THE FUTURE OF SOMALIA'S LEGAL SYSTEM AND ITS CONTRIBUTION TO PEACE AND DEVELOPMENT

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Abstract

This article argues that the distressing situation in Somalia offers an opportunity to introduce new legal institutions with less colonial path-dependence and greater sensitivity to the security and development needs of Somalians. Peace and stability could be enhanced by allowing customary law and Islamic courts to operate within the framework of the Transitional Federal Charter (TFC). A civil law system with the judicial discretion and selection of a common law system would help to enhance economic development by attracting foreign direct investment. A single court system which unifies ordinary and Sharia courts would create a more enabling legal environment for law and order and economic development than the dual court system. Moreover, as international human rights law is mainly in the form of conventions and treaties in the style of civil law, promotion and protection of human rights may be better served predominantly through a civil law system in which a judge applies particular provisions of specific conventions and treaties. Such a system would also help to harmonise a legal system which is cobbled together from five different sources of law.

Introduction

Paolo Contini, who helped to draft the post-colonial Somalian constitution as one of a team of United Nations legal experts, remarked that

> Somalia presents the legal draftsman with an unusual laboratory of applied comparative law … Since all legislations and institutions had to be integrated, the programme had to be conceived almost as if a new state were being built *ab initio* (Contini 1964:1, 6).

In addition to the two major legal systems – common law and civil law – customary clan and Islamic laws still govern several aspects of life in Somalia, such as social and political relations as well as economic transactions. Its people have lived under socialist laws for almost 20 years. In the 1960s, four significant codes were promulgated, [1] and laws designed to effect the integration of the judicial institutions and other legal bodies, including commercial and financial systems, were passed. Legislation of this sort determined revenue and taxes and, in principle, extended from Southern Somalia to the self-declared independent state of Somaliland and autonomous Puntland. However, in terms of legal enforcement and political institutions, the present situation in Somalia is much worse than that which Paolo Contini described in 1964.

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Unlike in the 1960s, Somalia today has no strong central authority except that derived from clan law and religious courts; central government institutions such as parliament, courts, the army and police have been destroyed. The Transitional Federal Government (TFG) of Somalia was established in November 2004. It is composed of transitional federal institutions (TFIs) including the Transitional Federal Charter, Transitional Federal Parliament (TFP), which is effectively a house of clan representatives, and the President and Prime Minister. Prime Minister Gedi faced serious legitimacy challenges from within and outside his government and has been replaced by his deputy, Salim Aliyow Ibrow. By August 2006, more than 42 of the 102 Cabinet members had resigned. Now some participants in the reconciliation process have called for his resignation or a limit on his powers. Since early 2007, the TFIs, with the help of the Ethiopian army and African Union peacekeeping troops, have gone on the offensive and are engaged in a variety of capacity and legitimacy-building processes. However, local governance structures and judicial and enforcement bodies have long been controlled by warlords and cannot ensure their own protection. Local authorities of northwest and southern Somalia exercise much weaker control than their counterparts in the northeast, i.e. Somaliland and Puntland. For example, there are more than seven ordinary courts in Puntland with more than 50 serving judges of whom more than half have had formal training. Moreover, Puntland has 'judges for peace' who adjudicate smaller disputes immediately. In Somaliland, there are 18 courts with more than 35 serving judges. The Somaliland Lawyers Association claims a membership of 43 lawyers of whom two are women. The Somalia Lawyers Association has about 35 members. However, their sphere of influence is limited to their members and services to clients.

Provision of basic services such as water and electricity is practically non-existent in most of Somalia's rural areas. In urban areas, such services are provided by the private sector, although poor people are unable to afford them (Nenova & Harford 2004:3-4). Indeed, in Berbera in Somaliland and several parts of Puntland, life is far better than in Siad Barre's time (Little 2003:83-87). Nonetheless, anarchy has allowed the proliferation and spread of both small arms and radical Islamic teachings of a violent Salafist version (Maru 2005).

In contrast with the public sector, the Somalian private sector experience shows that even in situations where formal government institutions are weak, traditional and religious institutions fill the gap in building trust for transactions. Sectors such as roads, water, education, and electricity which require formal, predictable governmental protection and support are poorly served, whereas sectors with fewer transactional constraints, such as retail, telecommunications and the media, which do not require much institutional security and infrastructure, have thrived. Telecommunication is a case in point. In 2002 there were 15 telephones per thousand people, which is better by five telephones than in neighbouring countries (Nenova & Harford 2004:2). Moreover, to overcome the lack of effective legal enforcement, institutions of other countries are used to serve as arbiters or guarantors. A good example is the Saudi banks whose cheques are issued in Somalia and cashed in any bank for transactions such as religious and commercial travel. In terms of laws applicable to contracts, companies such DHL, British Airways, Coca Cola and Dole use the contract law of their country of registration (MacCallum 2007:1).[2] Registration of companies is also made outside Somalia. Somali telecommunication services use the offices of the United Nations and International Telecommunication Union in Dubai. Similarly, airlines flying to Somalia use insurance companies of Eastern European countries such as Serbia (Nenova & Harford 2004: 3). Clan authorities, Sharia courts and local networks serve as guarantors for

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contracts and financial transactions for smaller business. Such coping mechanisms adopted by the private sector to fill the legal vacuum are instructive and could be developed through bilateral and multilateral agreements with countries and companies that have been working with Somalia's private sector.

