



A Collective Responsibility

Children in Conflict with the Law in Somaliland – A Summary

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1. Introduction

Since declaring independence from Somalia in 1991, Somaliland has built a modern democratic state based on English common law, which has developed significantly through a process of parliamentary law making. The Somaliland Constitution, domestic laws and international obligations provide a strong legal framework that protects the dignity and rights of individuals from State interference and prohibits arrest, detention and unlawful punishment except in accordance with the formal law.

Between 2014 and 2016 Horizon Institute worked closely with Somaliland's formal justice institutions. During this time, it emerged that a perceived increase of children in the formal criminal justice system, over the past ten years, is a subject of concern to many justice sector officials as well as the public at large, particularly in urban areas.

A Collective Responsibility: Children in Conflict with the Law, a 55-page report, based on extensive research in 2015/2016, looks at Somaliland's legal framework on justice for children, available data and perceptions among justice sector actors and the wider public about children in conflict with the law. It considers the opportunity presented by the customary justice system to provide diversion opportunities for children who would otherwise remain in the criminal justice system.

Horizon interviewed police officers, prosecutors, judges, prison staff, parents, teachers and former and current child detainees who have come into conflict with the law to varying degrees.

1.1 Summary of Challenges

Despite a strong theoretical framework, the formal justice sector faces serious challenges that dilute the formal legal protections afforded to Somaliland's citizens. Specifically, four major problems were identified as contributing factors to the arrest, detention and imprisonment of children.

These include:

- A lack of adequate resources on the part of justice institutions to fully realise their mandates;
- The absence of internal and external accountability;
- Differing concepts of justice in Somaliland reflected in an uneasy relationship between the formal justice system and the customary justice system; and
- Insufficient training, knowledge and understanding of the formal justice system among justice sector actors and the wider public.

2. Legal Framework

Three systems of law operate in Somaliland: the formal law; customary law; and *Sharia* law. Each plays an important role in seeking to deliver justice for Somaliland citizens. Given that this report is concerned with the formal justice system, it does not seek to address the use of *Sharia* law.

2.1 International Law

The Somaliland Constitution obliges Somaliland to observe all treaties and agreements entered into by Somalia insofar as they do not conflict with Somaliland's interests and concerns.¹ The Convention on the Rights of the Child (CRC) sets forth most of Somaliland's obligations under international law with regard to the rights of children. Under the CRC, Somaliland is obliged to make the best interests of a child (all persons under eighteen years) a primary consideration.² Somaliland also has positive obligations to ensure that a child has the right to be heard, to participate in judicial and administrative proceedings, and to be protected from all forms of physical or mental violence, injury or abuse.³

¹ Somaliland Constitution Art. 10

² Convention on the Rights of the Child (CRC) Arts. 1, 3

³ CRC Art. 19

2.2 Domestic Legal Framework

The Constitution itself also guarantees a number of rights, including the right to dignity, security of person, and freedom from physical punishment and injury. It prohibits arbitrary detention⁴ and protects due process.

Nevertheless, the main legal instrument that ensures the rights of children in accordance with international law in a manner consistent with Somaliland's cultural and Islamic values is the Juvenile Justice Law No. 36/2007 ("JJL"). It affords significant legal protection to children, and ensures that the best interests of the child are paramount at every stage of the judicial process. It guarantees children a broad set of fair trial and due process rights, in addition to sentencing and detention protections.

The JJL also establishes a number of institutions that specialise in the needs of children in conflict with the law, such as children's police, children's courts, social probation officers, children's pre-trial detention centres and children's rehabilitation centres in law. Due to a lack of government resources, these institutions have yet to be established.⁵

The findings from Horizon's research indicate that the JJL remains largely unimplemented for two key reasons. One is the common perception among justice sector actors that the JJL is a "foreign UN law" that is not relevant to the local context. The second is that justice professionals often apply three separate laws that offer far less protection to children in conflict with the law: The Maintenance of the Public Order and Security Law No. 51/2012 ("Public Order Law"), Somaliland Penal Code Law No. 5/1962 ("Penal Code"), and the Criminal Procedure Code Law No. 1/1963 ("Criminal Procedure Code"). The inconsistency in the implementation of these various juvenile justice laws undermines the rights of children.

The Public Order Law, for example, allows parents to have their child imprisoned for up to six months by a District Court for "parental disobedience".⁶ This provision – a common reason for child detention in Somaliland – contradicts the letter and spirit of the Somaliland Constitution and the JJL, and is an obstacle to the realization of a child-friendly justice system in Somaliland.⁷

⁴ The term arbitrary has been interpreted as meaning an arrest or detention that includes elements of inappropriateness, injustice, and lack of predictability and due process of law (see United Nations Human Rights Committee case of *Albert Woman Mukong v. Cameroon*, UN document CCPR/C/51/D/458/1991 [1994], paragraph 9.80).

