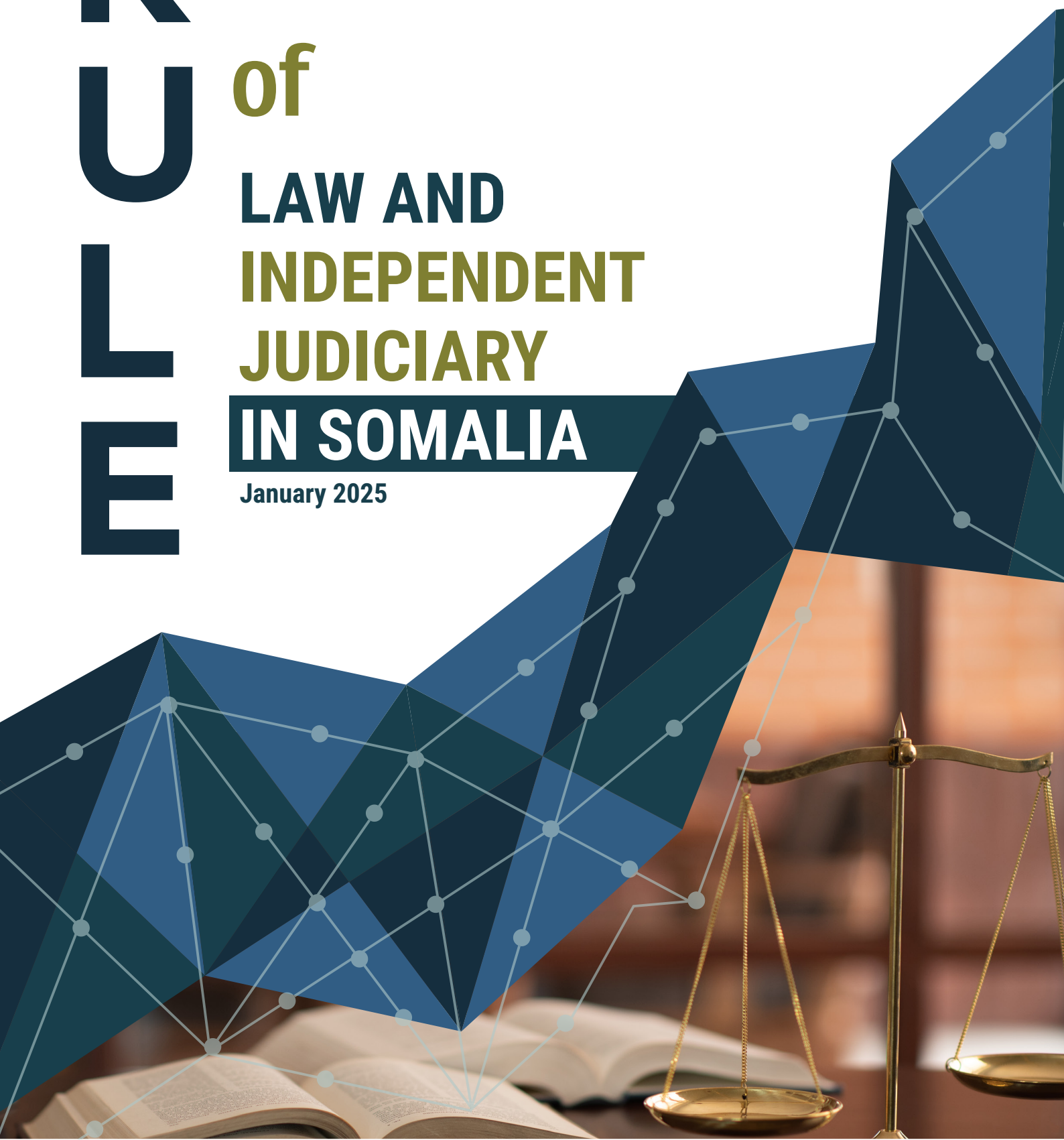


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IN SOMALIA

January 2025



## About the Author

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# 1. Executive summary

Somalia has a rich cultural heritage centered on oratory and the quest for justice and fairness. Words like *xaq* (justice) and *dulmi* or *xaq darro* (injustice) reflect society's profound respect for fairness. Despite this cultural and religious dedication to justice, equality, and impartiality, the rule of law remains difficult to achieve.<sup>1</sup> Effective legal systems and institutions are key to establishing the rule of law, but decades of fragility and a focus on stabilizing and reconstituting the fractured state over delivering justice have severely impeded these efforts. Bridging the gap between Somalia's ideals and its justice deficit requires building institutions that genuinely support the rule of law. This includes creating an independent judiciary, increasing community awareness, and reinforcing democratic principles to create a more just society.

Past efforts to establish the rule of law, particularly during the 1960s, have frequently failed, allowing fear and unchecked power to thrive. The 2012 Provisional Constitution aims to tackle these challenges by offering a legal framework that aligns with justice and Sharia principles. At its core is the principle of separation of powers, dividing authority among the executive, legislative, and judicial branches to ensure checks and balances. However, the interim constitution lacks clarity on the distribution of power between the national government and the provinces commonly known as federal member states. This unfinalized and at times ambiguous constitution weakens governance and raises concerns about the legitimacy of both federal and state laws. In a federal system, the judiciary is critical in upholding the rule of law, by interpreting laws impartially and acting as a safeguard against political overreach. Unfortunately, Somalia's judiciary has historically been weak and politically influenced, limiting its ability to serve this crucial function.

The Provisional Constitution provided a basic outline for the judiciary, establishing three court levels, but left for negotiation and finalization the details of the judiciary's structure and operations. The constitution grants the Constitutional Court the authority to review the constitutionality of laws passed by the Federal Parliament, but only certain federal officials (such as all members of the Upper House, 1/3 of the Lower House, or Council of Ministers), a member state, or 10,000 registered voters can challenge legislation, weakening the rule of law. Moreover, the provisions for judicial review of executive actions are both limited and problematic. Despite including mechanisms to ensure judicial independence, such as the proposed Judicial Service Commission (JSC) and Constitutional Court, these bodies have yet to be established due to political inaction.

