



THE JUDICIAL SYSTEM IN SOMALILAND

Workshop Report
April 2002

Introduction

A critical measure of the transitional administration of war torn country is its success in providing security and the rule of law to its people. These can only be realized when there are functioning institutions to uphold them. Somalia's legal, judicial and law enforcement institutions collapsed during the civil war. State responsibility for guaranteeing personal safety, protection of private property, and freedom of movement was lost. Social norms were violated and a state of lawlessness prevailed.

Rebuilding government institutions and restoring law and order has been a daunting task in Somaliland. Since 1993 there has been steady progress in re-establishing the foundations of the judicial system: legal codes, courts, jails and law enforcement agencies. Yet the re-establishment of the rule of law continues to face many challenges. These include:

- ❑ The existence of diverse, contradictory legal traditions;
- ❑ Untrained and under-qualified personnel;
- ❑ Insufficient offices and courts;
- ❑ Lack of necessary equipment and resources;
- ❑ Low public confidence;
- ❑ Absence of legal reform or development; and
- ❑ Limitations on the independence of the judiciary.

Realizing the importance of the judiciary in post-conflict reconstruction, the Swiss Embassy in Nairobi engaged the Academy for Peace Development (APD) in Hargeisa to examine the status of the judicial system in Somaliland. APD began the job by forming a Working Group comprising two practicing lawyers, a senior judge and two APD researchers. After lengthy discussions, the Working Group

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prepared a discussion paper that raised critical issues pertaining to following five topics on the status of Somaliland's judiciary:

1. Overview of the judicial system
2. Problems and constraints
3. Legal reform and development
4. Structure of the judicial system
5. Independence of the judiciary

When the discussion paper was finalized, a workshop involving key actors in the legal system in Somaliland was organized. The workshop was held in Hargeysa on 7-9th April 2002. The workshop participants included officials from the Ministry of Justice, judges, lawyers, lawmakers, human right groups activists, media people, women groups, international actors, and local NGOs.¹

The three-day workshop was fully audio-taped and partially video-taped. This report is based on the deliberations of the working group and of the workshop participants.

Rule of Law, or Rule of Laws?

Somaliland's current judicial system is a hybrid, combining several distinct legal traditions. While the Constitution stipulates Islamic jurisprudence as the "basis" of law, other laws – namely, customary (*xeer*) and secular legal codes - have been applied across the country. The practice of parallel legal systems reflects, in part, the historical evolution of legal and judicial systems in Somaliland.

In pre-colonial Somaliland, customary law (*xeer*) was used alongside Islamic *Shari'a* (of the *Shafi'i* school). Clan elders and experts in *Shari'a* law (the *qaadis* and *sheikhs*) applied the laws in an informal manner. In some matters, such as marriage, divorce and inheritance rights, *Shari'a* is more progressive than *xeer*, but was usually disregarded in favour of *xeer*.

The British colonial administration introduced an additional body of codified law and a judicial system based on British Common and Statute Law and the Indian Penal Code. In addition, the British established *Akil's* courts and, subsequently, *Qaadi's* courts to apply customary law, while *Shari'a* law continued to be applied in domestic matters.

¹ Workshop participants reported that this was the first consultation of this kind to take place in Somaliland. A list of participants is attached as Annex A.

At independence in 1960, when British Somaliland and Italian Somalia were united to form the Somali Republic, four distinct legal traditions – British Common Law, Italian (Continental) law, Islamic *Shari'a*, and Somali customary law – were in simultaneous operation. These four legal systems were partially integrated by the passage of a “Law on the Organization of the Judiciary” by the National Assembly of Somalia in 1962. According to this legislation, the civil and penal codes and commercial law were to be based on Italian law, whereas the criminal procedure code was to be based on Anglo-Indian law.

In Somaliland, however, the lower courts continued to practice British law until 1977 because judges were most conversant with this system. At the same time, Islamic *Shari'a* continued to apply in family and civil matters, while customary law (sanctioned by civil courts) was retained for optional application in such matters as land tenure, water and grazing rights, and the payment of *diya*. In parts of the country, particularly rural areas, where state law did not reach, customary law was predominant.

The military regime that seized power in 1969 suspended the Constitution of 1961, assigning all legislative, executive, and judicial powers to the Supreme Revolutionary Council. In 1973, the regime introduced a unified civil code. Its provisions pertaining to inheritance, personal contracts and water grazing rights sharply curtailed both the *Shari'a* and Somali customary law. In particular, the new civil code altered the customary system of *diya* payment as compensation for death or injury, in which responsibility was collectively borne by the clan. Any homicide offence was made punishable by death and compensation payable only to close relatives. The Socialist regime's determination to limit the role of *Shari'a* in domestic matters was further reflected in the Family Act of 1975, which gave equal inheritance rights to women.