⁵ According to officials at the Ministry of Justice, the Ministry is in the process of establishing an Office on Social Probation.

⁶ Maintenance of the Public Order and Security Law No. 51/2012 (Public Order Law) Art. 33(3): "A parent may request the district court for reformatory detention of his child aged more than 15 years and the court may, after consideration, and having satisfied itself of the reasons advanced by the parent, sentence the son to a detention of a period not exceeding six months."

⁷ JJL Arts. 6, 8, 9; CRC Arts. 3, 40; Public Order Law Art. 33(3)

Lastly, the Prison Law No. 94 of 1996 and the Prison Regulations Law No. 49 of 1984 (collectively, “Prison Law”) govern the responsibilities of the Custodial Corps and the rights of detainees in prison, including the rights of detained children in conflict with the law. Detainees are guaranteed adequate food, clothing, bedding, medical and healthcare facilities, education, family contact and the right to complain about prison conditions and treatment by prison staff. In addition, prisoners are granted the right to educational and vocational opportunities, health, hygiene and regular exercise. The law provides for the strict limitation on the type of punishment that can be meted out to prisoners. Findings that emerged from the research indicate that there is widespread disregard for these provisions.

3. Differing Concepts of Justice in Somaliland

The formal criminal justice system has statutory footing and focuses on addressing individual accountability through legal procedures, police station detention, court processes and imprisonment in the State’s prisons. In contrast, the customary justice system, led by traditional elders, concentrates on collective, compensation-based justice aimed at restoring inter-clan harmony and peace.

For many Somalilanders, particularly those in rural areas, the formal justice sector is both inaccessible and invisible and customary law remains paramount.

Although both customary law and the formal law are respected, these are, at times, seen to be in conflict when it comes to protecting the rights of children. For instance, the boundaries between the formal and customary justice systems are blurred when police officers detain children and their family members, sometimes for their own protection, while community elders negotiate compensation agreements between the victim and perpetrators’ families. Proxy detention as another example of an alternative, collective conception of justice, is working its way into the formal justice system.

It is important that the integrity of each justice system is respected and maintained. With the exception of the role the customary justice system can play in the diversion of children from the formal system, discussed in more detail below, instances of overlap between the systems, documented in this report, can result in the oppressive elements of each – detention, the denial of legal protections and procedural safeguards – eroding the proper function of each system. Despite its weaknesses, there is no substitute for the formal justice system as an expression of equality and the rule of law in Somaliland. When the rules and procedures of the formal justice system are adhered to, it can provide justice and redress for Somaliland’s citizens that is fair, impartial, transparent and reliable.

4. Diversion and Social Protection

A lack of resources has led to the inability of the justice sector to put into effect aspects of the JIL.

For instance, the Diversion Policy aimed at formalising the circumstances for non-custodial sentencing has stalled. The JIL sets out the law on diversion in Somaliland. It emphasizes the importance of diverting children from the formal justice system and provides for a number of non-custodial punishments. Importantly, the JIL explicitly directs a diverted child towards the customary justice system. The JIL outlines diversion options as a range of non-custodial punishments including apologies, community service, peer group support, counselling and participation in educational and vocational training.

The reliance on the formal justice system to address minor child offending places an additional, and unnecessary, burden on an already under-resourced and under-equipped system. The limited use of diversion is exacerbated by the critical lack of social workers as well as the absence of services aimed at rehabilitating children in conflict with the law. The lack of social services for children puts additional pressure on formal justice actors to address children's anti-social behaviour, particularly in urban areas. For example, the frequent use of the "parental disobedience" offence of the Public Order Law to detain children highlights both the pressures on the police and the wider justice sector to address anti-social behaviour as well as a common misconception among the general public about the role of the police.⁸

In addition to punishing children for actual or perceived crimes, communities turn to the police to protect orphans, street children and parents who cannot control their children.⁹ In these circumstances, the police station may provide a community's sole source of social protection for disadvantaged children, providing them with much-needed food and accommodation. This means that the police are under enormous pressure to provide solutions despite their minimal resources.

In light of these pressures, the customary justice system provides an excellent opportunity for the formal justice system to reduce the numbers of children who pass through police stations, courts and prisons,¹⁰ particularly when:

- There is a need for mediation or clan-based reconciliation in order to reintegrate the child into the community;
- The offence has caused inter-clan tensions that need to be addressed; and

⁸ Parents often request the police to detain their children to punish them before sometimes pursuing a prosecution under the Public Order Law.

