

# The Tortuous Journey of Federalism in Somalia: Current Perils and Future Hopes

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## Abstract

*After many years of conflict and crisis, the installation of a federal government and endorsement of a provisional federal constitution were widely welcomed by Somalis and the international community. The constitution establishes a number of federal member states as well as a senate and lower house of parliament; the country has also witnessed a peaceful transfer of power. However, as Somalia moves towards a fully-fledged federal system, the government faces the daunting task of leading, or at least coordinating, the federation process without deepening conflict. Al-Shabaab is far from defeated; social fragmentation within Somalia is increasing; and political infighting continues unabated.*

**Key words:** *Federalism, Somalia, clan, democracy, representation*

## 1. Introduction

Somalia has been plagued by civil war for more than 20 years, a crisis which began after the fall of President Mohamed Siad Barre in 1991. Since his overthrow, no strong central government has emerged. The failure to establish stable government has been attributed to clan animosity, leadership wrangles, easily accessible firearms, lack of commitment to a negotiated settlement, transnational jihadism and external interference (Abdullah, 2006). Many attempts have been made to find a solution to the ongoing conflict. Over the years, a number of peace agreements created new governments, but all of these failed to take control of the country beyond Mogadishu. The current federal government and its predecessor have received substantial backing from International community to rebuild Somalia and fight al-shabab terror group. Consequently, current administration is seen as having a

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crucial opportunity to address conflict in Somalia.

As its title declares, the Provisional Constitution of the Federal Republic of Somalia envisages federalism as a system of government.<sup>1</sup> A growing number of Somalis and members of the international community regard federalism as the most appropriate system of governance for Somalia. This is because of federalism's ability to manage differences, accommodate minorities and hold nation-states together.<sup>2</sup> Furthermore, federalism is believed to contribute to overall regime consolidation and increase the quality of the democratic process by guaranteeing accountability, fostering civil competence, promoting social capital and strengthening the rule of law and political participation (Bermeo, 2002 ; Harzell and Hoddie, 2003)

Somalia is emerging from conflict and prolonged fragility, a number of federal member state established. Somalia is gradually making progress towards federalism and democracy. However, insecurity, endemic corruption, the divergent nature of clans, and the persistent lack of political consensus among the country's most fractious clans, are some of the challenges that impede realization of a coherent, stable, federal and democratic state in Somalia. The situation is further threatened by the security challenges posed by al-Shabaab.

The aim of this article is twofold. First, it traces the origin of federalism in Somalia, analysing the political developments that led to its adoption and critically examining the provisions of the Constitution with a view to determining whether it can serve as a basis for ensuring much-needed peace and stability in Somalia. Secondly, it identifies challenges that could potentially affect the establishment of federalism in Somalia.

## 2. Somalia's Social-Cultural Background

Somalia is located in the Horn of Africa, bordering the Gulf of Aden and the Indian Ocean. Its population is estimated at between 9

1 The Federal Republic of Somalia, Provisional Constitution, Mogadishu, adopted 1 August 2012. Article 1(1) stipulates that Somalia is a federal, sovereign and democratic republic founded on the inclusive representation of the people and a multiparty systems. Despite the slow progress in its implementation, federalism is gradually taking shape.

2 According to Erk and Anderson (2010), federalism provides opportunities for solving conflict between regions.

and 12 million people (Lewis, 2000), who share a common language (Somali), common religion (Sunni, Muslim), and the same ethnic origin (the Somali tribe). The majority of the population (estimated at 65 percent) adheres to a primarily pastoral nomadic tradition.<sup>3</sup>

The Somali, although united through common descent and cultural characteristics, are divided into clan-families. The clan-families are sub-divided into smaller kin-based groups, sub-clans and primary lineages. The majority of Somalis belong to six major clan families: the Hawiye, Issaq, Dir, Darod,<sup>4</sup> Digi and Rahanweyn. The Hawiye, mostly located in central Somalia, are nomads.<sup>5</sup> The Issaq, also nomads, are inhabitants of northern Somalia. The Dir<sup>6</sup> are inhabitant of north-west and southern Somalia. The Rahanweyn and Digi are mostly agriculturists from southern Somalia (Lewis, 1999). Clan families are sub-divided into sub-clans, primary lineages, and “*diya*-paying”<sup>7</sup> groups. The *diya*-paying group (Jilib/Bah) is the most stable unit, with a membership of groups of families ranging from few hundred to more than a thousand.

The membership of each *diya*-paying group agrees to informal contractual agreements to support one another and share payments. The groups rarely have single “traditional leaders,” opting instead for a council of elders who have collective responsibilities.<sup>8</sup> Throughout the colonial administration, elders were appointed to act as the legitimate representatives of their respective groups. Somali traditional legal system is mostly based on Islamic law (Sharia)<sup>9</sup> as well as Somali customary law (*xeer*)<sup>10</sup>

3 Nomadic pastoralism is a sophisticated land-use system utilising mixed species comprised of herds of camels, sheep and goats.

4 The Darod clan is made up of the Ogaden, Herti, Marehan, Majerteen, Dulbahaante and Warsageli sub-clans.

5 The Hawiye include the following sub-clans: Habar Gedir, Abagal and Murusade. See Hinds (2013).

6 Sub-clans include the Issa and Gadabursi.

7 The term “*diya*-paying” implies that families within the group have a collective responsibility for settling acts committed by, or against, their members. Membership of a clan does not automatically give one certain rights and obligations; rather, they are negotiated and agreed in unwritten contracts.

8 Bradbury (1993) notes that Somali elders are representatives holding the traditions of clans together. The dynamism of Somali society means that it is constantly adapting to changing circumstances, causing the clan elders to adapt as well as enabling them to fulfil their roles in changing environment; regardless of these changes, clan elders have continued to maintain peace and reconciliation.

9 Sharia law has been a traditional features of Somali society throughout colonial era and into the post-independence era.

10 The Xeer is more than a contract between the different groupings within Somali

formed through clans' agreements. Traditional legal systems define the rules of collective rights and responsibilities as well as common interest. Bradbury notes that the blood-money (*diya*) system "provide[s] a sanction against violence and reinforces collective responsibilities" (Bradbury, 1993).