The military government did not change the basic structure of the court system, but it limited the powers of the courts. At the outset the Supreme Court and the Constitutional Court were abolished and the authorities of the Court of Appeals and District Courts were reduced. Although the Supreme Court was later restored, the regime introduced a major new institution, the National Security Courts (NSCs), which operated outside the ordinary legal system and under the direct control of the executive. These courts, which were situated in the national and regional capitals, had jurisdiction over offences that were deemed by the regime to threaten state security.

After the collapse of central government in 1991, different regions of Somalia reverted to different legal traditions. In Somaliland, the judiciary - like other institutions - had to be started from scratch. Popular sentiment favoured the

implementation of the *Shari'a* as a mean for re-establishing order and justice, but that hope proved unrealistic as most the available jurists were returnees from the South and educated in an Italian medium. Inevitably, they became the foundation of Somaliland's judicial system. Their initial endeavours were shattered by an outbreak of fighting in Bur'o and Berbera in 1992.

The 1993 "Grand National Reconciliation Conference", which took place in Boroma in the aftermath of the fighting, was an important benchmark in the process of re-establishing governance in Somaliland. The Boroma charter specified among other things the formation of a police force and an independent judiciary, based on pre-1969 laws. In practice, however, judges continued to apply the civil code and procedure enacted in the mid-seventies.

The 1993 Charter was subsequently replaced by a provisional Constitution, which was adopted in 1997 and ratified by public referendum in May 2001. Article 5.2 of the constitution stipulates that the laws of the nation shall be grounded in Islamic *Shari'a*, and shall not be valid if they contradict Islamic *Shari'a*. [Article 103.5] further states pre-1991 laws which that do not conflict with the Islamic *Shari'a*, or with individual rights and fundamental freedoms guaranteed by the constitution, shall remain in force until the promulgation of new laws. At the same time, legislation shall be prepared in conformity with the Constitution, and presented with the least possible delay to the Parliament. In reality, however, the application of diverse legal codes continues, and interpretation of the laws remains *ad hoc*, non-uniform, and highly subjective.

Current Situation

Contrasting views emerged from the workshop's debate on the application of parallel legal systems. Some participants denied that the systems in force are contradictory. According to this view, judges respect a hierarchy of legal systems, referring first to Islamic *Shari'a*, then to positive law, and finally to customary law.

Other participants asserted that the realities on the ground do not allow the full application of the *Shari'a* law. They argued that despite the precedence assigned to Islamic jurisprudence and despite the revival of Islam throughout the country, few of the judges in the system who administer the courts have expertise in *Shari'a* law. Furthermore, they asserted that although the universally Muslim public believes in the *Shari'a*, people are generally fearful of how it may be applied (or misapplied). The result is that *Shari'a* law is rarely observed. In the words of one participant:

“The stipulation of Islamic jurisprudence as the ‘basis’ of law is just lip-service and nobody applies it; its verbal affirmation only appeases the religious groups and the populace at large.”

This participant underscored what most participants had acknowledged: chiefly because the positive laws have legal codes, the majority of judges in the system administer these laws in their daily duties. The primacy of positive law in practice is reinforced by the existence of a complementary law enforcement and penal system. Thus the courts, police, and legal professionals (defence lawyers and public prosecutors) all rely on the positive laws. In contrast, judges are unfamiliar with the interpretation and application of the *Shari’a* legal code. Customary law has not been codified, and its application is even more ad hoc and inconsistent than that of the *Shari’a*.

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Some participants asserted that, in practice, customary law is pervasive, undermining the application of other legal codes. For instance, someone guilty of homicide may be brought before court for trial under positive law, but if settlement is reached outside the court in accordance with *xeer* (traditional social contracts), he or she may be set free without punishment.² This is particularly so where law enforcement and the courts are weak or non-existent, where warrants cannot be enforced, and relatives apprehend the offender. When the relatives settle an offence according to customary laws outside the judiciary system, judges and law enforcement officers cannot prevent the release of the offender brought to them by the relatives who now insist on his release. Women can be particularly vulnerable to the substitution of customary law for positive or *Shari’a* law. Elders routinely exert pressure on women to settle out of court through traditional channels and thus forfeit their legal rights.³

The pervasive influence of customary law in the judiciary system is encouraged by the lack of strong central government authority. Judges feel compelled to tolerate it, since to do otherwise may lead to confrontation or conflict and undermine public safety. In some cases, courts may simply sanction decisions reached by clans on the basis of *xeer*. As one district judge explained:

² Workshop participants repeatedly but inconclusively debated whether or not this practice encourages recidivism. There is no evidence to either substantiate or contradict claims that it does so, but judges in the workshop generally testified to a high incidence of recidivism among offenders punished according to *xeer*.

