



Alternative Dispute Resolution Initiatives in Somalia

The Expanding Access to Justice Program
in Somalia (EAJ)

June 2020

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Photo Front Cover: ADR Center in Baidoa, photo taken by Abdi Salah Ahmed

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ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
ADR	Alternative Dispute Resolution
ADRC	Alternative Dispute Resolution Center
ADRI	Alternative Dispute Resolution Initiative
ADRU	Alternative Dispute Resolution Unit
A2J	Access to Justice
BRA	Benadir Region
DDG	Danish Demining Group
DPC	District Peace Committee
DRC	Danish Refugee Council
EAJ	Expanding Access to Justice program
FGS	Federal Government of Somalia
FMS	Federal Member State
ICU	Islamic Courts Union
IDLO	International Development Law Organization
IDP	Internally Displaced Person
MOJ	Ministry of Justice
NGO	Non-Governmental Organization
RVI	Rift Valley Institute
SONSA	Somali Non-State Actors
SOYDEN	Somali Youth and Development Network
TDRU	Traditional Dispute Resolution Unit
TFG	Transitional Federal Government of Somalia
UNDP	United Nations Development Programme

I. INTRODUCTION

In Somalia, Alternative Dispute Resolution (ADR) is one of several approaches to improve access to justice following the collapse of state institutions and the civil war in 1990-92, both addressing transitional justice and as a supplement to formal statutory justice. The concept, however, is not new. To the contrary, ADR has been used to describe multiple justice-related processes.

In general, ADR comprises processes in which parties settle disputes with the help of third-party mediators or arbitrators, often out of court. In Somalia, it often denotes customary justice processes as alternatives to the fledgling statutory court system, involving clan elders and inter-clan agreements (*xeer*) that stipulate the procedures and framework for dispute settlement, and is also applied to the re-introduction of combatants into communities.¹

As Somalia's statutory system remains in its early recuperation from state collapse, customary justice institutions figure as the first ports of call for the majority of communities as disputes and conflicts arise. In response to this, ADR has been adopted as a supplementary approach to justice by the Ministry of Justice (MoJ) of the Federal Government of Somalia (FGS) since 2014, which is currently taking the form of 'ADR centers' operating in several urban centers and under administration by the MoJ.

The Expanding Access to Justice (EAJ) seeks to identify efficient approaches to Access to Justice (A2J) in Somalia in order to build on what is already working and to ensure that all subsequent interventions are context appropriate. The key objective of this study was therefore to increase the understanding of the modalities and impacts of programming and support to ADR initiatives within the delivery of justice in Somalia.²

The report opens with a brief history of ADR initiatives in Somalia and an overview of present activities. Subsequent sections present findings on socio-political dynamics in which ADR initiatives operate, before delving into the technical aspects of case management. The final sections consider the sustainability of structures as well as the impact on vulnerable groups, particularly women, and close with remarks on the implications for shari'ah and human rights in Somalia, the wider trajectory of the customary *xeer*, and a number of recommendations.

¹ See: Traditional Dispute Resolution Unit, *Policy Paper on the Somali Customary Justice System*, Ministry of Justice and Constitutional Affairs, Federal Government of Somalia, 23 November 2014, pp.9.; Janine Ubink & Anna Rea, 2017, Community justice or ethnojustice? Engaging with customary mechanisms for the reintegration of ex-combatants in Somalia. *International Journal of Transitional Justice*, 11, 2, 276-296.; Mahdi Abdile, 2012, Customary Dispute Resolution in Somalia. *African Conflict and Peacebuilding Review*, 2, 1, 87-110.

² For the purposes of this study, the term ADR Initiatives (ADRI) is applied as a common denominator for all the various non-statutory & non-Shari'ah-based initiatives to dispute resolution in Somalia.

2. A BRIEF HISTORY OF ADR INITIATIVES IN SOMALIA

In Somalia, *Alternative Dispute Resolution* has been used as a synonym for the historic and cultural Somali customary mediation and justice system known as the *xeer*. Under the *xeer*, elders act as mediators or arbiters. They listen to both sides of a dispute and propose an often compensation-based solution, which both sides will have vowed to accept prior to the process. This mode of dispute resolution precedes any rights-based justice institutions in Somalia, and has been part and parcel of Somali socio-political structures.

Xeer is:³

- a complex set of norms and rules that govern inter and intra-clan relationships;
- not a static legal code, but differs across communities in its particulars, and substantively between communities in southern and central Somalia and northern regions, in which pastoralist livelihoods are more prevalent;
- based solely on precedent and varies with the different agreements, norms, and outcomes of disputes among the Somali clans as they have evolved over time;
- possible to change to reflect land capture by stronger clans or the protection of weaker clans;
- not a type of formal law, even though its proceedings are systematic and somewhat formalized;
- mainly an oral tradition, and only legitimate elders who have memorized its history can facilitate customary processes of dispute resolution.

Xeer

The meaning of xeer is literally “agreement” and the expression “Xeer baa innaga dexeeya” means “there is an agreement between us”.

Customary mediation and justice surged in the judicial and governance vacuum left behind by the collapsed state and civil war of 1990-1992, and continues to function throughout Somalia as the most trusted mechanism and first recourse to resolve disputes and conflicts today.⁴ This moved elders into a central position for the regulation of access to resources (such as grazing areas and water), local dispute settlement, and the maintenance of security,⁵ for dispute management, settlement, and reconciliation among private individuals and business people, as well as the majority of civil and criminal cases.⁶ The *xeer*'s role is strongest in rural parts of Somalia, but even in the rapidly growing urban areas with functioning local administrations, *xeer* remains the dominant avenue for dispute settlement.⁷ Although clan elders have largely retained their authority at the local level and continue to play a role in the resolution of local and intra-clan disputes, they are either not or only indirectly⁸ involved in political conflicts in southern Somalia, which are by and large the province of politico-military elites,

³ Joakim Gundel & Ahmed A.O. Dharbaxo, 2006, *The predicament of the 'Oday': The role of traditional structures in security, rights, law and development in Somalia*. Danish Refugee Council, Oxfam Novib; M. Wasuge, C. Barnes & T. Kiepe, 2017, *Land Matters in Mogadishu - Settlement, ownership and displacement in a contested city*. Mogadishu/Nairobi: Rift Valley Institute & Heritage Institute for Policy Studies, pp.63.

⁴ See Joakim Gundel, Louis-Alexandre Berg, Yahya Ibrahim, 2016, *Political Economy of Justice in Somalia*. World Bank, pp.8-9; Natasha Leite, 2017, October 12, *Reinvigoration of Somali Traditional Justice through Inclusive Conflict Resolution Approaches*. Retrieved from African Centre for the Constructive Resolution of Disputes (ACCORD): <https://www.accord.org.za/conflict-trends/reinvigoration-somali-traditional-justice-inclusive-conflict-resolution-approaches/>

⁵ Gundel & Dharbaxo, 2006, *Predicament of the Oday*, p.7

⁶ Gundel & Dharbaxo, 2006, *Predicament of the Oday*, p.6

⁷ See Gundel & Dharbaxo, 2006, *Predicament of the Oday*, pp.41 and Wasuge, Barnes & Kiepe, 2017, *Land Matters in Mogadishu*.

⁸ Only the highest clan elders represent their clans politically. The majority of elders is concerned with dispute resolution at different geographical levels, depending on the amount of clan members they represent.

from faction leaders during the civil war to political leaders at different levels today.⁹ Nevertheless, political resolutions have had strong clan-based elements, both explicitly and implicitly, and have received support from both Somali organizations and international actors – although these are largely based on power sharing, falling short of actual reconciliation.

These Mogadishu-based elite bargains have in part reproduced a mixture of patronage and graft that hark back to government practices shortly before its collapse into civil war in 1991.¹⁰ Together with elders' cooptation into political agendas¹¹ and the onset of a Salafi-inspired extremist insurgency in the late 2000s, this trend has steadily undermined the legitimacy of many clan elders and limited their role in resolving large-scale conflict even further.¹² In Southern Somalia, *xeer* was therefore accompanied or even replaced in some locations by various forms of emerging shari'ah courts.¹³

The involvement of elders in appointing parliamentarians for the House of Representatives has further politicized the institution of elders. This and the potential access to resources and pay-offs it entails has led to a proliferation of either politically appointed or self-inaugurated elders, complicating the notion of which elders in fact hold legitimacy among their communities.¹⁴

2.1 The first external support for Alternative Dispute Resolution

In 2003, the mayors of Burco and Odweyne in the Togdheer region of Somaliland contacted the Danish Refugee Council (DRC) to seek support for local elders. As a result of the immense levels of violence and displacement during the civil war, the compensation-oriented *xeer* proved difficult to implement, and inter-clan disputes threatened to escalate into open conflict. In part, this was due to conflicting understandings of *xeer*, which is not a universal or monolithic system. Rather, *xeer* varies between different social units, depends on local agreements, and is based on precedence of case resolutions between sub-clans. Elders were struggling to adjust to rapid social changes, brought about by demographic factors such as rapid population growth and urbanization, increased and new forms of conflict and disputes, new patterns of migration and displacement in a globalized world, changing business and property relations, and new information and communication technology.¹⁵

The mayors asked for help in bringing elders together – unrelated to any immediate dispute – to discuss the negative and positive sides of extant *xeer*, in order to adapt it to the changing context and harmonize the varieties of *xeer* among sub-clans to facilitate dispute resolution and conflict prevention. Although this presented a novel type of engagement, DRC was able to utilize a human rights component within its strategy to pilot this approach, which resulted in programmatic support to elders in Puntland and Somaliland from 2004 to 2007.¹⁶

Working with a local NGO, Haqsoor, DRC's project manager, Philippine human rights activist Victoria Justiniani, managed to gain the trust of the elders, as she sat with them and listened. This was crucial

⁹ Ken Menkhaus, 2018, *Elite Bargains and Political Deals Project: Somalia Case Study*. DfID Stabilisation Unit.

¹⁰ Menkhaus, 2018, *Elite Bargains and Political Deals*.; Tobias Hagman, 2016, *Stabilization, Extraversion and Political Settlements in Somalia*. Rift Valley Institute, p. 11.

¹¹ Lidwien Kapteijns, 2012, *Clan Cleansing in Somalia: The Ruinous Legacy of 1991*. Philadelphia: University of Pennsylvania Press, p. 89.; Aoife McCullough & Muhyadin Saed, 2017, *Gatekeepers, elders and accountability in Somalia*. Mott MacDonald, Overseas Development Institute, IAAAP Programme, p. 13. Available at: <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11938.pdf>; Nicole Stremlau, 2018, Governance without Government in the Somali Territories. *Journal of International Affairs*, 71(2), p. 85; Ken Menkhaus, 2003, State collapse in Somalia: second thoughts. *Review of African Political Economy*, 30(97), p. 415.

¹² This applies less to the self-declared independent Republic of Somaliland, see: Gundel et.al., 2016, *Political Economy of Justice*, pp.9.

¹³ On the emergence of shari'ah courts, see: Afyare A. Elmi, 2010, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding*. London: Pluto Press.; Gundel et.al., 2016, *Political Economy of Justice*, pp. 9-12; Abdirizak Ahmed, Sagal Ali, Erica Harper, Tanja Chopra & Robin Mydlak, 2020, *The Shari'ah in Somalia*. Expanding Access to Justice Program, American Bar Association & Pact Kenya.

¹⁴ See the *Policy Paper on the Somali Customary Justice System*, 2014, pp.13 &15.; McCullough & Saed, 2017, *Gatekeepers, elders and accountability in Somalia*, p. 14.; Hagman, 2016, *Stabilization, Extraversion and Political Settlements in Somalia*, p. 29.

¹⁵ Gundel, 2006, *Predicament of the Oday*.

¹⁶ This section is partly based on the author's own memory as a direct participant in this DRC initiative in 2006 and 2007, as well as the resulting report: *Predicament of the Oday*, which the author produced as part of this involvement.

as elders agreed to accept the inclusion of human rights elements into the new *xeer* resolutions, in particular regarding women and children's rights.¹⁷ This engagement build on the inherent dynamism of *xeer*, with an important caveat encapsulated in the Somali saying - "*Meelaadan ku xirneyn ayaa lagu xeertaa*": *only during peacetime can the xeer be changed*. The relative stability in Togdheer region enabled the program to work through such peacetime meetings (*shir*), in which the elders collectively identify negative (*xumaan*) and positive (*wanaag*) aspects of extant *xeer*, and then formulate a new *xeer* resolution jointly present to their communities.

