



**HANDS OFF CAIN**

# **POSITIVE TRADITIONAL APPROACHES TO AVOID DEATH PENALTY IN SOMALIA**



**SOMALI WOMEN AGENDA  
2018**

**REALITY BOOK**

# **REALITY BOOK**

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**NESSUNO TOCCHI CAINO  
A RESEARCH**

**ON**

**POSITIVE TRADITIONAL  
APPROACHES TO AVOID  
THE DEATH PENALTY**

**IN SOMALIA**

**SOMALI WOMEN AGENDA**

**2018**

## **COVER AND LAYOUT**

Marco Banci

## **POSITIVE TRADITIONAL APPROACHES TO AVOID DEATH PENALTY IN SOMALIA**

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1	AIDS	Acquired Immune Deficiency Syndrome
2	EU	European Union
3	FGS	Federal Government of Somalia
4	HIV	Human Immunodeficiency Virus
5	ICCPR	International Convention on Civil and Political Rights
6	NGO	Non-Governmental Organization
7	OPCAT	Optional Protocol on the Convention Against Torture
8	SWA	Somali Women Agenda
9	UN	United Nations
10	UNGA	United Nations General Assembly
11	US	United States of America

# EXECUTIVE SUMMARY

This research on alternatives to death penalty in Somalia focuses on the application of the death penalty and payment of *Diya* as an alternative to it in Somalia. Its aim is to provide up-to-date information about the laws and practices relating to the application of the death penalty in Somalia, including an analysis of diya as an alternative sanction to the death penalty and whether it reflects international human rights standards and norms.

The researcher looked at primary sources, such as legislation and interviews with relevant government officials, lawyers and a former judge, journalists, and members of civil society/ human rights defenders in Somalia. The researcher also turned to reports by people or organisations with first-hand experience, including inter-governmental organisations such as the African Commission's Working Group on the Death Penalty, and reports by UN treaty bodies and Special Rapporteurs, as well as reports by international NGOs such as Human Rights Watch, Amnesty International, Death Penalty Worldwide and the World Coalition against the Death Penalty. The research was carried out during 2018.

The formal legal system in Somalia has two parallel court systems. There are military courts that deal with armed forces and armed groups like Al Shabaab. There are also civilian courts that tries ordinary cases within the country. The formal justice system in Somalia remains weak and dysfunctional. The weakness of the judiciary is exacerbated by the fact that it has been emasculated by the executive, corruption and injustices.

In Somalia Islamic law operates in tandem with traditional and civil law systems. The Somali traditional justice system consists of Somali customary laws loosely referred to as *Xeer*, which is an aggregation of unwritten agreements and contracts entered bilaterally between clans, sub-clans and diya-paying groups. *Xeer* also serves as a code of acceptable behaviour among Somalis in the realms of the collective payment of diya (blood money) for certain crimes. *Xeer* is a collective system that places responsibility for actions on the group rather than the individual.

Somalia is party to ICCPR, but not its second option. Somalia is a retentionist country and as such Capital Punishment is therefore legal. The death penalty is the most severe punishment in the country and is reserved for capital crimes.



Death penalty is enshrined in the Somali laws and the Constitution. Apart from murder, there are 17 articles in the National laws that provides for capital punishment by death in Somalia. Executions in Somalia are through shooting to death.

Amnesty International was able to document 334 cases of death penalty handed down to Somalis and 126 cases of executions, most of which were by the military courts. In general, the general mood in Somalia is such that majority of the people are of the opinion that death penalty should be applied in cases where the victims are not forgiving and they do not want blood money. This is more so when it comes to those convicted of terrorism (Al Shabaab) where there is no sympathy for the offenders.

Diya is the financial compensation paid to victim or heirs of a victim in the cases of murder, bodily harm or property damage as an alternative to *Kasas* as part of *xeer*. In the formal judicial process in Somalia, diya negotiation can only happen after a person has been convicted and probably spent some time in jail and the victim's family has agreed to negotiate. Accepting diya or *kasas* of the offender depends various parameters including the circumstance surrounding the killing, existing *xeer* between the two clans.

Diya negotiation is usually undertaken by well-known credible traditional elders and Sheiks from the two clans who have been seen to be fair to all in their previous deliberations, who would sit together to deliberate on what happened and what could be done to recoup the lost harmony between the clans. Diya payment like 3rd party insurance so that when a clan member kills a person from another clan, clan will pay diya on his behalf, regardless of the amount so as to forestall conflict that would result if was unable to foot the fine individually. Diya holds clan members together and also gives them the comfort that if something bad happens, there is the social network.

Diya's advantages to include the fact that is a compensation system that tries to repair the damage done. Diya allows the killer to be rehabilitated in order to allow him to re-enter the society after regretting what he did. At the moment diya is informal even if it is consented by the government because the process has intentionally not been incorporated in the Somali legal system. Another reason for not formalizing the *Diya* system is the need to balance the modern government and traditional

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system of government. Similarly, the penal code must be reviewed in such a way that it complies to the traditional culture. To formalize it will require careful consideration including looking at it from different perspective including protecting life.

### **Conclusions**

The Somali state remains an unapologetic retentionist country that continue to dispense death sentences to those convicted of capital offences despite the fact that it is a party to certain protocols that proscribe death penalty. Death penalty is accepted and generally encouraged as a punishment for capital offenders. There are strong traditional/religious alternative to death penalty in the name of Xeer and diya (blood money) but these are limited to cases of compensation for homicide between clans and families. The traditional alternatives for death penalty do not carter for the case of offences deemed to be against the state, among which terrorism cases consists the bul. Advocacy against death penalty for terror related death sentences also face the huddle brought up by the fact that terror is not committed against clans or families and as such there is no specific offended family or clans to compensate. Public opinion is also steeped against pardoning those accused of terrorism.