In short, as a country without central government authority and with a weak public sector for almost two decades, Somalia, along with Sudan and Iraq, is most in need of peacebuilding and reconstruction (Foreign Policy 2007). The process of peacebuilding and development demands policies and systems to restore law and order, stability and effective socio-economic institutions. Establishing an efficient and effective legal system is one vital measure that could significantly contribute to peacebuilding and development in Somalia.

Trying to select, adopt and introduce a legal system and laws after 16 years of statelessness and violent conflict presents an even more radical experiment than in post-colonial 1960s Somalia. The TFG faces the following four main challenges: ending the war, bringing peace and sustainable stability, maintaining the unity of the country, and fostering economic development. The question of which constitutional approach will best facilitate these broader goals towards ensuring Somalia's stability and unity is a critical one to answer. More specifically, which of the legal systems and assortment of laws would enable the TFG to bring peace and economic development to Somalia? Could Somalia have an efficient legal system without legitimising the questionable aspects of the existing *de facto* Sharia courts, customary clan and other alternative dispute resolution mechanisms and private sector transaction security systems? How should its colonial legal systems, traditional and socialist laws and Sharia courts fit into these efforts for peace and economic development?

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This article attempts to answer these difficult questions. It argues that taking the history of Somalia into account and in line with the TFC, a civil law system with a single, unified court structure is likely to be the best legal framework. It argues that until such an effective and efficient legal framework is established, the customary institutions and Islamic courts can be a basis for rebuilding the judiciary and administration of justice. The outcome is an obvious benefit for peace: an environment for re-establishing law and order and the rule of law. Such a legal framework would have to draw on the meagre human and material resources that exist in traditional law, Sharia courts and alternative dispute resolution mechanisms until a well trained body of legal practitioners and administrators is developed. Such an approach would be a hybrid of modern and traditional legal systems that would facilitate economic development by creating predictability in business and an enabling environment for trust and speedy resolution of disputes in transactions, thereby attracting foreign direct investment.

A Brief History of Somalia and Its Legal System

Somalia is one of the rare Africa countries with an overwhelmingly dominant ethno-cultural community made up of several clans. Its population of 10.7 million[3] has one religion, Islam, and one language, Somali. It became independent in 1960 after the integration of its northern part – Somaliland, which was a British colony – and Southern Somalia, which was under Italian rule. The government structure after integration was unitary at the top but highly decentralised in the form of a loose confederation at the local level (Contini 1964:1). In 1969, General Siad Barre assumed power by overthrowing the first democratically elected government, and declared 'scientific socialism' to be the official ideology. Barre's invasion the

Ogaden region of Ethiopia led to a war in 1978 which left the northern part of Somalia with an estimated 1.3 million internally displaced persons. With the global demise of socialism and the end of the Cold War in the late 1980s, Siad Barre's socialist regime lost power to rebel forces mainly based in refugee camps in northern Somalia. Central authority collapsed in 1991, a situation that has continued until recently. In 2004, the TFG was established in Kenya under the auspices of the African Union and the United Nations. With the initial backing of Ethiopian troops and the African Union Mission in Somalia (AUMSOL), forces of the TFG defeated the Islamic Courts at the end of 2006. Currently, the TFG controls much of the country with the exception of Somaliland; following the 1991 collapse of central authority, Somaliland declared itself an independent republic and is much more stable and peaceful than the rest of the country. The future of Somaliland is still undecided as is that of Puntland, another region that has declared autonomy.

Traditionally, Somalis have a clan-based legal system called *xeer*, which is a mix of criminal and civil customary law. *Xeer* assumes that for every crime committed there is clan and family victim, and hence compensation is legally required. Liability in criminal and civil acts is not limited only to individuals, but also extends to members of the clan of the offender (Muhammad 1964). For example, in rural Somalia customary law sanctions the payment of blood money, or *diya*, by the clan of a murderer in cattle or camels, but sometimes in cash to the victim's clan (Metz 1992:217). In pre-colonial times, Sharia courts functioned harmoniously with customary clan laws. Their focus was on family, property and succession matters and anti-social behaviour such as robbery. Of serious crimes, human rights violations and crimes against the state, only homicide is known under *xeer*.

