

Somalia

Legitimacy of the Provisional Constitution

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On 1 August 2012 Somalia adopted a Provisional Constitution marking the official end of transition and the establishment of the new Federal Government. A month later, on 10 September, Hassan Sheikh Mohamud was appointed President of the Republic of Somalia, bringing a dramatic change to the political landscape of the country as for the first time in over 20 years the presidency had been decided within Somalia.

Somalia's constitutional process dates back to the establishment of the Transitional Federal Charter (TFC) in 2004 and has been a cornerstone of the September 2011 Roadmap to chart Somalia's path out of transition and towards permanent and representative government. The UN Special Representative of the Secretary-General (UNSRSG), Augustine Mahiga, described the Roadmap as "the most inclusive process of all the efforts to rebuild Somalia's governance", with the UN's role merely to "facilitate a Somali-led process". Mahiga signed the Roadmap along with six Somali "Principal" signatories: the President and Prime Minister of the Transitional Federal Government (TFG), the Speaker of the Transitional Federal Parliament, the President of Puntland, the President of Galmudug, and the Chair of the Islamist group *Ahlu Sunna Wal Jama'a*.

But the legitimacy of the Roadmap and constitutional process is contested. In early January 2012 185 Somali parliamentarians wrote to the UN to protest that the Roadmap had not been submitted to parliament for approval, while Somali diaspora leader Abdi Dirshe has complained that the level of external oversight of the Roadmap has undermined Somalia's sovereignty. Quoted in the UK *Daily Telegraph* in August 2012, Abdirashid Hashi of the International Crisis Group described the Provisional Constitution as essentially "handing over from one interim authority to another, from one transition to another".

The constitution has a peacebuilding function in defining an acceptable social contract between state and society

– the lack of which has been a key element in civil war and failed reconciliation in the country. As Sally Healy pointed out in *Accord 20*, the Somali social order places great importance on contracts (*xeer*) that regulate relationships among Somali clans and lineage groups. And so the level of consequence – and controversy – of the constitution for many Somalis is no surprise, but makes the legitimacy of the constitutional process all the more important.

The constitutional process

The Provisional Constitution tries to pave the way for a Somali nation that pledges both Islamic and democratic values. It establishes Islam as the state religion and requires all laws to be compliant with *shari'a*. It sets up a federal system based on two levels of government – the Federal Government level and the Federal Member State level, comprising the local governments and the Federal Member State governments. Both levels are elected.

A permanent constitution is to be adopted by public referendum before the end of the first term of the Somali Federal Parliament in 2016. The specific allocation of powers and responsibilities are subject to further negotiations – except for foreign affairs, national defence, citizenship and immigration, and monetary policy, which fall within the remit of the Federal Government.

Other key issues are left open to modification by parliament. The UN *Guidebook on the Provisional Constitution of Somalia* notes that the creation of Federal



Somali delegates hold up the book of the constitution on 25 July 2012 during the National Constituent Assembly meeting in Mogadishu. © Mohamed Abdiwahab/AFP/GettyImages

Member States was highly controversial and so the Provisional Constitution does not create Federal Member States, but entrusts this responsibility to parliament to decide on their number and demarcation.

Amendments to the Provisional Constitution are to be prepared by an Independent Provisional Constitution Review and Implementation Committee – a 5-strong team of independent legal experts. This will operate under the oversight of a parliamentary Provisional Constitution Review and Implementation Oversight Committee, comprising members of both houses of the Federal Parliament, and one additional member per existing federal member state.

The constitutional process was built on three primary objectives: to unite the republic; to lend legitimacy to future political leaderships; and to introduce institutions that are representative, responsive and accountable to the people. The new constitution was born out of a near decade-long review process since the founding of the TFG in 2004, and was a stipulation of the TFC. The TFC further provided for an Independent Federal Constitution Commission (IFCC), established in 2006 and mandated to draft a federal constitution.

In 2008 a new political agreement was reached between the TFG and the Alliance for the Re-Liberation of Somalia (ARS) – an Islamist association established in 2007 out of the deposed Islamic Courts Union (ICU) and other Somali

leaders opposed to the TFG. After the election of former ICU Chair Sheikh Sharif as TFG President in 2009, the size of the IFCC was doubled in 2010 with the addition of fifteen new members in order to reflect and accommodate ARS interests. A Committee of Experts (CoE) was subsequently set up in 2011 to support the work of the IFCC, comprising nine members and led by Legal expert Mohamed Jawari. The CoE was established in part to try to offset growing misgivings over the competence and independence of the IFCC, which many Somalis saw as increasingly deviating from the TFC mandate and as being politically motivated.