### **RECOMMENDATIONS TO THE REPUBLIC OF SOMALIA**

- Follow International Best Practice in Sentencing: The death sentence process should be a bit slow because in Somalia the moment the process starts and up to execution is below six months, which is very short. This would allow for the convicts to appeal their sentences, which is almost impossible not that execution is almost immediate;
- Stop the Usage of Military Courts for trying civilian offenders: Since 2011, all and sundry including civilians suspected to have participating in terror related activities are tried and swiftly executed through the military courts, this is against all international conventions on treatment of prisoners facing death penalty and should be stopped forthwith;
- Strengthen Judicial System Value Chain of law enforcement, judicial and prisons system through provision of adequate/competent human resource, better investigation and court processes to ensure accused persons go through due process. There should be enough judges who are knowledgeable and experts in Sharia system and the formal Somali judicial system. This is rather urgent because in Somalia, Islam is supreme;

- Avail and Strengthen Defense for the Accused through a competent, corruption free and well-resourced initiatives, including mandatory provision of defense lawyers for those facing death sentence;
- Strengthen and Formalize the Xeer Justice System through inclusion in university education curriculum and adequate research on its comparative advantages;
- Strengthen and formalize Diya system such that even if blood money was paid, the culprit should at least spend some time in jail. Diya should only prevent capital punishment as a compensation/restoration in lieu of capital punishment to mitigate the perception that human life can be equated to a number of camels or money;
- Humanize the system of punishment by reducing the number of crimes (currently 17) for which death sentence may be prescribed, and limit these cases to only the “most serious crimes”.
- Amend national legislation so that it is in accordance with the UN Standards Minimum Rules for the Treatment of Prisoners, and other international human rights standards and norms.
- Implement controls to deal with the mass overcrowding in the Somali Prison Service.
- Ensure that prison conditions for death row and life sentenced prisoners approximate as closely as possible the conditions of life outside the prison system, and offer programs for rehabilitation and reintegration.
- Increase resources for the prison system to improve salary and working conditions for prison staff. Ensure all prison staff are appropriately trained in international human rights standards.

# 1.0 INTRODUCTION

The death penalty is the ultimate cruel, inhuman and degrading punishment. It represents an unacceptable denial of human dignity and integrity. It is irreversible, and where criminal justice systems are open to error or discrimination, the death penalty will inevitably be inflicted on the innocent. In many countries that retain the death penalty there is a wide scope of application which does not meet the minimum safeguards, and prisoners on death row are often detained in conditions which cause physical and/or mental suffering.

The challenges within the criminal justice system do not end with the institution of a moratorium or with abolition of the death penalty, as the problem of what to do with the most serious offenders remains. Many countries that institute moratoria do not create humane conditions for prisoners held indefinitely on ‘death row’, or substitute alternative sanctions that amount to torture or cruel, inhuman or degrading punishment, such as life imprisonment without the possibility of parole, solitary confinement for long and indeterminate periods of time, and inadequate basic physical or medical provisions. Punitive conditions of detention and less favourable treatment are prevalent for reprieved death row prisoners. Such practices fall outside international minimum standards, including those established under the EU Guidelines on the Death Penalty.

This research focuses on the application of the death penalty and payment of *Diya* as an alternative to it in Somalia. Its aim is to provide up-to-date information about the laws and practices relating to the application of the death penalty in Somalia, including an analysis of *diya* as an alternative sanction to the death penalty and whether it reflects international human rights standards and norms. This research provides detailed and practical recommendations tailored to Somalia to bring it in line with international human rights standards and norms.

We hope this research will assist Somali Women Agenda’s and CSOs advocacy efforts towards abolition of the death penalty and the implementation of humane alternative sanctions in the region. We also hope this paper will be of use to researchers, academics, members of the international and donor community, and all other stakeholders involved in penal reform processes including parliamentarians, prison officials and members of the judiciary.

## 2.0 RESEARCH METHODOLOGY

Access to information on the application of the death penalty and its alternative sanction is often unavailable or inaccurate in many countries. Statistical information is not always made available by state bodies, and information provided is not always timely, or lacks clarity. As such, although Somali Women Agenda aimed to undertake an in-depth analysis of legal, policy and practice areas within this research paper, access to certain types of information was sometimes beyond the abilities of the researchers, and therefore gaps in the research remain.

A research questionnaire was designed in early 2018 to assist researchers in identifying relevant information. The research questionnaire was designed by SWA in partnership with the consultant, Mr. Joshua Aridi. The research was undertaken by SWA in Somalia and included field visits and desk-based research.

The researcher looked at primary sources, such as legislation and interviews with relevant government officials (within the various departments of the Ministries of the Interior, the Ministries of Justice, and the Penitentiary Services), prison officials, lawyers and a former judge, journalists, and members of civil society/ human rights defenders in Somalia, as well as death row and life-sentenced prisoners where access was made available. The researcher also turned to reports by people or organisations with first-hand experience, including inter-governmental organisations such as the African Commission's Working Group on the Death Penalty, and reports by UN treaty bodies and Special Rapporteurs, as well as reports by international NGOs such as Human Rights Watch, Amnesty International, Death Penalty Worldwide and the World Coalition against the Death Penalty. Reports and articles by journalists and academics were also analysed. The research was carried out during 2018.

## 3.0 SOMALI LEGAL SYSTEMS

### 3.1 THE FORMAL LEGAL SYSTEM IN SOMALIA

The formal legal system in Somalia has two parallel court systems. There are military courts that deal with armed forces and armed groups like Al Shabaab. There are also civilian courts that tries ordinary cases within the country. The formal justice system in Somalia remains weak and dysfunctional, and most people rely on local modes of conflict resolution including *xeer*, *shari'a* and ad hoc mechanisms established by militia factions. Of these, *xeer* is the most widely used and influential; it functions in parallel to state law, making the legal framework in Somalia pluralistic<sup>1</sup>.