Under colonial rule, Somaliland followed British common law, while the Italian civil legal system in Southern Somalia was superimposed over the traditional customary laws (Metz 1992:217*).* Both the British and Italian colonial administrations established Sharia courts and applied customary laws. However, they had quite different approaches in accommodating the Sharia and customary laws within their colonies. While the British colonial administration limited the jurisdiction of Sharia courts strictly to family and inheritance cases, however, the Italian colonial legal system allowed for the application of Sharia to minor criminal and civil cases (Muhammad 1964). As Metz observes,'*Qadis* (Muslim judges) in British Somaliland also adjudicated in cases such as land tenure disputes and *diya*' based on customary law (1992:160). Moreover, within the Italian colony the plaintiff was given a choice as to whether to present the case to the Sharia court or to the secular courts.

From colonial rule to socialism

At the time of independence, Somalia had four legal systems co-existing across the country: common law in British Somaliland; civil law in Southern Somalia; Sharia law; and customary clan law. The unification of Somalia posed a challenge for the kind of legal system the new republic would adopt. Integrating Somaliland with Southern Somalia required integration of several of their laws and institutions at all levels. At the time of unification and under the British colonial administration, Somaliland had its own court system, with the High Court in Hargeisa at its apex. The court was organised under the 1962 Law for the Organisation of the Judiciary Decree [4] (Muhammad 1964). The first constitution of Somalia [5] was drafted by Italian legal experts and was initially meant to serve only Southern Somalia, but its application was extended throughout the country (Contini 1964:7).

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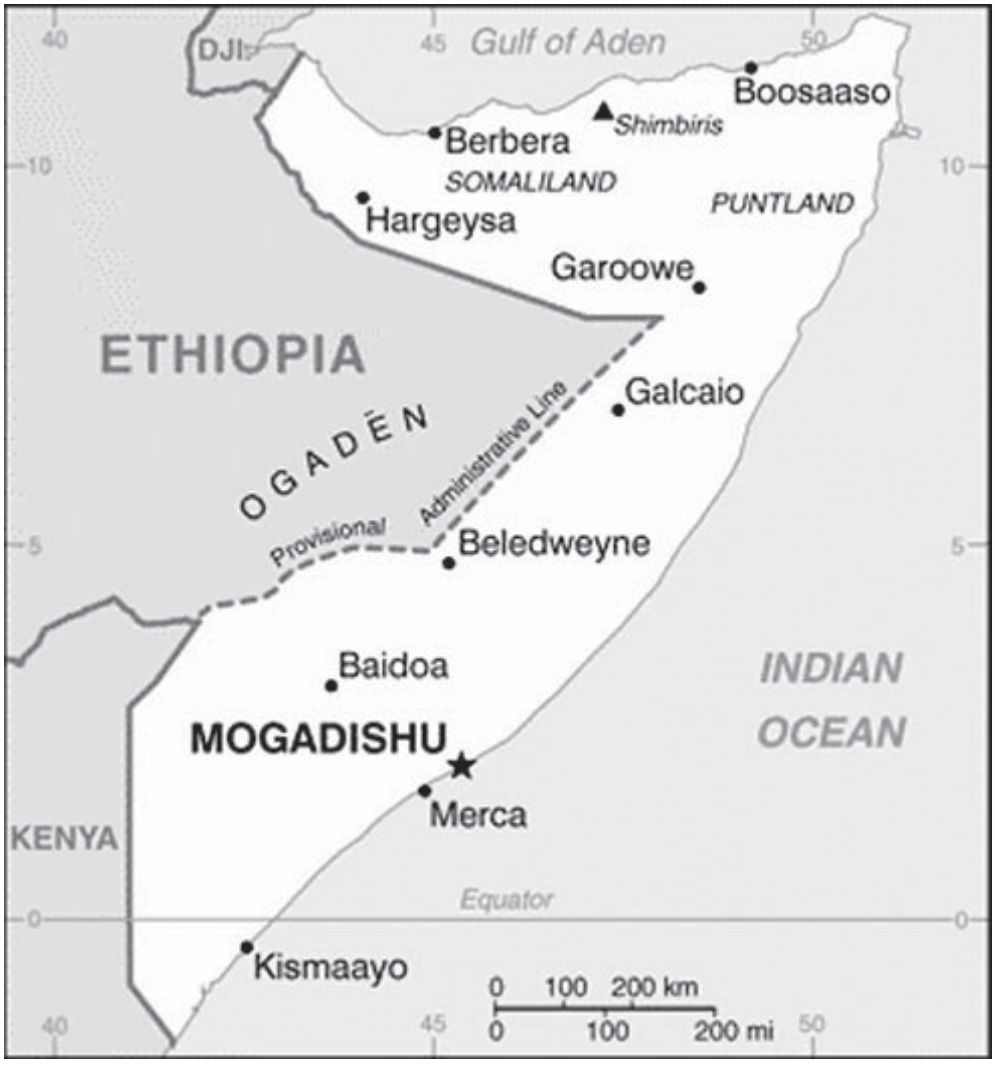
Somalia and Its Self-declared Independent Republic of Somaliland and Autonomous Puntland



