The Shari'ah in Somalia

The Expanding Access to Justice Program in Somalia (EAJ)

March 2020

Contact:

Anton Pestana
EAJ Chief of Party
Pact Kenya
Nairobi, Kenya
+254-712-232-200
apestana@pactworld.org

Table of Contents

Introduction

Over the past two decades, justice sector development has undergone an enormous transformation. The community of practice has broadly accepted that most 'top-down' approaches to reform have been unsuccessful at improving institutional functionality or access to justice for marginalized or vulnerable populations. In response, the community has shifted its focus towards locally-driven reforms, centered upon improving service delivery and empowering end users. Rolling out such approaches in Islamic jurisdictions such as Somalia, however, has proven complicated. *Shari'ah* principles can sit in tension with internationally accepted justice norms, which has confronted practitioners with questions on the acceptability of engaging with systems that do not always conform to human rights standards.

Critics argue that Rule of Law programming in such circumstances implicitly endorses and thereby perpetuates rights-abrogating practices. Donors also fear that such engagement could be met with criticism from their tax-paying constituencies. Yet, ignoring these systems ignores the social realities of those who, either by choice or compulsion, rely on them to uphold their interests and resolve disputes. Indeed, UN inter-agency assessments have argued that while violating practices must be taken seriously, not engaging systems for this reason is unconstructive and inconsistent with a human rights-based approach, as it abandons meaningful pathways for reform. They stress that local ownership — including a country's choice of judicial model — is imperative to development impact and sustainability and is not a principle that the international community can 'cherry pick' when and when not to apply.[1]

Most donors and development agencies have reconciled these arguments through policies that support engagement, albeit with the caveat that programing must be geared towards promoting progress towards human rights compliance.[2] The aforementioned UN inter-agency assessment concurs, and underscores that fundamental international human rights norms for justice provision must not be jettisoned during context-specific and pragmatic programming, and extra care should be taken to ensure that engagement does not directly or indirectly promote structural discrimination or other human rights violations.

This tension will likely remain at the center of what justice sector reform programs must negotiate. The likelihood that programs promoting human rights compliance will yield positive outcomes does depend very much on context. Where the practices that are the targets of reform are linked to broader deficits in the security or socio-economic framework, interventions may have limited impact, or divert attention away from other important reforms. In short, it is critical to view deficits and opportunities in context.

In Somalia, while outcomes are not always human rights compliant, marginalized groups stand to receive better protection under shari'ah vis-à-vis the customary *xeer*, both in terms of the rules applied, and their exposure to corruption and power politics in decision-making. This is not simply a failing of the justice system, but a product of the country's fragility, weak and often coopted institutions, and a deeply entrenched culture of violence and discrimination. In other words, there may be opportunities to improve rights-compliance via applied shari'ah, although sustainable gains would require a level of institutional capacity, civic engagement, and rule of law that does not exist in present-day Somalia.[3]

---

[1] Past assessments already cautioned that "strictly applying a criterion not to engage with informal justice systems that violate human rights excludes many informal justice systems from potential support, and applying the same criterion to formal systems would produce similar difficulties" Danish Institute for Human Rights (2009). *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement.* UNDP, UNIFEM and UNICEF, p. 16.

[2] The Swedish development agency, SIDA, states that an access to justice intervention may be directed at customary, traditional or religious justice systems, provided that its primary purpose is to increase alignment with international human rights and reaffirm that the state is ultimately responsible to ensure conformity with such norms. The Danish Aid Agency (Danida) will only engage with customary systems that either respect human rights or are willing to transition accordingly, if gradually. Danida adds that programming decisions should be context-specific, demand-driven and locally owned.

[3] The UK Department for International Development (DfID) summarized this situation as a standoff between different rule of law goals, access to justice, speed, and local ownership versus equality before the law and human rights protection. Its assessment acknowledges that not all rule of law ends can be promoted simultaneously in contexts marked by political and economic transition, and where institutions are

Interventions overtly geared towards human rights compliance might also be unwelcome as external interference, or even prove destabilizing. In this vein, it is important to note that Somalia's decision to introduce a shari'ah-based legal system and constitution was not only ideological. It was also a key element in an agreement brokered to end violence and move towards political unity. Thus, in addition to considerations around state sovereignty and national ownership, the stability and development of shari'ah-based juridical practice might also provide an avenue for post-conflict peacebuilding.

Justice provision in Somalia is a combination of statutory, shari'ah and customary *xeer* norms. Traditionally, *xeer* is agreed upon and applied by clan elders, while shari'ah rests in the hands of *ulama* (Islamic scholars), but only *prima facie.* The *xeer* itself and elders draw strongly on their knowledge of shari'ah, which in turn leaves space for local customs and customary law in particular to influence its specific application. In turn, both influence the practice of statutory law, which is constitutionally required to conform with shari'ah across all Somali state entities.

Customary xeer constitutes an odd fit with shari'ah and statutory law and justice. The latter two are individual rights-based traditions that seek to protect rights holders and punish transgression. Xeer provides the framework for preventive conflict resolution or de-escalation of potential violence via compensation agreement, all at the collective level. Absent functioning and legitimate courts, the best modality for improving access to human rights-based justice in present-day Somalia is likely found in strengthened shari'ah institutions and deepened engagement with the different traditions of its interpretation and application.

In this process, strengthening procedural and individual rights, greater legal system coherence and predictability, curbing of corruption, and improved legal literacy and enforcement are all mutually dependent and mutually reinforcing. Mainstreaming the shari'ah in Somalia's justice sector reform enterprise is therefore essential, especially as shari'ah functions as the ultimate source of law in the Provisional Constitutions of the Federal Republic of Somalia, in state-level constitutions, and in the Constitution of the Republic of Somaliland. However, realizing such a role for the shari'ah comes with some integral challenges related to its very nature.

This report is intended both as an entry point to shari'ah and its role in Somali law and justice, and for those who seek a more nuanced understanding of these integral challenges – integral to shari'ah in general as much as to its history in Somalia.

- **For those who want to learn about shari'ah in general**, Section 1 on *Islam and its Tools* provides a brief background to internal divisions within the *ummah* (the Muslim community) and defines key concepts needed to understand the potentials and pitfalls of shari'ah
- **For those who want to learn about the history of political Islam and the concomitant evolution of shari'ah in Somalia**, Section 2 on *Islam and Shari'ah in Somalia* chronicles Islamic social movements and their impact on today's politics and consensus/dissent over shari'ah
- **For those who want to engage with the potential for legal reform based on shari'ah in Somalia**, Section 3 on *Education, Practice, Law: Shari'ah in Practice* delves deeper into the positions and schools of thought that frame legal and justice sector reform in Somalia today
- **For those who seek practical recommendations for programming and support**, Section 4 maps three concrete recommendations and details the potential implications, nuances, and considerations for a conflict sensitive approach

This report seeks to spark a dialogue among national and international practitioners with regards to the application of shari'ah in a legally pluralist Somali justice sector, with the aim to service Somalia's population with increasingly fair and rights-based justice, especially for women and those vulnerable and marginalized groups – and it seeks to equip its readers with the concepts and background to do so in a manner appropriate to its context.

---

nascent or in flux. DfID (2013). *Policy Approach to Rule of Law.* Final version, July 12 2013, p. 17. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306396/policy-approach-rule-of-law.pdf

Methodology

This Report is a development of a paper that was drafted based on an in-depth desk review of the topic. The paper was then used as a basis for a consultative process among Somali Islamic Law scholars and practitioners. The findings, conclusions, and recommendations of the paper were synthesized and captured in a list of qualitative questions. These questions were translated into Arabic as the preferred working language of Somali shari'ah experts. The questions were used as a basis for two focus group discussions held in Mogadishu with a total of ten ulama, shari'ah experts, and shari'ah practitioners. This was followed by semi-structured interviews with 17 other shari'ah experts from South West State Jubaland, Puntland, Somaliland and Galguduud, and Gedo. Each interview lasted approximately 1.5 to 2 hours. The outcomes of the focus group discussions, semi-structured interviews, and the initial desk review are captured in this Research Report.

N.B.: To safeguard the identity of the study's participants, direct quotes are not attributed to any specific respondent. Quotes throughout this report, unless otherwise referenced, are taken from the above outlined pool of ulama, shari'ah experts, and shari'ah practitioners.

Islam and its Tools

Islam developed between the years 610-632 against the backdrop of the Arabian tribal system.[4] As a religion, rather than a governance or political movement, Islam did not embody a specific set of laws. Instead it set out duties and obligations spanning economic, political, social and religious life, collectively falling under the definition of *shari'ah*.[5]

Neither Islam nor shari'ah are monolithic, but instead interpreted and practiced differently by many groups among the 1.5 billion Muslims across the world.[6] Among the divides within the u*mmah*, the community of Muslims, the denominational schism between the Sunni and Shi'a is the most apparent as it figures prominently in current geopolitics.[7] For this study, however, it is of secondary importance as it primarily concerns political hierarchy – whether Islamic polities should fall under an elected caliph or an imam descending from the prophet. More salient for legal framework and juridical practice – and for Somalia – is the intra-Sunni divide between Sufis and Salafis, which dates back to the 9th century.

SUFISM

Sufism is a form of Islamic mysticism in which followers seek a spiritual union with God through various rituals and practices including meditation, devotional acts and asceticism.[8] Sufi scholars consider much of Salafism *ghuluww:* undue excess in their rigidity and isolationism. Sufis are organized into congregations known in Somalia as *jama'a* and adhere to the doctrines of their respective *tariiqas* (Sufi orders).[9] Sufism was first introduced into Somalia by Yemeni scholars in the 15th century, many of whom were based in Harar, and by the 19th century Sufi teachings were widespread and deeply engrained in Somali culture.[10]

SALAFISM

Salafism is a movement more concerned with behavioral observance of the most fundamental precepts of the Qur'an and the Sunnah, calling back to the lives of the first three generations of Muslims, the *pious ancestors* (*al Salaf al Salih*). By contrast to Sufism, Salafism does not tolerate any innovation (*bida*) of these practices, any analogical or metaphorical reading of the scripture, or the veneration of historical figures such as reformers (*mujaddids*), scholars, or saints, which it considers polytheism (*shirk*).[11]

Sufism and its practices are and have been widespread throughout Sunni communities globally. Its proponents included many philosophers and poets, such as Muhyi'l-Din ibn al-Arabi (1165-1240) and Jalaluddin al-Rumi (1207-1273), as well as the last caliphate, the Ottoman Caliphate that ended in 1924. Salafism is a result of reforms in response to early schisms and turmoil within Islam, which prompted some scholars to seek a more literal adoption of scripture in their practice of faith.[12]

---

[4] H Ibrahim (2012). *Practicing Shariah Law: Seven Strategies for Achieving Justice in Shariah Courts*. American Bar Association.

[5] Shari'ah is *not* equivalent to 'Islamic law'. See: J Schacht (1982). *An Introduction to Islamic Law*. Oxford: Oxford University Press, p. 1-10.

[6] Unknown (2020). *Demographics of Islam*. Georgetown University, Berkeley Centre for Religion, Peace & World Affairs, available at: https://berkleycenter.georgetown.edu/essays/demographics-of-islam

[7] The prominence of the Shi'a-Sunni divide derives from the geopolitical rivalry among Saudi Arabia and Iran, and obscures that the vast majority of Muslims are Sunni, which renders the intra-Sunni Sufi-Salafi divide important for many Muslim communities worldwide. It should be noted, however, that many of the Shi'ite practices that conservative Sunni teachings take issue with are similar to the Sufi practices that Salafi teachings characterize as improper, including the veneration of martyrs and the application of legal reasoning for reform purposes.

[8] I.M. Lewis (1998). *Saints and Somalis: Popular Islam in a Clan-Based Society*. London: First Red Sea Press.

[9] *Ibid*

[10] *Ibid*

[11] L. Martin & M.R. Smith (2011). Every Kingdom Divided Against Itself Will Be Ruined: A Reflection, a Deflection, and a Qualified Reinterpretation of the Global Jihad. *Studies in Conflict & Terrorism*, 43(9), 672-695.

[12] M. Woodward, M. S. Umar, I. Rohmaniyah & M. Yahya (2013). Salafi Violence and Sufi Tolerance? Rethinking Conventional Wisdom. *Perspectives on Terrorism*, 7(6), 58-78.

For Salafism, the first reformer was the jurist Ahmad Ibn Hanbal (780-855), who sought to purify Islamic belief and especially jurisprudence. His teachings were spread more widely by the 13th century Hanbali scholar Ibn Taymiyya (1263-1328), who did not reject Sufism *per se*, but held it to austere standards that imply an adherence to Hanbali teachings in practice.[13] The interpretation and implementation of shari'ah form the primary battleground for intra-Sunni tensions today, and undergird tensions between Salafist insurgents and moderate Salafi or Sufi Muslims in Somalia today.

The primary sources of shari'ah are the holy Qur'an and the Sunnah of the Prophet. The most authoritative source, the Qur'an, comprises 6,235 verses, roughly 500 of which have a legal inference. Muslims believe these verses to be the word of God revealed to His Prophet; its authority is deemed infallible and unquestionable.[15] The Sunnah of the Prophet is the second most authoritative source of shari'ah; it consists of the Prophet's sayings and deeds (*hadith*). Hadith are considered either strong or weak, and thus more, or less, binding, based on the authority and trustworthiness of the narrator(s) in question.[16]

WAHHABISM
In the mid-18th century, another Hanbalite scholar, Muhammad Ibn Abd al-Wahhab (1703-1792) entered an alliance with Muhammad Ibn Saud (1710-1765) during his conquest of Arabia. Ibn Abd al-Wahhab consolidated Ibn Taymiyya's criticism of *shirk* and hardened it in defense of orthodoxy, orthopraxy, and order. Hailing from the remote Najd area, Ibn Abd al-Wahhab's teachings incorporate elements of Najd Bedouin culture, which include harsher restriction on women in public. [14] In Western scholarship, the followers of the teachings of Ibn Abd al-Wahhab are often referred to as Wahhabists, who themselves prefer the term *Muwahiddun* (unitarians).

Islamic law consists of two components: *shari'ah* and *fiqh*:

SHARI'AH
Shari'ah is the set of rules and precepts taken from Qur'an and Sunnah. Those in the Qur'an are considered to be divinely revealed, infallible, and immutable. Those in the Sunnah derive from hadith, the compiled narrations of the traditions and sayings of the Prophet Muhammed and are thus fallible depending on their classification as authentic, inauthentic, or weak.
FIQH
Fiqh, often referred to as Islamic jurisprudence, denotes the specific judicial opinions derived from general shari'ah. Different schools of *fiqh* guide Muslims in the interpretation and application of Islamic laws. The rulings (*fatwas*) of Islamic jurists are legal opinions formulated within the legal principles of their respective schools of jurisprudence (*madhab*). *Fiqh* is considered to be fallible, is subject to change, and the application of laws can vary based on the context.

Over time, as Islam became more established, influential, and diffused geographically, more locally specific rules and norms became necessary. Following the death of the Prophet, the first four Caliphs started to form legal opinions and set norms drawn from scripture, in a practice known as *ijtihad*.

---

[13] cf. A. Post (2016). A Glimpse of Sufism from the Circle of Ibn Taymiyya – An Edition and Translation of al-Baʿlabakkī's (d. 734/1333) Epistle on the Spiritual Way (Risālat al-Sulūk). *Journal of Sufi Studies*, 5(2), 156-187, or: M. Ansari (1985). Ibn Taymiyyah and Sufism. *Islamic Studies*, 24(1), 1-12.

[14] M. Woodward et al (2013). Salafi Violence and Sufi Tolerance?, p. 65., also: N. Mouline (2014). *The Clerics of Islam: Religious Authority and Political Power in Saudi Arabia*. New Haven: Yale University Press.

[15] See: J. Nasir (1986*). The Islamic Law of Personal Status*. London: Graham & Trotman.

[16] In Islamic jurisprudence (*fiqh*), *hadith* exclusively refers to something that is reported about the Prophet, or, in some cases, his Companions. Other factors taken into account when establishing a *hadith*'s authenticity, include the breadth of dissemination of the *hadith* and the narrator's personal reputation. Indictors of weakness include a narrator who is not well known, approved of, or recognized by major scholars, a narrator whose *hadiths* are known to be invalid, or ones that show a break in the chain of transmission. See: Nasir (1986*). The Islamic Law of Personal Status*.

SHARI'AH LOOSELY TRANSLATES AS 'THE PATH OR THE ROAD LEADING TO THE WATER' OR, MORE SIMPLY, THE 'CORRECT PATH'

IJTIHAD	
Ijtihad is the interpretation of the shari'ah using independent reasoning based on judgement or analogy, drawing on Qur'an and Sunnah as primary sources, and on secondary scholarly opinion.	

There was some divergence of opinion on how this should be undertaken, which gave rise to different juristic schools (*madhab*).[17] Sunni Muslims have no hierarchy of clergy or universal religious leader *per se*. The majority of Sunni Muslims adhere to the laws of the *madhab* of their region and defer to local religious authorities and Islamic scholars for religious guidance. These *madhabs* are Hanafi, Maliki, Shaf'I, and Hanbali, which developed as a consequence of *ijtihad* and jurists' different opinions (*ikhtilaf*), as well as socio-political movements, and are named after their founding scholars (*mujtahidun*).

HANAFI	Tolerates other *madhab*	Founded by Abu Hanifa an-Nu'man (699-767) and further developed by Abu-Yusuf (738-798) and Muhammad al-Shaybani (749-805)
		Introduced in Somalia by *Tablighi Jama,* with limited application
		Prevalent in India and Central Asia
MALIKI	Follows the juridical and social model that emerged out of Medina, which in its turn is based on *ijma'* (consensus)	Founded in the 8th century by Malik bin Anas (711-795)
		Prevalent in Northern Africa
SHAFI'I	Provides a framework for deducting Islamic laws based on independent assessments and local conditions	Initiated by Aby Abdallah al-Shafi'i (767-820) through his teachings
	Rejects the use of *istihsan, istislah,* and *istidlal*	Followed by the majority of Somalis
		Introduced in Somalia by Yemeni scholars (*ulama*)

---

[17] Nasir (1986). *The Islamic Law of Personal Status*, 2

	Islamic texts (Qur'an and Sunnah) should be read literally and do not require further enunciation via *ijma', qiyas, istihsan, istislah,* or i*stidlal*	Founded by Ahmed ibn Hanbal (780-855) and later developed by ibn Taymiyyah (1263-1328) and Sheikh Muhammad Ibn Abd al-Wahhab (1703-1792)
HANBALI	Is the smallest school of jurisprudence	
	Does not accept jurist discretion as the Hanafi and Maliki schools do	Salafi movements (incl. Al Shabaab) follow the Hanbali *madhab*

Ijtihad is central to the formation of these schools, but its practice is not uncontested. Conservative scholars believe that the '*gate of ijtihad*' was closed around the tenth century A.D.[18] Others argue that it is only through interpretation and reform that states can respond to changing social, economic, and ecological conditions while still observing shari'ah principles.[19]

To understand the potential avenues for reform through ijtihad, it is important to unpack and appreciate the different methods via which ijtihad is conducted. *Mujtahidun*[20] utilize a variety of tools to develop juristic opinions in fiqh and ijtihad in particular, not all of which are permissible in each madhab (see above). These are:

IJMA'

Ijma' literally means 'to agree upon something,' or 'unanimous agreement'. Technically, it refers to any unanimous agreement of Islamic scholars during any period after the passing of the Prophet, on any matter.[21] The Prophet's statement: "*my community will never agree upon an error*" is often invoked to suggest that such consensus is a valid source for a ruling.[22]

QIYAS

Qiyas[23] can best be understood as analogical juristic deduction. Qiyas provides a tool for a ruling in an unprecedented case, where a solution cannot be found in the Qur'an, Sunna or ijma'. Under qiyas, the Qur'an or Sunnah may be extended from a known issue or problem to a new problem, provided that the precedent and the new problem share the same cause. For example, rulings on alcohol consumption, which are clearly set out and agreed upon, may be extended to drug abuse.