³ Though the issue was not raised in the workshop, it is noteworthy that there are no female judges in the system.

“The highest compensation for an injury the district court offers is 200,000 SI.Sh. If the social contract between the two clans offers more than that, they settle outside and I have to ratify their solution.”

The relationship between positive, *shari'a* and customary laws is complex: they can be contradictory, complementary, or even interchangeable. For example, according to some workshop participants, positive law should apply to civil and criminal matters, the *Shari'a* to family matters and customary law to clan matters. Were this is the case, they argue, contradictions could be minimized.

Other participants, however, contended that contradictions are inevitable, particularly with respect to criminal law. For example, in case of homicide:

- Article 418 of the Penal Code offers one option: the death penalty
- The *Shari'a* offers two options: either the death penalty or payment of compensation (*diya*) by the killer to deceased's family. The choice belongs to the close relatives of the deceased.
- Customary law offers various options, depending on the specific *xeer* (social contract) between the clans concerned and historical precedent. In general, the crime is treated as communal responsibility rather than individual responsibility, and the deceased's clan is allowed to choose between the death penalty or compensation (*diya*). Historically, compensation has been the preferred method of settling accounts, although the amount may vary between clans. However, in the post-war period, many clans feel unable to shoulder the burden of *diya* payment and there has been an increase in application of the death penalty.

Also, positive legal codes and the *Shari'a* differ significantly in their approach to these felonies. For example, under the penal code intoxication, robbery, and adultery are all punishable by fines or jail terms; the *Shari'a*, however, prescribes public flogging for intoxication, amputation for robbery, and either public flogging or death by stoning for adultery. With respect to civil code, workshop participants identified no major differences between positive law and the *Shari'a*, although this topic merits further investigation.

Judges differ in their application of the law according to their backgrounds, specialties, philosophy, and pragmatism. Since there are no written guidelines, judges often base their verdicts on individual assumptions and beliefs. As one judge admitted:

“I have used many penal codes that contradict the *Shari'a* and I know it is unlawful, but people accept that.”

Workshop participants identified the following two major problems associated with the application and interpretation of the various legal systems:

- The co-existence of parallel legal systems is equivalent to lawlessness (*sharci darro*), since no uniform standard of law applies. An individual cannot be sure of which law will apply in a given situation, or (in certain situations) even whether he or she has broken a law. The interpretation and application of the law thus becomes a purely haphazard affair.
- Second, it is possible that different laws may be applied to a given situation. In other words, the public persecutor might base his case on one system, the defence on another, while the judge administers the proceeding and reaches a decision according to a third.

At the end of the debate on this issue, there was consensus among participants that the Constitution does not provide sufficient guidance on this issue to render coherent the application and the interpretations of these diverse legal systems, and that there is a need to bring more coherence to the judicial system.

Structure of the judicial system

In Somaliland, the courts are divided into a three tier-system: the Supreme Court, Courts of Appeal, Regional and District Courts. The district courts deal with claims up to SI.Sh. 3 million and offences punishable by sentences of less than three years. The regional courts deal with claims that are more than SI.Sh. 3 million and jail terms in excess of three years. Six district courts and six regional courts are functioning, namely those at Hargeysa, Gabiley, Boorame, Burco, Ceerigaabo, and Berbera. There are also five appeal courts, located Hargeysa, Boorame, Burco, Ceerigaabo, and Berbera. Most of these courts have only one judge.

Most participants agreed that the structure of the court system was adequate, but that it suffers from a lack of qualified judges and is inefficient. The few qualified judges in the system tend to be concentrated in Hargeysa and other major towns. Outside the urban centres, the judiciary is weak or entirely absent, leaving disputes to be addressed by local elders or religious leaders. Even in Hargeysa, the municipal government manages land disputes and a private *Shari'a* court handles many domestic disputes. The latter has no constitutional mandate to administer justice and lack enforcement mechanisms.

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The problems caused by the scarcity of qualified judges are aggravated by the appointment of less experienced judges to higher courts while more experienced judges tend to remain in lower courts. In the absence of an evaluation process, judges are often promoted or demoted according to the number of cases they win or lose on appeal.⁴

Firing a judge is very difficult, even if he is known to be corrupt or incompetent, because of interference from his clan. According to one participant in the workshop:

“He (the judge) is protected by his clan and believes he is there to serve them; others in his clan think they own his seat as though they have struggled and paid a price for it.”

