A STUDY OF DECENTRALISED POLITICAL STRUCTURES FOR SOMALIA*:
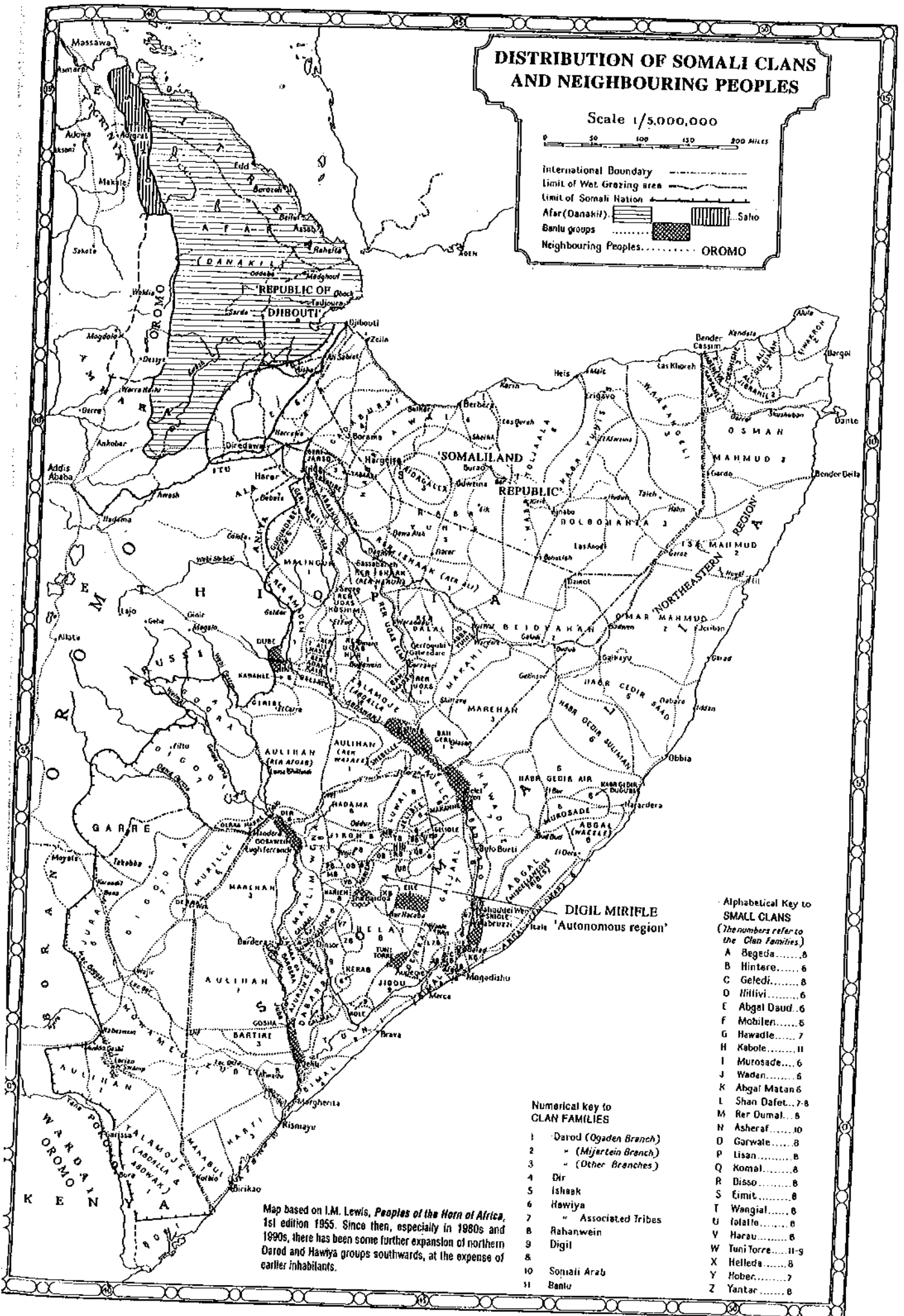
A MENU OF OPTIONS

* The term 'Somalia' refers to what was formerly known as the Somali Republic.

DISTRIBUTION OF SOMALI CLANS AND NEIGHBOURING PEOPLES

Scale 1/5,000,000

0   50   100   150   200 MILES

International Boundary	— · —
Limit of Wet Grazing area	— · · —
Limit of Somali Nation	————
Afar (Danakil)	
Saho	
Bantu groups	
Neighbouring Peoples	OROMO

Alphabetical Key to SMALL CLANS
(The numbers refer to the Clan Families.)

A Begeda 8
B Hintere 6
C Geledi 8
D Hillivi 6
E Abgal Daud .. 6
F Mobilen 6
G Hawadle 7
H Kabole 11
I Murosade 6
J Wadan 6
K Abgal Matan 6
L Shan Dafet .. 7-8
M Rer Dumal ... 6
N Asheraf 10
O Garwale 8
P Lisan 8
Q Komal 8
R Disso 8
S Eimit 8
T Wangial 8
U Ialalfa 8
V Harau 8
W Tuni Torre 11-9
X Helleda 8
Y Hober 7
Z Yantar 8

Numerical key to CLAN FAMILIES

1 Darod (Ogaden Branch)
2 " (Mijertein Branch)
3 " (Other Branches)
4 Dir
5 Ishaak
6 Hawiya
7 " Associated Tribes
8 Rahanwein
9 Digil
&
10 Somali Arab
11 Bantu

DIGIL MIRIFLE 'Autonomous region'

Map based on I.M. Lewis, *Peoples of the Horn of Africa*, 1st edition 1955. Since then, especially in 1980s and 1990s, there has been some further expansion of northern Darod and Hawiya groups southwards, at the expense of earlier inhabitants.

'Ceel Na Uma Qodna, Cidina Uma Maqna.'

(*'The well is neglected and empty,
and there is no one working on our behalf.'*)

- Somali proverb

Preface

This study presents a menu of options for setting up decentralised political structures and forms of government. It arose from discussions between representatives of the European Union and other members of the Somalia Aid Coordination Body (SACB) with Somalis from all parts of the country and many different political affiliations. After the trauma of civil war and, indeed, the disintegration of the Somali state, many Somalis believe that some form of radical decentralisation of power may represent the only hope for long-term peace and reconstruction. At the same time, since independence they have had little or no opportunity to work out their own forms of tailor-made decentralised government, and have been too preoccupied with the politics of survival to have been able to study experience elsewhere in the world. Hence this report.

The opportunity for such experimentation now exists. Indeed over the past two years, Somalis have established different forms of administration and justice in several parts of the former Republic. These developments are encouraging. It is for the Somalis themselves, and not outsiders, however well-intentioned, to determine how they should govern themselves. It cannot be emphasised too strongly that the authors of this report are not recommending any particular form of government. Our brief was simply to prepare a menu of options. Nor do we have anything to say about the number of states - one, two or many - which should be established to replace the former unitary Somali state; nor about where the boundaries between such states, and between regions and districts within them, should be drawn. Similarly it is not for us to say whether any future Somali state or states should be based on individual clans or groups of clans. All these are questions for the Somalis themselves and for no-one else.

We are aware that as of July 1995, the former Somali Republic is split up into at least three largely self-governing units: the 'Republic of Somaliland', Northeastern regions, and the Digil Mirifle autonomous area. Of these, so far, only Somaliland has declared itself independent, although it has not received recognition by the southern Somali groups, or internationally. The structures discussed here can be applied, as Somalis choose, at different levels. Thus our report neither endorses the views of those who wish to maintain Somaliland's independence, nor of those who oppose it.

Our purpose was to respond to a request for information about the implications of different ways of decentralising political authority to prevent one person or a group from usurping and/or monopolising power at the centre. In each chapter we have tried to relate the options, derived from constitutional experience around the world, to the unique circumstances of Somali political culture. The reality, here, is that traditional Somali society could not be more 'decentralised', and remote in terms of political organisation from the modern 'state'. The instability inherent in this uncentralised, segmentary system is reinforced today by the easy access to automatic weapons throughout the country. More generally, state formation in such uncentralised conditions rarely takes place without some form of external

intervention. The classic scenario, brilliantly delineated from his own experience, by the fourteenth century north African social historian, Ibn Khaldun, traces how states are formed by the conquest of one culturally distinct group by another.

State formation can occur less violently in other ways, however, often involving technological and economic change, when charismatic mediators or political entrepreneurs play a key role as foci for the crystallisation of power. Despite the uncentralised, segmentary basis of their traditional culture, Somalis have had over a century of involvement (however loosely) in 'modern' state structures. Our hope, therefore, is that this report will prove useful to Somalis as they debate the range of problems and possibilities confronting them.

For comparative purposes, we have referred to practice in centralised unitary states, such as the now-defunct Somali Republic at different points in the report. In the main, however, the emphasis of the report is on three territorially-based models of decentralised government - i.e., those provided by a confederation, a federation, and a decentralised unitary state - and one community-based type of power-sharing, sometimes called consociationalism. The essence of this type of political arrangement is its adaptability, and it can therefore be combined with any of the three main models. In addition, in the final chapter, we have raised the possibility of a non-governmental form of decentralisation, namely the creation of functional agencies to provide services such as veterinary care or fishery protection. These might have inherent long-run appeal for Somalis, but could be particularly appropriate in the period while the political future of the Somali nation is being debated.

The report has been organised so that it can be read as a whole, or in parts, depending on the special interest of the reader. A briefer and more general account is contained in the overview that precedes the report, and this is also being made available in Somali. We have tried to avoid technical terms, but where this has not proved possible, they are explained in a glossary at the beginning of the report.

Professor Ioan M. Lewis and Professor James Mayall
Co-Directors, The Somalia Project
The London School of Economics and Political Science

Contributors

John Barker, Co-Project Manager, specialises in international and constitutional aspects of the protection of human rights. In Malawi, he has coordinated legal and humanitarian projects, supported the transition to multi-party democracy, and has facilitated the drafting of the new constitution, anti-corruption legislation, and the strengthening of the judiciary.

Dr E.A. Brett is a Senior Lecturer and Programme Director at the Development Studies Institute at the LSE. He has been advising on political and economic reconstruction and institutional change in Uganda for the last ten years. His publications include *Providing for the Rural Poor: Institutional Decay and Transformation in Uganda* (1993).

Peter Dawson is a retired Senior Lecturer in the Government Department at the LSE. He specialises in issues related to development and administration. He was formerly an Administrative Officer for the Government of Northern Nigeria, a UNDP consultant on decentralisation to the Government of Sri Lanka, and a consultant on public sector management to the Government of Malaysia.

Professor Ioan M. Lewis, FBA, Co-Director of The Somalia Project, is widely regarded as one of the foremost authorities on Somalia. He has been teaching in the Anthropology Department at the LSE since 1969. He has written numerous articles and eighteen books, five of which describe different aspects of Somali culture and society, and include, *Blood and Bone: The Call of Kinship in Somali Society* (1994); *Understanding Somalia* (1993); and *A Pastoral Democracy: Pastoralism and Politics among the Northern Somali of the Horn of Africa* (1982).

Professor Patrick McAuslan is in the Department of Law at Birkbeck College, and was previously Professor of Public Law at the LSE. He specialises in constitutional and public law, with special reference to administrative justice, urban management, and land policy. He has taught law in Tanzania, worked in the United Nations Centre for Human Settlements, and has advised many countries in Africa and Asia. He has also drafted laws on land and the environment for many countries in Africa, Asia and the Caribbean. Amongst his publications is *Public Law and Political Change in Kenya* (with Y.P. Ghai).

Professor James Mayall, Co-Director of The Somalia Project, has been teaching in the International Relations Department at the LSE since 1966. His area of expertise includes African politics and nationalism, and a recent publication, *Nationalism and International Society* (1990), won the W.J.M. McKenzie Prize in 1991. He also edited and contributed to *The New Interventionism: UN Experience in Cambodia, Former Yugoslavia and Somalia*, which is being published by Cambridge University Press.

Dr Brendan O'Leary is a Reader in Political Science in the Government Department at the LSE. He specialises in national and ethnic conflict regulation, and recently authored a constitutional proposal for the government of Northern Ireland (1993). He has also been serving as an adviser to the British Labour Party. Recent books include: *Theories of the State* (1987), *The Asiatic Mode of Production* (1989), *The Politics of Ethnic Conflict Regulation* (1993), *The Politics of Antagonism* (1993) and *Explaining Northern Ireland* (1995).

Dr Karin von Hippel, Co-Project Manager, holds the John D. and Catherine T. MacArthur Foundation Fellowship at the Department of War Studies, King's College. Her publications focus on issues related to nationalism, including sovereignty and self-determination in Africa, democratisation and humanitarian intervention, and irredentist disputes.

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Glossary

Canton
A provincial unit of government in the Swiss Federation; equivalent of a state or province.

Clan
A large kin-based group comprising component lineages.

Clan-Family
A group of related clans, the largest basis of identity within the Somali nation.

Decentralisation
There is no firmly agreed definition of this term in the literature but most authorities recognise that it embraces three concepts, which are:

a) **Delegation**. This usually entails the assignment of a defined decision-making power or powers by a superior authority to a subordinate (individual or agency). The superior authority is able to over-ride the decisions of the subordinate and ultimately remains responsible and answerable for the exercise of the power. Where responsibility for the performance of specific tasks is delegated, the rules will be defined in a way that leaves little scope for independent decision making.

b) **Devolution**. This also entails the assignment of decision-making power by a superior to a subordinate individual or agency, but in this case the subordinate is directly answerable to some authority other than the superior (e.g., a local electorate). Once devolved the power is exercised independently of the superior, who cannot override the subordinate's decision.

c) **Deconcentration**. A geographical or locational concept (as distinct from (a) and (b) above, which can be called functional concepts). It entails the physical dispersal of the people or offices exercising an administrative or managerial function from one or a few locations to several or many locations.

The use of the term *Decentralisation* is complicated because it is commonly used to describe both some existing set of governing arrangements as well as the process by which powers are or may be dispersed.

The exercise of decentralised powers by local and regional governments has frequently been beset by two problems. The first is that in many instances (especially in recent African history), we have been able to observe extensive legal and constitutional provisions for decentralised government but without adequate financial provision to sustain the exercise of the decentralised power by the subordinate authorities. An autonomous power without a corresponding autonomous capacity to raise the revenue to support it is liable to become an irrelevant sham. The second problem is that the effective exercise of decentralised powers necessitates the recognition and acceptance, by both the subordinate and the superior

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authority, of the scope and limits of each other's jurisdictions. A defined and accepted set of rules is therefore an essential precondition for the successful exercise of multi-level government.

De Facto
Any set of arrangements that actually exist and are widely recognised as existing. Explicitly or implicitly contrasted with *de jure* (see below).

De Jure
Any formally and usually legally, defined set of arrangements. The term is generally used to draw a contrast with a *de facto* (see above) set of arrangements.

Dia (Arabic) or *Mag* (Somali)
Blood compensation.

Dia-Paying Group
Kinsmen of a clan segment who pay and receive blood compensation jointly; a basic political unit.

Heer/Xeer
Customary law, contractually based

Lineage
Kinship group based in Somali society on descent traced in the male line to a common ancestor whose name is taken to designate the group formed by his descendants.

Macroeconomic
Large-scale economic factors, e.g., money supply, fiscal policy, balance of payments, or national productivity.

Majoritarian
An electoral system that gives power to the party winning a majority of seats in an election.

Merit Good
A public good or service that is accepted as an entitlement of all citizens, such as primary education.

Octroi
A duty levied on goods entering a town.

Ombudsman
An official appointed to investigate individual's complaints against public authority.

Organic Law
A law setting out the formal constitution of a state.

Oromo
Neighbours of the Somalis, a very large ethnic group which speak a related Cushitic

language.

Plurality Rule (or *First-Past-the-Post*)
A type of rule which gives a seat to the candidate with the most votes, irrespective of whether it is a majority or not.

Qadi (Kadi)
An Islamic magistrate.

Shari'a Law
Islamic law, in the Somali case, of the *shafi'i* school (Sunni).

Somali Segmentary System
A political system, where the basic units are kinship-groups (lineages) which form and dissolve according to the political context. Essentially all groups are relative and formed reactively in confrontation with opposed units. Lineages unite and divide in Chinese-box fashion according to the situation. There are no completely stable groups. Political identity is volatile and multiple, as within the Somali nation, individuals, in effect, may carry different passports.

State
An internationally recognised territory, which may be either a sovereign entity or a provincial unit within a federation.

Zero-Sum
Describes any distributional arrangement in which the quantity of resources to be allocated is - or is believed to be - fixed and limited, so that gains by any one recipient must be at the expense of some or all other recipients.

Abbreviations

ECJ	-	European Court of Justice
EC	-	European Community
EU	-	European Union
FAO	-	Food and Agriculture Organization
IGADD	-	Inter-Governmental Authority on Drought and Development
IMF	-	International Monetary Fund
LSE	-	London School of Economics and Political Science
NGO	-	Non-governmental organisation
PNG	-	Papua New Guinea
SNM	-	Somali National Movement
SSDF	-	Somali Salvation Democratic Front
SYL	-	Somali Youth League
UAE	-	United Arab Emirates
USA	-	United States of America
USC	-	United Somali Congress

Somali Clan-Families

Arabian Ancestry

Irrir

Digil   Rahanweyn   Hawiye   Dir   Isaq   Darod
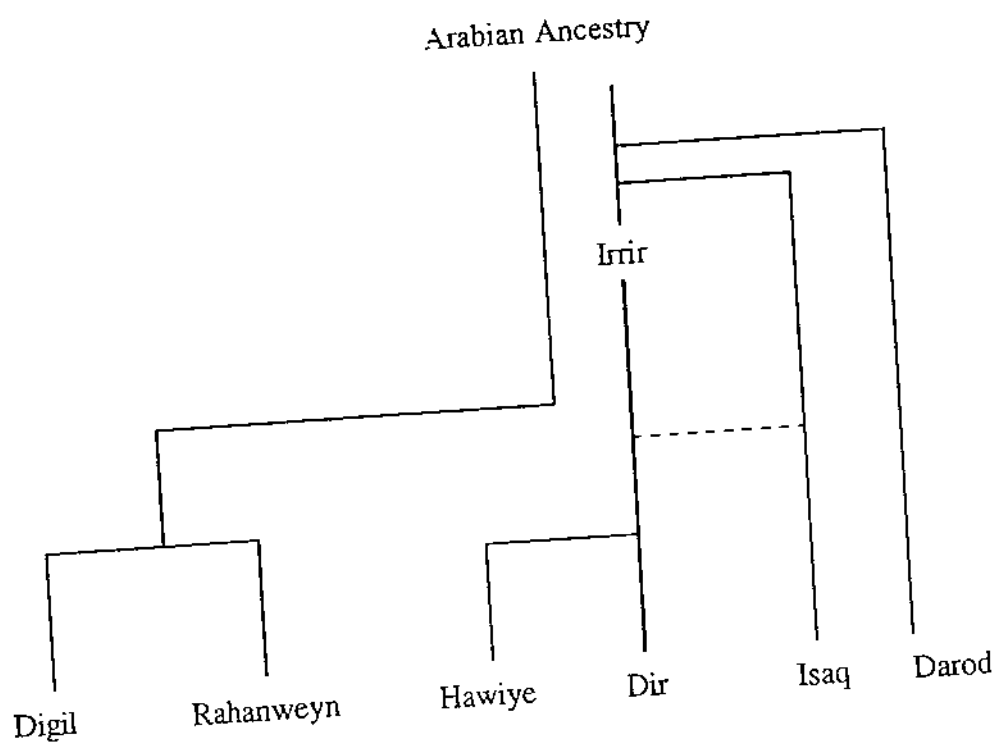
Major Somali Clans by Clan-Family

1 Dir clan-family
   Ise
   Gadabursi
   Bimal

2 Isaq clan-family
   Saad Muse ⬂
              →Habar Awal
   Ise Muse ⬈

   Ayub

   Habar Yunis ⬂
              →Habar Garhajis
   Aidagalla ⬈

   Arab

   Mohamed Abokor ⬂
   Ibrahim. ⬂
              → Habar Toljaalo
   Muse Abokor ⬈
   Ahmad (Toljaalo) ⬈

3 Darod clan-family
   Marehan
   Ogaden

   Majerteyn ⬂
   Dulbahante → → Harti division
   Warsangeli ⬈

4 Hawiye clan-family
   Hawiye associate: Hawadle
   Waadan
   Habar Gidir
   Abgal
   Murasadde
   Gaaljaal

5 Digil clan-family
   Dabarre
   Jiddu
   Tunni
   Geledi
   Garre

6 Rahanweyn clan-family
   33 clans, in two loose alliances

   Maalinweyna ⬂
   Harien ⬂
   Helleda → → The 'Eight'
   Elai ⬈
   and others ⬈

   Gassar Gudda ⬂
   Hadama ⬂
   Luwai → → The 'Nine'
   Geledi ⬈
   and others ⬈

Gulf of Aden

Bosasso

DJIBOUTI
Djibouti

AWDAL
Borama

Berbera

Erigavo

BARI

SANAG

'Somaliland Republic'

Jijiga

Hargeisa

Burao

Harar

TOGDER

SOOL

Garowe

NUGAL

'Northeastern Region'

ETHIOPIA

Galkayu

MUDUG

miles   200

0

km   200

Dusa Mareb

GALGADUD

Belet Weyne

BAKOL

HIRAN

Mandera   Luq

Bulohawo

Baidowa

MIDDLE SHEBELLE

GEDO

'Digil Mirifle Region'

Algoi   Mogadishu

BAY   S O   BENADIR

Merca

Brava

LOWER SHEBELLE

Liboi

MIDDLE JUBA

Indian Ocean

LOWER
JUBA

Kismayu

KENYA

S O M A L I A

AFRICA

Executive Summary

This study describes four models of decentralised constitutional government, focusing on aspects that may be appropriate for Somalis. The four models are: (1) a confederation; (2) a federation; (3) a decentralised unitary state with strong guarantees of local or regional autonomy; and (4) a consociational, non-territorially based form of decentralisation. It then looks at different elements of government in modern democracies, such as the political economy, the administration, the judiciary, defence and foreign relations, and electoral designs, and outlines how each would be organised in the different models. The report concludes with a menu of options, and considers a final form, which would be the most decentralised: functional cooperation, which could be applied to however many states Somalis decide they want to establish, or even without the creation of formal state machinery at all. The report does not assume that the former Somali Republic can only be reconstructed as a single state.

Introduction: The Uncentralised Somali Legacy
by Professor Ioan M. Lewis

Today, most Somalis under the age of 30 have no knowledge of the democratic structures that were in place before Mohamed Siad Barre's military rule began in 1969, nor of the colonial period. In traditional Somali politics, all decision making is conducted democratically (although formally excluding women), by segmentary groups of kinsmen whose patterns of alliance and confrontation are fluid and inherently unstable. Pastoralists are individualists who meet in general assemblies, where all adult male family heads (or elders) seek consensus, instead of taking decisions by majority vote. Since so many males can be elders, leadership is often difficult to maintain for very long. In this uncentralised, rather than merely decentralised society, there is thus no tradition of a centralised state nor any set political offices or ranked leaders.

The two most stable elements in Somali society are: 1) the 'dia paying group': the contractually defined kinship group within clans or subclans, which acts as a unit in paying and receiving damages for injury and death; and 2) the clan: a grouping of several related 'dia paying groups'. Clans usually live within a roughly defined territory, trade together, share and maintain wells and other resources (camels bear a common clan brand). There are approximately 100 clans in this country of some 5 million inhabitants, though the size and power of each clan varies considerably. Pastoral nomads belong to clans that are larger and more widely spread out than clan members who live by cultivating and in urban areas. All clans belong to a clan family - a group of related clans which is the highest level of political solidarity within the Somali nation or ethnic group.

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Clan Culture

The six Somali clan-families are the Dir, Darod, Isaq, Hawiye, Digil and Rahanweyn (also known as Digil-Mirifle). The Isaq live primarily in the former British Somaliland; the Digil and Rahanweyn are agro-pastoralists who live between the Juba and Shebelle Rivers, where they produce grain and have their own distinct culture and language (*May* or *Maymay*). They also adopt migrants from other clans. The Darod and Hawiye clans are the most widely distributed. There are also marginal Bantu groups along the rivers, other minority urban communities (some of Arab origin), and blacksmiths, leather-workers, and hunters who may seek to maintain retain separate status from the Somali clan structure.

Somali men are traditionally either warriors or men of God. Today, almost every male has an automatic rifle, and some have even heavier weapons, which constitute a serious obstacle to the formation of governmental structures. The country thus now consists of clans and unstable clan-alliances with their militias, as well as war lords with free-lance armed forces. There are also, in some areas, small independent Islamic communities, often with their own militias, providing educational and medical facilities and offering support to orphan war victims. In some urban settings, particularly, where other patterns of social control are failing, a fundamentalist style of Islamic law is being applied strictly, controversial though this is for many Somalis. There is in fact a deep-seated tension between universalistic Islam and particularistic local customary values and allegiances.

Over the past five years, there have been significant movements of population as people have pushed into the south, where economic and agricultural opportunities are greater. There has also been some 'clan-cleansing' during the same period, creating substantial numbers of refugees and displaced persons. While pasturage is traditionally not owned by specific groups, today clans are trying to maintain control over some regions, especially where there are water points and trading centres. In the absence of any effective central government, clan elders are also consolidating their power by making decisions in local clan councils, often in co-operation with militias, who provide informal police functions.

The Colonial and Post-Colonial Experience

There was no Somali state before European colonisation, which divided the nation into five parts (French, British, Ethiopian, Italian and Kenyan). This division ultimately served to unite Somalis, giving rise to Somali nationalism. After independence in 1960, which brought together the British and Italian Somalias, formal local councils were set up and elections held. The Italian legal system was largely adopted, while common features of Somali customary law continued to be applied alongside the European codes and *shari'a* law. The new state (the Somali Republic) was divided into eight regions with 59 districts, administered by regional and district governors.

The desire to unite all Somalis under one banner encouraged national solidarity cutting across clan ties, but created conflicts with neighbouring states, especially Kenya and Ethiopia. This unity lasted until the late 1960s when Mohamed Haji Ibrahim Egal, the new prime minister, made peace with the two neighbours. In what proved to be the last civilian elections held in 1969, most voters and candidates behaved according to their clan identifications, with 1,002 candidates contesting the 123 seats in the National Assembly.

Military Rule

In October 1969, General Mohamed Siad Barre took over in a military coup. Siad Barre developed a highly centralised, totalitarian state, and tried unsuccessfully to abolish clan behaviour. He applied what he termed 'scientific socialism'. Inspired by Marx and Lenin, Siad ruled through a revolutionary council, which effectively favoured the Darod clans, and was adept at manipulating clan rivalry in choosing ministers.

After the crippling 1975 drought the government adopted relief measures which displaced many northern nomads to the south, where they were settled in agricultural and fishing communities. Both activities were despised by the nomads, and many preferred to survive on food hand-outs while rebuilding their herds. Siad supported the Ogadeni guerillas (his mother's clansmen) in their secessionist struggle in Ethiopia, which by the late 1970s was gathering momentum and led to all-out war in 1977/78. This proved disastrous as Somalia had underestimated the strength of external support for Ethiopia and lost the war. Defeat and the enormous number of Ogadeni refugees who fled into Somalia gradually destabilised Siad's regime. The former Soviet Union had abandoned Somalia for the greater prize of Ethiopia, and Siad desperately switched allegiance to the West to gain assistance. As western aid gradually increased, the national economy collapsed, and Somalia became dependent on this aid for survival, although the informal economy thrived.

Current Patterns of Wider Alliance

Siad's peace agreement with Ethiopia in 1988, his arming of friendly clans to fight his opponents, the liberation of the 'Republic of Somaliland' by the Isaq guerillas, of Majerteynia by the SSDF, and his own overthrow in 1991 all helped to forge the current Rambo-style political economy.

Clans are not the only political units on the ground today, and, following wider economic and other strategic interests, are themselves involved in shifting patterns of alliance. Outside Mogadishu, there are currently at least three more ambitious political groupings, each with its own specific strengths and weaknesses: 1) 'Republic of Somaliland'/North-West, based on the former Somaliland Protectorate, and including the Isaq clans and their allies in the Gadabursi, Ise, Warsangeli and Dulbahante clans. The main port is Berbera, the capital Hargeisa; 2) North-East (Regions), based on the Majerteyn clan. The main port and capital is Bosaso; 3) Digil and Rahanweyn (Mirifle) alliance of clans based in the Inter-Riverine region of southern Somalia. The capital is Baidoa.

All three regimes claim local autonomy, but only Somaliland has so far asserted full independence (without achieving international recognition). This reflects the localisation of the Isaq and associated clans. The clan connections and interests of the SSDF Majerteyn in the North East, in contrast, extend far outside this region into the southern part of Somalia (through the Harti grouping). Here since June 1995 the demographically dominant Hawiye have two 'governments' based in different parts of the old capital, Mogadishu, and variously claiming 'national' status.

The Challenge

In conformity with their traditionally uncentralised political culture, the majority of those Somalis who feel a need for modern government (and not all do) advocate a lightly administered, decentralised system. Since Somalis have so energetically 'rolled back the

frontiers of the state', it will be difficult to establish decentralised and flexible political structures that can accommodate the powerful inter-clan conflicts that pervade their politics. The problems are compounded by the widespread distribution of modern weapons and the practice of voting with the gun which has become so deeply embedded. The challenge facing Somali political leaders will be to persuade people that there are general common interests that could be best served by wider forms of political structures than exist today. They will then have to establish (perhaps along the lines suggested in our Menu) loosely articulated forms of political organisation capable of securing public approval.

1. Decentralisation Options for Democratic Reconstruction

Four decentralised models of government are outlined in this report, drawn from the experience of other peoples whose history has something in common with that of the Somalis. These are analysed with reference to emerging institutions in the former Somalia. There are three territorially-based models (a confederation, a federation, and a decentralised unitary state), and one community-based model (consociational) that can be combined with any of the territorially-based models.

Decentralised constitutional structures in other parts of the world that have similarly developed through local initiatives should be of interest to Somalis who wish to rebuild one or more states to replace the discredited former republic. It is not yet clear how many states should emerge from the old Somalia. There are three possibilities: 1) to re-establish a united Somalia under either a unitary or a federal constitution; or 2) to create a union or confederation from two or more states; or 3) to form two or more independent states with no constitutional links. Whatever is decided, it need not be permanent. Arrangements can be built into a new constitution that allow for re-unification or secession. Another important issue is where sovereignty, i.e., supreme political authority, should lie. There are three possibilities: 1) sovereignty can rest with all adult Somali citizens; 2) it can also be vested in the constituent territorial units of a Somali state or states; and 3) it can also rest with the clans.

A Confederation
A confederation is a union of separate but equal states linked by international treaties. In confederations, sovereignty rests with the states, whereas in federations it is shared between the centre and the states (or provinces or regions). A confederation is normally created for specific purposes, such as for common defence, free trade, or to prepare for closer political union; and the centre normally acts as a coordinating body only. For example, in many federations, such as Switzerland, Germany, and the USA, a confederation existed before the member states opted for a closer form of co-operation.

In the European Union, which is still more of a confederation than a federation, member states (15 now but there is no limit) agreed to establish common institutions that are responsible for certain areas of policy throughout the Union. Once these functions, such as agricultural policy, are transferred to the centre, they cannot be exercised independently at the state level. In order that each state continues to have some control over these central institutions, provisions in the treaties of union allow each state to veto, or opt out of policies

that the state feels damages its interests.

In some departments, the EU has moved closer to a federation. The European Court of Justice, for example, is considered the highest court for EU members, and thus sovereignty has effectively been transferred to the centre. Its underlying structure, however, remains confederal because the transfer is voluntary, i.e., the Court does not have any power to enforce decisions. European experience here may have potential relevance for Somalis: one of the motives inspiring European union was to prevent a repetition of the two European wars that also engulfed the world in conflict earlier this century. At some point in the future, and in conformity with traditional political values, it would be possible for the different Somali regions or states to create common institutions and policies. Somalis could then work together in central agencies, with representation from each state or region, protected by the sovereign status of each region and by the right to veto, or opt out of unwelcome proposals.

A Federal System

It is probably too early to contemplate any form of centralised authority, but in theory, if enough trust developed between the different Somali groups, they could create a federation, satisfying those who want a more substantial central governing capability, and those who want strong regional governments. In typical federations, free and independent states come together, and transfer a limited amount of sovereignty to the federal institutions, although others have been created by decolonisation, or after a war, such as in Germany, where the purpose was to limit the power of the central authority. The centre and the regions (or provinces) share power, and the centre is unable, on its own authority, to change the constitution. There are three ways of organising federal-provincial relations: 1) the provinces have most of the powers of government, with the centre only exercising limited powers; 2) the centre has most of the powers with the provinces having a limited amount; or 3) the provinces and the centre share powers of government with specific means of mediating disputes between them. It is also possible to grant considerable autonomy – even the right to secede – to some regions within any of these three.

It is important to repeat that forms of government are not irreversible: a federation can become a confederation, and a confederation can develop into a federation. There are, in addition, many types of federation, and models exist that have never been applied. Federations are designed to allow diverse peoples and cultures to live together, with guarantees normally written into the constitution to ensure that the centre does not seize all the power. This is sometimes facilitated by removing the federal capital from a major city and placing it in a small city in an unimportant region. If Somalis wanted a federation, the capital could be moved from Mogadishu.

Swiss experience has some similarities to recent Somali history. Switzerland was forged after civil war, coups in various cantons, attempts at constitution writing, and intervention by outside powers. The federal plan was designed to bring together people torn apart by religious and political differences, all equally suspicious of central government. In the resulting Switzerland, the powers of the centre are sharply defined and limited, whereas those of the cantons are not (Option 1 listed above). The cantons may even have their own constitutions, as long as they do not contradict the federal constitution, and guarantee to continue to govern democratically.

Switzerland also has a collective presidency with seven members who take it in turn to serve as president; this assures that no one person or group takes over. This method has been very successful - there are no Swiss politicians famous outside Switzerland. There are two other governmental institutions. The first, the Federal Assembly, has two chambers, one with representation according to the population in each canton; the other has two representatives per canton. The second is the Federal Court, on which the four languages of Switzerland are represented; and which mediates disputes between the federal government and the cantons, and amongst the cantons themselves. The Swiss are first citizens of their communes, then of their cantons, and finally of Switzerland.

A Decentralised Unitary State with Guarantees of Regional or Local Autonomy

Just as the differences between a confederation and a federation can be slight, so too between a decentralised unitary state and a federation. The main difference is that in a federal system, power is shared between the centre and the regions whereas in a decentralised system, the regions are subordinate to the centre. For example, in Uganda or Papua New Guinea, although regions are allowed considerable control over many of their affairs, the centre retains the right to reduce this or to intervene if it wants to. In Uganda, the decision to decentralise was partly designed to accommodate strong regional pressures.

