

Adapting Somali Customary Justice Practices and Procedures

Evidence on the potential for and pathways to reform

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Customary justice (*xeer*) is the predominant institution providing access to justice for many Somalis, particularly in rural areas and areas of weak state capacity. In both Somalia and Somaliland, customary justice exists alongside state-backed courts of law and often overlaps with the state's law enforcement and justice systems. Much like other systems of customary justice, *xeer* is built around kinship or shared lineage, is primarily focused on maintaining or restoring social harmony between groups, and punishments typically take the form of financial restitution.¹ As with similar systems in other regions, *xeer* is often criticized for failing to meet international human rights standards. Likewise, many rule of law or access to justice practitioners view it as a system that should be replaced by state-backed courts as rapidly as possible.

To shed light on the nature of Somali customary justice, and the potential for its adaptation or reform, the authors surveyed 408 traditional elders from across Somalia and Somaliland. The findings of this survey constitute the most comprehensive view, to date, of present-day *xeer* practices and the public opinion of traditional elders, providing insight into the potential for, and barriers to, adaptation of *xeer*. Where adaptation is possible, many of the beneficial aspects of *xeer* – its efficiency and cost-effectiveness, the trust enjoyed by elders who adjudicate disputes, its alignment with the workings of Somali society, and its reach into rural areas – can be preserved, while potentially increasing the inclusion of women, increasing transparency, and ensuring equal treatment of all.

Critiques of Somali Customary Justice

Criticisms of *xeer* generally focus on three topics: collective responsibility, the procedural exclusion of women, and the unfair treatment of smaller or marginalized lineage groups. Below, we describe each critique and, in the boxes to the right, outline empirical evidence supporting the critique.

Collective Responsibility

At a base level, *xeer* relies on collective responsibility: a perpetrator of a crime is not held personally responsible; instead, their lineage group pays restitution on their behalf. This limits the deterrent effect of punishment, because perpetrators do not pay the full cost of their actions.

The inverse is also a common critique of *xeer*: that survivors of violent crime do not receive compensation directly – a criticism most applicable to SGBV cases. Instead, *maag*

Evidence: Collective Responsibility in *Xeer* Practices

For most disputes, the perpetrator and their immediate family raises only a small portion of the *maag* payment required through *xeer*. The extended family and *maag* group pays the bulk, though there is some variation by case type and across different clans.

Table 1: Share of *maag* payment responsibility across different groups

Type of Case	Perpetrator and Nuclear Family	Extended Family	Broader <i>Maag</i> Group
Murder	22%	17%	61%
Rape	42%	20%	38%
Car Accident with Incidental Injury	24%	18%	58%

¹ Harper, Erica. 2011. *Customary Justice: From Program Design to Impact Evaluation*. Available at: <https://www.idlo.int/sites/default/files/Customary%20Justice%201%20-%20From%20Program%20Design%20to%20Impact%20Evaluation.pdf>

payments are distributed to the family and lineage group, reducing the restorative value a restitution-based justice model.

The Role and Status of Women

Another area of criticism is the heavily circumscribed role of women, as women are broadly unable to participate in the meetings at which evidence is heard or cases are decided. Unable to present evidence or advocate for themselves, women involved in legal disputes are at a significant disadvantage, exacerbated by the fact that case outcomes, and the legal reasoning on which they are based, are often hidden from women or communicated only via male relatives.

Unequal Treatment Under the Law

Finally, because *xeer* is composed of bilateral agreements between lineage groups, the relative power of each group influences how favorable the agreement is to their side. Power differentials affect individual cases as well, because enforcing a punishment decided through *xeer* relies on the threat of retribution. For smaller clans, this results in unfair treatment at every stage: when negotiating a bilateral standing agreement, they are disadvantaged and when a dispute occurs, they cannot credibly threaten violence in order to enforce the decision of the elders. They often, therefore, receive less compensation for their members.

