

Peace and Security provisions in the Consultation Draft Constitution of the Federal Republic of Somalia

Introduction

This paper reviews key provisions in the consultation draft constitution (CDC) dealing with matters of security and defence in relation to comparative practice in other federations as well as to some of the challenges of the Somali context. Establishing peace and security is an important prerequisite both for the reconstruction of the Somali state and nurturing democratic development in Somalia. Establishing coherent national security institutions will require not just the disarmament of militia groups, including Al-Shabaab, and expansion of the national army, but also ultimately the integration of security forces currently controlled by Puntland and Somaliland. Given Somalia's highly evolved clan structure, federal arrangements around security, if properly implemented, has the potential to reinforce the process of state building while simultaneously providing local communities with a stake in the security architecture of the country.

In 2009 the federal government had a budget of only \$11 million, over 90 percent of which went to salaries and two thirds to the army and security forces. This puts in perspective the central role of the security forces in Somalia today and the need to ensure the country's democratization and federalization process is not held hostage by armed groups. Since 2009, efforts to rebuild a national army has yielded modest results. The force numbered 4,000 troops as of September 2011, a far cry from the 12 Division force fielded prior to the civil war or from the 10,000 strong African Union force and few thousand Kenyan troops now fighting Al-Shabab.

This paper offers commentary on the longer-term framework for peace and security as set out in Chapter 15 of the CDC.

Security and Federalism: A comparative overview

Many of the world's federations are products of post-conflict settlements. The evolution of federalism in Switzerland, the United States and Nigeria were heavily influenced by post-civil war settlements. More recently,

transitions to democracy in South Africa, Spain and Ethiopia have had to address either legacy issues resulting from civil war or conflict and those related to democratic consolidation.

An important element in the process of democratic consolidation and professionalization of security agencies is how these countries have gone about setting the mandate for their security agencies constitutionally. Federations have found it useful to distinguish (constitutionally) between the delivery of, and responsibility for, *national security or defence* on the one hand and *public security and safety* on the other hand—in broad terms, between *defence* and *policing*.

National security typically involves securing a country against external threats. This is always a responsibility of the federal level of government, which uses as its primary instruments, the nation's armed Forces, border security forces, and intelligence and counter-intelligence agencies.

Public security and safety is concerned with the enforcement of laws, administration of justice and maintenance of public order. This function is usually shared function between federal and state or regional governments level. Sometimes municipal authorities have public security functions. It is important to ensure that forces at each level have clear mandates and responsibilities. Federal security organizations and state security organizations typically enforce laws within their respective areas of jurisdiction, but there are important exceptions of delegations in both directions. The main responsibilities of police and security forces relate to criminal law and the enforcement of specific areas of regulation, such as traffic laws, public order and so on. Many other laws, e.g. health, environment and building regulations, are enforced by non-security departments. Sometimes responsibilities are determined by organizational capacity. The primary instruments for the maintained of public order and enforcement include Police Forces (and some countries have more than one kind of police at the federal level) as well as Criminal Intelligence and Investigation Agencies.

In the context of rebuilding the state in Somalia establishing the state's monopoly over legitimate use of force and *separating defence issues from policing issues* by disengaging combatant forces from local police enforcement duties will present a major challenge. This is chiefly because

often existing militia organizations undertake enforcement functions, notably in relation to crime and public order.

The other challenge, as noted above, will be that of *democratic consolidation*. This includes setting out a defined and limited role for the armed forces, along with the integration of the various allied security organizations (federal and regional) and the demobilization (and perhaps partial integration) of the rebel forces into the federal and regional state security agencies. Achieving representativeness and diversity in security institutions will also be a major challenge in a country where clan identities are so pronounced. An important element here will also include empowering local and marginalized communities with public security functions - namely, *devolving certain enforcement functions* to local communities so that enforcement agencies closely reflected the values and mores of the local community. In this respect, it is conceivable that parts of the existing security organizations in Somaliland and Puntland be re-established as regional police forces or regional arms of the federal police force, while other parts be integrated into the federal army.

This paper considers each of these in turn in relation to the emerging system for Somalia, as set out in the CDC.