#### a) Statutory laws

These are laws that are usually enacted by a legislative body (civil legal system). Applied in Somalia as the state (legislator) enacts laws in the form of statutes or codes, and manages its implementation.

#### b) The Current state of the Somali judiciary

All the stakeholders interviewed acknowledged that the Somali judicial system is really battered and the resources including personnel are not enough. The system is also not competent when you look at the process through which suspects are taken. The weakness of the judiciary is exacerbated by the fact that it has been emasculated by the executive, which currently act as if the judiciary is its extension, hence curtailing its supposed independence. A classic example was given of an instance where the executive has interfered with the judiciary by unilaterally appointing the current Chief Justice. At only 36 years of age, the stakeholders interviewed pointed out that he lacks the requisite experience, legal background and the wherewithal to execute the duties commensurate with that position. They noted that he was installed there to safeguard the interests of individuals running the state.

As currently constituted, most stakeholders noted that the judicial system is

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<sup>1</sup> J Gundel, *The predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, (2006)

rife with corruption and injustices, and hence not at all independent. According to them, as long as there are those impediments, the system will always be weak and corruption will always be widespread as it is right now, judges are taking money and ruling cases based on who pays them most. Under such unfavourable conditions, you may have people who are innocent who are convicted of murder or even political opponents, since justice is not arrived at fairly. With a weak judicial system-it may be unwise to execute the suspect because the system is not fool proof. Other stakeholders noted that even though the judicial system is weak, there must however be provisions for death penalty and what needs to be looked at is if due process is followed in the cases. They further pointed out that there is need for vigilance, to have due process of the law, a strong judiciary and prosecution.

#### **a) Civilian courts**

Cases of murder between civilians, the offender is tried by civilian court through the Attorney General. The person gets convicted and sentenced for capital punishment. However, execution will not be carried out. Currently there are about 70 cases that were convicted by the civilian courts and their executions have not been carried out. So the AG office generated sentences have not been carried out.

#### **b) Military Courts**

This is the second tier court system. Currently all terror related cases are tried by military courts and not civilian courts. Many terror suspects are sentenced to death and carry out the sentence, unlike those tried by civilian courts where the probably that sentence will not be carried out are high. A senior staff at the Attorney General's office pointed out that there are currently about 70 cases that are convicted but not executed yet as the government policy has changed. The military courts have jurisdiction over military matters during the war. It tries such cases like insubordination, which leads to court-martial. It is supposed to try military personnel. In November 2011 when AS was removed from Mogadishu the military was given the mandate to prosecute all cases concerned with terrorism because of the situation. Since then they have been trying these cases. There is ongoing discussion to transfer those cases from the military courts. Hopefully,

very soon all terrorism cases will be tried by civilian courts. Military will have their space under the military penal code while the civilian will be tried under the Somali penal code. If a military person murders another person, he will be tried in a military court and will most probably be convicted with capital punishment and most probably the court will carry out the capital punishment. Some stakeholders pointed out that the operation of the military courts on the unarmed civilians is illegal since the amendments made for the military are no longer valid.

### 3.2 SHARIA LAW IN SOMALIA

In Somalia Islamic law operates in tandem with traditional and civil law systems. Islamic law is embodied in the sharia, an Arabic word meaning “the right path.” Sharia covers all aspects of public and private life and organizes them into five categories: obligatory, recommended, permitted, disliked, and forbidden. The primary sources of sharia law are the Qur’an, believed by Muslims to be the word of God revealed to the Prophet Muhammad by the angel Gabriel, and the Sunnah, the teachings of the Prophet and his works. In addition to these two primary sources, traditional Sunni Muslims recognize the consensus of Muhammad’s companions and Islamic jurists on certain issues, called *ijmas*, and various forms of reasoning, including analogy by legal scholars, referred to as *qiyas*. Shia Muslims reject *ijmas* and *qiyas* as sources of sharia law.

Sharia was adopted in Somalia in 2009. Article 2 of Somali 2012 Constitution states no law can be enacted that is not compliant with the general principles and objectives of Sharia<sup>2</sup>. Sharia currently influences all aspects of *Xeer* as well as Somalia’s formal legal system.

### 3.3 THE SOMALIA CUSTOMERY LAW (XEER)

The Somali traditional justice system consists of Somali customary laws loosely referred to as *Xeer*, which is an aggregation of unwritten agreements and contracts entered bilaterally between clans, sub-clans and diya-paying groups that denotes specifically agreed upon rights, obligations and duties that regulates inter-clan relations, compensations for illegal works and management of disputes among others.<sup>3</sup> *Xeer* also serves as a code of acceptable behaviour among Somalis in the

<sup>2</sup> “UN officials welcome ‘historic’ approval of new constitution for Somalia”. United Nations News Center (2012). Archived from the original on 2017-07-04. Retrieved 2018-11-13

<sup>3</sup> Gundel above n 3, 9



realms of the collective payment of diya (blood money) for certain crimes such as murder, assault, theft and rape; the promotion of inter-clan harmony through the protection of certain social groups including women, children, the elderly and guests; and the payment of dowry obligations<sup>4</sup>.