Evidence: Restrictions on Women’s Participation in Xeer Procedures

Women are not entirely excluded from *xeer* proceedings, according to elders. Women may be able to attend and given evidence in hearings, though women – for instance, a shop owner who was victimized by a robbery – is less likely to be able to participate than a man with an equivalent relationship to the case. More importantly, women are often excluded from participating in cases where their direct testimony may have evidentiary value (e.g., sexual assault and homicide cases) or even where they are accused of a crime.

Table 2: Current ability to observe and speak in *xeer* hearings, by gender and role in case

Individual’s Role in Case	Attend and Observe	Give Evidence and Speak
Shop owner whose shop has been robbed (male)	77.9%	87.6%
Shop owner whose shop has been robbed (female)	57.2%	64.8%
Survivor of rape (female)	11.9%	28.9%
Perpetrator of homicide (female)	17.4%	31.0%
Widow (female) of homicide victim	19.8%	27.0%

Evidence: Unequal Treatment in Xeer

Several studies have documented the role of “relative power” in shaping case outcomes in *xeer*. For instance, a 2021 study² showed that clan power differentials influenced the likelihood a woman would report either a sexual assault or intimate partner violence, because women from locally marginalized clans expected unfair treatment via either *xeer* or the state-backed court system.

According to elders interviewed for this study, the relative strength of clans is often a factor in shaping case outcomes. Alongside past histories of conflict, premeditation of the act, and other factors, 45.0% of elders said the size and power of the other clan in a dispute would affect the outcome of a theft, assault, sexual assault, or murder case adjudicated via *xeer*.

² Peterson, Brenton D., and Manar Zaki. 2021. “A Research Report to Inform Area-Based Problem-Driven Security and Justice Programming in Somalia.”

Potential Adaptations: Views of Traditional Elders

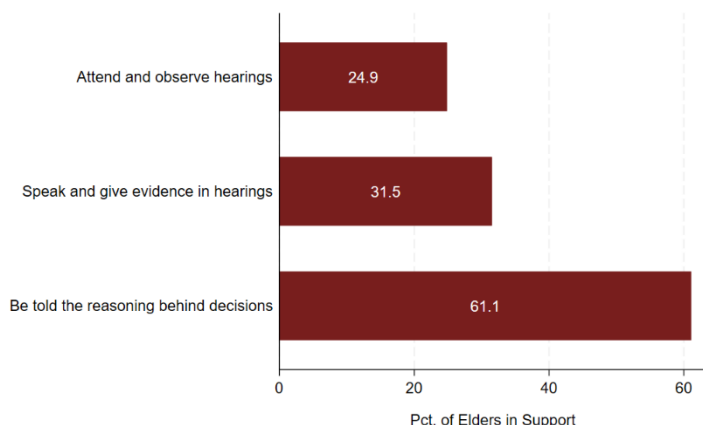
The potential for *xeer* to be revised, adapted, and reformed can seem surprising, given that it is implemented by customary authorities, who many assume to be conservative and unopen to change. This assumption ignores its negotiated nature: *xeer* is negotiated by two lineage groups to meet their respective needs and the specific circumstances of their relationship (for instance, to govern specific water points or migratory routes). It also ignores its common law structure, in which precedents from past cases influence decisions; common law systems tend to be more flexible, responding to changes in interpretation or standards over time.

Moreover, elders have incentives to embrace reform. The application of *xeer* gives elders considerable influence in Somali society that will be lost if and when state-backed courts come to dominate the legal landscape. If adaptation in line with citizen preferences ensures the continued importance of *xeer* – and, by extension, elders – in Somali society, we can expect at least some elders to be open to change. The

survey conducted with elders assessed their attitudes toward various adaptations that would make *xeer* more inclusive, more transparent, and shift it partially away from collective punishment.