Decentralisation is a top-down process, which by delegating power, can help to reduce the centre's control over the social, economic and cultural life of its citizens. In contrast, the formation of a federation, is a bottom-up process where local units join together creating an additional layer of government above them. This decentralised option might be more appropriate within the local units of state or states that the Somalis eventually establish, providing these reflect traditional structures of political authority. Although any decision to pursue the confederal or federal options would necessarily require widespread popular support, there are two major aspects of decentralised unitary systems that could be included in a future Somali constitution(s): 1) the constitution could define the powers of local governments. These powers can always subsequently be transferred to the centre if a local government wishes; and 2) guarantees should be included to ensure that larger units of government (such as provinces or the centre) cannot abolish smaller local units.

Consociation: A Non-Territorial Option

Power sharing or consociational principles of government can operate in confederations, federations and decentralised unitary states, and were developed specifically for divided societies. South Africa today is a model of a consociational democracy in its early stages. Consociational democracies normally include four elements: 1) a grand coalition government, which includes representatives from the major groups (or clans or clan-families) in society; 2) a quota of seats or jobs or public moneys for each community according to its population strength; 3) community responsibility for certain matters, such as education; e.g., the distinctive interests of clans and minorities could be respected wherever they lived or worked; and 4) minority veto power.

Under consociational arrangements, groups are separate but equal. For these to work, people need to be convinced that it is better to have a share of power than to risk the costs involved in trying to seek full control. Three conditions need to be satisfied: 1) competing communities must not try to integrate other groups or establish their own separate sovereign state; 2) politicians must strive to maintain these beliefs, economic and political stability, and

be mindful of the negative consequences of returning to a state of war; and 3) the leaders of the communities must be able to act independently so that they may be able to reach a compromise with other groups without being accused of betrayal by their own community. The Somali tradition of elders participating in consensual decision-making at the local level demonstrates that such principles could be appropriate here. When these conditions are not met, consociations fail, as happened disastrously in Lebanon and Cyprus.

The key feature of all four systems of decentralised government is the ultimate location and distribution of power: in confederations, power is above all held by the component states; in federal systems, it is shared between the centre and the constituent states; and in decentralised unitary states, it is located at the centre though certain regions enjoy considerable autonomy.

2.   The Political Economy of Decentralisation

Only the pastoral livestock industry managed to survive the destructive economic effects of the Siad Barre regime, which officially suppressed private enterprise, although thereby stimulating an extensive informal and black market economy. In the late 1980s, a structural adjustment programme was attempted but not properly implemented, leaving Somalis with little experience of successful economic policy. Once the state collapsed, the country was left with many small traders and producers lacking public services and regulation. There is little prospect in the future that donors will grant the large sums of aid of the past, and foreign investment can be expected to be slight for some time. Thus political reconstruction, at whatever level, will need to operate against a background of small-scale local economies.

The switch to private enterprise fits well with decentralisation, which depends on the abilities of local groups to manage their economies and resist pressure from the centre. If the state transfers assets to the private sector, it lets success and failure be determined by the market. Decentralisation may reduce conflict and may minimise the economic benefits associated with political office. Clan loyalties will play an important role in rebuilding the private sector, but need not lead to conflict if success and failure are determined by fair competition, i.e., providing the market is regulated and policed. Some services, such as law and order, defence, roads, health, education, etc., will still need to be provided publicly, but there is no reason why some of these cannot be managed by local authorities, with the assistance of donors and NGOs.

Modern states also require conditions that allow traders to produce and exchange their goods through common property laws, stable currency and a credit system. Many assume that local initiatives are the only way to restore order, and that new local authorities can combine to form a state while still retaining significant autonomy. Regional Somali authorities, however, will need access to personnel, financial resources and physical assets.

Inter-Regional Transfers
Inequality between regions will require attention if poorer regions are to be integrated in all political formations. Market economies often lead to an unequal distribution of income, which can only be corrected through transferring income by both local and central

government. In confederations, such transfers are rare, while in unitary states the centre controls taxes and grants and thus can redistribute more easily. In federal systems, transfers often create conflict. It is also difficult to establish criteria that determine who gets what, and in which circumstances. It is unlikely that Somalis will pay taxes to anyone or for anything outside their immediate region, so such a redistributive system may not be practical for some time. This means that local authorities will have to strengthen their ability to raise funds to pay for education, health, roads and water. Regional councils can also set up committees to decide how resources will be distributed, as well as to monitor spending. In the meantime, local authorities will have to charge full cost fees for consumer services, which will eliminate the immediate need to raise taxes and also give local people control over the service that is provided. Foreign donors may also be able to assist the poorer regions in restructuring. Communities can continue to provide services on a voluntary basis, such as mending roads, building schools, and digging wells.

Money

The collapse of the Somali Republic has removed controls over trade and investment, and ended the creation of state-supported credit and the growth of money supply. While the previous system caused inflation, which was increased by foreign aid, the current situation is deflationary since there is a shortage of money in circulation.

Trade is currently conducted in US dollars, Saudi rials and Somali shillings. If the local currency wears out or is rendered worthless by unauthorised printing of new notes, trade will continue, but the use of foreign currencies may expand if remittances and payment for exports continue. In the medium and long term, Somalis will have to decide whether they want to create regional currencies or a central one. There is no reason why several currencies cannot co-exist, although there would be financial costs to their doing so.

Trade and Credit

Export taxes should be kept to a minimum in economies that depend heavily on foreign trade. Most taxes today are collected at the four major ports and a few larger airports, which give the groups in control considerable leverage. It is obviously desirable that agreement can reached on the distribution of these resources. Attempts will also have to be made to discourage internal customs barriers, which can stimulate conflict. Most federations try to maintain free internal trade to avoid such disputes.

Currently, small producers and traders use their own assets and family networks for credit, while international traders also use foreign banks. Central banks may not be necessary, as experience has shown, and private banks can often be more effective. Community banking systems, such as those run by NGOs in Bangladesh, Bolivia and South Africa, could also be tried.

Property Rights and Agriculture

A means of sorting out property claims, returning assets to owners, and compensating those who cannot return to their property will need to be established. The legal system, courts of law, prisons, and police could be financed locally, possibly with donor support. Other issues of concern include the destruction of rangelands, illegal charcoal production, over-exploitation of fishing resources, and toxic waste dumping.

To improve agriculture, the private sector needs better credit facilities to buy fertilisers, crops, etc. If subsidies are to be involved from foreign NGOs, they should be careful not to discourage local initiatives.

Health and Water

Whether for people or livestock, health care requires many types of services that are often expensive and specialised. The major consideration now is access to clinics, drugs, and doctors or healers. Many of these services can be provided privately on a fee-for-service basis, supplemented by foreign NGOs, which would work similarly in unitary or decentralised political settings. Poorer consumers could be subsidised by communities or foreign donors, although it is often difficult to establish standards for deciding who needs these services the most. Wells and water rights may continue to be operated by clans and individuals as before, with some involvement of regional governments.

Education and Roads

As with health, similar problems arise for education. Private and public systems can operate at the same time, paid for by local parent-teacher associations and foreign donors. Local communities may manage and regulate their own schools, irrespective of type of government. Higher education will be more difficult to provide in the short-term, though it too could be controlled by local governments.

The most widely used roads should be maintained by the widest possible groupings, while local roads and footpaths can be a local responsibility, with some sub-contracting to private firms where necessary.

Security

A major concern will continue to be the huge number of weapons in circulation. New forms of community-based security could be established which recognise the right to bear arms, but also subject people to the authority of clans and local authorities. A citizen army could always be mobilised if there were an imminent danger, but meanwhile, regardless of the nature of the state, i.e., confederal, federal or decentralised unitary, costs would be kept down and control exercised by those with most authority at the local level.

3.   Remaking Administrative Structures

The six basic requirements here are: 1) how to organise a stable administration for even the most decentralised government; 2) how to overcome the assumption that every position is a prize for which rival groups compete, especially for those posts controlling public funds; 3) how to create administrative structures that allow policy to be implemented while also meeting the challenge set out in (2); 4) how to save funds by coordinating some services and functions of government on a state-wide basis; 5) how to resist any temptation to create a uniform administrative structure throughout the country (regional structures should reflect the needs of the region); and 6) how to finance and staff, over the long term, these public administrative structures, bearing in mind that numbers of people employed should be kept to a minimum.

Minimum Functions

There are seven minimum functions necessary for the effective running of a state administration:

1) Police and maintenance of order. In a unitary system, local governments can be responsible for police who work alongside national police forces. Under confederal arrangements, police forces would be organised by their own states, although there could be a coordinating body at the confederal level. In a federal system, local and national police could share certain duties. Consociation means communal self-government and is easier to organise in the judiciary than in the police - though fair representation of all clans is possible in a national police force.

2) Defence. Issues to consider here include land border protection, prevention of smuggling, protection of fisheries and off-shore resources, and the response to internal disorder and disasters. These would need to be covered in whatever form of government is adopted.

3) Fiscal policy. The issuing of a national currency would function at a central level in both unitary and federal states, while taxation and public borrowing are normally shared by the centre and regions/provinces. In a confederation, these responsibilities would normally be handled by the member states.

4) Collection, management and allocation of central revenue. Assuming there will be some funds gained from export and import duties, the centre in a confederal model need not be involved in this, whereas each state in a loose federation could control these functions, although some authority would be necessary to secure subsidies for poorer regions.

5) Judicial systems. These vary according to form of government and are discussed in Chapter 5.

6) Public service management. This is necessary under all models.

7) External representation. This is also a general requirement, and is discussed in Chapter 6.

Other Functions

In the medium term, other functions that would be essential for the proper running of any administration include: posts and communications, which need to be accessible throughout the country in any type of system, although it is not imperative that this be centrally controlled, and could even be privatised; major public works, such as roads; and tertiary education. In the short term, however, there are several concerns that need to be addressed, though not necessarily at the central level. These include: primary and secondary education, health, veterinary and agricultural services. Already in many parts of Somalia and the 'Republic of Somaliland', NGOs are assisting in providing some of these services, most of which are paid for on a fee-for-service basis.

The scarcity of trained staff for any of these functions makes it important to offer services on as wide a basis as possible. Some government funding will be necessary to plan for the future, although this often causes spiralling costs as demands increase for ever more services.

Staffing

Typically those working in the public sector are recruited on merit (by competitive exams, specified qualifications, and some consideration for representation), and are normally hired for life. Neither of these would seem to be appropriate for Somalis. Because of the clan-

based nature of Somali society, representation should be the primary principle of recruitment and promotion. Difficulties will arise, especially concerning how many clans or sub-clans or regions should be given representation, and this is especially problematic when such jobs are to be kept to a minimum in order to ensure that a greater proportion of available funds is directed to substantive service provision and not primarily to salaries. This dilemma might be resolved by limiting the period of service, rotating jobs, and, should sufficient trust be established, holding a census to determine exact numbers.

4.   The Judicial Branch of Government

This chapter does not directly discuss the situation that would arise if the former Somalia were to split into several independent states - although the same general considerations would hold and they might wish to operate common judicial institutions. There are six key areas to consider in decentralised systems: 1) the supreme court (or the highest court in the state); 2) the coordination of judicial systems; 3) multiple systems of laws; 4) Islamic law; 5) administrative justice; and 6) human rights safeguards.

The Supreme Court

A constitution is a guarantee that the agreement leading to the coming together of different peoples and groups will be observed. In confederal and federal systems, and in some decentralised unitary states, defending the constitution is normally the task of the supreme court. As such, the powers of the supreme court are very important for the proper functioning of the state.

There are several fundamental questions related to the supreme court. Who appoints members of this court? There is no set formula. They can be appointed by the president or prime minister, or they can be elected by the legislature. The 1960 Constitution of the Somali Republic allowed for the involvement of both, and it may be appropriate to consider a similar option in the future, for however many states finally emerge.

How many members should there be? A possibility would be to follow the method of the European Court of Justice, which has 15 judges, one from each member state. The more the court reflects the diversity of the state or states, the easier it will be to have its decisions enforced.

How long should a judge serve, and how can judges be removed? The advantage of long terms of office is that decisions can be made independently of political pressures, but this may also create friction between the court and the executive branch, and in turn cause the executive to either remove judges or pack the court with supporters. Short terms of office, on the other hand, often cause political considerations to take precedence as the continuation of employment is somewhat dependent on the approval of the executive.

These obstacles can be overcome, especially for state courts. Judges may be elected for medium length terms, such as six to ten years, as happens in Switzerland or in states of the US. An independent body can also appoint and discipline the judiciary. Mandatory retirement is another possibility. Just as in appointment, removal from office can involve

different branches of government, especially in controversial cases, such as removal from the supreme court.

The supreme court should be the final court of appeal for civil and criminal matters. It has the responsibility to uphold the laws of particular states or regions, while also ensuring that common standards apply throughout the federation. Confederations would not normally have a supreme court, although each member state would have one. In any future Somali federation, by contrast, this court would also have the responsibility developing unified federal law. To resolve constitutional disagreements, a combination of arbitration and referendum could be adapted to traditional Somali dispute-solving procedures.

Multiple Judicial Systems

An initial problem in reconstructing a Somali state or states will be finding enough qualified lawyers. In a confederation or a federation, an important issue to resolve will be how to enforce decisions made by courts in one state in another state, as well as between the state and the central government in a federation, as different laws develop in different areas of the country. One solution would be for the states to agree to enforce each other's judgements, irrespective of whether they were in line with the public policy or legislation of the enforcing state.

In all matters, though, it is important that (con)federal laws are enforceable throughout the (con)federation. This holds for criminal as well as for civilian law: the existing Penal Code in Somalia could be re-applied while courts are being established, and used as a basis by the successor state or states on which to construct their own criminal law.

Multiple Laws and Islamic Law

Federations and confederations may develop multiple systems of laws, which often complicate their administration and implementation. Somalis already have experience of multiple legal systems since customary and Islamic law have existed alongside English and Italian law. This previous Somali practice could therefore provide a possible model for a future decentralised state or states, and representative commissions could be established to ensure that laws are harmonised and disputes resolved during this process.

Until 1962, there were separate *shari'a* and non-*shari'a* courts in Somalia, with different methods of combining and ordering the various forms of law. Some similar formulation could be applied if Somalis agreed to establish a federation or a confederation.

Administrative Justice

The current international emphasis on 'good governance' has implications for the judiciary. For example, the new constitutions of Malawi, South Africa and Uganda all give citizens the right to fair treatment by government agencies as well as the right of appeal against government decisions. The question is where to locate such mechanisms, at the state or central levels, or both. Most decisions directly affecting citizens are probably best taken at the regional level, as people generally prefer legal disputes to be dealt with informally, using customary practices wherever possible.

Human Rights Implications

Some international laws are binding on states even if they do not wish to be bound. Even so, international human rights standards will need to be written into law, not only to protect the individual, but also to reassure potential donors and foreign investors.

Many treaties already exist that try to protect minorities by establishing political, education, language, and property rights, in addition to the fundamental rights theoretically enjoyed by all individuals, e.g., non-discrimination, freedom of conscience, and religion. Since it is easier to frame laws protecting human rights than to implement them, there is scope for a careful study of Somali traditional concepts of rights, and their relation to internationally recognised human rights.

International obligations are easier to legislate in *unitary* states than in decentralised systems because the centre has authority over the laws of the country. Yet at the same time, abuse of power is also more likely in such states. To avoid this danger the problems associated with federations and confederations need to be addressed at the start. For example, in *federal* systems one component state may not comply with international laws, or inconsistent laws may prevent the application of human rights norms. It is possible to overcome such problems by mutual coordination of laws or by creating a common Charter of Rights, and a constitutional court to oversee the process of coordination and implementation. The advantages of federal systems are that laws can be adjusted according to local needs. Federal systems also can protect minority rights, especially in terms of language, religion, education, marriage and family issues, where relevant. In *confederal* systems, each state would have responsibility for ensuring that human rights obligations are followed, although here too it would be desirable to create a coordinating body, or even to allow a single organisation to frame such laws.

5. Alternatives for Defence and Foreign Relations

Issues and problems related to foreign affairs will be similar irrespective of how many states are created. As foreign relations are relations between states, their conduct is generally guided by central structures, though adjustments can be made to cater for the needs of decentralised government. There are seven main concerns related to foreign affairs and defence that need to be addressed: 1) treaty-making; 2) foreign representation; 3) defence; 4) citizenship; 5) foreign trade, customs and excise; 6) foreign aid; and 7) currency.

Treaty Making

Treaties, whether they pertain to membership in international organisations such as the UN, or bilateral relations between states, are normally signed by some central authority, and then ratified by the president (or head of state), parliament and/or constituent states. All government systems, from a centralised, unitary state to a confederation, operate in this manner, although some federal states allow a degree of independence in treaty making. For example, in Australia and Canada, the provinces may sign treaties that deal with foreign trade matters, as long as such treaties do not conflict with those signed by the central authority. Further, in situations where the province or canton or state signs its own treaties, the central authority may also retain the right to approve it. Conflicts resulting from treaties

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signed by different authorities can be resolved by an independently appointed group, comprised of members from all segments of society.

Confederations allow for more decentralisation. The options for treaty making in confederal systems are as follows: 1) the central authority is granted full rights to conclude international treaties, while constituent states retain control over domestic matters; 2) member states have some independence in treaty-making as long as they are not in conflict with the interests of the confederation; and 3) member states can conclude treaties with foreign powers independently, while at the same time sharing common services and rules covering relations amongst themselves, as well as relations with external states in particular areas. In very loose confederations, such as the European Union, where members still have not granted the central authority sole jurisdiction over all treaty-making, even on issues which have been transferred, they retain the right to veto legislation that conflicts with their interests. For such a loose arrangement to work, there must exist a _measure of trust_ between the centre and the constituent parts. If Somalis were eventually to agree to confederate along similar lines, it would also be necessary for the component states to honour pre-existing agreements signed by earlier heads of state of Somalia (unless they were opposed to the principles of the new state or states).

Foreign Representation

The right to conclude treaties generally also determines who represents the new state or states in embassies abroad, at multilateral institutions, and international conferences. In unitary and federal states, the appointment of such representatives is usually controlled by the head of state. In confederal systems, such appointments will depend on how extensive the sharing of foreign relations decisions is between member states. The range of options for diplomatic representation may be illustrated by the European Union (where member states each have their own foreign embassy staff) and the United Arab Emirates (where such staff represent the federation and come from all member states).

The key issues concerning foreign representation relate to _recruitment_ of staff and the _cost_ involved.

The first difficulty is how to recruit personnel, whether on merit or according to a system of community representation (based on region or clan, for example), or on a combination of the two. In theory, this dilemma should not arise in unitary or federal states, but it would be a problem in confederal or decentralised unitary states, and could be very serious in states with deep divisions between groups, where no group trusts the others to fully represent its interest, e.g., a Kurd in Iraq would be unlikely to trust a non-Kurdish Iraqi to represent his or her interests in country-wide institutions. In such a situation, the solution may be to rotate offices between clans or regions, and establish safeguards so that while in office, each representative would not be able to pursue his or her group's interests at the expense of others.

As the new state or states will inevitably be short of funds, a further difficulty arises concerning how to pay for such offices. One solution would be to minimise the number of offices. For example, there could be a delegation to the UN which might also cover relations with the United States, a representative in Brussels to handle the European Union as well as bilateral relations with member states, a representative to work with neighbouring

East African states, one for the OAU, and a small group to cover regional issues such as trade, refugees, drought and food security. The need to deal with such issues will arise under any system of government but in no case do they require a large diplomatic establishment.

Defence

Even in decentralised systems, it may make sense for the centre to provide for common defence, in order to reduce the financial burden that is inevitably involved. Indeed, it is to make such savings that many federations and confederations are formed, as was the case in the short-lived Senegambian Confederation, or the United Arab Emirates. In most states, whether they be unitary or federal, responsibility for declaring war and maintaining the defence of the union rests with the centre.

In Africa, however, central control over defence has often proved disastrous. In many countries, there should be no need for large defence budgets, since they face no serious external threat. Yet almost invariably the government devotes a substantial portion of its expenditure to defence. The army often ends up usurping power, and far from protecting society, threatens the civilian population. The problem is even worse in states that have fallen apart due to civil war, and where, as in the former Somalia, most adults are armed. In these cases it is seldom possible to disarm the population and/or abolish the armed forces without enlisting the support of an outside power, which is likely to be unpopular and widely resisted. Yet without a regional threat there is no need to reconstruct a standing army. Once again, Swiss experience may offer some useful lessons for Somalis: the Swiss have no standing army, but if an emergency occurs, they can easily assemble a force from the different regions of the country, particularly as all citizens have to undergo a period of military service.

An additional safeguard to prevent internal conflicts between clan militias or regions could take the form of a dispute settlement group with representatives from all parts of the country and all clans, which could be assembled in time of need. Such a group would resemble the gathering of clan elders to settle inter-clan disputes. If there is insufficient trust to set up such a group, at least initially, an alternative would be to contract out this function to an international or regional organisation, such as the OAU. This would have the advantage that the donor community might be more willing to reinvest in whatever state or states are established if there are transparent mechanisms for preventing the abuse of power.

A final defence issue is the protection of the environment. In the absence of a Somali government or governments, Somali waters are already being overfished and used as a dumping ground for toxic waste. In the short term, it might be possible to contract out supervision of these activities to an outside agency to monitor and safeguard Somali natural resources.

Citizenship

In most systems, issues related to citizenship, such as the issuing of passports, naturalisation, emigration and immigration are handled by a central authority. Some countries allow dual citizenship, and in confederal systems, like the European Union, citizens belong first to their state, and second to the union. This could work for Somalis: they could have common citizenship, and also belong to their own regions or states, where they would vote. Thus a

Somali could live in any part of the reconstituted state or states, but perhaps only vote in his or her particular area. If this were to be agreed, then each region could also issue its own passports, as members of the European Union already do.

Foreign Trade

As Somalis have demonstrated, foreign trade can continue even in chaotic political circumstances. But for trade to contribute to economic recovery over the long term, it is important that it take place in a stable and secure environment. In some federal systems, the different provinces maintain independent trade relations with foreign states, as do the states in most confederations. Providing the rules, enshrined in the GATT, WTO and Lome conventions, are applied, it would be possible to devolve responsibility for trade policy to regional governments.

In most countries matters relating to customs and excise are under the overall control of a central ministry. The main reason is to prevent trade wars between the constituent states. For example, without some regulation they might be tempted to compete with one another by lowering import taxes. In unsettled conditions, this would not promote healthy competition but make it more difficult to maintain the peace, as it did in the Senegambian Confederation before its collapse (the Gambia refused to give up its low tariffs and liberal trade policy).

The general problems that come up with regard to trade relate to the collection of taxes and redistribution of funds, normally from wealthier regions to poorer ones, and how to convince those controlling strategic assets, such as ports and airports, to give them up. In the short term, it may be necessary to leave such assets under their current 'managers'. Each region would have responsibility for buying into whichever services (health, veterinary, fishing, transport, etc.) they needed, raising the money to buy the service by taxes within their region.

Foreign Aid

Decentralisation is probably necessary if development aid is to revive. Donors increasingly attach political and economic conditions to aid and will need to be assured that the local government(s) are legitimate and stable, and that the money will be used wisely. From this point of view decentralised governments would have an advantage over unitary ones in that legitimate representatives from local areas could manage (and petition for) projects, rather than having them administered by a centrally located agency. Aid could be managed in this fashion in confederal unions or federal states. Even in decentralised unitary states responsibility for foreign aid could be delegated to local authorities. Indeed it is possible that donors might make such delegation a condition for the resumption of aid.

In addition, with regard to disaster relief, as opposed to development assistance, attention will need to be paid to re-establishing early warning systems so that future famines may be prevented. International regional organisations could be enlisted in the first instance, on the condition that they train Somalis to staff their own offices in the long term.

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Currency

Authorities controlling the money supply are normally centrally located, though they may be independent of the government, as the Federal Reserve is in the United States, or they may maintain different values for domestic and foreign transactions, as the Republic of South Africa did until recently. In some countries where the local currency is very weak or has collapsed, a foreign currency often circulates next to the local one. But there are no unitary states or federations where rival currencies compete with each other. This is because of the fear that the authorities in one state or province might off-load their economic problems onto their neighbours by depreciating their own currency to make exports cheaper and imports more expensive. The situation in confederations is more ambiguous (see 1 and 2 below).

There are four possible arrangements for currency that comply with decentralised models. They are:

1) Each state or region could maintain its own currency and exchange it at a rate agreed upon by all parties. In this instance, it would be better to peg its value to a major international currency or basket of currencies. Difficulties may arise, however, if one region is wealthier than others.

2) A currency system modelled on the European *ecu* could be established. This would take the previous idea one step further by pegging each region's currency to a common one. This could work as an interim solution while trust was being restored in the new political structure. Eventually the common currency could replace regional currencies altogether.

3) The pre-existing Somali shilling could continue to be used for trading purposes along with a major international currency, such as the dollar, which would gradually replace shillings as they wear out or are devalued because of possible over-printing.

4) An independent monetary authority could be created for the entire state or states. Initially, staffing for this organisation could be contracted out to an international financial institution, such as the IMF, which could also train Somali bankers.

6. Principles of Constitutional and Electoral Design

If Somalis decide on some form of decentralised democratic system, they will need to design it in a way that will prevent a return to authoritarian rule. It will need a separation of powers, checks and balances, and some form of consociational or consensual, co-operative government.

Parliamentary Democracy

Democracies can be organised in several ways. One is parliamentary democracy, in which the legislature has most of the power. In the United Kingdom, for example, the legislature (or parliament) has significant control over the executive because the authority of the prime minister and the cabinet ultimately rests on the support of parliament. There are nine key features of this type of system: 1) a concentration of executive power, normally in a one-party government; 2) a mixing of executive and legislative power; 3) a two-chamber parliament, with one chamber being less powerful; 4) a mainly two-party system; 5) party competition normally over left and right issues, such as economic policy; 6) simple plurality

rule which gives seats to the candidate with the most votes; 7) unitary and centralised government, where local governments can be abolished or curtailed by the centre; 8) an unwritten constitution, with minimal judicial involvement in its interpretation; and 9) representative democracy with little use of referendums.

Parliamentary and majoritarian systems, which give power to the elected majority, only work well in fairly homogenous societies that are based on the concept of liberal individualism. In deeply divided societies, such systems do not function well, and it is often the case that a dominant community can take over and run the society for its own purposes.

Consensual/Consociational Democracy

Another form of organising a democracy is the consensual or consociational method, which is the opposite of the former system. Consensual models try to maximise participation and representation in government while also holding back attempts by a powerful group to take control. This type of system may be more appropriate for a divided society, and has something in common with traditional Somali decision-making processes.

In consensual systems, there are eight distinctive features which could work in a federal Somali state that was based on a multi-party system, or in the independent states of a confederal system: 1) executive power sharing that enjoys support from many communities, including a multi-person *rotating* presidency with representatives from each of the regions, veto powers, and separate elections for the executive and parliament; 2) separation of executive, legislative and judicial powers that allows for co-operation between the branches of government, or perhaps in the Somali case, a 'council of state' formed by elders and former presidents and prime ministers who would mediate disputes and take certain issues to the Supreme Court; 3) two federal chambers with equal powers and minority and/or territorial representation; 4) a multi-party system; 5) a multi-dimensional party system where language and clan differences, for example, are included in party platforms; 6) a proportional representation voting system in which the elected chambers genuinely represent the population and encourage some integration; 7) a type of decentralisation that allows some communities or clans greater autonomy; and 8) a constitution that gives minorities specified rights.

Consensual systems enable all those who are affected by political decisions to take part in making those decisions. They also allow distinct communities the opportunity to govern themselves, so long as they respect the rights of others to do the same.

Electoral Options

There are numerous types of electoral arrangements that can be adapted to a society's particular needs. In a federal system, each state or region could equally choose separate systems so long as they fall within overarching electoral rules. The same is true for a confederation. It must be remembered, however, that no outcome is certain in the different systems.

Proportional representation (PR) systems ensure a proportional relationship between the votes for parties or candidates and the seats they win. PR systems differ from non-proportional (NPR) systems, which are often called majoritarian systems. There are three ways of organising NPR systems: 1) plurality rule, where a candidate is elected in a single person

district and wins if he or she has the most votes; 2) alternative vote, where a candidate only wins if he or she has a majority of the votes; and 3) exhaustive double-ballot procedure, where if no candidate wins in the first ballot, there will be run-off elections between the top two candidates.

The advantage of having a NPR system in the Somali context would be that it would encourage parties to broaden their appeal to include many clans. The disadvantages, however, are three: 1) parliament could be filled with many small parties, which could in turn make it easier for a strong party to take control; 2) the 'winner takes all' principle would not be acceptable to those that lost; and 3) dominant coalitions of clans could try to damage weaker clans or parties. PR systems, on the other hand, may be more likely to produce a stable government, and would cope better with population shifts. In a PR system, moreover, clans could be allowed to form their own parties or coalitions if they so wished.

7. Conclusion: The Menu of Options

A concluding menu lists the advantages and disadvantages of the three constitutional models considered in the report, i.e., confederal, federal and decentralised unitary state, and also of consociational government. This analysis, which is already in summary form, is not reproduced here.

Functional Co-operation

There is one final possibility to consider: co-operative arrangements without an overarching political authority. Functional services, in which most Somalis have an immediate interest, and on which they might be prepared to co-operate include veterinary or health services; fishery protection and licensing; educational services such as curriculum development, the provision of textbooks, teacher training, and the negotiation of scholarships for Somalis in foreign universities; posts and telegraphs; weights and measures; and currency. Thus if attempts to construct a confederation, federation, or decentralised unitary state break down, or proceed at a very slow rate, agencies could still be created to provide specific services to meet certain needs. Indeed there is a traditional Somali precedent in the concept of contractual agreement (*heer*).

There are two ways in which such functional agencies could be set up, although they are not mutually exclusive. The first and theoretically most desirable would be by agreement amongst those Somalis from different clans, regions and/or 'states' who share a particular functional interest. Such agencies would employ Somalis and this might make external donors more willing to reinvest in their future. The second would be to contract out such services to an international agency, such as the World Bank. This would have similar advantages as the previous one regarding employment and foreign investment, and avoid the disadvantages that might spring from continued inter-clan competition, even over the provision of agreed welfare services. Such collaboration might foster wider Somali sentiments of national solidarity.

Introduction: The Uncentralised Somali Legacy

by Professor Ioan M. Lewis

Somalis, naturally, know better than anyone else what being a Somali entails. Nevertheless, like members of other cultures and nations, they do not necessarily have an analytical understanding of their socio-political institutions, or an objective knowledge of their political history.   Indeed those Somalis who are under the age of thirty today, have no direct knowledge of the democratic regimes which preceded Mohamed Siad Barre's military coup in 1969, far less of the colonial period before that. A sense of this past makes it easier to understand crucial features of the present, and should promote a more realistic approach to future planning. For its part, although the international community has access to relevant documents and books, it is often poorly-informed about the country and its people.

This introductory chapter, therefore, seeks to provide a general overview of key Somali institutions and their implications for decentralised government, as well as outline recent historical developments. It is addressed to Somalis and non-Somalis.

A. The Uncentralised Political Legacy

Traditionally, Somali politics are not so much decentralised as uncentralised. There is no local tradition of centralised statehood and no established hierarchy of political offices. The African pattern of chiefs and kings, and chiefdoms and kingdoms, is foreign to Somali political culture which, in contrast, emphasises the individual pastoralist's role in general assemblies (*shir*) where adult male family-heads seek consensus rather than majority decisions. The 'elders' involved in these deliberations do not constitute a distinct caste or social category, and include such modern figures as militia leaders, former Somali officials, and intellectuals, as well as illiterate pastoralists -- in fact any adult male of the group concerned who is locally available.

There are thus no fixed leaders able to command followers and sign binding agreements in this pervasively uncentralised society. This is one of the sources of the low success rate of international diplomacy in Somalia. The international community has tended to take at face value those who claimed to be leaders, although, at best most of these were *ad hoc* leaders of loosely based military bands with no permanent status beyond their variably interpreted clan identity. The clan elders have frequently declined to back agreements signed by the so-called 'war-lords', made in their name but usually not with their full consent or commitment. The international community, with its assumption of universal hierarchical government, has requested the Somali people 'To take us to your leaders'. And the Somalis, whose political philosophy is profoundly different, have taken them to the cleaners. *Westernised Somali intellectuals are fond of ascribing the collapse of Somalia and the difficulties of re-establishing statehood to a 'failure of leadership'. It is necessary to understand, however, that the leadership problem is more deep-seated and is an intrinsic part of traditional political culture, which needs to be addressed.*

1

The groups that decide their affairs in this excessively democratic fashion (though formally excluding women) are, in the Somali segmentary system, fluid and inherently unstable. They are based, primarily, upon kinship (*tol*) traced in the male line along (patrilineal) genealogies which regularly extend to twenty or more named generations - each ancestor's name representing a potential level of political action which may be mobilised, usually reactively in opposition to an equivalent, rival grouping. Here, family trees are not quaint historical documents, but rather blue-prints for a wide array of political mobilisation.

In this very fluid segmentary pattern, there are no completely stable units. Nevertheless, two levels of concerted group action stand out. These are the *dia* (blood-compensation) paying group, and the clan. The former employs the pervasive Somali concept of political contract (*heer/xeer*) to tie down and bind together in common legal cause (as an insurance group) close kin within the clan (and in the case of small clans, the whole clan). The individual members of a *dia*-paying group pay and receive damages in concert for death or injuries sustained, or inflicted, by a member of the group. In Somali customary law (*heer/xeer*) these are treated as wrongs (or torts) requiring reparation, rather than as crimes implying punishment. This practice is in keeping with the uncentralised character of Somali politics. Homicide and attacks on property involving people of different groups are, as the colonial administrations correctly understood, essentially political cases.

Several closely related dia-paying groups form a clan, which has some territorial definition especially in the case of cultivating groups. Clans have common interests in trading centres and collectively dug and maintained wells, and other shared economic interests (e.g., camels usually bear clan-specific brands). These aspects of clan solidarity may be reflected in a symbolic clan figure-head (sometimes misleadingly styled 'sultan', since this Islamic title suggests a more powerful position than is actually the case).

The total Somali nation of some 5 million people is divided into nearly a hundred clans which vary greatly in population and power. The pastoral nomads tend to have larger, more widely dispersed clans (in many cases, over 100,000 strong) than those in the cultivating and peri-urban coastal areas of southern Somalia. In the latter region, where there are some fifty clans, these may contain only a few thousand people. Smaller clans tend to be more united than larger ones which, because of their size, inevitably include more lineage divisions. *Clans, it has to be stressed again, like all Somali groups are oppositional units that can be mobilised in contested situations.* Lastly, related clans are associated in 'clan families', representing the highest levels of potential political loyalty in Somali society, although they are too large to act as concerted groups on the ground.

