

Republic of Somaliland
Ministry of Family Affairs
And Social Development



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Situation Analyses Report

Legal Technical Consultancy: Family Code

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1. Introduction

The ministry of family affairs and social development (MoFA&SD) being mandated to ensure family welfare, gender equity in all national development objectives and social advancement through planning, coordination, monitoring and evaluation of state interventions sectoral progress on implementation and citizen participation.

Specifically, according to the strategic plan 2008-2013 of MoFA&SD¹, the ministry's policy statement emphasizes a commitment on the part of government to ensure that measures are put in place that translate national development goals and objectives into meaningful gains for the family and provide equal opportunities for the diverse interests of women, children, persons with disabilities, the elderly, vulnerable and minorities. It placed the responsibility on government in ensuring that this policy procedure is implemented in a manner that meets the needs of its citizens including those of the category above. It asserts that citizens have the right to empowerment through provision of information and legal literacy to enable them make informed decision, equal opportunities, social protection and therefore social security.

According to the strategic objective 1 of that plan of the ministry: **legislative and Policy Reform**, the ministry planned to develop legislations and policies responsive to gender and human rights and protect women, children, the elderly, persons with disability, the marginalized and vulnerable groups.....], review and where lacking move line ministries to develop legislations on children, family and electoral laws to especially permit for increased participation and election of women at all levels of governance, and advocate for gender mainstreaming into sectoral policies, penal laws and legislations for the attainment of equity and social justice are the expected outcomes.

With respect to project title: **support to MoFA&SD to strengthen its capacity and deliver its mandate**, the ministry undertaken to formulate Act of family to protect women and children. Objective 1 of the project includes formulation and implementation of national policies and laws to protect vulnerable groups. One of the activities of the same objective is to initiate the development of a family bill of law. The tasks generated by the activities of formation of family law include conducting **situational analyses** on existing family laws and practices within the existing Somaliland judiciary system (statutory, sharia and customary laws) and later report to the concerned offices as means of verification.

In respect of the PCA (agreement) between the ministry of family affairs and social development (MoFA&SD) and UNICEF, the ministry was to conduct situation analyses on existing family laws and practices, and develop design for family code as secondary legislation (bill of law) besides provision of free appropriate legal advices to the family problem victims. In reply to that, according to TOR with (MoFA&SD), the technical consultant was required, as key duty, to undertake baseline data collection and analyses to evaluate the magnitude of the problem of family lawlessness to the community and particularly to the women and children, so this report is entry point to the formation of family bill of law.

¹ Five years strategic plan of MoFA&SD - 2008-2013

2. Background

Somali community as part of horn of Africa inhabited people had no central authority or government since immemorial. Traditional leaders had been ruling each clan or sub-clan, even no traditional ruler had ruled over another clan according to the history. Each community had social rules and social habits; precedents (Xeer). These rules were not even written let alone codification.

King or sultan assisted by traditional jury or assessors (xeer beegti) had been deciding cases by referring precedents between the clans and sub-clans in issue, if the dispute is between two different clans of different leadership; parties to the conflict were sending advocates, and independent neutral ad hoc jury were appointed. The law enforcement mechanism to execute judgment was the relativity and obedience to the orders of the elders (spiritual tribal bride) who were always stakeholders to every case to this day. The body of rules; precedents applied were memorized by the sultan, jury and advocates of the parties.

Besides that, Islamic faith; as the only practiced official religion did much to contribute to the completion of the legal frame work. Almost all provisions in the social rule and social habits were based on sharia despite rather cultural practices and norms linked or routed to the socio-economy or environmental nature of each clan.

Within the arrival of the colonizers, things had changed heavily including legal, depending to the legal system of the colonial masters who settled and ruled Somali people. Though penetration of the colonial legal systems in to the majority of the people who were pastoralists becomes very difficult due to their frequent movements in search for fodder and water for their livestock, no more urban inhabitants were available because urbanization was not so popular.

British firstly adopted to solve legal problems as per the local custom and practices, but this did not long last. Body of laws mainly Indian codes which was applied to Asian sub-continent settlers of Muslims and non Muslims were imposed in regard to all office procedures including judiciary. Courts were built in almost all the districts Somaliland consisted at that time.