Source: *CIA World Fact Book* 2007

The new constitution retained most of the colonial institutions and cultural laws even though the organisation of courts, content of codes, enforcement agencies and the army reflected their different colonial institutional make-up and experiences (Cotran 1963:1017). In the 1960s, the Consultative Commission for Integration, [6] composed of lawyers trained in Italian and British legal systems, experts in Sharia law and persons knowledgeable in clan customary laws, was established to spearhead the integration of the two parts of Somalia. The commission decided to legislate for the immediate institutional unification of the judiciary under a court of the Somali Republic at the higher levels while allowing for differences at the lower levels with regard to the status of Sharia courts and clan laws. Hence, institutionally, the commission created a judiciary unified at the top but highly diversified at the lower level.

At the lower institutional level there was a dual court system of Sharia courts and ordinary courts. *Qadis* had substantively different jurisdictions and structures: in Somaliland, they adjudicated personal cases (marriage, divorce, succession and guardianship) and were considered the lower part of a unified judiciary; in Southern Somalia, Sharia courts administered all civil cases (personal cases and torts and contractual and land disputes) between Muslim parties and were treated differently to the ordinary judicial system (Cotran 1963:1018). In the interests of gradually harmonising the substantive legal systems of Somaliland and Southern Somalia, however, the Commission for Integration recommended the adoption of a system of civil law. Several codes were promulgated, notably the Somali Penal Code and Criminal Procedure Code.[7] Judges were granted broad discretionary powers as common law application of precedent was legalised. This allows judges to employ creative interpretation of the law and precedents to adjudicate issues that are not directly covered by the codes. Sharia and customary law *(xeer)* took supplementary roles to be applied in cases that were not adequately addressed by the codes (Muhammad 1964). In 1974, a socialist legal system was introduced along with the military regime of Siad Barre. The socialist system attempted, albeit unsuccessfully, to abolish communal systems and clan life by dismantling the *diya* culture and the traditional and Sharia laws.

Of all the TFIs, the Federal Constitutional Commission [8] is perhaps the most appropriate institution to carry out similar functions as the 1960s Consultative Commission for Integration. The TFC does not stipulate the powers and functions of the Constitutional Commission, but its duties could cover the integration and harmonisation of government institutions, including the judiciary, police, army and codification of law. Clearly the Constitutional Commission would have to work with the Judicial Service Council, which is one of the TFIs mandated to issue the general policy and administration of the operations of the courts of Somalia under Article 63 of the TFC.

The advent of the Islamic courts

Schauer, in his article *On the Migration of Constitutional Ideas* (2005:919), said: 'Power abhors a vacuum, and there is no shortage of individuals and groups willing to fill it.' Indeed, it did not take long for religious groups and clan chiefs to take charge of the legal and political system, albeit unsuccessfully. Following the collapse of the state and in the midst of a political power vacuum, Islamic groups tried to convince Somalis that Islam was the only solution for the country's political, social and economic failures. Sharia courts have served Somali communities for a long time and were therefore adopted as a drastic solution to the country's problems of law and order (Maru 2005:12). Indeed, Sharia courts took the initiative to ensure law and order, organising their own militia to enforce decisions and carry out executions. In many parts of Somalia, the Sharia courts filled the power vacuum that was created by the collapse of central authority in 1991.

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In June 2006, the political landscape in Somalia changed when the Supreme Council of Islamic Courts (SCIC), or 'Midowga Maxkamadaha Islaamiga', drove out the secular warlords and took control of the capital, Mogadishu. SCIC was the new name for the Union of Islamic Courts which was first established under a core group of the Al Itihhad Al Islamyya leaders such as Sheikh Hassen Aweys. With the rise of the SCIC, Sharia courts began to exercise broader judicial and enforcement powers over several matters related to property rights, family affairs and commercial disputes. Indeed, for a short time the SCIC exercised the judicial, executive and sometimes legislative powers of a state. For almost a

year, it controlled the whole of Mogadishu, Belaide, Jowhar, Burakabana and Mahday and many other small towns. The SCIC publicly announced its intention to control the whole of Somalia and establish a unitary government, and its militiamen attempted, albeit in vain, to advance to Baidoa, the temporary seat of the TFG. The move was considered to be potentially destabilising for the relatively peaceful and stable breakaway state of Somaliland and the autonomous region of Puntland.