This opened the possibility of the incorporation of human rights, especially women's and children's rights, as well as the rights of minorities and internally displaced people. Yet, the process took time, as despite their general openness, elders were – and tend to be – conservative and protective of their people, traditions and culture. It did not achieve a fundamental change in social norms and elders' attitudes,¹⁸ but it initiated a review process of customary practices, the reform of existing *xeer*, and a national conference of elders in Hargeisa in December 2006, in which the new *xeer* resolutions were aligned into national ones.

The project triggered further interest in understanding the position of elders and the state of customary justice mechanisms in Somalia. Alongside Oxfam Novib, also active in local partnerships in the areas of engagement, DRC commissioned Joakim Gundel to conduct a study on customary justice structures and specifically the role of elders in 2006. It mapped the challenges elders faced as a result of civil war and wider social change, and offered a number of suggestions for further support to customary dispute resolution mechanisms – and to build on the bottom-up process of reflection among elders and communities that the project had initiated.¹⁹

In 2006, the project was expanded to include Puntland and later the Hiraa region. In 2007, following the removal of the Islamic Courts Union (ICU) from Mogadishu by an internationally backed Ethiopian incursion, DRC together with the local NGO Somali Peaceline formed an association of elders in Mogadishu to support peacemaking through similar methods. This laid groundwork for District Peace Committee and Traditional Dispute Resolution initiatives described further below.²⁰

At the same time, UNDP and UNOPS engaged the local NGO Center for Research and Development (CRD) in the 'District Based Peace Building (DBPB) Program' (2006-7). The program aimed at supporting local peacebuilding and governance in Bay and Bakool regions. It indirectly led to the formation of ADR centers in Mogadishu by its Somali project manager years later, which will be expanded upon below in section 2.4.

2.2 The District Peace Committees

Peacebuilding & Justice

Although the DPCs' main objective was to build and maintain local peace, they often perform *de facto* local justice provision and dispute resolution, based on the *xeer* and its related norms and processes.²¹

²¹ This conundrum is common to most localized justice and peace initiatives in Somalia: if disputes are not contained at the onset, they risk escalating to wider clan conflicts and trigger retribution and revenge killing cycles, drawing in clan-based political polities.

Inspired by their interaction with Peace Committees in the North-Eastern districts of Kenya,²³ and following a study on border conflict and traditional conflict mechanisms,²⁴ PACT Kenya and the Somalia Youth Development Network (SOYDEN) obtained USAID-funding in 2011 to facilitate the establishment of Local Peace Committees (LPCs) in towns along the border between Kenya and Somalia, in the regions of Lower-Jubba and Gedo, as well as sixteen District Peace Committees (DPC) in Mogadishu.²⁵ In 2014/15, SOYDEN, with support from Conflict Dynamics International, formed additional DPCs in Beledweyne, Baidoa, Jowhar, and in Kismayo.²⁶

Disputes mostly concern land issues, including conflict between farmers and herders, as well as killings and gender-based violence. All of these can result in spirals of revenge killings. As long as state institutions remain limited, peace and justice thus remain inextricably linked.²²

The DPCs still operate, but without external resources other than continued support from SOYDEN for annual meetings and supplies such as stationery, they have become less active. They work similarly to newer ADR centers established by the MoJ. And indeed, DPC staff interviewed for this study listed three cases in which they were cooperating with ADR centers, and in the Hamar Jabjab, Hodan, and Hamarweyne sections of Mogadishu, ADR centers have effectively replaced the DPCs. In most cases, however, DPCs work independently, and without support from donors or the government. Members volunteer without salaries or incentives, often out of a sense of duty.²⁷

2.3 The *Guurti+* Initiative

In 2013, the Danish Demining Group (DDG) picked up where the DRC initiative had ended, and developed the approach further, applying several of the recommendations of the initial report, *The Predicament of the Oday*. Its engagement with customary justice providers followed from community engagement using *appreciative inquiry* methods, and extended over a number of different projects:²⁸

- a 2013-2014 Canadian-funded intervention in Bay and Gedo regions;
- the 2014-2016 SIDA-funded *Community-Driven Recovery and Safety in Somalia* (CDRS) project in Baidoa, Luuq, and Warsheikh;
- the 2015-2017 DfID-funded *Danwadaag* project in Bay and Bakool regions;²⁹

¹⁸ In 2006, Victoria Justiani was replaced at the project's helm. The inevitably slow process in achieving tangible improvements to women's rights in particular led to the project's cancellation in 2008, which in turn caused a split within the local NGO, Haqsoor. On the linkages between change in legal frameworks and wider social norms, see: Alejandro Bendaña and Tanja Chopra, 2013, Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland. *Hague Journal on the Rule of Law*, 5, 44-73.

¹⁹ Gundel, 2006, *Predicament of the Oday*.

²⁰ The DRC initiative in Mogadishu was established by Omar Dharbaxo together with Joakim Gundel and A. Shirwa from Somalia Peaceline. Shirwa and Somali Peaceline were later instrumental in establishing SOSSENSA. Somalia South Central Non-State Actors (SOSSENSA) is a multi-sectoral platform with membership of networks an umbrella initiated in 2008, with support from SaferWorld's Non State Actors program. It is now known as SONSA (Somali Non-State Actors).

²¹ This conundrum is common to most localized justice and peace initiatives in Somalia: if disputes are not contained at the onset, they risk escalating to wider clan conflicts and trigger retribution and revenge killing cycles, drawing in clan-based political polities.

²² See: District Peace Committee Assessment, Conducted by Conflict Dynamics International in partnership with the Somali Youth and Development Network (SOYDEN), July 2015, pp.8-9.

²³ cf. Tanja Chopra, 2009, *Justice Versus Peace in Northern Kenya*. Justice and Development Working Paper Series 2.1, The World Bank.

²⁴ Joakim Gundel, 2011, *Rapid conflict analysis of Gedo & Lower Juba regions of Somalia - Recommendations for peace support*, Draft Report for PACT Kenya.

²⁵ SOYDEN, 2020, *Community Peace Structure (Peace Committee)*, available at: <https://www.soyden.net/peace-building/>.

²⁶ CDI & SOYDEN, 2015, *District Peace Committee Assessment*, Conflict Dynamics International & Somali Youth and Development Network.

²⁷ Interviews in Mogadishu with SOYDEN and two District Commissioners, December 19, 2019.

²⁸ See: Robin Mydlak, 2019, *Engagement of Somali Customary Institutions in Justice Programs - Establishing a Knowledge Base*, Forcier & Danish Demining Group, pp. 72-73.

²⁹ Robin Mydlak, 2017, *End-line Evaluation of the Danwadaag Project*, Forcier & Danish Demining Group, available at: https://b718eab7-6439-48c8-8e6e-46fd5a13eaf2.filesusr.com/ugd/67feb2_e2fd9012b55d47269fdd4406ceb18e51.pdf

- an EU-funded *Civic Engagement in Reconciliation and State Formation* (CERF) undertaking in capitals of Southern Somalia, in collaboration with the local NGO Women and Child Care Organization (WOCCA).

A central component of these interventions was to improve access to justice using the existing and legitimate institutions, whilst working with those to achieve greater levels of inclusivity, and enhance elders' conflict resolution capacity. An important element of the process aimed at documenting *xeer* and elder council (*guurti*) decisions with communities, which previously were only remembered by elders and transmitted orally, for the purpose of building a more consistent and accessible body of customary law and precedent. The consultation process involved marginalized groups such as women, youth, and representatives of minority clans, gradually forming more inclusive elder councils known depending on location as *Guurti+*, *Malaq+*, or *Duubab+*.³⁰

Beyond the issue of inclusion, which the *Guurti+* format addressed, the project aimed at two more long-term impacts. On the one hand, it leveraged the fact that although most *xeer* agreements were bilateral, should all elders in a location agree on a new *xeer*, all residents would become subject to that same code. This opens pathways for the incorporation of human rights ideals into local customary practice, anchoring achieved inclusion more deeply.³¹ On the other hand, the initiative followed the hypothesis that a written document and further training on legal practice would facilitate interaction and coordination between customary and statutory legal frameworks as well as referrals of cases between customary and statutory institutions.

Representatives of various marginalized groups participated in project activities, incrementally increasing their involvement in engagement with authorities and, ultimately, dispute resolution. Alongside elders, they received training in participatory conflict analysis and mediation. Both then participated together in the review, documentation, and ratification of a town-wide *xeer*.³² Through these workshops, participating elders and new *Guurti+* members engaged with issues of gender and human rights, and broached referral mechanisms to enhance access to justice and render the treatment of cases more efficient. Local civil society organizations were supported to provide legal aid.

The most recent iteration of DDG's engagement is the currently ongoing *The Time is Now* project, working in ten districts in southern Somalia.³³ A recent project evaluation found that, overall, *Guurti+* and documented *xeer* had enhanced communal trust and efficiency of dispute resolution, albeit in a different manner dependent on local context, reflecting local socio-political circumstances. Elders continue to play a crucial role in de-escalating violence, which was found to have been further enhanced by the involvement of women and youth representatives. These were described as able to mobilize their communities in support of conflict de-escalation and resolution efforts, and contribute these social ties to elder councils who were frequently struggling to connect with local youth and women.

The study also claimed that collaboration and division of tasks between customary and statutory justice institutions as well as security forces have improved, leading to increased efficiency and effectiveness of handling cases as well as strengthened community buy-in and legitimacy in communities where trust in elders, local authorities, or both lack. However, the project has not been able to further access to rights-based justice in cases of sexual and gender-based violence, and the handling of land disputes

³⁰ Mydlak, 2019, *Engagement of Somali Customary Institutions in Justice Programs*, pp. 7-9.

³¹ This could not be an outcome of mere training. Only elders' active adaptation of human rights ideas, to which training and awareness raising participatory action research (PAR) can contribute, and their incorporation into a new *xeer* may lead to change in practice.

³² This is similar to the initial DRC initiative except for the inclusion of women. The resulting documented town-wide *xeer* – a *xeer* agreement applicable to all clans within a town – are available on <https://somhub.org/>, and their dissemination among local communities is ongoing, albeit incomplete. See: Mydlak, 2019, *Engagement of Somali Customary Institutions in Justice Programs*. This section draws on this evaluation.

³³ with the African Police Civilian Oversight Forum (APCOF), WOCCA, Somali Legal Aid Network (SLAN), and Legal Action Worldwide (LAW).

appeared beyond the reach of *Guurtis+*. Here, customary norms continue to diverge from rights-based justice and international human rights standards.³⁴

2.4 ADR centers

In 2013, the Federal Government of Somalia (FGS) launched the Alternative Dispute Resolution Initiative (ADRI) in the Benadir region with funding from the United Nations Development Programme (UNDP) and under the aegis of the Ministry of Justice (MoJ).³⁵ The initiative took inspiration from DRC's first forays as well as the District-Based Peace Building Project (DBPB) from 2006.³⁶ This first ADR initiative remained fledgling and eventually failed, partly because the 'project-approach' to the ADRs was not suitable to its social context.³⁷ Experts interviewed for this study added that a staff of the Ministry of Justice had asked for kick-backs, the rejection of which allegedly resulted in an external expert overseeing the program implementation being declared *persona non grata*.³⁸

In 2014, the newly appointed and influential Minister of Justice, Farah Abdulkadir established a new Traditional Dispute Resolution Unit (TDRU) with support from the International Development Law Organization (IDLO). The MoJ inceptioned this process with a policy paper on the Somali customary justice system, and began pilot projects in the three districts of Hamarweyn, Hamar Jajab, and Wadajir in Benadir Region.³⁹ In August 2016, the Policy Paper was adopted as official FGS policy, aiming to harmonize *xeer* with national legislation and human rights, and adopting ADR centers as a supplementary approach to the nascent statutory justice institutions.⁴⁰

The Policy Paper aimed at providing guidance for an "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.⁴¹ To this end, the Paper advocated for the *xeer* to be "reformed" and "modernized" to overcome discriminatory practices and broaden participation in dispute settlement procedures.⁴² Short of providing practical guidance, however, the Paper noted that this was to result from bottom-up processes and local dialogues, possibly facilitated by government or non-governmental actors, for which more research was needed.⁴³

Despite this emphasis on a bottom-up approach and its invocation of declarations⁴⁴ as most suitable, the Policy Paper's recommendations included the recording of the customary *xeer*, in order to codify it into statutory law,⁴⁵ as well as the deepening of linkages between customary and state institutions through constitutional or legislative recognition, recognition or formalization of customary institutions,

³⁴ Tanja Chopra, 2020, *Fusing Paradigms. Individual Rights and Customary Justice in Somalia. Commentary on 'Engagement of Somali Customary Institutions in Justice Programs – Establishing a Knowledge Base'*, DDG/EAJ.