In order to address some of the shortcomings of the system, some participants suggested that a bench of three judges, instead of only one, should preside in regional courts and appeal courts. However, at least in the near term, this would stretch the few qualified judges even more thinly. Other participants suggested that the system of *caaqil* courts should be revived in order to incorporate customary law into the judicial system and take some of the burden off district and regional courts.

Legal reform and development

Somaliand’s civil and criminal legal codes date from the mid-20th century. There has been virtually no evolution of the law since then. There have been no major legal reforms and few new laws have been enacted. The few that have been passed (like Bill 80/96 which concerns land disputes) are poorly enforced, largely because legislation is not gazetted or otherwise made available to jurists, lawyers or members of the public. Overall, participants in the workshop agreed that the system is not dynamic and that it has not evolved to keep pace with the changing social, economic and political context.

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According to participants in the study, the areas in which legislation most urgently needs to be amended or updated by Somaliland’s lawmakers include:

⁴ In July 2002, government initiated a review of the entire judiciary system, including the development of an evaluation system for judges. As result of this review, in June 2002, the new president has appointed a new Chief Justice and replaced about forty five judges with new judges to overhaul the whole judiciary system.

- The Constitution
- The penal and civil codes
- The family code

In the absence of adequate laws, judges are obliged to improvise. “There are no commercial and administrative laws, but that does not prevent us hearing cases in those areas,” admitted one judge. How judges reach their decisions in such cases, and how these decisions are publicly perceived, is a matter for further investigation.

Areas in which new legislation is required were identified as:

- Commercial laws
- Traffic laws
- Administrative laws
- Juvenile laws
- Judicial administrative laws (includes the code of conduct of all judicial staff)

In fact, the process of drafting new legislation proved to be a contentious issue. Between 1997 and 2002, only twenty-two bills were passed by the Parliament, all of them initiated by the Executive Branch. This practice has been a source of concern for some participants, particularly with respect to legislation governing the judicial system itself, which has been put forward by the Ministry of Justice. This is in part a reflection of the fact that most Somaliland parliamentarians know little about law. Some workshop participants asserted that until Parliament becomes more effective, it should be the responsibility of jurists to prepare legislation and pass it on to the lawmakers. Likewise, they suggested that lawmakers should seek the inputs and advice of the judicial community in the legislative process.

Independence of the Judiciary

The Somaliland constitution stipulates the separation of powers and the existence of an independent judicial system (Article 97.2). An independent judiciary is critical for the impartial application of the rule of law, the effective separation of executive and judicial powers, and the guarantee of fundamental human rights. If the judiciary is to be perceived within Somaliland society as an impartial arbitrator, it should be independent from the influence of any particular level of government or political interference. However, under present circumstances, the independency of the judiciary and the effective separation of executive and judicial powers are challenged in many ways.

According to the Deputy Speaker of the House of Representatives, the entity responsible to ensure the supremacy of the Constitution – and thus the independence of the judiciary – is the weakest of all:

“Our system is based on three separate branches of government. The three branches of government are supposed to place some constitutional and practical checks on one another, and to have the resources (for each one) to fulfill its constitutional role. Unfortunately the judiciary is the weakest of the three. They have no say directly in the budget process, and no one speaks on their behalf. At least we, in the parliament, when we are endorsing the budget, we can demand more for ourselves. In other words, the judiciary is an orphan. It has no power and it has few resources in comparison to the other two branches of government. It is a political problem, and it will require a political decision to upgrade the status of the judiciary.”

Most of the challenges to the independence of the judiciary originate with the executive branch. First the court system, with the exception of the Supreme Court, is administered by the Ministry of Justice. In practice, this means that the Ministry controls the funds of the courts and has the authority to dismiss, hire and discipline judges. In other words, one order of government is openly subordinating the other, thereby undermining a fundamental constitutional principle. One participant described the situation in the following terms:

“Before reaching a judgment, a judge might be asked to favor one side or not to reach judgment. If he fails to do as he has been instructed, he might be fired or lose his salary [....]. The relationship between the Ministry and judiciary is unconstitutional. It is designed to create a role for the Ministry and to provide a degree of control over the judiciary. The Ministry is supposed to support the Attorney General, helping the government to enforce the law; instead it is managing the salaries of the judiciary. All courts should fall administratively under the President of the Supreme Court, or have an independent administration.”