The Supreme Council brought a measure of stability and law and order, and it provided services such as education, health and security. For this reason, and because of its swift success in gaining control of many areas of southern Somalia, it was welcomed by a population that had been victimised through a lack of law and order and which had lived for more than 15 years under anarchy and the rule of warlords (Maru 2005). Business people also supported the SCIC in the hope of avoiding taxes, regaining political power and imposing strict religious laws, among other reasons. With the support of powerful Somalis and foreigners – notably Islamic aid and political organisations and the government of Eritrea – the SCIC gained a broad but not necessarily deep popular base (Maru 2005). Some of the Sharia courts were radical and imposed draconian orders such as the enforced wearing of *hijab*, or headscarf, for women, and closed movie houses, press outlets and radio stations. Even worse, a few of the courts approved *hadd* offences that are punishable by death by stoning, amputation or flogging and which are applied only in Iran and Nigeria in the face of vehement domestic and international opposition (The Eye 2006:4-5). However, the Sharia courts were disbanded within 10 days of the 2007 Ethiopian intervention in Somalia. Most Sharia courts remain functional today, albeit with a limited mandate and dwindling influence in the realm of enforcement.

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The Future of Legal Institutions in Somalia

In the 1960s, Somalis understood that the integration of the legal systems and institutions in the two colonial administrations of Somalia was practically the same as building a new state. Today a similar challenge exists: Somalis must decide about the place of clan and customary law, the role of Islamic law and Sharia courts, and the merits and demerits of adopting a system of legal origin (the civil or common law system). At the centre of this choice should be how Somalia's legal system can serve the building of sustainable peace while fostering economic development and protecting and promoting human rights.

Differences between common and civil law systems

The difference between common and civil law systems should not be over-emphasised. The distinction is not about the substantive content of the law: differences between civil and common law have become increasingly blurred when it comes to the content of law. As Dam observes, the legal origin theory ignores two basic points. First, in both the common and civil legal systems, most laws today, especially those involving the economy and investment, are statutory laws following the style of civil law. Second, civil law systems have extensive bodies of case law (Dam 2006:12). The two systems have elements in common and they inform each other. The structural differences are few. A civil law system is one in which laws are in written codes and statutes made by a legislature, whereas in a common law system, judges make the law on the basis of precedents. Civil law offers greater clarity of rules and provisions, which helps to build transparency and hold judges and other judicial officers accountable in applying them. Codes and statutes also serve as

common references for the governed and the government; they can easily facilitate transactions without waiting for judges to adjudicate in disputes. The major weakness of the civil law system is its rigidity, while common law offers much broader discretionary power to judges. Such judicial discretion makes legal codes less subject to change. Researchers assert that common law is good for accountability, government effectiveness and rule of law, whereas civil law contributes towards political stability and control of corruption (Dam 2006:11-13).

Common law demands zealous coordination and organisational capacity on the part of the judiciary. It would require highly educated professionals and judges well versed in precedents and consolidation of case laws. This is difficult in Somalia which has a shortage of lawyers and researchers able to follow and research decided cases. A civil law system is more cost-effective and easier to organise. This is not to say that codification of laws is an easy task. It takes professionals skilled in drafting laws and knowledgeable about civil and common legal systems and Sharia and customary laws. However, careful revision and amendments of the codes of the 1960s could suffice in areas of criminal and civil law. In other areas, such as commerce, investments, financial securities and patents, new laws would be necessary.

Judicial selection is another area where difficulties arise. The quality and independence of the judiciary – the protection of judges and their decisions from unwarranted interference by any organ, be it secular or religious – are determined by judicial selection. For example, Miller and Perito argue that Afghanistan's judicial system is weak because the independence of judicial bodies and the quality of judges are compromised by the traditional appointment process involving the practice of *shura*, a council of religious leaders (Miller & Perito 2004).

Clan customary laws

Adherence to Sharia law and loyalty to one's clan are highly valued in Somalia. Both govern the private and collective life of clan members in particular and Somalians in general, and these values would not be easily changed by bringing in new laws. Clan laws mainly focus on local customs of land tenure and use of water. Cattle and grazing land are owned by the clan, and communal access to grazing land and water is the rule. In 1960s, attempts were made to codify customary clan laws. Codification of customary law is not only difficult, but might also be harmful as it tends to eliminate flexibility. In the 1970s, Siad Barre's regime attempted to reform customary and Sharia laws with the primary aim of suppressing provisions such as diya (paying compensation for homicide), but all attempts at reform failed. *Xeer* is a genuinely indigenous traditional law devoid of terms borrowed from other languages. Compared to the other laws of Somalia, *xeer* is the law most uniformly applied across the clans. According to MacCallum, x*eer* accounts for why the local justice delivery system remained intact in the absence of a central state (MacCallum 2007:3). There is widespread mistrust of the regular judicial system due to a lack of judicial independence, interference, corruption and abuse of power by judges for political influence. Radical reforms of customary laws and institutions would fail to bring about satisfactory justice. Moreover, such reforms could lead to unintended harmful consequences such as damaging the fabric of traditional society and leading to unnecessary litigation and violence (Sage 2005). *Xeer* and the Sharia courts