ISTIHSAN

---

[18] J. N. Dalrymple Anderson (1976). *Law Reform in the Muslim World.* London: Athlone Press, p. 7; W. Hallaq (1984). Was the Gate of Ijthad Closed?, *International Journal of Middle East Studies*, 16(1), 3-41.

[19] W Hallaq (1984). Was the Gate of Ijthad Closed?.

[20] Mujtahidun are the Islamic scholars (*ulama*) who are qualified to perform ijtihad.

[21] Scholars disagree on the definition of consensus as a source of legislation. Some limit viable consensus to the Companions of the Prophet. Others extend this to the two following generations in Medina. The most widely accepted position understands *ijma'* as the "general agreement of all scholars of the Islamic community living in a certain period after the era of the Prophet's revelation, without the requirement that this agreement is unanimous", J. Nasir (1986). *The Islamic Law of Personal Status*, pp. 20-21. To be accepted as *ijma',* the following conditions must be met: (i) consensus of scholars of outstanding moral reputation; (ii) the majority of scholars should agree on the legal opinion, allowing for a dissenting minority; (iii) the object of agreement should be a legal matter relating to permissibility, prohibition, validity, or nullity – not to secular matters, to matters that have already been settled by revelation, or to religious matters that have been conclusively proven (iv) *ijma'* must occur after the death of the Prophet, since, had he agreed or disagreed on the opinion in question, it would have been known.

[22] M. K. Masud (1977). *Islamic Legal Philosophy*. Islamabad: The Islamic Research Institute Press, p. 169.

[23] The literal meaning of *qiyas* is 'measuring the length, weight, or quality of something', but also 'comparison'. Because *qiyas* involves a process of individual reasoning, its authority is a matter of controversy among jurists. The Shafi'i position is best described as accepting it fully, but with a moderate degree of caution, whereas the Malaki school rejects its use completely, and Hanbalis accept it reluctantly. It is important to highlight that *qiyas* does not interpret sources or establish new law. Its purpose is to identify an analogy of cause in two cases to develop and refine existing law. Nasir (1986). *The Islamic Law of Personal Status*, p. 22.; M. H Kamali (1991). *Principles of Islamic Jurisprudence*. Cambridge: Cambridge Islamic Texts Society, pp. 180-182.

Istihsan literally means 'to approve' or 'deem something preferable'. In jurisprudence, *istihsan* is the exercise of personal opinion to avoid rigidity or unfairness that might result from a literal enforcement of existing law; in other words, to ensure that that a literal application of shari'ah does not defeat the higher objectives of justice.[24] The concept of *istihsan* is based on *maslaha.*

MASLAHA

Maslaha refers to the public interest, and alongside *maqasid al-Shari'a* (the shari'ah's foundational goals), *maslaha* encourages jurists and the government to act in the best interest of the community. Hence, if a literal interpretation of shari'ah does not represent these best interests, the principles of *istihsan* and *maslaha* permit other interpretations.

Other forms of *maslaha*-based reasoning are *istislah* and *istidlal.* The latter was defined by the Shafi'i scholar al-Juwayni (1028-1085) as legal reasoning based on "principle that suggests a corresponding rule on the basis of reasoned deliberation" in the absence of a "source that is agreed upon."[25] It is most frequently employed by Maliki *mujtahidun.*

TALFIQ

Talfiq is the assimilation of the views or opinion of one or more schools of thought to address one conclusive matter. It is used to come to a definitive legal ruling where no such prior ruling exists, or when conflicting opinions exist amid jurists. In these cases, a jurist applying *talfiq* considers adopting a point of view presented by another *madhab* if the latter is more practical and adapts most to the needs of the time. The jurist combines various opinions towards an entirely new ruling. *Talfiq* is used by modern Islamic scholars particularly to resolve issues related to Islamic finance, but many critics consider *talfiq* too fundamental a change to a *madhab*.

Applying *ijma'* and *qiyas* to interpret the shari'ah can be a technical and complex process. For any *mujtahid* of any one *madhab*, knowledge of a wealth of scholarly work and access to a community of learned religious scholars are imperative. The application of the *maslaha*-related *istihsan, istislah,* and *istidlal*, as well as the more syncretistic *talfiq* is controversial among followers of different *madhabs.* Decisions on jurisprudence, but also on the socio-political governance for Muslim communities are often taken by consultative councils, called *Majlis-ash-Shura,* or Shura council.

SHURA

Shura is derived from the Arabic for 'consultation' and often denotes advisory councils (*Majlis-ash-Shura*). The Qur'an mentions shura on several occasions, in three different contexts: The first verse deals with family matters. The second proposes it as a means of securing a positive afterlife. The third verse advises on how mercy, forgiveness, and mutual consultation can win over people. The Prophet Muhammed (*PBUH*) deemed consultation imperative for Muslim communities. It can be seen has a form of advice to governance within a community.

Somali Muslims are almost entirely Sunni, and have traditionally followed the Shafi'i *madhab*. This school understands the shari'ah as based on four principles: the Qur'an and the Sunnah as primary sources, and *ijma'* and *qiyas* as secondary sources.[26] In Shafi'i jurisprudence, 'consensus' strictly denotes the entirety of the Muslim community, although scholars increasingly limit consensus to only the religiously learned and dismiss opinions provided by lay-persons.[27]

[24] Kamali (1991). Principles of Islamic Jurisprudence, pp. 54, 218, 259.

[25] A. M. Emon (2010). *Islamic Natural Law Theories*. Oxford: Oxford University Press , p. 126.

[26] Kamali (1991) *Principles of Islamic Jurisprudence*; Nasir (1986) *The Islamic Law of Personal Status,* p. 2.

[27] The Hanafi and Maliki schools limit *ijma'* to the consensus of jurists only.

Over the past decades, the Hanbali madhab has increased in influence in Somalia. The Hanbali school argues that Islamic scripture, Qur'an and Sunnah, should be read literally and does not require further interpretation. It is the smallest school of jurisprudence and does not accept jurist discretion, as the Hanafi and Maliki schools do. Although the majority of Salafi jurists propagate Hanbali jurisprudence, and both mostly appear together, some Salafi scholars reject strict adherence to one of the four schools of jurisprudence.

In each region in which Islam figures as the primary religion, communities predominantly follow one *madhab* over others. This underscores the implication of a contestation or outright displacement of one *madhab* by another, which is illustrated by the disruptive influence of Hanbali Salafist movements in a previously largely Shafi'i Sufist Somalia.[28]
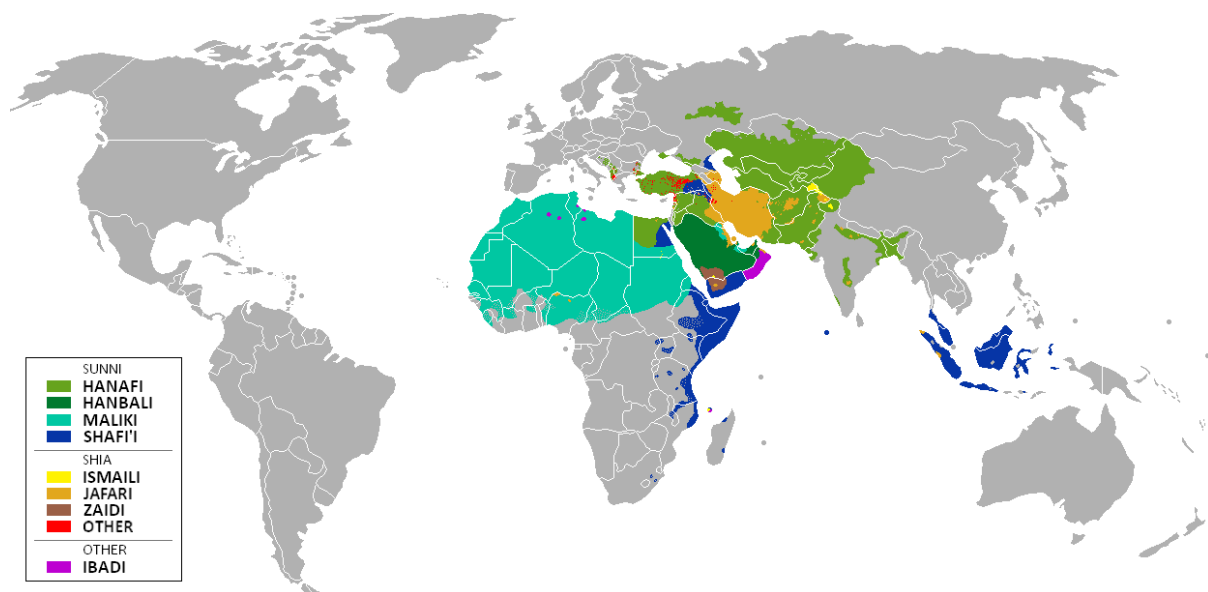
The adherence to *madhab*

Islam & Shari'ah in Somalia

Shari'ah has a long history in Somalia, accepted and implemented to varying degrees throughout the early Islamic era, colonial period, and post-independence. Prior to the Somali civil war that started in 1991, a significant part of the Somali population practiced a form of Sunni Islam that was highly influenced by Sufism.[29]

Prior to 1960: Somali Sufism and Anti-Colonial Struggle

SUFI ORDERS IN SOMALIA

The Qadiriyyah Sufi order was a major proselytizing force of Islam in the Horn of Africa and spread Sufism across Somalia, becoming its largest and most influential order.

---

[28] The following map is taken from: Faisal Ali (2018). *Memes and Madhabs*. Medium Religion, available at: https://medium.com/@fromadic92/memes-and-madhabs-80089af2016f

[29] Lewis (1998). *Saints and Somalis: Popular Islam in a Clan-Based Society.*

The **Ahmaddiya** and Salihiyya Sufi orders have far fewer adherents and did not expand into Somalia until the late 19th and early 20th century. The Ahmaddiya were predominantly apolitical and established Sufi congregations in farming settlements in Southern Somalia.

The **Salihiyya** order was a revivalist Islamist Sufi order that discouraged excessive veneration of holy men by the Qadiriyyah and called for a more strict adherence to the shari'ah. It promoted political Islam and Somali nationalism.

The historic popularity of Sufism in Somalia has often been attributed to the similarities between Sufi orders and the Somali clan system. Sufi orders trace the spiritual lineage of their founders and saints to the family of the Prophet Muhammed in the same patrilineal manner that many Somali clans trace their genealogy. Many Somali cultural traditions and pre-Islamic religious rituals were integrated into Sufi practices, including religious expression through music, poetry and dance, pilgrimages to burial sites, and the veneration of saints. Archaeological evidence includes tombs and pilgrimage sites in Somalia of ancient pre-Islamic origin that were assimilated into local Sufi traditions and attributed to Sufi saints.[30]

From the late eighteenth century until 1920, the Somali Dervish movement, led by Sayid Mohammed Abdullah Hassan, spread the principles of the Salihiyya Sufi order. The Somali Dervish resistance movement was part of a wave of anti-colonial Islamist movements led by Sufi orders across North Africa and Sudan. The Dervishes engaged in armed resistance against British colonial rule, briefly established an Islamic state within their sphere of influence, and enforced their interpretation of shari'ah. British colonial forces waged a concerted military campaign against the Somali Dervish movement. The Dervish movement came to an end with the passing of Sayid Mohammed Abdullah Hassan in 1920.[31]

Despite the political defeat of the Somali Dervish movement, Sufi Islam continued to flourish across Somalia with the Qadiriyyah, Salihiyyah and Ahmadiyyah Sufi orders. While British colonial leaders in Northern Somalia discouraged the implementation of Islamic law by Sufi leaders, the Italian colonial administration in Southern Somalia was actively involved in the selection of local Sufi shari'ah judges who would oversee Islamic legal affairs in their respective communities.[32]

1960-1990: the Arrival of Salafism overshadowed by Centralization and Repression

As the era of the Somali Dervish movement came to an end, the Ubeerey Islamic movement emerged in South Central Somalia between 1910 and 1930. The Ubeerey movement promulgated the Wahhabist form of Salafism and sought to eliminate what they considered un-Islamic cultural practices. The movement met some resistance from local populations. The movement's expansion was further curtailed by Italian and British colonial administrations in Southern Somalia and Northeastern Kenya.

FROM UBEREEY TO AL-ITIXAAD

Interviewed ulama considered the **Ubeerey movement** to be the precursor to the **Al Itixaad Al Islamiya (Al Itihad, Islamic Union)**. The genesis of Al-Itixaad dates to the mid-1970s, during which Somalia's military regime launched a repressive campaign against religious establishments that objected to government policies and laws that contradicted the shari'ah.

Al Itixaad was the merger of two Salafi groups, Al Jama'a Al Islamiya and Wahdat Al Shabaab Al Islam. Following the collapse of the military government, the group established a presence in Bossasso, Galdogob, and Dollow. The incursion of Ethiopian armed forces in the late 1990s largely

---

[30] S. Mire (2015). Wagar, Fertility and Phallic Stelae: Cushitic Sky-God Belief and the Site of Saint Aw-Barkhadle, Somaliland, *African Archaeological Review*, 32, 93-109.
[31] See for a British account: D. Jardine (1923). *The Mad Mullah of Somaliland*. London: Herbert Jenkins.
[32] Lewis (1998). *Op. cit.*

shattered Al Itixaad. Several of its leading members later rose to prominence within the Islamic Court Union and its military wing, Al Shabaab.

Following independence in 1960, shari'ah was designated as the supreme source of law in the Constitution of the newly-founded Republic of Somalia. Although shari'ah was intended to provide legal guidance, the government was modeled after secular parliamentary democracies, and the concrete role of shari'ah was never specified.[33] Following a coup in 1969, the military government led by Siad Barre designated Somalia a socialist state. From 1970 until 1991, the administration espoused an official state ideology that claimed to combine the principles of scientific socialism with Islam. The military regime also attempted to eliminate the clan system and adopted statutory laws and reforms that openly contradicted shari'ah, regardless of *madhab*.

When the government was questioned about the discrepancies between Islamic beliefs and scientific socialism, Siad Barre insisted the two were complementary. He vehemently defended his state ideology and famously declared: "*There is no chapter, not even a single word, in our Qur'an that opposes scientific socialism. We say: 'Where is the contradiction? The contradiction was created by man only.'*"[34]

Religious leaders who objected to government reforms were persecuted, arrested, or executed. After the execution of 11 prominent religious leaders by firing squad in 1975, many Somali religious leaders and scholars fled to the Middle East. The migration of Somali ulama principally to the Arab States of the Persian Gulf ultimately led to the emergence of the Salafi Al Itixaad movement and a generation of Somali Islamic leaders deeply influenced by Saudi Arabia.

"This was a great time of trouble for ulama who were repressed and their views were put down with violence, as well as for the shari'ah, because Siad Barre was against the use of shari'ah laws."

The Somali scholars who remained in Somalia passively resisted the regime and practiced their Islamic faith in private. Somali Islamists did not return to the country until the months prior to the collapse of the military government in 1991. When they did, many bolstered the expansion of the Al Itixaad movement. The Saudi-educated ulama and the Al Itixaad movement sparked a major shift in the practice of Sunni Islam in post-civil war Somalia.

This shift significantly curtailed the predominance of Sufism in Somalia as the Al Itixaad movement spread Salafist teachings. These teachings deemed as heretical the Sufi beliefs and practices that had become engrained in Somali culture, including the belief in the mystical powers of holy men and pilgrimages to the shrines of saints. The militant response by Sufi orders, the Ahl-Sunna wa Jama' movement, achieved military successes in various areas across Somalia, but, ultimately, both movements failed to disentangle themselves from clannist politics and lost ground.

AHL-SUNNA WA JAMA'
In the early 1990s, in response to the destruction of shrines of Sufi saints by Al-Itixaad supporters and increasing oratory against Sufi practices, the Ahmadiyyah, Qadiriyyah, and Salihiyyah orders in Somalia formed the militant and political Ahl-Sunna wa Al-Jama'a movement to combat Salafi groups and ideology. The movement remains influential today in Dhusamareb, Guriceel, and more broadly politics in the federated Galmudug State of Somalia.

[33] A. Abdullahi (2017). *Recovering the Somali State: The Role of Islam, Islamism and Transitional Justice.* London: Adonis & Abbey Publishers.
[34] J. Darnton (1977). *Somalia Trys to Live by Both the Koran and 'Das Kapital',* New York Time, Oct. 11 1977, available at: https://www.nytimes.com/1977/10/11/archives/somalia-trys-to-live-by-both-the-koran-and-das-kapital.html

AL ISLAH

Since 1978, Harakaat Al Islah has been in existence in Somalia. Al Islah is an Islamic Sunni movement and is affiliated with the Muslim Brotherhood. Until 1991, the movement did not operate openly for fear of government persecution. Since then, the movement has spread widely into Somali civil society, which makes it difficult to estimate the number of adherents. One of its sub-groups, *Damul Jadiid* ('new blood') briefly fought against the 2006 Ethiopian incursion against the Union of Islamic Courts, but has since pursued political office, successfully between 2012 and 2016 via one of its leaders, then-President Hassan Sheikh Mohamoud. Although part of an international network, Al Islah remains an independent entity in Somalia focused on socio-political reform and peaceful development.[35]

The Al-Itixaad movement seized its overt activities around 1998, whereas Ahl-Sunna wa Al-Jama' continues to remain in power in the central parts of Galmudug State of Somalia.[36] As both modern and traditionalist Salafi interpretations of Islam became more predominant in Somalia, the Al-Itixaad movement was succeeded by Salafi religious leaders and organizations that continue to spread their influence across Somalia. One of the less widely known but perhaps among the most politically influential yet unaffiliated organizations is the Al Islah movement, which continues to reinforce the role of Islam in Somali politics, albeit not via direct armed violence.