The six clan-families are the Dir, Darod, Isaq, Hawiye, and Digil and Rahanweyn (also known as Digil-Mirifle): looking inwards from the nation, these constitute the primary divisions of the Somali people. The Isaq are almost exclusively concentrated (see map) in the former British Somaliland (called by some 'Republic of Somaliland'). The Digil and Rahanweyn, who in April 1995 announced that they had opted for local autonomy, are agro-pastoralists occupying the relatively fertile zone between the Juba and Shebelle Rivers where they produce most of the country's grain. *The Darod and Hawiye are the most widely distributed clan-families, which tends to give their political leaders correspondingly large political concerns.*

2

Whereas all the divisions between the mainly pastoralist Somalis (Dir, Isaq, Darod and Hawiye) are essentially based on invisible genealogical differences, the Digil and Rahanweyn have their own distinctive culture. Their language (*May*, or *Maymay*) differs from the speech of other Somalis by about as much as Spanish differs from Portuguese. Their clans tend to be smaller, more territorially based, and with a slightly more hierarchical structure than those of their nomadic neighbours. They also differ in their political constitution, which is based on the adoption, over the centuries, of large numbers of migrants from other clans. With this melting-pot organisation, the Digil Mirifle are actually a microcosm of the entire Somali nation. Had they spoken 'standard Somali' and been less subject to nomadic prejudice, they could thus have provided an indigenous blue-print for a Somali state transcending clan divisions. This would have been all the more compelling because of their traditional tendencies towards political centralisation. But traditional nomadic values do not allow the Digil and Rahanweyn to act as an attractive role model for other Somalis since they are less bellicose and aggressive. The same applies to the marginal Bantu groups, settled in agricultural pockets along the banks of the rivers in southern Somalia, who derive in part from indigenous peoples, and in part from former slaves imported from East Africa.

More closely integrated to the nomads, are specialised 'castes' of blacksmiths, leather-workers, and hunters. There are also other minority, urban groups of Arab descent in cities like Mogadishu and Brava where they had their own, distinct quarters. *All these minority communities were in the past protected by being attached to major Somali clans, particularly for the payment and receipt of blood-compensation. At the height of expansive Somali nationalism in the 1960s, they tended to be assimilated to the dominant Somali culture. Following Somalia's collapse in the 1990s, they have reasserted (and sometimes invented) separate identities whose status will need to be addressed in the context of arrangements to guarantee minority rights.*

The majority pastoralist tradition is based on rivalry and conflict over grazing, water and other resources in a culture which cultivates male assertion and independence. In this macho tradition men are either warriors (*waranleh*: lit. 'spearmen') or men of God (*wadaad*). Ideally, the latter, with varying expertise in Islam and Arabic, led the religious devotions of this fiercely Muslim population and acted as mediators between warrior clansmen. *The religious commitment to Islam supposedly transcends the clan allegiances of the laity, creating a perennial tension between universalistic Islam and Islamic law and particularistic local customary values and allegiances.* Historically, these Islamic values have been most fully observed in independent religious communities on the margins of mainstream Somali society, and in moments of crisis when Islamic unity was summoned to protect Somali independence against foreign intrusion. Their potential as an element in social and moral reconstruction is seen today in various 'fundamentalist' Islamic communities providing shelter for orphans and the homeless, medical service, and schooling. Their contribution to social control, through the wider application of *shari'a* punishments for theft and physical assault, is more controversial (see below).

However, the Somali version of Rambo has a long, and in their eyes, honourable tradition, in close keeping with the earliest, detailed historical reference (in a sixteenth century document) to Somalis as especially expert in organising road ambushes. *Today, virtually every male Somali nomad has an automatic rifle and often ready access to heavier weapons. This is a serious challenge now to peace-making and political reconstruction in Somalia.*

3

Currently, as in the nineteenth century, when the first European travellers began to provide detailed accounts of the nomadic political landscape and Burton left his memorable impression of the Somalis as a 'fierce and turbulent race of Republicans', the country consists of a mosaic of independent clans and unstable clan alliances, each with its own militia (or militias). To complicate matters further, there are also 'free-lance' militias organised by former soldiers ('war-lords', big and small), and more loosely tied to clan allegiance. Their main *raison d'être* is the attraction of booty and pillage.

Particularly over the last five years, there have been extensive movements of population, mainly into areas in the south where agricultural and other economic opportunities, including those provided by UNOSOM and NGOs, have attracted aggressive clan expansion and conquest (e.g., by the Habar Gidir from Mudug). Coupled with 'clan-cleansing', fired by hatred of the Darod regime of Mohamed Siad Barre, this has produced social dislocation on a large scale, spawning refugees and 'internally displaced persons'.

Unlike agricultural land, or land in urban areas, pasturage is not traditionally owned by specific groups. Currently, however, clans are tending to assert territorial rights more generally, based upon their traditional or recently conquered spheres of interest, including watering points, and trading centres. Consequently, today as in the pre-colonial past, movement between clans requires the help of local agents and their militias, but this does little to impede local trade (the import and export of some commodities, especially *qat*, takes place by air).

In the absence of other governmental institutions, and with the disillusionment generally felt towards the former politicians and the elite, clan elders are very much to the fore. They have correspondingly formalised their decision-making meetings in local clan level councils which, with the co-operation of the militias, exercise local police functions, as well as external relations with other clans. District councils involving members of several clans, roughly along the lines of those which formed part of the previous colonial and post-colonial administrative structure, are also operating in some parts of the country.

B. The Colonial and Post-Colonial Experience

Before colonisation there was no Somali state. Sentiments of cultural identity, which were clearly evident to foreigners who encountered them, were not expressed politically in this form. Colonisation divided the nation into five parts (French, British, Ethiopian, Italian and Kenyan) and paradoxically promoted the nationalist sentiments which, eventually, politicised this cultural tradition, making it the basis for claiming Somali self-determination.

In general, the Somalis with their well-deserved reputation for sturdy independence, were ruled with a light hand. This also partly reflected the wider interests of the colonising powers whose concern with the Somali region was generally secondary (whatever Somalis might imagine). Thus, Britain was primarily interested in promoting Somali livestock exports to the British garrison at Aden, in check-mating French advances, and, later, in promoting cordial relations with Ethiopia. Even Italy which, unlike Britain, encouraged its nationals to settle in Somalia and developed a true colony, had its eyes on Ethiopia, which Mussolini briefly succeeded in conquering in 1935 on the eve of the second world war.

4

Ethiopia itself, as it extended its empire, had similar aims of colonising the Somali territories it claimed (the Ogaden, named after the locally dominant Darod clan), but ruled by sporadic military exploitation rather than systematic administration.

Bewailing the absence of clearly defined local chiefs, and anything remotely resembling the famous West African 'golden stool', the British found it very difficult to introduce their favourite system of indirect rule (the most economical form of colonial management then known). They did, however, eventually (1950) develop the earlier system of salaried 'chiefs' and elders into 'local authorities' with powers to levy local market and slaughter taxes. In principle, each dia-paying group had one salaried local authority, and administration remained primarily in the hands of the expatriate District Commissioners, who also acted as magistrates.

In the urban and more sedentary agricultural areas of southern Somalia, the Italians (particularly during the fascist period), established a centralised pattern of administration, with Italian Residents (Regional and District Commissioners) assisted by stipended chiefs ('Capos') and elders. Here the main exports (as in Somaliland) were hides and skins, and cotton and bananas from the plantations the Italians were developing along the rivers. Their labour force was drawn from local (ex-slave) Bantu communities.

Although there was theoretically a farm tax in southern Somalia, revenue collection was primarily based on customs and excise duties on exports and imports and trading licenses, as well as a 'zariba' tax (a form of octroi) levied on livestock and grain sold in townships. Urban councils in colonial Somaliland did, however, levy a house tax and collected land rents and fees. In the south, only municipalities had official councils with elected members headed by a mayor (sindaco), but derived much of their income from a share of the customs and excise income collected by the central government.

When British and Italian Somaliland became independent in 1960, and joined to form the Somali Republic, the distinction between urban and rural areas was abolished (1963), and local administrations were set up throughout the state, consisting of locally elected councillors with their chairmen, and a professional administrator as executive secretary, and powers to raise local taxes (as in the earlier British arrangements). The number of elected councillors ranged from eleven to twenty-five, according to the size of the town or district. The first local elections throughout the state, using the Italian system of proportional representation, were held in November 1963.

Other aspects of the two rival colonial traditions, which were tied linguistically and culturally to English and Italian, included differences in the legal system. In both territories, shari'a law was applied by government appointed Muslim magistrates (qadis) with jurisdiction largely limited to domestic issues (marriage, divorce, child custody, property inheritance, etc.), with, however, a slightly wider scope in ex-Italian Somalia. The main official legal systems were the Indian penal code in the north and Italian law in the south. Ultimately, in the integration of legal practise which followed union in 1960, the Italian system was mainly adopted.

The unification of legal processes has, naturally, been facilitated by the common features of Somali customary law which, before and after independence, continued to be widely applied

alongside the European codes and the Islamic *shari'a*. Thus, blood-money (*dia*) continued to be paid on a collective basis outside the courts (even in traffic accidents), contrary to a strict interpretation of the *shari'a*, and was only sometimes waived where a murderer was successfully convicted and executed, or sentenced to life-imprisonment.

C. Independence and Civilian Politics

The Somali Republic, formed on 1 July 1960 from the former British Protectorate (independent since 26 June 1960) and the Italian-administered UN Trust Territory of Somalia, was a direct product of the strong sentiments of pan-Somali nationalism of the times. Union and unification was facilitated by the joint experience of pro-Somali British Military Administration from 1941-50. Somaliland was added as two regions to the existing six regions in the south. These eight regions comprising fifty-nine component districts were administered, much as in the past, under the ministry of the interior by Regional and District Governors and were charged with supervising the local councils mentioned above.

Constitutionally, Somaliland brought its 33 legislative council members to join the existing 90 members in the national assembly in Mogadishu (probably roughly in accord with the population ratio of the two territories). Having chosen a form of government with a non-executive presidency, as in Italy, the assembly decided to fill this office with a much respected Hawiye politician (from a small clan), while the office of prime minister was filled by a Darod (Majerteyn) figure, and the northerners were well represented in a cabinet that sought to balance clan as well as party interests. The validity of these arrangements, incorporating the north, was tested in a national referendum on 20 June 1961 which the main Isaq northern party boycotted, and in which more than half the 100,000 northerners who troubled to vote, opposed the constitution. Nevertheless, the larger positive southern vote was taken as decisive, leaving a legacy of northern bitterness, expressed at many points over the ensuing years (as, e.g., in the abortive northern coup of December 1961), and most notably, in the 'Republic of Somaliland's' 1991 unilateral declaration of independence.

In the wider political context in which Somalia's leaders vigorously supported the independence struggle in the adjoining Somali territories (French Somaliland, the Ethiopian Ogaden/'Western Somalia', and northern Kenya), the dominant discourse expressed a nationalism transcending traditional clan divisions. Indeed, the English affix 'ex-' had been adopted into the Somali language as a loan-word, and the intelligentsia were encouraged to speak of 'ex-clans' rather than 'clans'. The political elite had long debated the 'problem of tribalism' (i.e., clanism), and in Somalia before independence, legislation had been passed banning the use of tribal (clan) names by political parties. This particularly targeted the Digil and Rahanweyn opposition which already sought local autonomy, which they claimed (again) in the spring of 1995. The bigger parties, especially the Somali Youth League (SYL), founded in 1943, with British encouragement during the British Military Administration, and the standard-bearer of pan-Somali nationalism, were multi-clan consortia. Smaller parties, whatever their titles and ideological orientations, tended to have a narrower clan focus and following, and, as we have seen, to claim viability, governments had to contain a judicious (frequently contested) balance of clan representation.

6

Clans, clan alliances, and transcendent nationalism are dynamically interrelated. In general, external opposition encouraged national unity, as Somalia's pursuit of the pan-Somali campaign promoted conflict with the neighbouring states. Somalia's support for the Somali secessionists in northern Kenya in the run-up to Kenyan independence was rebuffed by the British. This encouraged the Somali government in 1963 to accept Soviet military aid in preference to a smaller grant from the West which was seen (rightly) as supporting Ethiopia and Kenya. Threatened by the hostility which Pan-Somalism engendered, national unity remained buoyant until 1967/8, by which time the Majerteyn (Darod) prime minister had become President and his former office had passed to a prominent northern Isaq (currently President of the 'Republic of Somaliland') politician.

The new prime minister, Mohamed Haji Ibrahim Egal, quickly made peace with Ethiopia and Kenya, and the extent of the corresponding divisiveness was powerfully illustrated in the last civilian elections. These were held in 1969 with universal suffrage (women had been voting in Somalia since 1958), and a record 1002 candidates, representing 62 parties, turbulently contested the 123 seats in the national assembly. Despite electoral regulations designed to discourage one-man lineage or clan parties, with each constituency assigned an 'electoral quotient' (the number of votes cast, divided by the number of seats), most of those who sought election (including many civil servants who had resigned from the service to stand as candidates) campaigned on a clan basis.

Nevertheless, the SYL was able to hold over half the seats and Egal's government was soon joined by almost every other member of the assembly. *Somalia had succumbed to one party rule in a political context where, in the absence of acute external pressures, internal divisions along clan lines were highlighted, as each major clan sought to gain at least one seat in order to secure part of the spoils of power.*

D. Military Rule

With a bitter backlash of recrimination and legal disputes over candidature, and an increasingly autocratic style of government, the stage was set for the military coup which in October 1969 brought to power the military commander, General Mohamed Siad Barre, initially with popular acclaim. Previously, with its enviable cultural homogeneity in contrast to the heterogeneity of most African states, Somalia's exuberant multi-party democracy had seemed to illustrate the validity of the ideas of the nineteenth century philosopher, J.S. Mill, on the cultural preconditions for democracy. Broadly, he had argued that where there were two or more strong national groups in a single state, each would try to use the ballot box to capture the government for the advantage of its own followers only. Cultural and ethnic unity, however, in Somalia's case was shown to be apt for dictatorial rule.

President Siad Barre proceeded to develop a highly centralised state along totalitarian lines. Clans and clan behaviour were officially abolished (even the 'exs' were banished), replaced by stern ties of comradeship under the banner of (Somali-style) scientific socialism. This new political philosophy was inspired by the homely trinity of Marx, Lenin and Siad, whose images figured prominently on official posters (of North Korean inspiration) at the orientation centres established in all regions to instil the socialist spirit and right-thinking revolutionary thought. While Siad ruled through a revolutionary council, which, as in previous cabinets,

included figures from most of the main clans, there was now a pronounced Darod bias. Indeed, contrary to the official rhetoric, power was actually concentrated in the hands of three Darod clans - Siad's own Marehan clan, his mother's clan (the Ogaden) and the clan of his son-in-law (Dulbahante) who ran the much feared national security service. Siad was also adept at manipulating clan and intra-clan rivalries (of which he had an encyclopaedic knowledge) in his selection of ministers and senior officials. Here there was a rapid turnover, as cronies fell in and out of favour and into prison (where, after some months or years, they might be rehabilitated).

In the rural areas, local affairs were officially determined by district and regional revolutionary councils in which the elders, now re-styled 'peace-seekers' (*nabad-doon*) exercised authority. In reality, the all-pervasive state machine ruled directly through Siad's personally appointed officials (mostly military). Somalia had never been more tightly administered and the economy, similarly, was controlled through a host of inefficient (and corrupt) state agencies. The main exports remained bananas from the southern plantations (abandoned by most of the Italian settlers and taken over by Siad's close associates), and livestock and livestock produce from the pastoral economy. Under Siad's rule, the former trade soon nose-dived, whereas the latter - which remained outside state control - flourished, especially with rising world prices. The oil boom in the Gulf states also attracted an influx of Somali labour (the so-called 'brawn-drain') and hard currency thus earned (as well as much of that from livestock exports) remained outside the official banking system which gradually atrophied. No effective large-scale developments were achieved (except literacy in the previously unwritten Somali language), despite massive injections of foreign assistance which, particularly after the terrible 1975 drought, earned Somalia the reputation of being an aid grave-yard. On the other hand, from independence right through to the early 1980s, Mogadishu retained its reputation as the most peaceful capital in Africa, with perhaps the lowest crime rate.

Drought-relief measures included transporting drought-stricken nomads from the north, hundreds of miles south where they were settled in huge agricultural and fishing co-operatives. Both represented activities that these nomads traditionally despised and were reluctant to adopt, preferring to subsist on food hand-outs while rebuilding their herds in the care of kinsmen in the interior. The widespread scale of this activity represented an important if not entirely novel development in the multi-layered nomadic economy, combined, as it was, with livestock exports and labour migration.

With its monopoly of fire-power, the Siad regime was able to weather this natural disaster and the attendant population displacements. But the pressures engendered encouraged him to embark on the popular policy of supporting the Ogadeni guerillas in their struggle to liberate their territory from Ethiopian control. However, things did not turn out as planned. Somalia's defeat in the ensuing Ogaden war (1977/78) seriously de-stabilised the regime, and set in train forces which ultimately destroyed the state itself. The retreating Somali army was followed by a huge influx of some three quarters of a million Ogadeni and Oromo (a neighbouring ethnic group) refugees. And, since the Soviets had abandoned Somalia for the greater prize of Ethiopia, Siad desperately turned to the West for humanitarian assistance, claiming that he was (now) fighting communism.

8

As this aid grew in volume, other sectors of the national economy atrophied or collapsed, and Somalia became increasingly dependent on foreign support for basic survival. Public confidence in national financial institutions declined further, and the various parallel economies (migration, livestock exports, contraband trade) grew in volume and importance. With spiralling inflation, and totally inadequate salaries, the civil service and police sought supplementary incomes outside their official duties which they virtually ceased to perform. Only the army (with its increasingly Marehan officer corps) and the regime's cronies benefited from the state economy, which the head of state ran like a family business.

E. The Final Collapse of the State

The first sign of serious dissent was the abortive military coup of April 1978 by those Majerteyn groups who were later (1981) to form the Somali Salvation Democratic Front (SSDF). The Ogaden war and Siad's subsequent policy of arming clans friendly to him and encouraging them to attack his enemies, helped (with other sources) to promote the wider diffusion of modern weapons. The genie was now out of the bottle, and, deprived of democratic rights, people started voting with the gun. In the segmentary perspective, a further contributory factor promoting internal disunity was the peace agreement which Siad signed with Ethiopia in 1988. The successful liberation of the 'Republic of Somaliland' by the Isaq SNM (Somali National Movement) guerillas, of Majerteynia by the SSDF, the overthrow of Siad in Mogadishu itself in 1991 by Aydeed's USC (United Somali Congress) forces, and the ensuing civil war, established gun-rule on a national footing.

While it certainly saved the lives of thousands of starving war victims, particularly in the Bay ✗ region of southern Somalia, and restored some public services, the overall effect of the subsequent American and UN intervention, through its colossal (and largely unintended) economic impact, was, paradoxically, to encourage rather than discourage the growth of better-equipped clan and clan alliance militias (as well as freelance armed gangs). It is even probable that the UN (and other international) attempts to cobble together a government have further set back the process of national reconciliation and so contributed to the continued disintegration of the state.

At first sight, the UN's sporadic encouragement of district and regional councils, under the slogan 'bottom-up' government, seems a more positive development. However, the impact of this, in effect, revival of long-established local administrative structures is controversial. These districts and regions (from Siad's 1974 reorganisation) were incorporated into the 1993 Addis Ababa peace agreements, but these accords have never been implemented and some groups dispute the validity of these administrative divisions. More practically, the size of councils established by UNOSOM in some cases does not allow for adequate representation of the local clans. Careful scrutiny is needed before such councils can be regarded as effective voices of local opinion. By contrast, in some cases, spontaneously formed district councils have already developed fruitful co-operative partnerships with foreign NGOs and demonstrate what local government can achieve. An impressive example is Erigavo in the north, where three rival clans have succeeded in establishing a local administration.

Clans, it needs to be stressed, are today, as in the pre-colonial past, not the only socio-political units. The collapse of the state and the high level of armed conflict and looting

have naturally favoured the development of Islamic law and of religious communities transcending clan divisions. There are thus now a number of Islamic communities, providing education and medical services with external financial support, and sometimes with their own militias, established in a variety of areas (particularly in the south, where some provide facilities for orphans).

This Islamic tendency is further demonstrated in the *shari'a* courts, associated with a locally prominent religious figure, which have sprung up in certain urban contexts, e.g., in parts of Mogadishu where they fill the vacuum created by the absence of social control and the promiscuous violence of trigger-happy gunmen. Where these developments, often encouraged by businessmen, occur within a clan and prove popular, they potentially threaten local political leaders (especially of the secular 'war-lord' type).

F. Current Patterns of Wider Alliance

Recent trends emphasise the salience of the officially long suppressed clan, led by its elders (including those former officials and such members of the elite as may be available), as the most conspicuous local unit. Clans are not, however, intrinsically, permanently stable groups.

Clans can unravel, and also ally in wider groupings, sometimes in apparent defiance of the principles of segmentary kinship. Indeed, a well-known survival tactic is for two sections of the same group to back rival external forces (thus hedging their bets). Clans can also unite in wider alliances, sometimes spurred by common trading interests, inter-clan commerce being a significant force furthering co-operation and peace (as the flag follows trade, rather than vice versa). Recent studies by Somali social anthropologists have demonstrated the importance of economic stimuli in peace-making and reconciliation, as well as the tendency of clans to seek to monopolise economic resources. Finally, it must be emphasised that clan loyalties constitute an elastic resource, opportunistically manipulated as advantageously as possible by people who are natural and ruthless entrepreneurs, and in a loose sense, capitalists.

Beyond these local groupings, operative everywhere, there were at the time of writing (July 1995), at least three more substantial and more ambitious local political formations outside Mogadishu. Each had its own specific features, and strengths and weaknesses. In historical order they are:

'Republic of Somaliland'/North-West[1] (former Somaliland Protectorate); based on the Isaq clans, with the support of their allies in the Gadabursi and Ise (Dir) clans who extend in the west into Ethiopia, and Djibouti; and the Warsangeli and Dulbahante (Darod) who extend into the North-East. Some sections of these Darod clans, however, prefer to ally with their

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[1]   The term 'North-West' (*Waqoyi Galbeed*) is rejected by the Somaliland administration since, historically, it refers only to the central districts of the country, which, in 1960, was incorporated into the (united) Somali Republic as the 'Northern Regions'. In contrast, the term 'Northeastern Region(s)' is that used by the SSDF administration itself.

Harti kinsmen, the Majerteyn. This situation of divided loyalties dates at least from colonial times and reflects the fact that the Dulbahante straddle the old border between the former British Somaliland and Italian Somalia. Their role as a bridge between these two territories was ingeniously manipulated by President Siad who appointed a Dulbahante son-in-law as head of his National Security Service. No allegiances here or elsewhere in Somali politics are absolute. Somaliland's main port is Berbera and the capital Hargeisa. The current President was formerly prime minister of Somalia, re-appointed in April 1995 for an additional period of eighteen months.

Its upper and lower houses contain representatives of all the local clans, as does the presidential government. The SNM, an Isaq coalition that liberated the state fighting against Siad's forces on a clan basis, then made peace with their non-Isaq colleagues and disbanded in 1993. In classical segmentary fashion the Isaq clans soon after fell out among themselves, as rival political figures (including the former president who had then lost public support) belonging to different clans sought to manipulate clan support to advance their personal ambitions. More ominously, the clan in whose traditional territory Hargeisa airport is located has gone to war to defend its economic interests, being joined by a related clan. This had the effect for much of 1995 of destabilising central portions of Somaliland. *This precarious situation reveals all too clearly the difficulties of trying to build an effective modern state, with popular consent, on the shifting sands of clan allegiance.* Such inter-clan conflicts over resources are all the more complicated when clansmen are abundantly armed with modern weapons, and the centre has few independent military or other resources.

North-East; based on the Majerteyn clan (SSDF), who also inhabit the area around Kismayu (as part of the Harti clan grouping). The main port and capital is Bosaso. As members of the Darod clan-family (including the Harti and Ogaden and others), the Majerteyn have further wider interests in the south and have supplied two of the three civilian premiers of Somalia. Their elite has shown particular enthusiasm for a federal structure for Somalia (reflecting their wider, national interests), while at the same time increasingly moving towards an autonomous regime in the North-East itself. Recent internal differences between rival leaders of different lineage affiliation appear to be encouraging the Majerteyn to try to develop a leadership capable of accommodating different opinions.

The Digil and Rahanweyn (Digil Mirifle) alliance of related clans (and some Dir groups around the port of Brava); based in the Inter-Riverine region and stretching towards the coast. The capital is Baidoa. Culturally and linguistically, this is the most distinctive community within the wider Somali nation, and it is not surprising that it should have opted for local autonomy. In fact, it has done this in the past and had its own independent political party in the days before Siad Barre. As agro-pastoralists, the Digil Mirifle have the most stable local organisation in Somalia, and a long tradition of inter-clan co-operation through the local clan leaders. These structures are clearly active and viable today.

While each of these three local administrations, with their political frailties, claims local autonomy, so far only the 'Republic of Somaliland' has asserted full independence. This partly reflects the concentration of the Isaq clans in this region, although their Dir and Darod supporters have clan attachments (variably acknowledged) outside it. The Digil Mirifle are similarly locally concentrated in their region, while, as we have seen, Majerteyn attachments and interests extend far outside the North-East. In this respect the Majerteyn have,

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analytically, something in common with the Hawiye clans in and around Mogadishu and who, since June 1995, boast two 'governments', claiming to control not only their local sectors of Mogadishu town but also (to a greater or lesser extent) the whole of Somalia.

The widest claims are those made by the 'government' proclaimed by General Aydeed (Habar Gidir) which, as announced on 15 June 1995, includes vice-presidents said to represent the defunct northern SNM and the very much alive SSDF. Like the 'SNM' vice president, the foreign minister also comes from Somaliland and both men's clans, with Aydeed's support, have been fighting the Somaliland regime of Mohamed Haji Ibrahim Egal. At issue is the claim of Aydeed's foreign minister's clan to monopolise the revenue from Hargeisa airport (where they customarily live).

Naturally, Aydeed's long-term rival Ali Mahdi (Abgal) has contested the legitimacy of Aydeed's 'government', as have rival protagonists within the Habar Gidir clan. This situation has inevitably led to a series of new political alignments in southern Somalia which, at the time of writing, are still far from assuming a definitive resolution. Lacking international recognition, all that can at present be said is that neither of the two Mogadishu 'governments' can realistically aspire to control much beyond their local bases in the former capital. These developments highlight how inadequately the so-called 'factions' and 'movements', and in many cases their 'representatives', reflect the fluid clan manoeuvres of Somali politics.

G. The Challenge

During the British Military Administration of Somalia in the 1940s, a Somali nomad succinctly expressed his requirements for government: we want, he said, to be well-governed but to be left alone. Somalia's recent political history gives added force to these aspirations for minimal government.

The problem is to find de-centralised, or uncentralised, structures that can accommodate the formidable array of local divisions and groupings, and provide such minimal common services (local and for international relations) as are required - with the corresponding financial implications.

Such arrangements, which will inevitably be influenced by those recently introduced in federalist Ethiopia, will also have to be strong enough to protect minority rights, and flexible enough to permit changing patterns of association between the constituent units as, traditionally, component communities can opt in and out of contractual blood-compensation paying agreements.

Nothing will happen quickly. In this profoundly oral culture, with its vigorous political poetry, all decision-making processes are protracted. Time has to be allowed, in the aftermath of such extensive bloodshed, for clan animosities to subside. It is not realistic at this point to imagine anything other than, at best, a slow evolutionary process toward agreed governmental systems, driven by increasing trade, communications, and other emerging common needs (e.g., public services, aid, passports, protecting fishing and other maritime rights).

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In the meantime, to a degree which the European mind is apt to find puzzling, despite the lack of state structures, life continues in this corner of the world. *The Somalis have rather over energetically rolled back the frontiers of their state. They have created extreme decentralisation rather than anarchy.* The awesome challenge now facing Somalis who seek a wider political structure is to find a way of developing a loose, over-arching framework, capable of providing these minimal common service requirements, and at the same time securely rooted in local democratic processes. Clans are the most natural building blocks here. In the absence of external pressures, intervention or pervasive social economic change, it is not easy, however, for a traditionally uncentralised society to transform itself into even the most decentralised form of state.

Chapter 1. Decentralisation Options for Democratic Reconstruction

A. Introduction

This chapter has two objectives: first, to outline four feasible models of decentralised constitutional government based on countries that have, in some respects, experienced similar histories to the peoples of the Somali region; and second, to relate these models to the emergent governmental institutions spontaneously developing in the former Republic.

1.1.   State-formation is occurring in some parts of the former Somali Republic, and new and old governmental forms are operative in many other parts of the country. Traditional and modern ideas and institutions are being skilfully employed to re-establish some of the most basic functions of the state: the maintenance of law and order, the promulgation of constitutional laws, and the collection of taxes and other public imposts. Governmental institutions are being established at regional and district level, and in several instances, potential states are being established, which to many of their inhabitants merit international recognition. These developments are the product, not of a centrally directed initiative, of external intervention, or of the type of despotism that marked the Siad Barre regime, but rather of local initiatives. Amongst Somalis there appears to be widespread enthusiasm to avoid the creation of any overly powerful central government, like that of the former dictatorship. It follows that constitutional arrangements elsewhere in the world that have arisen from local initiatives, or that confer considerable powers on local institutions and peoples, are likely to be of considerable interest to those Somalis engaged in the constitutional and consensual reconstruction of their nation.

1.2.   Three territorially-based models of constitutional arrangements meet the requirement for 'local' and 'decentralised' government and will be discussed in the next section: (i) a confederation; (ii) a federal state, and (iii) a decentralised unitary state with strong guarantees of local or regional autonomy. Examples of these models will be discussed in this chapter (Sections B-D). A further model, (iv) the consociational, provides a *non-territorial* form of decentralisation (not based on or fixed to territorially localised units). This model is especially useful where people belonging to different communities are intermingled but wish to enjoy the distinct benefits of community self-government and a common state, and it has the advantage that it can be combined with any of the three territorial models of decentralisation. It is discussed in Section E. However, before we outline these models the first question that Somalis need to address is a simple one: how many states should be built from the old Somalia (which itself is historically comprised of the former British Somaliland Protectorate and the former Italian Somalia)?

1.3.   The question is simple, the answers difficult. Somalis have three fundamental options, that are consistent with democratic and consensual government, based on respect for the principles of self-determination and of international law. If so, they have three fundamental options. They can agree:
   (i)   to re-establish a united Somalia; or
   (ii)   to create a Union (or Confederation) of the Somalias built upon the agreement of two or more states arising from the decomposition of the old Somali Republic;

(iii)   to form two or more independent states that have no constitutional ties with one another.

Whichever of these options they develop the initial decision need not be permanent and irreversible. Constitutional arrangements can be built in, whatever number of states are created, which would allow *either* for the re-unification, by agreement, of the states of the former Republic of Somalia, *or* for the secession, by agreement, of any of the new political entities created by the re-establishment of a united Somalia.

1.4.   One equally important and directly linked question must also be addressed by the Somali peoples: what should be the nature of the holder(s) of sovereignty in Somalia or the states of Somalia? If sovereignty is the ultimate source of lawful authority then there are three distinct but not exclusive answers that might be relevant:

(i)   the constitution may specify that sovereignty derives from the consent of the Somali nation, defined as all legitimate adult citizens;

(ii)   second, sovereignty may be vested *additionally* in the territorial units that compose a Somali state, federation or confederation; and

(iii)   third, sovereignty may *also* be vested in the peoples (or clans) of the former Republic, wherever they may be territorially located.

B. Confederation

1.5.   If the Somalis agree to establish two or more sovereign independent states from the remains of the former Somali Republic they may nevertheless agree to remain linked in confederal arrangements. *A confederation is a union for specific purposes of equal but independent states.* A confederation has been well described by a Swiss constitutional lawyer as a federation of states; that is, a group of states linked by international treaties. This indeed was the position of the Swiss cantons for most of the 500 years preceding 1848, that of the American states at the time of the Articles of Confederation in 1781, and also that of the separate states in Germany before 1867. The European Union, a union of previously warring states, is also of this nature, though this association also has some of the characteristics of an emergent federation.

1.6.   In a confederation the power of the central authority is delegated, whereas in a federation it is autonomous; or, to put matters another way, *in a confederation sovereignty rests with the constituent states, whereas in a federation it is shared between the centre and the provinces* (sometimes called states or regions). A confederation, unlike a federation, need not be all-purpose; a confederation may be established for a specific purpose (e.g., defence or free trade) but have no other necessary implications for the domestic or foreign sovereignty and policies of its members. Perhaps the most important attribute of a confederation is that the separate political entities that have come together retain their own international status and remain therefore in the eyes of the international community, separate states. These separate states co-operate together for strictly limited purposes and the nature, extent, duration and detailed terms of the agreement are negotiated by the separate governments of the co-operating states.

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1.7. *Functions of a Confederation.* There are no particular matters that a confederation of states must come together to agree upon, but what is generally characteristic of a confederation is that no all-purpose powers are conferred on the central co-ordinating body of the confederation. A confederation may be established to create a common defence policy, to combine against common enemies; or to establish a common economic or trade policy, a free trade area or common market; or it may be self-consciously established as a stepping stone towards a closer political union, a prelude to the formation of a fully-fledged federation. In all the historical confederal precedents mentioned above (Switzerland, Germany, the USA, and the EU), confederation preceded federation; that is a loose union of independent states, some of them very small, ripened into a federation as the states and the peoples in the states began to perceive the advantages of deeper co-operation. The same pattern is evident in the evolution of Canadian institutions. A federal state, in short, need not be imposed; it can emerge through co-operative consent from parties previously involved in confederal arrangements.

1.8. The most famous existing examples of functioning confederations are European, notably the European Union, and its predecessors the European Community and the European Economic Community; and the Western European Union, established for 'collaboration in economic, social and cultural matters and for collective self-defence'. We shall focus briefly on the European Union even though it has emergent federal features. A number of member-states - now 15 but there is no limit to the number who may join - have agreed through a succession of international treaties, notably the Treaty of Rome (1957), the Single European Act (1987) and the Maastricht Treaty (1992), to establish European institutions with jurisdiction over all of them, and to transfer to those institutions certain functions previously exercised by the member-states alone. The formal objective has been to introduce, maintain and extend a common market in goods, services, capital and labour. Once these functions have been transferred they can no longer be exercised exclusively at the member-state level. Nevertheless, to ensure that the interests of member-states are properly considered in the making and implementation of policies to uphold and advance the common market, elaborate provisions have been written into the treaties to provide for member-state inputs into decision-making. For example, provisions exist for vetoes and 'opt-outs' on certain matters where states consider that their interests would be harmed by the introduction or application of a particular policy or law.