Overall, elders are relatively open to reforms, though there is certainly not consensus across all elders. For example, a majority of elders believe that women should be privy to the details of *how* their cases are decided – told, for instance, the precedent cases referenced and how evidence was weighed. However, as Figure 1 shows, there is much less support for forms of participation that violate the patriarchal norms that restrict women’s attendance in *xeer* hearings. Only around one-quarter of elders believe women should be able to attend and observe hearings in which they are a party to the dispute.

Figure 1: Support for various forms of women’s participation in *xeer*

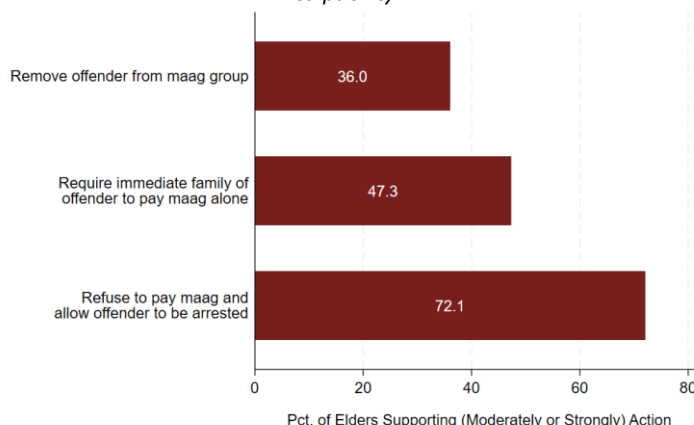


Increased transparency has relatively broad support. Currently, around three-quarters of elders report that information about the inner workings of *xeer* – the *xeer* agreement with another clan, details of precedent cases, details of recent cases, and *maag* payment totals – can be shared with any adult male in the clan. And a similar share would support broadening access to information to include women and youth. For example, 77.2% of elders believe the distribution of *maag* amongst group members following a case should be available to all, including women

and youth. This is a contentious topic, as some survivors of sexual assault are reportedly provided little in the way of direct restitution, and some Somalis complain that elders use their positions of influence and asymmetric information to collect a larger share of *maag* payments than they are entitled. Support for this level of transparency is, therefore, encouraging and surprising.

Elders also tend to support codification of *xeer* in a manner that would ensure equal treatment of all clans. A majority (65.7%) of elders say they strongly support institutionalization of a single *xeer* agreement across all clans, rather than bilateral negotiations. They are also open – in some cases – to subverting the system of compensation payments to reduce perceived impunity of offenders. As Figure 2 shows, just 36.0% of elders would support removing a repeat offender from their *maag* group, presumably because attempting to do so would lead to a fracturing of the group. But a majority support using the state-backed criminal justice system as a method for stopping repeat offenders – allowing them to be arrested in lieu of making *maag* payments. Indeed, this practice appears to already have formal acceptance, and just under half of elders knew of cases where a clan had refused to pay *maag* and the offender was arrested instead. Even selective use of this approach, coupled with increasing the share of *maag* that must be paid by an offender and their immediate family, would constitute a meaningful shift toward individual liability for offenses.

Figure 2: Support for adaptation of *maag* liabilities to increase individual culpability



Our data do not suggest that there is a cohesive coalition in favor of most reforms. For example,

it is not the case that younger elders tend to be more flexible and reform-minded; nor is there consistency in higher-ranking elders or more educated elders supporting reforms. To some degree, potential coalitions for reform depend on the *type* of reform in question: rural elders express greater support for expanding women's participation, for instance, but are among the least supportive of codifying a singular *xeer* or altering the structure of *maag* payments to punish individual offenders. This likely stems from the more traditional role *xeer* still serves in rural communities, where it governs grazing and water rights and where the specificity of bilateral agreements are still functionally important. This hints at the need to think of elders as actors with their own interests and the interests of their specific constituency in mind. Elders can be brought into a coalition for reform if the reform does not undermine their clan's position or dampen the value of *xeer*.