1991-2000: Emergence of Shari'ah courts

After the state collapsed in 1991, non-governmental organizations and Islamic organizations largely replaced the role of the Somali government in service delivery, which had all but vanished. The former centralized state gave way to protracted fighting among and within the clan-based militias that had toppled it. This created an environment of widespread looting, a rapid increase in sexual violence, and high levels of displacement. Those who were displaced internally or unable to leave remained at the mercy of an increasing number of armed militias.

In this context, Salafi ulama began to establish Shari'ah courts in some parts of Somalia. The first of these courts operated in the Madina District in Mogadishu as early as 1993.[37] More shari'ah courts emerged after 1997 in Southern Mogadishu and Marka with support from business communities that operated in these port cities. Each Islamic court maintained its own militia, which by and large acted with better discipline and conduct than the clan-based factions who purported to rule these areas.

> *"The government had been putting down Muslim groups and stood in their way –*
> *with the fall of the government, ulama and religious institutions took on a greater*
> *role and picked up where the government left – education, charity, humanitarian.*
> *This increasing influence culminated in the formation of the Islamic Courts."*

---

[35] It is inspired by the ideological guidelines of Hassan al-Banna, the founder of Egypt's Muslim Brotherhood in 1928. According to the Al Islah movement, Islam is a comprehensive way of life and a religion that calls for adopting the Islamic principles in all domains (political, social and economic). To gain influence peacefully, the group has pioneered *peace caravans* and established the Formal Private Education Network in Somalia (FPENS). "*The Somali Muslim Brotherhood ("al-Islah"), one of the largest non-Sufi organizations, operates medical programs and Arabic-language schools, 59 provides humanitarian assistance to northern Somalia, 60 invests in commercial ventures, 61 and organizes peace conferences.*" M. Cavedon (2014). Men of the Spear and Men of God: Islamism's Contribution to the New Somali State. *Emory International Law Review*, 28(1), p. 481; ICG (2005). *Somalia's Islamists*. International Crisis Group Report N°100; A. McGregor (2011). The Muslim Brotherhood in Somalia: An Interview with the Islah Movement's Abdurahman M. Abdullahi (Baadiyow), *Terrorism Monitor*, 9(30), available at: https://jamestown.org/program/the-muslim-brotherhood-in-somalia-an-interview-with-the-islah-movements-abdurahman-m-abdullahi-baadiyow/

[36] M. Bryden (2003). No Quick Fixes: Coming to Terms with Terrorism, Islam, and Statelessness in Somalia, *The Journal of Conflict Studies*, 22.

[37] This coincided with the arrival of Al-Qaeda looking for local partners. See: T. Bacon (2013). *Strange Bedfellows or Brothers-In-Arms: Why Terrorists Ally*. PhD Thesis, Georgetown University. Available at: https://repository.library.georgetown.edu/handle/10822/707433

2000-2006: the Islamic Court Union takes Mogadishu

In early 2000, a group of court leaders from Mogadishu formed the Shari'ah Implementation Council (SIC), which convened a *majlis* (assembly) of approximately 63 members. The SIC's objective was to unify and coordinate the fledging courts. In 2004, it achieved this objective. Ten different Mogadishu courts united under the umbrella of the Supreme Council of Islamic Courts in Somalia, which would later be renamed to Islamic Courts Union (ICU).

THE ISLAMIC COURTS UNION

The **Islamic Court Union's** bestowed upon itself the mandate to restore order and deliver justice and certainty in civil war-ravaged areas. It did so by re-introducing shari'ah as the sole frame for adjudication. The ICU relied on its approximately 400-strong militia for enforcement and for fighting against warlords, whose clannism it also sought to transcend in its own decision making. The Union was composed of shari'ah judges, each in charge of one of 11 specified district courts that presided over day-to-day issues. Approaches and the applied interpretation of shari'ah varied widely, from the very literal to a loose mixture of xeer and shari'ah. The Supreme Islamic Court of Benadir, composed of senior judges and chaired by Sharif Sheikh Ahmed (later President of the Transitional Federal Government) formed in 2006, alongside a consultative *shura,* chaired by Sheikh Hassan Dahir Aweys, which approved the High Court's decisions.

The ICU appeared as a socio-religious movement with a political agenda. The organization's militia became involved in clashes with various clan militias, and waged a campaign of targeted assassinations and attacks against opposing clan leaders and their militias. This campaign ran until mid-2006, when the ICU was able to gain control over Mogadishu and most of Southern Somalia.[38]

The ICU was received by many Somalis as a stabilizing force, because it appeared to counter the volatile and divisive militarized clan rule in Southern Somalia. Other drivers of the emergence of the ICU also included the numerous Islamic movements of previous decades and the failed attempts by the international community at reestablishing a stable and legitimate national government.[39] In December 2006, however, an internationally backed military invasion led by Ethiopian forces ousted the ICU.

The events of 2006 firmly anchored shari'ah in Somalia's post-civil war outlook, and the implementation of shari'ah intensified.[40] When the ICU was driven out in 2006, Al Shabaab, the ICU's armed youth wing, became a refuge for ICU Salafi hardliners who sought to continue their pursuit of a fundamentalist Islamic state in Somalia. Today, Al-Shabaab has been largely excised from main urban areas, but continues to exert influence throughout southern and some central rural areas. In the communities

HARAKAAT AL SHABAAB AL MUJAHIDEEN

Al Shabaab, or, in its long form, the *Mujahideen Youth Movement*, returned to Mogadishu four years after the ICU had been pushed out and its more moderate representatives had fled the country. Although its attempt to take the city was ultimately repelled, the group established a hold over much of southern Somalia, and today maintains a sophisticated governance structure for all regions it does and does not control. Central to this structure are courts that follow strict Hanbali teachings in adjudication and have gained a reputation for effectiveness, enforcement, and relative fairness – relative to the nascent and often corrupt court system and the sometimes partial customary institutions.

---

[38] Via Abukar Omar Adani, chair of its finance committee, the ICU militia drew on the 2000-strong guard force of El Ma'an, funded by UN humanitarian aid contracts. These forces morphed into *Hisbul Islam* after the Ethiopian invasion. See: UNSC (2010*). Somalia report of the Monitoring Group on Somalia and Eritrea submitted in accordance with resolution 1853 (2008),* S/2010/91.

[39] J. Abbink (2009). *The Islamic Courts Union: The ebb and flow of a Somali Islamist movement*. Boston: Brill Publishers.

[40] S. Shay (2014*). Somalia in Transition since 2006.* New Brunswick: Transaction Publishers.

where it asserts control, the group imposes a strict version of shari'ah that principally follows the Hanbali *madhab*.

Al Shabaab applies an extreme, Saudi-inspired version of shari'ah, likely the strictest one in Somalia. The group metes out swift punishment, such as death by stoning, amputation of hands and so forth. The group also forbids cooperation with international humanitarian organizations, while taxing them at the same time. Al Shabaab's trajectory commenced in urban areas, but after losing control of cities and towns to African Union and Somali military forces, its direct influence is now largely contained to rural areas and the Middle Juba region, although it does continue to operate in major towns in Southern Somalia.[41] Al Shabaab's success depended on its ability to transcend clan loyalties that had undermined Islamic movements before. Al Itixaad's attempt to establish itself in Gedo region, for instance, failed in part because the movement became associated with the Darood-Marehan clan. Instead, Al Shabaab focused its messaging on religious and nationalist ideology as unifying forces.[42]

Changes & Consequences

The growth and persistence of Al Shabaab has been a strong influence on the development, positioning, and trends in interpretation of shari'ah in Somalia. Its rise, and that of the preceding movements, reverberated not only within Islamic adjudication, but throughout the population's way of life.

- a more conservative Islamic dress code took hold;
- the reach of a more conservative, Salafist Islam expanded in Somalia;
- the juridical treatment of women under shari'ah improved (e.g. on inheritance or divorce);
- Islamic moral values (*akhlaaq*) spread, which improved on years of civil war;
- performance of acts of worship (*ibadah*) increased;
- an extreme form of Salafism, following the teachings of Ibn Abd al-Wahhab, has become more prevalent, which most interviewees for this study viewed as a negative development.

Consequences for Islamic jurisprudence and practice of faith.

Traditionally, the majority of the Somali population, and especially Sufi groups, have adhered to the Shafi'i *madhab*, which was first introduced to Somalia by Yemeni ulama. Its following include the Muslim Brotherhood and its Somali affiliate, the Al-Islah movement.[43] Yet, as the history of Islamic movements shows and as interviewed stakeholders agreed, the Hanbali *madhab* has been gaining influence through Salafi movements in Somalia and Al Shabaab more specifically.

The foothold of Salafism markedly increased in Somalia during the 1980s, as more and more Somali students went to Saudi Arabia to study in Islamic universities where Hanbali jurisprudence was taught. This coincided with economic migration to Saudi Arabia during the 1970s and 1980s, where Somali workers were also influenced by Salafist teachings and lived under Hanbali jurisprudence. This is a stark departure from the previous prominence of universities such as the Egyptian Al Azhar, which teach a variety of *madhabs* and include Sufi scholarship.

Respondents interviewed for this study noted that this shift in education is reflected in ulama's preferences throughout Somalia, among whom Shafi'i jurisprudence is gradually receding. This is also driven by Saudi-educated Somali Shari'ah scholars opening schools upon their return. Many respondents noted that madrasas, Islamic schools, and Islamic colleges in their respective cities are increasingly teaching Salafism and the Hanbali *madhab*.[44]

---

[41] BBC (2017). *Who Are Somalia's Al-Shabaab*, 22 December 2017. A faction of Al-Shabaab North East (ASNE) has joined the Islamic State (IS) under former ASNE leader Sheikh Abdulqadir 'Muumin'. ASNE itself was established by Sheikh Mohamed 'Atom' as a splinter group within the Darood-Warsengeli clan in the Galgala mountain chain in Sool and Sanaag regions, contested by Somaliland and Puntland.

[42] SAHI (n.d.). *The History of Al-Shabaab*. South African History Online. Available at: https://www.sahistory.org.za/article/history-al-shabaab

[43] Abdullahi (2017). *Recovering the Somali State.*

[44] Key informants interviewed for this study estimated that Salafism constitutes 50% of teaching in Mogadishu, 40% in South West State, and 60% in Puntland. Direct Sufi influence is more limited to Galmudug State and a declining presence (20-30% of teachings) across Somalia. In Southwestern member states, Salafism is strongest in rural areas. Within the cities, Sufi communities are more present. Sufi teachings in urban centers are principally influenced by Al-Azhar in Egypt and Islamic scholars from Sudan.

"Saudis are following the Hanbali Madhab and they are beginning to have greater and greater influence. At the time of Siad Barre, almost all Ulama were Shafi'i. Since the Government collapsed and the civil war broke out, Hanbali grew and gained more influence within Somali ulama. More ulama are following [Hanbali] instead of the Shafi'i [madhab]."

Already, most people in rural areas in South Central Somalia follow the Hanbali *madhab*, whether by choice or by necessity, conforming with Al Shabaab's doctrines. This urban-rural divide illustrates the political dimension of Shari'ah practice in Somalia. Where the Federal Government of Somalia, the Government of Puntland State of Somalia, and Ahl-Sunna Wa Jama' exert direct control, space for the teachings of Ibn Abd al-Wahhab and Hanbali jurisprudence is curtailed, or simply grows more slowly. In rural areas, communities

A February 2018 BBC map highlights the presence of AS in Somalia.

have little choice but to accept the modes of adjudication available to them. Yet, this should not be taken to suggest that the denominational landscape in Somalia is clear-cut into two monolithic groups, even though it does reflect the predominant conflict fault lines of an ongoing insurgency/counterinsurgency setting.[45]

Unaffiliated Muslims

The practice of Sunni Islam in Somalia is predominantly influenced by Sufi and Salafi religious movements, but not exclusively. Not all Somalis ascribe to either doctrine. A significant portion of the Somali population self-identify as unaffiliated[46] Sunni Muslims. Their beliefs and practices may or may not overlap with traditionalist or modern Salafi or Sufi interpretations of Islam or consist of a combination of both. Unaffiliated Sunni Muslims accept to varying degrees the shari'ah rulings and religious legal counseling provided by local Salafi, Sufi, and unaffiliated Sunni ulama, but all accept the validity of the interpretations of the shari'ah of at least one of the Sunni *madhabs*.

Revolutionary & non-revolutionary Salafis

Salafi theology is not uniform either. Different streams and views exist within Salafism. The more radical ones tend to oppose the currently dominant concept of the Somali state and, even more strongly, the federal power-sharing model introduced under the 2012 Somali Provisional Constitution. More

---

[45] BBC (2018). *Somalia's al-Shabab carries out attack on military base*, available at: https://www.bbc.com/news/world-africa-44923575
[46] The lack of affiliation to sects or movements is linked to the concept of *middle path*, or *middle nation*, which will be explored further in subsequent reports.

moderate Salafi groups, however, are supportive of the state and consider it '*haram*' (forbidden) to try and overthrow it. It is the more radical Salafi leaders and extremist streams of the Salafi movement that pose a threat to state building in Somalia, but the disagreements within Salafism present an opportunity to cooperate with more moderate groups and provide alternatives to (often violent) Salafi extremism.

Summary

This history of Islamic movements in Somalia illustrates how closely entangled local and regional politics are with the shape and content of shari'ah-based adjudication in Somalia and Somaliland. Armed resistance to colonial incursion stemmed from Sufi orders that utilized their faith in organizing their movements, both among the Dervishes in northern and the *Jama'as* in southern Somalia.[47] Today's insurgents draw from hardline Salafist doctrine and Hanbali jurisprudence, which reflects a growing influence of Saudi Arabia and other Gulf states, whilst the Sufi Ahl-Sunna Wa Jama' maintains its own governing authorities in an on-and-off collaboration with federal and federated Somali authorities.[48] Understanding the interconnections of regional politics and local Sufi and Salafi movements is vital for any constructive engagement with shari'ah-based jurisprudence and adjudication. The following provides a brief summary of these movements and their chronology:

---

[47] M. H. Mukhtar (1996). The Plight of the Agro-Pastoral Society of Somalia. Review of African Political Economy, 23(70), 543–553.

[48] External influence in Somalia is not new, but the intensity with which Salafi and Hanbali teachings and practices are spread is a departure of past Ottoman influence and recent Egyptian influence, which did not actively seek to spread the Hanafi *madhab*. Although it should be noted that Hanafi jurisprudence was the dominant practice in Somalia prior to the fourteenth century, when travelling Yemeni scholars brought Shafi'i teachings with them.

|	
Somali Dervish movement (Late 1800s-1920)	Led by Sayid Mohammed Abdullah Hassan
	Followed and spread principles of the Salihiyya Sufi order
	Anti-colonial armed movement, fighting British and Italian colonial forces
Ubeerey Islamic movement (1910-1930)	Spread the Salafi theology of the Saudi scholar Muhammad ibn Abd al-Wahhab among a predominantly Sufi population
	Sought to eliminate un-Islamic cultural practices and promulgated orthodox and fundamentalist interpretations of the shari'ah
Central military government (1969-1991)	Focused on the adoption of various statutory laws and secular reforms that contradicted shari'ah principles
	Persecuted ulama who spoke out against it
Al Itixaad (1970s-1998)	Genesis dates back to the mid-1970s
	Spread Salafism, but also provided some level of order in the midst of civil war
Al Islah (1978-present)	Islamic Sunni movement affiliated with the Muslim Brotherhood
	Islam seen as a comprehensive way of life and a religion that calls for adopting Islamic principles in all domains (political, social and economic)
Ahl Sunna wa Jama' (1991-present)	Formed by Ahmadiyyah, Qadiriyyah, and the Salihiyyah Sufi orders as a militant and political group in response to increasing Salafi influence
	Currently holds power in Dhusamareeb and Guriceel, Galgaduud region
Islamic Court Union (2000-2006)	Union of Shari'ah courts providing harsh but predictable order in the midst of civil war; comprising different groups, but with a tendency toward Salafism
	Was supported by local business people until scattered by US-backed Ethiopian forces entering Mogadishu in 2007
	Former leader Sharif Sheikh Ahmed became TFG-President, whilst other members of the leadership remained with Al Shabaab
Al Shabaab (2006-present)	Armed wing of the ICU, unsuccessfully attempted to retake Mogadishu after break-up of the ICU, aligned itself with Al Qaeda
	Currently pursues a decentralized insurgency, among which the provision of Hanbali-based adjudication figures centrally

Education, Practice, Law: Shari'ah in Somalia and Somaliland

During and after three-decades of violence and instability, a common Muslim identity has provided a unifying platform for communities across Somalia. A 2012 survey by Voice of America, one of the major news outlets consumed in Somalia, found that 87% of Somali interviewees agreed strongly with the statement: '*Shari'ah is the foundation of Somalia and should be applied as a civil and criminal code throughout Somalia*'. Only 7% disagreed. There were no meaningful differences between men and women, age groups, and regions. The general support for shari'ah is driven by two main factors:[49]

- In times of crisis and conflict, many individuals seek comfort in their faith.
- Especially Saudi and Emirati investments have opened numerous schools after the onset of the civil war and collapse of the Somali government. Islamic organizations and promoters have in many places filled the void left by the collapsed state.