1.9. Unlike many classical confederations, the European Union has established central institutions, which are recognisable as a legislature, an executive and a judicial body, all three of which may issue legal decisions binding member states. In this respect, the European Union has come, partially, to resemble a federal state, and the analogy may be driven home by noting that the Union's judicial body, the European Court of Justice, may give decisions whose effect is to indicate that a particular law passed by a member-state's legislature cannot stand against the constitutive treaties, or a legislative act of the European Union. Since sovereignty is traditionally thought to involve the right of a state to legislate for those within its borders as it sees fit, and the right for the highest state court to make the final and binding judgement on any matter within the state, evidently the member-states of the European Union have voluntarily surrendered a portion of their sovereign decision-making capacity to a another authority. They are still, however, sovereign states with the right of secession, and the European Union's central institutions have no means of

enforcing their decisions except through the active consent of the institutions of the member-states.

1.10. The evolution of the European Union has some relevance for Somalis. Its origins lie in the experiences of western European states in the wars of 1914-18 and 1939-45. The Somalis too are familiar with ruinous and protracted warfare and may well find confederal arrangements a sensible starting point for the avoidance of further conflict. It would be possible for different parts of the Somali state as it was on 1 July 1960 to form themselves into separate states, yet still agree to come together in a multilateral treaty to establish certain common institutions to develop and implement certain commonly agreed aims and policies. A treaty is a contract, and the concept of contract is firmly embedded in the traditional forms and processes of Somali political culture. To begin the process of the re-establishment of central co-ordinating capabilities through contracts between different groups of Somalis may well be an appropriate way forward. As with the European Union the peoples of the member-states may develop co-operation protected by their own sovereign status, and create central agencies in which each state is represented. The right to opt-out from a majority decision of member-states or to veto certain proposals might also have confidence-building consequences. Constructing a confederation would, however, require prior agreement on the constituent units.

C. Federation

1.11. If, despite their recent experiences, there develops some of the previous degree of trust between the Somali peoples, they may feel sufficiently strong bonds of shared nationhood, of past memory and future destiny, to move immediately into formally federal constitutional arrangements. The merit of a federation is that it satisfies the ambitions of both those who want to establish a central governing capability and those who want to have strong provincial (or state or regional) government.

1.12. *In a fully fledged federation central and provincial governments share sovereign constitutional authority, and the central or federal government cannot unilaterally amend the constitution.* A federation, unlike a confederation, is all-purpose or multi-functional, though the federal constitution may specifically limit the powers and capacities of the central or federal government. In fact there are three ways of organising central-provincial relations in a federation, viz.

(i) most of the functions of government are allocated to the provinces, except for the strictly defined and delimited powers of the centre [the most formally decentralised option]; or
(ii) most of the functions of government are allocated to the provinces, with the provinces' powers being strictly defined and delimited [the most formally centralised option]; or
(iii) the provinces and the centre may share powers of government with specified methods for mediating or arbitrating disputes between them [a mixed option].

Federal relationships between the centre and the provinces can also be either *symmetrical* or *asymmetrical*, i.e., all member-states can be defined as equals with identical rights and

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duties, or, alternatively, some member-states may enjoy greater autonomy from central or federal government than others. For example, if it was decided to form a new Somali Federation, some regions might merit a special autonomous status, including the right of secession.

1.13. Much ink has been spilled distinguishing between a federation and a confederation, and it is important that either form of government can develop into the other. As used here, a confederation is a union of independent states, in which the central organs of government, if they exist at all, are dependent for their existence and powers on the separate states. They are subordinate to the separate states, and this is so even in the European Union because the member states that make up the Union can meet together and rewrite the treaties from which the European organs of government derive their existence and powers. By contrast, in a federation, the federal government and the federated provincial units are constitutionally co-sovereign, and neither level of government is legally or politically subordinated to the other.

1.14. A federation is one state with (at least) two constitutionally independent territorial levels of government, the powers of which are provided for and protected by the constitution. It is a form of government designed to permit and indeed facilitate diversity within an essential unity: 'out of many one' (*e pluribus unum*) is the motto of the constitution of the United States of America. The unity of a federation is exemplified by the constitution, which has a fundamental role, since it is the guarantee of the rights of the separate units against any attempt by the centre to take them over, or subordinate them to itself. The diversity of a federation is exemplified by the autonomous powers of the provinces, regions or states that join together. It is additionally often symbolically emphasised by the location of the federal capital in a small city in a small district - an idea, which if adopted in a future state or states would require the removal of central governmental authority from Mogadishu. The diversity of a federation is also evident in the fact that there is no one model of a federal state, and there are, in principle, forms of federal government that have not yet been tested anywhere. The long-established federal democratic states that presently exist in the world (Australia, Austria, Canada, Germany, India, Switzerland and the USA), exhibit many differences from each other, as do more recently established federations (such as Belgium and the United Arab Emirates). However, they all have the underlying principle of co-ordinate systems of government, with neither one being constitutionally superior or subordinate to the other.

1.15. *The Swiss Federation.* In this report we shall briefly concentrate on just two examples of federations that have particular relevance for Somalis. The first is the Swiss Confederation that despite its name is a federal system. The federal system first came into being by the Constitution of 1848, though the current constitution dates from 1874. The history of Switzerland in the first half of the nineteenth century bears some resemblance to the last few years of Somalia's history. There were *coups d'etat* in various cantons - the regions or provinces or states of Switzerland - and constitutions came and went, along with interference by outside powers. It took a brief civil war, the Sonderbund War of 1847, before the Swiss forged a new federal agreement. In the view of one commentator 'the political map of Switzerland even today bears marks of this event... and if the final state of Swiss society and governance is considered enviable, then the civil war was necessary for Switzerland to become itself'. The federal arrangements were designed to meet the need to placate a people torn apart by political and religious differences and with a suspicion of

unaccountable central government. The essentials agreed to in 1848 were replicated in the constitution of 1874, and only those matters of particular relevance to discussions of the reconstruction of Somalia(s) will be noted here.

1.16. The cantonal units, of which there are now 26, are stated to be 'sovereign insofar their sovereignty is not limited by the Federal Constitution and, as such, exercise all rights that are not entrusted to the federal power'. In short, the powers of the centre are circumscribed whereas those of the cantons are not. The cantons may enact their own constitutions provided they do not contain anything inconsistent with the federal constitution, and that they ensure the exercise of political rights according to democratic forms. The general rule is that the federal government alone has the right to conclude treaties with foreign states, but exceptionally, the cantons retain the right to conclude treaties with foreign states concerning matters of public economy, neighbourly relations and police, provided these treaties do not infringe the rights of other cantons, or are not contrary to the federal constitution. In the event of disputes arising amongst the cantons, the cantons are to submit to the settlement of the disputes 'as decided in accordance with federal regulations.'

1.17. A distinctive feature of the Swiss federation is its collective presidency which acts as a check against any personal centralisation of power. The 'Federal Council', the executive authority, consists of seven equal members: there is no prime minister, or chancellor, or president in the American or French sense. The constitution provides that the chairman of the Federal Council, who is chosen by the Federal Assembly for a term of one year, shall be the President. A Vice-President is similarly chosen and 'the same member may not hold the office of Vice-President for two successive years.' These roles are symbolic rather than substantive. So effective is the Swiss system in denying personal power and authority to one politician that no Swiss statesman is famous outside his or her native land, and frequently none is famous within it. The members of the Federal Council are elected for four year terms by both the popular and federal chambers of the parliament sitting together. Not more than one member may be elected from the same canton. Amongst the functions specifically conferred upon the Federal Council by the Constitution are ensuring that the guarantee of the cantonal constitutions is not infringed; examining the agreements of the cantons amongst themselves, and with foreign states, and approving them if they are within the constitutional powers of the cantons; and ensuring the internal security of Switzerland and the preservation of peace and order.

1.18. Rather than providing, as many federal constitutions do, systematised lists of matters that are exclusively within the powers of the federal authorities, and the state (cantonal) authorities, and that are within the powers of both levels of authorities - i.e., concurrent matters - the Swiss constitution sets out these matters in some 60 articles, many of which contain within themselves statements about which level of authority may do what.

1.19. Two other federal institutions should be mentioned. The first is the Federal Assembly, which consists of two chambers: a National Council of 200 members allotted between the twenty-six cantonal units in proportion to their population, and a Council of States which has 46 members, elected in each canton at the rate of two per canton. Each chamber must elect from amongst its members a president and vice-president for each session. In the National Council, there must be a new president and vice-president for each ordinary session. In the Council of States, the new president and vice-president must come

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from a different canton from which the president and vice-president of the immediately preceding session came.

1.20. The second is the Federal Court that consists of 39 persons elected by the Federal Assembly. While there is no specific requirement that all cantons should be represented in the court, the Constitution does require that all four official languages (French, German, Italian and Romansch) are represented - which in practice ensures fair representation. There is no particular qualification specified in the Constitution for membership of the Court; any citizen eligible for the National Council may be appointed to the Court. The Court adjudicates on disputes between the federal government and the cantons and between the cantons. It does not, however, have any power to question the constitutionality of federal legislation; the Federal Assembly is the final arbiter of that issue, subject to a referendum which may be demanded by 50,000 citizens or eight cantons.

1.21. Three other features of Swiss constitutional practice are of potential relevance to the peoples of the former Republic. First, the Swiss have pioneered the idea of 'internal secession' through democratic means; that is, it is possible through local referendums for portions of a canton to secede to form another canton, or to join another. In the famous case of Jura (post-World War II) plebiscites were held commune by commune to produce a result that split the new canton in two, along religious lines (Protestants voted to stay with Bern canton). Second, a Swiss person is in the first place a citizen of his commune, and as such a citizen of his canton, and hence automatically a Swiss citizen, and both communes and cantons can, and do, impose their own requirements for citizenship.

1.22. Finally, Swiss constitutional provisions for the military may also be valuable for Somalis to reflect upon. Three are of especial importance:

(i)   Every Swiss is under the obligation to perform military service.
(ii)   The Confederation may not maintain a standing army.
(iii)   Without the consent of the federal authorities, no cantonal unit may maintain a standing armed force of more than 300 men, not including police forces.

Military dispositions are a federal responsibility, as is the act of declaring war and legislating on the armed forces. However, the federal army is stated by the Constitution to consist, *inter alia*, of 'the troops of the Cantons'; and the execution of federal legislation on military organisation is a cantonal responsibility within the cantons.

1.23. Many other aspects of the Swiss Constitution and its evolution testify to that country's desire to ensure that the federal authorities remain of modest proportions and of modest resources. At the outset of the federation in 1848, very few matters were allocated to the exclusive jurisdiction of the federal authorities and it has only been with the development of a modern economy that Switzerland, like many other federations, has allocated increased powers to the federal authorities. The referendum, the initiative (the right of the citizenry to propose a law at either cantonal or federal level which the legislatures must vote on), and the *Landsgemeinden* (the direct democracy of free citizens of the village or town), ensure that the people and the cantons can block any increase in central powers beyond what they consider proper.

1.24. The Swiss federation remained unified, in the final analysis, because the cantons agreed that it should. The cantons are the rock on which the state has been built : 'Cantonal identity, like the powers of the *Gemeinden* [communes], provides a receptacle for differences. It is the foundation of Swiss multilingual, religious and social peace. Each canton resembles a set of Chinese boxes or, perhaps a beehive into which history has built dozens of smaller boxes, the *Gemeinden*, or communes. They in turn are often subdivided into ethnic, religious or cultural sub-units which, while not formally recognised, give the commune its characteristic colour or tone. This cellular political system allows ethnic and other particularisms to flourish side by side.' (J Steinberg; *Why Switzerland?*)

1.25. Many features of the Swiss model may be exportable. It has, for example, distinct proportional representation electoral systems. Switzerland's population is close to Somalia's: 6.8 million. There are 26 cantonal units, so there are many small units of government below the federal level. The individual cantons have a history going back many hundreds of years and would clearly not have agreed to a federation if it had meant that they would have had to be subsumed into a bigger, or allegedly more 'viable' unit of government. The Swiss have an immensely democratic, accountable, and egalitarian federal executive and similar power-sharing arrangements for the presidencies of the two chambers of the legislature. Their democratic traditions are evident also in their referendums and armed forces. Above all, the Swiss model shows that out of adversity and civil war it is possible to forge a peaceful state, with maximum recognition and powers given to small units that have geographical or social or historical reasons for wanting to retain a separate identity, and the same reasons for wishing to prevent an overly powerful or despotic central government.

1.26. *The United Arab Emirates.* In many respects, the federation of the UAE could not be more different from the Swiss. It is less than 25 years old; it is made up of seven Emirates, none of which had constitutions before coming together into a federation; and all the Emirates declared themselves to be separate states immediately after ending a colonial relationship with the United Kingdom, and before joining together in a federation. It does illustrate an important point: the federation is a coming together of free and independent states willing to transfer limited amounts of their sovereignty to federal authorities. This commitment is reflected in a provision similar to that contained in the constitution of the Swiss Confederation on external relations. As such, the Emirates may, as an exception to the exclusive jurisdiction of the Union in matters of foreign policy, conclude 'limited agreements of a local and administrative nature with neighbouring states and regions provided that such agreements are not inconsistent with the interests of the Union.' The Union authorities have to be informed in advance of such agreements that are suspended pending a ruling of the Supreme Court if those authorities object to the agreement.

1.27. In another important respect there is a similarity between the Swiss Confederation and the UAE: the collective authority of the state. In the UAE, this is the Supreme Council of the Union, which consists of the Rulers of the Emirates, exercising supreme control over the affairs of the Union generally. Decisions of the Supreme Council must be taken by a majority of five of its members, which must always include Abu Dhabi and Dubai, the two most wealthy and populous emirates. Unlike Switzerland the UAE does not add a rotating presidency to its supreme authority. The President of the Council, elected by the members of the Council, serves for five years, and there is no constitutional prohibition on his being re-elected - the same goes for the Deputy President.

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1.28. Below the Supreme Council, there is a Council of Ministers of the Union that manages the day to day business of governing the UAE. It is 'under the supreme control of the President of the Union and the Supreme Council' and 'shall be collectively responsible before the President of the Union and the Supreme Council for the execution of the general policy of the Union internally and externally.' There are no constitutional provisions to ensure an equality of or indeed any representation from all the Emirates in the Council of Ministers. This is left to convention. Matters within the jurisdiction of the Union authorities are set out in two articles of the constitution with the general provision that 'the Emirates shall exercise all powers not assigned to the Union by this Constitution.'

1.29. The principal deliberative body of the UAE is the Union National Council consisting of 40 persons, with the number of seats allocated to each emirate set out in the constitution. Each emirate is left to determine the method of selection of the citizens who represent it on the Union National Council. The Union National Council is not a legislature in the sense in which that term is generally used. It may debate draft laws put before it by the Council of Ministers, and even amend them, but in the final analysis, it is the decision of the President of the Supreme Council or the Supreme Council that determines the content of the law and whether it is promulgated. A law that has been rejected by the Union National Council may, notwithstanding its rejection, be promulgated by the President after ratification by the Supreme Council.

1.30. A Supreme Court has jurisdiction over disputes between emirates and between emirates and the Union, and may also examine legislation from both the Union and the emirates for its constitutionality. An interesting power of the Court is the 'interrogation of Ministers and senior officials of the Union concerning the conduct of their official duties on the basis of a request by the Supreme Council', a mixture of judicial review of administrative action and impeachment.

1.31. The UAE is a federal system with few individual units of government below the federal level. The collectivity of the supreme authority is less pronounced than that of Switzerland. The constitution provides a lesser role for the citizenry or their representatives, falling some way short of democratic standards, indeed, the Union National Council may represent the emirs rather than the citizens. Nevertheless, since it is a working example of the combination of traditional authorities (although in contrast to the republican and egalitarian traditions of Somali society, these are hereditary and aristocratic) and their modes of rule with a modern state structure and institutions, it may have relevance.

D. A Decentralised Unitary State with Regional or Local Autonomy

1.32. Political opinion may be moving toward confederal or federal structures. The decentralisation possibilities within a unitary state structure are also worth exploring, however, because all options need to be considered. More importantly, even within a confederal or federal structure, it seems likely that within each future region, province or state there may well be a demand for constitutionally entrenched decentralisation.

1.33. Just as the dividing line between a confederal and a federal system is sometimes difficult to draw, so the dividing line between what might be called maximum

decentralisation in a unitary state and minimal federalism may also at times be a very fine one. The essential difference between a federal system and a decentralised system is this: a federal system creates a division of powers between central and regional authorities, each of which, in its own sphere is co-ordinate with the others and independent of them, whereas in a decentralised system, the regional governments are subordinate to the central government, which may, in principle, reconstruct or destroy them without their consent. This general statement may be illustrated by reference to the draft Constitution of Uganda which makes provision for extensive decentralisation of powers to district councils:

'Subject to such limitations as Parliament may prescribe, and as may be consistent with the decentralisation of local government, District Councils may exercise and perform functions and services other than those... exclusively reserved to the Central Government... The President may, with the approval of the National Council of State delegate to a District Council any of the functions and services within the exclusive jurisdiction of the Central Government if satisfied that the function or service can be effectively carried out by the District Council. The President may with the approval of the National Council of State take over the administration of any district in any of the following circumstances: ... (c) if circumstances have arisen which make it impossible or extremely difficult for a District Government to function.'

1.34. Here, despite the aim of transferring considerable powers, and in practice financial resources, to district councils, the central government retains considerable reserve powers. Constitutionally, it would be a central government decision alone to delegate (not transfer) exclusive central government functions to districts; and it will be an Act of Parliament, rather than the Constitution, which will set limitations on the exercise of powers by district councils. Even in Papua New Guinea, which has gone further down the road of decentralisation than Uganda, the decentralisation provisions are contained in an Organic Law, not the Constitution. The National Parliament retains ultimate supremacy and there are provisions that the central government can invoke to interfere in provincial affairs, including the coming into existence of a provincial government which requires its approval.

1.35. In Uganda, which from the mid 1960s, had an increasingly centralised (and corrupt, brutal and inefficient) government, the decision to decentralise government, and to entrench the principle of decentralisation in the constitution, is a major change of direction. According to Uganda's President: 'Our decentralisation measures aim at undoing the harm that was caused to local systems of governance by centralisation. We want to unleash local initiative and invigorate the local democratic process which together will sustain development and enhance local capacity for self-governance and service delivery...Human beings can govern themselves in peace and dignity in pursuit of their collective well-being once entrusted with their own destiny through the medium of popular democratic local institutions. Central government only defines the rules of the game and then proceeds to vest responsibility to local authorities and other local organisations... Decentralisation effectively breaks the monopoly of Central Government over the social, economic and cultural life of society...' Many of these sentiments will resonate with Somalis.

1.36. Nevertheless Ugandan decentralisation is essentially a top-down process. The central government of a unitary state is relinquishing powers. The construction of a federation usually is a bottom-up process; individual units of government coming together to create a

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tier of government above them for limited purposes. In the former Somalia the decentralisation option may be more apt *within* the regional units of government, and indeed it does seem as if it is already being acted upon by the regional authorities. The federal or confederal options may be more appropriate for the re- creation of central governmental capabilities. There are two simple decentralising ideas, however, that may be worth embedding in any future Somali constitution. First, the constitution should specify powers that local governments may have as of right, though they may choose to delegate these powers to higher levels or to share them with other authorities; and, second, constitutional checks should be placed upon the abilities of regional, provincial or state governments to abolish or circumscribe the powers of local governments. Requirements for extraordinary legislative majorities or for local referendums are some of the more obvious mechanisms that can fulfil this objective.

1.37. Whatever territorial constitutional structure Somalis devise they would do well to establish provisions for amending the constitution that are relatively inflexible. Examples of such provisions might include special weighted majorities for the legislative passage of amendments, unanimous agreement amongst regions, stipulations mandating periods of reflection before the passage of amendments, or veto powers for specific regions or other institutions.

E. Consociation

1.38. We have so far discussed territorially-based decentralisation and examples of how this principle may be put into effect. Decentralisation may have another meaning - the simultaneous decentralisation to and sharing of power by communities as opposed to districts. These *power-sharing* or *consociational* principles can be used within confederations, federations or unitary states, and can operate at the level of an entire state, or within a region of a state characterised by conflict. In short, these principles are relevant to both central and local governments. Their pertinence for Somalis, for whom clan, and sub-clan, rivalries are presently endemic, should be apparent.

1.39. Consociational practices are continually invented or re-invented by politicians within divided societies. They were invented by Dutch politicians in 1917 and operated until the 1960s; they were forged by Lebanese politicians between 1943 and 1975; Malaysian politicians experimented with consociationalism between 1955 and 1969, Fijians on and off between 1970 and 1987, Northern Irish politicians for a brief spell in 1974, and South Africans, in the course of abolishing the white minority dictatorship, have effectively created, at least for the time being, a consociation. Consociational democracies usually have four key features:

(i) A *grand coalition government* incorporates the political parties representing the main groups in the divided society. This can take several forms, such as a grand coalition cabinet in a parliamentary system, a 'grand' council or committee with important advisory functions, or a grand coalition of a president and other top officeholders in a presidential system, or a collective presidency. In a less ambitious version of consociation the guiding rule is *government by more than a simple majority*, which guarantees representation for minorities. It is important to realise that the same effect as grand coalition government can be accomplished if and when the separation of powers

prevents any one group, or majority group, from monopolising political power. For example, in the United States when different parties control different branches of government and are obliged to work together the impact is equivalent to the formation of coalition government.

(ii) *Proportionality-rules apply throughout the public sector*; i.e., each community is proportionally represented in all the core institutions of the state (by what are in effect community quotas): the legislature(s), the executive, the judiciary, the civil service and the police. Proportionality-rules may be specifically entrenched in electoral rules (see Chapter 6) or in the composition of parties. Proportionality-rules apply both to public employment and public expenditure - each community gets its fair share of public sector jobs and public expenditure, for example to fund its educational and broadcasting needs. The principle of proportionality might also apply to private sector employment: requiring employers to have balanced workforces to prevent or correct discrimination in employment and the development of potentially lethal economic inequalities between rival communities.

(iii) *Community autonomy operates*. Each community, formally or informally, is given self-government over those matters of most profound concern to it. In cases of ethnic conflict these issues revolve around language, education, religion, culture and the expression of national identity. In Somalia(s) the principle would mean respecting the autonomy of the clans, and sub-clans, and potentially the linguistic and cultural particularity of the Digil-Mirifle peoples and of the Bantu riverines and other culturally distinct minorities. Community autonomy within a consociational system differs from territorial autonomy under federal systems because members of each community must have their autonomy respected irrespective of where they live and work. One can, if one finds it easier, think of consociation as 'community federalism', or 'corporate federalism' in contrast to territorial federalism. The most obvious examples of the principle are religiously or linguistically organised education systems. For Somalis it could mean, for example, leaving each clan free to administer criminal law.

(iv) *Vetoes exist for minorities*. These vetoes can take various forms. For example, in Belgium weighted majorities are required before some legislation becomes law. Vetoes can be legally or conventionally entrenched. In Canada, before the adoption of its new constitution in 1982, Quebec had an informal veto over constitutional change (its loss of this veto is one of the factors underlying Canada's current constitutional crisis). If Bills of Rights are established, with supreme courts to uphold them, and if these bills entrench individual as well as communal rights, they can provide an effective way of protecting minorities. A controversial but interesting example of this phenomenon is the Canadian Charter of Rights and Freedoms of 1982.

1.40. Consociational principles embrace pluralism, whether that pluralism is based on ethnicity, religion, language or some other deep-rooted cleavage, such as a clan or lineage. They are based on the idea of allowing groups to be separate but equal. Like federal

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principles consociational practices facilitate unity and diversity, but without any necessary territorial or uniform implications. *They aim to secure the rights, identities, freedoms and opportunities of all communities, and to create political and other social institutions which enable them to enjoy the benefits of equality without forced assimilation, and without being dominated by the largest group or alliance of groups.* Consociational principles do not oblige people to be schooled together, although they do imply a commitment to integrated proportionality in political and legal institutions and possibly to proportionality in work-organisations - since these arenas are the ones in which ethnic or clan differences may produce violence, instability and perpetuation of conflict.

1.41. Consociationalists argue that in some parts of the world the relevant populations have a simple choice between creating consociational democratic institutions or having no meaningful democratic institutions at all. They argue that only consociational mechanisms can avoid perpetual civil war or dominance by the largest group or alliance of groups. A case in point is the Lebanon whose delicate consociational compromise was destabilised by Israel and Syria in 1975/6, and by the impact of the expelled Palestinian Diaspora. Consociational arrangements do not require academic experts or consociational engineers to come into being. They are constantly re-invented by politicians. The key point is that they have the autonomy, imagination and incentives to construct such compromises, and the appropriate external environment - a common threat. They require politicians to believe that it is better to have a share of power rather than to bear the costs and risks of seeking dominance. This situation may be emerging in Somalia. It is true that Somalis face no major external threat at present, but the collapse of the state has turned them against one another to the extent that each clan grouping constitutes an external threat to its neighbour, albeit from within Somali society rather than from outside it. The best case for consociational arrangements is that they involve the self-government of the relevant communities, and they are better than the alternatives: majority-domination, bloody partition, secessionist warfare, expulsion and genocide.

1.42. To work, consociations require at least three fundamental conditions:

(i)   The potentially rival communities must not be unreservedly committed to immediate or medium-term integration or assimilation of others into 'their' community, or to the creation of their own nation-state. The Somalis do share a sense of national identity which may help them develop a consociational system, though it has not stopped warfare among them.

(ii)   Successive generations of political leaders must have the right motivations to engage in conflict-regulation and sustain the consociational system. The leaders of the rival communities must fear the consequences of a return to war, and desire to preserve economic and political stability. They must, for example, believe they are incapable of governing successfully on their own, or establishing hegemonic control over others. Their motivations for supporting the system may be self-interested or high-minded, but without them there is no prospect of producing a stable settlement. The moment rival political élites and their followers believe that the benefits of war exceed the costs of peace a consociational system is doomed. The implications for Somalis will be apparent to all.

(iii) The leaders of the relevant communities must enjoy some political autonomy, so that they can make compromises without being accused of treachery. If they lack confidence they may not be prepared to engage in hard-bargaining, or to make difficult decisions. This condition requires restraint within the relevant communities, which will be especially difficult for Somalis with their traditions of splitting and splintering within clans, as well as between them. The authority of the elders, however, reinforced by Somali consensual local decision-making, may possibly help create the right types of leadership. Choosing the right kind of electoral systems to encourage effective and co-operative power-sharing is also problematic (see Chapter 6). Competitive elections, using proportional representation - which are normally recommended for consociational systems - may create incentives for extremist leaders to compete for office confident that they will not lower the overall support for their group. The net result of such behaviour may be that each group's extremist leaders may lack the skills or incentives to moderate their demands sufficiently to establish a workable power-sharing system. By contrast, in plurality-rule elections, a dominant party may emerge which may have no incentive to appeal to minorities. Thus in addition to no majority group believing it can govern on its own a consociational settlement requires that each community must be internally politically stable in a way that promotes compromise, and the workings of the electoral system must not undermine the internal stability of the communities.

1.43. These are demanding requirements. If they are not present, or break down, as has happened in recent times in the Lebanon, Northern Ireland, Malaysia, Cyprus and Fiji, then consociational experiments will also fail. An even more depressing conclusion is also possible. Consociational practices may work to calm ideological, religious, linguistic or ethnic conflicts, but only if these conflicts have not become the bases of separate national identities. In other words consociationalism may only be practicable in moderately rather than deeply divided societies. Perhaps Somalis, free of external intervention, and wishing to avoid any future humiliating external interventions, will prove only moderately divided - after all, they do share a common national identity.

1.44. How might consociational principles work in a future Somali state or states?

(i) One way of creating a grand coalition government would be with a constitutional requirement that the President require the Prime Minister to include representatives from enough parties in his/her Cabinet so that the sum of the parties represented equals at least 3/4 of the seats in the Assembly. This suggestion seems to assume a unitary state; but it could work within the Somali regions. A better suggestion for a federal executive might be that a collective presidency should be created. It would consist of representatives from each of the states or regions in the federation, as is the case in the UAE, and provided consociational principles operated within the regions then these representatives would be broadly acceptable. These are only two brief suggestions for creating a grand coalition government. Somalis themselves could elaborate others very effectively.

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(ii)   The principle of proportionality could be applied in all institutions, federal or regional (for discussion see Chapters 2-6), in a common civil service, judiciary and police, in electoral designs, and in the allocation of public moneys. Its full implementation, however, will require a census as well as an agreement on the constituent groups who are to be parties to the arrangements.

(iii)   The principle of clan autonomy could be operated in a radical or less radical form. In the radical form the clan could be left to decide what contracts it makes with other clans to establish co-operative institutions; in a less radical form clans could be left to govern themselves in those matters judged by Somalis to be of such obvious importance that to do otherwise would recreate the conditions for war, e.g., policing.

(iv)   Veto powers - of both a federal and non-federal, and of both a legal and non-legal kind - can be designed to prevent any group or coalition of groups lording it over others. In any reasonably liberal system provision would also need to be made to protect those who do not wish to belong to any clan.

F. Conclusion

1.45.   Both federal and consociational principles may be fruitfully applied by Somalis intent on reconstructing their nation. The federal, or confederal, approach would help avoid the construction of an overly strong centre, while the consociational approach recognises openly the real importance of the clans for most Somalis, and their concern that they are treated fairly in the future. Consociational and federal principles could also help Somalis break decisively with their Anglo-Italian colonial heritages and re-address their needs for stable and fair government. In subsequent chapters the implications of these arguments are elaborated. The key difficulties in developing both federal and consociational ideas, naturally enough, will lie in Somalis' willingness to agree on the appropriate federating and consociating units. That is a matter for Somalis, rather than the authors of this report.

Chapter 2. The Political Economy of Decentralisation

The previous chapter considered alternative political arrangements on a confederal, federal, and decentralised unitary basis that might be created to perform governmental functions. This chapter considers some of the economic and management issues associated with these different political structures.

A. Liberalisation, Privatisation and Political Decentralisation are Compatible

2.1.   Under President Siad, the Somali Republic attempted to develop the economy through nationalisation, protection, and subsidies, and used public spending to stimulate employment and growth, build infrastructure, and provide free social services. Large estates with protected export markets dominated the banana and sugar industry. State monopolies were set up to market agricultural products and produce goods and services, their losses being funded by foreign aid and taxation. Only the pastoral livestock industry escaped the destructive effects of a system that officially suppressed private enterprise, and inadvertently stimulated the growth of an 'informal' economy. Monopolies were used to maximise personal gain, and resources were allocated on the basis of personal and clan ties.

2.2.   In the late 1980s foreign donors attempted to change these policies through a structural adjustment programme that involved fiscal and financial reform, the elimination of licenses and monopolies, and the privatisation of state corporations. These reforms were not effectively implemented, and the crisis worsened, leaving Somalis with little experience of successful economic policy that might be drawn on to create viable new structures.

2.3.   The collapse of the state and virtual withdrawal of aid has eliminated all monopolies and further stimulated the laissez faire economy, which is the basis of the informal sector. The destruction of the formal sector has left behind a multitude of small producers and traders who lack public services or formal regulatory controls. Currently, more than two million animals are reportedly being exported annually to the Arab world and Kenya (mainly from Somaliland and the North-East), estate-grown bananas are going to Italy and the United States daily, and regular flights bring in qat and cigarettes from Kenya and Ethiopia. Along the coast, small ports are being developed. As in the past, large numbers of Somalis are working abroad and sending back remittances.

2.4.   There is little prospect of the large donor programmes that sustained the old state sector being resumed. Significant inflows of foreign investment are unlikely, and it will be many years before an efficient government (or governments) can be set up. Political reconstruction will have to operate therefore in an economy dominated by the needs and potential of a vigorous but small-scale, local private sector. The consequent implications for political reconstruction, and policy management and service delivery are considered below.

Competitive markets and political decentralisation
2.5.   The change from a state-dominated economic system to one based on competitive private enterprise should have positive consequences for the development of decentralised political structures. Decentralisation, whether in the form of confederal, federal or decentralised unitary structures, depends on the ability of local groups and individuals to

exercise control over their economies, and on their ability to resist political pressures from central government. This autonomy is impossible where government controls the most desirable jobs, allocates licenses and quotas, decides where new projects and services are to be located, and determines the rate of exchange and taxation. Centralisation also permits an unrepresentative elite to use these economic controls to reward its political supporters, marginalise its opponents, and feather its own nest.

2.6.   Centralised control is reduced when the state transfers key assets to the private sector and allows economic success or failure to be determined by market competition rather than political patronage and clan connections. When central governments no longer control resource-allocation, wealth and influence cannot be exclusively determined by political power; and social and economic groups will no longer have the same motives to seek power at the centre. In short, decentralisation should reduce political conflict and distrust, and minimise the economic benefits to be derived from state power. Where winners cannot use power to enrich their associates and dispossess losers, ambitious individuals may be more willing to accept the results of decentralised democratic processes.

2.7.   The same logic applies at the regional level. When regional authorities engage directly in trade and production themselves, intra-regional competition between public enterprises may lead to conflict. This danger can be avoided if trade is confined to private citizens, providing they recognise each other's property rights and honour their contracts. Such free trading is feasible within federations and confederations, and has been pivotal in the development of the European Union. The converse proposition also holds: federations and confederations may collapse in the absence of free trade, e.g., the East African Community failed when Tanzania and Uganda would not allow Kenyan goods free access to their markets, and the Senegambian Confederation was dissolved partly because the Gambia insisted on maintaining a protective regime.

2.8.   Decentralisation and privatisation are not completely risk-free, however. If there is no central government to determine resource-allocation, individual entrepreneurs can operate across political units, whether they divide districts in a unitary state, regions in a federation or semi-autonomous states in a confederation. Economic inequalities and conflict may emerge out of the competitive process, which may take on a regional or clan character. If harmonious political relations are to survive, losers must accept these results, but they can only be expected to do this when they feel they have not been the victims of unjust rules or political pressure. Clan loyalties will play a critical role in rebuilding trust and networks in the private sector, but this need not lead to political conflict if no-one is forcibly excluded from the market, and success or failure is determined by open competition, rather than coercion.

2.9.   Strengthening the private Somali economy will be no easy task. Most enterprises are tiny, while many of the wealthier traders have acquired their assets through political influence or force. Entrepreneurs have little access to developed credit-markets or modern skills and technology, and they operate in an environment characterised by minimal public services and a lack of law and order. These weaknesses may be reduced by the continuing use of traditional Somali commercial practices, which have already allowed trade to revive under extremely difficult material circumstances. It would seem, then, that on balance the

transition to a private market economy is consistent with current attempts to develop new centres of local political authority at village, district and regional levels.

2.10. The private sector will survive whatever the political situation, but it will only develop if the economic environment can be dramatically improved. The success of individual entrepreneurs depends on their motivation, assets, and skills, but even more on access to the external services and infrastructure. The most obvious need is for peace, security and a reliable system of law and order, but roads and airports also need to be repaired. Investment is constrained by the absence of formal credit facilities, and significant improvements in productivity will require adequate health or educational services. Common pastures, water supplies and fish stocks need to be protected from degradation, the existing currency may require attention, and recognised legal authorities will have to be instituted if international contracts are to be honoured and enforced, and long-term development projects and programmes are to be negotiated with foreign donors.