Very surprising was that, apart from the cases of constitutional or administrative in nature, criminal cases and civil litigations which Indian penal code, ordinances and other bodies latter drafted for Somaliland protectorate and legislated from British Empire common law as well as other statutory laws applied, the **family disputes** were reserved to be decided according to the sharia and customary rules.

This invited application of different three legal systems to function side by side. In late colonization era, some Acts were passed and very view professional lawyers and foreign judges were engaged in the judiciary sector of Somaliland. Furthermore, all legal materials were drafted in English so ordinary people could have no access to understand or even obey it.

In 1960, the two regions; British Somaliland and Italian Somaliland united under one flag forming Republic of Somalia. Though together, they adopted one constitution but deep conflict of law resulted by the different legal streams of continental Europe civil law called parliament made law or statute law, and English common law called judge made law or case

law disputed on the ground. No law reform authority was formed to humanize or integrate it. At that time, Somali citizen might be subject to different bodies of rules within the territory of the state. This problem among others including lack of unified family Act remained in force till 1969 when through coup d'état, the revolutionary government set up in the Republic by the national force.

Firstly, revolutionary government suspended already disputed constitution and issued 13 Articles plus administrative circulars (regulations) instead; 7 Articles for domestic application and 6 Articles for foreign dealings and relations.

None of these Articles specifically targeted family affairs but indirectly, it led to formation of unified family code for the first time in Somalia.

In 1975, the revolutionary government passed unified, codified and uniform **Family Code**; Law No. 23 January 11, 1975. This code contained 173 Articles under four books namely: *marriage and divorce, children and maintenance, guardianship and wills, and inheritance*. Accordingly, the sources and spirits of this code were sharia, customary and statutory plus provisions taken from international conventions but not in line with sharia. On the other hand, this code had limitations and legal gaps.

Anyhow, the government committed to enforce this code but most of the people opposed its application on the ground that it was partially contra to some basic principles of sharia, while cultural fanatics were sensitive about laws to govern their domestic behavior. Of course, some Articles were blindly modifying some Islamic provisions and no attempt was made to harmonize or frame with sharia because the government paid no heed to any who oppose it. According to Art.158 under head II of Somali version in page 37 of this code, *“being enforcing as per the general principles in the first letter and the second of the revolution, women and men shall entitle equal distribution of the inheritance”*.²

Although there are many times women may entitle share or proportion equal to or more than that of the men according to sharia, not in the customary, but this Article and others failed to make limitations and exceptions. As a result some religious jurists were sentenced while others executed for the sake of the crises of the family code.

Anyway, the family code got into force and practiced in the judiciary until 1991 when Somaliland restored its independence and almost all laws formed during the revolutionary government were repealed. The national charter 1993 signed in Borama as an interim constitution authorized the application of those Somalia laws not conflict with the sharia and the sovereignty of Somaliland. The constitution, again, reaffirmed under Article 130(5) *“All the laws which were current and which did not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accord with the Constitution of the Republic of Somaliland. At the same time, laws which conform to the Constitution shall be prepared, and each such law shall be presented within minimum time scales set by the House”*. Somaliland constitution, <http://somalilandlaw.com> by Ibrahim Hashi

² Unofficial translation of the Article as the official version to refer is the Somali version according to Art. 2 of the authorizing cover page signed by Major General Mah'ed Siyad Barre; chairman of the Supreme Revolutionary Council together with Dr. Abdisalam Sh. Hussien; secretary of state for ministry of justice and Religious Affairs.

3. Judiciary System of Somaliland

Somaliland, after regain of independence, adopted democratic, republic, presidential and constitutional form of government with bicameral legislation and independent judiciary including judicial commission. The system is based on the principle of separation of powers and check and balance. After endless effort, national constitution was adopted in Somaliland in 2001 after national referendum as a base for formation of all laws determined in that constitution.

The state shall have a judicial branch whose function is to adjudicate on proceedings between the Government and the public and between the various members of the public.