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need to be reformed gradually to bring them in line with TFC and international human rights laws. An example of the incompatibility of Sharia legal practices with international human rights are provisions of family law that allow polygamy and the exclusive right of divorce for husbands (Rehman 2007). Other examples are collective criminal responsibility under *xeer* and the cruelty of some of the punishments prescribed by Sharia courts.

Without tangible incentives such as self-rule and education, it is nearly impossible to enforce reformed laws, guarantee the effectiveness of institutions or ensure compliance. Moreover, implementation and enforcement of reforms require significant capacity and resources, particularly strong judicial and enforcement organs, all of which Somalia lacks. Foreign aid could be used to encourage legal reforms and to ensure that such reforms embrace the goals of peacebuilding processes and the protection of human rights. Hence customary laws and clan institutions will continue to play a pivotal role in Somalia for some years to come. It is simply prudent to use customary laws and Sharia courts until a strong state is established and the TFG has overcome the limitations of its capacity to establish an effective unified court system throughout the country.

Sharia laws and Islamic courts

With the rise of Islamic courts in a vacuum of statelessness, two divergent views have emerged on the application of Sharia law and its limitations. One holds that Sharia should be the law of the land without restriction; the other that Sharia should be limited to matters of personal affairs and to those willing to use it. The latter tries not only to limit material jurisdiction but also leaves the choice of law to individual citizens. The Consultative Commission for Integration discussed similar approaches in the 1960s. Article 9 of the Legislative Decree No. 3 of 12 June 1962 did allow Sharia and customary clan laws to be applied by ordinary courts of law (Muhammad 1964). Article 8 of the FTC also makes provision for Sharia law to be the basis for the legal system of Somalia. In early 2007, the first judges were sworn in.

The Sharia courts are still *de facto* judicial organs. Building peace and a working legal system in Somalia will necessitate organisational reforms to and capacity building of the Sharia courts, including those which have been active members of the Union of Islamic Courts. During the TNG, more than 70 Sharia court judges were integrated into the formal court system of Mogadishu and other districts around the capital. Most of these judges left the formal courts and helped to establish the SCIC because they were required by the TNG to take qualifying examinations. The move was ill advised as it excluded Sharia court judges to the detriment of peace and security. Hassen Aweys, the chairman of the SCIC, was one of those who refused to take the examinations. In retrospect, it would have been better to offer the judges on-the-job training as part of capacity building (Sage 2005:26). With intensive capacity building in office infrastructure and training and discussions over the TFC, Sharia courts could serve a basis to rebuild the judicial system rapidly. Sharia courts could help the TFG to provide a much-needed judicial service until ordinary courts are sufficiently established. However, Sharia law should be applicable only when it is compatible with constitutional or international human rights conventions. Some Sharia courts did attempt to function as an adjudicatory and executive body. For example, in 2004 a Sharia court in Mogadishu attempted, albeit unsuccessfully, to levy and collect tax from the ports. Such a failure to separate judicial and executive powers leads to an abuse of power; it also illustrates the

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need for checks and balances. Any form of tyranny should be legally prohibited; the Sharia courts, and for that matter any court, should have only an adjudicatory role, not powers of enforcement. Moreover the choice of which law to apply should be up to the parties involved in the disputes.

Reconciling Somalia's Legal Systems in Pursuit of Peace and Development

There are two ways of reorganising the judiciary in Somalia. As pointed out above, the Federal Constitutional Commission and the Judicial Service Council should be mandated to carry out the re-establishment and reform of the judiciary. The harmonisation and integration of the legal system should proceed in consultation with political forces, the local traditional institutions, universities and civil society organisations such as human rights NGOs. The first approach would be a unified court system somewhat similar to the integrated court system established by the Law for the Organisation of the Judiciary Decree. The Sharia courts would be established under the ordinary courts. Sharia and customary laws would be applicable in civil matters. In a unitary court system, the judges would have the discretionary power to use precedent and consult Sharia and customary law. Institutionally, it would be sensible for the TFG to reorganise the Islamic courts under a unified court system so that they can look at civil cases on the basis of both clan and Sharia laws. In order to ensure respect for human rights, gender equality and justice as well as a measure of uniformity, such reforms of the Islamic courts should provide that:

- Islamic courts apply both Sharia and customary laws;
- Their jurisdiction is limited to civil cases; and
- Their decision is subject to review by higher courts.