### 3. Independent and Military Government

Somalia achieved its independence from Britain and Italy on July 1, 1960. On that date, the Sovereign Republic of Somalia was formed as a merger of British Somaliland and the Italian-governed Trust Territory of Somalia. The first civilian governments were elected democratically and ruled the country from 1960 to 1964 and then from 1964 to 1969; the military government ruled from 1969 to 1990. Since 1991, the country has been without an effective government.

Since the fall of President Barre, efforts to restore peace, stability and the normal functions of state have faced numerous challenges, a situation that has culminated in various peace processes and agreements (Menkhaus, 2007, p. 357). Recently, three major transitional government arrangements were established. The first was the Transitional National Government (TNG), established through the 2000 Arta Declaration under the leadership of Abdiqasim Salad Hassan; it was followed by two further transitional arrangements, under the leadership, respectively, of Presidents Abdullah Yusuf Ahmed (2004–2008) and Sharif Sheikh Ahmed (2009–2012).

### 4. What is the Problem in Somalia?

The long-term absence of the Somalia state sheds a unique light on the complications and implications that follow from state collapse. After 20 years without a central state, Somalia is dealing with major, and manifold, internal and external problems (Samatar, 1992). Internally, these include the colonial legacy;<sup>11</sup> clan

society: it defines the basic values and laws of behaviour, thus playing an important role in establishing and maintaining forms of governance. See Bradbury (1993).

<sup>11</sup> Somali lands were distributed between France, Italy and Great Britain. The colonial powers took advantage of the lack of centralized authority in clan-based co-existence, ruling the lands separately in classic divide-and-conquer style. Somalia was partitioned into

hegemony;<sup>12</sup> severe drought; and power struggles over economic advantage;<sup>13</sup> the rights of minorities;<sup>14</sup> religious fanaticism; secession;<sup>15</sup> conflict over water and grazing land;<sup>16</sup> and territorial boundary disputes. The external challenges include the internationalization of the Somali conflict (irredentism, piracy, anti-terrorism),<sup>17</sup> and the direct interference in internal governance by international actors. Federalism, it is hoped, will address at least

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five territories: French Somaliland (now Djibouti); the Northern District Frontier (NDF) region under Kenyan rule; Ogaden (Region 5) under Ethiopia; and the two territories of North West Somalia, now known as Somaliland and the Italian Somaliland. The imposition of meaningless borders on the traditional grazing grounds of Somali clans created long-term instability in Somalia and the Horn of Africa region. It had negative implications for nomads, who had little respect for structured borders and authorities. See Tripodi (1999); Issa-Salwe (1996; and Adam (1995).

12 Somalis are alienated along clans lines, divisions which have made Somalia one of the most violently fractured societies in Africa. Consequently, the common language, religion and shared cultural values did not guarantee sustainable social cohesion, stability and peace after independence. The war of 1991-92 deepened clan animosities; the political conflict degenerated into government crises that eventually led to a general militarized social conflict through the clan faction network. Both Elmi (2006) and Barise (2006) see the “root cause of the [Somalian] conflict [as] stemming from competition for resources and power and politicized clan identity.” See also Lewis (1994).

13 A huge number of Somalis died in a famine in 1992. See Menkhaus (2011), Marchal (2009), and Bradbury (1998).

14 Historically, in Somalia the clan structure of the majorities excludes minorities from significant political participation and employment. It also limits their access to justice where abuse has been perpetrated against them or they stand accused of a crime; denies them their rights to development, education and sustainable livelihoods; and prevents and punishes inter-marriage with members of majority groups. Majorities routinely subject minority members to hate speech, which has perpetuated stereotypes about minorities’ physical appearance and traditional practices and thus deepened their exclusion. This minority group includes Somali Bantu groups, blacksmiths, and leatherworkers. See Hill (2011) and Besteman (1999).

15 Somaliland declared unilateral independence from Somalia shortly after the collapse of the central government in 1991. Traditional elders and political leaders representing communities in the territory met in Buraq that same year. The delegates agreed on two important issues – to seek reconciliation amongst the clans of Somaliland and to withdraw from the union with Somalia. Somaliland’s self-determination issues need to be addressed at the soonest and a decision will have to be made about how they are accommodated in the future Somalian constitutional dispensation. See Bradbury et al. (2003) and Hansen & Bradbury (2007).

16 Elmi and Barise (2006).

17 The key points that draw the attention of the international community is the perceived threat that terrorist groups inside Somalia, such as al-Shabaab, pose to the rest of the world. Al-Shabaab officially became part of Al-Qaeda in February 2012, although it had already aligned itself with it some two years before that. The incorporation of al-Shabaab into a global terrorist group like Al-Qaeda makes their activities and engagement reach much further than the borders of Somalia. The group has been able to recruit members from Somali communities in Europe and the US, as well as enlisting non-Somali men who then pursue suicide missions in Somalia and neighbouring countries. Actions like these, and the potential harm militant groups such as al-Shabaab can inflict on the rest of the world, require the engagement of the international community. See Howden (2013).

some of these internal and external challenges.

## 5. Federalism in Somalia

Discussion on the applicability of federalism was started in 1960 by the Hizbia Dastur Mustaqil al-Somal (HDMS) political party, which represented historically marginalized Digil and Mirifile clan families.<sup>18</sup> Mukhtar argues that they are the first Somalis to propose a federal structure as a way of protecting minority rights, in this case particularly those of the agrarian Digil and Mirifile clans prior to independence in 1960. Nevertheless, the proposal did not gain sufficient support, given that the preference among most political elites was for a unitary state. Subsequently, the leading proponent of federalism, Hon Osman – the leader of the HDMS and a member of the first post-independence government – was gunned down in 1960 for his espousal of a federal agenda.<sup>19</sup>

After many years of conflict and crisis, federalism is back again on the agenda. The Federal government was established in 2012 through the endorsement of a provisional federal constitution for Somalia. The consensus on the desirability of federalism has been driven largely by international donor agencies, the United States of America (US), the United Kingdom (UK) and neighbouring states, including Kenya and Ethiopia. However, the ideological commitment necessary to make federalism work is not entirely shared by all the role-players at home. Right from the country's formative years, Somali leaders have evinced considerable scepticism about it. Consequently, the Somalis are divided on the viability of the federal system – some view federalism and the current constitutional structure as a solution to the chronic problems of Somali politics; others see it through a clan prism;<sup>20</sup> and others yet perceive it as the product or outcome of various problems, one that could that could aggravate internal conflict

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18 Mohamed H. Mukhtar (1989).