This emphasis on shared Muslim identity was central to the onset of counterinsurgency in Somalia. Insurgents argued they would stop fighting if shari'ah was formally introduced. And indeed, in 2009, when then President Sharif Sheikh Ahmed negotiated with senior clan leaders to end anti-government violence,[50] they reached the compromise that Somalia would be an Islamic state with shari'ah as the nation's official judicial system.[51]

In March and April 2009, both cabinet and parliament unanimously supported this initiative, and in 2012, shari'ah was formally adopted as the basis of Somalia's constitution. Whether the constitutional model crafted meets popular understanding of an Islamic Somali state remains to be seen. It has remained a polarizing issue, particularly in light of divergent interpretation, but it has also given legal shape to Somalia's long history of competing Islamic movements.
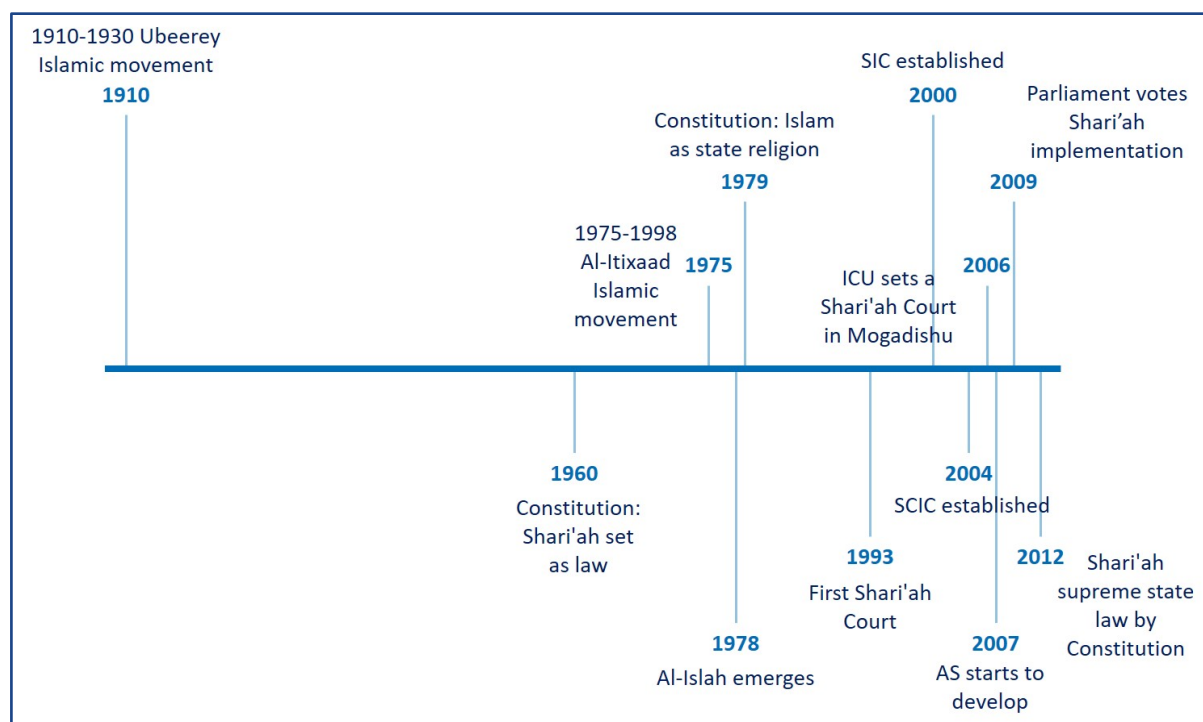
Timeline of the evolution of shari'ah and its incorporation into legal frameworks

---

[49] M. Hilburn, H. Maruf (2012). *Survey Shows Somalis Have Mostly Shared Vision for the Future*. VOA News, June 20 2012. Available at: https://www.voanews.com/africa/survey-shows-somalis-have-mostly-shared-vision-future
[50] This violence ultimately ended in August 2010, when Abukar Omar Adani was given control of Mogadishu port.
[51] On 18 April 2009, the proposal was unanimously adopted by Parliament.

This constitutional set-up is not limited to Somalia's Provisional Constitution. The Constitutions of Somaliland and Puntland each elevate shari'ah as the source of law and guiding principle of governance:

FEDERAL REPUBLIC OF SOMALIA	
"No law which is not compliant with the general principles and objectives of shari'ah can be enacted." (Art. 2.3)	
"The Constitution of the Federal Republic of Somalia is based on the foundations of the Holy Quran and the Sunnah of our Prophet Mohamed (PBUH) and protects the higher objectives of shari'ah and social justice." (Art. 3.1C)	
"After the shari'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all sections of government." (Art. 4.1)	
"The recognition of the fundamental rights set out in this Chapter does not deny the existence of any other rights that are recognized or conferred by the shari'ah, or by customary law or legislation to the extent that they are consistent with shari'ah and the Constitution (Art. 40.4)	

	PUNTLAND STATE OF SOMALIA
"The political system of Puntland is based on the guiding principles of: (a) Islamic Sharia" (Art. 3.3)	
"The laws and culture of the people shall be based on the Islamic religion." (Art. 9.3)	
"Any law and any culture that contravenes Islam shall be prohibited." (Art. 9.4)	
"All personal liberties shall not in any way contravene the Islamic Sharia, by-laws, ethics, the stability of the country or the rights of another person." (Art 19.3)	

REPUBLIC OF SOMALILAND	
"Islam is the religion of the Somaliland state, and the promotion of any other religion in the territory of Somaliland, other than Islam, is prohibited." (Art. 5.1)	
"The laws of the nation shall be grounded on and shall not be contrary to Sharia." (Art. 5.2)	
"The state shall promote religious tenets (religious affairs) and shall fulfil Sharia principles and discourage immoral acts and reprehensible behavior." (Art. 5.3)	

This opens the concrete implementation of shari'ah to a wide range of interpretation from various *madhabs*, not limited to the Shafi'i school. This potential notwithstanding, each governance framework comprises features and principles adapted from Egyptian Shafi'i *fiqh* and legislation. Somalia's provisional Constitution stipulates a federal system, with designated legislative authority and a court model with jurisdiction shared between federal and regional fora. As in Saudi Arabia, judges are vested with the authority to navigate different sources of law and apply their interpretation of shari'ah.

Aside from the extent to which a shari'ah-based legal framework protects the rights of all groups, rule of law in Somalia is thus legally formalized and enshrined. The difference to other contexts such as Egypt and Saudi Arabia is that Somali judges operate in a legally pluralist environment for which they are often ill-equipped. Many if not most judges lack a sound understanding of statutory law, of Islamic jurisprudence, and of the principles of *ijtihad* required to identify, prioritize and apply shari'ah and other laws (statutory and customary) to cases before them. Customary xeer remains the province of elders.

At the regional level, state judges share (or compete for) authority with customary leaders and ulama, some of whom suffer even greater knowledge deficits. The implications are manifold. Rule of law is limited in judicial practice, which lacks consistency and predictability, and by the fact that the laws cannot easily be accessed and understood by the public. These deficits in judicial capacity furthermore curtail the impact of legislation aimed at protecting marginalized groups, as lack of competence provides space for politics, patronage, and other interests to enter into these processes. To understand the impact of shari'ah, juridical practice must therefore be considered in its own right.

Legal Pluralism and Shari'ah in Practice

Although shari'ah is recognized as the basis of all law in all three major constitutions and is thus highly formalized in law, in juridical practice it largely plays an informal role. There are no formal shari'ah institutions in Somalia. Shari'ah runs in parallel with customary *xeer*[52] and statutory judiciary. Similarly to *xeer*, shari'ah mostly acts as a dispute resolution mechanism, in which parties voluntarily agree to abide by shari'ah rulings. Neither *xeer* nor shari'ah comprise direct means of enforcement other than both parties' assent to their rulings.

Although the Islamic practices and beliefs of Sufi and Salafi Sunni Muslims in Somalia may differ, both groups adhere to the same interpretations of the shari'ah of their respective *madhab* with minor differences. This is crucial, as shari'ah pervades all forms of adjudication in Somalia. Elders applying customary justice procedures draw heavily on interpretations of the shari'ah in their mediation or arbitration, particularly when it comes to domestic civil affairs. As such, Islamic precepts are considered when customary agreements are reached. Statutory law is based on shari'ah, and most judges are trained in another shari'ah-based legal framework rather than Somali statutory law (e.g. Sudanese law).

In statutory courts, judges may invoke the shari'ah when deciding on a case.

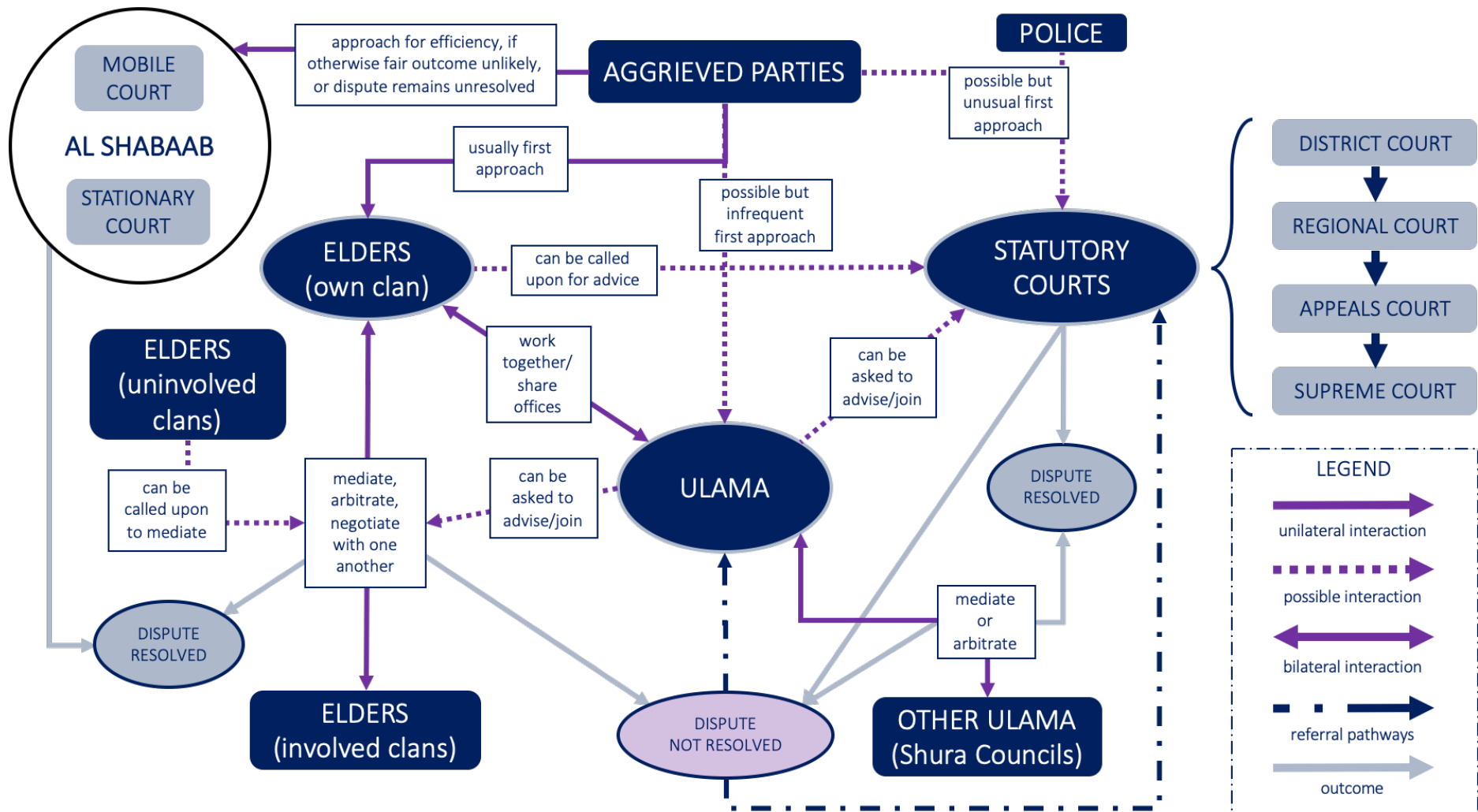Statutory court judges may refer a case to a local Islamic jurist.

Cases may be taken directly to shari'ah scholars, if parties agree to abide by their rulings.

In Al Shabaab-controlled areas, shari'ah is used exclusively, although xeer is applied in some cases.

The shari'ah's pervasive role in Somalia's justice institutions has a dual effect. It renders shari'ah the common entry point for legitimate justice sector reform. It also implies a number of challenges and limitations as shari'ah practice occurs within limited infrastructure and competing justice norms. The latter is practically unavoidable in a legal pluralist environment in which legal traditions do not operate as separate systems but are institutionally enmeshed and therefore must be negotiated anew each time they are applied.

The following model illustrates the most common pathways through which institutions cooperate, and via which aggrieved parties can address institutions in pursuit of conflict resolution or rights-based justice. The model encapsulates the most basic patterns of collaboration, and the tendencies indicated do not exclude frequent diversion. Should end users expect a more favorable outcome from one of these institutions rather than another, or trust or understand one more than others, it is likely that they diverge from the most frequently occurring patterns. Finally, most collaboration among justice providers, including referrals, are not systematized, but depend on inter-personal relationships.

---

[52] For an overview of customary justice in Somalia, see: R. Mydlak (2020). *The Clan System and Customary Justice in Somalia – A Brief Introduction*. Danish Demining Group.; J. Gundel, & A. Dharbaxo (2006). *The predicament of the 'Oday': The role of traditional structures in security, rights, law and development in Somalia*. Danish Refugee Council, Novib/Oxfam.

AL SHABAAB
- MOBILE COURT
- STATIONARY COURT

AGGRIEVED PARTIES

POLICE

approach for efficiency, if otherwise fair outcome unlikely, or dispute remains unresolved

possible but unusual first approach

usually first approach

possible but infrequent first approach

ELDERS (own clan)

can be called upon for advice

STATUTORY COURTS

DISTRICT COURT

REGIONAL COURT

APPEALS COURT

SUPREME COURT

ELDERS (uninvolved clans)

work together/ share offices

can be asked to advise/join

can be called upon to mediate

mediate, arbitrate, negotiate with one another

can be asked to advise/join

ULAMA

DISPUTE RESOLVED

DISPUTE RESOLVED

ELDERS (involved clans)

DISPUTE NOT RESOLVED

mediate or arbitrate

OTHER ULAMA (Shura Councils)

LEGEND

unilateral interaction

possible interaction

bilateral interaction

referral pathways

outcome

21

Harmful practices as a result of competing norms

The area in which shari'ah is applied most widely by statutory courts, especially family courts, is that of domestic civil cases – by and large following the Shafi'i *madhab.* This is also the area in which shari'ah most strongly interacts with the still widely dominant customary xeer, as elders remain a first port of call for many families and the de-escalation of potential collective conflict remains a priority for many communities. Statutory judges often apply xeer alongside shari'ah. In practice, this means that a judge's understanding of shari'ah might depart from Shafi'i principles, sometimes significantly.

Because the deeply patriarchal xeer can contradict both shari'ah and statutory law, especially as it is based on communal rather than individual responsibility, its application can in many cases be harmful and disenfranchising for vulnerable groups. This explains how practices such as female genital mutilation and cutting (FGM/C) and restrictions to women's inheritance rights are tolerated in many areas, even though both outright contradict shari'ah principles. In other cases, the fusion of law, religion, and tradition has opened pathways for discriminatory customary practices being presented as condoned by or required under Islam. Key examples include domestic violence as well as early and forced marriage.

In practice, parties involved in a dispute tend to first approach a family mediator or one of their clan elders (*oadayaasha*). This initial mediation usually draws almost exclusively on xeer, agreed-upon among the clans (*qabiil*) involved. Some elders work from offices, sometimes shared with ulama. In most disputes that cannot be mediated immediately at the family level, elders and ulama work together, regardless of the type of dispute. Specialized ulama are also called upon in their respective field of expertise, such as land disputes or inheritance (*dhaxal*), often receiving a fee for their services. Respondents referred to this collaboration as *gola is islayaacago* ('going to each other'), and noted:

"An elder cannot work without an ulama present."
&
"Ulama cannot work without a Sheikh [elder]."

Reliance on controversial security and justice providers for enforcement

As aforementioned, clan elders and ulama do not have the capacity to enforce their decisions. They must therefore rely on all parties' voluntary compliance, on the capacity of one party to enforce a judgement (which also implies this party's ability to ignore unfavorable outcomes), or on government-affiliated security and justice providers to enforce their judgements. Rather than a state-based monopoly of violence, however, Somalia's security forces are by and large amalgamations of clan-based and private armed forces with varying allegiances, and judges at statutory courts are frequently described as partial or receptive to outside influence.[53]

Nonetheless, there is significant interaction between ulama and statutory courts. The courts may call for ulama to contribute to or decide cases together in matters such as inheritance or other domestic affairs. Statutory courts tend to ask for the assistance of ulama when dealing with challenging cases. In some cases, the courts will also provide ulama with documentation (e.g. marriage certificates) for cases under their aegis. Ultimately, ulama are the final instance for cases that cannot be settled by elders or statutory judges, and advisors to both.

---

[53] K. 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;
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.

Education and Availability of Resources

Although both traditions hold potential for constructive interaction and offer valuable additions to shari'ah-based justice, ulama inevitably become entangled in the shortcomings of both customary and statutory institutions. These extend beyond normative tensions and issues of legitimacy and abuse to lack of equipment as well as gaps and vulnerability to influence in ulama's and judges' education.

The greatest challenge facing the shari'ah in Somalia is the complete lack of oversight over shari'ah education or any systematized curriculum for aspiring scholars and judges. Consequently, competent teachers and schools are few and far between. Years of protracted civil war have eroded the capacity of universities to deliver a comprehensive and rigorous religious education, and somewhat rendered the higher education sector a business opportunity for intrepid entrepreneurs. As a result, curricula are outdated, lacking in uniformity, and contain jurisprudential irregularities.

Local Schools

The majority of Somali ulama are educated locally. Of the 22 ulama interviewed during this study, only seven had attended shari'ah schools abroad. Of local schools, one interviewee said:

> *"Great ulama can be found across the country, who are learned, respected, and well educated. They do not hold a college degree or formal education, but rather learned from local schools. These local schools do not offer degrees or internationally recognized certificates, but some of our greatest ulama have come from them."*

Respondents observed that shari'ah and Islamic education flourished following the fall of the Somalia's central government in 1991. Initially, most shari'ah was taught in mosques or madrasas, but these political cataclysms – state collapse and civil war – eviscerated existing infrastructure and thereby provided space for outside investments to generate a new landscape for religious education. Since then, a plethora of institutions have emerged – interviewees referred to them as Islamic "colleges" – that are teaching shari'ah more formally and sometimes exclusively.

Islamic and shari'ah education in Somalia begins prior to primary school at local mosques, madrasas, and religious schools. Upon graduation, students have acquired general knowledge of different fiqh and schools of thought. But for further study in shari'ah, students must attend an Islamic college. Here, students learn of shari'ah jurisprudence, the hadith, and other Islamic sciences.

Some of these colleges, more recently, provide post-graduate degrees in Islamic studies (mainly focused on shari'ah). This is primarily taught by Somali teachers who have studied abroad. Few of these colleges award recognized post-graduate degrees. Only a handful exist in Mogadishu, including: Jama'adul Benadir, Jamaa'a Islaami, Jamaa'a Aljazeer, Jamaa'a Hormuud, and Jamaa'a Jumiiriya.

All of these schools are private. They are set up by prominent ulama with support from local business owners. Most are established without any involvement of federal or state institutions. In Baidoa, approximately 50 religious schools teach shari'ah. Only one offers a certified degree in shari'ah. Most of these schools have poor facilities and teachers themselves have received little education, and are pathways for further studies abroad, according to one respondent:

> *"In Baidoa, mostly Salafis control the schools, which are private facilities supported by Sheikhs. Schools collect fees for their services. Once the students graduate, if they have the means, they are sent to Qatar or Kuwait for further studies."*

Interviewees for this study largely agreed that although the number Islamic schools has expanded, their quality is not comparable to international schools. Local schools, they suggested, require a wide range of support, including general capacity building and seminars, a revised curriculum, actual school buildings, and an increase in the number of teachers trained in shari'ah. The quality of teachers translates directly to the level of education that students receive. In this vein, respondents argued for better access to books (*kutub*), salaries for teachers, and transport as well as uniforms for students.