Implementing Adaptations in Practice

Transparency is a low-hanging fruit in terms of generating support from elders.

Xeer agreements can be written – there is no stipulation against it and, more importantly, elders are broadly in favor of making information about *xeer* widely accessible. In many areas (e.g., Somaliland) criminal disputes resolved via *xeer* already require notarization and filing with the district court, further supporting the idea that transparency could be expanded. The biggest challenge to transparency is establishing a system for recording *xeer* agreements and precedent cases, and funding such a system.

Broadening women's participation has no statutory barriers, but limited support among elders

The barriers to women's participation in *xeer* hearings (e.g., *gar*) are norms and traditions. There are no specific reasons women are unable to participate, demonstrated by the fact that women often *are* able to give evidence or observe hearings to which they are a party. However, few elders support this change; if women's participation is to be increased, concerted efforts at attitudinal change are needed.

Moving away from collective punishment will be difficult, but can occur at the margins

Xeer operates as a form of insurance, allowing offenders to pay compensation amounts they could not pay on their own. This helps explain the staying power of collective punishment – individuals may object to paying *maag* for, e.g., a repeat offender. But they do so because failing to contribute means being removed from the “insurance pool.” If one refuses to contribute and later needs support of the *maag*-paying group, it will not be available to them.

A mechanism which made individuals or their immediate families responsible for *maag* payments, with the clan only co-signing on their debt obligation, would shift responsibility closer to the offender alone. However, *maag* payments are too large for individuals or their families to pay alone, which is one reason for the use of collective culpability (and the existence of the “*maag*-paying group”) in the first place.

A viable mechanism is one which shifts *more* of the *maag* liability toward the offender and his/her family. Implemented and applied to all members of the clan, this would not fracture the clan, and would increase accountability for offenders. Similarly, imprisonment in the state-backed criminal justice system is already used selectively to punish repeat offenders, and can be institutionalized slightly further to provide greater deterrence. Internal regulation – of, e.g., repeat offenders – maintains *xeer*'s network-based underpinnings while providing strong incentives.

Victim-focused restorative justice is possible under *xeer*

Currently, portions of *maag* payments are made to all male members of the lineage group, at least in most cases. This naturally reduces the resources available for a victim to recover. It is also counter-intuitive, as most members of the lineage group are not impacted by an offense against one member – such as theft from their shop, a car accident in which they are injured, or an assault – nor are they responsible for long-term financial support for the victim.

While collective responsibility for making *maag* payments on behalf of an offender is part and parcel of *xeer*, there is little reason why restitution *must* be divided among a victim's clan. Providing the full value of a *maag* payment – or at least a larger share – to the direct victim of the offense would facilitate restorative justice for the victim, allowing them to pursue medical care, psychosocial support, compensation for property damage, and so forth.

A unified, universal *xeer* is possible and could codify equal treatment for all clans

Bilateral negotiation of *xeer* agreements is less necessary in an increasingly urbanized society. Where *xeer* once largely focused on determining access to specific water points and migratory routes and needed to be contextualized to historical understandings regarding this access between two specific clans, much of *xeer* now relates to resolution of criminal and civil disputes. Bilateral negotiation worked because most *maag* groups interacted with just a few other clans; in urban settings today, individuals might live among and interact with members from dozens of clans and subclans. Witness the fact that a significant share of disputes today (36.7% in this study) are between clans that do not have a *xeer* agreement in place.

A unified *xeer* would be more efficient in terms of negotiation, and could be based on a combination of shariah law and standards that are common in *most* *xeer* agreements. A universal *xeer* would guard against negotiated settlements that are unfair to smaller clans. And while larger clans might object to this erosion of their negotiating position, it is important to note that universalizing *xeer* would protect members of large clans who live outside their home areas. Even members of the largest clans are classified as minorities in some areas, and a universal *xeer* would ensure they receive equal treatment wherever they live and work.

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