*Xeer* is a collective system that places responsibility for actions on the group rather than the individual. This allocation of responsibility operates to protect the group and its collective strength — in harsh and unstable environments it is deemed more beneficial for the group to collectively assume responsibility for compensation payments rather than lose one of its members. In this way, *xeer* has functioned as an effective tool for promoting social cohesion and for the regulation of inter-clan affairs<sup>5</sup>. *Xeer* is the preferred and most used legal system in all Somali regions, applied in up to 80–90 percent of disputes and criminal cases. Together with the elders, *Xeer* is regarded as fundamental to maintaining social relations within clans. While the elders are the guarantors of peace and stability in most of Somalia, *xeer* is the glue that prevents collapse into anarchy.<sup>6</sup> *Xeer* cases are adjudicated at the lowest appropriate genealogical level of the clan, commencing with the nuclear family, followed by the extended family, through to the sub-clan and clan levels<sup>7</sup>.

It is traditional because it has been undertaken over a long time but it is essentially an Islamic practice. There are traditional *xeer* agreements that gives clans opportunity to negotiate over blood money, which varies from one area to another. In Somali culture death penalty existed but as revenge killing. The internal war between clans would go on for centuries. A retired judge gave an example of his family feud:

*“When I was born my father managed to stop a 150 years’ revenge killing. They killed six of my uncles and they lived in the bush, we are a segment of the family who lived in urban areas for centuries. My father was a rich man, he said that killing other people for nothing was not good and they listened to him because he was a rich man. He was one of the last warlords, he managed to make the other clans to pay the diya and the war stopped from the time I was born. My seven uncles were killed the same night I was born and they were the last ones. The other tribe who doesn’t go to war*

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<sup>4</sup> Le Sage, above n 2, 32-33.

<sup>5</sup> Gundel above n 3,9.

<sup>6</sup> Gundel above n 3,9.

<sup>7</sup> Gundel above n 3,9

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*would present the culprit to the offended tribe for killing. Most of the killings happen because of pillage and occupation of land”.*

According to a Minister from the South West State, in the Somali nomadic life when someone kills another, there is normally the need to revenge. The killer would either have to be killed or someone else from the clan will be killed, regardless of such a person's innocence. This is not fair so the clans have come to an understanding where *diya* is paid. Failure to pay the *diya*, the clan of the killer will produce the criminal to be dealt with as they want. There are two choices-the criminal to be killed or they accept compensation. If they decide to kill the offender, then somebody from the offended clan will kill me by shooting. There is traditional dispute resolution system that tackle matters out of court in a formal system using elders or informally between families. Generally, elders encourage alternative dispute resolution within the community which could involve sharia or traditional systems but there are parameters and principles that must be applied. Some cases even when they are submitted to court might be settled by traditional system and the person is convicted and given capital punishment-but the families agree on compensation. The person spends some time in jail but comes out eventually.

### **3.4 TRADITIONAL VIS-À-VIS FORMAL COURT SYSTEM**

In the Somali legal system traditional mechanism is applied within the formal court system in such a way that they complement each other. However, discussions with different stakeholders revealed that there are comparative advantages and disadvantages of each of the two systems, which the blending of the two tends to remedy. The modern system does not compensate the victim's family and as such when homicide cases are taken to the formal courts the victim's family opt to negotiate. There is an informal understanding that the state would normally apply the death penalty but the family of the victim has a right to ask for a retributive alternative. Even in cases where the police and the court system are involved, the victim's family is consulted on their view as to how the case should be concluded.

Those who view the traditional system (*diya*) pointed out that it always results in injustices since it enhances prejudices against women, minorities, disabled, the youth, however, Somali culture cannot be wished away. On the other hand, the opposing view is that *diya* is restorative but not as efficient as the modern way.

Those against the formal justice system that promote mandatory death penalty were of the view that death penalty is not always a deterrent because when one look at what is happening in the US, despite the death penalty and executions, the number of murders keep on increasing. They further noted that death penalty is not retributive to the victim's family from the government, who in most cases would prefer blood money. Those holding the middle ground pointed out that both death penalty, diya and forgiveness are part of Somali laws. This is because penal code must be implemented according to the constitution, which is inferior to the Quran. The Quran allows for the three alternatives-unconditional forgiveness, diya and revenge killing s the last resort.

### **3.5 CHALLENGES TO THE JUDICIARY IN SOMALIA**

Different stakeholders interviewed noted that the Somali judicial system is quite weak. Most of them noted that the entire judicial system, especially the appeal courts are very weak. This is coupled with poor investigation system as the Somali police are poorly trained, kitted and resourced to launch proper investigations. The judicial system also lacks proper protection system to cater for the accused persons that ensures due process is followed. There is also an acute shortage of defence lawyers for capital offence cases. As a result, many of the death sentences related to insurgency are not fair or justified.

#### **a. *Monitoring of prisoners***

Somalia has not yet ratified OPCAT, and does not have a national preventive mechanism to monitor places of detention. However, civil society organisations like SWA have permission to visit prisons, and these visits continue to reveal harsh conditions, as well as allegations by prisoners of inhumane treatment, including torture. In December 2018 Somali Women Agenda visited prisons in Mogadishu and Baidoa to inspect prisoners and other places of detention, and make appropriate recommendations, documented beatings and assault by prison staff of prisoners. The media also pays occasional visits to prisoners and helps to highlight the conditions and treatment of detention. These media visits can be undertaken for all prisoners, including those on death row and lifers.

#### **b. *Transparency and accountability in Somalia***

The state does not publish any statistics in regard to the death penalty. However, some information regarding the number of prisoners is available from the prisons department upon request.

**c. *Abolitionist movement in Somalia***

The abolitionist movement in Somalia has been relatively unresponsive in recent years. However, during the past eighteen months, a coalition of national human rights organisations has established a Working Group on the Death Penalty to develop and implement a national advocacy strategy and to build up the momentum towards moratorium and abolition in Somalia. The Somalia Working Group on the Death Penalty has linked up with a newly-established East Africa Coalition and with the Great Lakes Coalition to share examples, strategies and lessons learned within the region on the abolition movement.