Another arena of confrontation between the judicial and executive branches is the Justice Committee (*Guddiga Cadaalada*). According to the Constitution, the chairman of this committee is the President of the Supreme Court, who is also the highest-ranking member of the judiciary. The Ministry of Justice is a member of this Committee, and routinely contests its leadership or refuses to implement

its decisions. A senior civil servant from the Ministry of Justice described the tensions within the Committee:

“Before I went to meetings [of the Committee] the Minister would order me to refuse certain things. In fact, everything he told me to refuse was put forward by the President of the Supreme Court, so I refused them as instructed. During one meeting, the proposals looked good and made sense to me, but when I signed [the Committee’s decision] I lost my transportation allowance [from the Ministry].”

In order to break the deadlock, the President of the Republic intervened in late 1999 by directing the President of the Supreme Court to relinquish the chairmanship of the Justice Committee to the Minister of Justice, in violation of the Constitution.⁵ The President of Supreme Court did relinquish the chairmanship, but the President subsequently retracted his decision under pressure from Parliament.

The struggle for control of the Justice Committee highlighted another problem cited by participants in the workshop: excessive interference from the Executive branch in the workings of the Supreme Court. In particular, the post of Chief Justice is vulnerable to the influence of the President, who has in the past appointed and removed Chief Justices virtually as he wished. Attempts by Parliament to exercise their constitutional power to approve or refuse candidates for the post were largely futile. However, since 2001, Parliament has begun to wield its constitutional powers to greater effect: the President’s candidate for the post of Chief Justice was rejected and eventually set aside.⁶

There have been several other attempts on the part of Parliament to defend the independence of the judiciary, but without great success. The House of Representative nullified the controversial law 1962 Public Order Law, which gave the executive branch considerable powers to over-ride due process. Parliament also attached to its approval of the 2002 budget a recommendation urging the President not to allow the Justice Ministry to administer allocations for the

⁵ The late President Egal had long campaigned for the Minister of Justice to be awarded the Chair of the Justice Committee in the Constitution, but had ultimately been obliged to cede on this issue.

⁶ The candidate was Judge Shunu, a former Chief Justice who had previously been removed by Parliament from his post for bowing to Presidential pressure to allow the Minister of Justice to chair the Justice Committee. Shunu was subsequently named to the post of Attorney General, but Parliament rejected this appointment as well. When he was once again put forward by the President for the post of Chief Justice in 2001, Parliament declined to approve the appointment and the post remained vacant until mid-2002. However, the new President appointed a new Chief Justice in June 2002 and about 45 judges were fired and were replaced by the new president in an effort to overhaul the whole judiciary system.

judiciary. However this advisory was not binding and has so far not been acted upon.

Executive pressure on judges in regional and district courts can also be very direct. According to workshop participants, it is not unknown for members of the executive (or the parliament) to intervene when they have a direct interest in the outcome of a case. Whether or not such interference succeeds depends largely on the integrity of individual judges.

Human Rights

The Somaliland constitution includes various commitments to universal standards of human rights, except where they expressly contravene the Islamic *Shari'a*. In addition to those rights enshrined in the constitution, the Somaliland government acceded to the Convention on the Rights of the Child in January 2001.

Rights	Constitutional Reference
Adherence to the United Nations Charter and the Universal Declaration of Human Rights (UDHR)	Article 10.2
Equality before the law (regardless of colour, clan, birth, language, gender, property, status, opinion etc.)	Article 8
Fundamental social, economic and political rights, (including freedom to stand for political office)	Article 22
Freedom of movement	Article 23.1
Freedom of association	Article 23.3
Freedom from torture	Article 24.2
The right to a trial	Article 26.3
<i>Habeas corpus</i>	Article 27.2
Right to ownership of private property	Article 31
Freedom of the media	Article 32
Freedom of expression	Article 32
Freedom of thought, conscience and religion	Article 33
Equal rights for women ⁷	Article 36

⁷ Except those expressly ordained by Islamic *Shari'a*.

Violations of human rights in Somaliland are neither systematic nor widespread. Nevertheless, the record of the Somaliland administration with respect to human rights is not free from criticism, and the role of the judiciary in defending human rights has been poor. The most common violations include arrest without warrant and detention without trial of government critics, human rights activist and journalists. Workshop participants also noted that it is also possible for influential individuals to arrange someone's arrest without due process. According to one participant: "If you simply pay the police, they will arrest any one you want."⁸

The "National Security Committee" can detain people without charge for up to 90 days and has the power to sentence people to jail terms up to one year. In the past, the Committee has detained political dissidents those who have questioned the government's commercial dealings. A similarly powerful (and controversial) Anti-Corruption Committee that was formed in March 2001 ordered the detention without trial of numerous former and serving government officials. All of the accused were eventually released without charge in late 2001 and the Committee was dissolved.