Commentary on Chapter 15 of the CDC

(a) Security Services of the Republic

Article 162 lists the federal security services and establishes the mandate and responsibilities for these services – 162(2) covers the armed forces and 162(3) deals with federal police. The article also makes provision for the establishment of sub-national police forces in 162(4).

The following observations maybe made about the article:

- It is consistent with the practice in other federations that the constitution assigns defence responsibilities to the federal government.
- From the point of view of democratic consolidation, Art 162(2) is rather wanting. Given the central role that the armed forces are likely to play in stabilizing the country, it is important to ensure that post-conflict, the armed forces are bound by the constitutional order. To this extent it **is important to provide the constitutional basis for keeping the armed forces out of politics**. For example in Spain:

Article 8, the Armed forces main job is “...the defense of its territorial integrity and the constitutional order.” Similarly, in South Africa: Sec 11: Article 198(c), “National security must be pursued in compliance with the law...” Article 200(2),” The primary object of the defense force is to defend and protect the Republic..... in accordance with the Constitution ...” **The existing mission to “guarantee sovereignty and independence of the country.....” is vague and could be broadly interpreted by the armed forces. Principles to be respected by the armed forces laid out in Art 164(1) should be part and parcel of the armed forces mandate.**

- Under 162(3) federal police are mandated to “protect the lives of citizens of the republic.....their peace and security” and the regional police forces are expected to “protect the lives and property and preserve peace and security locally” under Art 162(4). Are members of local communities not citizens of the republic? Art 162 (3) and 162(4) do not sufficiently demarcate spheres of responsibility between federal and regional police forces. Even Article 168 provides no clarification in this regard. While 162(4) and 168 (2) makes provision for cooperation between federal and regional police forces, there is ambiguity about their terms of engagement that would lead one to assume that federal police has supervisory functions over regional police. The latter assumption would not be unreasonable since the CDC appears to take a good deal of inspiration from the integrated model of federalism. This however needs greater clarification. It should be noted however, that even in the integrated German model federal police do not have supervisory functions over their sub-national counterparts.

It is important to note that federal police agencies in countries like Australia, Canada and Germany have relatively narrow mandates when operating in the space occupied by regional police forces—in other words, in a model with two levels of police, most policing is by the regional or state police. The advantages of devolved policing are many. Subnational police forces are in principle most responsive to local needs and accountable to local authorities. For a country emerging from years of civil war and distrust across society, local polices forces may provide communities with a sense of safety via representation in the security services. The key question of what linkages should exist between federal and subnational police forces would have to be addressed. In India, where policing is a state function, the executive cadre of state police forces is centrally recruited via the Indian Police Service. This ensure uniformity of management capacity and a consistency of

professional ethic across the states. However, a devolved model of policing in Somalia would probably result in a fairly small federal police force with a limited role, with most police being with the regional states. Given the human resource challenges that Somalia will face, an Indian model of a national police force of officers who would be assigned to the regional states could assist in ensuring the capacity and quality of regional state forces and could potentially lay the basis for smoother interface between levels of government and their enforcement agencies. In addition, a federal law on policing could establish basic standards for policing personnel. Such an approach could be consistent with the CDC's approach to ensuring standards in the federal and regional state civil services. In Canada, as in India, policing is a state function, but a number of states (provinces) find it cost effective to contract out policing duties to the federal Royal Canadian Mounted Police. When the establishment of a local force is not viable on cost or human resource grounds, the Canadian model offers an attractive way of ensuring high standards of policing for such states.

- While the CDC calls for both federal and regional state police, perhaps the better model for Somalia would be a national police force with proper provision for local command and political oversight by the regional states. Thus in the South African constitution, there is to be one police force, but it is to have regional (provincial) structure with provincial commanders reporting to the national commander; the provinces would normally concur in the naming of a provincial commander and can initiate due processes for a commander to be removed. In addition, there is provision for the provinces to initiate investigations of inefficiency or of a breakdown in relations between the police and a local community, and the provinces have a continuing right to monitor, oversee, assess and liaise with the police in the province. There is to be a federal-provincial committee of ministers on police matters.

(b) Control of the armed forces and intelligence services

This subject area is covered by two articles in the CDC: Art 163 "Control of Armed Force" and Art 167 "Non-military control of armed forces and intelligence services."