⁹ The National Human Rights Commission also reported that children with actual or perceived mental and physical disabilities are brought to the police by their own families, who feel unable to provide for their care: *Forgotten Behind Bars, Evaluating Somaliland's Legal Process for Children in Conflict with the Law*, National Human Rights Commission, 2013.

¹⁰ JIL Art. 69

- The offence can be dealt with through compensation or restitution orders (for example, petty theft).¹¹

However, there are drawbacks to using the customary justice system to adjudicate more serious crimes. The emphasis on compensation can have a discriminatory effect on children, IDPs, minority clans and other vulnerable groups. Furthermore, the customary settlement of disputes removes responsibility from individual perpetrators and is therefore unsuitable for the settlement of crimes such as murder and rape.¹²

5. Economic Inequality and Social Status

While the Constitution guarantees equality in the eyes of the law, this is often not the experience of Somaliland citizens. Money, social status and clan influence can enable powerful citizens to avoid accountability. Courts impose fines in addition to custodial sentences on those convicted of criminal offences. Instances were reported where poor detainees are held in prison beyond their term of imprisonment due to their inability to pay the fine. This practice reflects the way economic status can promote inequality before the law.

A similar situation arises when children's families agree to out of court compensation arrangements in parallel to formal court proceedings, with the result that children remain in prison after they have served their sentences while their families raise the money, further weakening the formal administration of justice.

6. Absence of Reliable Data

Among the many obstacles which hinder compliance with the legal framework is the absence of reliable data. Despite the efforts of the Ministry of Justice, the Attorney General's Office and the National Human Rights Commission to collect information on the number of children detained in police stations and prisons and prosecuted for criminal offences, accurate and comprehensive data across the justice chain – from the police station through to the prisons – is absent.

As a result, it is not possible to verify reported trends on the situation of children in conflict with the law. Many police officers, prosecutors, judges and prison staff have reported that offences by children have increased over the past five to ten years. The breakdown of families, *qat* and substance abuse, high unemployment, poverty, poor quality education and boredom have all been cited as contributing factors to this apparent

¹¹ As discussed elsewhere, serious violent crimes such as rape and murder are not suitable for transfer to the customary system.

¹² Despite concerted attempts by the AGO to prevent prosecutions for rape being dropped due to the intervention of customary leaders, the practice of referring cases for resolution by the customary system is widespread, especially outside of Hargeisa. In September 2014, the Attorney General issued a directive to all prosecutors prohibiting them from settling rape cases outside of the formal justice system. In rape cases, in particular, a customary settlement benefits a female victim's clan, rather than herself, and the perpetrator may avoid culpability entirely.

trend. An alternative explanation may be that the detention of children is becoming more common, as justice actors and parents turn to the formal justice system to address anti-social behaviour under laws such as the Public Order Law.

Without comprehensive data, it is also difficult to obtain a full picture of the situation of children in conflict with the law across Somaliland or to verify the most common child offences. Anecdotal evidence suggests that these are: public order offences, drug offences, parental disobedience, theft, robbery, and rape.

There is also a need for accurate data on what proportion of total criminal cases are children's cases, as well as on the number and proportion of cases that are dealt with at the police station by customary leaders and by prosecutors prior to a formal hearing.

7. Detention and Lack of Procedural Protections

Somaliland's domestic law and international standards outline procedural protections to prevent arbitrary detention. But Horizon's research shows that, in practice, many police officers, prosecutors and judges overlook the procedural rights of children and adults in criminal proceedings and that the boundaries between formal and customary justice systems are blurred.

The substantive rights of children in detention are also frequently violated. Horizon's research uncovered examples of forced confessions, ill treatment, corporal punishment, shackling and other related abuses. Prisons tend to be run exclusively as places of punishment, rather than places for correction and rehabilitation.

There are serious long-term effects of detention on children, and many, once they are released, experience depression and anxiety. Moreover, many detained children emerge permanently disadvantaged due to missed educational and vocational opportunities.

Like many of the wider challenges facing justice for children, arbitrary detention and mistreatment of detainees can be traced to the following four factors.

7.1 Lack of Resources

The formal justice system in Somaliland was almost entirely destroyed during the civil war in the late 1980s and, compared to other government sectors, has been largely neglected until very recently. This has led to institutional weaknesses in Somaliland's formal justice institutions, which are due, in part, to chronic underfunding. This lack of resources has serious implications for protecting the rights of the child.

Prison conditions were found to be sub-standard, with many lacking the most basic facilities. Problems include dilapidated infrastructure, poor hygiene and sanitation, inadequate medical services and educational opportunities, and the detention of children with adults. In addition, children and pre-trial detainees usually live alongside convicted prisoners, exposing them to serious and dangerous offenders.