## 4.0 DEATH PENALTY IN SOMALIA

### 4.1 LEGAL FRAMEWORK ON DEATH PENALTY AND EXECUTION IN SOMALIA

#### *a) International Treaties signed by Somalia on Death Penalty*

Somalia is party to ICCPR, but not its second option. Somalia was a co-sponsor and voted in favour of the UNGA resolution 67/176, adopted on 20<sup>th</sup> December 2012 on Moratorium on the use of the death penalty. Article 4. Calls upon all States in clause “c”: To progressively restrict the use of the death penalty and not to impose capital punishment for offences committed by persons below 18 years of age and on pregnant women; “d”: To reduce the number of offences for which the death penalty may be imposed; and “e”: To establish a moratorium on executions with a view to abolishing the death penalty. Somalia also voted for the same in 2014.

#### *b) Death Penalty and the Somali Penal Code*

Somalia is a retentionist country and as such Capital Punishment is therefore legal. The death penalty is the most severe punishment in the country and is reserved for capital crimes. Death penalty is enshrined in the Somali laws and the Constitution. Apart from murder, there are 17 articles in the National laws that provides for capital punishment by death in Somalia. These include<sup>8</sup>:

**Article 1:** “committing offences adverse or damaging to the independence, unity and security of the Somali State”

**Article 2:** utilizing weapons against the State when it is at war

**Article 3:** establishing organizations “whose purpose and work is hostile to the security of the Somali State”

**Article 4:** conspiring with a foreign power

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<sup>8</sup> Amnesty International (1979). The Death Penalty: Amnesty International Report. Amnesty International Publications. pp. 57–58. ISBN 0900058889.

**Article 8:** engaging in armed banditry

**Article 12:** “using religion for the purpose of breaking up the unity of the Somali people or weakening or damaging the authority of the Somali state”

**Article 16:** engaging in trade with a nation hostile to the Somali Democratic Republic

**Article 18:** displaying or disseminating information “aimed at damaging the sovereignty of the revolution of the Somali nation.”

According to the old Somali Penal Code, executions in Somalia are through shooting to death<sup>9</sup>. Shooting is also sanctioned under the Military Penal Code. Diya (payment of blood money) does not apply in these 18 cases. The court system ordinarily does not reject a case where a clan has accepted to pay diya for murder. However, since the beginning of 2016 when the new president was elected, all civilian cases of death penalty have been put on hold.

### ***c) Death penalty and Sharia law in Somalia***

In the Somali constitution, Sharia is the highest source of law such that anything that contradicts it is strictly invalid in Somali law. Death penalty in Somalia is enshrined in the Islamic religion (sharia law). According to the Quran, if someone kills another person there are three alternatives. The family of the murdered person may forgive the offender unconditionally; the offender’s family may pay compensation if acceptable to the offended family (diya) or the family of the dead person may insist on *kasas* (killing of the offender). These options are tied with Islamic teachings and laws. There is an ongoing reform of the constitution, but the stand on death penalty is not expected to change because sharia will remain the primary source of law that informs the constitution, and all laws should be in line with sharia.

Apart from *kasas* for those convicted for murder, Sharia laws also prescribe compulsory death penalty for blocking the street or robbery with violence and banditry. These prescriptions coincide with the provision of the penal code. Mode of execution according to sharia law include beheading, stoning or hanging. Extra judicial tribunals associated with militias in Somalia also carry out execution by shooting.

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<sup>9</sup> Somali Penal Code, art. 94, Legislative Decree No. 5, Dec. 16, 1962, translation edited by [www.somaliland-law.com](http://www.somaliland-law.com).

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#### *d) Death Penalty and Xeer in Somalia*

The boundary between xeer and sharia law in Somalia is rather thin, largely because traditional laws fully accept sharia laws. Xeer has been developed over time between the Somali clans to guide the relationships between them. Through xeer, Kasas (revenge killing), forgiveness or payment of diya (blood money) is determined by the two clans through the use of the law of precedence from the payments that were made before. Kasas is the last resort in Xeer when the two sides in a dispute cannot agree and the offended side refuses to take blood compensation. If the offending clan cannot pay or refuse to take diya, then the death kasas is executed.

Execution of revenge may take place without recourse to xeer, where by the offended clan would target and kill the number of the offending clan believed to be equal to the strength of the victim. For example, If the victim was a wealthy person the avenging clan would kill a wealthy person from the offending community; if the deceased was well educated they would target a person of similar rank and to give a good lesson they would kill more than one. It is not usual for one from a weaker clan to kill someone from a stronger clan.

There are however some exemptions to kasas in Somali tradition. When a woman kills some clans allow for the female offender to undergo Kasas, while others do not. It also depends on if the woman is pregnant or has young children. In the few cases that involved women there was sympathy not to kill them. There have been cases where women who have killed their husbands are executed. Children (aged less than 18 years) are also exempted from kasas.

*Kasas* is mandatory in cases that involve the crime of terrorism. This is largely because terror is regarded as crime against the state. Similarly, acts of terrorism often go beyond the clan, especially in cases with mass casualties. When the family of the deceased turns down diya payment and refuse to unconditionally pardon the offender, he will be executed. This depends on existence of precedence between two clans. If either of the clans had rejected diya in the past, there is likelihood of non-acceptance of diya payment again. Again, diya may be declined because the elders commanding a clan are wise and they don't want the war to go on, or they are stupid enough to think that the other clan is weaker and they can



kill many of their members, inflict more damage or force them to flee<sup>10</sup>. Crimes against the state are also punishable by mandatory death sentence.