Schools Abroad

Somali Islamic schools do not award internationally recognized degrees in shari'ah. For these, students must attend school abroad. Prior to the civil war, Sudan, Egypt and Yemen were popular locations for students of shari'ah. Respondents argued that their popularity stems from the previous prevalence of the Shafi'i *madhab* in Somalia, as most renown Shafi'i ulama teach in these countries.

Although Egypt remains an important destination, current Somali students increasingly choose to study in Saudi Arabia. In practical terms, most interviewees characterized institutions in Saudi Arabia as Salafi and the famous Al-Azhar University in Egypt to Sufi teachings, even though the latter offers a variety of teachings from ulama following both schools of thought. Interviewees underscored this distinction with the observation that Al-Azhar-trained ulama living in areas controlled by Al Shabaab tend to hide their educational background, alleging that the hardline Salafi group strongly opposes Al-Azhar's teachings.

The benefits of studying abroad, as identified by respondents, are threefold:

– Students are taught in Arabic, which both shari'ah and Islam are based upon;
– Students are taught by prominent scholars;
– Students receive an internationally recognized certificate/degree (*Shahadaad mu'talif*).

Respondents, especially from Baidoa, cautioned that few students have the means or opportunity to study shari'ah and Islam abroad.[54] The diversification of destinations and different external influences on Islamic schools in Somalia, moreover, imply a less uniform landscape of teaching shari'ah and greater potential for divergence in its application, echoing the aforementioned tension between Shafi'i and Hanbali traditions.

Physical infrastructure, or a lack thereof

Even without uniformity or consensus around *madhab*, judges generally require access to legislation to refer to relevant passages and ensure that law is applied correctly, be it religious precept or statutory code. Currently, most judges have access to a copy of the Qur'an and (sometimes) sections of codified law, such as the Penal Code. Few have access to further copies of existing legislation, some of which dates to the colonial era and is written in Italian, imposing a further linguistic barrier.

Linguistic issues extend to the religious texts available. Not all ulama are fluent in Arabic, and the translation of religious texts varies in quality and availability. This contributes to manifold divergence in the application of scripture, teachings, and precepts, as their understanding differs, and agreement is hindered by a lack of constructive dialogue among *madhabs* and movements, each linked to external backers and political agendas. In some places, this has undermined the standing of ulama and the legitimacy of their role in local governance and justice provision.

For ulama in particular, a further challenge concerns access to past decisions. There is no central database of shari'ah rulings in Somalia. The last such database was maintained prior to 1991, which has resulted in a three-decade-long gap in filing. Today, most ulama use an analogue cabinet and file system, although the use of electronic means is gradually increasing. These files are mostly kept in ulama's homes or offices. Ulama must therefore call one another and/or a prominent scholar to learn of precedence, which reinforces the primacy of inter-personal relationships over systematization. The documentation of statutory court cases is more reliable and centralized, but also kept in physical files rather than stored digitally, in judges' office cabinets.

> *"If tomorrow you want to remember a case that happened today it is only through memory. There is no way to find a case or past case or past decision other than through personal memory or another Ulama."*

---

[54] The most popular college at Al Azhar among students from Baidoa who venture abroad is *Sharia wa Qeynun*. Others look to Sudan, Saudi Arabia, and Yemen. The influences of the Egyptian Al Azhar and Saudi Arabian schools are the most relevant from the perspective of Baidoa Scholars. There are a series of private Islamic schools in Saudi Arabia that receive funding and support through Islamic agencies (e.g. Xuneyn), which increases the likelihood of Somali people to study in those schools. Baidoa Scholars use *Minhaaj* as reference for cases.

Al Shabaab Courts

The confluence of allegations of corruption, inadequate education among judges and ulama, the lack of enforcement capacity among ulama and elders, and the lack of equipment opens up space for alternative justice providers, first and foremost Al Shabaab. Insurgencies tend to revolve less around military conflict and more around each party's ability to provide constituencies with predictable and capable governance from which they derive legitimacy and thus support. [55] In other words, a government's shortcomings in justice provision always constitutes an opportunity for insurgents.

In Somalia, Al Shabaab indeed capitalizes on the above-discussed challenges that the various institutions in the legally pluralist landscape face. The group maintains a full-fledged governance system with governors, tax collectors, and judges for each region, whether it exercises control or not.[56] Justice provision figures as one of the most prominent avenues for recruitment, and has helped Al Shabaab weather a sustained military counterinsurgency campaign and recuperate from previous losses.[57]

A vital component of its success in this is Al Shabaab's ability to enforce decisions and render these in a somewhat transparent and legitimate manner – based on shari'ah. Public persons up to a general of the Somali National Army have openly stated that they do prefer Al Shabaab courts when it comes to land disputes, and respondents during this study confirmed this. In Baidoa, interviewees were frank about government courts' reputation of corruption and lack of enforcement capacities.

> *"Almost all decisions at formal courts are settled with bribery – if you do not pay bribe, your case will almost always be lost or never be adjudicated."*

Al Shabaab courts, on the other hand provide binding decisions that are enforced by its military and intelligence capabilities. Al Shabaab is said to operate a base and office in each regional capital. In case of a dispute, individuals can directly approach an Al Shabaab court. The group's court officials will then approach the defendant/other party and summon them to appear before the court. Several respondents mentioned that Al Shabaab courts are predominantly located in Baidoa and Afgoye.

> *"It is better to go to Al Shabaab because they are impartial, their decisions fair...
> although people are afraid of Al Shabaab because they could kill you."*

Yet, and despite these factors, access to Al Shabaab courts does not necessarily come easy, or even always preferably. For many communities, customary justice with its shari'ah elements and local communal ties remains the first port of call, for a variety of reasons including communal pressure, lack of trust, ease of physical access, but also potential repercussions. On the one hand, Al Shabaab must also engage with political and clan dynamics, as much as it takes steps to transcend these, and thus inevitably alienates some groups. On the other hand, several administrations have taken measures to punish residents who seek out Al Shabaab courts with arrest and imprisonment.

---

[55] D. Kilcullen (2010). *Counterinsurgency*. Oxford: Oxford University Press.
[56] Sahan Research (2016). *Al-Shabaab as a Transnational Security Threat*. Commissioned by IGAD. Available at:
https://igadssp.org/index.php/documentation/4-igad-report-al-shabaab-as-a-transnational-security-threat/file
[57] J. Crouch (2018). *Counter-terror and the logic of violence in Somalia's civil war - Time for a new approach*. Saferworld.

In South Central Somalia, a woman filed a complaint against her husband who she said did not financially support her, did not work, did not support the children, was argumentative, and abused drugs. She sought divorce as well as a financial settlement. She initially went to the family and elders, who were unable to resolve it. Then she approached the ulama. They mediated the issue and gave the husband a warning for his behavior. But this behavior continued unaltered. Frustrated, she decided to go to court. The court filed for the benefit of the wife. The husband turned to an Al Shabaab court and complained. She was summoned, and Al Shabaab ruled in favor of her husband. They explained that he was unemployed, and told her to be patient.

A few months later, she went back to Al Shabaab to file a complaint against him, because he had not changed his behavior, and renewed her request for a divorce. Al Shabaab granted her request. When they returned to the nearest city, they were both arrested by government security forces for interacting with Al Shabaab, especially as a statutory court had already adjudicated the case. She explained that she had feared that she would be killed if she had not obliged Al Shabaab's summons. Both are currently under arrest and their case is pending.

"We work, we use the roads, the government cannot protect us. These people [Al Shabaab] have power. The government does not have complete power."

People in many places continue to ignore government warnings and pleas and use Al Shabaab courts, also out of fear of the group itself, whose enforcement of both its summons and sentences make use of its military and intelligence capacities. Nearly all disputes dealt with by Al Shabaab courts are settled, and no subsequent disputes arise.

Respondents estimated most disputes in Baidoa to be land disputes, and estimated them at an average of ten per day. However, following the politically charged 2019 presidential election in South West State, the new Mayor of Baidoa put all rulings on land disputes on hold. The administration argued that this was in response to an increase in corruption and violence related to land disputes, some of which involved casualties of one or both parties.

The absence of definitive land registration, a working cadaster office,[58] and the centrality of land-based resources for revenue streams and for customary justice structures all amplify the stakes involved in land disputes.[59] Interviewees for this study added that several ulama in and around Baidoa refuse to mediate land disputes because of this potential for violence and further complications. They tend to refer these disputes to the courts, but people often ultimately turn to Al Shabaab Courts.

In case of a land dispute, Baidoa residents often approach Al Shabaab courts with legal documents, such as land titles issued by previous governments, and bring three witnesses. They also bring a Qur'an for witnesses to take an oath. The person accused of occupying the land without rights is likely to be imprisoned. By contrast, statutory courts dealing with land disputes tend to ask parties to wait for 2-3 weeks – a wait that parties can avoid by going to the Al Shabaab courts right away.

"80% of land disputes are taken to Al Shabaab and perhaps 20% go to formal courts. If the parties are unhappy with the court decision or their cases get delayed, they end up going to Al Shabaab."

---

58 Wasuge, Barnes & Kiepe (2017). *Land Matters in Mogadishu*.
59 K. Menkhaus (2017). *Land and Conflict in Somalia's Lower and Middle Jubba Valley*. Nairobi: USAID - OTI.

Al Shabaab's use of the shari'ah presents a double-edged sword for the group. On the one hand, it renders its adjudication somewhat transparent and legitimate among a population that strongly supports shari'ah as the basis of law and justice. On the other hand, Al Shabaab interprets and implements shari'ah in its strictest form, which reduces its purchase among affected communities who may not support a strict Hanbali reading.

In all territories controlled by Al Shabaab, shari'ah is not only implemented strictly, but violently: stoning for adultery, hand amputation for theft, detentions and floggings for other deviations or transgressions. Furthermore, Al Shabaab limits women's rights and movement in public in a severe manner. Women are forced to adhere to a specific dress code and be accompanied by a male guardian; they cannot engage in commerce if they would be in contact with men, and further restrictions.[60] The group also enforces a strict gender division in public transportation and in public interactions.

A twist is added to this seeming competition among insurgent and counterinsurgent justice structures, as Somalia's legal pluralism does not always neatly fit this clear-cut distinction. Al Shabaab must navigate communal dynamics, which requires a level of respect for communal institutions, such as customary justice procedures and elders' authority. This can imply that Al Shabaab recognizes extant judgements and rejects a case.

LEGAL PLURALISM IN PRACTICE	COMPETITION WITH MUTUAL RECOGNITION

One man severely beat up a friend of his cousin. The family of the perpetrator considered giving money to the victim to take him to the hospital. The parties opted for customary justice, *xeer.* The elders gathered to mediate the case and proposed 70 million Somali Shillings to be given to the victim.

Unhappy with the decision, the victim approached an Al Shabaab court and filed a complaint, hoping to obtain a larger amount of money. Al Shabaab court officials proceeded to contact the defendant, who explained that the issue had been settled by elders. The court officials concurred that the case fell within the elders' province, and ordered that as long as elders are mediating the case, the victim was not to approach Al Shabaab courts.

---

[60] cf. ICG (2019). *Women and Al-Shabaab's Insurgency*. International Crisis Group, Briefing N°145. Available at:
https://www.crisisgroup.org/africa/horn-africa/somalia/b145-women-and-al-shabaabs-insurgency

Regional Variations

This section has made frequent mention of the imperative for political and justice actors to tailor their activities to local socio-political dynamics. This holds true for the workings of all institutions as well as the legal and juridical dimensions of shari'ah. Although the general patterns of legal pluralism described here provide the framework, their workings are context specific, as the following examples of Somaliland, Puntland, and South West State illustrate.

SOMALILAND	

Systemically, justice provision in Somaliland operates similarly to that in Somalia. It combines statutory courts based the colonial legacy of Italian civil law and British common law with both xeer and shari'ah. The latter constitutes the supreme law of the land and state courts are constitutionally obligated not to contradict the shari'ah. All three systems are recognized by the Constitution of Somaliland, which views them as complementary. Somaliland residents also often opt for either xeer or shari'ah to avoid the high fees for lawyers and to find a resolution in a matter of days rather than wait for several weeks to be heard by a statutory court, which are equally accused of corruption.

The primary departure from practices elsewhere is that the population in Somaliland tends to use shari'ah given its unequivocal verdict, rather than turning to elders for immediate de-escalation. Shari'ah is also able to resolve cases that cannot be settled through xeer, such as business, finance, and technology-related cases. Approximately 30% of all cases are resolved through shari'ah, which also takes pressure off statutory courts that are already overstrained.[61]

One result of this divergence from Somalia is the caseload for ulama. Major ulama work from an office or an arbitration space where they make decisions and where the local population can present their legal cases, instead of approaching a statutory court. These arbitration spaces are referred to as shari'ah courts but may not necessarily meet the requirements of what Islamic jurists would generally define as a shari'ah court.

In practice, shari'ah is frequently used as a form of arbitration or alternative dispute resolution in Somaliland, which contributes to the overall workload and expands their scope. In part, this may link to the potential enforceability of outcomes. The rulings of arbitrators are to be enforced according to Article 317 to 333 of the Somaliland Constitution. Yet, decisions are not binding. Although shari'ah court decisions can be legally enforced by the government, parties must voluntarily agree to abide by the rulings of the shari'ah courts.

Ulama in Somaliland principally follow the Shafi'i *madhab,* but the number of Saudi-influenced scholars that follow the Hanbali school is growing. This divergence mirrors the wider denominational chasm as Sufi ulama in Somaliland unanimously adhere to the Shafi'i *madhab,* a tension that extends to government oversight of shari'ah-based adjudication. *Qaadis* (shari'ah judges) are evaluated by the Ministry of Religious Affairs and licensed by the Ministry of Justice.

The scope of the shari'ah courts is limited. Only civil cases can be handled by *qaadis,* whose decisions are not legally binding. Parties can disagree with the ruling of a shari'ah court and move the case to another shari'ah court, a statutory court, or to elders. Only statutory courts have full jurisdiction and claim to enforcement over all civil and criminal cases.

The key challenge for vulnerable groups seeking to access justice via shari'ah courts are the high fees some shari'ah courts charge. These fees render the system too expensive for the poor, while statutory courts benefit from external aid, albeit still limited. Although more accessible to and amenable towards women and women's rights than most customary justice providers, the tension over different interpretations of the shari'ah can invalidate testimonies of women in some cases.

---

[61] J. Jeffrey (2016). *Somaliland's quest to enforce rule of law.* Deutsche Welle, available at: https://www.dw.com/en/somalilands-quest-to-enforce-rule-of-law/a-19279817

Gedo region, the northern part of Jubaland, is both a seat of scholarship among the early Sufi *jama'a,* but it is also the origin of the first Salafi movement in Somalia, the Ubereey movement in the early 1900s. Here, Al Itixaad flourished after the civil war in the 1990s. As a result, current interpretations of the shari'ah by ulama in Gedo and across Jubaland are influenced by the Hanbali *madhab.*

In Lower Juba, the more southern region of Jubaland, the current government operates from the Kismayo port, and is presided over by Ahmed Mohamed Islam 'Madobe', a former member of the ICU leadership.[62] Following recent elections in Jubaland, tensions between the Federal Government of Somalia and the Kismayo administration run high, and Gedo region has been largely aligned with the Federal Government, which has now moved to expand its control to the Kismayo-leaning parts of the region.

This leads to a disparate application of shari'ah, which is furthermore confined to urban centers controlled by administrations. Rural parts of Jubaland and Middle Juba region in its entirety remain under Al Shabaab control and its strict Hanbali adjudication. In government-controlled areas, there is increased collaboration between statutory courts, clan elders, and religious leaders, with shari'ah and *xeer* being the most active. The three institutions operate together given their complementary application, but only courts have executory powers. Verdicts by ulama and elders need to be enforced by the court and police in order to be implemented.

The use of shari'ah as a source of law and reference for adjudication rather than an institution in its own right, however, is widespread:

- **Shari'ah is invoked by statutory judges**, although especially in Gedo their knowledge of shari'ah is limited
- **The military court uses the Somali Civil Law,** which conforms with the shari'ah in many ways, in adjudicating criminal matters
- **Al Shabaab operates both stationary and mobile courts** applying Hanbali jurisprudence
- **Ulama in Gedo apply shari'ah in various matters, including land disputes,** as confidence in statutory courts is low due to political affiliation and lengthy process

SOUTH WEST STATE

In Baidoa, ulama act as statutory court judges. They are educated in shari'ah and apply it in their decisions, which are binding. These judges have titles and are employed by the courts, of which there are four different types: District Courts, Provincial Courts, Appeals Courts, and a Supreme Court. These are sub-divided into shari'ah and a statutory courts.

The Supreme Court, composed of experienced judges knowledgeable in shari'ah, monitors and advises judges at lower levels. If a dispute cannot be solved at the district level, the case is referred to the Provincial Court. Also, disputes that exceed a certain value, generally US$3,000 and above, are automatically referred to provincial level. If a court's decision is not satisfactory to the parties, Appeal Courts and ultimately the Supreme Court can be approached.

Ulama can also be found at local mosques, or they operate from local schools or from home offices where they teach the Qur'an and the broader religion. The disputes they resolve predominantly concern inheritance, divorce, family disputes, land disputes, and commercial/business disputes. Most issues are settled outside of courts. Cases are generally initiated by male family representatives.

---

[62] H. Maruf & D. Joseph (2018). *Inside Al-Shabaab: The Secret History of Al-Qaeda's Most Powerful Ally*. Bloomington: Indiana University Press.

Popular ulama, the most knowledgeable, are known within the community. They are the ones most often chosen to handle cases. Interviewees noted that ulama do not normally charge a fee, and that payments they receive are viewed primarily as donations. In comparison, fees at statutory courts include US$50 per person for opening a case (*Gal-Fur*). If the case is business-related, the court charges US$5 for every US$100 of the amount in dispute.

In terms of workload, individual ulama could see between 30-60 cases per month, at a daily average of one to two cases. Not all issues settled outside the courts conclude in a time-effective manner. In particular protracted land disputes might take three or four years to come to a decision, or remain unresolved. This is a direct consequence of ulama's lack of enforcement capacity. In cases in which a decision cannot be reached by ulama or lacks enforcement entirely, parties might turn to Al Shabaab.

"We have a problem with implementation and enforcement. We can address issues according to religion, but there is no real way of enforcing them. There are cases that have not been settled for three or four years because there is no one to enforce them."

"The only time an Ulama cannot resolve an issue, it is not because it is too complicated or he does not understand the matter or that it does not come under his purview, it is because he cannot enforce it."