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The IFCC agreed a Consultative Draft Constitution in July 2010 and various sectors of society were consulted on it over subsequent months. The CoE and the IFCC then revised the 2010 Consultative Draft Constitution and produced a Harmonised Draft Constitution in early 2012,

following which, at a meeting in Addis Ababa in April, the Principal Roadmap Signatories (ie without the UNSRSG) established a Technical Review Committee to assess and amend the Harmonised Draft.

Two consultative conferences were held in Garowe, Puntland, in December 2011 and February 2012, involving the TFG and other Somali stakeholders. These agreed the “Garowe Principles”, which developed language on the content of the constitution, for example relating to federalism, and also outlined plans for a National Constituent Assembly (NCA) to finalise the Provisional Constitution.

The Garowe Principles agreed that the NCA would comprise 825 delegates selected according the 4.5 formula of fixed proportional representation of Somali clans – introduced at a national reconciliation conference in Sodere, Ethiopia, in 1996–97. The formula allocates political representation (for example, in relation to distribution of parliamentary seats) equally to the four major Somali clan-families, Darood, Digil and Mirifle, Dir and Hawiye, with the remaining 0.5 allotted to “minority clans” and to women. NCA membership would include “youth/students, business people, diaspora, religious and traditional leaders, professionals, scholars and existing and emerging administrations”. At least 30 per cent would be women. Women were to be nominated for NCA membership first to ensure the minimum quota would be reached, while nominations that failed to return 30 per cent women would be rejected.

Nominations for NCA membership were made by the Principal Roadmap Signatories, assisted by traditional leaders and civil society, and overseen by a 135-member Technical Selection Committee to evaluate candidates. Nominations were verified by an Interim Independent Electoral Commission comprising 15 voting members – again based on the 4.5 formula – who had to be “patriotic, honest, of good standing in Somali society”. The NCA met for eight days in July 2012 and finally adopted the Provisional Constitution on 1 August 2012.

Legitimacy of the constitutional process and its outcome

Agreement on a Somali Provisional Constitution is a major achievement. But many Somalis have serious doubts about the legitimacy of the constitutional process and its outcome. Since 1 August 2012 there have been numerous delays in carrying the process forward towards a permanent document – such as in the establishment of independent commissions to advise on key issues such as human rights, boundaries and federation, elections, security, and truth and reconciliation.

A fundamental problem relates to representation. Many Somalis see the 4.5 power-sharing formula as crude and simplistic. Marginalised groups and minority clans in particular perceive it as having reduced their political representation and access to authority. This resentment has been transferred to the constitutional process, as the 4.5 formula has been used to select membership of key constitutional decision-making bodies – including the IFCC and the NCA. Somali analyst Professor Ayfare Abdi Elmi has observed that the use of the 4.5 formula in the selection of the IFCC encouraged many politicians to see it as an employment opportunity for their allies and affiliates, while paying scant attention to the technical qualifications for the job.

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The haste and lack of transparency of the selection process for NCA membership has also raised concerns among a number of constituencies in Somalia. Jason Mosely has described how, after the Garowe II meeting in February 2012, the Principal Roadmap Signatories on 23 May finally agreed an “aggressive” timeline and criteria for selection, significantly streamlining the process for vetting membership from the more rigorous framework presented in the Roadmap. The signatories also strengthened the role of technical committees to advise elders on NCA membership selection, thereby establishing key points where less representative or accountable bodies could significantly influence the process. Perceptions of a lack of checks and balances to ensure accountability of the NCA to the people of Somalia have further raised questions over its mandate to amend the draft constitution and whose interests these amendments would serve.

Differences over the substance of the constitution have centred on federation as an appropriate framework for establishing more representative governance: whether Somalia should be federated at all (parliament is divided into two distinct camps that support or oppose a federal system); or, more specifically, over the nature of the federal system that should be adopted. Many Somalis see federalism as overly complex, alien and potentially divisive, and a threat to the homogeneity of Somalia’s population.

The role of sub-national entities is especially difficult, particularly in relation to clans. A 2012 Chatham House report noted that the TFG failed to realise a federal framework for Somalia that could maintain national coherence at the same time as allowing space for the emergence of sub-national entities. It identified a discrepancy between a nominal commitment to federalism and decentralisation and the reality of the TFG's focus on statebuilding efforts to develop central institutions. In fact, potential federal entities have emerged at their own initiative through processes of local reconciliation and peacebuilding that are rooted in Somali practice and have occurred largely outside the constitutional process. There are fears among many Somalis that the development of new and competing sub-national entities could threaten Somali national identity and strengthen clan-based association and identification, which has been a major component of violence since 1991 and remains a threat to national government.

A key challenge to the domestic legitimacy of the constitutional process relates to perceptions of the level of international engagement and the extent to which the process has been engineered and accelerated to hit

external benchmarks. The public consultation phase of the constitutional process was truncated under pressure (widely perceived as coming from international partners) to deliver a draft constitution before the end of transition on 1 August. This not only raised questions over the wisdom of linking the constitutional process so closely to political developments, but also contributed to waning popular trust in and ownership of the process.