There are a few cases of *xeer* that go against the grain of sharia law. These include some discriminatory beliefs concerning certain minority groups regarded as lesser beings and untouchables (*bantus*). The culture of impunity is also closely linked to traditional law. Similarly, FGM is a traditional practice prohibited by the Quran.

*Executions:* Traditionally, there was a period that had to pass between sentencing and execution of a condemned person. The two clans would negotiate until they reach a settlement. This could drag for up to 5 or 6 months. Normally when execution is happening there are two ways under traditional law when execution is to happen. The offending clan agree to hold the offender until the settlement is made. If they cannot agree and the offender is to be executed, he is formally handed over to the offended family for execution. The other way is that under the state system, the offender stays in police detention while the two clans agree at which point they will go to the authorities to convey what they have agreed upon. Insistence on execution may be arrived at when the offender is a habitual murderer.

#### **4.1 CASES OF DEATH PENALTY AND EXECUTIONS IN SOMALIA SINCE 2012**

Despite the government's positive vote in the UN in support of moratorium on death penalty and executions, sentencing and executions by the military courts still continue in Somalia unabated in the recent past. The last reported execution was on 14<sup>th</sup> October 2018 of one of the men condemned to death for participation in the 14<sup>th</sup> October 2017 Zobe car blast in Mogadishu. Coming on the anniversary of 2017 bombing, the execution was meant to commemorate the bombing day and to send warning to terrorists that the Somali government is out to fight terrorists to the last man.

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<sup>10</sup> Interview with a former judge of the Somalia Court

Year	Death sentences	Executions
2018		9
2017	24+	24
2016	60	14
2015	5	25
2014	52	14+
2013	117	34
2012	76	6+
<b>Total</b>	<b>334</b>	<b>126</b>

Table 1. Death Sentences and Executions in Somalia 2012-18<sup>11</sup>

Even though the data on death penalties and executions in Somalia is scarce, Amnesty International has consistently gathered data on the same in Somalia for some time now. Amnesty International was able to document 334 cases of death penalty handed down to Somalis and 126 cases of executions, most of which were by the military courts (Table 1, above). Discussions with different stakeholders revealed that 90% of death penalties by the civilian courts in Somalia are not executed because they do out of court settlements and the person remains free from Kasas.

## 4.2 PUBLIC OPINION ON DEATH PENALTY AND EXECUTION IN SOMALIA

In general, the general mood in Somalia is such that majority of the people are of the opinion that death penalty should be applied in cases where the victims are not forgiving and they do not want blood money. This is more so when it comes to those convicted of terrorism (Al Shabaab) where there is no sympathy for the offenders and many of the stakeholders we interviewed were of the view that they should all be executed. A senior official at the Attorney General's office assured this consultant that sentencing culprits to death will continue regardless. According to him, Somali laws will always have death penalty. The position of the FGS Attorney General and the entire legal sector of the government is that death penalty should remain in the laws of Somalia without an option of moratorium

<sup>11</sup> Sourced from Amnesty International Annual Reports

on death sentence. This is largely influenced by the fact that death penalty is sanctioned by Islamic religion, traditions/culture and the old penal code, hence not a matter for discussion.

Other stakeholders noted that there are gross misconceptions about death penalty in Somalia, pointing out that Somalia does not widely use death penalty. In their view there were always traditional systems where the family of the victim could ask for blood money. This is consistent with Islamic system. In Islam when one is killed the first option is for the affected family to forgive unconditionally. The second option is to seek blood money. The death penalty is the last resort when they are not happy or are not willing to negotiate the blood money through the traditional ways. All these are consistent with the Islamic laws, which is very clear what must be done before you arrive at death penalty.

There has been persistent misconception that in Somalia when somebody kills another then he has to be killed. There are cases where it is but in majority of the cases death penalty is not applied. When somebody has committed mass killing, then the state is obligated to have him killed. But under normal circumstances there are those options that may avoid killing.

A staff at AGs chambers noted that the mood in Somalia is such that bringing moratorium issue at this time is not sensitive as people reeling from the blasts are thinking with their hearts and not brains and they cannot be blamed for this. The *Zobe* terrorist attack on 14<sup>th</sup> October 2017 is said to have been the tipping point for the Somali public. One of the convicted masterminds was executed on the first anniversary of the bombing, (14<sup>th</sup> October 2018). If one was to tell an average Somali that such person would be set free because of due process they would surely not accept such an explanation.

Kasas is only applied in case somebody killed another person and the family has opted not to pardon the offender or take dia. It is important to note that Kasas is the last option. Under traditional system executions do not happen most of the time with exceptions of pre-agreed tradition between the two clans to have it. Traditionally, other offences have appropriate punishment.

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#### 4.4 DEATH PENALTY AND TERROR CASES IN SOMALIA

Somalia has a serious problem with terrorism and there are heinous crimes committed by terror group (*mostly Al Shabaab*). Most of the stakeholders were of the view that if death penalty is not applied then the acts of terrorism would not be deterred, as many of them may hesitate when they realize that they would be killed if they partake of terrorism. However, some of the stakeholders interviewed were of the view that death penalty does not deter terrorists because most of the time the terrorists are on a mission of death. It was however clarified that there are two types of terrorists, those who have the belief that they should die for the cause on one hand and their masterminds and those who accompany them to commit suicide. Most of the time they want to escape from the scene and continue with the business as usual. When caught they will be subjected to death penalty as a deterrent because if this person was willing to die then they would not want to escape.

According to a Minister in South West State, Somalia need death penalty especially for those who commit crimes against humanity. He strongly feels that such persons should be killed unless the family of the victims says otherwise. A former FGS Minister noted that death penalty does not help reduce crime in Somalia, which he blamed on the situation that is currently obtaining in the country. However, he also noted that Diya payment does not encourage committing of murder, which he pointed out has gone down in the last five years, in response to the stabilizing security situation in the country. A minister from South West state pointed out that death penalty enhances security in places like Somalia.