19 Abow, 2011.

20 Support for, or opposition to, federalism tends to follow clan lines. Many Hawiye clans, which dominate central and South Somalia and greater Mogadishu, support a unitary state, whereas many Darod clans, which dominate Puntland and Jubaland, are strong proponents of federalism. There has also been a strong suggestion of hostility to federalism within al-Shabaab and Somali Islamism. Most Somali Islamist movements, whether classified as moderate, conservative or hard-line, tend to favour a strong central state. Waldo (2010) see federalism as a viable solution to the political crises in Somalia.

and lead to further, deadly inter-clan wars.<sup>21</sup>

## 6. The Negotiation Process Underlying Somalia's Constitutional Adaptation of Federalism

Yash Ghai (2003) identifies several factors that make the process of constitution-making inclusive and legitimate. These are the definition of the project, the nature of participation, the rules for decision-making, the mandate given to the people writing the constitution, the selection and composition of the drafting team, the openness of the drafting process, the inclusion of different groups, and the justifications offered for adoption of the final outcome.

In Somalia, many citizens have serious doubts about the process and outcome of the making of provisional federal constitution. Arguably, the absence of the factors above in the constitutional process in Somalia undermines its legitimacy. For example, there is growing controversy about the ownership, transparency, representivity and accountability of the overall process, with actors such as academics and civil society organizations feeling excluded from it.<sup>22</sup> The negotiation process has been perceived as marred by alleged corruption, meddling by neighbouring countries, and disagreement among the Somali clans (Macha, 2012).

The constitution-making process in Somalia started in 2004 with the signing of an agreement regarding the cessation of hostilities,<sup>23</sup> the adoption of a Transitional Federal Charter (TFC),<sup>24</sup> Con-

21 Hersi(2004) and Elmi (2014). Hersi argues that the factors and characteristics, including geographical and language barriers, that warrant federalism are absent in Somalia. Similarly, Elmi contends that federalism is alien to Somalis, saying it is neither desirable nor feasible in the context of Somali homogeneity.

22 Afyare Elmi has argued that the process of drafting Somali constitutions was fundamentally flawed. According to him, the process does not express the aspirations of the Somali people, particularly with regard to regulating conflicts or prescribing contest-appropriate institutions that are necessary for building a durable peace and a functioning state in Somalia. See Elmi (2012) and Shuriye (2012).

23 At the conclusion of the Embagathi peace conference, the stakeholders (including armed warlords and groups in civil society) signed a cessation-of-hostilities document, agreed on a National Charter, and formed a 275-seat parliament that elected HE Abdullahi Yusuf Ahmed as the second transitional president of Somalia.

24 A draft national charter was adopted at the Embagathi conference. The Charter was to serve as a precursor to a national constitution at a future date. Delegates agreed on the formation of a broad-based government to bring about peace and engage in economic and social development. The Charter directed future government progress towards a more



sequently, the federal journey formally began at the 14<sup>th</sup> national reconciliation conference in Nairobi in 2004, which resulted in the creation of the Transitional Federal Government (TFG), where a decentralized system of administration based on federalism was officially adopted.

Article 11 of the TFC<sup>25</sup> sets out a clear roadmap for developing a federal constitution and calls for the government to establish an Independent Federal Constitution Commission (IFCC). Subsequently, the IFCC was established, with a mandate of drafting a federal constitution and obtaining the views of public.<sup>26</sup> The IFCC, as expected, presented a draft constitution to parliament. Further members, commonly referred to as the Committee of Experts (CoE), were added to the IFCC.

In July 2010, the IFCC presented the first draft provisional federal constitution to the Somali public. A number of workshops and seminars were held to synthesize public comment on the contents and details of the constitution.<sup>27</sup> Some contentious views received from the public included ones that questioned the relevance of federalism or concerned the future status of the autonomous regions of Somaliland and Puntland, the role of Sharia law, and the structure of federal government. The revised version of the draft provisional constitution was presented to the seven signatories of the 2011 United Nation Political Office for Somalia (UNPOS) Roadmap for the End of Transition in Somalia.

In May 2012, close to the finishing line of the Transitional Federal Government, a constitutional conference was held at the AU headquarters in Addis Ababa and attended by the three principal leaders – the president, the speaker, and the prime minister – as well as the Roadmap signatories and many members of international community, fronted by the representative of the Secre-

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permanent modern constitution, providing a timeline of two years in which a draft thereof was to be completed. In addition, a significant number of stakeholders ensured that the Charter referred to a federal governance model; hence the title of the 2004 charter is “The Transitional Federal Charter of Somalia.”

25 The TFC explicitly prescribes the process for the drafting of the Constitution [of the] Transitional Federal Charter of Somali Republic; see Article 11(1).

26 Public participation was enhanced by use of the mass media, including radio services such as BBC Somali Service, the government’s Radio Mogadishu and Somali National Television (SNTV), and the radio Bar Kulan, Universal TV.

27 The federal constitution was drafted in a non-inclusive manner. Participants in the early stages include groups led by the United Nations Development Programme (UNDP) and United Nation Political Office (UNPOS).



tary-General of the United Nation to Somalia. Among the items on conference agenda was the finalization and harmonization of the federalism section of the constitution and, more specifically, the power- and resources-sharing formula to be drafted and agreed upon. Nevertheless, it was agreed that power- and resources-sharing clauses would be discussed and adopted when all regions are free from al-Shabaab and have formed their respective federal units (Hosh, 2004).

Two consultative constitutional conferences were held in Garowe in Puntland in December 2011 and February 2012 involving the TFG and other stakeholders. Key issues that were deliberated at the conferences included federalism and models of government, the design of an electoral system, a plan to nominate a National Constituent Assembly (NCA), and the composition and mandate of the latter.<sup>28</sup> The conference agreed that the NCA would comprise 825 delegates, to be selected according to a 4.5 power-sharing formula. Subsequently, nominations to NCA<sup>29</sup> membership were made. The candidates' suitability was determined by the principal roadmap signatories after evaluation by the Technical Selection Committee, assisted by traditional leaders and civil society. Eventually, the NCA, consisting of the 825 delegates, debated the draft constitution. The drafting process was concluded in 2012 with the adoption of the Provisional Federal Constitution of Somalia.<sup>30</sup>

On August 1, 2012, the NCA approved the draft provisional federal constitution by an overwhelming majority. Following that, the mandate of the Transitional Federal Institutions, which include the TFG, TFC and TFP, came to an end. In August 2012, the Federal Government of Somalia was established, and Hassan Sheikh Mahmud was elected president.