Ownership, transparency, representation and accountability

The birth of the third Somali republic presents a real chance to develop a common framework of social and political values for Somalia. The mere fact of negotiations among clan leaderships, as well as among regional administrations, such as during the Garowe I and II constitutional conferences, demonstrates a new level of political maturity and will. For a country like Somalia emerging from decades of violent conflict, the current constitution-making moment should provide an opportunity for its people to reflect and negotiate their future national direction, as well as to enhance the social contract between state and citizen.

BOX 1

Timeline of the Somali constitutional process: 2004–12

2004 Transitional Federal Charter adopted. Transitional Federal Government (TFG) established and provides for the Independent Federal Constitution Commission (IFCC).

2006 IFCC established to work on a new federal Constitution.

2008 Moderate wing of the former Islamic Court Union (Alliance for the Re-Liberation of Somalia – ARS) included in the TFG and 275 new Members of Transitional Federal Parliament sworn in.

2009 Sheikh Sharif (former Chair of the Islamic Court Union) elected as new TFG President.

2010 – January Fifteen new commissioners of IFCC sworn into office. **July** Consultative Draft Constitution presented by IFCC and public consultation process commenced.

2011 – September Roadmap to End the Transition adopted by the Somali Roadmap Signatories. **November** Committee of Experts (CoE) established by the Roadmap Signatories to complement the work of the IFCC, comprising nine “experts selected based on their knowledge and experience in law”.

December Garowe I Constitutional Conference introduces a National Constituent Assembly (NCA) to replace the national referendum in the adoption of the new Constitution.

2012 – February Garowe II Constitutional Conference

develops procedures for the adoption of the new Constitution, and makes substantive decisions about the content of the new Constitution, eg to establish a parliamentary system of government and ways forward for federalisation. **March** Galkaayo Agreement introduces Somali Traditional Elders as a mechanism to select members of the NCA and the new Federal Parliament.

April Harmonised Draft Constitution presented by IFCC and CoE. Addis Ababa Agreement by the Roadmap Signatories establishes the Technical Review Committee (TRC) to review and amend the Harmonised Draft. **June** Nairobi Agreement by the Roadmap Signatories transforms the TRC into the Technical Facilitation Committee (TFC) to finalise the Harmonised Draft Constitution and establishes the Technical Selection Committee to vet members for the NCA and the new Federal Parliament. TFC publishes the Draft Provisional Constitution for presentation to the NCA.

1 August Provisional Constitution adopted by the NCA.

End of transition. **20 August** The 275-member Federal Parliament of Somalia inaugurated. **28 August** A new Speaker of the Federal Parliament selected. **September** A new President of the Federal Republic of Somalia selected. **6 October** A new Prime Minister of the Federal Republic of Somalia appointed. **13 November** The Council of Ministers endorsed by the Federal Parliament.

Adapted from the United Nations Political Office in Somalia

But fundamental flaws in the constitutional process have undermined the legitimacy of the Provisional Constitution for many Somalis, provoking controversy over issues of ownership, transparency, representation and accountability as key actors like civil society organisations and political parties have felt excluded. The constitutional process grew from the TFC and transitional institutions, whose legitimacy was fundamentally challenged as having been developed outside Somalia with too much foreign influence. Important parts of the constitutional process have subsequently been modified to respond to events and political developments – for example the expansion of the IFCC in 2010, or the streamlining of NCA selection process. The common perception that important constitutional decisions have occurred behind closed doors has not helped to ensure a broader acceptance of the Provisional Constitution.

There are some measures that can potentially address these flaws. For example, building local technical capacity through training and support for Somali constitutional experts who can then oversee implementation of the constitutional process and thereby increase local ownership. Institutions and independent commissions that are stipulated in the Provisional Constitution are behind schedule and should be established forthwith to ensure public discussion and promote broader engagement and ownership of the constitution as the process progresses.

The international community can help by supporting both formal and informal governance structures in Somalia to engage traditional clan-based arrangements in order to accommodate the realities of authority and power in Somalia – in other words, developing a hybrid approach to infuse constitutional reform in the local context rather than imposing it. The government will need to monitor progress closely to ensure the gains are felt by both majority and minority groups. Divergent views should be welcomed and the state must remain self-critical in its pursuit of democratic self-governance.

There is a real opportunity for more emphasis on dialogue and reconciliation to address key debates that surround the constitutional process: between communities and clans to respond to clan rivalries; and between national and sub-national administrations to mitigate state fragmentation. Somaliland's declaration of independence is still contentious in relation to the provisional document. Although members of Somaliland clans have been included in Somali institutions, Somaliland still rejects the idea of a unified Somalia and can point to a constitution of its own.

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