2.11. Some of these services could be provided privately, but even dedicated market theorists accept that many should be public, or at least regulated if they are not managed publicly. These include public goods to which access cannot be controlled, such as law and order, defence, common property resources, research findings or money; others which are natural monopolies, such as roads; and yet others, such as health and education, which most people believe should be available as a matter of right. In the past it was assumed that these services would have to originate from the centre, a view that is reinforced by official donors who today operate almost exclusively at that level. Indeed, the Articles of Agreement of the World Bank and the IMF, and the mandates of UN agencies, with the exception of UNICEF and UNHCR, make it difficult for them to work through any agency other than a legally recognised government.

2.12. There is, however, no intrinsic reason why services should emanate only from the centre, and almost all have been managed by local authorities in other countries in the past. This is also true in the case of confederations such as the EU, where the regional governments are dominant and the centre only controls services and money allocated to it. It can also be the case even in decentralised unitary states with strong local government systems of the kind the Ugandans are trying to develop. Given the contemporary significance of Somali regional authorities, we will be mainly concerned with the problems involved in economic management and service provision at that level.

B.   Macro-Economic Management, Private Sector Development and Political Decentralisation

2.13. Modern states generally create conditions that allow entrepreneurs to produce and exchange their products at minimal cost by creating a common system of property law and enforcement, and a reliable and universally accepted currency and credit system. They must also regulate access to common property-resources, manage external economic relations, and raise and spend taxes honestly and efficiently. Economic theorists have much to say about the general principles that should govern policy management in these areas; here we consider how different levels of decentralisation can influence the way in which they are managed.

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We will therefore begin by raising some general problems associated with the management of decentralised systems, then look briefly at some of the key areas of policy.

Decentralisation, standardisation, unification and equity

2.14. Local authorities are presently being set up wherever communities, with or without external help, can agree on representative structures and give them responsibility for security and basic services. It is widely assumed that local initiatives are the only way to re-establish political order, and that the new authorities may ultimately combine to form a state (or states) where they will retain a significant degree of political and economic autonomy.

2.15. The nature of the powers assumed by the regional units will thus decisively influence the patterns of economic management in any new state structure. In a confederal system, the centre might exercise little more than a symbolic authority, while each region developed its own financial and economic arrangements. In federal systems, such as the United States, the centre will preside over a unified system of commercial law, money, finance, credit, economic regulation and public administration. The evolution of the EU demonstrates that standardisation is not essential for a high degree of economic co-operation and integration. Chronic controversy over the locus of sovereignty in Europe and the need to unify economic policy and practice also suggest that local units should voluntarily attempt to harmonise their arrangements, as they go along, if they wish to avoid such difficulties in the future. Many issues arise here, including the scale, boundaries and economic viability of the local authorities, the nature of the powers allocated to each level, the extent to which policy and regulatory arrangements can be standardised, and whether regions can establish independent relationships with external donors and private investors

2.16. If existing or future regional authorities are responsible for a wide array of services, financial management and development planning, they will need access to adequate levels of manpower, financial resources and physical assets. This problem has two aspects: the adequacy of the resources that can be mobilised by any region for basic services, and the degree of inequality that might develop between areas with strong and weak natural endowments. While problems of scale and scarcity are significant, they are probably less critical to the viability of regional units than problems associated with inequality. Resolving these problems will also be closely associated with the nature of the relationship created between regional authorities and the central government (or governments), which will be qualitatively different in unitary, federal and confederal systems.

Scale

2.17. *The economic viability of political units is not a function of scale or natural resource endowments, but of skills, investment, and stable institutional arrangements that protect property rights and create an incentive system that guarantees efficiency and equity.* Hong Kong and Singapore are small communities yet economically successful despite an almost complete absence of natural resources. What undermines development is not size but rather predatory government and violent political conflict. The key problem that must be addressed in Somalia is how to create a viable basis for political authority and security, and this can only operate when people are willing to recognise each other's rights and to accept their own obligations. Since trust is the crucial variable in determining political viability, common interests, rather than scale, should be the determining factor in defining regional boundaries.

2.18. The viability of small regions will depend, however, on the maintenance of open boundaries between regions, which will ensure that businesses do not have to depend on local markets and resources, but on their capacity to trade with their neighbours. This will be difficult if, but only if, any region should disrupt investment and trade by closing borders, imposing punitive taxation, prohibiting firms from trading, or introducing monetary, regulatory or legal systems that are incompatible with those of their neighbours. These are real dangers since new authorities are already having to raise taxes, protect local producers from competition, recognise property rights and enforce contracts.

Inequality and inter-regional transfers

2.19. Inter-regional inequality is bound to arise in any devolved system, and will demand attention if poor regions are to be integrated into a viable, larger unit. A competitive market economy will usually produce uneven development between regions since most enterprises will go to centres with good resource-endowments, stable infrastructure and large markets. These market-driven processes will then create and be reinforced by corresponding inequalities in public provision, since the capacity to tax and pay for services is a function of the success of the private economy. Such inequalities will then decisively influence the economic success of any region and especially the willingness of its citizens to support a common government and cooperage with other regions. The tensions resulting from inequality will only be effectively managed if they can be offset by mechanisms for financial management and development planning at local and central levels.

2.20. The dominant pastoral economy makes it difficult to raise direct personal taxes, and thus most revenue is generated from import and export duties. Regions that control major ports and airports can raise far more revenue than those that do not, despite the fact that the goods on which the taxes depend are produced elsewhere. Unless some mechanism can be created to ensure that such revenue generating opportunities are equitably distributed, or to redistribute resources from a central fund, their relative deprivation will increase and ultimately threaten the integrity of any wider structures.

2.21. Improved revenue-generation will have to be accompanied by a better capacity for financial management. Treasuries will have to be manned by trained personnel with an obligation to produce regular accounts. Competitive procedures will have to be introduced for tendering; some form of independent audit is also essential. Regional Councils can set up finance committees and effective procedures for allocating resources and monitoring the way they are spent and accounted for. None of these requirements need involve very complex technology or advanced skills, but they do require a high degree of integrity amongst politicians and staff, and the development of simple but rigorously managed procedures.

2.22. These changes can and should be introduced by regional authorities, and some of them could also be used at lower levels. The re-establishment of a single state or association of states would raise new problems about the allocation of tax instruments and of the resulting revenues. In a strongly confederal system the regions could retain control over all taxes and transfer sufficient revenues to finance the central administration, as in the EU. If the centre had greater autonomy it could take over the most profitable taxes (probably import and export duties) and transfer agreed amounts of resources to the constituent regions. This fiscal policy would help to eliminate some of the inequalities that would otherwise arise

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between well and poorly endowed regions. The balance between central and local control will have to be struck pragmatically, and will be influenced by the political commitment to centralisation and the relative administrative capacities of the regions and any central authority. Within most confederations, inter-regional economic transfers are rare. By contrast, in a unitary state, the centre often controls most of the taxes and grants, and can redistribute them to offset inequality without reference to the areas in which they were generated.

2.23. In countries where the central government is best placed to levy taxes, as in Uganda, regional autonomy and equity can be achieved through direct subventions through guaranteed access to block and equalisation grants, although it is always difficult to establish objective criteria through which this can be done. In the former Somalia the central treasury has collapsed, and few people would be willing to pay taxes to anyone outside their immediate region, so a wider redistributive system will not be possible for some time to come. This means that the first concern must be to strengthen the revenue-generating capacity of local authorities themselves by improving the collection of existing taxes, finding new ones, and introducing some form of fee-paying for the use of services like education, health, roads and water where this is possible. External donors will also have to deal directly with the regional and lower level authorities responsible for service provision. Given the enormous importance of inter-regional equity, they should also use their resources to support the most marginalised groups and areas to compensate for the absence of a central state capable of doing so.

Macroeconomic management

2.24. A national government that can manipulate exchange rates, money supply, credit, fiscal deficits, tariffs, monopolies and property rights can produce mismanagement and distortions that lead to inflation, depreciation, the suppression of private enterprise and capital flight. The Siad Barre regime indulged in all of these malpractices, thus producing a major economic crisis by the time it fell despite significant inflows of foreign aid. The disappearance of the state has removed these distortions by eliminating all controls over trade and investment and ending credit creation and the growth of the money supply. This has taken matters from one extreme to another. While the previous system created inflationary conditions strengthened by inflows of donor money, the present one forces enterprises to operate under conditions of deflation and scarcity. Any regional authority that can be created will immediately have to consider what it can do to alleviate these difficulties. It will be impossible for weak regional units to develop macro-economic stabilisation programmes comparable to the structural adjustment programmes being developed in other crisis-ridden countries in the immediate future.

Money

2.25. In the former Somalia trade is currently being conducted in US dollars, Saudi rials and Somali shillings issued by the Siad Barre regime. More recently, there have been conflicting reports that warlords in southern Somalia are issuing Somali shillings, which could create inflationary pressures. A new currency has been issued in the 'Republic of Somaliland', although it is too early to judge its acceptability and stability. Other regions could soon find that their supply of the old Somali shilling is wearing out, and they may have to decide whether further new notes should be issued.

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2.26. At present, most countries have their own currencies issued by central government, but this is not essential for statehood. Historically money took the form of precious metals supplemented by credit money created by private goldsmiths and then banks. When these proved untenable, governments created central banks to issue paper money and manage the credit system. Where governments could be relied upon not to print money, this policy produced stable economic conditions, and where they could not, it led to hyper-inflation and became a hidden form of taxation. When monetary indiscipline was combined with controls over the allocation and price of foreign exchange, as under Siad Barre, governments commonly allowed high levels of overvaluation to develop, which discouraged exports and allowed functionaries to exploit their monopoly positions.

2.27. The creation of private credit in the absence of a viable banking system is unlikely. As Somalis have demonstrated, the absence of an official domestic currency does not end trade, but expands the use of foreign currencies, whose availability depends on exports and remittances. Here the situation is not very different from what prevailed under the colonial Currency Board system, where the supply of domestic currency was tied directly to the size of the balance of payments surplus. That system had deflationary effects, because it ruled out deficit-financing, but it also excluded the damage that usually results when governments have been free to debase their own currencies.

2.28. There is no technical reason why several currencies should not be minted, and this indeed is the present situation following the introduction of the 'Somaliland shilling'. In a confederal system, this could be essential where all the units were determined to maintain their economic autonomy for political reasons. As is well known, agreement on full monetary union is still a long way off in the EU, for example. The issuing of a large number of independent currencies in a small and economically interdependent region will, however, be expensive and involve heavy and unproductive costs for local governments and more especially for traders.

Trade
2.29. The restrictive controls that reduced exchange under the Siad Barre regime have disappeared, but regional authorities are now raising most of their revenue from import and export taxes. This raises three issues of political and economic policy:

(i)   Export taxes should be minimised in an economy that depends heavily on foreign trade - every effort should be made to find additional tax instruments that will reduce the burden on exporters, who at present make the largest contribution to public finances.

(ii)   Most of these taxes now appear to be collected from the four major ports (Mogadishu, Kismayu, Berbera, and Bosaso) and a few key airports, giving the political groups that control them a decisive advantage.

(iii)   Regional authorities, especially those without direct access to ports or airports, will be tempted to erect internal customs barriers that will discourage domestic trade and even create political conflict. Most federations try to establish free internal trade, though it is not essential that they should do so.

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If Somalis wish to avoid an intensification of economic fragmentation of their former state they will have to find equitable and transparent mechanisms for the distribution of customs revenue on a regional basis.

Fiscal management

2.30.   Modern states rely on income and sales taxes, and less on customs duties - given the growing commitment to free trade. Local authorities in the West utilise property taxes for funding local authority services, while many African countries depend on individual poll taxes. In contemporary Somalia, however, almost no-one earns a regular taxable salary. In the immediate future, a continued reliance on import and export duties is to be expected, which will strongly favour certain regions. Some urban authorities have already resumed the collection of property taxes, market dues, road licences and slaughter taxes. This type of revenue could continue to be generated by contracting out services to private operators. The sales and excise taxes can only realistically be levied after a large business sector and viable regional tax administrations are in place.

2.31.   Until the capacity to raise taxes improves, local authorities will have to recognise that they will be able to offer few free services and must rely instead on full cost fees for service payments. As happened previously in some cases in Somalia, these can be charged whenever a direct service is offered to an individual, whether for health treatments (including the treatment of livestock), education, water or, where access can be controlled, e.g., to roads. Charging fees will not only eliminate the need to raise taxes, but also ensure that consumers have some control over the quality of service. The major disadvantage of such a system is that it reduces access for the very poor, a problem that can be addressed by finding ways of subsidising this group.

2.32.   As Somalis are well aware, when viable community structures exist at the local level, such as in village committees, parent-teacher associations or primary health care associations, people may be persuaded to contribute to service provision by mending roads, making bricks for schools and health centres, improving springs, and digging wells.

Property rights and contracts

2.33.   Economic success in a capitalist economy depends on the effective enforcement of property rights and contracts. Under Siad Barre these rights were constantly threatened by the predatory nature of the state. During the civil war, property has been systematically expropriated and assets looted. Regional authorities need systems of rules and enforcement to sort out claims and, eventually, return assets to rightful owners, or establish compensation schemes. It will be important to have in place a clear basis on which commercial transactions can be carried out, and contracts enforced.

2.34.   Legally the simplest solution might be to restore the pre-1990 codes (which were never properly applied), and gradually rebuild the court system starting from the lowest levels. Alternative strategies are available. In Somaliland the legal situation that prevailed until 1969 has been restored, using a combination of British and Indian common law, and Somali customary law and parts of the *shari'a*. In some towns in the former Somalia, where the government court system has collapsed, *shari'a* courts and law are becoming more influential. Ownership, liability for damages and contracts continue to operate under customary rules and procedures in the pastoral economy as well as outside it, and will no

doubt continue to do so indefinitely. As discussed further in other chapters, the restoration of the legal and court systems will need to accompany the re-establishment of police forces and prisons. These can emerge at the local level, and will depend on the development of local revenue generating capacity, possibly supplemented by donor support.

2.35. In the short term, the predominance of customary and informal rules and procedures will not hold back an economy dominated by small producers who have never had access to the formal judicial and legal system. As a formal sector develops and foreign companies return, however, a system must be developed to give Somalis internationally recognised guarantees as to the security of their assets and their ability to enforce contracts. The perennial problem of rangeland-degradation also requires legal regulation, as does the resumption of illegal charcoal production mainly for the export trade. The current uncontrolled, free-for-all fishing exploitation by foreign enterprises along the Somali coast needs urgent attention, as does the threat of toxic waste dumping.

2.36. In the short run it is difficult to see how these problems can be dealt with until a formal authority (or authorities) is (are) in place (although, see Chapter 7). Given the national and global importance of environmental issues, a strong case might be made for international intervention to limit further abuses until an effective Somali response can evolve. However, those interested in developing solutions to the 'tragedy of the commons', i.e., where uncontrolled competition leads to the breakdown of customary constraints on behaviour and therefore to the destruction of a common resource, might be advised to study systems that encourage personal and collective responsibility rather than relying on state intervention. For example, the Senegal Basin Development Authority produced plans for damming the river and introducing irrigated agriculture, but failed to consult either the Senegalese farming communities or the Mauritanian agro-pastoralists about the impact of these schemes on the delicate balance of ecological and social forces in the basin. As a result, a well-intentioned bureaucratic scheme led to violent conflict in the early 1990s.

Credit

2.37. Except in the 'Republic of Somaliland', formal private banking no longer exists, forcing traders to use facilities in Kenya, Djibouti, Ethiopia, and in the Middle East. During the closing years of the Siad Barre regime, the central commercial bank could no longer honour its obligations, producing a secondary market in cheques that it had been unable to cash. This was a measure of the strength of the informal Somali economy and the weakness of the official government economy in which there was a marked lack of public confidence. Currently small producers and traders depend upon their own assets and on family credit networks, while international traders use foreign banks. Although the 'Republic of Somaliland' has created its own central bank, in general the poor performance of state banks in Africa suggests that this is a function best provided by the private sector.

2.38. As conditions improve it should be possible to encourage private banks to open or re-open local branches, although these will only be used by a small economic elite for many years. Alternative forms of community banking, based on co-operative savings and loan schemes, might also be tested. Successful models can be found in Bangladesh, Bolivia and South Africa, where they are managed by NGOs and do not depend on direct state control for their success.

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Development planning and external donors

2.39. In the short run, any economic planning will necessarily take place at the regional level and requires a capacity to identify and prioritise realistic projects. Where regional authorities devolve services to lower level units, they will need to resist the temptation to use devolution as a cost-cutting mechanism under which such resources as are available are kept at regional headquarters. For devolution to work satisfactorily, it is necessary to build in mechanisms that will ensure that lower level authorities can meet their financial obligations.

2.40. Even now, however, a significant amount of development spending depends on contributions by donors, notably NGOs, which have continued to operate in relatively peaceful areas and are extensively used as implementing agencies. These agencies should not simply attempt to offer services that would collapse without their support, but should concentrate, as many of them do already, on rebuilding Somali capabilities, including local NGOs.

C. Managing Economic and Social Services

2.41. Prosperity is dependent on the quality of the services available in health, education, water, roads, agriculture, and security. While different communities may prioritise these services differently, the demand for them is universal and, where production and distribution are in private hands, they constitute the substantive basis for most rural and urban development programmes. How can these essential services be best provided in an environment dominated by scarcity, insecurity and the breakdown of centralised bureaucratic structures?

2.42. Historically, public services were made available in Africa by bureaucracies responsible to central ministries, funded from taxation and grants and given without substantial charge to users. After independence, these systems performed poorly; today's demand for decentralisation is one response to this. Decentralisation measures could, however, simply lead to the replication of previously centralised service delivery systems at the local level and reproduce the problems of inefficiency and corruption that undermined them at the centre. Successful change requires the development of effective financial management systems in the regions, strong bureaucracies and reliable mechanisms of political accountability. While local authorities should extend services when they can afford them, they should recognise that traditional state services should be complemented by private and voluntary agencies.

2.43. Health, education, water, roads, agricultural and other services can be offered through a variety of institutional arrangements - public bureaucracies, private firms, community groups, NGOs - and involve different relationships between providers, funders and beneficiaries. Traditionally the government transferred resources from taxpayers to officials who were paid a salary, irrespective of the quality of their service. The alternative systems, which are now being tried, reduce monopolies previously enjoyed by officials, giving the customer, or beneficiary, greater choice and control over what he or she receives. Local authorities in various parts of the former Somalia, including the 'Republic of Somaliland' are already experimenting with a wide array of alternative systems of this kind, assisted by

external and internal NGOs and donors. We cannot review the full range of alternatives here, but it is worth noting some problems associated with them.

2.44. No single form of organisation is suitable for every sector and service. Where services are regarded as necessary or are 'merit goods' that cannot depend purely on the market mechanism, they can be provided through community action on a full or partial cost-recovery basis. These functions would demand some form of public provision financed from taxes or external grants. The implications of this approach to service delivery can be explored by considering a range of sectoral administrative dilemmas.

Health

2.45. Health care, whether for people or livestock, involves a wide range of services. For most people, the major concern is access to clinical and curative services - doctors, veterinarians and their support staff, and to traditional healers. These services, together with the associated supply of drugs, can operate through a private service on a full cost recovery basis, which separates provision from direct state control. Donors are apparently attempting to develop systems along these lines, with some success.

2.46. These private arrangements would function equally well in unitary or decentralised political environments. Their major disadvantage is that they potentially exclude the poorest consumers; they also can be subject to abuse by professionals unless subjected to effective regulation. Communities or donors can attempt to offset problems of exclusion by subsidising services to the poor, though reliable means-testing is a significant problem. Regulation is traditionally a function of a ministry of health, but some functions could be transferred to professional associations, since they have a vested interest in maintaining the reputation of the whole service.

2.47. Hospital-based care can also be privatised, but its services are expensive. Somali professionals would be unable to create local facilities on the required scale as yet, while consumers would be unable to pay the necessary fees in the absence of any form of health insurance. Hospitals and health centres will probably continue to depend on public funds or provision through external NGOs. Financing need not be dominated by a central government, if there is one, since control over lower level facilities - health centres and dispensaries - can be vested in local councils. Again, some degree of cost-recovery can be introduced.

2.48. Preventive health care cannot be privatised since it depends on public education that should be available to all. These services are often developed through community-based health care programmes, linked to local committees, which exploit voluntary labour. While this makes it possible to create flexible, low-cost arrangements, they will only work if they are backed up by strong professional support and linked into adequate, curative health care facilities. As they have already demonstrated, international NGOs can play a useful role in encouraging programmes where public health facilities have failed.

Education

2.49. Education is also regularly privatised and offered on a full cost basis - private schools exist alongside public ones in most countries. This indeed was previously, to some extent, the situation in Somalia. Private schools, however, exclude the poor from a service essential

to human development, and undersupply a key 'merit good'. Hence, most countries treat education as a social service, though this need not involve entirely free provision. Mixed systems are feasible. They depend on state support but also make heavy use of community action through the formation of elected parent-teacher committees that can impose fees and mobilise collective action to supply materials and labour for school development.

2.50. Primary and secondary school management can be a matter for regional and lower level councils, whether the central political system operates on unitary, federal or confederal lines. Tertiary education, as with hospitals, involves complex skills, economies of scale and high costs, and is more difficult to sustain on a private or community basis than schools. They require a significant degree of state or donor input, though it would be perfectly possible for the relevant public colleges to be managed and controlled by regional governments, as occurs in public universities in the United States.

2.51. While schools and colleges can be managed by their own staff or elected management committees, the efficacy of the system as a whole depends on the existence of a higher level capacity to produce curricula, set and evaluate public examinations, and ensure that teaching materials are produced and made available.

Water
2.52. Supplying water depends on the nature of the source and the community. Traditionally, wells and springs are owned by Somali lineage groups. In the Digil-Mirifle farmlands, villages ponds are collectively excavated and maintained. Water tanks are the property of individuals and families, and water from them is regularly sold to non-kinsmen. Bore holes, provided by government, offer water at small charges. These traditional patterns of community and private water management can be extended. Private enterprise is also well established in irrigation along the Shebelle and Juba river systems.

Roads
2.53. Roads are expensive to maintain with user charges for access to them, and monopoly is almost inevitable. Trunk roads need to be managed on the largest scale possible - whether by a central or regional ministry of works. Local feeder roads can be managed by local councils, while villages can take responsibility for local tracks and footpaths. Maintenance offers wider organisational possibilities - historically it was the responsibility of government departments and was generally neglected, with disastrous results. More recently authorities in many countries have favoured sub-contracting to private firms on a competitive basis, with regular reviews of performance. At the local level, communities may well attempt to use voluntary labour to perform such tasks. The problem is ensuring that the regulatory authority has the skills and integrity necessary to supervise the private sector.

Agriculture and pastoral production
2.54. The need to develop acceptable policies for the restitution of expropriated land and the control of open rangelands has already been noted. Other agrarian services raise different organisational problems. Marketing involves the purchase of crops and the supply of inputs required for agricultural production, such as fertiliser. Research facilities, including laboratory services to control animal and plant diseases, are best provided on a public basis because they produce information that should be offered as a public good. Extension services have generally involved a hierarchical relationship between professional veterinary or

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agricultural officers and producers, who have no control over the information or the quality offered. Where they involve the direct treatment of animals, they can be privatised, as has been the case in much of Somalia. Where they involve the transfer of research findings and new technologies, they should probably involve less emphasis on traditional field staff, and more on public information programmes involving the circulation of simple materials, especially for schools and radio.

Security

2.55. Peace and security are probably the most important public goods in any society, and cannot be provided privately without producing insecurity and injustice. In the former Somalia insecurity has produced private enforcement systems that are not only threatening lives, but also making it difficult for viable markets to operate. Most men carry weapons, and competing clan leaders run private militias, which are rewarded by looting the facilities they capture. Creating a viable security system that will not be open to abuse is a serious problem.

2.56. It is unlikely to be solved through a process of uniform disarmament. Instead new forms of community based security that recognise the right to bear arms, but impose effective discipline through the authority of clan and local councils, could be extended. This already exists in many parts of the country, and they could form the basis of a citizen's army if one is required. This might help to discourage centralised dictatorship based on military power and be cost effective. It would also be compatible with confederal, federal or decentralised unitary political systems. Regional governments could be responsible for training troops, establishing a high command, and supplying equipment in an emergency. Local police forces and prisons would have to be created at regional and local levels and paid out of taxation, rather than user-fees.

Chapter 3. Remaking Administrative Structures

This chapter is divided into four parts which consider some basic premises of administrative reconstruction (Section A); necessary administrative functions and their allocation (Sections B-D); public service structures (Section E); and some principles of staffing (Section F). What this chapter does not discuss, except in the most general terms, are issues relating to the detailed relationships between different levels of government. The time at which these issues will become pressing is still some way off and in an interim period of perhaps five years or more a variety of political structures are likely to emerge. The number and character of these structures will, in due course, be a major determinant of the broader pattern of future government to an extent which would make a detailed elaboration of inter-governmental relations highly speculative.

A. General Observations and Basic Premises

3.1.   This chapter will relate its discussion to the three models described in Chapter 1 although many of the observations that can be made about the administrative implications of possible political structures are equally relevant to all three and would in fact be relevant even if, for an indefinite interim period, the pattern of political organisation that emerged were to comprise several separate and autonomous regional governments. The discussion is based on six premises:

(i)   The accomplishment of even the most minimal functions of government necessitates the maintenance of administrative structures capable of providing coherence, consistency and continuity in the performance of the tasks assigned to them. Even within the loosest of confederal arrangements this necessity would prevail both at the confederal level and at the level of the constituent governing entities. The large number of non-governmental organisations for the provision of local-level services such as primary education and veterinary care which have sprung up across the former Somalia are likely to have only a limited capacity to deal effectively with more complex tasks, or to provide genuinely public goods as opposed to particular benefits.

(ii)   The very creation of posts, the occupants of which would be rewarded by the payment of a regular salary and other perquisites and at the more senior levels by payments well above national average income, would tend to create 'prizes' for which rival groups would compete. That many of these posts must necessarily entail the exercise of significant discretionary powers over the allocation of important and desired resources would intensify that competition, which would be intensified still further by participants assuming that all allocations were zero-sum (when one clan wins, another loses). At a certain point such competition would tend to become harmful to the achievement of substantive policy objectives as well as of any broader hope of achieving collaboration and co-ordination between different political and social entities.

(iii) The central dilemma that confronts any consideration of the creation of Somali administrative structures is one of devising a scale of operation and levels of competence sufficient to ensure the formulation of practical policy and its effective implementation while containing the more extreme manifestations of competition and even conflict envisaged above.

(iv) Some important functions of government, but by no means all, can be achieved with greater cost-effectiveness by co-ordinated provision to several or all of the Somali territories. These functions are detailed in Sections B and C below.

(v) *It is unwise and impracticable to envisage a uniform pattern of administration across the entire country.* Such structures as emerge must reflect differing perceptions of need, differing capacities to sustain political authority and differing amounts of human and material resources. New structures must also be capable of incorporating existing administrative agencies that may have been created on an *ad hoc* and/or voluntary and/or local basis. Ideally the work of these agencies should be supplemented and sustained, not displaced. Flexibility, adaptability and responsiveness to local variations should be prime objectives of the first phase of institutional creation, i.e., the first 3-5 years, and would remain as important considerations in later phases.

(vi) The major restraint over the next ten years or longer on the growth of fully effective public service provision will be the acute shortage of finance and the insufficient number of qualified and experienced people. It is therefore imperative that institutional growth and staff numbers be kept to an absolute minimum, not only to ensure that those functions can be adequately sustained, but also to prevent such resources as are available being consumed by salaries and staff benefits at the cost of substantive service provision to the population.

B. Minimum Functions

3.2.   Any putative state or states would normally be expected to perform an irreducible minimum number of functions:

(i) *The maintenance of civil order* through a police force capable of dealing with major criminal activity. Under a unitary system of government it would be possible for non-autonomous local governments to exercise a concurrent police responsibility in respect of minor criminal activity and small-scale public order matters. This was to some extent the case at the district level in Somalia and Somaliland during the colonial period, and is still the case in a number of African countries, and indeed in Italy, where municipal police forces work alongside those which are centrally controlled. A division of responsibilities for police matters between a central government and the component subordinate governments would be an expected feature of a federal system. Under confederal arrangements and some federal arrangements, e.g., Germany, the organisation of police forces is primarily the concern of the

constituent governments, but even here there is a strong pressure for a co-ordinative and collaborative body at the confederal or federal level. Formally, consociational policing, in which each clan polices itself, might be more difficult to organise than consociational judicial administration. It might, however, be possible to establish a consociational national police force.

(ii) *The effective provision of defence.* Four functions are subsumed under this heading:

    (a)   land border protection;

    (b)   prevention of smuggling (for a) and b), if not handled by the federal or confederal police);

    (c)   protection of fisheries and other off-shore resources;

    (d)   response to major internal disorder or disaster.

There would be a need for these functions to be performed under all three territorial models of decentralisation. Were regional governments to emerge in the interim, or longer term, they too would be confronted by the necessity to undertake, at the very least, the tasks involved under headings (b) & (c) above. Even the most rudimentary provision is likely to create a centrally controlled force which would be seen by sub-units of government and the communities they represent as potentially threatening. Issues relating to the creation of a defence capacity and possible means by which the potential threat to subordinate governing units might be resolved are discussed more fully in Chapters 2 and 5. Even a relatively small defence force, maintained on a reserve basis, would require a significant organisational capacity and resource-commitment to maintain adequate levels of training and equipment, and the ability to mobilise rapidly were this to be necessary. (In 1994, one fifth of the budget of the 'Republic of Somaliland' was allocated to the Ministry of Defence.)

(iii) *The determination and implementation of fiscal policy.* This would include the issue and control of a national currency (see Chapter 5), the establishment of the incidence and levels of major taxation, and the control of government borrowing. In both unitary and federal structures we would expect to find these functions being performed by state institutions. They could also be functions of the central authority in a confederation, although this model would also permit the responsibility for the operation of taxation and borrowing to be performed wholly by the constituent governments, with the confederal authority having no independent revenue raising capability - relying instead on subventions or 'fees' paid by constituent governments in return for the provision of common services. A very loose confederal arrangement might also operate without a common currency, although the economic weakness of the constituent Somali territories would suggest that this could only be an interim arrangement.

(iv) *The collection, management and disbursement of central revenue* principally from export and import duties, discussed in Chapter 5). These activities are a defining characteristic of a unitary state. Under a confederal model,

suggested earlier, the central authority need not necessarily have any independent revenue-raising capability. Within a federation there are a range of possibilities which at their loosest could entail the constituent authorities exercising the revenue collection function, paying all or part into a common fund, and requiring a federal agency to operate an equalisation scheme which transferred money from richer territories to poorer. More than with any other element of common or collaborative government the issues which arise under this heading have the greatest potential for economic disagreements and disputes which could prevent the emergence of a common Somali political entity.

(v) *The administration of the judiciary.* Chapter 4 sets out the possible range of judicial structures. In all there would be a need for a formal and continuous administration to be responsible for the recruitment, training and remuneration of judicial and support personnel, for the management of courts and cases and for the compilation and publication of case records.

(vi) *Public-service management,* necessary under a unitary model, and at both levels under the federal and confederal models. The processes of recruitment, training, posting, promotion, remuneration, discipline and retirement and their systematic organisation necessarily arise from the performance of the functions outlined in the rest of this section and in Section C. The accommodation of representational needs in staff-recruitment and posting, contract-based employment and processes of secondment, which are envisaged in Sections E & F, would require close regulation and monitoring to operate effectively, and would thus reinforce the need. The necessity to achieve an adequate level of managerial competence within the public services while containing the more extreme manifestations of inter-communal contestation over appointments to public offices and over the resources they control has already been emphasised. The need to contain the growth of public services and to resist the pressures that must inevitably arise to increase their scale and scope has also been stressed. Concern for both these issues places effective public service management at the heart of the creation and maintenance of any future governing arrangements embracing the whole of the former Republic.

(vii) *The organisation of external representation.* The issues which arise in this respect are discussed more fully in Chapter 5. Under both federal and confederal arrangements the constituent territories may (but need not) maintain some element of external representation for such purposes as trade promotion, and the management of specific programmes of technical assistance. However, within Somali territory the absence of *de jure* states, and the probable international weakness of any potential *de facto* entities, suggest that for a number of essential external functions central representational capacity is necessary. These essential functions would include treaty-making, the conduct of relations with international bodies and some national governments, and the negotiation and management of major multi-lateral and bi-lateral aid programmes.

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C. Additional Functions

3.3.   There are a number of additional functions that would be accomplished more efficiently and more effectively if they were to be undertaken by a consolidated authority operating across the entire territory. It is, however, not *essential* that the responsibilities should be assigned to the central government. In the initial phase of governmental reconstruction (say 3-5 years) these functions could be performed by existing *ad hoc* and more local bodies, or by regional governments; in the short term, in some cases, they might not be performed at all. In the medium term (say 5-10 years) it is very likely that the need for consolidated provision would move from being highly desirable to being regarded as necessary.

   (i)   *Posts and telegraphs.* While the rapid development of satellite-dependent technologies, and their extensive commercial exploitation may to some extent diminish the importance of a governmental role in this area it nevertheless seems probable that for some years the regeneration of commercial activity across the entire territory and the nurturing of a sense of intra-national awareness will require the availability of a communication system which is accessible to all individuals and organisations, operating with uniform procedures and tariffs. In the first instance the service might not cover the whole country, but were it to be established initially in a limited number of locations it could extend its operations where demand and favourable circumstances prevailed. It is difficult to envisage ways in which this service could initially be operated on a self-funding, let alone profit-making, basis; a substantial element of external and/or government funding would seem to be necessary. It is, however, remarkable how telephone (and radio transmitter communications) have already been established in many areas, not only in Somaliland and in the North-East, but also by entrepreneurs in other regions. Under unitary, federal and confederal models a central authority would be needed to ensure adequate and continuing funding, but the management of the service need not necessarily be a direct governmental responsibility. In many countries the device of the public corporation or state-owned company has been employed. If internal Somali disagreements were to hinder the establishment of a consolidated authority then a corporate structure might also more readily facilitate the involvement of foreign or international participants either in partnership or in overall control.

   (ii)   *Major public works.* These would include, as the most important tasks, the construction and maintenance of trunk roads; the communities and governing authorities in territories along the route of such roads will not necessarily perceive the same benefit and will thus not have the same incentive to undertake such work. Again, as with posts and telegraphs, the extensive and substantial regeneration of commercial activity is likely to be in large part dependent on such work being carried out on a territory-wide basis, and any significant growth in domestic commerce will in turn exert pressure for this to be so. Under any of the three models it is difficult to see the major role in financing and overall planning of this function being other than a direct responsibility of the higher level government, although a variety of formulas

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are available which could entail shared financing, and the involvement of subordinate level governments and private contractors in carrying out the necessary construction work.