## 5.0 TRADITIONAL ALTERNATIVES TO DEATH PENALTY IN SOMALIA

the following are trad.

### 5.1 DIYA (BLOOD MONEY)

Diya is the financial compensation paid to victim or heirs of a victim in the cases of murder, bodily harm or property damage. It is an alternative punishment to *kisas*. In Arabic the word means both blood money and compensation. It only applies when victim's family want to compromise with the guilty party; otherwise *kisas* applies. The customary law of the Somali people recognizes the obligation of *diya*, and define it as being between subgroups, or *mag*, who may be part of different clans or even the same clan<sup>12</sup>. In Somalia, both *Kisas* and *diya* have been integrated into the traditional Somali culture to the extent that when asked, most Somalis believe that the two are parts of *Xeer*. A former Minister, while acknowledging that *diya* payment is part of the Islamic culture, noted that most Somali cultural values and traditions have their roots in Islam. As such, since *diya* payment is embedded within the clan system, it has gained a traditional sheen. It is part of the *Xeer* that has developed over a long time within the Somali community to mitigate constant conflicts brought about by competition and subsequent fights over scarce resources like water and pasture among the mostly nomadic pastoralists.

In the formal judicial process in Somalia, *diya* negotiation can only happen after a person has been convicted and probably spent some time in jail and the victim's family has agreed to negotiate<sup>13</sup>. Normally when there is murder in rural area and the murder was settled through *diya*. The offender may remain free as the negotiations go on. This is the same for the areas that are not under government, where they would walk free. In Mogadishu the person will be held in jail.

Accepting *diya* or *kisas* of the offender depends various parameters: it may be determined by how the killing happened, if the person was killed arrogantly in

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<sup>12</sup> I.M. Lewis, "Clanship and Contract in Northern Somaliland", *Africa*, 29 (1959), pp. 274-293

<sup>13</sup> The Somali AG will always insist that the person is prosecuted, sentenced and spend some time in jail before *diya* negotiation can be commenced.

a sadistic manner, then the family may choose to refuse compensation and insist that the killer must die. They also have to look at the cases historically, what happened before between the two clans/families. If in the past either of the clans accepted compensation, meaning that a traditional xeer exist between the two clans with a fixed amount, then there is likelihood that compensation will do<sup>14</sup>. Some clans have a running agreement between them that there will be no blood money paid when somebody is killed and the killer is automatically killed under kisas<sup>15</sup>. In cases of Killing within the clan, most probably the clan will not execute kisas and instead, which would probably be less than if the homicide was committed by a non-clan member. Cases of unintentional killing do not call for kisas most of the time. If it happens within the clan they will definitely forgive, but in case the deceased is from another clan then diya would be paid.

Diya negotiation is usually undertaken by well-known credible traditional elders and Sheiks from the two clans who have been seen to be fair to all in their previous deliberations, who would sit together to deliberate on what happened and what could be done to recoup the lost harmony between the clans. They will proceed to discuss the blood money. The offending clan would be given time to collect the blood money from the clan members which will be conveyed to the offended clan. Should the offending clan feel that the judgement is not fair it is allowed to appeal and bring on board new negotiators. In case there is a conflict between a weaker and a stronger clan, the weaker clan is allowed to request for a third clan to mediate between her and the stronger clan.

## **5.2 DIYA PAYMENT**

The way Somalis distribute compensation among themselves, the aggrieved family does not get much. It may only get 1/10<sup>th</sup> of the compensation. Diya is actually like 3<sup>rd</sup> party insurance so that when a clan member kills a person from another clan, clan will pay diya on his behalf, regardless of the amount so as to forestall conflict that would result if was unable to foot the fine individually. The offended family only get a fraction of the diya and the rest is shared within the clan. The rate of diya fine is arrived based on traditional law of precedence. The Saudi Arabia case is interesting because the state has set the amount of money to be paid in case of murder. The standard for Mogadishu has been the equivalent of

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<sup>14</sup> A Minister from the South West State.

<sup>15</sup> A former FGS Minister for Interior.

100 camels in cash because they no longer pay in terms of camels, unlike in the rural areas. In Mogadishu they could value the camels for example, say 1 camel is 1 thousand dollars. The amount paid is also pegged on past diya payments between the clans. Pastoralists from rural areas are more predisposed to take diya than those from the urban areas. According to a former Minister, nowadays there is no difference in the amount of diya charged by gender. He however noted that the amount used to be the same for a woman and a man but now it has changed. This has something to do with the elevated profile of women, a tribute to the advocacy work done by the many women activists in the recent past who have done advocacy work towards this.

The diya does not go to the victim's family even though their member was killed. The family may end up with only 10% of the payment, while the rest will go to the clan. The reason for the clan giving the family a small portion is that should their member kill somebody else in future, it will only be asked to contribute a small portion that is 10% or less. Diya holds clan members together and also gives them the comfort that if something bad happens, there is the social network. Because it is like a 3<sup>rd</sup> party insurance, the bereaved family do not take the blood money but it is instead shared by the clan.

### 5.3 ADVANTAGES OF DIYA

The stakeholders who support the use of diya to deal with homicide cases noted its advantages to include the fact that unlike the western system, where the offender sometimes get retribution from the state, in Somalia diya is a compensation system that tries to repair the damage done. Diya allows the killer to be rehabilitated in order to allow him to re-enter the society after regretting what he did. Diya does not condone murder since in most of the cases the murderer is prosecuted, convicted and made to spend some time in jail. Compensation is only in lieu of death sentence<sup>16</sup>. Its noted disadvantage is that it encourages people to commit more crime, for example if I killed someone and I am killed, everybody knows that the punishment is very harsh the people will therefore think twice before killing<sup>17</sup>.

