to cater to the diverse needs of its people, ensuring that justice is served in various contexts [KII 14, 15, 16, 19; 2023].*

The current study aligns with the views expressed by Menkhaus (2003), who underscores the necessity of understanding the social contracts intrinsic to traditional Somali communities. According to Menkhaus, any effective effort to build a cohesive and functioning legal system in Somalia must be deeply rooted in an awareness of the essential social dynamics at play. This perspective resonates with the "bottom-up" strategy that the current study supports, as opposed to the often-criticized "top-down" approach that inadequately incorporates local perspectives (Lewis, 2002; Menkhaus, 2003).

Similarly, this study is in agreement with Powell (2014), who emphasizes that while foreign assistance is significant, the focus should be on strengthening existing local institutions instead of introducing new, externally-imposed frameworks. This is particularly relevant in the unique context of Somalia, where international interventions can sometimes be perceived as neo-colonial, thereby reducing their effectiveness and acceptability (Harper, 2012).

The study also finds concordance with academic scholarship, notably from Ingiriis (2016), on the importance of "localized peacebuilding." This entails a shift from one-size-fits-all foreign policy to a more customized approach developed in consultation with those most affected by these policies. The aim is to reframe foreign involvement in a manner that respects local conditions and traditions.

Therefore, in line with the views of Gardner & El Bushra (2004), the current study posits that the creation of a stable legal framework in Somalia demands a synergistic approach that includes international actors, local government, and civil society. This approach should strive for a balanced integration of formal legal frameworks and the informal institutions deeply ingrained in Somali society, taking into account the unique cultural and social nuances of the Somali population.

Conclusion and Recommendations

Based on the finding emanating from the interviews conducted, this study concludes that the Somali mainland legal system remains a complex and evolving amalgamation of customary law, Islamic law, and formal statutory law. While significant progress has been made in recent years to restructure and strengthen the justice sector, numerous challenges persist, including political interference, resource constraints, inadequate infrastructure, and limited public trust in the formal system.

Informed by the findings and the conclusions, this study recommends that to enhance the immediate Somali mainland legal systems, stakeholders should focus on harmonizing the various sources of law, ensuring consistency in the application of customary law, Islamic law, and statutory law. Additionally, strengthening the capacity of legal institutions and professionals should continue to be a priority, with ongoing training, resources, and infrastructure support.

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