In 2018, the federal government's justice ministry and federal member state counterparts met and negotiated Somalia's judicial mode. The Jowhar political agreement proposed an integrated court system, where both state and federal governments would share a unified trial court framework.

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1. As further discussed in this report, the rule of law has largely been absent in Somalia, a condition that could arguably be traced back to the arrival of colonial powers on Somali shores. The absence of the rule of law has become particularly pronounced over the last 30 years, largely because of the breakdown of law and order following the collapse of central governance.

This system would allow judges to handle cases under both state and federal laws, enabling concurrent jurisdiction. The Council of Ministers and the National Consultative Council have further refined the proposed integrated court system outlined in the Jowhar agreement, addressing and resolving certain internal inconsistencies.

However, implementing such a system requires strong leadership and skilled jurists. Some stakeholders have also raised concerns about this model and its potential impact on other elements of the justice system — such as prosecutors, police, and prisons. Centralizing these components could lead to federal overreach, undermining the principles of federalism that emphasize local governance and responsiveness. Additionally, integrating justice systems could dilute accountability, as local jurisdictions often have a better understanding of their specific challenges compared to a centralized authority.

While the idea of an integrated court system presents a promising opportunity to establish a functional judiciary that aligns with Somalia's governance structure, broader governance issues must also be addressed. Ensuring member state autonomy and maintaining a balance that respects member state justice systems is vital. Should Somalia choose an integrated justice model, it will need to carefully navigate the complexities of merging state and federal systems while managing power-sharing challenges. The design of the court system should ensure that local jurisdictions retain the authority to deliver justice in ways that reflect their values and needs. A balanced approach that respects local autonomy while promoting efficient governance is crucial for the success of Somalia's judiciary and its broader progress toward democracy and the rule of law.

This report advocates for the creation of strong legal frameworks and institutions, emphasizing that Somalia's cultural commitment to justice, if properly harnessed, can ignite a transformative legal renaissance in the country.