The Judicial Branch shall fulfill its duties in accordance with the Constitution³, and shall be independent of the other branches of the state. (Article 97 of the constitution)

1. Judiciary power:

a) Interpretation, in accordance with the Constitution, the laws passed by the Constitutional bodies and emergency laws;

b) Adjudicate on disputes between the governmental bodies and the public and between the members of the public;

c) Adjudicate on all disputes which relate to compliance with the provisions of the Constitution

2. A judge shall not engage in any other occupation whilst in office.

3. The proper status of judges shall be determined by the law. (Article 98)

Structure of the Judiciary

1. The Judiciary consists of the courts and the Procuracy.

2. The judges and the members of the Procuracy are independent when exercising their judicial functions and shall be guided only by the law (Article 99)

The courts of the Republic of Somaliland:

1. The Supreme Court;

2. The Appeal Courts of the Regions;

3. The Regional Courts;

4. The District Courts; and

5. The Courts of the National Armed Forces.

The Supreme Court is the highest organ of the Judiciary and is also at the same time the Constitutional Court. In addition to the Chairman, the number of judges in the court shall not be less than four. A special law shall govern the court. (Article 100 and 101)

The Lower Courts

The appointment and the conduct of the work of the lower courts (the Appeal Courts of the regions, the Regional and the District Courts) shall be determined by a special law. (Article 102)

Judicial commission specified under Article 107 of the constitution, as an administrative body, do responsibility for the appointment, removal of office, promotion, demotion, transfer and discipline of the judges of the lower courts (the Appeal, Regional and District Courts), and the Deputy Attorney Generals.

³ The National Constitution as amended 2000, approved through national referendum in May 2001, Art.8, 98, 100, 101 and 107, website: *somalilandlaw.com* by Ibrahim Hashi

4. Legal Limitations

For legal system of a state, the lawmaking bodies should regularly produce new or modify Acts to frame with the society in issue, the judiciary should decide according to the Acts in force and the executive should enforce laws according to law and only law. There should be supreme law of the land in issue and ordinary laws comprising administrative justice system, criminal justice system, civil justice system and family justice system, and so many other Acts required supporting the policies of the nation.

Again to avoid loopholes, it is necessary for the administrative organs of a state to have administrative rule making and rule interpretation according to the empowering provisions of the Acts of parliament (Rule of law).

Somaliland has its constitution but many Acts determined by it are not still drafted as bill of law while many outdated proclamations which are still in force need modification to respond current legal diagnostics and fulfill the legal limitations. For instance, the **Penal Code** which is applicable in Somaliland was drafted in 1963; a time it might be framed with the social advancement. Since that time, many things changed; new forms of crime or techniques to commit crime or new technology with which crime may be committed against or with it invented or innovated.

Ordinary laws whether substantive or adjective laws including procedural laws are about to be outdated. Review of all of them is inevitable, but it is understandable that technical and financial resources required by these projects are beyond the government's capacity.

Legal limitations adversely affect rule of law, law and order, good governance in the aspect of legal framework and democracy; rule of law refers that only provisions of law in force should be the ruling one, but the question is what about if the provisions are not responding to some conducts or acts, what should be referred? Of course, there will be alternative, and until the gap is covered, the meaning and genuine rule of law is vague. Missing of updated and modified Acts of parliament also affect to over all transactions, dealings and matters which may be irrelevant.

Although, the state branches are doing hard works according to its capacity and many Acts passed where many others amended, but never the less, political crises, constitutional conflicts, civil litigations and, mostly, all family affairs were solved through extrajudicial means due to the available loopholes or legal gaps. Furthermore, the conflicts happened so far, mainly, constitutional cases were not legislated to cover that gap and not agreed reference of the same case and its solution as a Case Study for the future similar conflicts.

Anyhow, as far as legal limitation is available in legal system, as far as instability or insecurity and conflict of interest. This may lead to extensive violation of human rights.

5. Codified Family Lawless and its Consequences

The legal limitations in Somaliland include **Codified Family Lawless**. There are different bodies of laws, administrative procedures and supervisory or implementing mechanisms in the context, but in this title let us highlight the fact of absence of family law.