³⁵ Interview in Mogadishu October 6, 2019; In 2013, the UNDP commissioned a legal framework specialist, Niaz Shah, to write up a Concept Note on how to approach their Alternative Dispute Resolution initiative in the Somali context, which was submitted on May 30, 2013.

³⁶ The first formulation of the ADR initiative under the Transitional Federal Government was initially driven by Musse M. Afrah as Head of the Traditional Dispute Resolution Unit, an IDLO supported Project in 2013-14), who also worked as the national project manager of the DBPB for UNOPS. See: Joakim Gundel, 2008, *The District Based Peace Building and Reconciliation Project & The Community Based Peace Support Project Somalia*, Review Report for UNDP Somalia by Katuni Consult.

³⁷ The caveats of the project approach in the Somali context will be discussed further in relationship to the sustainability of ADRI and in the final analysis. For more on alternative approaches to aid in Somalia, see also: Sean Allen and Joakim Gundel, 2017, *Enhancing district-level governance & accountability in Somalia - A case study on the citizen-directed negotiated accountability project*, KATUNI Consult & IAAAP.

³⁸ Interviews in Mogadishu, October 2019.

³⁹ *Policy Paper on the Somali Customary Justice System*, Traditional Dispute Resolution Unit, Ministry of Justice and Constitutional Affairs, Federal Government of Somalia, 23 November 2014.

⁴⁰ Interviewees in Mogadishu, December 19-22, 2019, alleged that the FGS at the time was planning a nationwide grassroots reconciliation process based on traditional practices, for which the TDRU presented a pilot project. High cabinet turnover led to the dissipation of this plan.

⁴¹ *Policy Paper on Customary Justice*, pp.10.

⁴² *Ibid*, pp.28.

⁴³ The Paper appeared to build on findings from *The Predicament of the Oday* (Gundel & Dharbaxo, 2006), albeit without reference.

⁴⁴ This term was also used by DRC in its engagement with elders in Somaliland, alongside partial self-declarations.

⁴⁵ *Policy Paper on Customary Justice*, pp.29.

and formal recognition of the authority of elders with the possibility of formal political positions. Finally, the paper suggested that elders be trained in shari'ah and human rights.

In June 2018, the TDR Unit was renamed 'Alternative Dispute Resolution Unit (ADRU)',⁴⁶ and more ADR centers were established across the country, coordinated by the MoJ, with support from IDLO and UNDP. According to the ADRU, centers have been set up in the following locations:

- Benadir Region: Hamar Jab Jab, Hodan & Karaan;
- South West State: Dinsoor & Baidoa;
- Puntland: Bossasso, Garowe, Galkayo, Badhan, Buhodle, Dahar & Burtinle;
- Galmudug: Dhusamareb;
- Hirshabelle: Jowhar;
- Jubaland: Kismayo & Garbahaarey.

In the three districts of Hamar Jab Jab, Hodan, and Karaan, it appears that the new ADR centers were built on existing DPCs.⁴⁷ According to interviewees, the ADRU did not train the new ADR committees, instead using most of the DPC members initially supported by SOYDEN. The MoJ allegedly dismissed some of the elders involved and replaced them with newly but untrained ones.⁴⁸

Comments on the ADR Policy Paper

The Policy Paper's recommendations are not unproblematic. The *xeer* has broad legitimacy and acknowledgement among the wider population, whereas statutory legislation and the Provisional Constitution do not. Bestowing clan elders with governmental roles risks undermining their reputation as guardians of their communities' wellbeing, and thereby potentially the very legitimacy this policy seeks to harness.

In August 2019, the ADRU published a set of Standard Operational Procedures (SOPs) for ADR centers to follow,⁴⁹ which appear to differ substantially from the 2016 FGS Policy Paper. They contain new technical terms, and contravene the Policy Paper in several points. For instance, the Paper warned that: "assigning jurisdiction of major crimes exclusively to state courts will not work unless judicial security and protection is improved and there

is increased trust by clan leaders in the formal sector."⁵⁰ The SOPs, by contrast, exclude major crimes such as murder from the ADR centers' remit, without tangible improvements of statutory judiciaries or evidence for increases in popular trust.⁵¹

2.5 The Challenge of ADR Initiatives

Except for the DDG program *The Time is Now*, most post-2007 initiatives appear to eschew one of the most important aspects of customary practices and a major mechanism for change: the *xeer* is not static, but dynamic, and can change during peacetime through elders' collective decisions. Instead, most initiatives seem to have opted for simply training elders with much less certain effects, and even *The Time is Now* does not outwardly reflect lessons learned from initial processes of reforming *xeer* in peacetime meetings, although it is questionable to what extent southern communities are *at peace*.

⁴⁶ Interview with ADRU staff, April 2019

⁴⁷ Interview, Mogadishu, October 6, 2019.

⁴⁸ Interview in Mogadishu, December 16, 2019.

⁴⁹ *Alternative Dispute Resolution Standard Operational Procedures*, Alternative Dispute Resolution (ADR) Unit, The Ministry of Justice and Judiciary Affairs, Federal Government of Somalia, Mogadishu, Somalia, August 2019.

⁵⁰ *Policy Paper on Customary Justice* pp.32

⁵¹ See: ADRU, 2019, *Alternative Dispute Resolution Standard Operational Procedures*, sections 6 & 7.

3. PRESENT ADR INITIATIVES & THEIR MANAGEMENT STRUCTURES

This section aims at mapping ADR initiatives in Mogadishu, Kismayo and Baidoa, including: who runs them, how they are structured, how they are managed, and how their committees or leadership structures are identified/elected/selected.

The most cross-cutting finding was that among various ADR initiatives, community representatives lack clarity as to which entities can be identified as ADR Initiatives, and about the concept of ADR as such.⁵² Almost all interviewed elders, religious leaders, and women were aware of ADR initiatives. Only two religious leaders were not, whilst all but two elders claimed to be actively involved with such initiatives without specifying which. The two religious leaders mentioned 'ad hoc ADRs', by which they seemed to refer to the traditional activity of elders in dispute resolution, which these always have practiced. Women's representatives mentioned abbreviations such as CEPID, IDA, or entities such as community women leaderships, clan elders, District Pastoral Committees, Animal Market Auction Committee, and others, which illustrates the confusion as to what qualifies as ADR and what does not.

Despite this lack of clarity, the study identified the following ADR initiatives, by region:

3.1 Benadir Region (Mogadishu)

In Mogadishu, centers and committees established by different projects overlap:

1. Three ADR centers established and run by the MoJ ADRU, located in the districts of
 - Kaaraan (covering the districts of Kaaraan, Abdiaziz, and Yaqshiid)
 - Hamar Jabjab (covering the districts of Hamar Weyn, Bondheere, Waberi, and Shangani)
 - Hodan (covering Hodan, Howlwadag, Wardhiigley, Wadajir, and Dharkenley)
2. 17 District Peace Committees run by local communities with support from SOYDEN
3. Several voluntary 'ADR' run by elders⁵³

ADR center members are selected by the MoJ and district authorities, after consultation with local elders.⁵⁴ The Hamar Jab Jab Committee, for instance, consists of 10 individuals, including two women and members from civil society. The center's three employees are recruited by the MoJ. However, a civil society representative alleged that the ADR centers' committees are selected by the MoJ, and the communities are not involved.⁵⁵

The selection process for District Peace Committees in Mogadishu differs from ADR centers in that community members select committee members, who then allocate positions within the committee among themselves. According to an assessment from 2015, the district peace committees are comprised of representatives from youth, women, elders, religious leaders and the business community.⁵⁶ They are organized with chairperson, vice chair and two department secretaries, as well as five ordinary committee members, and maintain coordination committees for every four districts.⁵⁷ The Peace Committees are run by five five-member committees, and select one chairperson for all 17 committees to coordinate once every two years. The current chairperson is the chair of the Dharkenley Peace Committee.

⁵² It turned out to be surprisingly complicated to clearly identify existing ADRIs, which may stem from the tendency across communities to refer to similar institutions differently, with variation in spelling, name etc., which implies that two different terms can identify the same item.

⁵³ The references to these appear to point to the traditionally functioning *xeer* carried out by elders. This is driven by very old elders, all above 65 years of age, who want to maintain their respect in their communities, avoid involvement with politics and government institutions, and seek to protect and continue their traditional way of solving disputes within the communities.

⁵⁴ Interviews with members of the Hamar Jabjab ADR Centre in Mogadishu, October 20 and 21, 2019.

⁵⁵ Interview in Mogadishu, October 6, 2019.

⁵⁶ CDI & SOYDEN, 2015, *District Peace Committee Assessment*.

⁵⁷ Interview in Mogadishu October 18, 2019.

District Peace Committee Selection

SOYDEN convened 120 members of the Dharkenley community in four groups, as well as 105 individuals from Howlwadag District and 120 from the Hamar Weyne District. These selected 15 members for the District Peace Committee.⁵⁸ The Committee then selected its Chairperson and other positions from within itself, including five delegates to the overall ADR Centre committee.

The committees work directly with district courts (where available) and police, which refer cases that are likely to be resolvable by mediation. Outcomes are submitted to district authorities and courts. Committee members claim to work voluntarily, without salaries. Via its web-presence, SOYDEN notes that DPCs are actively engaged in promoting peace via community dialogue and reconciliation, and are recognized by the FGS.⁵⁹ Only one interviewee during this study distinguished sharply between peace committees and ADRIs. Most conflated them, which underscores the broad applicability of the concept.

3.2 Baidoa

In Baidoa researchers identified the following ADR centers:

1. *Isha Center*, Isha village (Section One)
2. *State Community Center*, Located by the State Presidential Palace
3. *Wadajir Center*, Wadajir Village
4. *Horseed Center*, Horseed village
5. *Hawl-wadaag Center*, Hawlwadaag village

All of these ADR centers are overseen by the South West State MoJ, operate in close collaboration with the Baidoa District Administration, and are managed by a selected committee, composed of community clan elders and religious leaders – other committees based on clan and practicing *xeer*-based mediation and arbitration remain the province of elders.⁶⁰

"We have one big ADR center and other small centers in our district, connected to all sections and villages in the district, and to the small villages around Baidoa."

- Baidoa District Commissioner

The ADR committee membership draws from all clans in the area, but accounts of their selection differed. Respondents variously asserted that clan representatives, the head of the District Social Affairs Department, and religious leaders are those selecting, and that clan elders, religious leaders, civil society organization representatives, and district administration members (in particular the district's Social Affairs Officer) are among those selected.⁶¹ Two practitioners stated that members are selected via the 4.5 clan formula.⁶² This is questionable, as the 4.5 clan formula only applies to the national level, and likely implies that members are selected based on the local sub-clan presence. Community members do not appear to play a direct role in the selection of the committee members, which is allegedly occasionally influenced by religious leaders and wealthy business owners.⁶³

⁵⁸ Interview in Dharkenley District, Mogadishu, October 18, 2019; Interview with a Howlwadag Peace Committee member, October 17; Interview with a member of the ADR Centre in Hamar Weyne, October 19, 2019. See also *Political Accommodation and Reconciliation in Somalia*, Final Report, (EUROPEAID/137-021/DD/ACT/SO), Conflict Dynamics International, July 2018.

⁵⁹ Available at: <https://www.soyden.net/peace-building/> – SOYDEN has recently established new DPCs in Gedo region, and in the towns of Barawe, and Warsheikh, and is planning to establish another DPC in Galmudug.

⁶⁰ According to email from Infospectrum December 17, 2019; Interviews with ADR practitioners in Baidoa, 10 and 11 October 2019; Interview with a district official in Baidoa, October 13, 2019.