## 2. Introduction

The rule of law is fundamental to any society, and the challenges Somalis face in their daily lives are largely as a result of its absence. Without a stable legal framework, individuals find it difficult to secure their rights, leading to widespread uncertainty and fear. This lack of structure creates an environment where disputes easily escalate into violence, and where corruption and the abuse of power can thrive unchecked. When the rule of law is absent, essential services like education, healthcare, and security become unreliable, further undermining community stability. Economic activities also suffer because property rights are not protected, making investments too risky, which perpetuates poverty and instability. Denying Somalis the opportunity to live under the rule of law may be the greatest injustices their successive governments have inflicted upon them throughout history.

Somali culture is renowned for its rich oral traditions and the nuanced expression of important traditional concepts. However, less attention has been given to how Somalis articulate their perceptions of justice and whether this reflects a deep belief in its importance. Despite enduring decades of lawlessness, the Somali language is filled with expressions that reveal a profound appreciation and yearning for justice. Although this study does not provide an in-depth linguistic analysis of the connection between Somali culture and justice, the frequent and almost instinctive use of justice-related terms in everyday discourse shows a latent cultural commitment to justice. Common Somali terms like *cadaalad* (justice), *caddaalad-darro* (injustice), *dulmi* (oppression), *gar* (rightness), *gardarro* (wrongdoing), *xaq* (truth or right), and *xaqdarro* (falsehood or injustice) all demonstrate an inherent belief in the importance of justice and the rule of law. The regular use of these words indicates a deep-rooted cultural respect for justice. If this dormant cultural phenomenon were harnessed effectively, it could potentially lead to the creation of a more just society in Somalia.

Justice is also a cornerstone principle in Islam. The Quran emphasizes the obligation to uphold justice in both personal and legal matters. This principle dictates that all legal decisions must be fair, unbiased, and aligned with Sharia. The concept that modern societies call the “rule of law” closely mirrors what Islamic scholars refer to as “Islamic justice,” which is deeply rooted in Sharia principles. These principles include ensuring fairness and impartiality in all legal decisions, equality before the law regardless of social status, the right to a fair trial, the reliability of witnesses, and the integrity of judges who must be held to high ethical standards. Judges are also expected to impartially interpret and apply the law in both public disputes—such as criminal cases and labor issues—and private disputes, like land and contract disagreements. However, despite Somalia’s strong cultural and religious foundations that should naturally align with the rule of law, these principles have not yet been effectively translated into practice. This gap between Somalia’s guiding principles and their implementation reflects the governance failures that have hindered the establishment of the rule of law in the country.

Leadership shortcomings have further obstructed the development and enforcement of societal and religious norms that could support the legal frameworks necessary for establishing the rule of law. Ongoing insecurity and the inadequacy of the existing legal system have prevented the meaningful application of justice-related concepts, keeping citizens from achieving tangible justice outcomes. This disconnect between Somalia’s cultural and religious ideals and the practical reality of justice underscores the urgent need for structural reforms and the creation of institutions that can bridge this gap. This report will examine the institutions and systems that are essential for upholding the rule of law, many of which remain absent in Somalia. The author argues that establishing these institutions, along with targeted awareness efforts, could help Somalis develop and sustain a legal framework that supports the rule of law.

### 3. Methodology

This report aims to provide a roadmap for establishing the rule of law in Somalia, with a particular focus on the judiciary's pivotal role. Recognizing that a well-functioning judiciary is the cornerstone of the rule of law, this report highlights how the judiciary influences other essential components such as law enforcement agencies, investigative bodies, prosecutors, and correctional facilities, ensuring their adherence to the principles of justice. A robust judiciary plays a critical role in safeguarding the rule of law and guiding these other sectors to uphold justice and accountability.