(iii) *Tertiary Level Education.* There is likely to be a rapidly-growing need for education and training in a wide variety of professional and technical fields both for secondary school leavers entering early adulthood as well as for older men and women seeking to make good the educational deficiencies of recent years or to acquire new and updated skills. The inevitable scarcity of qualified trainers and of support facilities, and the consequent necessity to utilise such resources to maximum effect makes it highly desirable for this provision to be organised and provided on as wide a territorial basis as possible. This is another service whose management need not necessarily be a direct governmental responsibility. A variety of organisational forms can be conceived which would place a tertiary institution (or institutions) outside the control of any one government and dependent on a plurality of agencies, governmental and non-governmental, for subventions and fees.

D. Non-Central Functions

3.4. There remain a substantial number of functions, one or more of which impinge directly on the lives of most of the population. These would include primary and secondary education, all preventative and most curative health services, veterinary and agricultural extension services and possibly some limited welfare services. Chapter 2 discusses issues that arise in relation to the performance of these functions. There already exists an extensive and diverse pattern of provision mostly in the hands of NGOs in the South, frequently initiated by locally based professionals, and operating on a payment-for-service basis, which appears to be operating with much success. Somaliland and the north-eastern regions have their own education 'ministries' and services and have entered into training projects with external agencies. For very many reasons it must be hoped that these initiatives will flourish and be widely extended.

3.5. In the future, there are likely to be gaps in the provision of these services, but even now, there are needs, e.g., for research, training, data gathering and dissemination and for technical advisory services, which cannot adequately be sustained under the existing models of management. When or if regional or higher-level governments are created they will be faced with valid demands to supply these needs. The provision of such support does not necessarily belong to any one level of government but, as with tertiary level education, the scarcity of qualified staff and of support facilities, and the consequent necessity to utilise such resources to maximum effect makes it highly desirable for this provision to be organised and provided on as wide a territorial basis as possible. This need not, however, preclude the participation of subordinate level governments. What is imperative is that if/as government agencies at whatever level assume a role in these areas they should work with what already exists 'on the ground' and not displace it.

3.6. While the financing of Somali-wide support services in these activities, might be partly met from *ad hoc* or annual fees paid by user agencies the needs for continuity of

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provision and credible forward planning would almost certainly necessitate a substantial element of government funding. At the same time a proven record of successful governmental provision is likely to generate a demand for more complex and more extensive services. Since all these services are labour-intensive and since they all require the employment of people with relatively high skills, any response to the demand would be likely to lead to a progressive increase in their overall costs. Such increases could very quickly overtake local capacity to pay and generate demands for ever-greater subvention from higher levels of government. In the medium term (5-10 years) there would probably be some conflict between the desire for higher-level financial support and the disinclination to accept the constraints and directions which might come with it.

E. Public Service Structure

3.7. The most common form of public service structure to be found in the contemporary world is that of the unitary and consolidated civil service with uniform or near-uniform patterns of grading, remuneration and other conditions of service. Its members are deployed in the major functional departments of government, may sometimes be moved from one department to another or may be seconded to supposedly autonomous or quasi-autonomous government agencies without loss of status, salary or pension rights. This pattern of organisation is expected to promote the more effective co-ordination and standardisation of government services and enhance the career-attractiveness of government employment. Whether such a model would necessarily provide the most appropriate basis for the future government (or governments) of Somalia is open to doubt.

3.8. The need for maximum flexibility has already been stressed as has the need for the leanest possible public services. There is a further need - that of keeping "the centre" small so that it neither appears nor is able to threaten the sense of independence and separateness of the constituent elements of the state. In the initial stages of any attempt to recreate governing institutions there would be a strong case for maintaining a fragmentary structure of public service provision with specific and separate authorities performing functions of the sort outlined in Sections B, C & D above. Some element of co-ordination would be necessary and some activities might be better performed on a common basis. Evolution towards a partial or total consolidation of functions within a unitary organisation would be a possible but not inevitable longer term development.

F. Staffing

3.9. Most African civil services share a number of common characteristics. In respect of staffing-arrangements the two most important are meritorious and life-service appointments:

(i) The primary criterion for recruitment is merit, measured by formal academic or professional qualifications and/or by competitive examination, with only secondary consideration, in most cases, being given to such factors as the need to maintain a broadly proportional ethnic representation. The Nigerian Federal public service has, however, gone some way towards acknowledging the importance of territorial origins in its recruitment and placement policies

while in other parts of the world governments have established a statutory basis for ethnic quotas, e.g., the Malaysian federal service.

(ii) The second staffing arrangement is for entrants, at both senior and junior levels, to join soon after the completion of their formal education, and the majority to remain until retirement age.

For Somalis both traditional characteristics of African civil administration may prove to be inappropriate.

3.10. *Recruitment.* The principles of merit and of representation need not be mutually exclusive. Where it is necessary for both to be adopted it is probable and desirable that one will be treated as the primary requirement and the other as secondary. The clan-based character of Somali society, the rivalries this engenders, and any broad-based governing institutions emerging in the former Somalia will have to take account of existing regional institutions. This makes it desirable and necessary for the primary principle of recruitment to be representation. To some extent, this principle was loosely followed in some branches of the civil service in the British Somaliland protectorate. Only through the open acknowledgement and implementation of this primary principle is it likely that members of sub-groups will be able to accept the existence and decisions of agencies operating on a broader territorial basis as something other than alien imposition. The principle of representation would be expected to operate not only in relation to recruitment, but also in relation to the promotion and assignment of staff.

3.11. Two major and related difficulties arise. Put simply they are - how many parts should any 'whole' be divided into, and what should be the size of each part? The first question is confusing because of the multi-layered identities for which representation is demanded - sub-clan, clan, clan alliance, region. Small organisations employing few people especially at a senior level (which we have suggested would in general be desirable) would be incapable, at any one time, of satisfying all representational demands. This problem might be allayed by a variety of devices to limit the length of tenure of post-holders, in particular those at the most senior levels. The fairly frequent movement of staff between different agencies would be one such and the widespread adoption of contract-based employment outlined below would be another. The second problem is to determine even the crudest of quantities that might provide some semblance of proportionality to the operation of representational systems. *We must acknowledge that while the attempt to pursue proportionality is necessary and inevitable, its processes are likely to be inherently disputed, unless there is an agreed census, and agreement on the constituent units for representation.*

3.12. *Contract-based employment.* The attempt to recreate Somali governing institutions would require the maintenance of the highest possible levels of flexibility in order to accommodate potentially large-scale changes in needs and in the scale and scope of operation. It is possible that some agencies of government may have only a short life span before it is necessary for them to be reconstructed, amalgamated or abolished. One means to achieve this flexibility would be for all or most appointments within the public services to be made through time-limited contracts of perhaps not less than three and not more than ten years duration. While contracts could be extended or renewed, subject to some reasonably

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stringent review procedure, the expectation would be that the bulk of administrative cadres could be deployed in a highly fluid manner. What would be lost under this arrangement would be some degree of continuity and some quantity of accumulated technical experience. The gains that might be expected would be:

(i)   that transfers between different levels of government would be facilitated;

(ii)   that recruitment to employment in higher level agencies would be less likely to permanently denude lower level authorities of managerial talent;

(iii)   that fluctuations in the numbers of staff required in different grades could be more easily accommodated;

(iv)   that the maintenance of broad representational parity within agencies and between different levels could more readily be maintained.

An additional expectation would be that of providing a sharp incentive to improved personal performance. Certain posts such as those in the judiciary and some others for which a strong case for exception could be made, might be excluded from this requirement.

3.13. *Secondment.* The staffing of superordinate level institutions under both the federal and confederal models could be achieved wholly or in part by secondment from subordinate levels, but the adoption of time-limited contracts discussed above would tend to diminish the importance of this device.

Chapter 4. The Judicial Branch of Government

A. Introduction

This chapter considers the judicial branch of government. It does not treat what may arise if several independent states are formed, although in these circumstances it would be possible to develop a modern judiciary along the lines sketched here.

4.1.   The Law on the Organisation of the Judiciary, dating from 1962, provides the skeleton of a system of regional and district courts, and some of the regional or other authorities that have come into being recently are basing their courts on that law. It is necessary to stress 'some', because NW Somalia/the 'Republic of Somaliland', in its recent draft 'Constitution', has established a judicial system based on that in existence immediately before its independence from the United Kingdom on 26 June 1960.

4.2.   The matters to be discussed in this chapter are as follows: (a) the composition and powers of the supreme court (the highest court in the state); (b) the creation and operation of several judicial systems, (con)federal and state; (c) the development of multiple systems of laws and the resolution of conflicts between them; (d) Islamic law; (e) aspects of administrative justice; and (f) human rights.

B. The Supreme Court and the Resolution of Constitutional Disputes

4.3.   Where the constitution sets out the powers of different levels of government and endeavours to limit them so that each has its own independent and inviolable sphere, compliance assumes great importance. The constitution guarantees that the agreement preceding and leading to the coming together of different peoples will be observed. In confederal and federal systems, and in decentralised systems that are established by an organic law, the task of policing the constitution has in many cases been allocated to the supreme court. It follows that the composition and powers of this court are of the utmost importance.

4.4.   Who should appoint the members of the court? An independent body, for example, a Judicial Service Commission, or the executive or the legislature, or a combination of such bodies? There is no set formula. The Swiss constitution provides for the members of the Federal Court to be elected by the Federal Assembly. In the UAE constitution, the judges of the Supreme Court of the Union are appointed by the President of the Union after approval by the Supreme Council. The draft Ugandan Constitution provides for the Chief Justice and deputy Chief Justice to be appointed by the President with the approval of the National Council of State, a body which is to act as an additional check on the executive and the legislature. In the USA, the President appoints justices of the Supreme Court but these appointments have to be confirmed by the Senate.

4.5.   The 1960 Constitution of Somalia is worth quoting on the appointment and composition of the supreme court:

> A question of constitutional legality shall be decided by the Supreme Court constituted as a Constitutional Court, with two additional members appointed for a period of three years by the President of the Republic on the proposal of the Council of Ministers and two further additional members elected for the same period by the National Assembly by an absolute majority.

This article explicitly combines political and judicial oversight of constitutional questions, and recognises that it is unrealistic to isolate the appointment of judges from the political process. The involvement of both executive and legislature is politically appropriate in all decentralised systems.

4.6.   For Somalis the key consociational question is this: to what extent should the supreme court be composed of persons from all major clan-families, regions or states in the country?   One model could be the European Court of Justice, which is composed of 15 judges, one from each member state.   Judges must be persons 'whose independence is beyond doubt' but the appointment is made at the member-state level.   Assuming that those appointed are of the requisite competence and independence, there is much to be said for a 'representative' supreme court, which may well have the effect of increasing the acceptability of its decisions.   A more difficult question is whether the appointment of representative members should be made at the clan, clan-family, regional or national level.   A combination of criteria might offer the best solution.   For example, a supreme court could be appointed from a panel of candidates which proportionally represented the major clan-families and regions.

4.7.   The inter-linked matters of length of tenure and removal of judges must also be considered.   (Impeachment only becomes a major problem if judges are appointed for life, as is the case with appointments to the Supreme Court of the USA, or until they reach a fairly advanced age.)   While lengthy tenure facilitates independence from executive pressures, immobilism, and lack of turnover in the supreme court can lead to tensions between the executive and the judiciary. This, in turn, can lead to attempts to purge judges through political pressures, or to 'pack' the court. Judges appointed for short-term contracts, by contrast, may tailor their decisions to please those who renew their contract of employment.

4.8.   Intermediate solutions exist.   The Swiss constitution provides for the judges of the Federal Court to be elected by the Federal Assembly for six year terms.   Judges who begin to display idiosyncratic tendencies may thus have their services dispensed with relatively easily.   Since there are 39 judges in the court, it is difficult in practice, given the composition of the Federal Assembly, to 'pack' the Court with judges of a particular political or religious persuasion or from a particular canton.   Many state constitutions in the USA require their state supreme court judges to be elected by the general electorate for up to 10 year terms.

4.9.   Many constitutions establish an independent body to appoint and discipline the judiciary.   Disciplinary proceedings follow a judicial mode: an investigation, a hearing, a

recommendation or decision, an appeal, and a final recommendation or decision. Where the hearing body makes only a recommendation, it is usually the President who formally removes a judge from the highest court in accordance with the recommendation. Most states establish through the constitution or some other law, for a retiring age for judges, and the trend has been for this age to be around 70 or less. The draft Ugandan constitution requires a justice of the Supreme Court to retire at the age of 70.

4.10. The choice then in relation to removal is the same as with appointment: to isolate it from the political process or to involve it. Isolation may be more form than substance, and the appointment and the removal of a judge of the supreme court is a major political event, and therefore the overt involvement of the other branches of government is to be preferred. A second chamber in the federal legislature is the most usual body involved in judicial appointments, e.g., the role played by the US Senate.

4.11. The supreme court is normally the final court of appeal in civil and criminal matters. The court has a dual role in exercising its jurisdiction. On the one hand, it must give effect to the particular laws and practices of the state or region from which the appeal has come. On the other hand, as the highest *national* judicial body, it must endeavour to ensure that common standards of public conduct and morality and common rules of legislative interpretation apply throughout the federation. This last function can be illustrated by reference to the well-known case of *Hussein Hersi v Yusuf Deria Ali*, decided by the Somali Supreme Court in 1964. The issue was the constitutional validity and scope of 'dia', i.e., was it a penal or civil liability? Could it apply to motor car accidents, and if so, would it cover both urban and rural accidents? The Supreme Court held that while 'dia' under the *shari'a* was penal, under Somali customary law it was civil, and that the continued application of 'dia' was not against public policy. The Supreme Court also held that:

> When it is generally accepted that, under Somali customary law, a person must pay the 'dia' of the person he kills, it does not matter whether the homicide is caused by the person directly or through the vehicle that he drives negligently... If we accept the principle of collective responsibility of the tribe for the payment of 'dia' or other compensation, there is no reason why a distinction should be made whether the act was committed within a town or in the bush.

Many constitutions spell out the constitutional jurisdiction of the supreme court. This is the case with the constitution of the UAE (summarised in Chapter 1), which has some merit: it may be useful to citizens, officials, and units of government to know the constitutional issues that can be referred to the supreme court.

4.12. How should a constitutional issue be dealt with if it arises during an 'ordinary' case as opposed to being the sole issue before the court? The Constitution of Somalia (1960) illustrates one way of handling the matter:

> (i)   A question of constitutional legality, in form or substance of a law may be raised in the course of judicial proceedings, at the request of the interested party or of the Public Prosecutor or by the court, when even a partial decision depends on the application of the disputed legislative provision.

(ii)   If the request of the interested party or the Public Prosecutor is presented when the case is before a judge of the first or second instance, and provided that such request is not manifestly unfounded, the court shall suspend judgement and refer the case to the Supreme Court for a decision which shall be binding.

Similar provisions applied if a constitutional point arose in the Supreme Court in a non-constitutional case, or a judge raised it of his own motion. These provisions are similar to those in Article 177 of the EEC Treaty which enable national courts to refer matters concerning Community law to the European Court of Justice (ECJ) for its preliminary ruling. The case is adjourned until the ECJ ruling is given.

4.13.   There are ways to resolve constitutional disputes other than through a judicial process. In Switzerland, the Federal Court has no jurisdiction to pass judgement on the constitutionality of laws passed by the Federal Assembly. There is an elaborate procedure within the legislature to try and ensure that legislation is constitutional but the only way that the constitutionality of a federal law may be challenged is through a referendum, which may be demanded by 50,000 citizens or 8 cantons. In the draft Constitution of Uganda, where the President considers that there is such a disagreement between the executive and the legislature that it is likely to disrupt the smooth running of the government, he is obliged to refer the issue to the National Council of State for its advice. The Council may give advice to the President, or refer the matter to Parliament, which may by resolution advise the President on how to resolve the matter. If the disagreement continues, the President *shall* request the Council to make the issue a national issue for resolution by referendum. The President and Parliament are bound by the decision of the people; if either refuses to accept the decision, the President must resign, or Parliament stands dissolved. There is an ultimate resort to the people via a referendum to resolve a conflict that might otherwise be referred to the supreme court.

4.14.   The provisions for resolving disputes about decentralisation between the central government and the provincial authorities in Papua New Guinea (PNG) are also worth considering. The following explanation of the arrangements was written by two of the principal architects:

> The primacy of consultation and co-operation is, however, basic to the scheme of decentralisation. Intergovernmental relations are to be conducted on the basis of consultation and disputes are to be settled through negotiations. Failing this, settlement would be through mediation and arbitration. For this purpose, a key role is assigned to the Premiers' Council, which has the broad functions of making recommendations and decisions, as well as of settling disputes. In some instances, the law interposes conciliatory, mediating or independent bodies between governments. For example...the National Fiscal Commission mediates on fiscal matters...The emphasis on political and consultative mechanisms...is designed also to avoid the legalisms and rigidities that can arise if the primary role of dispute settlement is given to the courts.
> > Ghai and A.J. Regan, The Constitutional Arrangements for Decentralisation in Papua New Guinea: An Overview (1991) Melanesian Law Journal

4.15. The same criticisms of rigidities and legalisms would apply to the use of courts to resolve disputes in a federal or confederal system. Traditional Somali ways of problem-solving approximate much more closely to consultation and mediation - to give and take - than to the winner-takes-all approach that tends to characterise judicial decisions. In our view, constitutional inter-governmental disputes might best be dealt with following the Papua New Guinea model, while disputes about the validity of federal laws could be handled following the Swiss model, i.e., allowing a challenge to the laws to be mounted either by a number of citizens, or by a number of the regions. Ideally a referendum would determine the outcome, or if this were not possible, a representative group of clan elders could mediate.

C. Multiple Judicial Systems

4.16. It is a characteristic of federal and confederal systems of government that both the central and state governments have their own systems of courts and laws. This arrangement poses no insuperable difficulty and indeed is intrinsic to confederal systems. In a federation, it will be essential to provide that appeals lie from the highest state court to the highest federal court on any matter that can come before the state courts - this is standard in all federal constitutions. In a confederation there will not necessarily be a supreme court, although there is nothing in the confederal idea to rule one out. Indeed some confederations such as the European Union have such a court, and in this respect resemble federations. Where confederal arrangements *do not* extend to the creation of a common legal system, specific measures will need to be adopted to prevent conflicts of law undermining the union. These mainly relate to extradition and are dealt with below in the discussion of the criminal law.

4.17. One matter that may need specific legislation is the recognition and enforcement of the decisions of the courts of one state in another state; similarly too for the decisions of the federal courts. It will accordingly be necessary to provide that the decisions of the federal courts are enforceable throughout the federation; without such a provision, the federation would quickly break down as the federal government would not be able to enforce its authority on those matters within its jurisdiction.

4.18. Matters are not so straightforward when we turn to the mutual recognition and enforcement of state judgements. If, as is likely to be the case, the different states develop their own body of laws, these laws may well begin to diverge. There may be good reasons for the divergence. The reason state A does not go down the same legislative route on certain matters as state B might well cause its courts to refuse to recognise and enforce the judgements of the courts of state B on similar matters.

4.19. Disputes such as these could very quickly escalate and sour relations between states, although the continued existence of Somali traditional customary law will reduce the possibility of such inter-state disputes. One solution if a federation is chosen would be for the states to agree to enforce each other's judgements irrespective of whether they were in line with the public policy or legislation of the enforcing state. The only issue would be whether the judgement had been properly obtained in the state of origin. An alternative solution would be to go down the same route on a subject-by-subject basis, which would lead to a number of reciprocal enforcement of judgements and laws covering, e.g., divorces or

perhaps all family law issues, commercial laws, personal injury laws, etc. Whichever route is followed, it would be desirable for a standing commission of state and federal law officers or commissioners to be established. Its tasks would be to keep the subject under review and to ensure that swift action can head off ill-will caused by failures to accord reciprocity in lawfully obtained judicial decisions.

4.20. Separate mention needs to be made of criminal law. In federations, there is a strong case for criminal law being made a federal matter, while if a confederation is established and different basic criminal laws are applied in the different regions, for example, some based on the *shari'a* and some on the Penal Code, it will be essential for the standing commission to make the development of policies and rules on extradition between the states one of their earliest priorities. It is not conducive to the restoration of peace and tranquillity and respect for the law if actions are held to be criminal in one part of the country but not in another. There is already a nation-wide Penal Code in Somalia which could be applied again in the different regions as courts are re-established. This could form the basic criminal law, with each state at liberty to add to the basic law.

D. Multiple Systems of Laws

4.21. A confederation and a federation will develop multiple systems of laws. There will slowly develop a set of federal laws applicable throughout the federation and each state within the federation will develop its own laws. In a confederation, the confederal authorities will likewise be empowered to legislate on certain matters and these laws will be applicable throughout the confederation.

4.22. The existence of multiple systems of law within a state does complicate administration and implementation. Somalis, however, in common with people in many other African states, already have some considerable experience in multiple legal systems since customary law and Islamic law have co-existed alongside the received English and Italian law. Immediately after the union of Somaliland and Somalia on 1 July 1960, two legal systems were in existence based respectively on the systems in British Somaliland and in Italian Somalia. A commission was established to bring about a unification of the two legal systems.

4.23. That commission is one possible model for the future development of the law in a future Somali state or states. There would be considerable merit in setting up a law reform and development commission, composed of representatives of all the state governments and the central government, reporting to the state and central Ministries of Justice. It would act as a counterweight to divisive tendencies in legal developments and encourage legal harmonisation. This could be done by drafting model laws on matters within the exclusive jurisdiction of the states for their enactment - a role performed by various Indian Government bodies - and by commenting on drafts of laws proposed by the various states.

4.24. Over the long haul, the different states may develop different sets of laws, which will give rise to conflicts. Clan A may claim that a contract made with clan B should be governed by the law of clan A's state; meanwhile, the person from clan B might claim that his state's law should govern the contract. A husband and wife, preparing for a divorce,

may dispute a property brought into or obtained during their marriage. The laws on marriage and divorce of their two states may differ, if one state has introduced statutory modifications to the basic Islamic law and the other state has not, this will add to their dispute. The subject of the internal conflict of laws is, as might be supposed, immensely complex and makes litigation expensive and time-consuming. It may be impossible to avoid, but everything possible should be done to reduce its incidence. Here too, the proposed federal law reform and development commission will have a vital role to play. Conflicts of laws arise in a confederation as a result of social and commercial relations between citizens of wholly independent states. There will be an equal need for inter-governmental law reform and harmonisation bodies within a confederation.

E. Islamic Law

4.25. Until Legislative Decree No. 3 of 1962, there were separate *shari'a* and non-*shari'a* courts in Somalia. The decree integrated the courts and the law that they applied in Article 9:

> Subject to the provisions of the Constitution and this law, the courts shall apply: (a) the *shari'a* law or customary law in civil controversies where the cause of action has arisen under the said law; (b) statutory law in all other matters.

This provision has been criticised as being rather vague, but it represented a compromise between two schools of thought: one, that the application of the *shari'a* should not be restricted; the other, that it should apply only to matters of personal status, and the parties should be given a choice of law. (This difference of view reflected the position that existed within the two colonial halves of Somalia.) While the provision does appear to give priority to the *shari'a* beyond the categories previously specified in the law applicable in the British colonial part of Somalia, it does give the parties some freedom of choice between the *shari'a* and customary law (although it must be noted that there has always been a considerable intermixing between Somali customary law and Islamic legal principles).

Thus, for example, the 'Constitution of Somaliland' reverts back to the old British colonial formulation, providing that:

> In all cases, civil and criminal, to which only Somalis are parties, every court shall: (a) be guided by Somali customary law, *Xeer*, (including Somali customary law based on Islamic law) so far as it is applicable and is not repugnant to justice, equity and good conscience or is inconsistent with any written law in force in Somaliland.

F. Administrative Justice

4.26. Considerable emphasis is now being placed in international aid circles and in national constitution making on 'good government'. Good government is concerned with administrative justice, a matter specifically referred to in the new constitutions of Malawi and South Africa and the draft Constitution of Uganda. In all three, the citizen is accorded a right to be treated fairly by administrative agencies, and a right of appeal against adverse

administrative decisions. The issue for Somalis is whether administrative justice, such as administrative appeal tribunals, Conseils d'Etat, Ombudsman, or judicial review of administrative action should be located at the central or the state level or at both.

Most administrative decisions affecting the citizen, which might be made the subject of complaint, will be taken at the state level. Normally the citizen would prefer the matter to be dealt with informally. Ombudsman-type institutions, which handle individual complaints, should therefore be located at the state level.

4.27. Developing an administrative culture that respects the rule of law is, *par excellence*, a federal matter: there should not be different standards of administrative justice in different parts of a federal state. A federal Conseil d'Etat or Administrative Appeal Tribunal, whose jurisdiction would embrace hearing appeals, should be established at both state and federal levels. Appeals would lie from such a body to the highest court of the federation. There is also a case for a central administrative review council, composed of representatives from all the state governments and the federal government, to develop appropriate and common standards of administrative procedures. The Australian Administrative Review Council, although confined only to dealing with federal administrative law matters, provides a useful model for what could be developed in a future Somali state or states. Such harmonisation would no doubt also be desirable in a confederation, although it is not a prerequisite for one. This issue would not arise in a decentralised unitary state, which would necessarily have a single legal system.

G. Political Structures and Human Rights Implications

4.28. Another important consideration is the introduction of human rights standards into the laws of the country. Political and civil rights provisions can enhance the quality of life of the population. Human rights safeguards also have an effect on donor and investor support, which is increasingly affected by the presence or lack of democratic and human rights standards. Any political entity seeking international recognition as a state will be assessed in part on the establishment of a responsible human rights regime and record.

4.29. *International vs. National Laws*. States stand between two distinct legal systems: they are subject to international law, and they are also the authors of the national law within their territory. While a state is relatively free to fashion its internal laws to suit its requirements, it does not have control over international law. In matters of 'customary international law', which govern a range of subjects including the treatment of aliens, diplomatic immunity, and observance of treaties, states cannot exempt themselves from international norms.

4.30. Amongst states' mandatory obligations are rules relating to fundamental human rights, e.g., those covering genocide, torture, slavery and apartheid. States cannot avoid these obligations by passing incompatible national laws, and would be considered responsible under international law for any breach. By contrast, bilateral and multilateral treaties voluntarily entered into only apply to their signatories. Consequently, states have greater control over the treaty obligations they assume, although some contain provisions which may develop into customary international law of general application. Bilateral treaties are the most easily

tailored to suit the particular requirements of a state, but the most important standard-setting obligations come from the principal multilateral conventions.

4.31. This pattern is also evident in the field of human rights. For example, the protection of minorities has been the subject of a number of bilateral treaties, enshrining political, education, language, and property rights, as well as non-discrimination, and freedom of conscience, belief and religion. But in the Somali context the International Covenant on Civil and Political Rights, 1966, the Optional Protocol, the International Covenant on Economic, Social, and Cultural Rights, 1966, and the African Charter on Human and Peoples' Rights are likely to be the most important human rights instruments because of their comprehensive standard setting nature. As the appendix shows, there are many other conventions to which the former Republic of Somalia was a party.

4.32. The range of political and economic benefits that flow from full participation in the international community, and pressure to improve conditions within their borders, are both strong incentives to accede to international human rights instruments. International law is concerned not only with setting human rights norms, but also with training, monitoring, reporting, and the establishment of institutions with responsibility for implementation. The manner in which these standards are adopted and implemented will depend on the structure of the political authorities in the country.

(i) *Unitary State.* Measures to implement international obligations are more readily legislated in a unitary state because the central political unit has exclusive authority over the laws of the country. On the other hand, centralised authority creates opportunities for increased and excessive concentrations of power, which may leave groups, especially minority groups, disenfranchised and vulnerable.

The right to participate in and shape civic society is enshrined in many human rights measures. Decentralised structures are now regarded as inherently conducive to facilitating wider participation, which is already the bedrock of traditional Somali society.

(ii) *Federal Systems.* One possible disadvantage within federal systems is that if states were given exclusive jurisdiction over some human rights they might be less amenable to international scrutiny and pressure. The federal government can be embarrassed internationally by the failure of one or more of its constituent units to comply with international requirements, and may not have the constitutional capacity to rectify the relevant wrongs. It is also possible that inconsistencies in laws among the constituent units serve as barriers to the uniform application of human rights norms. These difficulties can be overcome, either by mutual co-ordination of laws or a common Charter of Rights enshrining minimum international standards, which would apply throughout the country. If adopted, individual units could also formulate standards that go beyond the state's international commitments or charter requirements. A supreme court is necessary in either case to adjudicate conflicts over rights.

One major advantage of a federal system, apart from the encouragement of greater civic participation, is the adjustment of laws to meet local requirements. Another is the protection of territorially concentrated minorities. A federal system may make it possible to cater for minority interests in language, education, matrimonial and family issues and religious freedoms.

(iii)   *Confederal Systems*. In confederal systems, each constituent state would separately assume responsibility for human rights obligations, unless some special arrangement is entered into by which responsibility for treaty-making is conferred upon a single, over-arching authority. In this event, provision will have to be made for remedying breaches by the responsible member states.

4.33.   Since it is easier to frame laws protecting human rights than to implement them, there is scope for a careful study of Somali traditional concepts of rights, and their relation to internationally recognised human rights. Such a study could well be undertaken with the co-operation of organisations such as the UN Centre for Human Rights and/or Amnesty International.

Chapter 5. Defence and Foreign Relations

A. Introduction

This purpose of this chapter is to explore the implications for foreign relations and defence of several different forms of government. For ease of presentation these have been reduced to four - a unitary state, a decentralised unitary state, a federation, and a confederation. [A consociational model of government (see Chapter 1) can take a unitary, federal or confederal form]. Whichever system is chosen by Somalis, and whatever administrative and other arrangements within that system, it will need to be determined with reference to the circumstances of the people concerned and their implications for foreign relations fully understood.

A further preliminary point needs to be made: the implications for external relations, which we consider below, will arise irrespective of whether Somalia remains a single country, albeit re-constructed under a decentralised administration, or is divided into two or more separate states. The same issues will need to be confronted by the authorities of the two or more successor states as will arise if the country is reconstructed as a single entity; the only difference is that relations between the successor states will now be international rather than domestic. In any case nothing that follows is intended to pre-judge this issue. Whether there should be one Somalia or several Somali states is a matter for the Somali people.

5.1.   In most contemporary states, sovereignty, that is, supreme political authority, is formally vested in the people. This tells us very little, however, until we know who are the people, and according to what rules and through what institutions, their sovereignty is expressed.   Since relations with foreigners are, formally speaking, those of one sovereign people with another, which live under a separate jurisdiction, foreign policy and external relations generally tend to be the preserve of the central institutions of the state. None-the-less variations occur, particularly in the activity of foreign trade.

5.2.   Against this background we have identified seven sets of issues that will need to be addressed, regardless of the form of government chosen, or the number of governments. We have organised them under two separate headings. The first heading, *foreign policy and citizenship*, concerns four issues:

      (i)   treaty-making
      (ii)   foreign representation
      (iii)   defence
      (iv)   citizenship

The second heading, *economic externalities*, explains the last three:

      (v)   foreign trade, customs and excise
      (vi)   foreign aid
      (vii)   currency

Guidelines as to how these matters can be handled are derived both from first principles and governmental practice in different parts of the world. Let us consider each in turn.

B. Foreign Policy and Citizenship

(i) Treaty Making

5.3.   No state, however decentralised, can exist in isolation from the rest of the world. It follows that some agency (or agencies) must be authorised to enter into international agreements on behalf of the people. In general there are fewer discrepancies between unitary states, decentralised unitary states, federations, and confederations in this regard than in most other aspects of government. In constitutional *unitary* states, such as Somalia was between 1960-69, the National Assembly or Parliament authorises the government to conclude treaties either on a multi-lateral basis, for instance membership of international organisations such as the UN, OAU or World Trade Organisation, or bilaterally with individual countries or organisations, for example, to secure financial or technical assistance. These agreements are then ratified by the President or Head of State on the advice of the Assembly. Much the same arrangement is found in *decentralised* unitary states such as Spain or Tanzania, which provide for a high degree of provincial and cultural autonomy. Thus, as Spain is a constitutional monarchy, the King gives his assent to treaties approved by the Cortes General. Although the Spanish constitution provides for extensive devolution of power to 'autonomous communities' and procedures for expanding their areas of competence under the law, the central state retains exclusive control over international relations and defence. In Tanzania the attempt by Zanzibar in the early 1990s to act independently in international affairs, by joining the Islamic Conference, provoked a constitutional crisis, and led the central government to reassert its monopoly over foreign representation.

5.4.   Federations, such as Malaysia or the recently constituted Federal Republic of Ethiopia, also mostly maintain a single regime in external relations. The key difference between a unitary state (even with a decentralised government) and a federation is that in the former case the first loyalty of the population is assumed to be to the state, so that any devolution of power, or arrangements for meeting local aspirations for self-government, as in the Spanish case, stem from the central government and must be authorised by it, whereas in the latter, pre-existing communities, with their own governments, agree to form a new entity. Their price for doing so is invariably to entrench certain states' rights and powers alongside those of the central government. Typically, this gives rise to three sets of powers, those that are exercised exclusively by the states, those that fall solely within the competence of the federal government and those which are divided between the states and the centre.

5.5.   Since, historically, two of the primary reasons for federation have been the need to provide for a common defence against external threats, and the need to reduce the cost of government by sharing common services, it is not surprising that foreign affairs in general and treaty-making in particular are usually to be found within the list of powers exclusively within the jurisdiction of the federal government. Thus, while the draft Ethiopian constitution stipulates 'every nation, nationality or people in Ethiopia, shall have the unrestricted right to self-determination up to secession' and establishes constitutional procedures for the exercise of this right, in the meantime it is the duty of the Council of

Ministers, under the Prime Minister, to formulate and conduct foreign policy and of the President of the Republic to 'promulgate laws and international agreements ratified by the Council of Peoples' Representatives'. The Ethiopian constitution was drawn up after a prolonged period of civil conflict, which saw the central government repeatedly challenged by peoples whose primary loyalty appeared to lie with their ethnic, regional or linguistic group, and one of which - Eritrea - has already established its right to a separate state. It is this background which makes its new constitution of such interest to other deeply divided societies. At the same time, in providing for possible future secession, it is very much the exception. A few federations, e.g., Australia and Canada, allow their provinces a measure of autonomy in seeking foreign investments and export promotion, but the majority are constructed on the Malaysian pattern, that is, on the assumption of permanence, with a single legal personality, and no division of treaty making powers.