⁶¹ Interviews in Baidoa, October 11 & 12, 2019; Interview with district official in Baidoa, October 11, 2019.

⁶² The consociational arrangement underpinning Somalia's state building, granting four equal shares to major and a half-share to minor clans.

⁶³ Interview in Baidoa, October 12, 2019.

Once selected, committee members elect chairperson, secretary, and treasurer among themselves, who work alongside a security officer and other local support staff. The Baidoa Town Hall Centre is administered by a committee of 10-50 elders, and includes a chairperson, a treasurer, and a secretary who records the cases.⁶⁴ Interviewees did not provide any detailed information on the structure and selection of committees of other ADRIIs such as the *Malaq+* and DPCs, but indicated that DDG and SOYDEN provide trainings and other support services required by the ADR centers.

3.3 Kismayo

In Kismayo, the respondents mentioned the following ADR Initiatives:

1. ADR center at the MoJ State Office
2. Kismayo ADR center
3. Other forms of ADR: Community Action Groups, Community Dispute Resolution Committees, a Land Dispute Management Committee, and a *Guurti+*⁶⁵

Respondents in Kismayo described the ADR center at the MoJ State Office as set up by the MoJ State Office, accompanied by a separate (non-ADRI) legal aid center, and administered by a Committee of Elders representing the local clans. The ADR Committee in Kismayo is composed of a chairperson, vice chair, secretary, vice secretary, and regular members.⁶⁶ Respondents agreed that committee members are selected by local clan elders (from each local clan), whilst differing on whether they consult with the Jubaland MoJ, each send one elder, or otherwise ensure fair clan representation.⁶⁷



Photo: ADR facility in Kismayo, Jubaland

Civil society representatives are allegedly not included in what is seen as the traditional province of elders, community members or not directly involved in the selection, although influential community members such as religious leaders and business owners may be consulted.⁶⁸ An interviewed NGO staff member in Kismayo explained that some of the committee members were largely original clan elders cast as members of the ADR committee.⁶⁹ The interviewee added that the selection can involve the community members and can appoint civil society representatives on occasion, even though generally, the selection follows the above outlined pattern.

⁶⁴ Interview in Baidoa, October 11, 2019; Interview with district official in Baidoa, October 12, 2019.

⁶⁵ Interview with NGO staff member in Kismayo, 15 October 2019. The interviewee was unable to provide further details of what the *Guurti+*, set up by DDG as a separate unit under DRC, is and how it works

⁶⁶ Interviews in Kismayo, 15 and 16 October 2019.

⁶⁷ Interviews in Kismayo, October 15 and 16, 2019.

⁶⁸ Interview in Kismayo, October 15, 2019.

⁶⁹ Interview in Kismayo, October 15, 2019.



Photo: ADR facility in Kismayo, Jubaland

3.4 Analysis

The MoJ's Alternative Dispute Resolution Unit (ADRU) is tasked with the coordination and guidance of ADR centers and their committees, as well as with managing the overall framework for ADR with the MoJs of the Federal Member States (FMS). To this end, the federal MoJ convenes quarterly meetings with the presence of donors and legal aid organizations, as well as members state MoJ staff, to review the progress of the ADR activities and other access to justice programs across the country.⁷⁰ Beyond this, however, ADR centers appear to be largely overseen by local administrations and linked to local community representatives – most often clan elders. The majority of the interviewed community leaders appreciated this division, and noted that more direct FGS-involvement would likely cause discontent. They stressed that communities prefer to select their own committee members. One elder expressed this sentiment by saying that were the FGS to intervene more directly, the community might not reject a committee outright, but would lose confidence in it.⁷¹

This local freedom is reflected in divergence from the aforementioned SOPs, which stipulate that ADR center committees should consist of ten members – eight men and two women – comprising religious leaders, elders, and other respected community members. These were to be directly selected by the MOJ/ADRU, by the respective district authorities, and members of the civil society. The SOPs further specified selection criteria by reputation as honest and well-respected locally. Finally, committee members were to be selected based on their clan backgrounds, with a view to be inclusive, but to give special considerations to the powerful and dominant clans in the area and their representation.⁷²

In practice, however, selection procedures appear to diverge by location and types of ADR Initiatives. In each location, moreover, descriptions of structure, management, and selections of committees to differed among respondents. ADR centers by and large do not include civil society members, and most committees seem to be formed from elders and religious leaders exclusively. Except for the Peace Committees in Mogadishu, communities are not directly involved in selections, which relegates the composition of committees to community leaders and government officials, with MoJ oversight – depending on location at federal or state level.

It should be noted that researchers found it difficult to obtain clear responses, because respondents did not want to 'rock the boat' and be explicit about power dynamics involved. These differ by location, and are likely to be reflected to some extent in the ADR centers' operations. In Kismayo and Baidoa, regional state structures are dominated by one clan (Mirifle and Darood respectively), and in Kismayo, this clan does not represent the majority of the clans residing in the town. This may affect the trust of

⁷⁰ Information from Infospectrum, given on December 22, 2019.

⁷¹ Interview in Kismayo October 11, 2019

⁷² Note that in the Somali context, majority clans do not always refer to the most numerous clans, but the more powerful and dominant clans in political and military terms. A curious observation is that the ADR Centre in Kaaraan district is more independent from the MoJ because 95% of the people are from the same clan in Middle Shabelle, and thus refer to their elders in Middle Shabelle, rather than the MoJ/ADRU.

the people and may lead to a bias of who gets selected to the committees. In Mogadishu, by contrast, more clans can affect power balances and hence committee structures – although power remains concentrated in the hands of a few major sub-clans. It should be noted here that it is indeed common in Somalia that some offices are simply established to appease clan interests, or ensure political clan balances by providing each clan with one chairperson or member irrespective of qualification or need. There appears to be significant overlap among the ADRIs, which indicates that most engage more or less the same group of elders. It is also noteworthy that in the Benadir Region, respondents mentioned the existence of several voluntary ‘ADR’ initiatives run by elders. These are most likely not ADRIs *per se*, but simply the elders doing what they always have been. This suggests that even in the major urban context of Mogadishu, elders remain the first recourse before any other justice institution.

4. SOCIO-POLITICAL DYNAMICS

The research team started with an implicit hypothesis: that there is a likelihood of competition between different ADR Initiatives, or that political tensions – as they currently underpin relations between member states and the FGS, as well as local political dynamics – may play out in the implementation of some ADR Initiatives. Yet, the study did not find any political groupings or individuals, or any other political interests involved. Rather, there appeared to be broad support for the ADR Initiatives, anchored in communities’ shared interest in peace and justice to be upheld. Although a few respondents hinted at the possibility of political interests being involved, this did not appear to be a major concern. However, findings do suggest that this could change should ADRIs become projectized or receive significant increases in funding, prompting competition over these resources. This section attempts to map out extant and potential challenges for ADR centers arising from this context.

4.1 Challenges Due to Direct FGS Involvement and Funding

Some respondents indicated that projectization, increased funding, or more direct FGS-involvement could create local political tensions over ADR centers⁷³ or even outright graft (especially should funding be channeled through local authorities),⁷⁴ involving the replacement of legitimate ADR practitioners with recipients of patronage.⁷⁵ These concerns were most openly expressed in Mogadishu, whilst respondents in Baidoa and Kismayo were more evasive when asked about potential political issues, or stated that politics do not play a role in ADR.⁷⁶

The most openly critical respondents were civil society leaders in Mogadishu, who mentioned that there are political challenges, such as the application of the 4.5 formula, limited trust by the community, and that the ADR centers are project-based and tend to be money motivated.⁷⁷ Other, more cautious respondents qualified their concerns by noting that “good” structures would mitigate the potential challenges of increased funding and government involvement. This could be interpreted as a wish for more funding and hiring of more ADR practitioners.

At the current levels of funding and involvement, tensions appear to exist at two levels:

I. District Authorities & ADR Centers

Respondents noted that several new district commissioners – especially those hailing from Somalia’s extensive diaspora – do not always understand ADRIs’ remit and purpose.⁷⁸ Some

⁷³ Interview in Mogadishu, October 6, 2019.

⁷⁴ Interviews in Mogadishu, October 18 & 20, 2019.

⁷⁵ Interview in Mogadishu, October 21, 2019.

⁷⁶ Interview in Baidoa, October 11, 2019.

⁷⁷ Interview in Mogadishu, October 6, 2019.

⁷⁸ Interview in Mogadishu, October 18, 2019.

allegedly perceive ADRs as competition, especially as ADRs have better relations with communities and understand local structures better.⁷⁹

2. District Courts & ADR Centers

A practitioner in Kismayo raised the concern that increased funding to ADRs could create tensions with statutory courts. Should ADRs resolve more cases than courts, judges may become concerned about seeming irrelevant, and thus jeopardizing much-needed revenue.⁸⁰

Different ADRs, such as ADR centers and DPCs in Mogadishu, do not appear to be in competition. They are likely interwoven through overlap in their membership, as all must involve locally legitimate elders, whose number is limited. However, DPCs in Mogadishu have been established before ADR centers, can be accessed anytime, and have received better and more training. They hold collective coordination and information-sharing meetings, which often appear to be lacking among ADR centers. An interviewed NGO staff member in Kismayo was perhaps the most optimistic respondent concerning the potential for competition over resources, which currently appear largely absent indeed.⁸¹

“There are no conflicts. The institutions and the ADR Initiatives are meant to provide services and are not meant to make profits.”

4.2 Security Risks for ADR Members

Most of the practitioners and elders did not find that they are facing any security risks due to their membership in an ADRI. This perception underscores that people in general trust and accept elders and *xeer* more than statutory courts, which face persistent threats from Al Shabaab,⁸² who in turn operate among communities. A member of a DPC in Mogadishu explained that the security risks are low and that Al Shabaab does not interfere with their work, precisely because they are not affiliated with government authorities. Should such a risk arise, DPCs would reach out to statutory courts for help.⁸³

Although it remains unclear if MoJ-supervised ADR centers fall within this category, the fact that one respondent claimed that Al Shabaab has begun to emulate ADR Initiatives and work with both parties’ elders to resolve cases, indicates that Al Shabaab respects decisions rendered by elders.⁸⁶ This would indicate a significant shift in the group’s tactics, which before was based

Outliers

Two practitioners, one in Baidoa and one in Kismayo, did find that should a party become sufficiently dissatisfied with an outcome, they may pursue potentially lethal revenge.⁸⁴ One elder in Kismayo similarly argued that current political volatility in Kismayo poses a risk, especially when cases involve criminal elements such as Al Shabaab.⁸⁵ These three accounts present outliers among overall responses.

⁷⁹ Some district commissioners reportedly use their limited term in office for personal gain, or wield both formal and informal influence beyond the technical limit of their office, in which cases ADRs can appear as threats. See: Ken Menkhaus, 2016, *Non-State Security Providers and Political Formation in Somalia*. CSG Paper No. 5, Gerda Henkel Stiftung. Available at: <https://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Non-State-Security-Providers-and-Political-Formation-in-Somalia>; Erik Bryld & Christine Kamau, 2010, *Political Economy Analysis in Mogadishu*, Danish Refugee Council, UNICEF & TANA Copenhagen.

⁸⁰ Interview in Kismayo, October 15, 2019 – it should be noted that in Mogadishu, some courts do refer cases to the ADR centers.

⁸¹ Interview in Kismayo, October 15, 2019.

⁸² See: Gundel et.al, 2016, *Political Economy of Justice*, on how statutory courts are under constant security threats and need protection.

⁸³ Interview in Mogadishu, October 17, 2019.

⁸⁴ Interview in Baidoa, October 11, and in Kismayo October 15.

⁸⁵ Interview in Kismayo, October 15, 2019.