## 7. Somali Federal Government (SFG)

The SFG was welcomed by Somalis and the international commu-

28 Federal Republic of Somalia, Second Somali National Consultative Constitutional Conference, Garowe principle 3(1)-3(3).

29 The National Constituent Assembly is made up of 825 prominent Somalis, including traditional elders, religious leaders, women representatives, minority clans, and Somalis in diaspora.

30 Of the 645 NCA delegates who were present at the Constituent Assembly, 621 voted for the document, 13 against, and 11 abstained. See BBC News Africa (2012).

nity. Since its establishment, concerted efforts have been made to build a foundation for a modern and democratic state. The election of President Hassan Sheikh and establishment of a number of regional governments raised hopes that Somalia will soon attain its goal of restoring peace and security. Thus, the adoption of Provisional Federal Constitution in 2012 was widely welcomed by Somalis and the international community. Additionally, a number of policy documents that aimed at fast-tracking federalism and the establishment of constitutionalism were adopted. This included the Somali Compact (SC) and the Vision 2016. The SC identifies key peace-building and state-building goals in the area of inclusive politics, security, justice, economic foundations and revenue services.<sup>31</sup> In turn, Vision 2016 stipulates guidelines and roadmaps for completing the provisional federal constitution as well as setting up strategies and time-frames for the transition to democracy, including holding general elections in 2016.<sup>32</sup>

### 7.1 Basic principles of the Somali Federal Republic Provisional Constitution, 2012

A number of basic principles are expressly entrenched in the text of the Constitution. Among other things, it provides a legal foundation for the existence of the Republic.<sup>33</sup> It declares the supremacy of the Constitution, after Sharia, over all other laws;<sup>34</sup> stipulates federalism as a system of government;<sup>35</sup> entrenches a bicameral parliament;<sup>36</sup> and makes provision for the separation of powers as well as a checks-and-balances mechanism,<sup>37</sup> including an impartial judiciary. Furthermore, the Constitution guarantees protection of all universally accepted fundamental rights.<sup>38</sup>

31 Federal Republic of Somalia. The Somali Compact, Brussels, 16 September 2013. Retrieved from December 28, 2016 from <http://Somalia-newdeal-conference.eu>

32 Federal Republic of Somalia. Vision 2016: Principles and Recommendations, Mogadishu, 6 September 2013. Retrieved from <http://www.villasomalia.gov.so/?p=812>

33 Article 1 of the Constitution of the Provisional Federal Republic of Somalia.

34 Article 4(1) of the Constitution states: "After the Shari'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all section of government."

35 Article 1(1).

36 Articles 55(1)-55(2) provide for two houses of parliament, namely the House of the People and the Upper House.

37 Legislative authority is vested in parliament (section 71). Executive authority is vested in the Council of Ministers; the highest executive authority consist of the Prime Minister, Deputy Prime Minister and Ministers (Article 97). Judicial authority is vested in the courts (section 106).

38 Articles 10-22 make provisions for fundamental rights, socio-economic rights and environmental rights.

Additional provisions in the Constitution relate to the role of constituent member states, the distribution of power, mechanisms for sharing resources between the federal government and the federal member units,<sup>39</sup> along with a number of issues designed to guarantee the member units' legitimacy, autonomy and integrity.<sup>40</sup> The Constitution also provides procedures for its amendment.<sup>41</sup> Other principles, such as constitutionalism, democracy and the rule of law, are implicit in the text. The next section discusses some of these implied principles.

## 7.2 Supremacy of the Constitution and Provision of Fundamental Rights

The Provisional Federal Constitution stipulates that the Constitution is the supreme law of Somalia after the Sharia.<sup>42</sup> So, unlike the case in other federal systems, the Constitution is not the supreme law of the land: it is subordinate to Sharia law. This renders the entire federal scheme dependent on the interpretation of Sharia and places it at risk to the extent that it is found to be inconsistent with Sharia. Furthermore, the Constitution provides for a number of fundamental human rights. These include the rights to life,<sup>43</sup> human dignity,<sup>44</sup> equality,<sup>45</sup> freedom of association,<sup>46</sup> freedom of religion and belief,<sup>47</sup> freedom of expression and opinion,<sup>48</sup> and freedom of assembly.<sup>49</sup> In addition, the Constitution provides for, inter alia, just administrative action<sup>50</sup> and the right of access to information.<sup>51</sup>

39 Article 3(3) states: "The Federal Republic of Somalia is founded upon the fundamental principles of power-sharing in a federal system." Section 54 further provides that powers and resources shall be negotiated and agreed upon by the federal government and the federal member states (pending the formation of the federal member state).

40 Articles 133–134.

41 The Provisional Constitution provides strict processes and procedures for amending the constitution. It stipulate two periods in which such amendments can be made: before the expiry of the first term of the Federal Parliament (section 133 and 134), and after the expiry of the first term of the Federal Parliament (Section 132).

42 Article 4(1).

43 Article 13.

44 Article 10.

45 Article 11.

46 Article 16.

47 Article 17.

48 Article 18.

49 Article 20.

50 Article 33.

51 Article 32.

### 7.3 Structure of Government and Separation of Powers

The Provisional Constitution explicitly states that Somalia is a federal republic, based on the fundamental principle of power-sharing.<sup>52</sup> The Constitution provides for two levels of government, the federal government and the federal member states. The latter comprise of the federal member state and its local governments.<sup>53</sup> The Constitution also provides for key fundamental principles of federalism, including the sharing of powers, resources and revenue and the establishment of a mechanism for dispute-resolution.<sup>54</sup> Significantly, the Constitution states that the powers and resources shall be negotiated and agreed upon by the federal government and federal member state (pending the formation of federal member state).<sup>55</sup> The competency of government is assigned to the level of government where it is likely to be exercised.<sup>56</sup>

The Provisional Constitution stipulates that the president is the head of the state of the Federal Republic of Somalia. He is therefore required to carry out his duties in accordance with the Constitution and the other laws of the Federal Republic.<sup>57</sup> The term of office of the president is four years, limited to two consecutive terms.<sup>58</sup> The House of the People of the federal parliament can propose the dismissal of the president if he is accused of treason or gross violation of the Constitution or the laws of the Federal Republic of Somalia.<sup>59</sup>

### 7.4 Judicial Independence and Rule of Law

The Provisional Constitution provides for the independence of judiciary from the executive and legislative branch of government in fulfilling its judicial functions. Furthermore, members of the judiciary are subject to the law only.<sup>60</sup> The Constitution stipulates three levels of courts: the Constitutional Court,<sup>61</sup> the feder-

52 Article 3.3.

53 Article 48(1)(a)-(b).

54 Article 50.

55 Article 54.

56 Article 50(b)

57 Article 87(a)-87(2).

58 Article 91.

59 Article 92, on impeachment and discharging the duties of the president.

60 Article 106(1)-(3).

61 Article 109(b)-(c) enumerates the formation and powers of the Constitutional Courts.

al-government-level courts and the federal-member-state-level courts.<sup>62</sup> The highest court at federal government level is the Federal High Court, whilst the highest court at the level of the federal member state is the Federal Member State High Court.<sup>63</sup> The Constitutional Court has supreme powers to review acts of the federal parliament in case it fails to conform to the Constitution.<sup>64</sup> Its competences are enumerated in the Constitution.<sup>65</sup>

## 7.5 Democracy and Accountability

The Provisional Constitution stipulates that “Somalia is a federal, sovereign, and democratic republic founded on inclusive representation of the people, a multiparty system and social justice.”<sup>66</sup> The Constitution also provides a number of rights that relate to democracy, such as freedom of speech, freedom of political participation,<sup>67</sup> the right to demonstrate,<sup>68</sup> and freedom of publication and opinion.<sup>69</sup> Thus, in providing these rights, the Constitution is opening up democratic space.

It also provides for the creation of a number of institutions designed to protect, promote and safeguard the Constitution. These are, inter alia, Constitutional Courts, the Anti-Corruption Commission,<sup>70</sup> Human Rights Commission,<sup>71</sup> Judicial Service Commission,<sup>72</sup> Boundaries and Federal Commission,<sup>73</sup> National Independent Electoral Commission,<sup>74</sup> Truth and Reconciliation Commission,<sup>75</sup> and the office of the Ombudsman.<sup>76</sup> Their duties and functions are enumerated in the Constitutions. These national institutions are designed to ensure that the government is held accountable in the exercise of its power. The rationale for having them is the belief that accountability of the government will ensure that the ethos of constitutionalism can thrive.

62 Article 108(a)-(c).

63 Article 108(a)-(c).

64 Article 4(2) and Article 68(1).

65 Article 109(c).

66 Article 1(1).

67 Article 22.

68 Article 20.

69 Article 18.

70 Article 111(c).

71 Article 111(b).

72 Article 111(a).

73 Article 111(e).

74 Article 111(g).

75 Article 111(h).

76 Article 111(j).

## 8. The Potential of Federalism to Promote Peace in Somalia

A number of principles mentioned in the Provisional Constitution can potentially enhance peace, conflict-resolution and strengthened constitutionalism in Somalia. These include the separation of powers, dispute-resolution mechanisms, democracy and inclusiveness, shared rule and self-rule, the rule of law, and judicial review of administrative action. The next section briefly examines some of these provisions.

### 8.1 Dispute-Resolution Mechanism

Disputes between different levels of state, as well as between federal units, are to be expected in any federal system. These can be triggered by a wide range of issues, such as questions over land, boundaries and resource ownership. For these reasons, dispute-resolution mechanisms are essential. The Provisional Constitution provides for the creation of such mechanisms, for example, special mediation committees, intergovernmental councils, judicial review by courts, and referenda. In addition, it mandates the Constitutional Court to adjudicate on disputes between organs of the federal governments concerning their respective constitutional powers.<sup>77</sup> This function given to the Constitutional Court may prove to be a highly useful tool in settling matters between different levels of government. Furthermore, the Provisional Constitution confers powers on the Constitutional Court to invalidate any law or administrative action that is contrary to the Constitution.<sup>78</sup> Thus, Constitutional Court will have a vital role in upholding the principle of devolved powers in Somalia. The judiciary in general, and Constitutional Court and Supreme Courts in particular, will play a crucial role in the preservation of federalism and constitutionalism in Somalia.

Following the collapse of the Somalian government, traditional forms of dispute-resolution have flourished.<sup>79</sup> Since the Constitution provides for mediation and negotiation, it means that informal mechanisms of dispute-resolution will also be invoked, in particular Somali customary law (*xeer*). One of the defining

77 Article 109(1)(e).

78 Article 4(2).

79 Although the traditional Somali legal system emerged prior to the introduction of centralized governing structures, it has continued to function in areas under federal government control as well as those areas in which no government exists. See Menkhaus (2005).

characteristics of Somali political practice is its rich historical tradition of local peace-making that draws on customary law and focuses on mediation, reconciliation and consensus-building. The tradition is based on kinship (blood compensation or *diya* payments), *xeer* and the Islamic law. These mechanisms remain important in addressing grievances and resolving conflicts in Somalia (Brickhill, 2010).

## 8.2 Constitutionally Guaranteed Shared Rule and Self-Rule

The combination of shared rule and self-rule in a federal framework, as stipulated in Somalia's provisional federal constitution, entails some principles on which a federation is usually said to be based, namely, cooperation, separation of powers, and a judicial umpire. As discussed above, the constitutional division of powers between the federal government and federal member states, guaranteeing that each level of government has a certain sphere of autonomy, is considered the most important characteristic of a federal form of state (De Villiers, 1992).

De Villiers (1992) rightly argues that a combination of self-rule and shared rule within a framework of power-sharing is the best way of resolving intractable ethnic conflicts. More often than not, conflicts in Somalia revolve around sharing of powers among the clans, minority rights, resources and disputes over grazing lands and water-points.

In order to solve such conflicts, both self-rule and shared rule are included in the provisional federal constitution. Article 3(3) stipulates that the Federal Republic of Somalia is founded upon the fundamental principles of power-sharing in a federal system. Article 54 further provides that powers and resources must be negotiated and agreed upon by the federal government and the federal member states (pending the formation of federal member state). This presupposes that actors have the political will to accord effective power to the federal member state so that each unit can define its own destiny to some extent.

The Provisional Constitution is a major guarantee of the constitutional principle that any issues agreed upon by both levels of government cannot be unilaterally changed by the other level. In addition, according to the constitution, any changes must be based on consensus. Likewise, the Constitution stipulates that



federal units must be involved in the procedures for constitutional change. Therefore, constitutional amendment requires the consent of a significant portion of the federal unit (federal government or federal member state). Besides, shared rule, as stipulated in the federal constitution, promotes decision-making that respects the interests of federal units. The federal units participate in the political process through a bicameral parliament (the structure of which was discussed earlier).

The separation of powers and federalism both imply that there are constitutional limits on state power, whether through the functional or the territorial divisions of governmental roles and offices. The separation of powers as enshrined in the Constitution makes it nearly impossible for one faction to speak on behalf of the other segments of government.<sup>80</sup> In other words, the division of powers between national and subnational levels creates offices with competing territorial claims and which seek to speak on their own behalf.

### 8.3 Democracy, Participation and Inclusiveness

Federalism is closely linked to the democratization of political structures and participation of social groups that have previously been excluded from the decision-making process. As indicated earlier, the Constitution stipulates that Somalia is “a federal, sovereign and democratic republic founded on inclusive representation of the people, a multiparty system and social justice.”<sup>81</sup> This presents a real opportunity to develop a common framework of social and political values for Somalia through public participation, engagement and negotiations. Ultimately, such an approach is likely to bring about the increased mutual understanding that will lead to a lasting peace and democratic space.<sup>82</sup>

Regarding the protection of minority and vulnerable groups,<sup>83</sup>

80 Article 51(4)

81 Article 1(1).

82 The principle of democracy is referred to at several points in the Provisional Constitution. In its founding principles, the Constitution stipulates that the Federal Republic of Somalia “promotes human rights, rule of law, general standard[s] of international law, justice, participatory consultative and inclusive government and the separation of powers between legislature, executive and independent judiciary, in order to ensure accountability, efficiency and responsiveness to the interest of the people.”

83 Historically, in Somalia the clan structure of the majorities excludes minorities from significant political participation and employment, limits their access to justice where abuse has been perpetrated against them or they stand accused of a crime, denies them their

marginalized groups and minority clans' interests are adequately protected in the Provisional Constitution; such groups include women, marginal Bantu groups, blacksmiths, leatherworkers and hunters who want to retain a status separate from the Somali clan structures. Among Somalis, recognition of, and advocacy for, minority rights are slowly increasing. Political participation by minorities in government and parliament has been accepted in principle. A power-sharing deal in the TFG, made in accordance with the Transitional Federal Charter (TFC) adopted in 2004, included minority representation. Similarly, the provisional federal constitution accords equal rights to all Somalis regardless of their clan affiliation, gender and social status.

#### 8.4 Rule of Law and Judicial Review

According to Richard Fallon, an essential feature of the rule of law is the recognition of the law's obligation as binding on those, both government and private, to whom it purports to apply (Fallon, 1997). Somali federalism recognizes the law as binding on all layers of government. Its application is both vertical and horizontal.<sup>84</sup> The basic mechanism for applying law is judicial enforcement.

In Somalia, the judiciary is anticipated to serve as a, or the, key organ for holding executive powers to account and for implementing the ideals contained in the Provisional Constitution.<sup>85</sup> The Constitution is the cornerstone of the guarantee of judicial autonomy. It vests judicial authority in a judiciary and guarantees its independence from other authorities,<sup>86</sup> enabling it, for instance, to review executive action. Judicial review of executive acts and of legislation is a fundamental aspect of both constitutionalism and federalism. The power of judicial review is an important aspect, too, of the doctrine of separation of powers. Such review ensures that organs of government act within the parameters set by the Constitution. The independence of the judiciary thus is essential to democracy in that it ensures that the federal rights to development, education and sustainable livelihoods, and prevents and punishes inter-marriage with members of majority groups. Majorities also routinely subject minority members to hate speech, which has served to perpetuate stereotypes of minorities relating to their physical appearance and traditional practices, and thus heighten their exclusion.

84 Article 4(1) stipulate that after Sharia, the Constitution of the Federal Republic of Somalia is the supreme law of the country; it is binding on the government and guides policy initiatives and decisions in all sections of government.

85 Article 106.

86 Article 106.

government cannot encroach upon the jurisdiction of the subnational government.

## 9. Progress So Far

Parliament passed a law in 2014 establishing a body called the Boundary and Federalisation Commission, which is mandated to determine the boundaries of the constituent units of the federation to resolve boundary-related disputes. The Commission has made important advances in defining the member states of the federation. Vision 2016 emphatically states that “the completion of the federal system should be achieved by dialogue and reasonable consensus and not by imposition or coercion.”<sup>87</sup>

Nevertheless, the political boundaries of the newly established federal member state (FMS) regions are often undefined and contested, in some cases partially or completely overlapping with the territories of already existing states. The SGF, together with the FMS and international community, has made efforts to overcome these challenges through dialogue, regional conferences and peace meetings.<sup>88</sup> The next section examines some of the established FMS.

### 9.1 Puntland State of Somalia

Puntland, situated in the northeast of Somalia, was formed as an autonomous regional administration in 1998. It has played a critical role in advancing the establishment of federal system in Somalia (Puntland Government, 2007). As in Somaliland, clan elders, traditional leaders, religious organizations and prominent

<sup>87</sup> In 2013 the SFG rolled out Vision 2016 in an attempt to translate the Provisional Constitution into an achievable and broadly acceptable framework for completion of the Constitution, development of the federal system, and election of a new parliament before the end of its term of office. Vision 2016 identified three “foundational elements” stipulated by the Provisional Constitution: constitutional review and implementation; completion of the federal system; and democratization. It also proposed milestones and a timeline that would allow the transitional tasks to move forward in parallel and without delay, while at the same time respecting the need for formal consultation with the established and yet-to-be-established federal member states.

<sup>88</sup> Former UN Secretary-General Special Representative to Somalia Nicholas Key (2014) argues that creating federal states with their own governments is not an automatic panacea. He points out a number of risks associated with the creation of member-state regions in Somalia, stressing that all interested and affected parties should be included in the process.

personalities played a major role in the establishment of Puntland (Menkhaus, 2007). The process of institutional development is the result of locally driven efforts. The region is widely considered to be the first federal state. It has been a staunch advocate for a federal system of governance since its founding (HIPS, 2015). According to Mubarak and Mosley (2014), Puntland is the only currently existing state that mostly fulfils the constitutional requirements for statehood; however, although it played a major role in the constitutional consultative process, its relations with the federal government have been characterized by significant irregularities since the adoption of the provisional constitution.

Puntland has played a decisive role in assisting Somalia in developing the new constitution, hosting two conferences in its capital and supporting the entire Roadmap which put an end to the Transitional Federal Government. Puntland has cut ties with the Mogadishu-based government numerous times; however, it has maintained its status of being part of Somalia, unlike its neighbouring breakaway, Somaliland, which declared unilateral independence from the rest of Somalia in 1991 (Mubarak & Mosley 2014).

## 9.2 Jubaland Administration

The Jubaland administration, comprising of the regions of Gedo, Middle Juba and Lower Juba, was formed by negotiations that began in 2009 between warring groups and ended with the creation of the Jubaland Administration, with Ahmed Madobe as its leader. The Jubaland administration was awarded a two-year mandate and acknowledged its aspiration to become a federal member state subject to parliamentary approval (Skeppstrom & Nordlund, 2014). In May 2013, politicians from the Lower Jubba, Middle Juba and Gedo regions gathered in the coastal city of Kismayo and unilaterally declared Jubaland as a new federal member state; Ahmed Madobe was formally confirmed as president.

The creation of an FMS has served as a vehicle for bringing together the many clans and political groups in Jubaland to begin conversations around good governance, inclusivity and political reconciliation. A report by the organization Saferworld (2016) contends that political accommodation has been central to Jubaland state formation, and that continued negotiation and mediation between Jubaland FMS and political opponents demonstrate

a commitment and willingness to reach a political agreement.

### 9.3 Southwestern Somalia

The territory known as the Southwestern State of Somalia (SWS) consists of six Somali administrative regions: Bay, Bakool, Middle Juba (*Jubada Dhexe*), Lower Shabelle (*Shabeelada Hoose*), Gedo and Lower Juba (*Jubada Hoose*) regions. Initial tension emerged over the ownership of the process, both between the SFG and local leaders, and within the SGF itself, when two rival conferences opened in the town of Baidoa. One group sought that Southwest FMS should comprise of six regions: Bakool, Gedo, Lower Shebelle, Lower Juba and Middle Juba. In contrast to what is commonly known as the “South West Six” (SW6) were opposing groups, known as the “South West Three” (SW3), which aspired to a three-region FMS comprising of Bay, Bakool and Lower Shebelle. Contentious issues relate to the rights of minority clans, particularly Digil-Mirifle clans, and their representation (Balthasar, 2014).

With the involvement of the SFG, and particularly of President Hassan Sheikh, who mediated between them, the two groups subsequently merged their initiatives on 17 November 2014, and Sharif Hassan Sheikh Adan was officially elected President of South West FMS (Balthasar & Grzybowski, 2012). The international community unanimously hailed the outcome as a major accomplishment and step towards consolidation of the federation process in Somalia.

### 9.4 Central State/Galmudug

Galmudug is a state in the central region of Somalia. The name is a combination of “Mudug” and “Galgadud.”<sup>1</sup> Its administrative capital, Gaalkacyo, is located in the southern half of the district of Gaalkacyo.

The SFG has recognized Galmudug for its efforts, praising the “intellectuals, traders and the people of Galmudug” for “achieving security and development.” Though the Galmudug region is home to many clans, the Sa’ad sub-clan of the Habar Gidir Hawiye clan dominates the Galmudug administration, and the Saleban,

1 Central Regional State Formation Agreements. Retrieved February 20, 2017 from [http://peacemaker.un.org/sites/peacemaker.un.org/files/SO\\_140730\\_CentralRegion-Formation.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SO_140730_CentralRegion-Formation.pdf)

Ayr, Dir, Marehan and Shekaal sub-clans refuse to accept Galmudug as their governing authority. The negotiation and mediation successfully led to the creation, on August 14, 2013, of the autonomous Galmudug region. Mohamed Warsame Ali “Kiimiko” was elected as the new administration’s president, and Galkayo was declared the new polity’s capital (Somali Review, 2015).

## 9.5 Indirect Election and Peaceful Transfer of Power

The Somali Compact put strong emphasis on the election to be held in 2016; however, the lack of security, adequate infrastructure and an agreed-upon electoral system, along with the high costs of registering voters, made it impossible to conduct a one-man, one-vote election, as a result of which the SFG ruled this out in 2015. The federal government, together with the regional administration and international partners, convened the National Consultative Forum (NCF), which was tasked with devising electoral systems. In December 2015, agreement was reached on several principles that would inform electoral processes and the way forward. It was agreed that the current government terms of office would not be extended and that the formation of both the upper and lower houses should be based on a balance between constituency and clan, with seats being reserved for women as well as marginalized and youth groups. Nevertheless, the consultations did not yield consensus on a specific electoral model.<sup>2</sup>

In January 2016, the federal government came up with a new election model. It envisaged an electoral college as the best system for Somalia in view of insecurity and other dilemmas. The new model proposed that the House of the People should have 275 members of parliament, elected by clan elders according to 4.5 formula and with 30 percent of being reserved for women. The Upper House, on the other hand, would have 54 members, 48 of which are distributed equally among FMS and the emerging member states, and six of which are divided between the established autonomous regions of Somaliland and Puntland.<sup>3</sup>

### The Federal Indirect Elections Implementation Team (FEIT) and

2 Federal Republic of Somalia. Somali National Consultative Forum. Mogadishu Declaration, 16 December 2015. Retrieved January 4, 2017 from <http://goobjoog.com/english/?=23032>

3 Federal Republic of Somalia. (2016, January 27). *Communique on the Electoral Model for 2016*. Mogadishu. Retrieved January 5, 2017 from <http://www.villasomalia.gov.co/?p=4069>

State-Level Electoral Indirect Implementation Teams (SEITs) were tasked with election responsibilities. Moving forward, 135 traditional elders were formally nominated; the elders in turn selected 14,025 that formed electoral colleges. Towards the end of 2016, electoral colleges selected 275 members of the lower house based on the 4.5 power-sharing ratio, while 54 members of the Upper House were selected by federal member states and aspiring federal member states.

On the positive side, the 2016 Somalia election model took into consideration the bicameral system of parliament as envisaged in the Provisional Constitution of 2012. Somalia's lower house now consists of 275 members of parliament, selected along the traditional 4.5 model, whilst the upper house is comprised of 54 members who were appointed by the federal member states.<sup>4</sup> Both houses provide the required 30 percent of seats for women. In 2017, the joint sitting of upper (senate) and lower house (members of parliament) voted out President Hassan Sheikh Mahmoud and replaced him with President Mohamed Abdullahi "Farmajo." The peaceful transfer of power and the election of President Farmajo were welcomed by Somalis and the international community.

## 10. Challenges Impeding the Realization of Federalism in Somalia

Notwithstanding the significant progress in building federal member states, a number of significant issues are still hampering federalism in Somalia. Notably, the determination of boundaries among the subnational entities is far from complete, and various flashpoints have begun to emerge – the recent clashes in November 2015 between Puntland and Galmudug forces near Gaalkayo are a case in point. Article 49 of the Provisional Constitution stipulates that future federal units must be based on the same boundaries as Somalia's erstwhile 18 regions. In practice, this requirement is being ignored, given that existing and emerging federal units are shaped largely on the basis of clan boundaries. The city of Gaalkayo, for example, is being partitioned between Puntland

<sup>4</sup> The senate is therefore comprised of 48 members of the Upper House, a number which was equally distributed among Somalia's existing and emerging federal member states. The remaining six members are distributed equally between Somaliland and Puntland in recognition of their political status and maturity, according to the Somali Federal Government.



and the emerging Central State. The de facto situation in Sool and Sanaag is similar. The two regions are engulfed in three-way contestation between Puntland, Somaliland and Khaatumo.

Similarly, shared and self-rule have not been clearly spelt out. Several issues thus remain unresolved, such as the division of competences between the federal institutions and the federal member state, and the management and sharing of natural resources and revenues. The substantive issues associated with federalism, in other words, have yet to be agreed upon.

Somalia's lack of political pluralism, democracy, rule of law, open and democratic contestation of power, and functioning government institutions, such as a judiciary and enforcement agency, will affect the growth of federalism. The long absence of a central government has meant that most of the critical institutions that enhance democracy and the rule of law are not yet in place. Lane and Erson observe that, to be successful, federalism requires all its benefits to be implemented, namely well-functioning democratic institutions, a judicial system, integrated national political parties, and appropriate political competitiveness; where such institutions are not present, the democratization process is either stalled or rejected outright.

Though weakened, al-Shabaab still poses a great threat. Its change of tactics to encompass asymmetric warfare and sustained suicide attacks on key SFG targets in Mogadishu, across central Somalia, and in other key areas and countries – actions including, for instance, those against the UN compound in Mogadishu, the Kampala bombings of 2012, the attack on Westgate shopping mall in Nairobi and the killings of Kenya Defence Forces personnel in Somalia – underscore the magnitude of the continued threat it poses despite the recent offensive against it. Somalia's security situation remains fragile and is the biggest challenge confronting the government.<sup>5</sup>

The role of traditional authority has not clearly been spelt out in the current constitutional dispensation. Traditional authorities have for the past several years taken over the role of the state in providing law and security, thereby consolidating their historic role as dispute mediators and enforcers of Somali customary

<sup>5</sup> The attack on the mall in the Kenyan capital, Nairobi, took place in September 2013; the one on Garissa University, Kenya, in April 2015; and in Kampala, Uganda, in July 2010. See Howden (2013).

law. Thus, they are instrumental not only in resolving conflicts between clans but in, for example, establishing relatively stable structures of governance and security in both Somaliland and Puntland. A key example is the house of elders, such as the Guurti in Somaliland, which can prevent escalation and solve political conflicts in the government using traditional conflict-resolution mechanisms. Clearly stating the role of Somali traditional authority in the current constitutional dispensation would be likely to strengthen federalism in Somalia.

## 11. Conclusion

Somali appears to be moving towards a federal system of government. As has been shown, the 2012 Constitution contains such tenets of constitutionalism and federalism as the protection of fundamental rights,<sup>6</sup> the separation of powers, limitations of government power, an independent judiciary, the rule of law and judicial review of administrative actions.<sup>7</sup> Furthermore, the recent establishment of federal member states is encouraging. The success in this regard can be attributed to negotiations, mediation and peace conferences that started at the grassroots and were supported by the national government and international community.

Federalism is hence taking shape, with the government gradually creating democratic space and demonstrating increased accountability and transparency.<sup>8</sup> Similarly, establishment of FMS is encouraging. This has facilitated the growth of a more positive relationship between civil society, local state and federal government, has reduced the governance gap, and has enhanced the legitimacy of the FMS.<sup>9</sup>

Nonetheless, the SFG is still fragile and federalism is underdevel-

6 The protection of fundamental rights falls within the purview of good governance and has increasingly become a defining feature of constitutionalism.

7 See Bellamy (1996) and Ming-Sung (2010). See also Shivji (1991) and Ihonvbere (2000).

8 Abdihakim Ainte notes that “the potential federal member states have emerged at their own initiative through processes of local reconciliation and peacebuilding that are rooted in Somali practice and have largely occurred outside the constitutional process.

9 The mere fact that there are negotiations among clan leaders as well as regional administrators, such as during the Garowe 1 and 11 constitutional conferences, demonstrates a new level of political maturity and will.

oped. The rule of law is not widely applied and there is no political pluralism or open democratic contestation for power. Arguably, this will make the consolidation of federalism difficult. The fact that the Constitution leaves the substance of federalism, that is, the division of powers and sharing of revenues, to be negotiated between the federal government and member states of the federation means that there are unresolved issues that are critical to the success of the system.

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