As per the preceding background, we have briefly explained different rules and norms of sharia, customary and statutory of procedural and substantive which governed family affairs. Things related to the family or personal affairs have changed but those unwritten rules are still unchanged which shows incompatibility between the social advancement and the governing laws.

As part of social change, many acts or conducts which were not available on the ground due to cultural restrictions have raised, new forms of marriage or divorce are adopted; marriage or divorce may take place between two persons of different jurisdictions by using technology which itself has no updated Act to regulate. The legal status of a child whose mother married in local and was born in abroad or a woman in legal waiting period or due to a matter relating to private international law (conflict of law), a pregnancy may be disputed by Somali citizens or Somali and non Somali citizens. Fiction marriage which a sister or brother in abroad may make marriage certificate as a couple of her brother/his sister in Somaliland courts for recognition by foreign courts and relocate there in search for better life has been increasing recently.

There are no codified national laws to govern the legal status of the child whose father is unknown, on the other hand, apart from the criminal punishment, tortuous liability and customary fine (xaal) paid as a result of rape, the question of the paternity of pregnancy of rape is still pending. This question widens when collective rape is committed against a woman, it also double widens and even leads to clan conflict when the rape is committed against a girl where the girlhood lost, physical, psychological and emotional problems affected to such innocent girl and the pregnancy is rejected by those who committed collective rape. This is deteriorated by the local culture that no one family accepts to keep a child of unknown paternity.

The biggest legal diagnostic (absence of Act of family) on this issue is very common to the minority, IDPs and economically disadvantaged people who have no clan protection to deal with those responsible unknown paternity child.

Gender based violence specifically domestic violence could be minimized and, at least, stopped if family code which strictly regulates cohabitation between spouses is formed because the most effective protection offered to vulnerable groups including women is legal protection based on sharia and good practices of the society towards the respect and welfare of women and children.

In the local courts, since there is no uniform family code, the proceeding of the case depends to the judge who is trying it and same cases may be subjected to different decrees of judgments despite use for example Minhaj as a substantive law and civil procedure code as an adjective law. The family code of a state is to specify according to the territorial jurisdiction, subject matter, the parties, the administrative procedures, also it has to answer the specific circumstances and problems of its citizens.

6. Alternative Practices in the Context

Generally people sort to either sharia or customary law to settle personal or family related disputes whatever approaches they apply. If spouses in marriage conflict or even use violence to each other, the family of origin of the husband with the assistance of relative jurists mostly elders try to mediate between spouses. Those relatives are assumed that they are committed to preserve the unity of the family; they do not always suggest divorce. If the wife left the conjugal home, her family of origin may interfere and the elders of whom spouses originated may meet to solve the dispute after they present the claims of each spouse.

If the wife suffers from continuous or regular assault or abuse like grave insulting or humiliation of her origin or clan, her relative elders never return the wife to the conjugal home until the husband disproves or pays customary fine (xaal) on the spot. The reflection is the clan identity not family welfare or priority.

When disagreement or irreconcilable differences arise between spouses, wife may petition the court, but to object, the husband argues that he is willing to care his wife; always it is very rare for the court to conduct investigation on the ground as there is no family law provisions to order the court such investigation, secondly technical capacity of the court is limited. Culturally, the relatives of the wife have no option to argue for divorce, unless the relationship of the parties deteriorates.

Anyhow, no way the wife may never get its divorce from a husband however he is negligent or shows bad conducts unless he voluntarily decides to do so. This may sometimes lead confrontations between the relatives of the spouses. Sometimes, the wife may commit husband murder⁴ or suicide as a relief to get rid of the family problems.

The enforceability of financial maintenance to the children which is always obligation on the father according to shaia has no strict mechanisms to monitor and supervise. The court may decide the payment of the maintenance to the children after the long process ranging from the district court to the Supreme Court by successive appeals which itself is a delay and deceleration of the justice, but after that prolonged proceeding of maintenance litigation, the husband may evade or escape from the judgement or jurisdiction. Sometimes, the husband may burden the wife to handover child custody to himself who later deliver to someone who cannot undertake responsibility of child care while his overall objective is to tighten the wife to have no options to child custody and support.