⁸⁶ Interviews in Mogadishu, December 22, 2019.

exclusively on the application of strict shari'ah under the Hanbali *madhhab*,⁸⁷ and involved direct targeting of elders.⁸⁸

4.3 Objectives and Preferences of the ADR Initiatives

Stakeholders' understanding of the purpose of ADRs illustrates the tension between or entanglement of peacebuilding and access to justice in post-conflict environments. The most frequent depictions of ADRs depicted them as responsible for resolving disputes and conflicts in their communities and/or promote peace.⁸⁹ Several respondents described this as inherently improving justice, whilst others pointed directly to increasing access to and improving justice as the ADRs' objectives.⁹⁰ Only respondents selected as 'community leaders' argued that ADRs were set up to support statutory courts and/or the local district administration, which they subtly criticized for being inadequate or merely unable to provide justice services.⁹¹

“The goal is to facilitate the administration of justice, resolve conflicts, and generally complement the work of formal courts that are hard to reach by many people”

- District official, Baidoa

This assessment of courts' and administrations' capacities is reflected in the reasons given for why many people prefer ADRs to the formal statutory courts. Most users interviewed concurred with the ADRU in that ADR centers are faster and cheaper than statutory courts, which charge fees for every step.⁹² Several users added that ADR centers are simply more accessible to users, both geographically and in their understanding of local context, rendering them friendlier, more peaceful, and consensus-seeking than statutory courts – reflecting general preference for customary institutions. A committee member from Hamar Jabjab in Mogadishu added that the center had traction because it worked with language that people understand, instead of legal language.⁹³ As a result, and in the absence of police in many districts, he claimed that his committee receives cases from other districts, potentially for more pragmatic reasons than the ADRs' actual stated goals or objectives.

This level of accessibility may be somewhat compromised by the new ADR SOPs, by 'bureaucratizing' the centers, adding technical rules that are not easily understood, with more rigid management rules on what they can, and cannot, do. In particular the restrictions on resolving cases that involve killings may be problematic given the customary institutions' role in preventing escalation to revenge killings and collective violence (see discussion below). Ultimately, the result may simply be that people skip the ADR centers as an option and revert to individual elders.

This may be less pertinent for ADR centers with specific focus, especially those primarily serving internally displaced persons (IDPs):

⁸⁷ Ahmed et al, 2020, *The Shari'ah in Somalia*.

⁸⁸ cf. Juuso Miettunen, 2019, *Conflict Analysis: Strengthening Police Accountability & Access to Justice in Beledhawo*, Danish Demining Group & Forcier, available at: <https://somhub.org/categories/conflict-analyses/>

⁸⁹ Interviews in Baidoa, October 12 & 13, Kismayo October 15, Mogadishu October 10, 2019.

⁹⁰ Interview October 6, 2019.

⁹¹ Interviews in Mogadishu, October 1 & Baidoa, October 11, 2019

⁹² cf. Joakim Gundel, 2020, *Pathways and Institutions for Resolving Land Disputes in Mogadishu*, Expanding Access to Justice Program, available at: <https://somhub.org/categories/research-studies/>; User interviews were carried out between 10 and 21 October, in Kismayo, Baidoa and Mogadishu.

⁹³ Interview with Committee Member from Hamar Jabjab.

“My ADR is in an IDP center and our work is to resolve disputes that arise between individuals, groups as well as clans. We also work with local organizations to promote peaceful co-existence given the district is host to many IDPs.”⁹⁴

- Practitioner in Baidoa

“[The goal is] to provide justice to minorities, IDPs, and vulnerable people who are victims to the powerful groups.”

- Interviewee in Mogadishu

4.4 Awareness of ADR Initiatives

The ambiguity of the term ‘Alternative Dispute Resolution’ figures most prominently when respondents were asked to estimate their communities’ awareness of ADRs. Eight out of nine interviewed community leaders claimed that people generally know of the ADR options, and only one out of ten interviewed practitioners disagreed with the statement that most people know about the ADR options. This high rate of positive responses may indicate that people are aware of ADR centers, or that they are referring to the general practice of traditional elders applying the *xeer*.

The latter option could be reinforced by a user’s explanation for his use of ADR: because older generations encourage its use – thus probably meaning the traditional *Xeer*. Such informal patterns of influence matter, as most respondents claimed that they heard about the ADR initiatives through a friend, via advertising boards, in community gatherings, in mosques, via radio/TV, peacebuilding campaigns, and through Moj or local government awareness campaigns.

Yet, this appears to differ by location. In Baidoa, respondents noted that sheiks and community leaders spread awareness on ADR initiatives,⁹⁵ whilst in Kismayo, a respondent pointed to legal aid organizations.⁹⁶ Indeed, corresponding to lower estimates of public awareness of ADRs in Mogadishu, practitioners listed significantly fewer examples of awareness raising than their counterparts in Baidoa and Kismayo. DPC practitioners noted that their work speaks for them, and their members are elected from the communities they serve, whilst practitioners from Moj ADR centers stated that awareness is raised via media (a radio programme airing the day the ADR opened, mentioning Radio Kulmiye) and slogans on a billboard.

in Hamar Jabjab, BRA



Photo: ADR Center

⁹⁴ Interview in Baidoa, October 11, 2019.

⁹⁵ Interviews in Baidoa, October 11, 2019.

⁹⁶ Interview in Kismayo, October 15, 2019.

5. CASE MANAGEMENT AND PROCESSING

5.1 Case Types & Records

According to the ADRU, since August 2018, ADR centers have resolved about 400 cases, mostly family and land cases.⁹⁷ All interviewees agreed that the majority of cases they handle are civil cases. In Baidoa and Kismayo, however, practitioners noted that they handle criminal cases as well, albeit to varying degrees, which would contravene the MoJ's ADR SOPs.⁹⁸ Following family and land matters, other case types concern work relations, rent issues, and commercial disputes. Two respondents, one from Kismayo and one from Baidoa, stated that they have been involved in solving inter-clan conflicts. All interviewed ADR members claimed that they keep hard copy records of the cases and share copies with official institutions in one form or another.⁹⁹ Beyond this, specific filing and sharing systems differ.

- In Kismayo, one ADR initiative shares its case files digitally with the MoJ, and another reportedly sends copies to statutory courts.¹⁰⁰ Both keep hard copies of case files.
- In Mogadishu, only a member of the Howlwadag DPC expanded on filing procedures,¹⁰¹ outlining a file system provided by SOYDEN. The DPC keeps hard copies and share copies with the district authority for all cases not classified "small cases", for which no records are kept.
- In Baidoa, one ADR center keeps hard copies of their case files, shares copies with the MoJ, and is in the process of digitalizing them. Another ADR center keeps its case files both in hard and soft copy, and shares copies with both MoJ and local administration. A third ADR center keeps its case files in both hard and digital copies and shares copies with the MoJ only.¹⁰²

In Mogadishu, case load per center reaches approximately 35-40 per month, which is why the MoJ aims to expand beyond the three districts currently served to all 17 districts of the city. ADR committee members agreed that the case numbers are very high, exceeding their current capacity.

SOPs

That ADR SOPs prohibit ADR centers from handling criminal cases, especially killings or cases of SGBV, is problematic, because the customary *xeer* is designed to deescalate these and prevent further violence, which may be why some ADR centers contravene these SOPs, and do handle such cases.¹⁰³

5.2 Case Processing

The generic description of the dispute resolution processes in the ADR centers as given by the ADRU of the MoJ is as follows:

1. An aggrieved party comes to the center and fills in a form, which is free of charge.
2. The committee calls in both sides of the dispute and the respected elders of the families, as well as potential witnesses.
3. The committee explains its role and asks both sides if they want to open the case.
4. The committee listens to the case.
5. The committee mediates and works to identify compromises, lacking powers of enforcement.
6. The agreed decisions are written up, and three copies of the document are produced.

⁹⁷ Gundel, 2020, *Pathways and Institutions for Resolving Land Disputes in Mogadishu*.

⁹⁸ See: ADRU, 2019, *Alternative Dispute Resolution Standard Operational Procedures*, sections 6 & 7.

⁹⁹ Interviewees offered to show the files, but prevented researchers from reading or copying them for analysis, due to files' confidentiality.

¹⁰⁰ Interviews in Kismayo, October 13 & 15, 2019.

¹⁰¹ Interview in Mogadishu, October 19, 2019.

¹⁰² Interviews in Baidoa, October 11, 13 & 14, 2019.

¹⁰³ The SOPs change the principle of the first post-independence Somali law: parties to a dispute can choose between *xeer*, shari'ah, and statutory courts when opening their case.

Each party receives a copy, and the third one is sent to the local formal court. Here it will receive a stamp and will be signed by the Moj. If a party is not satisfied with the decision, the committee will refer to a court and inform it about the history of the case and the process.

This does not apply equally to all types of cases. For example, inheritance disputes can be mediated, but final decisions remain with statutory courts as inheritance disputes fall under shari'ah, in which committee members may not be educated. Procedures furthermore vary by location.

5.2.1 MOGADISHU

Mogadishu contains a variety of institutions, which diverge from the general pattern in several points:

- **With District Peace Committees (DPCs)**, both parties will sign a document upon opening a case in which they agree that they will accept the committee's decision.¹⁰⁴ Then the committee (usually fifteen members) will listen to the cases presented by each side separately and together, including the presentation of witness. There are no charges, no enforcement, and the main methodology is mediation and negotiation rather than sentencing.¹⁰⁵ The DPCs function entirely independently of the Moj or other authorities. If they need documentation from the aggrieved parties or witnesses, they will request them.
- **At the Dharkenley DPC**, an elder and religious leader oversee proceedings.¹⁰⁶ Cases they cannot resolve are referred to statutory courts.
- **The Howlwadag DPC** sometimes receives cases from the district court or the district commissioner.¹⁰⁷ The committee does not announce a sentence but negotiates a solution.
- **ADR committees in Mogadishu** operate similarly. Cases are opened by both parties being called upon, and then resolved through the *xeer*, and sometimes via shari'ah, as described above.¹⁰⁸ A practitioner in Hamar Jabjab added that should one side not appear, the case is cancelled as summons cannot be enforced.¹⁰⁹

An elder in the Hamar Jabjab ADR centre described the process in this way:¹¹⁰

“First they invite both sides and identify the case. If it is a criminal case, they will send the file to the court. If not, and the parties accept their mediation, the actual hearing will take place. After a resolution is received the parties will receive a document with the decision and two copies will be sent to the district authority and district court. Our outcomes are always based on mediation and consensus.”

5.2.2 BAIDOA

In Baidoa, cases are first registered by the ADR center's secretary,¹¹¹ who is also a committee member.¹¹² Proceedings commence with a session in which the two parties present their cases, including their witnesses and evidence. The committee then determines a resolution using the *xeer*.¹¹³ The committee then agrees on a settlement through consultations with the aggrieved parties.¹¹⁴ The

¹⁰⁴ This follows the traditional *xeer* practice, in which the parties in a conflict have to swear in a ceremony that they will follow the committee of elders' verdict. Interview in Mogadishu, October 19, 2019.

¹⁰⁵ Note that in the Somali tradition, non-compliance with the elder's judgements usually triggers acts of retribution, and in cases of murder, revenge killings.

¹⁰⁶ Interview in Mogadishu, October 18, 2019.

¹⁰⁷ Interview in Mogadishu, October 17, 2019.

¹⁰⁸ Interview in Mogadishu, October 20, 2019.

¹⁰⁹ Interview in Mogadishu, October 21, 2019.

¹¹⁰ Interview in Mogadishu, October 20, 2019.

¹¹¹ SOPs propose coordinator and clerk instead of secretary. See: ADRU, 2019, *Alternative Dispute Resolution Standard Operational Procedures*.

¹¹² The SOP also do not use the term committee, but refer to a "Management Team" and "Adjudicator Panel." *Ibid*.

¹¹³ Interview in Baidoa, October 11, 2019.

¹¹⁴ Interview in Baidoa, October 13, 2019.

elders in Baidoa explained that the process starts with prehearings before engaging parties and witnesses.¹¹⁵ The process is usually based on mediation and consensus, although arbitration occurs.

5.2.3 KISMAYO

In Kismayo, processes start with parties registering the cases through their elders.¹¹⁶ This is then followed by a discussion of the case and two further hearings during which each side presents their respective story, witnesses, and other evidence. Thereafter follow the ‘xeer procedures’ for resolving the disputes.¹¹⁷ Interviewed elders in Kismayo added that disputes are handled through mediation and arbitration, depending on the case.¹¹⁸ One elder claimed they apply xeer and Sharia.¹¹⁹ In case of failure of the process, the case is referred to statutory courts.

5.3 The ADR process versus the traditional practicing elders

All descriptions indicate that ADR centers simply perform the xeer, with added technical support and infrastructure – an observation echoed by interviewed elders. However, a few differences were of note:

- In Mogadishu practitioners noted that documentation by ADR centers as an important difference, and added that a new xeer is needed to address the urban setting.¹²⁰
- In Kismayo and Baidoa, practitioners stated that ADR centers use newer conflict resolution methods and members are trained to address disputes involving younger generations.¹²¹

Interviewed users and two elders underlined that the ADR initiatives seem to be more “modern”, and less “influenceable” or “corruptible” than the traditional practice.¹²² One user also suggested that the ADR initiatives benefit women. Together with added structure, ADR centers reportedly evoke more confidence than traditional customary institutions, because it is easier to access the ADR centers than convening elders in the traditional way.¹²³

Yet, even though ADR figures as first choice within most urban and rural communities, ADR centers do not reach remote villages. In rural parts, therefore, traditional processes remain relevant.¹²⁴ The traditional elders still play a critical role in resolving disputes, especially in the villages and they have the deep knowledge and history of causes of conflicts in their localities.¹²⁵

5.4 Observations

All ADR centers under study appear to work in a similar manner, centering upon elders’ application of xeer, before they may consult the shari’ah. Only if elders cannot resolve a case it is referred to statutory courts. What renders more granular analysis difficult is that respondents do not elaborate on the xeer process other than using the words arbitration, mediation, or negotiation – and the use of the terms arbitration and mediation remains ambiguous in most responses.¹²⁶

¹¹⁵ Interviews in Baidoa, October 11 and 12, 2019.

¹¹⁶ Interview in Kismayo, October 15, 2019.

¹¹⁷ Interviews in Kismayo, October 13 & 15, 2019.

¹¹⁸ Interview in Kismayo, October 15, 2019.

¹¹⁹ Interview in Kismayo, October 11, 2019.

¹²⁰ Interviews in Mogadishu, October 19 & 20, 2019.

¹²¹ Interview in Kismayo, October 13 and Baidoa October 11 & 13, 2019.

¹²² Interviews Baidoa, October 11, Kismayo October 10, 2019, and Mogadishu, October 20, 2019.

¹²³ Interview in Kismayo, October 15, 2019.

¹²⁴ Interview in Baidoa, October 11, 2019.

¹²⁵ Interview in Baidoa, October 13, 2019.

¹²⁶ In Somali (*Af Mahatiri*), both terms are covered by the same word: *dhaxdhaxaadin*.

6. FUNDING, FEES & SUSTAINABILITY

Funding is a cross-cutting issue, not only for ADR initiatives, but for courts as well. Political dependence for funding undermines a judiciary's independence and legitimacy, and subverts its accountability to the public.¹²⁷ External support, such as international aid funds, must therefore understand local political dependencies to avoid reinforcing rent-seeking behavior and practices of extraversion.¹²⁸

6.1 Funding of ADR Initiatives in Mogadishu

The ADRU claimed that it provides ADR centers in Mogadishu with office spaces, a secretary for the writing-up of decisions, petty cash for tea, and transport money at US\$100 per month per committee member. Interviewed practitioners agreed, specifying that transport money is transferred via Dahabshiil and costs are reimbursed for transport to seminars and, within an allocated amount, for stationery.¹²⁹ They assumed that funds originate with IDLO, but added that they have not had any direct contact with the organization.

One committee member from Hamar Jabjab complained that the transport allowance is insufficient to cover members' families' needs, which then prevents committee members from carrying out their tasks. Other committee members alleged that other states and regions with lower population figures have just as many or more centers and receive more funding.¹³⁰

"I have heard that donors fund us, but I do not know who the donors are. We do our work voluntarily and independently."

- Practitioner in Hamar Jabjab, Mogadishu

According to ADR practitioners in Mogadishu, the MoJ set-up ADR centers were funded by the IDLO, while the Peace Committees were organized by SOYDEN, in both cases respondents were unaware of who fund them.¹³¹

The 17 DPCs were initially supported by SOYDEN, but now mainly receive funding from their members and local communities. Most respondents were unaware of precise funding sources, and a practitioner at the Howlwadaag DPC claimed that they received no funding nor training.¹³²

"Even though we did not get any funds from outside, we contribute from our own pockets, and sometimes receive very small amounts from the local community."

- DPC member in Mogadishu

6.2 Funding of ADR Initiatives in Baidoa

According to practitioners, ADR centers in Baidoa receive minimal support from the MoJ and local administration, and training and incentives from NGOs.¹³³ Beyond this relative consensus, respondents differed widely in their attribution on where funding originates, spanning voluntary contributions from wealthy businesspeople, elders, and educational institutions, state and federal sources of funding, external actors such as UNDP, DRC, or NRC, and humanitarian actors where IDPs are serviced.

A Baidoa district official and two users noted that ADR centers charge a small fee of US\$20 for registration of their cases, but dismissed the potential for corruption with the argument that it is

¹²⁷ See also: Gundel et.al, 2016, *Political Economy of Justice*

¹²⁸ cf. Menkhaus, 2018, *Elite Bargains and Political Deals.*; McCullough & Saed, 2017, *Gatekeepers, elders and accountability in Somalia.*; Hagman, 2016, *Stabilization, Extraversion and Political Settlements in Somalia.*; Menkhaus, 2003, *State collapse in Somalia.*

¹²⁹ Interviews in Mogadishu, October 20 and 21, 2019.

¹³⁰ Interview in Mogadishu, October 21, 2019.

¹³¹ Interview in Mogadishu, October 19 and 20, 2019.

¹³² Interview in Mogadishu, October 17, 2019.

¹³³ Interview in Baidoa, October 11, 2019.

difficult to bribe an entire committee, with one official adding that such cases are uncommon.¹³⁴ Three practitioners rejected any claims of fees charged, but reported receiving ‘sit-in’ incentives, such as tea, presumably from users.¹³⁵

6.3 Funding of ADR initiatives in Kismayo

Accounts of funding sources differ as widely as the alleged funding sources themselves. Practitioners and MoJ staff pointed to the FGS, UNDP, and DRC – which a DRC member of staff in Kismayo confirmed. Respondents did not specify, however, whether they referred to the MoJ ADR Centre only, or all the various ADR initiatives together.¹³⁶ In yet another version, a practitioner at the ADR Centre in Kismayo stated the Jubaland State government to the above, and added that CSO-managed centers are supported through initiatives like the Somali Stabilization Fund (SSF),¹³⁷ whilst another ADR committee member pointed to funding by the MoJ with some support from NGOs operating in Kismayo.¹³⁸ Similarly to Baidoa, it appeared common that users provide tea as incentives for committee members to sit in meetings.¹³⁹ A practitioner added that they do charge an unspecified registration fee.¹⁴⁰

6.4 Analysis of Funding and Sustainability

The resources needed for ADRIs to continue to convene and operate can come from three sources: public funding via governmental authorities, via users in the form of community contributions or fees, or external support from international actors. Apart from a few mentions of ADRU and MoJ support at varying levels, there has generally not been any public funding to the ADR initiatives. In Baidoa, one practitioner mentioned that the MoJ had promised funding, but nothing ever arrived.

A number of practitioners and community leaders thought that there should be more government funding, and that the ADR centers should be formalized as a government departments with own budget allocations and permanent employees¹⁴¹ – which another practitioner vehemently rejected as potentially compromising their legitimacy.¹⁴² The potential detriment of greater direct involvement by government authorities at this stage of state building has been discussed above in section 4. The potential conflict of interest was especially elucidated by rivalry among different government institutions over funds. And indeed, respondents in Mogadishu noted that statutory courts occasionally may prohibit a case from being taken to ADRIs, claiming that they lack capacity, whilst allegedly seeking to earn money from the cases.¹⁴³

Such rent seeking behavior would likely be exacerbated by all three funding pathways. Yet, only one respondent mentioned an incident of corruption within ADRIs in the past, which was resolved by the MoJ.¹⁴⁴ This may be due to the fact that apart from the mentioned tea incentives, most respondents claim that ADRIs do not charge any fees, and receive little direct support from external actors, mostly in the form of training and incentives, in Baidoa and Kismayo.

¹³⁴ Interviews in Baidoa, October 11, 12 & 13, 2019.

¹³⁵ Interviews in Baidoa, October 11 and 14, 2019.

¹³⁶ Interviews in Kismayo, October 15, 2019.

¹³⁷ Interview in Kismayo, October 15, 2019.

¹³⁸ Interview in Kismayo, October 15, 2019.

¹³⁹ Meeting in Kismayo, October 16, 2019.

¹⁴⁰ Interview in Kismayo, October 15, 2019.

¹⁴¹ Interview in Baidoa, October 10 & 14, 2019.

¹⁴² Interview in Mogadishu, October 21, 2019.

¹⁴³ Interviews in Mogadishu, October 20 and 21, 2019.

¹⁴⁴ Interview in Mogadishu, October 19, 2019.

A minority of respondents argued that ADRIs should also be allowed to charge fees and impose fines.¹⁴⁵ This appears mostly out of ambition to expand their role in dispute settlement rather than immediate rent-seeking behavior, as four respondents from Baidoa and Kismayo all stated that they believe they have the capacity to handle more types of cases – particularly violent criminal cases, such as robberies and murder, the traditional remit of customary *xeer* and in direct contradiction to the ADRU’s SOP.

To expand and shoulder a greater caseload, many respondents agreed that the ADR initiatives need more capacity building,¹⁴⁶ awareness and collaboration with the MoJ – but independently.¹⁴⁷ Only one respondent disagreed with their potential for expansion,¹⁴⁸ whilst another deemed it imperative as long as courts remain inaccessible and unaffordable for many.¹⁴⁹ It is noteworthy here that respondents did not mention any particularly good relationship between ADR centers and statutory courts, or that the courts can legitimize solutions and ensure enforcement.¹⁵⁰ Instead, courts are mostly mentioned as potential competition.

An expansion of ADRIs in scope and capacity to handle more cases may be warranted. Any link to greater funding appears to present an impasse. Partner staff from SOYDEN warned outright against providing salaries and funds such as per diems and transport money directly to the elders, because such funds tend to “spoil everything”¹⁵¹ – local authorities may attempt to nominate relatives. This poses the challenge of ensuring that levels of external support are *just right*, without underfunding initiatives but also without projectization threatening to turn constructive initiatives into rent-seeking projects.¹⁵² Here, however, support may err on the side of opting for assistance through training and infrastructure, as one mark for traditional elders has been their integrity, to work voluntarily as they have always done.¹⁵³

¹⁴⁵ Interviews in Baidoa, October 11 & 12 and in Kismayo, October 15, 2019.

¹⁴⁶ Interviews in Baidoa, October 11, in Mogadishu, October 17 & 20, and in Kismayo, October 15, 2019.

¹⁴⁷ Interview in Mogadishu, October 20, 2019.

¹⁴⁸ Interview in Mogadishu, October 19, 2019.

¹⁴⁹ Interview in Mogadishu, October 20, 2019.

¹⁵⁰ one of the main arguments by donors to support the ADR initiatives

¹⁵¹ Interview in Mogadishu December 22, 2019.

¹⁵² Gundel & Dharbaxo, 2006, *Predicament of the Oday*

¹⁵³ *Ibid.*

7. OUTCOMES & IMPACTS FOR WOMEN & MINORITIES

As mentioned in section 5, ADR processes are always based on mediation and consensus, not on judgment and sentencing. This elevates the framework applied in terms of analytical value, as specific outcomes vary by what is acceptable for parties involved rather than categorically by type of case. Respondents' depiction of outcomes echoes this in its vagueness: none of the respondents disaggregated outcomes by case type, but characterized outcomes as "mostly acceptable", "win-win", "positive", or "successfully resolved."

Respondents were clearer on which legal norms the ADRs apply. The primary legal source and usual point of departure is the traditional *xeer*, followed by the *shari'ah*, and ultimately the statutory legal framework, which in turn is based on *shari'ah* and respect for *xeer*. All constitutions at federal and state level stipulate that laws must not contravene *shari'ah* norms,¹⁵⁴ which one respondent stressed also applies to *xeer*. *Shari'ah* is directly applied in some to most family-based disputes, particularly in property, divorce, and inheritance cases, echoing Somalia's first post-independence constitution.¹⁵⁵

7.1 Outcomes for Women

Half of all respondents – including all interviewed elders and religious leaders – claimed that ADR is trying to provide "equal justice" and to "try to solve the cases as best they can," and most of the interviewed ADR practitioners claimed that they do not discriminate based on gender. Yet, the ADR's basis in *xeer* implies that it carries over the inherently patriarchal nature of customary practice, which in several respects does not live up to international human rights standards, which is reflected in women's access to justice and their representation in committees, both discussed below.¹⁵⁶

The elders' responses to the questions on gender reflect a widespread denial of harmful practices towards women amongst many men in the predominantly patriarchal Somali society. Younger women with better access to education, some lawyers by training, have already begun to challenge these structures. More immediately, the *mélange* of *xeer* and *shari'ah* provides some mitigation. One religious leader from Baidoa concurred that women are disadvantaged by *xeer*, but not under *shari'ah* norms.¹⁵⁷

7.2 Stigma and female access to justice

The first barrier to women's access to customary justice or mediation lies with their ability to physically access the institution. Traditionally, women can only bring their cases to elders with a male intermediary. Nearly all ADR practitioners interviewed indicated that the same applies to women seeking to approach ADR initiatives.¹⁵⁸ A member of the Hamar Jabjab ADR center added that the committee facilitates an intermediary, specifying the intermediary can be male or female. All but one of the interviewed women noted that the same requirement applies to appeals to ADRs, and attribute the need for intermediaries and potential stigma for women who seek out justice directly to the patriarchal underpinnings of their society.¹⁵⁹

Most users agreed with this depiction, whilst several – mostly male – respondents who reject the notion of a stigma explained that women are simply too shy to present their own case in front of the often exclusively male committees. Some elaborate that shyness stems from cultural expectations, implicitly affirming the aforementioned engrained patriarchal structures, whilst others attribute shyness to a lack of awareness of existing women's rights. Yet, should women indeed require

¹⁵⁴ Ahmed et al, 2020, *The Shari'ah in Somalia*.

¹⁵⁵ See Gundel et.al, 2016, *Political Economy of Justice*.

¹⁵⁶ Interview in Kismayo, October 10, 2019

¹⁵⁷ Interview in Baidoa, October 20, 2019. The seven user interviewees state that the processes were fair and equal, but the group is too small to be considered representative and should as such just be viewed as statements about their perception of their own case. Users and members of the public stated that they do not think that gender equality is a priority for the ADRs. See also: Ahmed et al, 2020, *The Shari'ah in Somalia*.

¹⁵⁸ Interview in Mogadishu, October 20, 2019

¹⁵⁹ Attribution: interview in Kismayo, October 10, 2019; outlier: interview in Mogadishu, October 21, 2019

intermediaries, allegations of shyness lose relevance. This is likely, as previous studies identified the same barrier to women’s access to justice concerning statutory courts.¹⁶⁰

7.3 Womens’ membership in ADR Initiatives

The Moj’s policy on ADR centers stipulates a mandatory quota of female members.¹⁶¹ A respondent from Kaaraan appreciated such inclusion as rendering committees “more gender friendly” and conducive to gender equality. As to whether centers achieve this quota, however, responses differed:

- Five out of the seven interviewed ADR practitioners claimed to have no female colleagues;
- One practitioner in Kaaraan stated that two out of ten committee members are female;
- An elder from Hamar Jabjab claimed that three out of ten committee members are female;¹⁶²
- Female respondents in Kismayo reported that no female members in their ADR committees;¹⁶³
- Respondent groups from Baidoa state that their committees, whilst comprising female members, restricts women from taking on leading roles;¹⁶⁴
- In Howlwaddaq, a DPC member noted that four out of 15 committee members are female.

In contrast, DDG’s longer-term approach to including women into the *Guurti+* arrangements in their appeared to have yielded different results. A key finding from the recent study of the project found that:¹⁶⁵

“women and youth representatives’ involvement in local civil society provides them with social capital, which further legitimizes [sic!] their inclusion, and enhances Guurtis’ traction with local communities, rectifying some of the elders’ limitations”.

Yet, a recent evaluation has shown that inclusion does not necessarily lead to justice in SGBV cases.¹⁶⁶

7.4 Outcomes for Minority Groups

Regarding minority groups, most respondents, including practitioners, simply stated that the process is fair or evaded an answer entirely. Especially elders in Kismayo and Mogadishu repeatedly asserted that they do their utmost to avoid bias, and that users are free to appeal to courts.¹⁶⁷ Their counterparts in Baidoa allowed that despite their efforts, differences in outcomes for vulnerable groups can occur, largely due to a lack of representation.¹⁶⁸

This suggests that political representation as well as representation in committees does play a role, and raises doubts as to whether Kismayo and Mogadishu ADRIs are indeed free of discrimination, given the importance of representation in both locations. Only one interviewee from the practitioners group noted active support in the form of allowances for negotiations for vulnerable groups.¹⁶⁹

¹⁶⁰ Gundel, 2020, *Pathways and Institutions for Resolving Land Disputes in Mogadishu*, p. 34.

¹⁶¹ ADRU, 2019, *Alternative Dispute Resolution Standard Operational Procedures*.

¹⁶² One of the interviewees in the ‘other practitioner’ interviewee category was a female committee member from Hamar Jabjab.

¹⁶³ Interview in Mogadishu, October 21, 2019

¹⁶⁴ The interviewee explained that this is due to their *xeer* being derived from shari’ah. One of the Baidoa group interviews added that there are five women in each of the ADR centers in their district.

¹⁶⁵ Mydlak, 2019, pp.23.

¹⁶⁶ Forthcoming

¹⁶⁷ Interviews in Kismayo, October 11, 2019 and in Mogadishu, October 20, 2019.

¹⁶⁸ Interviews in Baidoa, October 11 & 13, 2019

¹⁶⁹ Interview in Baidoa, October 11, 2019

8. SHARI’AH IN ADR

Customary *xeer* norms and shari’ah rules and precepts are deeply intertwined in tradition and practice. Where Islamic scripture allocates space for customary norms to concretize general regulations and adapt them to local context, *xeer* refers domestic affairs by and large to adjudication by shari’ah.¹⁷⁰ The interviewed practitioners, elders and religious leaders confirmed this, and several interviewees added that shari’ah is used when the *xeer* is unclear. Where both contradict, however, interviewees differed from one another. Some asserted that shari’ah supersedes *xeer*, some asserted the obverse. Some denied that contradictions occur, and prioritized procedure – negotiation and mediation with attention to context and disputing parties’ choice.¹⁷¹

Most practitioners who applied the shari’ah did not refer to a specific *madhhab*, a school of Islamic jurisprudence (*fiqh*), and simply referred to the Qur’an and the hadith of the Sunnah as their sources. This suggests that they follow the Shafi’i *madhhab*, which is dominant in Somalia and rejects other sources of *fiqh*, or the Hanbali *madhhab* propagated by Al Shabaab and more conservative Salafi scholars, which has risen in popularity over the past decades but remains minor compared to Shafi’i. Interviewed religious leaders confirmed this,¹⁷² and noted that most follow the interpretations of religious members of the committee, local imams or scholars, and to a lesser degree prominent imams or sheiks, which one respondent clarified as the founders of the great *madhhabs*: “the interpreters are the most well-known imams, such as al-Shafi’i and Malik [ibn Anas]”.¹⁷³

9. ALIGNMENT WITH HUMAN RIGHTS

Justice sector reform efforts frequently find themselves in a space of tension between upholding international human rights norms and working with existing and legitimate customary norms that often contain rights-abrogating practices.¹⁷⁴ This also applies to practitioners of customary justice, who navigate the safeguarding of tradition in a changing and increasingly globalized context. This tension is apparent among interviewees, who split into one group supporting greater alignment with human rights as a “global trend”,¹⁷⁵ and another deeming human rights are unnecessary as both *xeer* and shari’ah are fair, with some open to accept human rights when not in contradiction to *xeer* or shari’ah.

Respondents in all locations were equally split in regards to whether their ADRs conform to international human rights standards. The majority of practitioners of customary *xeer* in all locations found their centers to not do so, but individual respondents in each place expressed either the contrary or hope that both normative frameworks will gradually align. Religious leaders were equally split, although four out of seven argued that such alignment is unnecessary as human rights are already protected by the shari’ah. The three others agreed that their work should conform to global trends.

Female respondents tended to be more skeptical. Only two claimed that ADR centers uphold rights equitably – one of whom added that this is largely practitioners’ self-perception and not consistently applied.¹⁷⁶ Only two respondents argued openly against human rights as not “not globally agreed.”¹⁷⁷

It should be noted that most interview respondents for this study exhibited a vague understanding of what international human rights standards entail. The ADRU is not unaware of this, and claims to have

¹⁷⁰ Robin Mydlak, 2020, *The Clan System and Customary Justice in Somalia – A Brief Introduction*. Danish Demining Group.; Andre Le Sage, 2005, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*. Henry Dunant Centre for Humanitarian Dialogue.

¹⁷¹ Interview in Mogadishu, October 20, 2019

¹⁷² Interviews in Mogadishu, October 2 & 10, 2019

¹⁷³ Interview in Baidoa, October 11, 2019

¹⁷⁴ cf. Danish Institute for Human Rights, 2009, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*. UNDP, UNIFEM and UNICEF, p. 16.

¹⁷⁵ Interview in Kismayo, October 15, 2019

¹⁷⁶ Interviews in Mogadishu, October 21, and in Kismayo, October 14, 2019

¹⁷⁷ Interview in Mogadishu, October 20, 2019

provided training in human rights standards, conflict resolution, policy & procedures, women's empowerment, and the importance of justice in society to ADR committee members. More recently, the ADRU has widened this approach to elders and communities, and in March 2019 facilitated a workshop on traditional justice and preventing human rights violations.

Outlier

One elder from Mogadishu argued that: “*the other members should receive human rights trainings to know that there is no difference and forget the human rights phobia.*”¹⁷⁸ This interviewee is the only elder to claim having received human rights training (although it is unclear whether or not this was in connection with his current involvement in the ADRI), that his ADR center conforms with international human rights standards, and that his committee successfully used human rights-based arguments in mediation that were accepted by both parties. The interviewee claimed that the committee combines *xeer* and human rights methodically, but did not elaborate how.

Yet, only two out of seven ADR practitioners interviewed in Kismayo and two respondents in Mogadishu stated that they had attended a human rights training, and noted that DRC¹⁷⁹ and IDLO have “started” to offer such training in Kismayo.¹⁸⁰ Any other respondent who had received training on human rights specified that this was independent of ADRI.¹⁸¹ This is reflected in the practical application of human rights in ADR processes. Most respondents professed that they have not attempted incorporating human rights standards into their practice. Two practitioners stated that they have seen cases where human rights-based arguments were used, but did not clarify how or if the argumentation was

accepted.¹⁸²

In addition to fledgling training on human rights standards, one respondent in Kismayo recalled brief lessons from the district court, but cautioned that those were insufficient, and that trainings had not resulted in the incorporation of human rights standards in practice.¹⁸³ All but one respondent noted that no methods for aligning the *xeer* with international human rights standards exist at this time.

10. CAN THE XEER BE HARMONIZED & INSTITUTIONALIZED?

It is unlikely that government legislation or procedures are going to be successful in aligning customary norms such as the *xeer* with human rights standards. This study's findings indicate that little has been achieved in this respect.

Early initiatives in Somaliland in 2004 to 2006 and Puntland in 2006 and 2007 achieved social change and changes in practice towards a human rights-compliant *xeer* through time-consuming and complicated processes that included awareness-raising to show why human rights are a valuable addition. Crucially, the projects worked directly with community-based elders, who are not only the key actors in these processes, but also the ones who need to accept new norms for behavior to change. It is possible that *xeer* becomes compliant with international human rights standards, but it is unlikely to happen via top-down policies, governmental regulations, or constitutional requirements if communities have not been part of their formulation. While this may sound easy in theory, it is a difficult process in practice, not least because it will inevitably challenge many fundamental components

¹⁷⁸ Interview in, Mogadishu, October 20, 2019

¹⁷⁹ Interview in Baidoa, October 14, 2019 – The respondent expected upcoming human rights training from DDG through the CERF program. It should be noted here that the CERF-funded DDG engagement with elders concluded in 2016/17.

¹⁸⁰ Interviews in Kismayo, October 13, and in Mogadishu, October 19, 2019.

¹⁸¹ Interview in Mogadishu, October 19, 2019

¹⁸² Interview in Kismayo, October 15, and in Baidoa October 11, 2019.

¹⁸³ Interview in Mogadishu, October 20, 2019

in culture and religion. A rushed, policy-induced effort may invite blowback towards more rights-abrogating practices.

Incorporating inherently dynamic customary justice institutions, albeit formalized in procedure, into statutory structures that are formalized by codified and thus static frameworks, is a delicate undertaking. It risks undermining not only their character, but the elements that render them legitimate among their communities. The manner in which the MoJ's ADRU and its local centers have evolved warrants caution. Policies and recent SOPs may accelerate processes to the detriment of trust in ADR initiatives, as they risk moving away from responding to immediate societal needs.

The ADRU's SOP for ADR centers appears to morph the centers from an enhanced application of the *xeer* towards a more generic third party dispute mediation centers that eases courts' caseloads within the auspices of statutory law. Should ADR centers become an avenue for forcing customary justice norms into a regulated framework aligned with the statutory laws, it risks undermining the role of traditional elders in Somali society. A recent IDLO evaluation of their support to ADR centers – '*strengthening linkages between the formal justice system and traditional dispute resolution*' – more carefully depicted the 'harmonization' of justice systems and changing customary institutions towards greater compliance with international human rights standards as the program's main objective.¹⁸⁴ This echoes the objectives of the 2004-2007 engagements in Somaliland and Puntland in principle, albeit not in method, which thus far only DDG's *Guurti+* initiative appears to have incorporated.¹⁸⁵

Attempts to change local justice institutions also bear risk, as these institutions respond to local socio-political structures and beliefs. They draw legitimacy from social acknowledgement and socio-cultural norms, and their effectiveness depends on voluntary compliance. If they are externally altered in a way that does not meet social expectations, they may lose their ability to solve conflicts. Formalization, regulation, and even training can all undermine their role in achieving and maintaining peace.

As ADR initiatives aim to establish more 'equitable' customary justice processes to protect vulnerable groups, they may undermine the very essence of *xeer*, which primarily pertains to conflict prevention and resolution. Moreover, these groups are protected as *biri mageydo* (protected from the spear).¹⁸⁶ Equitable justice may be better located with rights-based justice providers, including shari'ah-based institutions.¹⁸⁷ Vulnerable groups and poor people currently struggle to receive equitable treatment by statutory courts, which suggests that shari'ah-based justice may provide a better entry-point.

Given the extreme challenges, which Somalia's judicial system is facing, it is questionable whether it is of benefit to integrate institutions designed for collective conflict resolution into an individual rights-based judiciary. Rather than just training elders on international human rights standards, training them in human rights-friendly interpretations of the shari'ah may be more effective, as it is more acceptable to their communities. Although a Somali proverb says that only during peacetime can the *xeer* be changed, this could prepare the ground for elders to agree on new *xeer* which gradually incorporates human rights elements in resolutions formulated at elders conferences.

II. CONCLUSION

The general trust communities bestow upon the variety of existing ADR initiatives is owed to their perception as more just, more affordable, more efficient, and more accessible for urban populations.

¹⁸⁴ IDLO further provided training to ADRU staff and elders on human rights standards. While stakeholders indicated in the evaluation that 'awareness on human rights' has increased, the evaluation could not establish whether elders now provided 'fairer' dispute resolution. See: IDLO, 2018, *Final Evaluation of the IDLO-implemented project 'strengthening linkages between formal and informal justice system and traditional dispute resolution system to improve access to justice in Somalia (Phase II)*, International Development Law Organization.

¹⁸⁵ See: Gundel & Dharbaxo, 2006, *Predicament of the Oday*.

¹⁸⁶ Clans are obliged to protect their guests (IDPs would come under this), women, children, elders, all whom the *waranle* (male citizens/warriors) are forbidden to harm. See: Gundel & Dharbaxo, 2006, *Predicament of the Oday*, p.7; ICRC, 1997, *Spared from the Spear: Traditional Somali Behaviour in Warfare*, Nairobi: ICRC Somalia, Delegation, February 1997.

¹⁸⁷ Erica Harper, 2019, *Gender Equality and Social Inclusion Analysis in Somalia*, Expanding Access to Justice Program.

It appears that most ADRs are effective as they are based on *xeer* and shari'ah norms and processes, which both, especially shari'ah, enjoy broad legitimacy among communities and require little resources and infrastructure – and in contrast to the nascent statutory courts are less susceptible to corruption, manipulation by powerful networks, and legislation that contravenes local norms, or come under pressure by practitioners of Hanbali-inspired shari'ah, foremost among them Al Shabaab.

That ADRs perform on the basis of the continued traditional *xeer* indicates that, so far, norms change has not yet taken effect. A few practitioners added that a new *xeer* was needed in the urban settings and that the ADR use more “modern” resolution methods, which indicated inspiration from DDG's *The Time is Now* program. By and large, however, ADR processes appear to reproduce their patriarchal underpinnings, which in many cases disadvantage women, who allegedly require male intermediaries to access ADRs – which, contrary to policy, not always include female members – and contravene human rights standards.

Although half of the respondents claimed that the ADRs are “trying” to provide “equal justice,” respondents generally appeared to have only a vague grasp of what international human rights standards are, and stressed that no methods exist to align the *xeer* with human rights. Apart from the *Guurti+* and the *The Time is Now* Project, which draws on experiences from the initial DRC-supported engagement with elders in 2003-2007, methods for reviewing the *xeer* and aligning the *xeer* agreements with women's rights and the protection of vulnerable groups in particular seem to have largely been abandoned. Current ADR initiatives mainly resort to providing human rights training.

To the contrary, government policy on ADR appears to aim to harmonize the *xeer* with statutory institutions, and incorporating customary justice into the government judiciary. This approach seems to lack a meaningful methodology of harmonizing the *xeer* with human rights standards and statutory law more broadly. In this respect, top-down involvement in customary justice processes to these ends risks, including in the selection of the membership of ADR committees seems to be received negatively by communities. Should ADRs be viewed as being influenced by political interests, people may lose confidence in them.

Currently, ADR initiatives do not appear to be politicized, which may be a testament to their grounding in communities, but may also be due to the relatively low level of external funding they receive. Respondents warned that increased funding and government involvement could lead to graft and patronage. Traditional dispute resolution survives without donor or government funds. Even absent funding, however, respondents cautioned that tensions may nevertheless arise should ADRs resolve cases that could have been lucrative for other justice providers, or threaten to render these irrelevant. Customary justice mechanisms, conversely, are likely to remain relevant as long as these correspond to existing social needs:¹⁸⁸

“... there is the risk of institutionalising the traditional structures. The point in this respect is that they already are an institution, albeit not in the modern formal sense. But, sociologically and de-facto, they are. Traditional elders, especially the aqiil/nabadoon are intimately linked to clan structure, especially the mag-paying groups. As long as the latter remain as the most important social insurance system for the individual Somali, they will persist. Once they no longer are needed, the traditional structures will wither away.”

At the time at which the above was written, elders generally found themselves stepping in to fill a vacuum after the collapse of the state, but not to replace it, acknowledging that there are limits to what they can do, and what their long term role should be. Current ADRs appear to move towards a more institutionalized *xeer*, which caters for some of the challenges that the very localized *xeer* faces. This is then promoted as an ‘alternative’ to a statutory justice system that, in its current form, cannot cater to Somali society, for various reasons.

¹⁸⁸ Gundel & Dharbaxo, 2006, *Predicament of the Oday*, p. 61.

The necessity of a parallel system based on local norms and processes raises the question to what extent the statutory judiciary is appropriate in its current form – and with external support – to its societal context. At the same time, an observation that surfaced particularly in the context of urban Mogadishu is that the *xeer*, based on collective conflict resolution, struggles to address individual rights-based issues, which are becoming more prevalent in the rapidly urbanizing Somalia. This leaves practitioners within a tension between widespread support for a variety of dynamic ADR practices and the need for these frameworks to evolve towards greater human rights compliance, without being subsumed under a politicized judiciary based on more static codified laws.

11.1 Recommendations

A number of recommendations for actors involved in justice sector reform arise from this study:

It is not clear how far statutory legislation or Sharia influences ADR procedures, but this could be a subject for further research that also could shed further light on the interlinkages and differences between *xeer* and shari’ah, and the implications of the application of both in Somalia.

Supporting local statutory courts that integrate the views, needs and perspectives of local communities could improve cooperation with ADR practitioners, accountability and relevance to society, and the predictability of justice provision based on multiple normative systems.

In the meantime, the elders and the *xeer* will continue to provide justice based on *xeer* norms in cases where it is relevant, workable, and demanded by the community. **Support can be granted to these customary processes by supporting elders with transport or similar modalities to fulfill their function.**

Human rights, women’s rights and other individual rights-based justice can enter two-fold:

A slow process, in which elders decide to apply right-based justice in *xeer* processes can lead to changes in *xeer* from within. That way it will maintain its most important strength: its legitimacy among the communities it serves.

Individual rights can be propagated and safeguarded via statutory laws and shari’ah applied by courts. That way, an ‘alternative’ to the local *xeer* processes is opened up and litigants are provided with different options to choose from. As social norms increasingly adapt to individual rights and human rights standards in particular, users will likely turn increasingly towards courts. *Xeer* processes can and likely will remain in place to cater for specific types of grievances and prevent outbreaks of collective violence.

ANNEX A: METHODOLOGY

This study employed a qualitative approach as most appropriate to understand the ADR initiatives (ADRs) and their relations to:

- human rights
- gender equality dimensions
- legal issues
- xeer and shari'ah
- political economy considerations underpinning the functioning of the ADR initiatives

In order to capture the qualitative aspects of the ADRs, their public perception, and how they function in practice, this study employed semi-structured interviews with relevant experts and individuals in three key locations, supplemented by a desk review for contextualizing the analysis.

Researchers identified eight different categories for interview groups, corresponding to the key actors engaging with ADRs (See following page), and developed specific interview questionnaires for each group based on the key-research questions. Data collection was carried out in three key locations – Kismayo, Baidoa and Mogadishu – in which the MoJ ADRU has established active ADR committees, and where the research team expected to find other ADR initiatives as well. Interviews were performed by field researchers from the Somali consultancy firm *Infospectrum* in Baidoa and Kismayo, and by Professor Yahya Ibrahim in Mogadishu. The lead consultant trained *Infospectrum* researchers in the required qualitative research methodology in September 2019. Field researchers were trained subsequently in Mogadishu in early October 2019. The researchers conducted 57 interviews in total, 16 in Mogadishu, 17 in Kismayo and 22 in Baidoa. Two interviews from the User group were performed outside of the key locations, in the districts Afmadow and Dhobley.

Finally, the lead consultant conducted a comprehensive desk review to inform the data collection process, and to establish the necessary knowledge base for subsequent analysis. This included a framework for understanding the historical and political circumstances surrounding ADR projects and initiatives in Somalia from 2003 to the time of writing, as well as secondary literature concerning the customary law of the Somali, xeer, and other legal systems with a focus on their interconnectedness.

The Interview Groups

Groups 1 & 2, Practitioners: Individuals working with dispute resolution within an ADRI, MoJ-affiliated or otherwise. This group was divided into two in order to make it possible for the researcher to pose all questions in one interview session.

Group 3, Users: Individuals that have had a case handled by an ADRI.

Group 4, Public: individuals with direct connection to an ADRI.

Group 5, Traditional elders: Including elders that are not members of a specific ADRI, as well as elders who may occasionally be involved with ADRI.

Group 6, Leaders: Prominent citizens in the selected locations.

Group 7, Religious: Prominent religious persons in the local communities, including Sheikhs and Imams who may be involved with ADRI.

Group 8, Women's groups representative: Members of women's groups in the key locations.

	Female	Male	Mogadishu	Kismayo	Baidoa	Afmadow	Dhobley	Total
Practitioners 1	2	8	4	2	4	-	-	10
Practitioners 2	0	7	2	2	3	-	-	7
Users	3	4	1	1	3	1	1	7
Public	1	4	1	2	2	-	-	5
Elders	0	6	1	3	2	-	-	6
Community Leaders	0	9	3	2	4	-	-	9
Religious Leaders	0	7	3	2	2	-	-	7
Women	6 ¹⁸⁹	0	1	3	2	-	-	6
Total	12	45	16	17	22	1	1	57

¹⁸⁹ Two of these interviews were group interviews in Baidoa, done by a male interviewer.