Somaliland's custodial system is also responsible for some basic human rights violations. The few prisons that exist are old and some of them were built during the colonial administration. These facilities are in poor condition and overcrowded. There is no provision for separate detention of juveniles or mentally ill prisoners. Conditions are unhygienic and medical treatment is minimal. Some prisoners are held for months or years without trial in violation of the constitution.

In Somaliland there are two local NGOs that monitor, educate and advocate the effective implementation of human rights law. But lack of resources and expertise, low public awareness and a weak legal system present major challenges to the effectiveness of these organisations. Indeed, not a single human rights violation has ever been brought before the courts. Indeed, according to one ex-President of the Supreme Court: "While I served at the Supreme Court, no one challenged the constitutionality of anything." In July 2002, that was still the case.

Problems and Constraints

⁸ Parent routinely persuade the police to arrest and detain children whose behaviour they find objectionable.

In Somaliland, the judiciary is the most neglected and under-funded of the three orders of government. As one participant described the situation:

“In other countries, courts and justices are very distinguished and they are the most respected places and people. In our country that is not the case: you can’t differentiate the judges from the ordinary people, and the appearance of the courtroom is no different from any other social gathering. That should give you a picture of the state of our judiciary.”

Table 1: Breakdown of Government Budget

Ministry/Agency	Budget of 1999	Percentage	Budget of 2000	Percentage
Presidency	8,432,547,000	14.7%	2,578,182,000	03.4%
House of Elders	1,721,617,840	03.0%	1,664,439,600	02.2%
House of Representative	1,727,329,000	03.0%	1,708,871,000	02.2%
High court	116,960,950	00.2%	268,761,960	0.35%
Attorney General	116,702,860	00.2%	242,341,920	0.32%
Ministry of Justice	125,632,720	00.2%	192,593,400	0.25%
Custodial Corps	3,014,526,000	05.0%	3,861,169,300	05.0%
The Police Force	8,472,701,150	14.8	11,050,854,000	14.8%
National Army	22,396,344,000	39.0%	25,991,704,000	34.8%
Lower Court	128,032,000	0.2%	928,955,200	1.24%

Total Budget	57,255,071,000	100%	74,692,891,000	100%
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Source: Somaliland Ministry of Finance

As indicated by table 1 in 1999, the allocations to the Presidency, the House of Elders and House of Representatives were 14.7%, 3% and 3% respectively, while the combined allocation to the High Court, Lower Courts, Attorney General and the Ministry of Justice was just 0.8%. In the fiscal year 2000, this percentage was increased to 2.16%, the budgets of the Presidency and the Parliament were somewhat reduced, but resource constraints continued to hinder the judiciary's performance. The most commonly cited problems include:

- ❑ Few qualified people and no refresher courses or training
- ❑ No association or regulatory body for the legal community
- ❑ Lack of basic equipment and facilities
- ❑ No legal libraries, text, journals, or other legal resources
- ❑ Poor working relationship between the actors within the system

Remuneration is also a problem. Most of the judges in the system today began working on a voluntary basis when the judiciary was re-established in 1992. As one participant put it: "They should be commended for that, and they have done quite well under extremely difficult situations - they have made great sacrifices." Ten years later, remuneration for the members of the judiciary was still lower than that of other high ranking political appointees and civil servants: judges receive 900,000 Somaliland Shillings per month (approximately US\$ 140), whereas Parliamentarian and Ministers receive a base salary of So.Sh 1,200,000⁹ (US\$ 185) and So.Sh. 2,000,000 (US\$ 310) respectively.

One source of the judiciary's financial difficulties appears to be that the Lower Courts – namely, the District and Regional Courts and the Courts of Appeal - administratively come under the Ministry Justice. It is the responsibility of the Ministry of Justice to make available to these courts the fund allocated to them, but this often does not happen. According to one judge:

"Funds allocated in the budget don't make it to the courts. They are there in the budget but you can't get them." (*Waxa weeye cad dawlada ka yimi anaga aan na soo gaadhin*).

Another judge complained:

⁹ Some Parliamentarians receive more than this base salary.

“It is also the Ministry’s responsibility to appoint ten jurists to work with the court. Because it fails in these responsibilities, I have to use money from my own pocket to find court jurists.”