All elder councils (*guurti* or *malaq*), shari'ah courts, and Al Shabaab courts work in parallel in Baidoa, as is the case in other regions where Al Shabaab is present. Respondents explained that elders are generally the first port of call if a dispute arises. Only if they fail are courts approached. As a result, most cases that reach statutory courts are murder cases and land disputes. In murder cases, customary justice is geared towards collective responsibility and compensation, generally a number of camels or the equivalent monetary value given to the family of the victim. This is more likely to pacify the aggrieved parties at a group level. Capital and other punishment of individuals, on the other hand, may incite retaliatory communal violence.

"The clan will say: 'If our family member is killed for his crime, we will kill someone from your clan for revenge.' Fearing outbreak of clan violence, elders use xeer and instead ask for compensation."

Legal and Justice Sector Reform: Avenues and Barriers

Despite a common frame, Somalia's legal pluralism manifests in different constellations in each region, in terms of relations among institutions, politicization, and traction among local populations. Each deficit that arises from institutional shortcomings benefits Al Shabaab courts, which have the advantage of presenting a unitary system administered by each local chapter of the group and geared towards local context. The pluralist system, by contrast, comprises institutions that reflect a wider variety of interests, traditions, and purview.

Aside from Somaliland, where *xeer* and shari'ah are almost equally engaged, customary institutions remain dominant throughout Somalia. The extent to which these command legitimacy depends on local communal politics and the extent to which elders themselves have become politicized. Their lack of ability to enforce decisions and role as de-escalator rather than rights-based justice provider has been discussed above. These two elements fall under the purview of statutory courts and security forces, far more politicized than elders, lacking greatly in capacity, and approached with caution in most cases.

Given these competing paradigms and interests, as well as the continued lack of a shared social contract, a coherent singular juridical architecture is unlikely to manifest soon. When it comes to rights-based justice, however, the entry point that is most equally legitimate across regions and communities, most able to rise above clannist politics, and historically most likely to receive grassroots support, is adjudication and jurisprudence based on shari'ah. Gains via this avenue are likely to be modest, but most likely to enjoy communal support, most likely to point towards rights-based justice provision, and most likely to appear intuitive to communities where they build on and include customary authorities.

Here, legal reform and implementation of the extant legal framework should be considered separately. The latter is closely intertwined with the prevalence of customary mediation and arbitration, as well as the overall lack of resources and capacity. The former links directly to state building, which is enmeshed in local political conflict and tied in with external influences and thus (geo)political interests, as has been discussed above. The legal frameworks' constitutional roots in shari'ah, however, may provide an opportunity to wrest its reform from external interests and internal strife, instead grounding it in a discursive frame supported by a majority of citizens and acknowledged by most major political actors.[63]

Legal Reform: Ijtihad

The centrality of the shari'ah for Somalia's and Somaliland's state building and constitution does not translate into a direct application of one madhab. Rather than a set of laws geared towards enabling governance, the shari'ah is more a set of social, moral, and situational guidelines. Most Muslim-majority countries have therefore built secular legal systems on the basis of these guidelines and supplemented them with shari'ah courts that enjoy jurisdiction over those areas most clearly governed by Islamic precept, such as personal status, inheritance, and some aspects of crime.

Chief among these are the Kingdom of Saudi Arabia and The Islamic Republic of Iran, which most closely approximate 'Islamic states' insofar as their legal systems are based on a systematic application of the shari'ah. Both accompany interpretations of shari'ah with written laws and regulations covering areas that are not specifically articulated in the primary Islamic sources. They do this by invoking the Islamic concepts of *al-siyasa al-shar'iyya* (shari'ah-based policy) and *al-Maslahah al-Mursalah* (public interest). These are important doctrines that facilitate governments making rules and allowing them to respond to changing needs or development imperatives in a shari'ah-compliant manner. Given that the Somali population is almost entirely Sunni Muslim, and given Saudi Arabia's strong influence on teaching of Islam and shari'ah, it is worthwhile taking a closer look at the composition of Saudi Arabia's application of shari'ah in its juridical system on the basis of its legal framework.

---

[63] Such an engagement would require a high degree of context sensitivity, as well as a distinction between moderate, peaceful Islamic movements or actors and more violent extremist groups. In his 2002 assessment of political Islam in Somalia, Ken Menkhaus notes this distinction, and emphasizes that all such engagements and political developments occur under the umbrella of a clannist and essentially pragmatic framework, opening space for equally pragmatic reform – whilst warning that a "boilerplate approach" antagonizing all movements alike is likely to exacerbate instability. See: K. Menkhaus (2002). *Political Islam in Somalia. Middle East Policy,* 9(1), 109-123.

The 1992 Basic Law of the Kingdom of Saudi Arabia (the Kingdom's version of a Constitution) states that the government draws its authority from the Qur'an and the Sunnah of the Prophet Muhammed, and that these two sources serve as the Kingdom's Constitution and govern all administrative regulations of the state. The 2007 Law of the Judiciary established a High Court, with Courts of Appeal in each province empowered to exercise their jurisdiction through labor, commercial, criminal, personal status, and civil 'circuits'. First-Degree Courts sit at the lowest level of the court hierarchy, and are made up of criminal, commercial, labor, personal status, and general courts. All courts must 'apply the rules of the Islamic Shari'ah … in accordance with what is indicated in the Qur'an and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah'.

Judges apply the shari'ah drawing on the Hanbali *madhab*, but with some discretion insofar as they are guided by their own understanding of the Qur'an and Sunna. Where the guidance provided by the primary sources is unclear, judges employ the jurisprudential tools (*ijtihad*) permitted by the Hanbali school. While there is no legislature on the basis that only God can legislate, there are written rules and justice is administered following clear regulatory framework. A range of statutory laws and regulations enacted in criminal, administrative, and commercial areas supplement the shari'ah. This authority is shared by the King, 'the enforcer of divine law', the Council of Ministers, and the Consultative Council (shura). As noted above, this is facilitated by the principle of *al-siyasa al-shar'iyya* for the public interest (*al-Maslahah al-Mursalah*).

Ijtihad, as is applied in Saudi Arabia in one of its most restricted forms, is central to wider legal reform and judges' performance in cases where existing legislation is not unambiguous. It comprises a set of tools used to glean shari'ah principles from scripture, including *ijma'*, *qiyas*, *maslaha*-based tools (*istihsan*, *istislah*, and *istidlal*), and *talfiq* (see page 7 for definitions). This list is not exhaustive, but comprises most relevant tools for this discussion. Ijtihad is essential to develop provisions for new types of cases. Ijtihad can also be understood more broadly as a process of judicial interpretation, which can potentially achieve law reform. Two examples illustrate how this has occurred in the recent past.

| IJTIHAD AS A TOOL FOR REFORM | TUNISIA |

In 1956, Tunisia introduced a new Code of Personal Status. This law abolished polygamy, granted women the right to file for divorce (and abolished men's right to unilateral repudiation of marriage), introduced alimony and strengthened women's custodial rights.[64] The government presented the code as the outcome of a new phase in Islamic thinking, similar to earlier phases of interpretation (ijtihad) identifiable throughout history. It was accompanied by a communiqué confirming the Islamic character of the new laws and that religious judges and scholars had participated in the law's preparation and approved its content.

These reforms were not driven by demands for gender equality, but instead by a state agenda to reduce tribal influence (which coincidentally aligned with greater freedoms for women). Additional reforms took place in 1993 and 2007, this time driven by a strong civil society. First, the Tunisian Code de Nationalité was reformed to allow mothers to transmit their nationality to their children.[65] Then, the minimum age for marriage was raised from 15 to 18 for both men and women, further expanding women's rights in the areas of marriage, alimony, and custody.

---

[64] M. Charrad (2007). Contexts, Concepts and Contentions: Gender Legislation as Politics in the Middle East. *Hawwa: Journal of Women in the Middle East and the Islamic World*, 5(1), 55-72; M. Charrad (2001). *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*. Berkeley: University of California Press, pp. 201-232.; S. Bessis (1999). Le Féminisme Institutionnel en Tunisie. *Clio. Histoire, femmes et sociétés,* 9, [*En ligne* (online)].

[65] M. Charrad & A. Zarrugh (2013). The Arab Spring and Women's Rights in Tunisia. *e-IR*. Available at: http://www.e-ir.info/2013/09/04/the-arab-springand-womens-rights-in-tunisia/

Around the same time as Tunisia's first round of reforms, a reverse trend was taking place in neighboring Morocco. In 1958, the Code of Personal Status (1958), also known as the *Mudawwana*, was drawn from conservative interpretations of Malaki *madhab*. Advocacy to reform the Code through a process of *ijtihad* commenced in the 1980s. By 2000, street demonstrations in Rabat and Casablanca culminated in both the government and women's rights organizations appealing to King Mohammed VI to intervene in his Islamic leadership capacity. In April 2001, he established a commission to reform the *Mudawwana*. When the revised law was ratified in 2004, it was heralded as among the most progressive in the region.

The conditions under which, and how, *ijtihad* can be used as a tool for legal reform is a matter of debate among scholars. Conservative scholars believe that the 'gate of *ijtihad*' was closed around the tenth century A.D.[66] Others argue that it is only through interpretation and reform that states can respond to changing social, economic and ecological conditions while still observing shari'ah principles.[67] Other traditions disagree on the extent to which different tools can be utilized for *ijtihad*.

Crucially, for Somalia, the examples of Tunisia and Morocco illustrate applications of *maslaha*, the public interest or common good, as well as wider interpretations of the aims of shari'ah. Women's groups and other interested parties based their case on laws being inconsistent with these aims, and argued that changing socio-economic conditions meant that a literal interpretation of the Islamic texts had become unjust towards women, children, and families more generally.

Such arguments cannot be called upon in Shafi'i jurisprudence. The *maslaha*-based jurisprudential tools — *istihan*, *istislah*, and *istidlal* — are rejected by Shafi'i scholars, although they are used in other Sunni schools. The school recognizes ijma' and qiyas. *Prima facie,* reform is thus limited to consensus of opinion within Islamic scholarship, or deduction, that is applying a ruling from a similar case to a new situation that is not covered by the Qur'an, Sunna or *ijma'*.

"'Ijma' is straightforward and easy. It is when there is clear consensus among all the Madhabs. For example, we are all required to pay Zakat-al-Fitr (alms to be paid to poor at end of Ramadan). But different scholars have said it can be paid differently. Some have said that it should be paid only with the food that is most common in that country where they live, such as rice. And others have said that it can only be paid in cash. Of the four Madhab, three said you don't have to pay money and one said you have to pay money. So there is Ijma' that it is not required only to pay money."

Some scholars have argued by way of Qiyas that the Qur'anic ban on harming one's own body can be extended to prohibit smoking or using drugs, even though these practices are not mentioned in the holy texts. A similar argument might be extended to the practices of FGM/C and early marriage. Likewise, scholars have invoked the hadith that stipulates that someone that committed a murder should not inherit from the victim, and extended it to include that the perpetrator should not benefit from bequests made by the victim. It might be argued that this principle could be extended to a rapist not benefiting by being permitted to marry the victim.

"Qiyas is a measurement – when there is a phenomenon and a past judgment was not found. So you will find qiyas for something that happened from hadith or Qur'an [you determine qiyas from hadith and Qur'an]."'

---

[66] Dalrymple Anderson (1976). *Law Reform in the Muslim World*, p.7.; Hallaq (1984). Was the Gate of Ijthad Closed?
[67] Hallaq (1984). Was the Gate of Ijthad Closed?, pp. 12-15.

> *"The Prophet Muhammed said that if the saliva of a dog were to touch you
> or any part of your body or anything you are wearing, you must wash your
> body. By using qiyas and individual reason, early scholars also said that to
> come into contact with the blood of a dog or the feces of a dog, you must
> also wash your body. This was not explicit but they used qiyas to determine
> it to be so."*
>
> *"A man asked Prophet Muhammed (PBUH) whether he could make
> ablutions in preparation for prayer in the ocean using its waters. The
> Prophet responded the sea's water purifies and all within it purifies. By using
> Qiyas, you can determine that it is halal to eat fish and crustaceans from the
> ocean, although it is not explicitly stated."*

Both *ijma'* and *qiyas* are technically permissible for Shafi'i ulama. Yet, in Somalia, cases with no consensus (*ijma'*), in which the use of *qiyas* would be required, are extremely rare. Moreover, similar cases are not known to have received different rulings. The only disagreements appear between xeer and formal courts. Ulama tend to follow each other or act in alignment with some minor differences between the shari'ah interpretations of Salafi ulama and Sufis. This has consequences for the acceptance of *qiyas,* as *ijma'*, existing consensus, is by and large presumed.

> *"The only disagreements ulama have in law are with Xeer or formal courts – but all
> ulama follow each other, unless of course it is about very small differences in Salafi
> Ulama or Sufi, but even then differences are minor because we are all Shafi'i."*

Several ulama interviewed for this study insisted that *qiyas* is not applied in Somalia in practice at all. When asked to give an example of a case in which the particular issue was not already specified in the Qur'an or a hadith, and in which no *ijma'* exists, several interviewees responded:

> *"Everything that happens is in the Sunna and the Qur'an. Everything related to
> religion is in the Kitab and very clearly so. And anything that has not been set out
> has been clarified by great ulama such as Al-Shafi'i."*

> *"There is always consensus. All the great scholars have agreed upon all the major
> issues of Islam and Diin. Out of 100 cases in Islamic Shari'ah, 99% have ijma'."*

Somalia, unlike countries such as Egypt, has a particularly short history in the direct application of shari'ah. Somali ulama thus strictly follow rulings from their respective *madhab*, and prominent scholars in other countries, such as Egypt and more recently and increasingly Saudi Arabia. As such, most ulama draw from previous *qiyas* of major ulama, but by and large do not conduct their own.

> *"No, an Ulama cannot use qiyas in court. Everything is in Hadith and Qur'an and
> ijma'. He can, however, follow qiyas of major Ulama, but he cannot make his own.
> This is not seen."*

> *"'Everything that comes before us can be found in the Qur'an, the Sunna (Hadith),
> ijma among scholars and qiyas, made by prominent scholars of the past."*

Several other interviewees deemed any performance of *ijtihad* by Somali ulama impermissible. Instead, they described *ijtihad* as the province of the great scholars of early Islam, echoing the aforementioned view that 'the gate of *ijtihad* is closed'. Many added that even should ijtihad be performed, it imposes narrow limitations on ulama in their interpretations. Most rejected innovation and stated that they did not practice it. None were aware of a case in Somalia in which *ijtihad* was used, neither *ijma'* nor *qiyas.*

Yet, some interviewed ulama disagreed with the impermissibility of *ijtihad* as such. The previous examples of Tunisia and Morocco illustrate cases in which strong civil society was able to build on such *a priori* openness towards change, even if still highly conservative, by altering the socio-political environment and the pressure it exerts on holders of religious, legislatorial, and juridical authority.

TUNISIA & MOROCCO	IMPORTANCE OF CIVIL SOCIETY

In both Tunisia and Morocco, civil society groups played a critical role in presenting gender as an issue of political concern. Such movements often need time to grow and evolve. In Tunisia, the work of women's rights advocates in the 1980s, while severely restricted, paved the way for groups in the 1990s and 2000s.[68] The composition of these groups was also critical to their impact. Women's associations in the 1980's were principally comprised of an urban elite of women in Tunis. The more successful movements of 2010 brought together a more diverse and representative group including both rural and urban women, as well as the poor and privileged.

SEIZING OPPORTUNITIES AS THEY PRESENT THEMSELVES	TUNISIA & MOROCCO

The reforms that took place in Tunisia in 1993 and 2007, were driven by a state agenda that made gender rights politically appealing. President Ben Ali presented himself as a progressive leader. Women's groups targeted this discourse, and looked for opportunities and synergies by presenting gender rights as a symbol of modernization and tool of political capital. In Morocco, the Casablanca terrorist attacks in 2003 opened new space for discussion on gender. Morocco suddenly needed to present itself as an ally in the war on terror, and seized opportunities to be perceived as progressive and democratic. Women's movements latched onto this momentum, presenting their demands as a fence against religious extremism and a pledge of the state's commitment to modernity.

In these cases, women's movements were able to insert themselves among wider social movements, but also push for women's rights to join the public agenda as space presented itself. In Somalia, first steps towards more inclusive customary justice structures are being taken,[69] but xeer largely still excludes women from its proceedings and enforces traditional patriarchal values. Courts are deeply integrated into political power sharing, which is based on Somalia's clan system and thus vulnerable to the same disenfranchisement of women, as well as liable to tokenism where women are represented.

The examples of Tunisia and Morocco, by contrast, illustrate that drawing on Islamic scripture provides a narrative for women's involvement as well as greater protection of women's rights. They also highlight that the pledge towards international human rights standards and equality that many constitutions have incorporated under international pressure – including that of the Federal Republic of Somalia – provides another entry point, as well as point of leverage for renewed *ijtihad*.

TUNISIA & MOROCCO	WOMEN

Morocco's reform movement was driven, in large part, by networks of women within the Islamic political establishment. Women participated in the main Islamist movements, as well as in the production of Islamic knowledge and religious policy-making. This liberal approach was quite unique in the region at the time. It commenced in 2000 with the Ministry of Islamic Affairs permitting women to deliver sermons in Mosques, followed in 2004 with the King appointing 30 women to the Ulama Council and one to the Supreme Council of Ulama. This network of female

[68] L. Brand (1998). *Women, the State, and Political Liberalization: Middle Eastern and North African Experiences*. New York: Columbia University Press.; E. Beardsley (2011). *In Tunisia, Women Play Equal Role in Revolution,* National Public Radio, 27 January 2011.; N. Zoughlami (1989). *Quel Féminisme dans les Groupes-Femmes des Années 80 en Tunisie?,* 26 Annuaire de l'Afrique du Nord.
[69] cf. R. Mydlak (2019). *Engagement of Somali Customary Institutions in Justice Programs: Establishing a Knowledge Base*. Danish Demining Group. Available at: https://somhub.org/

Islamists and religious figures not only created new scope for engagement. It used its position strategically. They defined their cause as challenging the legal source of women's oppression, therefore pitching their battle with the legislature, and not with men, Islam, or the King.

Their argument was also multifaceted, making it easier to gain support from a variety of stakeholders: the *Mudawwana* (i) breached the Constitution's equality guarantees (ii) was incompatible with Morocco's international legal obligations, (iii) was contrary to Qur'anic precepts on gender equality and (iv) negatively impacted modern family structures in a way that contradicted the intention of the shari'ah.

Finally, the movement deliberately distanced itself from western feminist discourse by presenting reform as an Islamic imperative. Arguments were presented in terms of family rights (as opposed to women's rights) and the correct positioning of women in the family unit as envisaged in the Holy Scriptures. They highlighted that ijtihad had previously been used to reform family law in Morocco, then built legitimacy around these arguments through evidence-based links to Qur'anic verses and hadith supporting gender equality. This moderate approach limited their exposure to criticism from traditional Islamists as well as secular conservatives.