The second option is to establish a dual court system: Sharia and customary courts distinct from ordinary courts. However, this option would require harmonisation, jurisdictional clarity and the institutional hierarchy of the Sharia and customary courts *vis-à-vis* the ordinary courts. The example of Ethiopia may be instructive here. Sharia courts are organised as an independent court system in all tiers of government, from district *qadis* and regional state Sharia courts to the Federal Supreme Sharia Court. However, in Ethiopia, Sharia courts have the following limits on their power:

- Limited jurisdiction over family affairs, notably marriage, divorce, devolution of property and maintenance and guardianship of children;
- Adjudicative power only over parties to a dispute who have fully consented to their jurisdiction when the dispute arises (contrary to laws of countries such as Nigeria and Sudan which require consent at the time a marriage contract is concluded). This is mainly to ensure gender equality and that women's rights are protected, because women are often pressured to settle cases even against their interests; and
- Right of appeal should be first within the Sharia court system and later to the ordinary courts for those who have grievances about the application of Sharia law.

For Somalia, whose population is overwhelmingly Muslim, a unitary court system is recommended for the following four reasons:

- It unifies the judiciary as an institution with all judicial powers vested in it by ensuring that all laws (Sharia, common, civil and customary) are applied;
- It encourages judges to learn all the legal systems and laws so as to better serve the society;
- It avoids jurisdictional conflict;
- It avoids discrepancies in interpretation through a hierarchical approach and enhances uniformity of decision to avoid conflicts of laws.

The integration of the court systems with well-referenced codes which draw on the five sources of law that were practised in Somalia – civil, common, socialist, customary and Sharia – would be of great assistance in forging internal consistency in the law. This would help in the delivery of a substantively uniform justice and procedurally harmonised system of judicial administration. According to a United Nations Development Programme survey in 2006, Somalia not only has the weakest judicial and administration of justice but also the lowest popular observance of the rule of law (UNDP 2006). The rule of law is essential for the predictability of the behaviour of all actors in society: the state, the people and other political, social and economic forces. Peace and development depend on their observance of rule of law.

In 1962, the Consultative Commission for Integration abolished the dual court system and replaced it with a unitary system of ordinary courts. The customary and Sharia courts became benches under district courts with a first-instance jurisdiction whose decisions were subject to review by higher ordinary courts (Contini 1964:10). [9] Besides creating internal consistency, the post-colonial unified legal system and law gave the courts the opportunity to refine the Sharia and customary laws in a way that made them responsive to prevailing circumstances and peaceful societal transformation. Such a unified judiciary would help to harmonise some incompatible features of the five legal systems. For example, if a motorist struck and killed a pedestrian, he or she would expect to be punished under the traffic laws and civil law. However, the families and clan of the victim could also request the offender to pay *diya* according to customary clan law.

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Several of Somalia's universities, such as Mogadishu, Benadir, Amoud, Somalia National, Hargeisa, and Garawo, have functioning law schools which could help to spearhead the harmonisation and integration of laws and the training of lawyers. A unitary court arrangement does not prevent alternative dispute resolution mechanisms if the parties agree. Paralegal and legal clinics and community services could easily serve as the basis for a bottom-up approach to rebuild the judiciary and improve the administration of justice. For Somalia, with its culture of clan-based xeer dispute mediation and Sharia courts, it is important to recognise and improve alternative dispute resolution mechanisms, taking care to enforce their decisions effectively and fairly without discrimination based on clans. Alternative dispute mechanisms would not only assist the development of laws in these areas, but also facilitate quick reconstruction and restoration of community life through local justice delivery.

Concluding Priorities

Moving towards a hybrid system

To sum up, ensuring peace and stability in Somalia will depend on the efforts of the TFG to establish a unitary court system with a complementary hybrid legal system that accommodates the diverse sources of laws in Somalia, particularly Sharia and customary laws. Disregarding the supposed superiority of a given legal system, the TFG should borrow widely from other countries. It should adopt and adapt political and legal structures and laws that ensure peaceful resolution of conflicts among clan and political forces; facilitate economic development, peacebuilding and post-conflict reconstruction; and offer effective protection for human rights. To avoid the shortcomings of a civil law system, judges should be granted the same discretion as under the 1960s Law for the Organisation of the Judiciary Decree to apply precedents and consult Sharia and customary laws. A unified court could help to ensure uniformity of applicable laws through out the country, while a hybrid legal system would enhance flexibility. It is to be hoped that the officials of the TFG understand that due to colonialism and international influence, laws and the legal system of Somalia cannot remain purely indigenous. The Transitional Federal Government officials should decide which laws, institutions and legal systems serve their society best and enable them to discharge the core functions of the state most effectively.