Another increasing bad alternative is infanticide by mothers pre-birth by using drags or neglecting⁵ him after birth as a result of failure of fathers to accept or admit the paternity of pregnancy or pay maintenance due regularly. On the other hand, payment of the dowry and giving legitimate fair share of the succession to the children and particularly to wife from the wealth of her deceased relatives and from her husband is also another issues which are managed by local customs with different approaches.

⁴ Shoots and burning cases by wives to their husbands can be seen from the medical sources and courts

⁵ Refer below statistics of family or personal related cases/issues

7. Need for Codified Act of Family

Codification of family applied laws is needed by the states and nations as part of their legal systems to achieve uniform and standard for family issues management of the communities whether different cultural, religious, ethnic and background, or they are homogenous because the homogenous themselves have their compatible goals and conflict of interests.

In Somaliland, most of the aforesaid problems are due to the lack of family law with modified and simple administrative procedures carrying the rights and obligations of the spouses legalized by sharia and framed by penalties, civil liabilities and sometimes customary fine (xaal) and administrative disciplinary actions to make sure its full implementation.

Formation of family Act would be access to justice standard to realize rule of law by realizing those laws mentioned by the constitution to be determined by a law to fulfill the legal gaps and limitations. On the other hand, this need directly proportional to the equality of the citizens which the constitution clarified under Art.8 as “*All citizens of Somaliland shall enjoy equal rights and obligations before the law, and shall not be accorded precedence on grounds of colour, clan, birth, language, gender, property, status, opinion etc*”. Somaliland constitution, <http://somalilandlaw.com> by Ibrahim Hashi

In Islam, there are four schools of thoughts that have different opinions in some aspects of personal or family affairs, some of these opinions may favor for husband or man while others may favor for the wife or woman. To prefer and refer one which may be weighted with the local custom, Act of family to precise the spirit and source for interpretation should be available.

In the marriage and divorce, there are many styles of marriage and forms of divorce accultured by Diaspora from western or Arabian practices which are inconsistent with the traditional practices and values of Somali society but nobody can argue its badness or illegality by legal grounds as there are no prohibitive orders and illustrative orders to specific modes of marriage or divorce. Of course, sharia is applicable to both of them, but no answer if marriage or divorce occurs through telecommunication or technology in different jurisdictions. Family law is required for recognition or non recognition of foreign judgment regarding marriage, divorce, cohabitation, maintenance and child custody, will and succession by referring given and specific law.

It is also needed for defining the jurisdiction of the family cases to appropriate and specific court(s) which some of the family cases judgements may be opened to appeal while others may not be subject to appeal, cassation or review by higher court or administrative organ because delayed justice is denied justice.

At least, need for family law remembered for the protection of the privacy and dwelling homes and parental responsibility to the wrong acts and conducts of their children and youth, and also for the recognition and further inviting of the traditional relative elders to the welfare, custody of children or tutorship, reconciliation between spouses, participation of the settlement of disputes and improvement of social coexistence regarding the overall matters relating to the family.

8. Statistics of Family or Personal Related Cases/Issues

Year	Marriage	Divorce	Neglected children	Succession	Women double marriage (Bigamous women ⁶)	Maintenance & cohabitation	Total family related cases
2008	No figure	101	23	30	16	906	188
2007	442	110	No figure	No figure	No figure	No figure	721
2006	291	110	No figure	No figure	No figure	No figure	No figure
2005	287	139	No figure	No figure	No figure	No figure	No figure

Source: Hargeisa district court yearly summary rough report/statistics to the ministry of family affairs and social development (MoFA&SD)

Limitation of the information: as we have already mentioned, most of family affairs particularly family cases are solved through traditional methods and no report to the court about the conclusion of the cases tried by the elders. On the other hand, this statistic is that collected from the jurisdiction of Hargeisa district court, no any other district.

Furthermore, as there is no separate family code, generally family cases are regarded as ordinary civil litigations and therefore it is mixed to the ordinary civil suits that it cannot be separated from the other civil matters. That report by the district court to the ministry of family affairs was not professionally written which might suspect its trustworthiness.