Despite its lack of financial resources, the judiciary is overstaffed with unqualified judges and unqualified support staff. Of 35 practising judges in June 2002, only 19 possessed law degrees, while the rest have some basic education and experience in administering the *Shari’a*¹⁰. When wages for judges were increased to their present level in 2000, many unqualified people sought employment in the judiciary with the help of ministers, clan elders and other patrons. A former President of the Supreme Court described the situation in the following terms:

“The judiciary is like a stray she-camel (*baadi irmaan*) laden with milk and everyone is milking her. So, every clan wants to have a judge and in the process they are flooding the system.”

There are currently no criteria or examinations for employing judges. Furthermore, the Ministry of Justice hires support staff and the clerks without first assessing the number of staff needed and the qualifications required. As a result, the Ministry has overstaffed the system with unqualified clerical workers. Again, the ex-president of the Supreme Court stated:

“It should have been for the judge to inform the Civil Service Commission of the number of clerks he needs and qualifications required, and then for the Civil Service Commission to examine them, but that has not been the case.”

A host of other constraints that jeopardize the capacity of judges to reach impartial decisions were also raised in the workshop. Unlike other senior government officials, judges do not enjoy physical protection (e.g. security guards) and are thus vulnerable to harassment by members of the public. People have easy access to judges - both at their residences and offices - to discuss with them their cases, to threaten them or to offer them bribes. Other pressures come from clans, because a judgment against an individual is usually seen as an action against a clan.

Trained legal professionals (public prosecutors, defence lawyers and civil lawyers) are scarce. Many public prosecutors are not qualified and have only limited knowledge about the existing law, so they do not prepare their cases thoroughly. The few lawyers in the system are overwhelmed by the caseload and

¹⁰ Human Development Report UNDP, Nairobi 2001.

are often accused of being greedy for taken on more cases than they can handle. Many clients know little about the justice system and have unrealistic or inappropriate expectations of their lawyers. According to one lawyer:

“The first question they [the clients] ask you is: ‘Do you know the judge?’ And that is why many of them fall prey to what is known as a *Mukhalis* (facilitator), who convinces them that, as an insider, he [the *Mukhalis*] could finish their cases in no time. Most of the time, people fall for that and pay dearly.”

Sometimes it is the judge who presents a problem for the lawyer, offering verbal abuse or otherwise indulging in improper conduct, as there is no code of conduct in the courtrooms.

The judiciary also suffers from low public confidence. Many people believe, rightly or wrongly, that the law best serves the rich: a case is won by the side that has paid the most. This is partly because they can afford the best legal advice money can buy, but it is also because many people attempt to buy the judges, encouraging dishonesty and corruption in the system. In the words of one participant:

“The people aim for the judge, exercising different means to influence him: money, clan-relations and so on. Moreover, each side produces about ten or fifteen witnesses, and there is no means to verify them. So the public does not actually want justice to prevail and undermines it consistently.”

Cases tend to move very slowly, drawing accusations that justice is not the objective of the process: “[The judges] just drag out the cases to squeeze money from both sides until one side outdoes the other,” alleged one participant.

Even if a fair verdict is reached, there is no guarantee that it will be enforced. Like the courts and the police, the custodial system is vulnerable to outside pressures and many people convicted before the courts do not serve out their sentences. The problems associated with the law enforcement institutions in Somaliland include high level of illiteracy, poor pay, recruitment that favours males and major clans, inadequate equipment and facilities and lack of training in criminal court procedures.

Conclusions and Recommendations

Participants agreed that Somaliland has yet to achieve a society founded on the rule of law. Some argued that the Constitution and the judiciary will continue to lack real force unless they are underpinned by a social and political transformation. One participant put the argument in the following terms:

“Socially and politically we simply cannot implement what is in the Constitution - even if we had the best Constitution. (*waxa guriigiisa qofku kala soo kaco ayaa dastoor ah*), people today are governed only by the rules they learn at home. The constitution can function properly when we [have a] committed parliament, constructive and proactive opposition parties, civic pressure groups and informed citizens who know their constitutional rights and duties. Moreover, we can't have it both ways: we have to decide whether we want an ad hoc, makeshift society or one rooted in formal institutions and constitutional rule.”

Participants in the workshop identified three key areas in which the judiciary requires strengthening:

- ❑ Integration of the various legal systems
- ❑ Independence of the judiciary
- ❑ Improved performance of the judicial system.

The following are some of the key recommendations and conclusions.