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Economic priorities

A peaceful and stable Somalia will serve development while, conversely economic development will contribute to the quick stability and sustainability of peace by allowing citizens to gain income for living and spend their time in more productive activities. A future Somali government will have to work for the speedy recovery of the economy. It will need laws and institutions that attract foreign investment by facilitating processes and providing protection for investment and returns. To achieve this, the TFG has to solve coordination problems by providing core services and infrastructure such as roads, airports and ports for those who want to build hotels and industrial plants and engage in import/export activities.

Promulgation of laws that facilitate investment and protect investors from the inhibiting effects of intervention in the form of excessive taxation and barriers to trading is the second core function of a government. The passing of laws in itself does not make a difference. Rights in law are secured only if the formal institutions are complemented by informal norms and culture (North 1990; Weingast 1995; 26). Formal institutions, including constitutions and laws, are less useful if the informal political and other norms stand in opposition to them. Hence, broad consultation and education are vital inputs to create the informal norms that are pro-investment. Such laws and policies should encourage competition among regions and local governments, and leave room for decision making by local governments in levying taxes and spending. Such powers should be subject to oversight by elected bodies, and audits and reports made available to the public.

Economic efficiency, political effectiveness in bringing peace and stability, and maintaining cultural and other values necessary to sustain unity and integrity of the country are

important considerations in deciding what kind of legal system and laws to adopt. The TFG should be able to adapt the commercial and investment laws of countries that provide effective protection to shareholders and investors to attract foreign direct investment.

Building peace and developing working legal systems in Somalia will require reorganisation and reforms of the judicial system as well as capacity building of the Sharia courts, including those which have been active members of the Union of Islamic Courts. Sharia courts and traditional law could serve a basis to rebuild the judicial system fast, with reforms to ensure their accountability to a unified judicial system, provision of infrastructure and intensive training. Higher courts could review cases, particularly those involving human rights and gender injustice. Sharia courts could help the TFG to provide a much-needed judicial service at the lower levels until ordinary courts are established and can discharge their functions effectively. However, Sharia laws should be applicable only when they are compatible with constitutional or international human rights conventions. Tyranny in any form should be legally prohibited. The Sharia courts, and for that matter any court, should have only an adjudicatory role, not enforcement powers.

Governance priorities

Legal origins aside, more important considerations for the TFG are perhaps the quality of governance and the capacity of its legal, enforcement and political institutions. It is not the substantive laws but rather the quality of legal infrastructure and enforcement competence that impede growth in developing countries. In general, the orientation of law reform in Somalia should be towards centralised legislation, whereas implementation at local level should be decentralised. This would ensure legal centralism of the source of law in a body of elected representatives, while decentralised implementation would provide legal pluralism at the local level by offering a margin for diversity of application. This has been successful in many parts of Indonesia (Salim 2007). Codes of the 1960s could serve as a basis for developing centralised legislation. Moreover, decentralised implementation would allow for a bottom-up reform of law and the establishment of a justice system that allows local indigenous institutions to function adequately. At the same time, the centralised legislative approach at the top would allow for the diffusion of the norms of international human rights while supervising the compatibility of laws and practices at a lower level. In terms of capacity, most law schools in Somalia, such as the faculty of Sharia and Law at Mogadishu, and Benadir, Amoud, Somalia National, Hargeisa and Garawo universities, offer courses in Sharia law. Moreover, these schools provide *pro bono* legal services to the needy. In 2006, law students of the University of Hargeisa provided more than 200 *pro bono* services. With more aid from international community and support from the TFG, the universities can produce law graduates to cater for short-term demand as well as specialised legal expertise. Indigenous institutions and local innovations should be encouraged as they could facilitate peacebuilding.

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Endnotes

[1] The Penal, Criminal Procedure, Military Penal and Military Criminal Procedure codes.

[2] 'Somalia lacks contract law, company law, the concept of limited liability and other key pillars of commercial law' (Nenova & Harford 2004).

[3] According to a 2005 United Nations estimate.

[4] Legislative Decree of June 12, 1962, No. 3, *Official Bulletin of Somali Republic,* Supplement No. 6 to N0.6

[5] Legislative Decree, Constitution of the Somali Republic, 1 July 1960

[6] Presidential Decree of October 11, 1960, No. 19, *Official Bulletin of Somali Republic,* Supplement No.1 to N0. 4 1960

[7] Law of 10 February 1962 No. 6, *Official Bulletin of Somali Republic,* Supplement No. 1 to N0. 2 1960

[8] The constitutional commission is provided for under Article 68 and 69 of the FTC.

[9] In recognition of the need to use customary law in adjudications, assessors were appointed to advise the colonial courts; the assessors functioned like jurors in a trial (Contini 1964:12,13).

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