5.6.   It will be clear from these examples that for a federation to succeed, that is, for people to agree to unite under a single government so far as relations with the outside world are concerned while retaining autonomy over their internal affairs, they must be able to combine at least two loyalties. The first is to their provincial state (regardless of its social base, e.g., residence, linguistic or ethnic group or clan). The second is to the wider federal state (also regardless of its social composition). In other words, *there must exist amongst the federating states a measure of trust.* Without it, they will not be able to agree on the division of powers between the centre and the states, or on procedures for settling conflicts of interests either between the centre and states, or amongst the states themselves.

In some societies this trust has either never existed, or has broken down; yet there may be powerful, historical, geopolitical, economic and/or cultural reasons prompting rival groups to combine, if not for all purposes, at least for some. It is this kind of association which is often referred to as <u>confederal</u>, although the dividing line between a confederation and a federation is not so sharp as that between a unitary state and a federation. This is because a confederation which maintains itself over time will gradually establish the basis of trust which may allow it to evolve into a more conventional form of federal state with a stronger central authority and a common citizenship. This is more or less what happened in the case of the Swiss confederation, and, on one view, is what is currently happening within the European Union. Until that time, however, the confederal authority confines itself to some narrowly defined tasks and there is no common citizenship.

5.7.   Since it requires the smallest surrender of power by pre-existing groups or states to a central authority, some form of confederal arrangement is likely to recommend itself in deeply divided societies where the immediate problem is the containment of conflict and the re-establishment of trust rather than nation- or state-building. Confederations are likely to be more concerned with the independence and integrity of the Union, than with the details of government and administration in any of the states which make it up. For this reason, however, such powers as do fall within the competence of the central authorities are likely to be concentrated within the area of foreign affairs. For example, the Republic of the Gambia and the Republic of Senegal joined forces between 1982 and 1989 to form the Senegambian Confederation for exactly these purposes: the need for common defence and economic policies. The President of Senegal became the President of the Confederation while the President of the Gambia became the Vice-President of the Confederation, and although the agreement reached between the two countries stipulated that the Confederation

was based on integration of defence, foreign relations, communications and other economic matters, each state was to maintain its independence and sovereignty.

The (con)federal authority need not necessarily have a monopoly on treaty making, but where it does not, as for instance in Switzerland, the United Arab Emirates, or the Senegambian Confederation, it will still retain the right to approve treaties made by lower level authorities. Thus, in Switzerland the federal government has the right to conclude treaties with foreign states on behalf of the Union, but so do the cantons on matters 'of public economy, neighbourly relations and police', providing such treaties do not conflict with the confederation or the rights of other cantons. When another canton complains of such a conflict it is referred to the National Assembly for settlement.

Similarly, in the United Arab Emirates, the exclusive jurisdiction of the union is relaxed to allow individual Emirates 'to conclude limited agreements of a local and administrative nature with the neighbouring state or regions', providing that there is no conflict with the Union and that the Supreme Council is informed in advance. In the Senegambian Confederation, any international agreements of mutual concern entered into had to be negotiated or ratified by the President, in agreement with the Vice-President. Yet each state also maintained the right to "conclude International Agreements in accordance with its constitutional requirements".

The exception amongst confederal arrangements is the European Union: except in designated areas such as international trade agreements which are covered by the Common Commercial Policy, the member states have still not agreed to sign over their right to make treaties on their own behalf. And even in agreements within the Union, the major states effectively retain a veto on any legislation they believe conflicts with their vital interests.

5.8.   What seems to follow from this brief overview of confederal arrangements is that the parties to a confederal union have three options: 1) they may transfer authority for external affairs and treaty making to the centre but retain full domestic sovereignty; 2) alternatively, they may allow the individual parties some freedom in external affairs providing there is no conflict with the interests of the confederation as a whole or its members; 3) finally, they can retain their international personality - and hence their capacity to conclude treaties with foreign powers - but create common services and rules covering co-operation amongst themselves and relations with outsiders on particular subjects.

5.9.   Whatever system is finally devised, a decision will have to be taken about the status of any previous international agreements entered into either by the first Somali Republic, or by the government of Mohamed Siad Barre. *The most straight-forward and conventional approach would be for any new Somali state or states to honour such agreements unless they explicitly contradicted the principles upon which the new state or states were constructed.* In any event, membership of international organisations and access to international financial agencies are unlikely to be available unless the new Somali authorities can provide satisfactory assurances that the standards and commitments established under existing international agreements, e.g., with respect of the protection of human rights, the law of the sea etc., will be adhered to. In addition, in the current international climate, it may also be desirable for any future Somali state or states to provide explicit guarantees for the protection not only of individual human rights but also of women's and minority rights.

(ii) Foreign Representation

5.10. The decision taken with respect to the right to conclude treaties and conduct external relations will to a large extent determine who is to represent the new state or states in embassies abroad, such multi-lateral institutions as the United Nations, Organisation of African Unity or Arab League, and at international conferences sponsored by UN. In a unitary state or federation the appointment of ambassadors and their diplomatic staff is generally the prerogative of the Head of State, as it was under the original Somali constitution and is under the draft constitution of the Federal Democratic Republic of Ethiopia. In decentralised unitary systems, provisions can be made for representation abroad for commerce or cultural purposes, as, for example, occurs with Quebec, the Australian provinces, or Catalonia. But in all cases, to date at least, even within a decentralised unitary system, formal diplomatic representation remains with the central authority. Within confederal systems the appointment of representatives will depend on the nature of the association and how closely it approaches the federal model. Thus in the United Arab Emirates and in the failed Senegambian Confederation, the President appoints diplomatic representatives, while in the European Union the member states all maintain national diplomatic services and the Union's own external service is recruited both directly by open competition and by secondment from the civil services of the member states.

5.11. The problems that arise in connection with representation are likely to be of a practical rather than a theoretical nature. Two are worth further comment. The first concerns the principles of recruitment for the diplomatic service, the second the question of cost:

(i) **Recruitment.** The basic question here is to decide whether diplomatic personnel are to be chosen on merit, according to a representation principle, e.g., quotas for different regions or clans, or by some combination of merit and representation. In theory, within a unitary state or federation defined in terms of a single citizenship, the question should not arise. The practical problem is to ensure that the state secures the services of the most competent people, a requirement which usually dictates that foreign service personnel, like other members of the public service, are selected by open competitive examination. A serious difficulty arises in societies which are too deeply divided to support a common citizenship or to allow people from one part of the country to have confidence in public officials from another area or social group, regardless of how competent they may be, or how they are selected. In these circumstances it may be possible to re-establish confidence by ensuring that office holders are appointed by their own regions or clans under an agreed system of rotation. There would no doubt need to be additional guarantees that those representing the confederate state in its external relations would be unable during their period of office to pursue the interests of their own immediate group at the expense of their rivals or the union as a whole. *The most obvious way of building in such an equity principle would be to minimise the number of issues on which the central authorities could initiate, and therefore influence, programmes requiring foreign funding.* We shall

return to this possibility below when we consider the implications of foreign aid [see below].

(ii)   **Cost**. Ideally, in societies where there are many different social groups, the system of presentation should not only provide for the major common offices to rotate, but should seek to ensure that no group feels excluded. In practice this is likely to prove extremely difficult because the tasks that will need to be performed by the centre within a decentralised system of government are likely to be smaller than the number of groups aspiring to representation, and also because the new state or states will inevitably have to operate under severe financial constraints. At independence, most African governments created diplomatic establishments far in excess of their real needs, i.e., to protect essential interests, or their capacity to pay for them over the long term. *The creation of a new diplomatic service or services, depending on the number of new entities with treaty-making power, will need to be carefully tailored to the resources available.* At first sight, these considerations would seem to argue in favour of a single service, since there are savings to be made by avoiding obvious duplication. But in any event - and in line with current African practice - the list of overseas posts will need to be kept to an absolute minimum. There will presumably need to be a small Somali delegation to the United Nations, which can probably also cover diplomatic relations with the United States, and similarly a representative in Brussels who could also handle bilateral relations with the European Union member states. Beyond this, and representation in key neighbouring states, it will be necessary for the new state or states to be represented within the OAU and to have a small cadre of people with responsibility for handling regional issues such as cross-border trade and refugees, as and when they arise. *These problems related to recruitment and cost will arise irrespective of the type of government chosen or the number of states.*

(iii) Defence

5.12. Perhaps the most widespread definition of the state is that agency of government which exercises the monopoly of legitimate violence. Certainly, in all but one of the constitutions we have examined, i.e., those of Ethiopia, Malaysia, the United Arab Emirates, Spain, Senegambia, and Switzerland, the central or federal authorities are responsible for maintaining the defence of the state or union and for enacting laws on the carrying and use of firearms. And in all cases it is the central or federal authority that has the sole right to commit the country to war. Switzerland is the one state in which responsibility for defence is shared between the confederation and the cantons, although in the Senegambian Confederation, the President of the Confederation presided over defence and security of the Confederation, but the President of the Gambia retained his position as commander-in-chief of the armed forces of the Gambia "in accordance with its constitutional requirements". We shall review the possibility of adapting the Swiss model shortly.

5.13. The model which is reflected in all the other constitutions is that of the national security state. It is unfortunate that this model was adopted so widely at the time of

decolonisation since relatively few of the new states that built up powerful armies, sometimes supported by air and sea power, faced any serious threat. On the other hand, the armed forces were frequently in a position to capture the state for themselves and their immediate followers. This might not have mattered had the military - as they often claimed - represented the national interest against the divisive forces that plagued so many societies. More often than not, however, the armed forces merely mirrored society at large including its divisions. *Unfortunately, in many parts of the world the consequence was that the military, far from performing their proper function of protecting society against aggression, itself became a major source of insecurity for the civilian population.*

5.14. It would be naïve to assume, however, that states which have disintegrated as the result of civil war and armed insurrection, can be reconstructed on a more legitimate basis by disarming the population and abolishing the armed forces. Apart from the fact that this solution stipulates an end without identifying any credible means by which it can be achieved, it fails to distinguish between the abuse of military power and the need to match the defence forces available to a society to its legitimate security preoccupations. *The real problem faced by such societies is how to harness their military resources so that they can contribute to, rather than undermine, the framework of law and order.*

When a state disintegrates, its military forces also tend to divide into rival factions and armies. To the extent that these represent real divisions in society, rather than merely the armed following of ambitious individuals, it may be possible to put this fracturing to the service of a decentralised structure of government. *If society faces no immediate external threat to its existence, there should be no attempt to reconstruct a standing army.* This conclusion also follows from the basic assumption on which all systems of decentralisation are based, namely the desire to keep the central authority as weak as possible in relation to the other autonomous parties to the union.

5.15. In the Swiss case referred to earlier, the confederation is forbidden by law to maintain a standing army, and no canton is permitted to have an armed force of more than 300 men, exclusive of police. At the same time, every Swiss has an obligation to perform military service. In the event of a threat to a canton from outside the confederation, that canton has the right to call on other cantons for support which they are obliged to provide, while simultaneously informing the federal authority which then rules on the appropriate response. Another example is provided by Costa Rica. Article 12 of the constitution states, "The army as a permanent institution is proscribed. For vigilance and the preservation of the public order, there will be the necessary police forces. Only through continental agreement or for the national defence may military forces be organised; in either case they shall always be subordinate to the civil power; they may not deliberate, nor make manifestations or declarations in individual or collective form." What such arrangements means in practice is that society is simultaneously demobilised and militarised: *there is no powerful military establishment with the ability (and right) to consume a major share of the states resources, but in the event of a genuine emergency it is possible to put together quickly a formidably armed force.*

A broadly similar arrangement could be envisaged for Somalis if it were decided to pursue reconstruction through a decentralised system of government. The militias which grew up in the aftermath of Siad Barre's overthrow were a response to a general breakdown in

security, and could, in principle, be stood down in the event of a new political settlement, as has to some extent happened in the militias demobilisation programme in the 'Republic of Somaliland'. Because of the status enjoyed by the military under the previous regime, there is no shortage of trained military leaders, while most of the young fighters already move in and out of civilian life. The militias could therefore be used as the basis for local citizen defence forces, if at some point in the future it became necessary to remobilise.

5.16. The obvious weakness in any system of citizen defence as distinct from national security is the absence of any constraints against the use of armed force in civil or internal, rather than foreign, conflicts. The Swiss solution to this problem is purely legal. Article 14 of the Constitution state that 'in the event of disputes arising among them, the Cantons are bound to refrain from taking any independent action and from arming. They shall submit to the settlement of such disputes as decided in accordance with federal regulation.' A clause of this kind would have little credibility in a society which is already divided into heavily armed camps and where local antagonisms reflect a fundamental absence of trust. It is worth recalling, however, that the Swiss Constitution of 1874 was drawn up after a civil war when Swiss society was deeply divided. Such legal commitments were deliberately agreed upon to symbolise the beginning of a new era. In the Somali context, it might be possible to reinforce a legal undertaking of this kind by establishing a dispute settlement group, with representatives from the different clans. This group could also be called upon to settle inter-clan boundary conflicts, which is indeed the protracted process led by clan elders that culminated in the famous Borama peace conference of 1993 from which Egal's the 'Republic of Somaliland' administration emerged.

5.17. We may note that a willingness to explore the possibilities of confederal association would itself indicate a desire to overcome the more destructive consequences of inter-clan rivalry. Any attempt to deal with the problem of militarisation by enforced disarmament imposed from the centre would certainly fail; but it might be possible to make progress if the individual members of the confederation agreed to register their heavy weapons and bring them under their own control. During the transitional period, while the new political order was being established, there would no doubt be much continued mutual suspicion and accusations and counter-accusations that agreements on the maintenance of armed forces and the control of weapons were not being adhered to. It would probably be necessary, therefore, to devise a system of inspection that would command confidence. This itself would be problematic but it might be achieved either by creating a special confederal agency, with representatives from all member states, or by contracting out the task of verification to the newly created OAU mechanism for conflict management, or some other international agency. Such a proposal may not be quite as implausible as it may seem at first sight if it is recalled that the donor community is unlikely to provide significant financial or other assistance unless it is satisfied that political order has been restored and is holding.

5.18. The resolution of many security and defence problems will be complex and protracted. Yet there are some international issues which are of immediate and pressing concern, issues around which the disintegration of the Somali state is imposing real costs on Somali society. These include the over-fishing of stocks within the 200-mile exclusive economic zone off the Somali coast, and the unregulated dumping of toxic waste. One possible solution would be for the various Somali authorities to create an agency for coastal patrolling and monitoring of illegal fishing, and for issuing licences to regulate the dumping

of waste. Such an agency could be eligible for international financial and technical assistance. Alternatively in the first instance, it might be simpler to contract such supervisory activities out to an external agency, which could then train Somalis to take over these functions at a later date.

(iv) Citizenship

5.19. In the contemporary international system it is impossible to move around without a passport issued by the state of which the traveller is a citizen. The issuing of such documents, together with questions relating to naturalisation, emigration and immigration, the right of aliens to residence and to asylum, is customarily handled by the central, federal confederal, or decentralised state authorities. This holds for the sample of constitutions we have examined, and for most others, although there are cases of countries which allow dual citizenship, of others which distinguish between nationality and citizenship, and in some confederations, notably the European Union, nationals are citizens of both their own state and of the Union.

Some version of this last practice seems likely to suit a decentralised Somali state or states. Somalis travel a great deal, and it can be assumed that those in the extensive Somali Diaspora that has grown up since 1978 reached their destinations with the help of Somali passports issued by the previous regime, or of a facsimile version of this passport, if they have emigrated or travelled since the collapse of the State. Even if it was decided to create a union of independent Somali states, it would be courting unnecessary difficulties and expense to require all such people to re-register. The obvious solution would be for the confederating states to agree to a common Somali nationality, as in the original 1960 Constitution - something which in any case does not seem to be in dispute - and dual citizenship between the Union and the provincial state. All Somalis would have rights of residence anywhere within the Union, even if their right to representation could only be exercised in their state of origin. If some version of this system were adopted, it would not necessarily follow that there should be a central issuing authority for passports and for ruling on residence or asylum questions. Once the principles had been agreed, it would probably be preferable - and certainly much cheaper - to devolve these functions to the provincial authorities, as is currently the practice with the national states within the European Union and the United States.

C. Economic Externalities

(v) Foreign Trade, Customs and Excise

5.20. In normal times trade is the activity which most often brings citizens of one country into regular contact with those of another. In important respects trade is a private activity: where there are willing buyers and willing sellers, international frontiers may sometimes act as barriers to the movement of goods but can seldom stop them moving altogether. In many parts of the world experience has repeatedly shown that attempts to regulate trade in ways which ignore the structure of supply and demand merely create opportunities for profiteering, extortion and other black market activities. Nonetheless, while trade will take place in conditions of near anarchy, and some merchants will be able to exploit the absence of law

and order for their own advantage, particularly if they can support their commercial activities with private force, for the most part traders, like their customers, prefer a stable and predictable environment in which to do business. *It is an important function of government to provide the framework of law and order which creates this atmosphere of stability and predictability.*

5.21. So long as foreign trade is conducted in a way which is consistent with international commercial law, as established under the GATT, WTO, or Lome Conventions there is no reason in principle why the commercial framework should be the sole or even primary responsibility of the central authorities. Even within unitary states there are many examples of local authorities which are empowered to regulate the rules and conditions under which trade is conducted, and to levy taxes to finance local services. In federal states it is common to find variations in practice between different provinces. The tolls which are charged for the use of certain bridges and roads in many countries, or harbour dues which are charged by port towns, or the sales tax which varies from state to state in the USA are all examples of this kind of delegated financial autonomy in respect of trade.

Nonetheless within unitary states, decentralised unitary states, federations, and confederal unions it is usual for the central authorities to have overall responsibility for foreign trade and all matters relating to customs and excise. This observation holds for all the constitutions to which we have referred in this chapter, i.e., the Spanish, Ethiopian, Malaysian, UAE and the Swiss. In the case of the European Union the common commercial policy with respect to trade with non-member countries was one of the first areas of public policy to be brought under a common regime, even though it took many years for the member states to create a single market amongst themselves.

5.22. The reasons why it is generally thought desirable to bring foreign trade under central control are both economic and political. From an economic point of view, the fewer obstacles in the form of differential taxes and regulations that are imposed on traders, the greater will be the material incentives to expand production and exchange. Politically, if different states, regions or towns are free to set their own import and export taxes they may be tempted to engage in economic warfare with each other thus fuelling inter-group conflict. For example, adjacent port towns may try and undercut one another. In an environment where law and order had already been firmly established, it is possible that free competition of this kind could have a generally beneficial effect; but in other circumstances it is likely to make it virtually impossible to establish law and order. Indeed, this partly accounts for the failure of the Senegambian Confederation, where despite the desire to create monetary and economic union, the Gambia refused to eradicate its low tariffs and liberal trade policies.

5.23. In most of the constitutional arrangements we have examined, the centre is provided with an independent source of revenue in the form of a monopoly on the collection of custom duties and export taxes, which are relatively easy to collect even when the states and regions are left free to collect other types of taxes, as in the proposed constitution for Ethiopia. For a deeply divided society which can only realistically contemplate reconstruction through the most far reaching system of decentralisation that can be envisaged, this type of solution raises two kinds of difficulty. The first concerns the equitable sharing of the costs and benefits of confederal union. It can be illustrated by considering the fate of the former East African community:

Following the failure of Kenya, Tanzania and Uganda, to federate in the early 1960s, the Community took the form of a loose economic confederation until its demise in the mid-1970s. Apart from paying for the administrative cost of the community from its own revenues, the centre attempted to compensate the economically more backward members by means of a transfer tax, which redistributed some revenue to Tanzania and Uganda and away from Kenya. A similar objective was pursued through an industrial development policy under which foreign investment in particular centres was to be directed to the two poorer states. Not surprisingly, both these provisions were resented by Kenya, and over time helped to undermine the Community. It may be possible for Ethiopia, which is a single state, to avoid a similar fate, but it is clear that in a region characterised by widespread poverty and little overarching social solidarity, attempts to persuade the richer areas to subsidise the poorer are likely to prove problematic.

The second kind of difficulty associated with creating a central power with independent resources over the regions is how to persuade those currently in a position to tax foreign trade or the use of strategic assets, such as ports or airfields, to give them up, as has been vividly illustrated in Somaliland. There, despite attempts to maintain local tax monopolies, Egal's government has managed to tax imports and exports (including as a new departure, a tax on qat imports valued to some $250 million in 1995/95). These sources have generated sufficient revenue to pay for the core public services currently in operation. The same would apply to those in a position to negotiate agreements with private companies covering fishing rights, shipping, or even oil exploration. In the absence of a general disarmament of the civilian population, which in a country such as Somalia is effectively impossible, this is likely to be a wrecking difficulty. No one is likely to surrender a strategic source of revenue in the interests of an abstract concept of nation or state building. Surrender would require a superior show of force, if not actual military defeat, in other words, measures that would contradict the purpose of reconciliation and reconstruction.

5.24. In such circumstances, where power is already radically decentralised, it seems unlikely that progress can be made by starting at the centre and working outwards. Rather it may be necessary to assume that, whatever the ultimate form of the Somali state or states, for the moment, taxation, including taxation on foreign trade, will continue to be levied by those who control strategic assets. *The problem will then be for these power-holders to decide amongst themselves what minimal common services they require and how these are to be financed without creating a powerful and unrepresentative central authority.* One possible solution would be to establish a minimum flat rate levy on all the parties to the union (i.e., and e.g., regions, towns, clans, clan groups) to cover the costs of a small central administrative and diplomatic service as discussed in the previous section, and beyond this to establish separate functional services, e.g., to cover fishing protection, health care, public transport, veterinary services etc., which would be funded by their users. In other words, the autonomous local authorities, however constituted, would contract into whichever of the central services were most relevant to their needs, and would be responsible for raising the necessary revenue from their own tax base. In countries where the concept of a democratic majority is unlikely to correspond to social reality some such scheme would have the advantage of meeting the first principle of democratic government - no taxation without

representation - while concentrating the minds of local authorities on the priority needs of their own populations which cannot be met without the co-operation of other groups.

(vi) Foreign Aid

5.25. The receipt of aid is not strictly speaking a constitutional matter at all. On the other hand, financial and technical assistance is of such importance to most developing countries that it would be unwise to consider any form of political reconstruction without assessing its implications for relations with potential aid donors. In the early 1960s, when most African countries achieved independence, virtually all aid was provided on a government to government basis. Indeed, to have provided it on any other basis would have risked accusations of neo-colonial intervention on the one side and been regarded as unwarranted interference in the domestic affairs of a sovereign state on the other. Nor at that time was it considered appropriate to attach explicit political conditions to aid, even though some states benefited as a result of their loyalty to one or other side in the cold war. The inevitable consequence was that aid flows reinforced the centralisation of state power in developing countries. In some cases it also contributed to the corruption of public life, since state officials (with access to external funds) were often able to charge personal commissions for the award of contracts to foreign suppliers and the location of projects within the country.

5.26. The aid environment in the 1990s is quite different. Not only is there much less aid in real terms to go around, partly as a consequence of the end of the cold war and the emergence of many new potential recipients, but donors are much less squeamish than they were about attaching political and economic conditions to resource transfers. *It can be safely assumed that they will need to be satisfied that any government or governments are both viable and legitimate before there will be any serious injection of funds from outside in support of development and reconstruction projects.* They will also need to be satisfied that the money will be put to good use rather than be frittered away.

5.27. All these considerations argue in favour of the most decentralised form of government and administration consistent with the maintenance of political stability: projects will need to be initiated by the legitimate representatives of the communities in which they are to be located, rather than by a central planning agency. At the same time, since resource transfers, whether of capital or technical assistance, can only follow the signing of an aid agreement or contract, donor governments and international financial institutions will need access to properly constituted authorities. Thus the regions should have the authority to enter into international aid agreements on their own behalf. *Such a system could be devised within a decentralised unitary state, a confederation, and providing it was specified in the constitution, in a federation.*

5.28. In international law the principle that promises will be kept (*pacta sunt servanda*), is qualified by the acceptance that the context may change so dramatically that this is not possible, *(rebus sic stantibus)* But despite this concession to the uncertainties of international life, governments will not normally enter into agreements without some reasonable expectation of continuity. It follows that if the donor community is to contribute to the process of reconstruction, there will have to be a finite rather than infinite number of local authorities empowered under law to negotiate directly with foreign governments and financial

institutions. How this might be achieved in a society of constantly shifting loyalties and power alignments is discussed in another chapter of this report.

5.29. One final issue related to future stability concerns the establishment of on-the-ground experts to assist international organisations, such as the Food and Agriculture Organization (FAO), or the Desert Locust Organisation, in efforts to systematise early warning systems. Greater co-ordination with the Inter-Governmental Authority on Drought and Development (IGADD) in Djibouti could be the first step, and would help to strengthen the regional authority. At some stage in the near future, offices throughout Somalia(s) would need to be opened, and the Ministry (or Ministries) of Agriculture (or in the case of a confederal or decentralised system, the relevant agricultural authorities in the different states), would also have to be involved very closely with such an organisation in order to prevent the recurrence of widespread famine.

(vii) Currency

5.30. Modern states, irrespective of their political form, tend in part to be defined by the monopoly of the central authorities over the national currency. In some countries, such as the United States or the Federal Republic of Germany, the monetary authorities are formally independent of the government, and in others, such as until recently the Republic of South Africa, different values are maintained for domestic and foreign transactions. In yet others, where confidence in the local currency has collapsed, often as the result of hyper-inflation, a foreign currency, usually the US dollar, circulates alongside the domestic currency and to some extent replaces it. But in no case are there rival monetary authorities within a single country.

The reasons for this wide conformity in monetary arrangements are partly symbolic - the currency, like the anthem and the flag, is regarded as an official expression of national identity - but also, and more important, it is practical. For international, as well as domestic purposes, money is used primarily as a medium of exchange and a store of value. Some theorists have argued that if money was treated as a commodity like any other, anybody could issue it, but only the best, that is, the money that was trusted by traders because it held its value, would survive. This view has not been shared by governments in unitary states, decentralised unitary states, federal states, or indeed by confederal unions which tend in the federal direction. They all fear that rival currencies would be manipulated by the issuing authorities to gain an unfair competitive advantage through unilateral depreciation or revaluation, depending on circumstances.

5.31. If, then, it is decided to reconstruct a society according to principles of maximum decentralisation, what monetary arrangements would be most appropriate? The practical choice probably lies between four alternatives:

(i)   Each party to the union could create its own currency, and agree to exchange it at par in intra-confederal transactions. Ideally, they should also seek to maintain a common exchange rate with a major external currency or basket of currencies. In practice this might prove difficult to achieve, if one part of the union proved to be economically more successful than the others. In other

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words, monetary harmony between different currencies depends upon a high degree of convergence in the real economy.

(ii)   This idea could be taken one step further with the establishment of a currency system modelled on the *ecu* of the European Union. Each state would have its own currency (which would reflect current developments in parts of the former Republic of Somalia), yet it would be pegged to the common currency. The problems with this type of system have already been discussed, but it could serve as a buffer while trust is being re-established in some form of a state structure. When that trust is fairly complete, the common currency could then take over, in a similar fashion to the timetable for monetary union designed by the EU.

(iii)   The union could do without either a central bank or local monetary authorities. The pre-existing currency could continue in use for trading purposes alongside a major international currency such as the dollar, which would gradually replace it as the local money physically deteriorated. There are precedents for this kind of approach. During much of the 19th and early 20th centuries the Maria Teresa dollar and Indian rupee were widely used throughout the Gulf area and in the Horn.

(iv)   An independent monetary authority could be created for the confederal area, i.e., it would exist alongside but would not be subordinate to any central power. It would need to be staffed by qualified personnel, so that the usual problems of balancing the criteria of representation and merit would arise. One possible solution would be to contract out the task of running monetary affairs to an international financial institution such as the IMF, which could be charged with running a training programme for local bankers. For Somalis this approach might also help to resolve the problem of outstanding debt since the Fund suspended all dealings with the country for non-repayment of past loans following the overthrow of Siad Barre's government.

Chapter 6. Principles of Constitutional and Electoral Design

A. Introduction

6.1.   Somalia has experienced several constitutional failures. Its post-colonial period of competitive party democracy (1960-69) terminated in military dictatorship. In our judgement, the failings of the post-colonial period stemmed partly from over-reliance on Somalia's Anglo-Italian imperial institutional heritage, which led to the formation of an excessively parliamentary, majority-based, imbalanced system. The excess in the first democratic Somalia arose because insufficient consideration was given to creating a separation of power between the executive (e.g., president or prime minister), legislative (e.g., parliament or assembly) and judicial authorities at the central level - or to creating self-governing territorial units at a more local level. It was too 'majoritarian' (see below), despite the existence of a proportional representation electoral system, because its unitary structure encouraged all to believe that power was concentrated at the centre and that it was essential to be part of the majority alliance at the centre. For example, in March 1969 over a thousand candidates belong to sixty-two 'parties' competed for 123 seats in the National Assembly, but the Somali Youth League was able to establish a one-party regime when almost all independents joined the governing party. The first democratic Somalia was also culturally imbalanced in that traditional Somali institutions were not effectively integrated into the new political system. These constitutional features, when added to other unpromising conditions, precluded successful democratic conflict-management.

6.2.   Not all democracies need be excessively parliamentarian, majoritarian or culturally imbalanced. A future Somali state or states evidently requires more effective democratic design - which in turn requires the explicit use of constitutional principles mostly foreign to British, and to a lesser extent Italian, governmental practice. These principles include a formal *separation of powers* accompanied by *checks and balances,* and *consensual* or *consociational principles* of co-operative government (see Chapter 1). These principles alone will not be sufficient to realise a workable constitutional settlement, but they will help the Somali peoples to enjoy modern self-government in ways characteristic of other democratic confederations or federations. In this chapter we shall focus largely on the merits of federal as opposed to unitary structures of government. By extension most of our arguments would apply with equal force to the merits of a confederation.

B. Two Constitutional Designs for Democracies

(i) Parliamentarianism and majoritarianism and their defects in divided societies

6.3.   In parliamentary democracies the legislature is the most important political body. In the United Kingdom, an extreme example of a parliamentary democracy, parliament is sovereign, or, more strictly, the Crown-in-Parliament. The legislature formally controls the executive because prime ministerial and cabinet authority ultimately rests on the support of the elected members of parliament - however, a party with a working majority is usually able

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to dominate the legislature. Parliament is also sovereign, because with some exceptions relating to the UK's membership of the European Union, there is no effective judicial review of the acts of parliament.

6.4.   The parliamentary democracy in the United Kingdom is easy to understand, and could almost have been designed to facilitate rule by a majority of the people. Historically it has had nine key features, as identified by one leading authority:

(i)   a concentration of executive power, normally through one-party government, and cabinets which are based on a bare majority of legislative support;

(ii)   a fusion of executive and legislative power, because the cabinet is technically a committee of the legislature, although it has practical predominance in the making of law and public policy;

(iii)   weak bicameralism, that is, a two-chamber parliament in which the second chamber, the House of Lords, is not powerful;

(iv)   a predominantly two-party system, both in electoral support and parliamentary representation;

(v)   a system of party competition organised principally around one political cleavage, i.e., left and right divisions over economic policy and the distribution of income and wealth;

(vi)   an electoral system, simple plurality rule, which awards parliamentary seats to the candidates winning the most votes in single member constituencies;

(vii)   a system of unitary and centralised government, in which local governments can be abolished by the central parliament;

(viii)   an uncodified constitution with a formally minimal judicial role in interpreting 'constitutional' law; and

(ix)   an exclusively representative democracy in which the use of the referendum is unusual.

Ideally the Westminster system gives power to an electoral majority (in practice a plurality) and facilitates strong and responsible government: strong, because the single party dominated cabinet should facilitate unity of purpose, and responsible, because the government will be held to account by the electorate for its actions. It is therefore both parliamentarian and majoritarian.

6.5.   Parliamentary and majoritarian systems provide one defensible and workable model of democracy. They only work well, however, in relatively homogeneous societies (or societies with a uniform national political culture in which it makes sense to think of politics as underpinned by the suppositions of liberal individualism). They work where there is a genuine likelihood that today's minority will become tomorrow's majority or plurality, and

where individuals are open to appeals to them as individuals, i.e., where there is effective political competition for electoral support amongst individual citizens so that the principles of responsible government can work as intended. In Great Britain (but not in Northern Ireland) these conditions, with qualifications, have been present for much of the twentieth century. In societies profoundly divided by nationality, ethnicity, race, language, religion, or clan, however, simple parliamentary and majoritarian democratic systems are not likely to win widespread legitimacy, and the suppositions of liberal individualism can be usurped by a dominant community to advance its own exclusive interests. In such circumstances the institutions of parliamentarianism and majority rule are very likely to become instruments of tyranny for the largest or majority community. It is essential to recall that these consequences can occur at either the central (federal) or sub-central (regional) level of government. To become a viable and functioning democratic entity Somalia requires principles of constitutional design which recognise its clan-based realities, and which recognise that liberal individualism is characteristic of only a small fraction of its population. It requires in our judgement a significant departure from the Westminster or majoritarian model of democracy.

(ii) Consensual and consociational constitutional principles

6.6. The opposite of parliamentarian majoritarianism is the consensual model of democracy, which, in principle, seeks to maximise participation and representation in government, and to provide restraints on the degree to which a majority or powerful plurality can exercise governmental power. Whereas the majoritarian model defines the people who are to rule in a democracy as 'the majority', the consensual model defines the people more expansively - 'as many people as possible'. Consensual democracy, as its name suggests, is much more appropriate for divided societies, and much more likely to inhibit dominance, and insurrection against such dominance. It therefore may be more appropriate for Somalis intent upon democratic reconstruction and reconciliation. It also has the advantage of having some distinct resemblance to traditional Somali decision-making practices - in which consensus through dialogue is the paramount process.

6.7. In consensual democratic systems eight institutional features can be identified (many of which are found in the Swiss system of government):

(i)   executive power-sharing, so that 'over-sized', and in some cases 'grand coalition', governments are formed, which enjoy widespread support within and across multiple communities;

(ii)   a separation of powers, both formal and informal, i.e., a system in which the executive is more or less invulnerable to legislative attack but in which it cannot dominate all other political institutions; in which the legislature is not controlled by the executive; and in which the judiciary is invulnerable to legislative or executive attack;

(iii)   balanced bicameralism, in which there are two legislative chambers, and special care is taken to ensure minority and territorial representation (of the federated units) in the second chamber;

(iv)   a multi-party system that reflects the nature of the constituent societies;

(v)   a multi-dimensional party system in which, for example, religious, linguistic or clan cleavages, are electorally expressed and informally institutionalised in support for political parties;

(vi)   a proportional representation voting system that ensures that the elected chambers are broadly representative of the electorate;

(vii)   a form of decentralisation which may contain both territorial and non-territorial elements, which may include explicitly federal forms, but which may also allow cultural communities considerable (consociational) self-government - for example in the field of education; and

(viii)   a formal codified constitution that provides minorities with specific constitutional protections and rights of veto.