<sup>16</sup> Views of a Prosecutor at the Somalia Attorney General's office

<sup>17</sup> Views of a Minister from South West State



#### 5.4 FORMALIZATION OF DIYA

At the moment diya is informal even if it is consented by the government. The detailed diya process has intentionally not been incorporated in the Somali legal system. This is largely because the pre-civil war Somali government was a strong modern government run through clearly defined legal system. Since the civil war sharia has been incorporated into the Somali legal system even though it is not clearly documented a lot happen informally. A person suspected of committing homicide would be arrested, investigated, convicted, but then instead of the person being executed or being in death row for 20 years if the families agree the Attorney General and the courts will divine that diya payment and subsequent release will be part of consideration.

Another reason for not formalizing the *Diya* system is the need to balance the modern government and traditional system of government. Similarly, the penal code must be reviewed in such a way that it complies to the traditional culture. To formalize it will require careful consideration including looking at it from different perspective including protecting life. By the time of this study the penal code review was ongoing and diya was one of the issues being discussed in the framework of Somali penal code review. Most of the stakeholders interviewed noted that it was not clear if there are formal provision for diya within the legal system. Others noted that diya derived its formality and authority from the supremacy of Islamic law that supersedes the constitution.

## 6. CONCLUSIONS

The Somali state remains an unapologetic retentionist country that continues to dispense death sentences to those convicted of capital offences despite the fact that it is a party to certain protocols that proscribe death penalty. Death penalty is accepted and generally encouraged as a punishment for capital offenders. There are strong traditional/religious alternatives to death penalty in the name of Xeer and diya (blood money) but these are limited to cases of compensation for homicide between clans and families. The traditional alternatives for death penalty do not cater for the case of offences deemed to be against the state, among which terrorism cases consist. Advocacy against death penalty for terror-related death sentences also faces the hurdle brought up by the fact that terror is not committed against clans or families and as such there is no specific offended family or clans to compensate. Public opinion is also steeped against pardoning those accused of terrorism. There is however hope in three fronts, first the fact that Somalia is a party to certain death penalty protocols, two the diya system could be latched on to ensure that all cases of homicide are negotiated to probably mandatory life sentence; three discouraging the use of military courts to try civilians would ensure that those who are convicted are not executed as is the case now with civilian courts.



## 7.0 RECOMMENDATIONS TO THE REPUBLIC OF SOMALIA

- a) **Follow International Best Practice in Sentencing:** The death sentence process should be a bit slow because in Somalia the moment the process starts and up to execution is below six months, which is very short. This would allow for the convicts to appeal their sentences, which is almost impossible not that execution is almost immediate;
- b) **Stop the Usage of Military Courts for trying civilian offenders:** Since 2011, all and sundry including civilians suspected to have participating in terror related activities are tried and swiftly executed through the military courts, this is against all international conventions on treatment of prisoners facing death penalty and should be stopped forthwith;
- c) **Strengthen Judicial System Value Chain:** There is need to strengthen the whole value-chain of law enforcement, judicial and prisons system. There is need for better investigation and court processes to ensure accused persons go through due process without which innocent people continue to end up in death row. There should be enough judges who are knowledgeable and experts in Sharia system and the formal Somali judicial system. This is rather urgent because in Somalia, Islam is supreme;
- d) **Avail and Strengthen Defense for the Accused:** There should be a good legal system that protects the accused person. This include mandatory provision by the state of defense lawyers to defend those facing death sentence. Special attention should be given to accused persons from poor background and marginalized persons like minority clans, since they are not able to pay for their representation, and the higher levels of prejudice that they face;
- e) **Strengthen and Formalize the Xeer Justice System:** Xeer system should be taught at the university. This would entail research on Xeer to enlighten people on its comparative advantages. The traditional court system should be formalized and be recognized in law and the constitution. Retrogressive aspects of Xeer like discrimination against marginalized groups (women, minorities and PWDs) among others should be dealt with to mitigate its harmful side effects
- f) **Strengthen and formalize the Diya system:** Strengthen and formalize Diya system such that even if blood money was paid, the culprit should at least

spend some time in jail. Diya should only prevent capital punishment as a compensation/restoration in lieu of capital punishment to mitigate the perception that human life can be equated to a number of camels or money;

- g) Humanize the system of punishment by reducing the number of crimes (currently 17) for which death sentence may be prescribed, and limit these cases to only the “most serious crimes”.
- h) Amend national legislation so that it is in accordance with the UN Standards Minimum Rules for the Treatment of Prisoners, and other international human rights standards and norms. Allocate necessary resources to the Somalia Prison Service so that they can effectively implement those international standards and norms.
- i) Implement controls to deal with the mass overcrowding in the Somali Prison Service. This should include addressing the issue of the excessive number of remand prisoners by only using pre-trial detention as a means of last resort in criminal proceedings; developing alternatives to pre-trial detention and alternatives to imprisonment; upholding the right to apply for bail; and ensuring that the justice process takes no longer than necessary without undermining respect for fair trial principles.
- j) Ensure that prison conditions for death row and life sentenced prisoners approximate as closely as possible the conditions of life outside the prison system, and offer programs for rehabilitation and reintegration. This should include the possibility to study, to work, to have contact with the outside world, and to receive psychological and medical treatment (in particular for prisoners suffering with TB, typhoid or HIV/ AIDs).
- k) Increase resources for the prison system to improve salary and working conditions for prison staff. Ensure all prison staff are appropriately trained in international human rights standards.









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