Significant efforts in recent years to transform the police from a “fighting force” to a professional police service have been hampered by poor educational levels, low morale, inadequate training and insufficient pay. The standard basic monthly wage for police officers is \$100-150 per month, making it difficult to support even a small family.¹³

Given the lack of funding for the police force, combined with limited training on formal justice standards, the police frequently resort to customary financial settlements for child offending as well as corrupt practices to supplement their earnings. This in turn creates a perverse financial incentive for the police to detain people, including children. In Hargeisa, Boorama and Burao, interviewees reported that the police do indeed routinely detain groups of children for group fighting and public disorder.

Horizon’s discussions with a broad range of interviewees found that paying bribes at police stations is all too common. These corrupt practices affect victims, witnesses and suspects alike, and erode public confidence in the formal justice system.

7.2 Accountability

Without the necessary wholesale reform of Somaliland’s justice system, the police and justice institutions remain without sufficient accountability mechanisms in place to hold police, prosecutors and judges responsible. Nor are the justice institutions sufficiently held to account by the Government.

As a result, Somaliland’s laws become more difficult to enforce, including those designed to protect children’s access to justice. For example, the Constitution and domestic laws protect individual rights equally before the law and guarantee a raft of fair trial and due process rights, with a special law governing the rights of children in conflict with the law. In practice, these rights are not consistently realised.

7.3 Differing Concepts of Justice in Somaliland

As explained above, Somalilanders often show preference for two other systems of law – the customary justice system and *Sharia* law – rather than the formal justice system. This is particularly apparent outside of the major urban areas where the institutions of formal justice are largely absent.

The emphasis on customary inter-clan compensation payments leads to the police detaining children for a range of non-judicial reasons including:

- To elicit bribes from victims and parents for a child’s continued detention or release;
- To facilitate resolution by traditional elders under customary law, even in cases where it is inappropriate;

¹³ Police Officers working for specialist departments of the police such as the Rapid Response Unit (RRU) or the Special Protection Unit (SPU) can expect an additional \$150/month.

- To buy time to investigate a case and to encourage a monetary settlement;
- To punish children for “parental disobedience”;
- To compel the appearance of a relative (“proxy detention”);
- To punish alleged perpetrators after payment of a bribe by a victim’s family; and
- For social protection.

Ultimately, the application of customary justice principles within the formal justice system serves to erode formal legal protections, to contribute to arrests and detentions, and to undermine the integrity of the formal justice system and the rule of law.

7.4 Training, Knowledge and Understanding of the Formal Justice System

A general lack of training contributes to misunderstanding and misapplication of formal laws among justice sector actors. Many lawyers and judges have not received sufficient training on the formal application of the Penal Code, Criminal Procedure or special laws, including the JIL.

The consequences for children are manifold.

For example, a lack of legal knowledge among justice sector actors and a presumption of a child’s guilt means that some children facing ordinary criminal proceedings, are being denied a range of procedural protections. Too often, children pass through the criminal justice system with minimal, if any, participation in the process. In some instances, children are not informed of the reasons for their arrest and detention.

Furthermore, justice actors and members of the public misunderstand the role of defence lawyers, and often express suspicion that lawyers are somehow complicit in criminal behaviour. As a result, defence lawyers are routinely denied access to police stations and children are deprived of their rights to legal representation. Due to the absence of representation, children are rarely granted bail in advance of trial, spend significant time in pre-trial detention and many are unrepresented at trial.

Poor access to legal representation is exacerbated by a serious shortage of defence lawyers in Somaliland with an estimated total of 100 practising in the whole of Somaliland. Notably, there are only a few lawyers currently providing free legal representation to criminal defendants, which means that poor and indigent child detainees are routinely denied access to legal representation.¹⁴

The presence of an independent lawyer provides an important oversight mechanism against abusive practices at the police station. The denial of defence counsel is therefore a

¹⁴ To date, the four legal aid providers – Hargeisa University Legal Aid Clinic, Amoud University Legal Aid Clinic, the Somaliland Lawyers’ Association (SOLLA) and the Somaliland Women Lawyers Association (SWLA) are largely dependent on UN funding which has been absent for protracted periods since 2014. The Ministry of Justice has recently appointed several public defenders to assist indigent defendants.

contributing factor to the arbitrary detention of children, risks enabling further violations of their rights in custody, and substantially reduces the prospects of a fair trial.

8. Implementation

Despite shortcomings in implementation, the formal justice system has the foundational tools for achieving a child-friendly system of justice in Somaliland. While realizing such a system is the government's intention, much work is needed to enforce the law as it relates to children, and to successfully address the situation of children in conflict with the law. In order to support the justice institutions to remedy this situation, a collective response from all sectors of Somaliland is required. These include: justice actors – the police, prosecutors, defence lawyers, judges and prison officers; from non-governmental organisations; parents, teachers, traditional elders as well as the wider public.