Analyses: according to these statistics, there are double marriage cases (women bigamy); 16 cases 2008. In fact this is forbidden under the sharia and the customary but there is no family code to administer solution and proceeding of such cases and others which can be similar. Double marriage of woman is always likely to take place when there is separation of spouses by divorce or irreconcilable differences which leads partners to live alone, or when there is a dispute over the ending of legal waiting period (Iddat) where the husband claim continuation of the legal waiting period while the wife disputes over its ending and neither of them has decree of court to refer, as a result, paternity of the child disputed.

Cases concerning maintenance and cohabitation are also considerable; 906 cases in one district 2008 with the possibility of existence of many more but not petitioned the courts. The result can be seen from the same statistics where 101 cases ended with divorce and 23 infants were neglected.

⁶ According to black's law dictionary: means marrying one man while legally married to another

9. Conclusion

The applicability of three legal systems (sharia, customary and statutory law) in Somaliland separately is a legal barrier to some extent, not only to the family affairs but also to the overall legal system of the state. Family affairs are the broadest issues which absence or lack of codified Act of family adversely affected and led domestic violence and breach of the rights of either spouses or children.

According to 2006 declaration⁷ organized by HAQSOR Organization, and participated by the traditional elders of Somaliland discussed agenda include:

1. ***Review and deliberation on practices of the Somali customary laws (Xeer) that are contrary to the international human rights standards and the sharia law such as: -***
 - ***Revenge killing***
 - ***Intentional killing***
 - ***Payment and receiving of blood compensation (Diya).***
 - ***Denial of the rights of Women, Children, Refugees, IDPs, and Minorities.***
2. ***Standardizing the differing codes of the Somaliland customary laws... Quoted from the declaration of the Elders sponsored by HAQSOR.***

According to the women rights, the elders declared ***“The traditional leaders declare that the rights of women must fully be protected in accordance with the Sharia law. This will cover violations such as: -***

- ***Rape, slander, harassment, inheritance rights, forced marriage.***
- ***Arranged marriage, divorce, and dowry payment.***

The parliament must pass the applicable provisions on these issues.

The current secular law will be applied on all violations on the rights of women until the passage of the new provisions on these issues by the parliament.

The traditional leaders call for the full protection of the rights of women in Somaliland. They are also committed to advocate for the implementation of all the changes made in the harmful codes in the customary law that promote more protection on the rights of women”⁸...Quoted from the declaration of the Elders sponsored by HAQSOR.

With respect to this call for passing applicable provisions on rape, slander, harassment, inheritance rights, forced marriage, arranged marriage, divorce, and dowry payment, the Act of Family may be the only law which can meet all above mentioned issues.

⁷ 2006 national declaration of Somaliland traditional leaders, Dec. 4th – 10th sponsored by HAQSOR organization and participated by the traditional leaders of Somaliland

⁸ Page four of the same national declaraton of Somaliland traditional leaders

10. Recommendations

- Conduct extensive research to the family cases through the exact records of all district courts of Somaliland besides drafting the bill to identify the root causes of the family cases or problems, this would be useful for insertion of provisions of law reacting the discovered legal diagnostic in the expected family code;
- Continuation of public forum discussions, debates and symposium meetings on the need for family code participated by all stakeholders throughout the regions of Somaliland, this would be democratic participation as it would pave the way for the smooth implementation of the expected family code;
- Regular consultative meetings with the popular Somaliland Islamic jurists, this would be useful for making sure that all provisions of expected family code are accorded to the sharia to acquire public trust and confidence;
- Make available many different family law versions of different school of thoughts or sects, e.g. Egypt, Algeria, Malaysia and etc
- Proceeding of Family Code drafting for a period of time to avoid all potential risks and incorporate contributions and common or shared experiences;
- Holding validation workshops in every stage of drafting of the parties and chapters of the family code to sustain follow up of the people of the stages of drafting;
- Recognition and empowerment of the role of traditional leaders and relative elders in the reconciliation and rulings in the expected family code, this would prevent suspect of the elders that their authority over their domestic affairs is endangered;
- Insertion of provisions regarding parental responsibility to the acts and conducts of their children and youth to reduce children in conflict with law and avoid street children in the expected family code.

THE END