6.8.   Consensual constitutional principles of democracy ensure that all those affected by decisions should have institutional opportunities to participate in decisions that affect them, either directly or through their elected representatives. They also favour cultural or communal autonomy: they aim to ensure that communities are allowed considerable institutional opportunities to govern themselves provided that they respect the same rights for others. On the premise that many Somalis seem interested in pursuing a federal and consociational path of constitutional reconstruction, we draw extensively upon the elements of the consensual model.

6.9.   If Somalis embark upon creating a federation they would benefit from establishing consensual institutions with the following features:

(i)   a multi-member and multi-party executive, i.e., a collective presidency, which would cement federal and consociational principles in the new democracy;

(ii)   a constitutionally entrenched separation of powers between the executive, legislature and judiciary, with a special constitutional 'council of state', composed of traditional elders and former members of the executive;

(iii)   a two chamber federal parliament, one based on the entire population of the state, the other based on the constituent Somali states or regions;

(iv)   the use of proportional representation electoral rules for the election of the executive and the federal chambers, and some other electoral devices to encourage a certain degree of integration;

(v)   non-territorial autonomy for ethnic and clan communities and associations; and

(vi)   a codified constitution that provides safeguards and protections for minorities, at the federal level and within the federated units.

This array of institutions would work best if a stable multi-party system can be established - a major requirement in the recreation and stabilisation of Somali democracy at the national level.

6.10. *Executive.* Power-sharing has often failed to work where it required an entirely voluntary agreement between political parties within a parliament to share executive power - an agreement that within a purely parliamentary system might easily be broken by the withdrawal of legislative support, or by the departure of a key political party from a coalition. *One solution to this fundamental problem is to have an executive authority which does not require a formal coalition between political parties, nor rest on legislative or parliamentary support.* In other words power-sharing can work with a separation of powers - including a president or prime minister separately elected from the legislature. Opposition to having a single president in divided societies has been based on the idea that a president is necessarily appointed by a majority vote. And many Somalis seem to fear, at present, that competition for a single person presidency (or premiership) will lead to the renewal of war. Competition for such a post has been a principal element in the present civil war. These fears and objections hold, however, *if and only if* presidential rules requires a single president. It does not. A multi-person presidency, composed of several figures with equal status, conducting their business with a rotating chair, and comprised of one representative from each of the new federating regions of a future Somali state, might provide the necessary unity and diversity to stabilise the new federation. A collective presidency could be required to operate consensually (with any one member having a veto) or to operate on the basis of an extraordinary majority (say over three quarters) of support of the members of the presidential council. To be effective, however, the electoral methods for choosing the collective presidency would have to win widespread legitimacy - a point to which we shall return.

6.11. *Separation of Powers.* Controlling governmental action lies at the heart of constitutional thought. The separation of powers is the classic device to ensure constitutionalism. The pure doctrine, which might be taken to imply that the executive, the legislature and the judiciary should divide governmental functions in such a manner that the different branches of government need never exercise the functions of another is entirely implausible. Rules are made by legislatures, judges, and by bureaucrats working for the executive; rules are applied by courts as well as by the executive; and judgements are made by civil servants and ministers as well as by judges. Under a sensible interpretation of the doctrine of the separation of powers, governmental power and authority (executive, legislative and judicial) are institutionally separated but enabled to co-operate together within a framework that limits and balances the individual capacities of each branch of government. The merits of a formal separation of powers are obvious to most Somalis. This classical device will assist in preventing the concentration of governmental power, which has been a major cause of antagonism. For this reason it is possible to argue that the establishment of a collective executive independent of any Somali legislature, and having the ability to propose laws subject to appropriate passage (and possible amendments) through a legislature, is an idea that could prove attractive and appropriate. Such an executive, because it would be independent of the legislature would be reasonably stable - and could remain unaffected by possibly volatile party realignments in the legislature. Good government requires a capable executive, but in Somalia, precisely because of its potential power a capable executive must be a multi-person body rather than a single person; and it must be structured in such a way

that it cannot easily become an instrument of dominance by a permanent majority or alliance of clans.

6.12. A formal separation of powers and a formal constitution presuppose a formal role for judicial review and interpretation of the constitution. Despite the risks inherent in the 'legalisation of politics', what some refer to as 'juridification', we believe that, provided judges are representative, there is a creative and protective role for a supreme court in establishing workable Somali democratic institutions (see Chapter 4). An autonomous judiciary would considerably assist in supporting the rule of law and in protecting individual and collective cultural rights specified in the Constitution. Certain rights, for all the difficulties that arise in their interpretation, could and should be constitutionally and judicially protected against possible majoritarian abuses. Precisely because judges of the Somali Supreme Court would play a pivotal role in supervising the Constitution, careful proposals are required to facilitate the formation of a representative judiciary - including the possible election of judges.

6.13. We are aware that a federal system need not separate powers between the executive, legislature and judiciary. The Canadians, before 1982, did not do so. However, the key principle of federalism, the horizontal division of sovereignty between a federal government and its co-sovereign states, has a major affinity with the vertical separation of executive, legislative and judicial powers. Both principles fragment the potential for centralised power within any governmental regime. For this reason Somalis may wish to embrace both the horizontal and the vertical separation of powers, and therefore to consider designing a collective presidency checked and balanced by two co-equal legislatures (one elected on the basis of the national population, and the other on the basis of the equal representation of the constituent federating units (regions or states or provinces)). Attention will, naturally, need to be given to how these two chambers are elected (a matter discussed below), and their precise powers and capacities. In addition, Somalis may wish to make some of their traditional institutions into custodians of the constitution, or into supplementary checks and balances in an overall separation of powers. For example, a constitutional council of elders might be entrusted with two functions:

(i) arbitrating disputes between the collective presidency and the two legislative chambers; and

(ii) taking to the Supreme Court issues that they believe require constitutional adjudication.

The (s)election of the council of elders would have to be determined by traditional Somali methods. It would be advisable if former members of the collective presidency were automatically entitled to become members of the council upon retirement or resignation from office.

6.14. The foregoing discussion suggests that upon accepting federal and consensual principles of constitutional design Somalis would have to consider electoral mechanisms for at least the choice of the following offices: the federal collective presidency, the two federal chambers, federal judges, and the institutions of the federating regions. In addition traditional selection mechanisms may need to be formalised for the construction of a

constitutional council of elders. Below we consider the possible electoral options for some of the democratic offices of state (excluding judges).

C. Electoral Principles and Constitutional Design

6.15. Somalis can choose between two principles in the design of the institutions of modern democracies: the majoritarian or the consensual. Each has implications for the electoral and party systems that Somalis may develop. Broadly speaking the majoritarian form of democracy is associated with electoral rules that seek to be competitive, and simultaneously dualistic and integrative. Majoritarian electoral systems (such as plurality rule, the double-ballot and the alternative vote) provide incentives for competitive parties to seek a plurality, or majority support. The operative idea is that if parties do not respond to these incentives then they will be losers. In appropriate conditions such electoral systems have a dualistic or polarising effect, encouraging a two-party or two-bloc system of competition. This effect can also be integrative, however, because, in order to win, a party or bloc must usually moderate its appeal to prove attractive to the 'middle ground', or 'the floating voter'. In consequence such electoral systems have, in some circumstances, convergent and integrative properties, leading the two principal parties or blocs to converge in their policy platforms and commitments. By contrast, the consensual form of democracy is associated with electoral rules that seek to be representative of the diversity within states, and in consequence proportional representation formulae are normally commended. Electoral mechanisms such as proportional party list systems or the single transferable vote seek to establish legislatures (or collective executives) that are proportionally representative of citizens' preferences. Below we consider the potential application of different electoral formulae in Somali conditions.

6.16. It is essential, however, to recognise three matters before proceeding. First, the toolbox of possible electoral systems is potentially infinite - so that Somalis are completely free to fashion their own distinctive systems, tailored to their own conditions. Though the advantages of custom-designed systems are obvious, they do have the drawback of not having been tested elsewhere, and therefore of being more unpredictable in their repercussions. Second, in a Somali federation (or confederation) each of the federating states or regions could be free to choose its own electoral system at state or regional level - though any common confederal or federal institutions should, logically, be constructed with uniform electoral rules. Third, the impact of electoral formulae is not precisely predictable. Though political scientists have an increasingly sophisticated grasp of the political consequences of electoral laws their knowledge, like that of weather forecasters, is circumscribed. A host of variables may impact on politicians and the party system which are not predictable from the choice of electoral formula alone. Other factors may be much more decisive, such as the drawing of districts, district-magnitudes (the number of persons elected from a given district), the choice of legal or implicit electoral thresholds, the nature of electoral cleavages, party political culture, and the resources available to political leaders .

6.17. *Majoritarian or NPR Systems.* Proportional representation (PR) systems ensure a proportional relationship between the percentage of votes cast for parties (or candidates) and the percentage of seats they win in a legislature (or collective executive). Such systems differ in the manner and degree in which they achieve proportionality, which is determined

by the existence and scale of thresholds, the magnitude of the electoral districts, and the mathematical formulae used for the allocation of seats. Non-proportional (NPR) systems, by contrast, do not ensure a proportional relationship between the votes cast for a party (or candidates) and the seats they win in an executive or legislature. They are often called majoritarian systems - even though one of them, plurality rule, is not necessarily majoritarian in its operation. Should Somalis decide at the federal or regional level to organise their elections according to majoritarian or NPR principles they could adopt one of three well known formulae for the allocation of offices in the federal executive and legislatures or in the regional executive and legislature(s): (i) plurality rule; (ii) the alternative vote; or (iii) the double-ballot.

(i)   <u>Plurality rule</u>. Under the simplest version of this system office-holders are elected in single person districts. Voters mark an X against their most preferred candidate. The candidate with the most votes, irrespective of whether he or she has a majority is elected.

(ii)   <u>The Alternative vote</u>. Majority rule, unlike plurality rule, guarantees that a candidate can only be elected if he or she wins a majority of the votes cast (i.e., 50% + 1). If no candidate wins a majority on the first count, then as happens in Australia under the alternative vote, the second (and subsequent) preferences of eliminated candidates may be counted to ensure that one candidate has a majority (the single ballot system).

(iii)   <u>Double ballot majoritarianism</u>. The alternative to the alternative (single ballot) system is the double ballot. If no candidate wins an absolute majority in the first ballot a second or run-off ballot may be held between the two highest placed candidates to ensure that the winner enjoys majority support (as happens in the French presidential election). Many variations on this system are possible.

6.18. A general case can be made for the introduction of NPR systems for Somalis but we do not find it convincing. The case would take the following form: 'There is no majority clan, or stable majority clan-alliance. Consequently, any majoritarian electoral formula would encourage parties, or alliances of parties, to broaden their appeal, to develop an inter-clan as well as an intra-clan appeal, that is if they wanted to win. The results of such an electoral strategy by the victorious party, or alliance of parties, would lessen political tensions, and help establish a workable and legitimate government at the federal level. Similar rules at the sub-federal level would have the same consequences. In the long run inter-clan alliances would give way to a non-clan modern politics'. We have three objections to this argument. First, the argument does not apply to plurality rule - which in the present fragmented conditions of Somali could return numerous candidates to executive, legislative and judicial positions with very low thresholds of support. In short, very fragmented electoral support for diverse parties could result in the dramatic over-representation of the strongest party - which we think would be a recipe for renewed conflict. Second, the 'winner takes all' implications of the majoritarian formulae (the alternative vote or the double ballot) probably would not be acceptable to prospective losers. Most Somalis we have spoken to want a system from which all can benefit. Third, it may be that the introduction

of any majoritarian or NPR system could encourage an opportunist dominant coalition of clans to emerge which would seek systematically to disadvantage its rivals.

6.19. A federalist case for the introduction of NPR systems at the regional (or state) level in Somalia can additionally be made, but we also do not find it convincing. The case here would be as follows: 'Majoritarian formulae at the regional level would ensure that some clans, or clan-alliances, could be confident of control of governmental institutions in their regions. The long-run benefit from this choice of system would therefore be stabilising because in most of the country local majorities would enjoy the benefits of self-government'. We have two observations to make about this thesis. First, the argument does not hold at the federal level at all - which suggests the need for a PR formulae at the federal level, and there may also be a case for common electoral system throughout a future Somali state. Second, whatever way regions are territorially designed there are going to be a high proportion of regions in which no clan, or alliance of clans, can be confident that they will form a stable electoral majority. Advocates of majoritarianism for such regions have to believe that the search to win votes will successfully produce moderate and accommodating political leaders and parties. It is possible that this result could materialise in the long run, but in the short run, a period in which Somalis are recovering from protracted civil war, it is not obvious that moderate and accommodating politicians and parties are going to be the most numerous.

6.20. It is worth observing that the designers of Nigeria's second federal constitution sought to create two kinds of region - one in which one ethnic group would be a dominant majority, and another in which no group could become a dominant majority. The idea was to follow a dual logic: allowing big majorities to dominate their regions (and to fragment internally in a fruitful manner) and to create fragmented regions where minorities would be forced to work together to achieve governmental power. The use of a majoritarian electoral formula along with careful engineering of regions along the lines of the Nigerian experiment is not an idea that should be dismissed out of hand. We believe that PR electoral systems, in whatever types of region are created, are more reliably likely to produce stabilising consequences. They are also more likely to dampen the consequences of any significant shift in the demographic composition of a region.

6.21. Our inclination is not to recommend NPR or majoritarian systems for any elected offices in a reconstructed and federal or confederal Somalia. We must make one partial exception (but see 6.25.). If the collective federal presidency is to be composed of one representative from each of the newly created regions then the alternative vote is the obvious mechanism to be employed. In regions where one clan, or clan-alliance, is dominant, the alternative vote could, however, be supplemented by a requirement that the winning candidate receive a minimum proportion of the first-preference vote in some proportion of all sub-regions. This additional requirement would ensure that candidates for the collective presidency would have to attract a broad territorial level of support. For example, imagine that a region of Somalia is decomposed into 19 sub-regions or districts. The electoral rule formula could be the alternative vote supplemented by the requirement that the winning candidate attract at least a fifth of the first or second preference votes in two thirds of the 19 sub-regions or districts. Another (non-territorial) way of achieving the same objective would be to register voters in a region on different, clan-based, electoral rolls with a requirement that the winning candidate have a minimum level of support across a given number of

electoral rolls. This mechanism would help protect dispersed and potentially vulnerable minorities from potentially hostile presidential candidates. Different electoral rolls would, however, create administrative difficulties, and would be controversial for those who do not wish to have a fixed clan identity.

6.22. *PR Systems.* Most proponents of majoritarian or NPR systems wish to break down societal cleavages, such as clans, and to generate political parties that are obliged to develop non-clan or at least cross-clan appeals in order to win at the polls. We believe that objective is not feasible in contemporary Somalia, and consequently consider that constitutional and electoral designers should permit parties directly (or informally) to develop around the clan system. The pure consociational principle would commend direct representation of clans through clan-parties. All that is required, however, is the legal right of clans to organise as political parties. (We do not believe that parties *must* be built on the clan system). Consociational systems, as we have seen, are usually associated with proportional representation electoral formulae. These are very numerous and we shall outline only some of the most common below.

6.23. Almost all proportional representation systems operate with multi-member constituencies, although it is possible to combine single member constituencies with proportionality - as in the German 'additional member system', although this mechanism has the unfortunate consequence that representatives to the same legislature are being elected by different methods. PR systems differ in the extent to which they achieve proportionality. No system achieves perfect proportionality (because human beings do not come in fractions). The degree of proportionality is radically affected by numerous considerations, for instance by:

(i)   whether or not legal thresholds exist; parties or candidates may, for instance, be required to achieve 5% of the vote before being assured representation - for Somalis amongst whom fragmentation is a fact of life it would appear sensible to have some threshold to constrain centrifugal politics;

(ii)   the magnitude of electoral districts - broadly speaking, the higher the number of candidates to be elected in a given district then the more proportional the result will be;

(iii)   the precise mathematical formulae used for the allocation of seats (examples of which include the d'Hondt, Hagenbach-Bischoff and Sainte-Laguë methods) vary considerably in the extent to which they help large or small parties.

The closest approximation to proportionality is achieved through having the entire country vote as a single district, without thresholds. If Somalia is to be federalised, it would seem sensible to elect representatives to the federal legislatures through regional districts. The district-magnitude would, however, vary between the house of representatives and the federal senate. For the house of representatives regional district-magnitudes would have to be determined by the size of the electorate in each region. By contrast, in the federal senate, it may make sense to have an equal district-magnitude for each region - even though the size of electorates will vary across regions.

6.24. The most basic variation within PR systems is that between:

(i)   list systems that aim to ensure the proportional representation of parties; and

(ii) the single transferable vote (STV) that aims to ensure that voters have greater choosing power than political parties, and can express their preferences across candidates.

The most extreme party list systems leave the rank-ordering of candidates for a given party entirely in the hands of a given party: so if you vote for party A you accept party A's slate of candidates in the order that it prefers. In practice, however, most PR systems give voters some choice - in Switzerland, for example, they can vote for candidates from more than one party list (*panachage*). Given the weakness of Somali parties we believe that a list system would be the best method, at present, for the effective creation of a multi-party representative democracy. A list system should be used both in the electoral determination of the two federal chambers and at the regional level. Later, when parties are more stable and established, modifications could be added to empower voters against parties. The party-list system has the decided advantage that some Somalis have administrative and practical experience with it. To reduce fragmentation we believe that a minimum threshold of five per cent and a high electoral deposit for parties should be added to the system. Moreover, one important possible modification at the federal (or regional) level might be to require parties to attract some minimum percentage level of support in a high proportion of regions (or sub-regions). This requirement would help parties to become national parties with nation-wide appeals (or regional parties with region-wide appeals), and would partly offset the consociational and federal logic of what we propose. Any such modification, however, as with all matters of electoral design, must be for the Somali peoples and their representatives to determine through negotiation.

6.25. The sharpest alternative to a list system is to use STV. This system empowers voters to rank their preferences across candidates (ordering them 1, 2, 3...) on their ballot papers - and a quota system and a transfer-procedure for preferences are used to determine the winning candidates in multi-member districts. Used in a single district STV is the same as the additional member system which we have already commended for the election of the federal collective presidency. STV proper, that is in multi-member districts, could, and in our judgement should, be used for the election of regional collective presidencies, but we would not commend its use for the election of either the federal or regional legislatures because it might fragment the party system too much at the delicate initiation of a new Somali democracy.

D. Conclusion

6.26. PR systems, with appropriate variations depending on whether collective executives or legislatures are being chosen, offer the best prospects of creating a stable Somali democracy consistent with federal and consociational principles. We have, however, presented some of the arguments for NPR systems. But whichever electoral options are chosen, either at federal or regional level, major tasks of institutional engineering (e.g., determining the electoral formula, district magnitudes), and political will (the creation of agreed and fair electoral registers) remain. These can be resolved once Somalis negotiate their future by democratic consensus.

Chapter 7. Conclusion: The Menu of Options

The purpose of this final chapter is to review in summary form the menu of options that we have presented from different points of view in earlier chapters. Choosing the appropriate option, or mixture of options, like selecting a meal from an over-elaborate menu at a restaurant, is bound to be a difficult and often confusing task, particularly as different political arrangements are likely to be preferred by different groups. As with food, constitutions are largely a matter of taste. What goes with what? In the hope that it may help our Somali readers, in the process of comparison and selection from the menu, we have listed the advantages and disadvantages of the four models of government that we have examined. In each case, there are two lists under each heading, one covering external and the other internal affairs. The chapter ends with a brief discussion of a non-governmental form of co-operation which might offer a way forward in the short run while discussions are proceeding, and possibly over the longer term as well.

Option 1   -   *Confederation.* A confederation is an association of independent sovereign units which nonetheless agree to join together for certain purposes and to create common institutions to manage their common affairs. Confederations can be narrow (i.e., confined to a few specific functions) or broad in scope, and, in principle, can be regarded as either the terminal point in a political process or as a point of departure, the end of which after a period of evolution could be either a federation or a decentralised unitary state (Options 2 and 3).

External Affairs

Advantages:
(i)   Provides a separate international personality for the constituent units, thus reducing rivalry and friction between them.
(ii)   Maximises regional autonomy and provides for local citizenship.
(iii)   Allows the constituent units to either maintain their own economic and financial arrangements or create a single market and/or currency without threatening their political sovereignty.
(iv)   Minimises the risks of strong central authority because its powers are deliberately circumscribed and confined to delimited areas of confederal competence.
(v)   Allows for further integration if desired, as occurred with the Swiss confederation, the United States and may or may not with the European Union.
(vi)   Allows for separation if the parties so wish, as in the case of the failed Senegambian Confederation.

Disadvantages:
(i)   Increases the cost of foreign representation, unless this is designated as a confederal service.
(ii)   Leads to fragmentation in international forums and hence a weak external bargaining position.

(iii)   May invite foreign interference by interests intent on playing one of the constituent units off against another.

(iv)   A confederation will have an initially weak defence in the face of outside threats.

(v)   There is a risk of further fragmentation if parts of the constituent units seek to secede.

Internal Affairs

Advantages:

(i)   Maximises local and regional autonomy.

(ii)   Satisfies local needs.

(iii)   Ensures greater popular legitimacy than in more centralised systems.

(iv)   Maximises respect for local variations in customary law and social practice.

(v)   Absence of a standing army reduces the potential for dictatorship and arbitrary government at the confederal level.

Disadvantages:

(i)   Raises the cost of internal administration and has potential for duplication.

(ii)   Lack of economic cohesion and mechanisms for income transfers from rich to poor members.

(iii)   Difficult to achieve consensus between sovereign units with competing interests.

(iv)   Constant threat of secession.

Option 2   -   *Federation*. A federation is an association of states which agree to form a union under a federal government, while retaining full control over their own internal affairs. There are several different ways in which sovereignty can be divided between the centre and the regions or provinces, but the most usual is for the federating units to agree to a triple list of powers, i.e., those to be exercised exclusively by the centre; those to be exercised exclusively by the regions or provinces; and a concurrent list of powers that can be exercised by both the centre and the regions. In this latter case, mechanisms have to be established for resolving conflicts of interest that may arise over the appropriate level for particular decisions.

External Affairs

Advantages:

(i)   Normally unified voice in foreign affairs and single personality for purposes of representation, treaty-making, etc.

(ii)   Effective defence at federal level by making questions of war and peace and the right to maintain armed forces a federal prerogative.

(iii)   Economies of scale in defence and diplomatic representation, i.e., avoids duplication.

(iv)   Unified external economic policy.

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(v)   If federation represents a higher stage of integration, i.e., over a previously existing confederation, strengthens international bargaining position.

(vi)   Unified citizenship.

Disadvantages:

(i)   Loss of those advantages specifically attached to confederations, e.g., international personality and separate representation.

(ii)   Risk of centre-regional conflicts over foreign policy and foreign economic affairs.

(iii)   A powerful federal government is prone to monopolise foreign aid to reinforce its own power at the expense of the regions.

(iv)   If federation represents a lower stage of integration, i.e., from a previously existing unitary state, weakens international bargaining position.

<u>Internal Affairs</u>

Advantages:

(i)   Unity combined with diversity, i.e., if federal units represent distinct ethnic, linguistic, religious, or clan groups, they enjoy internal self-government and common citizenship.

(ii)   Economies of scale in the provision of nation-wide services.

(iii)   Allows for inter-regional income redistribution.

(iv)   Mechanisms for dealing with 'spill-overs', e.g., concurrent powers create ability to regulate matters such as pollution whose effects may be 'exported' from the region in which they arise.

(v)   Strict adherence to the constitution entrenches the rule of law and hence respect for legal procedures.

Disadvantages:

(i)   If federal units are not ethnic, linguistic, religious, or clan groups, disadvantaged minorities are created at both federal and local levels, thus reducing national cohesion (see Option 4 below).

(ii)   Strict adherence to the constitution leads to rigidity and excessive legalism.

(iii)   Perpetual disputes over income transfers from rich to poor regions.

(iv)   Prone to secession and/or inter-regional conflict, repeatedly leading to military intervention, as in Nigeria.

(v)   Centre prone to growth at the expense of the regions with constant temptation to arbitrary power.

(vi)   Potential for conflicts between centre and regions over the allocation of powers.

Option 3   -   *Decentralised Unitary State.*   A decentralised unitary state, as its name implies, is one in which sovereign power and authority lies with the central government; but within which, for reasons of administrative convenience, and to underpin

its legitimacy by widespread popular support, the government devolves many of the functions of government, to regional and/or local authorities.

<u>External Affairs</u>

Advantages: With a few modifications, several of these are the same as under Option 2, i.e.,

(i) Single international personality for purposes of representation, treaty-making, etc.
(ii) Unified citizenship.
(iii) Unified external economic policy.
(iv) Strong defence as the result of the central government's monopoly over the armed forces.
(v) Economies of scale in defence and diplomatic representation.

There are also some additional advantages, viz.

(vi) Inability of external powers and/or private interests to interfere by playing off local against central interests or vice versa.
(vii) Potential for generating national loyalty.
(viii) Potential for developing a professional sense of loyalty amongst the administrative and diplomatic elite.

Disadvantages:

(i) Loss of all the specific external advantages attached to confederation and federation, Options 1 and 2.
(ii) Creates even stronger and potentially more rapacious central government than under a federation.
(iii) Potential suppression of internal debate about external affiliations, e.g., the way in which Scottish enthusiasm for the EU is arguably suppressed by the major British political parties, or Kashmiri sentiment in favour of either outright independence or union with Pakistan has been consistently denied by India.

<u>Internal Affairs</u>

Advantages:

(i) Economies of scale for administrative and state-wide services.
(ii) Unified administrative and judicial services and correspondingly cohesive policies.
(iii) Fiscal equalisation at the national level.
(iv) Greater re-distributive capacity than under Options 1 and 2.
(v) Ability to harmonise laws.
(vi) Potential for nation-wide mobilisation.

Disadvantages:

(i) Decentralisation is at the discretion of the central government rather than being a recognition of the right of local communities to manage their own affairs.
(ii) Absence of diversity and control over experimentation.

(iii) Devolution of powers needs constant re-negotiation in the light of economic and technological change.

(iv) Potential for the despotic exercise of power, both with regard to the suspension of the rule of law and as a result of the temptation for the centre to engage in fiscal graft and corruption.

(v) Potential for the suppression of minority rights.

Option 4 - *Consociational Systems.* Consociational government involves non-territorial power-sharing amongst all important communities within a state (e.g., component ethnic groups, clans, etc.). Unlike the other forms of decentralised government, consociational principles do not require the state to be divided territorially into separate local units. For example, under a consociational system members of clan A, even if they lived outside their home region, would be entitled to receive broadcasts from their home region. Consociational governments normally have four key features: executive power sharing; the principle of proportional representation in all public institutions and allocations; community self-government; and veto powers for minorities. Consociational practices can be applied within confederal, federal or decentralised unitary states, and are continually invented in multi-ethnic or multi-clan states.

External Affairs

Advantages:

(i) Unity and diversity: a unified external voice may be generated through power-sharing while ensuring that diverse voices have contributed to policy-making; for this reason consociational practices work best in small states with light and minimal external relations.

(ii) Proportional external representation of constituent communities produces a legitimate distribution of offices.

(iii) The advantages of a confederation (see Option 1) can be combined with consociational practices.

(iv) The advantages of a federation (see Option 2) can be combined with consociational practices.

(v) The advantages of a decentralised unitary state (see Option 3) can be combined with consociational practices.

Disadvantages:

(i) External powers can exploit internal divisions in the power-sharing coalition - e.g., Israeli and Syrian interventions destabilised consociational arrangements in the Lebanon.

(ii) Proportionality in appointment to jobs must be ranked above the principle of merit, with possible implications for administrative efficiency.

(iii) Consensual decision-making makes participation in external relations cumbersome and prolongs external negotiations.

(iv) Some confederal disadvantages (see Option 1) can be combined with consociational practices

(v)   Some federal disadvantages (see Option 2) can be combined with consociational practices

(vi)   Some unitary state disadvantages (see Option 3) can be combined with consociational practices

Internal Affairs

Advantages:

(i)   Permits unity and diversity. Each group may enjoy maximum feasible cultural self-government, while sharing power with other groups, and it may enjoy these privileges wherever its members reside. For example, each clan may have its own broadcasting channel(s), and, as of right, these wavebands or channels would be broadcast in all parts of a future Somali state.

(ii)   Consensual decision-making is inclusive. It thereby avoids the despotic potential in democracies where 'majorities' decide everything, and thereby protects minorities.

(iii)   Successful track-record in some states which have experienced civil wars, e.g., South Africa.

(iv)   They can be used to stabilise divided societies as long as they are necessary, and later dispensed with, e.g., the Netherlands.

(v)   Some of the advantages of a confederation can be combined with consociational principles (see Option 1).

(vi)   Some of the advantages of a federation can be combined with consociational principles (see Option 2).

(vii)   Some of the advantages of a unitary state can be combined with consociational principles (see Option 3).

Disadvantages:

(i)   Group representational principles are disliked by liberal individualists who believe consociational arrangements entrench communal divisions.

(ii)   The allocation of public resources and expenditure may take place according to group size, rather than need or merit, with possible negative implications for administrative efficiency.

(iii)   Decision-making may be protracted at the expense of efficiency.

(iv)   Some of the disadvantages of a confederation can be combined with consociational principles (see Option 1).

(v)   Some of the disadvantages of a federation can be combined with consociational principles (see Option 2).

(vi)   Some of the disadvantages of a unitary state can be combined with consociational principles (see Option 3).

Functional Co-operation

7.1.   There is one final possibility that is worth considering. Let us assume that, despite their advantages, it proves impossible to secure agreement on any of the options for decentralised government considered in this report, at least in the immediate future and perhaps over the longer term as well. Does this mean that all wider Somali co-operation must be ruled out? Not necessarily. Functionalists have long argued that what is needed to solve concrete problems is not a new political structure, which necessarily creates conflicts of interest about the constituent units and the division of powers, but co-operative arrangements that can work without reference to any political authority.

7.2.   It is said that David Mitrany, who pioneered this approach, had fought as a young man in one of the Balkan wars, which at the beginning of the 20th century as at its end, threatened to destroy the social fabric of Balkan society as well as its political structures. He noted wryly that even the methods employed by the sovereign state were inefficient: more people died from disease than were killed in the fighting. This observation, that the state was part of the problem rather than the solution, may strike many Somalis as all too familiar. Mitrany's solution, which admittedly has been largely ignored in most parts of the world, might nonetheless provide Somalis with a way forward in their current predicament. 'The functional approach', he wrote, 'seeks, by linking authority to a specific activity, to break away from the traditional link between authority and a definite territory [perpetrated by either an association or a federation of states]. This approach resolves the dilemma of creating either too loose or too narrow an international organisation by building up authorities which would be comprehensive and solid, in selected fields of common life.' (*A Working Peace System*, Chicago 1966, p.27).

7.3.   Mitrany's idea of functional co-operation was not purely theoretical. He extrapolated from the empirical record: from the last quarter of the 19th century onwards a growing number of international functional authorities had been created to manage common interests such as posts and telegraphs or navigation on inland waterways, i.e., in areas where co-operation was imperative if social and economic needs were to be met, and where consequently transferring authority did not threaten the political identity of even rival states.

7.4.   Are there similarly functional services in which most Somalis have an immediate interest, and on which, therefore, they might be prepared to co-operate, regardless of their regional or clan allegiances or rivalries? A number of possible candidates suggest themselves, e.g., veterinary or health services; fishery protection and licensing; educational services such as curriculum development, the provision of textbooks, teacher training, and the negotiation of scholarships for Somalis in foreign universities; posts and telegraphs; weights and measures; and currency. The need for arrangements to cover some of these matters, and ways of dealing with them, have already been discussed in this report in relation to the four options we have considered. There may well be other issues where the need for a regulatory regime will be more apparent to Somalis than to us. Here the point to note is that, even if attempts to construct a confederation, federation, or decentralised unitary state break down, or proceed at a very slow rate, agencies could still be created to provide specific services and meet discrete rather than wider political needs. Indeed there is a traditional Somali precedent in the pervasive concept of contractual agreement (*heer*).

7.5.   There are two ways in which such functional agencies could be set up, although they are not mutually exclusive. The first and theoretically most desirable would be by agreement amongst those Somalis from different clans, regions and/or 'states' who share a particular functional interest. For example, those occupying coastal areas might take the initiative in creating an agency for fishery protection, while recently established local and regional authorities who are already encountering communications problems with the outside world (letters from the 'Republic of Somaliland' have to be routed through Djibouti) might initiate a posts and telecommunications agency.

7.6.   Apart from their main purpose, such agencies would have two additional advantages. They could provide employment for the many professional Somalis, some of whom are unemployed within the country, and many more of whom have been forced to move abroad since the collapse of the state. Second, once in existence, functional agencies would be well-placed to attract foreign aid funds and technical assistance, much of which is at present blocked because of the lack of Somali structures to which it can be channelled. The creation of these agencies would also provide a convincing demonstration of the will to co-operate.

7.7.   If the problem of representative staffing made even this level of co-operation impractical, it might be possible to envision a second arrangement: to secure agreement to contract out the provision of these and other functional services. In order for the new agencies to attract aid funds, they would probably need to be answerable to an international organisation. The United Nations is the obvious contract holder, although if, as a result of recent history, this proved controversial, the League of Arab States or the Organisation of African Unity might be acceptable alternatives. Such a regional approach would also be consistent with the policy outlined in the UN Secretary General's *Agenda for Peace*, published in 1992, and the Supplementary Report to the Security Council published three years later. Whatever organisation was the formal contract holder, it could if necessary sub-contract the actual running of an agency, e.g., to the European Union, the World Bank, IMF, or even a consortium of donors. Similarly, whoever actually provided the services could be required as a condition of the contract to employ and train Somalis. Under this option, however, it might be necessary to keep the top management positions in non-Somali hands, at least in the short run, while public confidence was being established. If this was not done there would be a danger of employment within the new organisations being viewed as a prize in inter- and intra-clan competition, thus undermining the strategic rationale for functional agencies.

Appendices

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The Federal Republic of Ethiopia (draft)
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The Federation of Malaysia
The Independent State of Papua New Guinea
Organic Law on Provincial Government Papua New Guinea 1976
The Senegambia Confederation
The Somali Republic (1960)
The Kingdom of Spain
The Swiss Confederation
The United Arab Emirates
The United States of America

Human Rights Treaties

Human Rights Treaties to which the former Somali Republic was a Party

1949   Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
1949   Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea
1949   Geneva Convention III relative to the Treatment of Prisoners of War
1949   Geneva Convention IV relative to the Protection of Civilian Persons in Time of War
1951   Convention relating to the Status of Refugees
1965   International Convention on the Elimination of all Forms of Discrimination
1966   International Covenant on Economic, Social and Cultural Rights
1966   Protocol relating to the Status of Refugees
1966   International Covenant on Civil and Political Rights
1966   Optional Protocol to the International Covenant on Civil and Political Rights
1973   International Convention on the Suppression and Punishment of the Crime of Apartheid
1981   African Charter on Human and Peoples' Rights
1984   Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment