Transforming Justice sector in Fragile and Conflict Affected Situations (FCAS) is often complicated, especially when the focus is normative or behavioural change and transformation. This, however, does not stop successive Somali governments and international community repeatedly developing ambitious policies, programs and models that raise the question of why failure is so common, and why is Somalia’s justice sector is still not fully functional. These questions are further explored in this paper, using a paradigmatic case study—in this instance, the recently agreed Justice and Corrections Model (JCM). The Model is to be understood within the context of Somalia’s complex legal pluralism and political entrepreneurship where divergent actors operate in dynamic arena of projectized and individualized interests rather than coherent, institutionalized sector.

Abstract

Transforming Justice sector in Fragile and Conflict Affected Situations (FCAS) is often complicated, especially when the focus is normative or behavioural change and transformation. This, however, does not stop successive Somali governments and international community repeatedly developing ambitious policies, programs and models that raise the question of why failure is so common, and why is Somalia’s justice sector is still not fully functional. These questions are further explored in this paper, using a paradigmatic case study—in this instance, the recently agreed Justice and Corrections Model (JCM). The Model is to be understood within the context of Somalia’s complex legal pluralism and political entrepreneurship where divergent actors operate in dynamic arena of projectized and individualized interests rather than coherent, institutionalized sector.

Key words: Justice and Correction Model (JCM); Justice Governance; legal pluralism; political entrepreneurship.
Introduction

Somalia’s complex legal pluralism: statutory, customary, and religious legal frameworks coexist and are intertwined. While some progress has been made in advancing Somalia’s justice service including investing Human Capital through scholarships, providing legal aid to those who can’t avoid, setting protocols for custodian services etc., however, this is further complicated by the personalized or neo-patrimonial relationships and inter-agency rivalries conducted amongst and between Somali political elites and justice chain actors such as police, prosecutorial, court, custodial, intelligence agencies, special units, and commercial security companies’ contrary to the standard bureaucracies and institutions associated with what in Westphalian states is referred to as the Justice sector. To reference Rabi’s observation about the state in clan-based societies, the Justice sector should be seen as ‘a “political field,” i.e., an area within which diverse actors compete for influence and resources’.

Despite several decades’ experience of implementing programmes designed to build inclusive justice governance and rule of law, systematic analysis of the consequences of interventions remain very limited. This is primarily because international community and their partners focus more on what is being implemented than on the way in which it is implemented and received by communities.

Further, the affinities and procedures on which international models of Rule of law depend are assumed to be universal, whereas they may not be, with some scholars believing that the Rule of law “has become meaningless thanks to ideological abuse and general over-use.”

International actors have yet to analyse how and why recipients receive, manipulate, or reject imported ideas and practices, or, indeed, how imports are transformed once filtered through local interests and dispositions; Recent Somalia Rule of Law evaluations indicate that “the high-level direct support provided to the Federal Ministry of Justice and to a lesser extent Federal Member State Ministries of Justices, has produced minimal impact and the institutional dynamics between the two are poorly diagnosed, with common reliance on existing studies and baselines to ‘formulate and design’ justice interventions that have been deemed ‘inflexible’ and ‘unresponsive’ by passing of dialogue and lack of political commitments further compounding these issues”. Further noting that the “programme implementation modalities are not fit for purpose and need to be revisited”.

Taking as its departure point Luckham’s observation that ‘instead of conceiving of the Justice sector as a coherent and “unified” sector, it may be more realistic to see it as a shifting terrain of Justice arena and coalitions’.

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4 Particip and Dansom, Somalia Rule of Law Evaluation

The sharply defined notions of a Justice sector can be misleading particularly when applied to societies characterized by the absence of common understanding on nature of state, complex legal pluralism, and political entrepreneurship.

These issues should be understood in context of a war economy – where state building is associated with a predatory state and as such is deeply distrusted, emergent or embryonic forms of state institutions are confined to major urban areas such as entity capitals, and international reform projects are valued for the entrepreneurial opportunities they bring.

This paper explores sectoral dynamics in relation to the tensions that result when international and local actors have different expectation on the nature of justice system and how it is negotiated, financed, and executed through local realities. It questions the orthodoxy that Somalia’s Justice governance should be understood in terms of the actors and networks identified in analyses of liberal democracies which assume the need for models and the existence of specific behavioural patterns, norms and practices intersecting to form linear process that heavily focus on technical solutions rather than acknowledging historical complexity, the “political marketplace and the identity politics, by their very nature, preclude the rule of law and universal access to impartial justice services”.

2. Methodology

This analytical paper utilizes a paradigmatic case study approach, a “paradigm is a typical example of something, or a model”, in this instance, taking to account the recently agreed Somalia’s Justice and Corrections Model (JCM).

The case study approach allows in-depth, multi-faceted explorations of complex issues in their real-life settings and was based on the review of available evidence, extensive literature and light touch primary qualitative data that emerged out of semi-formal and semi-structured interviews with policy makers and key community.

2. Context

3.1. Fragmented governance

Somalia is geographical diverse country fitting in to wider geographical land. The country has made significant strides on its journey towards recovery and resilience but still ranks 119 out of 120 countries in the Fragile States Index, a result of a combination of decades of conflict, nearly 70 percent of Somalis live below the poverty line and 6.6 million people in Somalia still face acute food insecurity.

6 Henrik Vigh, Navigating Terrains of War, New York: Berghahn, 2006).
10 The data is based on the review of available evidence on Justice Sector reform as well as Key Informant Interviews with key justice actors and international community in Somalia and Nairobi, between May–June 2023.
12 The conflicts in Somalia can roughly be categorised as a) political conflict (between the federal government, regional member-state governments, Municipalities, and Ministries); b) communal conflict (between clans and local elites, mostly over access to resource and land); and c) violent extremism primarily led by Al-Shabaab.
13 World Bank, Somalia overview, 2022
The general context requires a nuanced understanding of how these broader geographies manifest themselves in, for example, variety of justice and administrative entities whilst being part of complex web of networks, which refers here to the rules, processes and interactions through which policy and political decisions are made and authority exercised. The country’s political and administrative divisions have developed since the 2012 constitutional changes creating the six federal member states of Jubaland, Southwest, Hirshabelle, Galmudug, Puntland and the self-declared independent Somaliland. There are still confusions on the nature of federalism and subsidiarity within the federalism agenda(s).

The Local government and districts across the country are most neglected even though they are the critical interface to communities and people of the delivery of justice services. The derogation of responsibilities in the federal system remains with numerous interpretations creating further political disputes as power balances continue to be derived from inherent, culturally evolved, clan relationships. The old regions (that strongly defined administrative boundaries for the states) are still apparent; their role and remit unclear.

The Justice governance of these entities is shaped by Somalia’s informal economy of clans, conflict and entrepreneurialism, rather than by formal appointments or sectoral organizations configured according to international models. Sate institutions are currently failing citizens in the provision of fair and enforceable justice, customary justice structures are also battling to meet citizen justice needs particularly where population density and changing justice requirements challenges their capabilities, while al-Shabaab is seen by many citizens as offering more affordable, fairer, and more effectively enforced rulings.

Somalia makes explicit the tensions existing between international conceptions of a coherent Justice sector and the realities of Justice governance in Fragile and Conflict Affected Situations (FCAS). The dominant characteristic being chronic insecurity, fragmentation, questions around legitimacy and a functional ambiguity which, combined with historical issues and political entrepreneurialism against the development of Western-style Justice sectors. The reality is that Somalia state is still seduction of “isomorphic mimicry”-a situation where a state looks like its functional, but in fact only gives that impression to obtain continued donor assistance without necessarily delivering for its citizens. The change of government or the process of agreeing Justice and Corrections Model alone is not guarantee of building strong social contract, so it’s time to re-think the role of the state in society.

3.2. Plural Justice & Multiple Agendas

Somalia’s complex, legal pluralism: statutory, customary, and religious legal frameworks coexist and are intertwined. The law derives from at least four sources, including a legislatively framework that follows the Italian (civil law) and British (common law) legal traditions, customary xeer principles, and Shari’ah.
Elders and religious scholars play an important role in legal disputes, and there is a mixed application of modern laws and customary xeer principles in place, with results seemingly following existing levels of social organisation and social cohesion, as well as the multiplicity of initiatives targeting the same groups of elders and community leaders.

The agendas pursued by international actors present in Somalia is varied over time, place and often overlaps. Although most if not all internationals operate on the assumption that a coherent Justice sector is desirable and achievable, there are tensions amongst and between actors on how this might be accomplished; compare for example European Union’s preference for framing Justice development projects as technical assistance (e.g. capacity building); UNDP’s focus on ‘building the capacity of formal justice actors and institutions’; FCDO’s focus on social norms and USAID promoting people-centred justice or IDLO’s heavy focus around Alternative Dispute Resolution–ADR centres – a significant contribution to the justice environment – that emerged as an important source of frontline justice provision which can bridge the gap between Somalia’s multiple justice systems and have garnered considerable donor support that should be critically assessed impact-wise.

Somalia’s National Development Plan 2020-2024 prioritizes “reforming the Custodial Corps, Correctional Services and Prisons in compliance with international human rights standards”.

However, the formal or State-sponsored system is only one part of the justice matrix in Somalia. Aside from struggling to gain legitimacy in this pluralistic legal context, public institutions suffer capability trap, the mechanisms of persistent implementation failure.

Country wide judicial level capacity review conducted in 2017 found gaps across key functions including administration, case management, performance management, ethical guidelines for judges and staff, and office policies and procedures. Estimates suggest Somalia has only around 200 judges and 70 prosecutors, a ratio of 2 judges and 0.7 prosecutors for every 100,000 citizens. In terms of access to justice, the Somali judiciary received just under 20,000 cases, in which a total of only 8,569 were heard, reflecting its current low levels of judicial capacity.

Somalis are more likely to choose informal institutions over the court system to resolve disputes. The success of the informal justice system lies in the fact that its mechanisms are embedded within the community and leaders that have the power and legitimacy to directly impact people’s lives, coupling these with a lack of effective oversight mechanisms on formal justice and a choice of institutions and political centres of gravity to interact with has rendered corruption and graft endemic and widespread.

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20 The ADR Centre model being referred to is that started by UNDP but later taken to scale by the IDLO.
23 Somalia’s security and justice sector public expenditure report, World Bank Report
These are further complicated by al Shabaab offering forceful adjudication on land disputes, homicides, and inter-familial matters – areas in which elders and qadi (Islamic judges) may be reluctant to venture. Yet, recent offensives against al Shabaab courts, such as its main court in Torotow, have dampened usage, at least overtly.27

The lack of fiscal sustainability of formal justice sector work is apparent. It is impossible to deliver on complex and challenging mandates that are unfunded or inadequately funded. The 2023 allocated Federal Government budget for the justice sector is $14 million28 that's fraction of the needs. At the Federal Member States (FMS) level, justice institutions are even weaker. In the absence of agreed intergovernmental fiscal transfer, negotiations to get national allocations takes longer and often politicized, with EU, for example, cutting budget support in 2022 after “the funding, which is typically used as an approach to facilitate the payment of recurrent costs became a political issue during the last year of the Farmajo government.”29

3.3. Justice & stabilisation

The concept of ‘stabilization’ in fragile states and post-war countries originates in international interventions in Iraq and Afghanistan in the early 2000s.30

The key idea was to combine state building, humanitarian action, and development in order to help achieve stable environments in Fragile and Conflict Affected Situations (FCAS).

In Somalia “stabilization” has become commonly used phrase by international development organizations but given its history in Somalia, it is not really underpinned by any distinct concept or familiarity with the average Somali citizens. Stabilization projects, heavily dominant in Southern Somalia, is initially regarded as territorial fight against al-Shabaab and countering violent extremism31 but later, UNSOM’s ‘stabilization’ effort developed in connection with the new UN approach to stabilization32 and the FGS Stabilization Strategy, officially endorsed in 2017, which focuses on four components: community recovery; social reconciliation; local governance and rule of law.

Many scholars wrote about rethinking stabilization efforts in Somalia but less focus is given to the where ‘justice’ sits in the stabilization continuum. Providing justice services in the newly or recently recovered area as part of wider stabilization agenda is urgent for restoring a functioning governance apparatus.33

33 https://www.sipri.org/commentary/blog/2019/rethinking-stabilization-efforts-somalia#:~:text=The%20basic%20premise%20of%20current%20fight%20against%20violent%20extremism
Looked at through a government mandates and responsibilities lens, Justice Ministries at Federal and state-level has to deliver on its formal mandate, derived from the constitutional and a loose regulatory framework, while leading in a range of stabilization-efforts, while also being ready to respond to government’s national security imperatives, which currently coalesce around the offensive against al-Shabaab. Placing reconciliation front and center in areas liberated from Al-Shabaab, and weaving it into the developing administrative structures, will help reduce incentives for aggrieved clans to use macawisley fighters to advance their interests.

4. Unpacking the model

In late December 2022, the National Consultative Council (NCC) except Puntland, agreed on the Justice and Corrections Model (JCM) for Somalia and the JCM is expected to provide a robust federal framework based on an integrated courts systems which sought to devolve authority to FMS courts, with the Federal Supreme Court as the final authority.

The Federal Judicial System Act, and Constitutional Court Establishment Act, which would form the legal basis for a federal justice system remain gridlocked. Similarly, the Judicial Services Commission (JSC), an independent oversight body responsible for accountability, standards and procedures of justice institutions is not yet finalized.

While 2022 agreement is seen as a big milestone and has several merits, however, it's not first time consensus is made regarding the Justice model. In 2018, state and federal justice ministers agreed the proposed model in Jowar with the Director of the UN Assistance Mission in Somali's (UNSOm) Rule of Law and Security Institutions Group (ROLSIG), Staffan Tillander, saying that “this agreement will enable the systematic building of justice and corrections institutions at state and federal levels and increased provision of basic justice chain services for the Somali people”.

But this agreement was never materialized.

The establishment of agreed model have in the past failed due to absence of wider political buy-in, accusations of politicisation, and doubts as to the proposed members’ qualifications. The Heritage Institute for Policy Studies found in its research that “policy makers may not be committed to the establishment of these institutions as, at the current point, each would tangibly limit all other institutions’ purviews and manoeuvrability – whilst also recognising that establishing such institutions would significantly empower their members with unclear checks and balances involved”.

35 National Consultative Council (NCC), a body by the top FGS, FMS, and BRA leaders, has met four times in Mogadishu. The NCC is a de facto high-level platform for executive leaders at FGS and FMS levels in Somalia who negotiate and agree on contentious political issues.
Recent EU commissioned Somalia Rule of Law evaluation acknowledges that “lack of agreement between the FGS and FMS on several important political issues continues to constitute one of the main challenges for the achievement of key programme goals. The limited progress on reaching an agreement on a federated Justice and Corrections Model has left several programme objectives pending, including a review of the legal framework and establishment of key institutions”.

4.1 Between legal pluralism and political entrepreneurship

The agreed Judiciary model has some drawbacks. First, the model emphasizes building Westphalian-based, formal justice systems, as opposed to building on existing justice mechanisms or coming up hybrid system that are trusted and accessible by the population.

Second, the federal parliament has no role in the appointment and approval of the Supreme Judicial Council- which would be the highest body in the judiciary.

Third, the model must recognize and reflect available resources – the version of the JCM with most support from FMSs requires a complex and expensive judicial architecture which is unlikely to be deliverable with the available fiscal resources. Fourth, the legality of the model agreement is in a big question - the lack of stable structures and binding inter-governmental agreements due to the full control of executive organs of the FGS and FMS, characterized by lack of legislative control and judicial review, as well as less commitment, high contestation, and distrust.

In May 2023, the Federal Ministry of Justice, and Constitutional Affairs (MoJCA) convened Justice and Corrections Model (JCM) roundtable event showcasing “collective commitment and collaboration on achieving meaningful justice reform”, while the roundtable initiative is important step forward, there was no concrete immediate outcome, the lack of an articulation of a vision of what Justice model mean in practical and what actions could be realized through, including costing the model.

Furthermore, in Fragile and Conflict Affected Situations (FCAS), sectoral – development depends less on technical fixes and more on genuine political settlements and strong Intergovernmental Relationships (IGR). Despite a decade of effort to effectively implement formalized Inter-governmental Relations (IGR), the Federal and State governments have not been able to come to a final agreement on matters of developing regulatory and legal frame works for IGR, including allocation of revenues and expenditure responsibilities.
This lack of policy agreement and lack of proper legal enforcement has facilitated repeated elite-bargaining. Legal pluralism and intense political contestation must be “understood as a protracted social condition in which multiple public authorities operate, the dominant logics being: The political marketplace and Identity politics”.

4.2. Projectization vs Institutionalization

Somalia’s Justice governance has attracted significant donor support through different modality including direct budget support, technical assistance and ‘capacity injection’ programs. According to 2019 Aid mapping report, rule of law spending reaches close to 200 million per annum.

The heavily projectized ways of doing Justice governance programming are not yielding sustainable results. The new momentum to support “government-owned and government-led” processes remain at an early stage and is only possible when a coalition of the willing national and subnational actors can drive the process forward. Despite the repeated push for ‘government-led and owned” and the high-level commitments made by international community, “Only 4% of development aid was delivered through Use Country System (USC) Somalia in 2015, compared with 28-44% in the Central African Republic, Mali, and Liberia in the same year.

Given the explicit focus on statebuilding in Somalia, the preferring of short-term operational concerns over long-term government systems building appears to run counter to the international community’s stated objectives.”

The programs focusing on federated Justice and corrections model include Somalia Joint Justice Programme (JJP), implemented by UNDP and UNSOM aims to “build the capacity of formal justice actors and institutions to respond to the needs of the vulnerable, including the provision of gender responsive services through engagement with clan elders and influencers in view of supporting institutional reforms”. Although not explicitly designed to develop robust nation-wide Justice sectors or facilitate political agreement like Justice and Corrections Model, its various elements can be seen as designed to facilitate sectoral emergence. The Program, now in its 3rd phase, started in 2015 to support the delivery of justice service for all Somalis, but the challenges of achieving this has actually resulted in years of doing same interventions, technical fix, and strategic incoherence.

Other Justice related projects includes USAID’s Expanding Access to Justice, Somali Security and Justice program (SSJP II), IDLO support to the development of legal drafting manual, the ADRs, among many other smaller scale initiatives mostly implemented in Southern Somalia.

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International donors like USAID, FCDO and EU are shifting more into commercial consultancy contractors for quick and rapid delivery of aid projects. These corporate companies, mostly if not all, from US and European countries are profit-oriented, answerable to shareholders. The commercialization of aid is emerging global phenomena, “contracts, though sometimes overlooked, levers of control in the development assistance, assumes supportive infrastructures of both the government and the market” [50]. The “increased marketization of international aid and development, the shift in delivery mechanisms by USAID for example challenges our notion of a public good, accountability for public dollars, and the ethics of profit generation from aid delivery” [51]. Furthermore, in a country that has yet to generate more than a tiny fraction of the resources and revenues necessary to maintain basic bureaucracy, the Somali stakeholders’ approach to aid industry has evolved into more entrepreneurial where “international projects and approaches are welcomed, manipulated, or obstructed according to the resources they represent and their alignment with local political goals and practices” [52].

This picture underscores the importance of home-grown ‘institutions’ to deliver required mandates, recognizing that weak institutions are ineffective and unresponsive to develop or execute required plans and policies. When successful, these “institutions more often emerge through continuous dialogue and modification based on local knowledge and experience and given the classic knowledge problem, the challenges to designing complex institutions in a top-down manner are generally insurmountable, particularly in a Fragile and Conflict Affected Situations (FCAS) that has seriously limited revenue generation and continues to experience ongoing conflict” [53]. However, the statutory institutions face numerous challenges including individualization and politicization of bureaucracy in Somalia where local resources and revenues are limited and, in a context, where the merging or unmerging of Ministries, Departments and Authorities (MDAs) has created situation of perpetual transition and institutional uncertainty. For example, the current Federal Ministry of Justice and Constitutional Affairs (MoJCA) has undergone significant evolution throughout the decades since its establishment, the Ministry’s name and the scope of its mandate have been changed several times due to changing priorities of different governments “with out enact a new law or amend the previous Law on the Organization of the Government; such a law will help the parliament to create a new establishment act for each ministry or to revise existing one (HIPS May 2022)” [54]. The absence of operationalized Justice and Corrections Model and coherence sector strategy means the federal and state institutions are more focused on projects, rather than focusing on executing core mandates and the long-term strategic objectives of serving for Somali people.

5. Conclusion and way-forward

This paper has argued that the sharply defined models, quick technical fixes, and normative goals associated with Justice and Corrections Model (JCM) are to be understood within the context of Somalia’s complex legal pluralism and intense political contestation. Furthermore, Somalia’s justice landscape is, in reality, an arena of multiple actors with opposing interests than coherent unified sector, it embodies an organizing principle that can be traded for “political or entrepreneurial purposes, rather than a process or precursor to state building” in which personalized relationships and entrepreneurial rivalries are conducted amongst and between power brokers in justice chain actors such as police, prosecutorial, court, custodial, this provides a more realistic picture of Justice governance in Somalia.

To address the complexities and challenges of justice governance in Somalia and promote a more sustainable and effective approach to justice governance, the paper suggests following policy recommendations:

- **Institutionalize to avoid the business as usual ‘projectized’ approach:** The current dual justice and constitutional affairs mandate of the Ministry of Justice and Constitutional affairs (MOJCA) creates opportunities to turn high-level political agreements into legal and legislative mechanisms. Institutionalize the Justice and Corrections Model to avoid a projectized approach. Focus on the long-term strategic objectives of serving the Somali people rather than prioritizing short-term projectized approaches. Develop a shared vision and sectoral strategy for operationalizing the federalized Justice and Corrections Model, investing robust, home-grown institutions that can deliver required mandates effectively and responsively.

- **Fiscal Sustainability:** Urgently address the issue of fiscal sustainability for the Justice and Corrections Model. This includes costing the model, negotiating, and enforcing fiscal federalism and revenue-sharing models to ensure the availability of adequate locally-generated resources. In the meantime, the government and international partners must establish smart financing/innovative pool of funding mechanisms achievable through Use Country Systems (UCS), with strong ‘government-owned and led’ management, intergovernmental transfers, and mutual accountability mechanisms.

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Establish data, information analytical capability within the justice: This will enable effective monitor who is doing what in justice environment, performance, and conduct of service providers, and better understanding of citizen justice needs and priorities.

Foster Cooperation for Service Delivery:
There are multiple actors in justice service provision, encouraging cooperation among justice institutions to address service delivery challenges. Setting common standards and commitments to citizens collaboratively will be more effective than directive approaches.

Hybrid and network-approach to Justice Mechanisms:
Consider building on existing justice mechanisms and adopting a hybrid approach that is trusted and accessible by the population, rather than solely focusing on building Westphalian-based, formal justice systems.

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About the Author

Abdiwahab Ali is Governance and Rule of Law specialist with hands-on experience in designing, implementing & evaluating complex governance related-policy processes & programs with a variety of partners across the Horn of Africa, with special focus in Somalia. Abdiwahab is currently engaged research, analytics, and consulting services. He is also a research fellow at SIDRA Institute.

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