Integration of legal systems

- ❑ Somaliland's Constitution is the highest law in the country
- ❑ Laws that contradict the Islamic *Shari'a* should be removed as specified in the constitution

Independence of the judiciary

- ❑ The Justice Committee should be replaced with a purely judicial body. Specifically, Article 107 of the Constitution (concerning the Justice Committee) should be amended and membership of the Committee should be confined to the judiciary
- ❑ The budget of the judicial branch should not be administered by the Minister of Justice
- ❑ Lower courts such as the appeals, region and the district should be administratively under the jurisdiction of the Supreme Court
- ❑ Women should be included in the judiciary

- ❑ The President should not have sole authority to dismiss the President of the Supreme Court

Improving the performance of the judicial system

- ❑ Judges should be required to hold at least a law degree and should fulfil specific qualifications.
- ❑ Judges should have at least six months training or apprenticeship on the bench prior to employment as a judge.
- ❑ Courts should be required to recruit supporting staff in accordance with employment rules and guidelines established by the Civil Service Commission.
- ❑ Refresher courses should be given to judges, assistant judges and registrars.
- ❑ Legislation should be gazetted.
- ❑ In collaboration with non-governmental organizations, the government should establish a legal research centre/library, where books, legal journals and text books can be kept
- ❑ The government should provide the necessary equipment, facilities and financial needs of the courts in order that they may perform effectively.
- ❑ A professional association of lawyers/jurists with regulatory authority should be established.

Safeguarding against corruption and interference

- ❑ Remuneration for judges should be increased.
- ❑ Performance of judges should be evaluated and monitored.
- ❑ Judges should be provided with a degree of protection from the public

Opportunities for the International Community

- ❑ Supporting and strengthening institutions for law and order through UNDP's Somali Civil Protection Programme (SCPP) and similar initiatives.
- ❑ Supporting legal training, such as the University of Hargeysa's Faculty of Law
- ❑ Enhancing the understanding and the observance of human rights by supporting local human rights organisations

Annex A

List of Judiciary workshop Participants

- | | |
|----------------------|------------------|
| 1. Saido Ahmed Abdi | Ordinary people |
| 2. Roda Ahmed Yassin | Ordinary people |
| 3. Khadra Omar | Women NGOs |
| 4. Ahmed Mohamed | Buhodle District |
| 5. Said Farah Ahmed | Supreme Court |

- | | |
|-------------------------------|---|
| 6. Omar Roble | Ministry of Foreign Affairs |
| 7. Mohamed Mohamoud Abdillahi | Custodial |
| 8. Ibrahim Mouse | Independent Writer |
| 9. Mohamed Salah Cige | Hargeysa District Court |
| 10. Sheekh C/qadir Ahmed | Odwayne District |
| 11. Muse Ali Faruur | Traditionalist |
| 12. Ahmed Salebaan | Traditional Elders |
| 13. Ahmed Abdi | Sool Region |
| 14. Adan Haji Mohamed | Hargeysa Regional Court |
| 15. Mohmaed Said Hirsi | Judge |
| 16. Ali Mooge Gedi | Poet |
| 17. Osman Hussein Khayre | x-chief justice |
| 18. Ifraan Adan | lawyer |
| 19. Ali Mohamed Kaar | Human rights organisation |
| 20. Fosi sheikh Yonis | Judge |
| 21. Skeekh Mohamed Cabdi | Supreme court |
| 22. A/rahman Ibrahim | Awdel Regional Court |
| 23. Sh. Muuse Osman | Awdel District Court |
| 24. A/rahman Sham'a | Maandeeq Newspaper |
| 25. Sahal A/llahi Hirsi | Sanag Region |
| 26. Yusuf Ismail | Sahil Region |
| 27. Mohamed Ismail | Ministry of Justice |
| 28. Musa Dualle | Hunan Rights Advocate |
| 29. Ismahaan A/salaam | Women NGOs |
| 30. Abdi Mohamed | Jamhuriya Newspaper |
| 31. Abib Iman Hassan | Ragio Hargeysa |
| 32. Saleban Ismail | Judge |
| 33. Dahir Mouse | Criminal Investigation Department |
| 34. A/lahi Qawden | Somali Civil Protection
Programme SCPP |
| 35. Hassan Adan Idd | SCPP |
| 36. Mohamed Ibrahim | Ministry of Justice |
| 37. Saleban Ismail | Horn Watch (human
rights) |
| 38. Mohamed Ismail Ise | Ministry of Justice |
| 39. Layla Mohemed Omar | Women NGOs |
| 40. Ali Abdi Ismail Guul | Court of Appeal |
| 41. Sh. Ismail Khayre | Ministry of Religious
Affairs |
| 42. Ahmed Aw Ali | House of Elders |
| 43. Adan Ahmed Mouse | Office of the Attorney General |
| 44. Adan Garmuute Mohemd | DH of Ministry of Justice |
| 45. Mohamed Ali Kaahin | House of Representative |

46. Abdiqadir Jirde

Deputy of House of Rep.