The following observations maybe made about this subject:

- The desire to establish civilian supremacy oversight over the armed forces and intelligence agencies is consistent with the approach taken

in other federations, including the United States, India, Nigeria, South Africa and Spain. This is achieved through the appointment of the President as Commander-in-Chief (Art 99(1)) and establishment of civilian oversight under Art 167.

- There is **duplication** between parts of Art 163 and Art 167, and the two should be consolidated into one article.
- The CDC, and Art 167 in particular, is silent on the specifics of how oversight is to be achieved for the intelligence agencies. **In order to ensure that intelligence agencies do not serve partisan agendas, it is important to provide a measure of legislative oversight.** In the South African constitution Art 210 (b) provides for “civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.”
- In addition to constitutional provisions for civilian control of security services, countries such as Spain and South Africa have also adopted legislation to bolster these constitutional provisions. In Spain, Organic Law 6 /1980, and modified by Organic Law 2/1984 provided for civil authority over the military; restricted military establishment to operational matters and established civilian supremacy in budgetary matters. In South Africa, the New Defence Act of 2002 reinforced the SANDF’s subordinate and advisory role in the formulation of national policy; introduced parliamentary oversight and limits the SANDF to territorial defense.

(c) Emergency Powers

Article 169 of the CDC deals with the states of emergency – declaration, continuance and repeal. The emergency powers have a history of being abused in long standing democracies, including countries like India. This is all the more reason that they need to be framed with care in the context of countries that are embarking on a process of democratization. Declarations of national emergencies tend to undermine the shared rule aspect of federal countries. They should therefore be exercised with care. Article 169 as currently framed is **ambiguous** (section 1) and **inconsistent with the federal character** of the republic (sections 3 and 4).

The following observations are relevant:

- Art 169(1) adopts defines emergencies very widely to include ‘disorder’, in addition to war, invasion and natural disasters. This is reminiscent of Art 352(1) of the Indian constitution prior to its 44th amendment, which allowed the proclamation of an emergency on the grounds of ‘internal disturbance’, namely a political agitation against the incumbent government. This article was subsequently amended in 1978 to replace the phrase ‘internal disturbances’ with ‘armed rebellion’. One must therefore reconsider leaving CDC Art 169(1) open ended in the current manner. Could political demonstrations be construed as disorder?
- The most critical brakes on abuse of emergency powers have to do with the procedures for their use and review. Since the proclamation of emergency allows federal authorities to intrude upon the constitutional space provided to regional states, it is important that the regional states have their say in the proclamation and continuation of states of emergency. Therefore Art 169 (3) and 169 (4) should be expanded to include assent from both houses of parliament including the House of the Regional States. This also provides an additional check against the arbitrary exercise of emergency powers.
- Since not all emergencies are likely to impel the state to declare national emergencies, it is important to allow for regional emergencies as well. These too should be subject to strong procedural protections.

The constitutional provisions in the CDC dealing with defence and emergency powers largely follow those of other federations. As noted earlier, the key challenges for the country will involve the creation of truly representative national security agencies, while at the same time moving forward on the road to democratization. The security agencies are likely to be plagued by trained manpower shortages for many years to come. What truly will ensure security and safety across the country in the long term is a comprehensive demobilization, disarmament and rehabilitation program. The costs of the program should not be underestimated. Between 1991 and 2003, the Ethiopian government demobilized and disarmed close to 500,000 combatants and ran a relatively successful rehabilitation program supported by donors such as Germany. In the end the program cost close to \$470 million. In addition to SSR (security sector reform) with its objective of professionalizing, increasing transparency, accountability and restoring civilian control over security forces) it is important to ensure proper

rehabilitation and reintegration ex-combatants into civilian life – job training, re-employment, pensions, etc.

Recommendations

The constitution would be greatly strengthened by importing many of the security provisions contained in the South African constitution.

Given the capacity problems facing Somalia, the South African approach of having a single police force, but with provisions for regional commands subject to regional political oversight and coordination between the orders of government may be the most practical.

The two tier model of the CDC would likely result in a very small federal police force relative to the regional state forces and this carries significant risks in terms of capacity, professionalism and coordination. Measures such as a national police service of senior officers who would be seconded to the regional states, a national policing standards act and a coordinating federal-regional state forum on policing would help reduce these risks.

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