The examples illustrate the importance of political space for a robust, inclusive, and grounded civil society – grounded not merely in sustainable funding structures, but in grassroots momentum rather than streams of external resources. Each case underscores the potential of organized movements to act once space for reform opens or leverage points present themselves, and the extent to which they are able to engender change if it is framed in ways acceptable to local power holders and religious authorities. In this respect, consideration of Somalia's and Somaliland's Shafi'i tradition and Hanbali influences are pivotal for potential legal reform.

This implies an inherently controversial position for the last tool of *ijtihad* discussed here: *talfiq.* It denotes the practice of abandoning one's own *madhab* and looking for inspiration from other schools, one or multiple. Interviewed ulama asserted that *talfiq* is not used in Somalia. The fusion of or the use of different legal opinions from different schools of thought is frowned upon, as ulama in Somalia strictly adhere to their specific *madhab,* Shafi'i or Hanbali. Within these schools, however, interviewed scholars did not rule out considering different opinions. One such respondent cited a popular saying concerning different opinions of different ulama:

> *"'We have a common saying that you never ask an Egyptian ulama about beards or ask ulama from Yemen about Qat. In Egypt, the ulama shave their beards and in Yemen they eat Qat.'"*

The challenges for a reform of the shari'ah underpinnings of legal pluralism in Somalia and Somaliland are daunting, given Shafi'i scholars hesitation to embrace *ijtihad*, and growing Hanbali influence. The potential gains in rights-based justice provision, in particular for the protection of vulnerable groups and the efficacy of adjudication match this challenge, as shari'ah permeates and underpins all facets of Somali legal pluralism. Considering its linkage to the socio-political environment remains crucial, both for the legal framework discussed here and for its application in practice.

Legal Practice: Shari'ah in Customary and Statutory law

Legal reform of the predominant interpretation of shari'ah in Somalia, primarily among Shafi'i scholars as this *madhab* remains prevalent outside of Al Shabaab controlled areas, has direct ramifications for the application of both customary and statutory law. The latter is constitutionally based on shari'ah and prohibited from contradicting it. Elders are chosen for their reputation as mediators, but also for their knowledge of proverbs, precedence, and shari'ah. That different *madhabs* are competing within Somalia, and that civil society elsewhere managed to catalyze socio-political change into legal reform, suggests that the strict limitations to *ijtihad* in theology can by softened through shari'ah in practice.

The challenge of reform is much more complicated when the abrogating practice in question is unambiguously regulated under the primary Islamic sources. Even highly progressive scholars find it difficult, for example, to construct legal arguments questioning the validity of Islamic inheritance or early marriage provisions. In such cases, alternative pathways to strengthen protection need to be explored. Sometimes these decisions will form part of a broader strategy for enhanced protection.

- **In Morocco, women's groups decided to remove the issue of gender inequality in Islamic inheritance from their major advocacy tool** 'the One Million Signatures Campaign', because the argument had weak legal merit and the campaign's legitimacy rested on its rigorous approach to religious scholarship.
- **In Jordan, NGOs deemed it more pragmatic and useful to advocate for women to receive their religiously guaranteed (albeit unequal) inheritance rights** (which they were routinely denied under customary law), rather than attempt to raise an argument for equal inheritance right and risk alienating the Islamic establishment.

Another entry point is to seek out legal alternatives that can facilitate more protective practices – including a possible inversion of the relationship between customary law and shari'ah, using the former to mitigate the latter. Here, Somalia's legal pluralism constitutes an asset, as traditions have been negotiated, co-existed, or merged with (parts of) one another.

- **In some parts of Indonesia, communities have circumvented the unequal nature of Islamic inheritance by recognizing a customary form of private property (*bawaan*)** named *hareuta peunulang*. *Hareuta peunulang* is a bequest of non-movable property (either a house or land) to daughters by their parents upon marriage. While *peunulang* property may be considered 'inheritance', it does not form part of the parents' estate, nor does it displace a daughter's normal inheritance rights. In practice, this means that *peunulang* property remains under the daughter's complete and exclusive control,[70] and cannot be shared with other heirs. As gifting is a recognized form of property transfer in Islam, this custom is rarely contested by male heirs. It is often linked to the hadith that retrieving a bequest is akin to a dog eating its own vomit.[71]

Inheritance provides a good illustration of the issues involved in these legal conundrums. There are various conditions in which inheritance may vary for both genders under shari'ah. This is because the amount of inheritance is not only dependent upon gender but on other conditions.

---

[70] E Harper (2006). *Land, Inheritance and Guardianship Law in Post-Tsunami Aceh*. International Development Law Organization.
[71] Sahih Muslim Book 012, Hadith Number 3949. Umar b. Khattab (Allah be pleased with him) reported: "I donated a pedigree horse in the path of Allah. Its possessor made it languish. I thought that he would sell it at a cheap price. I asked Allah's Messenger (may peace be upon him) about it, whereupon he said: 'Don't buy it and do not get back your charity, for one who gets back the charity is like a dog who swallows its vomit.'" This hadith has been narrated on the authority of Malik b. Anas with the same chain of transmitters but with this addition: 'Don't buy that even if he gives you for one dirham.'

If inheriting from the mother, male and female heirs inherit the same amount

If inheriting from the father, male heirs receive more, including all financial responsibilities.

Women who inherit retain their full inheritance and do not have to pay for or share their earnings with their husband or family. They also do not take on their father's financial responsibilities.

The extent of inheritance for female heirs vis-à-vis children and grandchildren depends upon how close of kin they were to the deceased.

The daughter of the deceased inherits more than the father of the deceased.

Shari'ah provides scope for the protection of finances and inheritance of women against Somali customary practice, in the finances and inheritance of women are taken from them. For this, contextual understanding is paramount. Successful cases of combining customary and shari'ah law to anchor the juridical landscape more deeply in locally legitimate practices exist, and appear to support the formation of a state structure that ultimately comprises both.

SHARI'AH & THE STATE	NIGERIA

The Federal Republic of Nigeria is a constitutional republic made up of 36 states and a federal capital territory (Abuja). The Constitution of 1999 recognizes both customary law and shari'ah, following the Maliki *madhab*. The Supreme Court is the highest judicial authority, followed by the Court of Appeal. Under these sit the Federal High Court (a branch of which operates in each state hearing matters falling under federal jurisdiction), State High Courts (with jurisdiction over so-called 'English law'), State Customary Courts of Appeal, and State Shari'ah Courts of Appeal (presided over by a Grand Khadi). The lowest courts are the state courts: (i) Magistrate Courts with jurisdiction over English law cases (ii) Customary Courts and (iii) Shari'ah Courts. The customary law applied is unwritten and varies by ethnic group (of which there are around 250). The shari'ah applied, by contrast, is more comprehensive, covers civil and criminal matters, and is codified.

MALAYSIA	SHARI'AH & THE STATE

The Federal Constitution of Malaysia of 1957 established a federal structure comprising 13 states and three federal territories. Secular courts apply a uniform body of federal law that governs most aspects of life. While some of this law is drawn from Islamic scripture, the majority is not. States are empowered to legislate on matters related to Islam and create shari'ah courts to adjudicate disputes involving Muslims in specific areas, including personal status (marriage, divorce, dowry etc.), inheritance, zakat and *wakaf* (alms and Islamic trusts), matters related to religious practice (including alcohol consumption and proselytizing), and some criminal matters. These courts enjoy significant autonomy. Since 1988, civil courts can no longer accept appeals from shari'ah courts.

A final entry point is to work indirectly, by supporting the conditions that promote the redundancy or abandonment of rights abrogating norms. For example, there is strong evidence that positively correlates increased adult economic opportunity and female educational attainment with lower rates of early marriage and FGM/C.[72] Insofar as Shafi'i jurisprudence accepts both of these practices, interventions aimed at poverty reduction and female education opportunities could be impactful and influence ulama, as juridical and legal practice remains embedded in its socio-political context.[73]

---

[72] cf. ICRW (2016). *Leveraging Education to End Female Genital Mutilation/Cutting Worldwide*. International Centre for Research on Women.; D. Rubin, C. Green & A. Mukurla (2009). *Addressing Early Marriage in Uganda*. USAID Health Policy Initiative.

[73] cf. A. Bendaña & T. Chopra (2013). Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland. *Hague Journal on the Rule of Law*, 5, pp 44-73

Summary

Ijtihad is widely accepted across the Muslim world as a basic principle of Islamic law, although the implementation of *ijtihad* has historically varied due to diversity of Islamic societies and historical trends. The potential of invoking *ijma'* and *qiyas* for the purposes of reform underscores the need for Somalia to build a community of learned Islamic scholars who can debate and advise on such issues. Judges in Somali statutory courts, currently, are not learned enough in Shafi'i jurisprudence to be able to apply ijtihad in a meaningful or equitable way.

Another layer of confusion is created by the fact that Somali judges have been educated in different countries and in different systems of statutory law (i.e. Sudan, Egypt, Pakistan, Ethiopia). The outcome is that judges not only apply a mélange of statutory law, shari'ah, and xeer, but also possibly adhere to different schools of Islamic jurisprudence. Which norms assume priority seems to be a product of on the judges' education, personal beliefs, and the power of clan elders. The result fails to meet the minimum standards of a system governed by the rule of law.

- **The judicial process lacks clarity and predictability.** Indeed, there is strong anecdotal evidence that people preferred the ICU for their draconian but swift, clear, and consistent dispensation of justice. For the same reason, people now frequently go to Al Shabaab courts.
- **This situation limits the impact of legislation**, and thus the extent to which interventions aimed at enhancing the protection of marginalized groups.
- **The broad discretion enjoyed by judges when resolving disputes creates opportunities for corruption and abuse of power.**
- **The conditions that enable a responsive and integrated legal framework to evolve are absent**, limiting longer-term stability, growth and resilience.

The combination of poor religious education, inconsistency in *madhab*, and the influences of xeer have resulted in a legal system fraught with lack of clarity, coherence, and predictability. The challenge begins with the pluralism enshrined in law. The Constitutions each recognize shari'ah, statutory law, and custom. The tool given to judges to reconcile these bodies of law is the supremacy of shari'ah.

Against these challenges, there is a clear need to devise interventions aimed at building system coherency and strengthening the capacity of jurists to administer the law in a transparent and equitable manner. As discussed below, these might include establishing a scholarly body to develop and advise on the application of shari'ah, providing jurists with knowledge and capacity building in shari'ah jurisprudence, and developing tools for reconciling the different sources of law and applying them correctly.

Recommendations

A Scholarly Body (Shura Council) to Advise on Shari'ah Development

Unlike other world religions, Islam has no defined leadership hierarchy or centralized decision-making authority. Quite the contrary, Islam prohibits *taqlid,* blind adherence to a single voice or teaching, and obligates every Muslim to discover the divine message as an endeavor in personal growth. It follows that there is no equivalent of a secular judicial council aimed at guiding and officiating the development of the shari'ah. Many Islamic jurisdictions do, however, create consultative bodies, shura councils composed of senior scholars and jurists, charged with advising on religious doctrine and interpretation, and promoting consistency between policy and shari'ah.

SHARI'AH & THE STATE	SAUDI ARABIA

In the Kingdom of Saudi Arabia, the Consultative Assembly (*Majlis Ash-Shura*) is a formal advisory body empowered to interpret and propose law to the King and the cabinet, and provide advice on other aspects of religious policy. It is composed of 150 members, including women, who are appointed by the King. In Indonesia, an Ulama Council (*Majlis Ulama*) performs a similar role, providing decisions on fatwa and guidance on a range of shari'ah issues. This Council is separate from the Department of Religious Affairs, which deals mainly with Islamic teaching and specific subjects such as the *hajj* and *zakat*.

In Somalia, a Shura Council composed of scholars and jurists who have been educated in Islamic jurisprudence,[74] could support the building of a consensus on concrete the role of Islam in Somali state building and the role of shari'ah in its legal architecture more specifically. Such a body could be either integrated into existing Departments of Religious Affairs or sit separately as a complementary, principally academic, entity.

The potential fields of application are diverse, and include policies on *zakat*, *fatwa*, prayer, imam training or certification, or leading engagement with the broader Sunni community.

	SHURA IN SOMALIA

In Somalia, the term *shura* is widely used, and refers to a group of ulama or religious leaders who meet to consult on any issue. Many informants to this study used the term '*shuraan*', which is used as a verb and denotes such consultations. Shura in Somalia is seen as a community conflict mediation mechanism and as a means to redress turmoil around issues of local importance.

Currently, when a serious issue is brought before ulama, they convene a Shura Committee (*Shuraan*). These committees meet regularly and have a yearly agenda. There are between three and four Shura Councils in Mogadishu currently in operation, headed by a chairperson.

In Baidoa, ulama tied to the Government form Shura Councils that gather temporarily. They in response to social outrage, such as in cases in which soldiers kill civilians and citizens demand a government response, in which ulama will gather and approach the Government, or to address issues of regional significance. In the past, the Sufi organizations Ahl-Sunna wa Jama' and Az-har Ulama maintained two formal Shura Councils. These met in mosques or hotel halls for want formal meeting places, in order to promote security. Both Councils' chairpersons were killed by Al Shabaab. The insurgent group calls its executive council 'Shura Council'.

An important role for a Shura Council would concern the provision of guidance on jurisprudential tools to promote coherence in legal development and uniformity in practice. The reconciliation of statutory law, *xeer,* and shari'ah remains a crucial challenge for Somali state building, and shari'ah is both the

---

[74] It is critical that the scholars and jurists have had sufficient training/education. The cause of much tension and conflict in Somalia is the lack of proper education in Islam by many local scholars that do not understand that there is room for differences of opinion in Islam. Many of these have been radicalized in their *madhab* or theology and refuse to compromise or work with others. Comparatively, scholars with higher levels of education in these matters are generally more amenable to dialogue and consideration of different viewpoints.

constitutional and popular key to this process. Whereas this primary role for shari'ah is clearly stipulated, which deductive tools judges should apply for its application and potential *ijtihad* is not.

This is not to suggest that a Shura Council should determine national *madhab*. This may not be necessary (in several states, jurists subscribe to different *madhab*) or even possible (the top-down imposition of one *madhab* would violate *taqlid*). Perhaps most importantly, prematurely pushing for agreement on *madhab* may be unwise given the political and military context. In other words, while confusion over shari'ah jurisprudence may delay the development of a coherent legal and juridical architecture, any rushed attempts to rectify it might jeopardize peace and stability in the near-term.

A Shura Council could nevertheless lead or enable progress towards achieving wider consensus around key shari'ah principles, tools of *ijtihad*, and how to reconcile areas of inconsistency. To avoid accidentally generating opposing spheres of influence that might destabilize the status quo, a Shura Council should not be granted unilateral decision-making powers. Instead, it should act as a forum or conduit for inclusive debate, scholarly exploration, and informed opinion.

It will be important to include, at least at the outset, highly learned and respected international scholars from different jurisprudential schools. This might compensate for knowledge deficits among Somali jurists and at the same time, promote a more even diffusion of influence and authority. A final guiding principle would be to promote coherence in religious development, by ensuring that the work of a Shura Council be linked up to policy-making, imam training, and the education of as well as cooperation with those responsible for *fatwa*, law school reform, jurist training programs and similar activities. More concrete actions could include involving Shura Councils in the support of IDPs and those who have left, to build wells, to bring food, clothes and education to impoverished population, and other direct humanitarian services administrations are currently unable to perform directly.

Should such a council be established, the political and insurgency environment must be taken into account. A great investment of resources would inevitably politicize the council, which could be mitigated by a gradual scaling up of the council or with the help of authoritative ulama. The public exposure participants would expose these to targeting by Al Shabaab, the mitigation of which will require a high degree of conflict sensitivity, community support, and security provision – the latter at least at the beginning.

Tools & Training for Judges

A systematic provision of copies of legislation in key areas and new legislation to all courts is needed. Bench books could be developed to aid judges in different thematic areas, focusing on the most common disputes and key points of vulnerability such domestic violence and divorce. Such resources should be designed in a generic way that focuses on basic Islamic principles that are not contested between or within the madhab. Over time, key decisions issued by higher courts could be disseminated to courts.

However, many judges do not have the training to interpret shari'ah, which can be challenging when interpreted for modern contexts. A system of shari'ah experts working together within the courts system is one possibility. Djibouti provides an example: a shari'ah expert sits with the judge and works with the judge on cases.

A comprehensive effort to elevate judicial capacity to meet minimum standards in Islamic jurisprudence should be undertaken, utilizing learned and respected scholars of the Shafi'i madhab. Such training is unlikely to be met with resistance. Broad consensus exists among legal stakeholders regarding the primacy of shari'ah and the importance of resolving inconsistencies between xeer and shari'ah.

Again, in order to avoid contestation over ideological approaches, such training should concentrate on the fundamental tenets of Islamic jurisprudence, shari'ah principles that promote the protection of marginalized groups, and precepts that delegitimize harmful cultural practices. Moreover, it must be remembered that judges are not the only, or even main actors in dispute resolution. To this end, elders and ulama should also be included, as well as police, legislators, and law professors.

Alongside capacity augmentation, it is necessary to invest in a cadre of learned Islamic scholars. Carefully selected, high potential jurists, including women and minority clan members, might be sponsored to attend a reputable Islamic higher education institution, such as Egypt's Al Azhar, or universities teaching Shafi'i jurisprudence, such as those in Djibouti.[75] In parallel, law schools must be reformed including by modernizing curricula, training staff in appropriate pedagogy and ensuring accuracy and consistency in religious doctrine.

Law Reform for Vulnerable Groups

The Federal Government of Somalia, the administration for Puntland, and the government of Somaliland have each made progress in establishing legal frameworks that protect the rights of women, children, and other marginalized groups. The constitutions contain language that promotes a transition away from collective responsibility, and acknowledges that minority clans and women have historically been denied rights available to other Somalis.[76] Specific laws have also been passed to address locally-specific phenomena including Female Genital Mutilation or Cutting (FGM/C) and sexual and gender-based violence (SGBV).

This is not to say that more cannot be done to strengthen protections and close legal loopholes; a key example concerns efforts to prevent child labor and trafficking.[77] Laws pertaining to personal status also need to be promulgated. Given that the shari'ah regulates this area quite specifically, the process of defining provisions may expose ideological rifts between different groups.

There are no guarantees the progressive trends in legislative reform to date will continue. It is entirely possible that future administrations will backtrack on gains made in gender equality, protection of individual rights, and overall freedom from discrimination. It is thus important to examine the scope that exists within an Islamic system to undertake and promote law reform for specific ends.

Finally, consideration should be given to the necessary reform of legal norms that are based on Islamic doctrine, but contravene human rights or gender principles, such as early marriage. Constitutions do not provide clear guidance on these issues, which provides more space for local political issues to come to the fore, and thereby potentially to engender renewed conflict.

---

[75] Al Azhar is the most prestigious university in Sunni Islam. Globally, its reputation is that of the chief center of Islamic learning. Al Azhar is known for its progressivity and particularly its inclusion of women in its student body.

[76] M. Hill (2010). *No redress: Somalia's forgotten minorities*. Minority Rights Group International.

[77] cf. 'Implementation of the Beijing Platform for Action Bejing+20 Review: Somalia Country Report' (2014) 37-38, available at: https://www.uneca.org/sites/default/files/uploaded-documents/Beijing20/NationalReviews/somalia_beijing_review_report_0.pdf

Conclusion

Justice sector reform efforts in Somalia face a daunting task – that of rebuilding a justice system in a context of legal pluralism, whilst instability and violent conflict loom large. This is complicated by a state infrastructure under reconstruction, in the midst of an ongoing counterinsurgency, and on the basis of a consociational power sharing system that has frozen previous fault lines for communal conflict in place. External actors furthermore face the challenge of weighing support for human rights compliant but exogenous and thus likely less legitimate legal and juridical infrastructure against support for existing legal and juridical traditions that may in parts of their practice violate human rights standards.

What is more, the plural legal and juridical landscape differs by region, and sometimes by district, which renders contextual appropriateness paramount for successful and sustainable programs. Among divergent and regionally specific legislation, juridical practice, and political constellation, the most consistent factors are the reliance on customary institutions for dispute settlement and a common Muslim identity. Both challenge human rights standard in distinct ways.

Customary xeer is deeply embedded in Somali clan fissures, but is also primarily a system for de-escalation and conflict resolution at the collective level. Its patriarchal tradition and inbuilt discrimination against less powerful clan groups do conflict with international human rights standards – but customary xeer is not designed as a system for the protection of individual rights and provision of rights-based justice. This role falls to shari'ah, which has a long history and deep roots amid Somali communities, and to statutory courts, which are still fledgling, lack resources and training, are accused of corruption, and are often politicized.

The history of shari'ah in Somalia is interwoven with its political trajectory. Its Sufi tradition gave rise to Sufi orders that violently resisted colonial forces, and spread Islamic practices that diverged in their progressivism and conservatism, but shared common practices. Among these were the veneration for saints and pilgrimage to holy sites, as well as a level of mysticism long rejected by the more scriptural and conservative Salafi scholars. With growing Arab influence grew the footprint of Salafi movements, but most emerged from the bottom up, with considerable communal support, and often in opposition to clannism and warlordism as harsh but predictable bastions of stability.

This political tension translates into an increasingly divided field of Islamic jurisprudence. Somalia's traditional Shafi'i scholarship faces competition from Hanbali teachings, spread and reinforced by Arab investments and returnees from conflict-displaced diaspora communities. The conservativism inherent in both schools constrains the scope for legal reform to close space for rights-abrogating practices by way of ijtihad. Yet, all traditions – Sufi and Salafi, Shafi'i and Hanbali – comprise both moderate and more radical traditions, and ongoing conflict tends to elevate radical factions at the expense of moderate voices.

This report has mustered a variety of international examples to show how a well-positioned and organized civil society in other Muslim societies has been able to seize politically opportune moments in order to re-open the 'gate of *ijtihad'*. They did so recognizing that political tides determine the strength of resistance – and also recognizing that arguments grounded in a sound and strategic understanding of the tools and intricacies of shari'ah, but also customary justice, can help curtail rights-abrogating practices that contradict Islamic precepts more than invoking international human rights standards can.

To achieve such reform, however, Somalia currently lacks both infrastructure and educated ulama. Both of these challenges can be overcome incrementally, so as not to expose participants to unnecessary risk within an ongoing armed conflict. This report has set out a number of recommendations for initiatives, programs, and types of support that could facilitate such processes. If it has been successful, this report has also equipped the reader with the conceptual and contextual knowledge to engage in meaningful discussions on the topic of *Shari'ah in Somalia*.

Definitions

The definitions below are not presented in alphabetical order, but rather based on their relevance and relation between them.

Qur'an **Shari'a** **Āyah** **Surah**	The Qur'an is considered the principal source of Islamic Law - Shari'a. Āyah denotes a verse in the Islamic Qur'an. A collection of verses (ayah) forms a surah (chapter).
Maqāṣid al-Sharī'a	The goals and objectives of Shari'a - an Islamic legal doctrine.
Siyasa Shari'yya	Governance according to Shari'a, expressed in regulatory decisions or policy of Governments.
Xeer **Xeer Begti** **Dhig** **Dhaqasho**	Considered the traditional (customary) legal system of Somalia, Xeer is utilized alongside civil law and Shari'a. Xeer remains an oral law being passed on from generation to generation. It has been never fully codified. Xeer is implemented by respected elders, known as mediator judges (Xeer Begti). Xeer has both a penal section (dhig) and a civil section (dhaqasho).
Ḥadīth **Sahih** **Hasan** **Da'if**	It refers to the record of the traditions or sayings of the Prophet Muhammed. Some definitions also include the Prophet's companions (e.g. Sunni Islam). The hadīth is ranked right after the Qur'an as a source for religious law and moral guidance. Considering that the Qur'an has a relatively limited number of verses pertaining to law, the hadīth gives direction on practically everything. Thus, it can be argued that the majority of the Shari'a rules are in fact derived from hadīth and not the Qur'an. Individual hadīth are generally classified by Muslim jurists and clerics in: sahih (authentic), hasan (good) and da'if (weak).
Sunnah **'Ilm al-ḥadīth** **Tafsīr** **Fiqh** **Uṣūl al-fiqh**	Yet another major source for Shari'a, Sunnah (also wrote Sunna) is derived from hadīth and it refers to setting a precedent, an authority or directive. Consequently, hadīth can be regarded as the biographical fundament of law, while Sunnah is the system of obligation that derives from it. The authoritativeness of the Sunnah was strengthened in the 3rd Century AH when 'ilm al-ḥadīth was developed: the science of determining the reliability of various traditions (hadīth) as specified above. The Sunnah was further used in Qur'anic exegesis (tafsīr - the explanation of the Qur'an) in order to supplement the meaning of the text and in fiqh (Islamic jurisprudence - the human effort to know the Shari'a). The collective sources of Muslim jurisprudence are known as uṣūl al-fiqh.

ʿUlamāʾ Muftis Qadis Ijmāʿ Umma	Men of knowledge - those who are well versed in Muslim religious sciences (e.g. Qurʾan, hadīth, fiqh). These generally include qualified legal lawyers (muftis), judges (qadis), theologians, professors or high ranking religious officials. ʿUlamāʾ used to be a powerful class, especially during the early Islam, when their consensus (ijmāʿ) was sought in theological and juridical issues. This consensus was later transposed into communal practices to be used by future generations. In fact, ijmāʿ generally refers to consensus reached in the past, not something of the present and it involves the agreement of the Muslim community (umma) as a whole or of specific Muslim scholars.
Ijtihād Mujtahid Raʾy Qiyās Madhabs	It represents an independent or original interpretation of issues that are not precisely covered by other sources (Qurʾan, hadīth, ijmāʿ). In the early Muslim community, qualified jurists (mujtahid) could exercise ijtihād. In doing so, they were using their personal judgement (raʾy) or analogical reasoning (qiyās). Along with the appearance of legal schools (madhabs), jurists started to interpret the problems following the principles and the doctrinal precedent of their respective madhab.
Istiḥsān	Istiḥsān is generally used when ijmāʿ and qiyās did not provide satisfactory results. Considered a method of legal reasoning, Istiḥsān denotes the juristic preference for the principle of law in order to promote the aims of law.
Ikhtilāf	The opposite of ijmāʿ: disagreement on religious matters. In the presence of ikhtilāf, Muslims can choose the interpretation that causes the least harm and is best suited to their circumstances. Ikhtilāf is a source of intellectual wealth that can be used for the benefit of the entire community.
Talfiq	The merging of the differing opinions of madhabs - a tool of Ijtihād that leads to a conclusive legal ruling when such ruling did not previously exist. Consequently, a merged/more optimal ruling is to be used even though it is not the direct result of the jurisprudence of the specific madhab that the jurist belongs to.
Istiṣlāh Maṣlaḥa	Discerning the intended good from the Qurʾan and hadīth in the name of human welfare (maṣlaḥa).
Istishab Ahkam	It refers to the presumption of continuity, with the objective of extracting a legal solution (ahkam) when a situation that existed previously is believed to be continuing until the contrary is proven. A relevant example would refer to the impossibility of claiming an inheritance for a missing person until there is evidence that the person has died.

Fukaha' Sada Hashimis	Traditionally known as members of the judicial aristocracy, situated immediately underneath sada in regards to social categorization. Sada or Hashimis represent an elite category claiming descent from the Prophet Muhammed. Fukaha', the scholars of Islamic Law, were traditionally scribes or learned men.
Fatwa	Formal ruling or interpretation on a point of Shari'a given by a mufti. They are not binding judgements, although they are considered authoritative and informational. A requester (individual or Islamic court) can seek a second opinion if desired.
Had (pl. Ḥudūd) Zina Tazir	Punishments that are mandated by Shari'a and fixed by God. They derive from the Qur'an or hadīth and relate to crimes that are against the rights of God. Six crimes are included in the list: illicit sexual relations (zina), theft, making unproven accusations of zina, drinking intoxication, apostasy and highway robbery. The actual punishments are death (including by stoning), lashes and amputation of the hand. The application of Ḥudūd has been severely limited after the implementation of strict requirements for evidence. Punishments for all other crimes are decided by the court and are called tazir.
Shura Majlis-ash-Shura	Mutual consultation - the Qur'an and the Prophet Muhammed encourages all Muslims to decide on their affairs after consulting with those that will be affected by the decision. Majlis-ash-Shura refers to a council (Shura Council) formed by a body of individuals that advise, consult and decide.

Bibliography

Abbink, J. (2009). *The Islamic Courts Union: The ebb and flow of a Somali Islamist movement*. Boston: Brill Publishers.

Abdullahi, A. (2017). *Recovering the Somali State: The Role of Islam, Islamism and Transitional Justice.* London: Adonis & Abbey Publishers.

Ali, F. (2018). *Memes and Madhabs*. Medium Religion, available at: https://medium.com/@fromadic92/memes-and-madhabs-80089af2016f

Ansari, M. (1985). Ibn Taymiyyah and Sufism. *Islamic Studies*, 24(1), 1-12.

Bacon, T. (2013). *Strange Bedfellows or Brothers-In-Arms: Why Terrorists Ally*. PhD Thesis, Georgetown University. Available at: https://repository.library.georgetown.edu/handle/10822/707433

BBC (2017). *Who Are Somalia's Al-Shabaab*, 22 December 2017.

BBC (2018). *Somalia's al-Shabab carries out attack on military base*, available at: https://www.bbc.com/news/world-africa-44923575

Bendaña, A. & Chopra, T. (2013). Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland. *Hague Journal on the Rule of Law*, 5, pp 44-73.

Bessis, S. (1999). Le Féminisme Institutionnel en Tunisie. *Clio. Histoire, femmes et sociétés,* 9, [*En ligne* (online)].

Bryden, M. (2003). No Quick Fixes: Coming to Terms with Terrorism, Islam, and Statelessness in Somalia, *The Journal of Conflict Studies*, 22.

Cavedon (2014). Men of the Spear and Men of God: Islamism's Contribution to the New Somali State. *Emory International Law Review*, 28(1), 473-508.

Charrad, M. (2001). *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*. Berkeley: University of California Press, pp. 201-232.

Charrad, M. (2007). Contexts, Concepts and Contentions: Gender Legislation as Politics in the Middle East. *Hawwa: Journal of Women in the Middle East and the Islamic World*, 5(1), 55-72.

Charrad, M. & Zarrugh, A. (2013). The Arab Spring and Women's Rights in Tunisia. *e-IR.* Available at: http://www.e-ir.info/2013/09/04/the-arab-springand-womens-rights-in-tunisia/

Crouch, J. (2018). *Counter-terror and the logic of violence in Somalia's civil war - Time for a new approach*. Saferworld.

Dalrymple Anderson, J. N. (1976). *Law Reform in the Muslim World.* London: Athlone Press.

Danish Institute for Human Rights (2009). *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement.* UNDP, UNIFEM and UNICEF.

Darnton, J. (1977). *Somalia Trys to Live by Both the Koran and 'Das Kapital',* New York Time, Oct. 11 1977, available at: https://www.nytimes.com/1977/10/11/archives/somalia-trys-to-live-by-both-the-koran-and-das-kapital.html

DfID (2013). *Policy Approach to Rule of Law.* Final version, July 12 2013, p. 17. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306396/policy-approach-rule-of-law.pdf

Emon, A. M. (2010). *Islamic Natural Law Theories*. Oxford: Oxford University Press.

Gundel, J. & Dharbaxo, A. (2006). *The predicament of the 'Oday': The role of traditional structures in security, rights, law and development in Somalia*. Danish Refugee Council, Novib/Oxfam.

Hallaq, W. (1984). Was the Gate of Ijthad Closed?, *International Journal of Middle East Studies*, 16(1), 3-41.

Harper, E. (2006). *Land, Inheritance and Guardianship Law in Post-Tsunami Aceh*. International Development Law Organization.

Hilburn, M. & Maruf, H. (2012). *Survey Shows Somalis Have Mostly Shared Vision for the Future*. VOA News, June 20 2012. Available at: https://www.voanews.com/africa/survey-shows-somalis-have-mostly-shared-vision-future

Hill, M. (2010). *No redress: Somalia's forgotten minorities*. Minority Rights Group International.

Ibrahim, H. (2012). *Practicing Shariah Law: Seven Strategies for Achieving Justice in Shariah Courts*. American Bar Association.

ICG (2005). *Somalia's Islamists.* International Crisis Group Report N°100.

ICG (2019). *Women and Al-Shabaab's Insurgency*. International Crisis Group, Briefing N°145. Available at: https://www.crisisgroup.org/africa/horn-africa/somalia/b145-women-and-al-shabaabs-insurgency

ICRW (2016). *Leveraging Education to End Female Genital Mutilation/Cutting Worldwide.* International Centre for Research on Women.

Jardine, J. (1923). *The Mad Mullah of Somaliland*. London: Herbert Jenkins.

Jeffrey, J. (2016). *Somaliland's quest to enforce rule of law*. Deutsche Welle, available at: https://www.dw.com/en/somalilands-quest-to-enforce-rule-of-law/a-19279817

Kamali, M. H. (1991). *Principles of Islamic Jurisprudence.* Cambridge: Cambridge Islamic Texts Society.

Kilcullen, D. (2010). *Counterinsurgency*. Oxford: Oxford University Press.

Lewis, I. M. (1998). *Saints and Somalis: Popular Islam in a Clan-Based Society*. London: First Red Sea Press.

Martin, L. & Smith, M.R. (2011). Every Kingdom Divided Against Itself Will Be Ruined: A Reflection, a Deflection, and a Qualified Reinterpretation of the Global Jihad. *Studies in Conflict & Terrorism*, 43(9), 672-695.

Maruf, H. & Joseph, D. (2018). *Inside Al-Shabaab: The Secret History of Al-Qaeda's Most Powerful Ally*. Bloomington: Indiana University Press.

Masud, M. K. (1977). *Islamic Legal Philosophy*. Islamabad: The Islamic Research Institute Press.

McGregor, A. (2011). The Muslim Brotherhood in Somalia: An Interview with the Islah Movement's Abdurahman M. Abdullahi (Baadiyow), *Terrorism Monitor*, 9(30), available at: https://jamestown.org/program/the-muslim-brotherhood-in-somalia-an-interview-with-the-islah-movements-abdurahman-m-abdullahi-baadiyow/

Menkhaus, K. (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

Menkhaus, K. (2017). *Land and Conflict in Somalia's Lower and Middle Jubba Valley*. Nairobi: USAID - OTI.

Mire, S. (2015). Wagar, Fertility and Phallic Stelae: Cushitic Sky-God Belief and the Site of Saint Aw-Barkhadle, Somaliland, *African Archaeological Review*, 32, 93-109.

Mouline, N. (2014). *The Clerics of Islam: Religious Authority and Political Power in Saudi Arabia*. New Haven: Yale University Press.

Mukhtar, M. H. (1996). The Plight of the Agro-Pastoral Society of Somalia. Review of African Political Economy, 23(70), 543–553.

Mydlak, R. (2019). *Engagement of Somali Customary Institutions in Justice Programs: Establishing a Knowledge Base*. Danish Demining Group. Available at: https://somhub.org/

Mydlak, R. (2020). *The Clan System and Customary Justice in Somalia – A Brief Introduction*. Danish Demining Group.

Nasir, J. (1986*). The Islamic Law of Personal Status*. London: Graham & Trotman.

Post, A. (2016). A Glimpse of Sufism from the Circle of Ibn Taymiyya – An Edition and Translation of al-Baʿlabakkī's (d. 734/1333) Epistle on the Spiritual Way (Risālat al-Sulūk). *Journal of Sufi Studies*, 5(2), 156-187.

Rubin, D., Green C. & Mukurla A. (2009). *Addressing Early Marriage in Uganda.* USAID Health Policy Initiative.

Sahan Research (2016). *Al-Shabaab as a Transnational Security Threat*. Commissioned by IGAD. Available at: https://igadssp.org/index.php/documentation/4-igad-report-al-shabaab-as-a-transnational-security-threat/file

SAHI (n.d.). *The History of Al-Shabaab*. South African History Online. Available at: https://www.sahistory.org.za/article/history-al-shabaab

Schacht, J. (1982). *An Introduction to Islamic Law*. Oxford: Oxford University Press.

Shay, S. (2014*). Somalia in Transition since 2006.* New Brunswick: Transaction Publishers.

Unknown (2020). *Demographics of Islam*. Georgetown University, Berkeley Centre for Religion, Peace & World Affairs, available at: https://berkleycenter.georgetown.edu/essays/demographics-of-islam

UNSC (2010*). Somalia report of the Monitoring Group on Somalia and Eritrea submitted in accordance with resolution 1853 (2008),* S/2010/91. Available at: https://www.un.org/securitycouncil/sanctions/751/work-and-mandate/reports

Wasuge, M., Barnes, C. & Kiepe, T. (2017). *Land Matters in Mogadishu - Settlement, ownership and displacement in a contested city.* Mogadishu/Nairobi: Rift Valley Institute & Heritage Institute for Policy Studies.

Woodward, M., Umar, M. S., Rohmaniyah, I. & Yahya, M. (2013). Salafi Violence and Sufi Tolerance? Rethinking Conventional Wisdom. *Perspectives on Terrorism*, 7(6), 58-78.

Other

'*Implementation of the Beijing Platform for Action Bejing+20 Review: Somalia Country Report*' (2014) 37-38, available at: https://www.uneca.org/sites/default/files/uploaded-documents/Beijing20/NationalReviews/somalia_beijing_review_report_0.pdf