The author draws on empirical evidence from field research conducted by scholars at the Heritage Institute for Policy Studies (HIPS) during 2020 and 2021, as well as interviews with key justice stakeholders conducted earlier this year. The 2021 HIPS research, supervised by the authors of the report "Rebuilding Somalia's Broken Justice System," serves as the foundation for the analytical framework of this report. In the course of writing this report, the author interviewed the Chief Justices of the Federal Supreme Court, the Supreme Courts of Puntland and Southwest member states, as well as the Chief Judge of the Banadir Court of Appeals, the Chairman of the Independent Constitutional Review Commission, and senior officials from the Ministries of Justice of the Federal Government, Puntland and Southwest.

Additionally, the author reviewed a wide range of materials, including the work of government entities like the Ministry of Justice, the Council of Ministers, and the National Consultative Council, all of which are working to rebuild the judiciary. Other sources reviewed included the constitutions of other federal countries, Somalia's judicial history, the Provisional Constitution, and its provisions related to the judiciary and the rule of law. Reports on the drafting process of the Provisional Constitution, overseen by the Max Planck Institute for Comparative Public Law and International Law, were also examined. Moreover, the author studied international examples, such as South Africa's approach to rebuilding the rule of law and judiciary, the United Nations' efforts in the post-Yugoslavia Balkans, and monographs from the United Nations Commission for Human Rights on rebuilding collapsed justice systems. Particularly useful was the monograph on Operational Framework, which, although focused on international actors, provided valuable insights. This comprehensive investigation allowed the author to construct a detailed picture of Somalia's judiciary and its role in establishing the rule of law.

By synthesizing information from these diverse sources, the author contextualized the state of Somalia's rule of law, emphasizing the judiciary's crucial role within Somalia's conflict-prone federal system. The report analyzes the approaches taken so far in rebuilding the judiciary and concludes with policy recommendations for creating a judicial sector that can uphold the rule of law. While some recommendations may be familiar, the author hopes this report will offer fresh insights into their importance and potential for driving meaningful reform.

## 4. Defining the Rule of Law

Although various scholars and organizations have defined the rule of law using different language, they are essentially synonymous and express the same core meaning. One widely accepted definition was adopted by the United Nations General Assembly in 2012, stating that the rule of law exists when “all persons, institutions, and entities, public and private, including the State itself, are accountable to just, fair, and equitable laws and are entitled without any discrimination to equal protection under the law.”<sup>2</sup> The World Justice Project (WJP) offers a more striking definition, describing the rule of law as “a durable system of laws, institutions, norms, and community commitment that delivers four universal principles: accountability, just law, open government, and accessible and impartial justice.”<sup>3</sup> (Emphasis added). In any interpretation of the rule of law, the fundamental idea is that everyone is held accountable to a clear set of publicly-established laws and regulations that are applied equally and independently adjudicated. Equal enforcement and independent adjudication of laws are essential to upholding the rule of law. Notably, these principles align closely with the Islamic principles of justice previously discussed.

This report reviews the history of the rule of law in Somalia and examines the institutions in the Provisional Constitution that are designed to establish it. It will then evaluate the current state of these institutions in relation to the provision of justice and explore proposed court systems that could further strengthen this framework. Finally, the report will offer practical recommendations to build a solid foundation for the rule of law in Somalia.

## 5. The History of the Rule of Law in Somalia<sup>4</sup>

The concept of the rule of law in Somalia has historically been fragile, often teetering on the edge of non-existence.<sup>5</sup> An impartial observer would likely note that since 1969, successive Somali governments have prioritized elite interest, maintaining order and security over ensuring adherence to the rule of law. While “order and security” are important measures of the rule of law, they are not sufficient on their own.

In the pre-colonial era, Somali society was structured around autonomous clans, each governed by its own set of traditional legal systems, known as *xeer*. These rules were enforced through basic tribal mechanisms, with elders mediating disputes. While there was a form of rule of law within these communities—where even clan leaders were subject to *xeer*—the focus was largely inward, with little concept of shared rules beyond clan boundaries. Clans operated independently, relying on mutual respect and hospitality as long as there were no hostilities between them.

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2. G. A. Res. 67/1, ¶2 (Nov. 30, 2012).

3. What is the Rule of Law? | World Justice Project, last visited May 12, 2024.

4. The state called Somalia should not be confused with the Somali nation that existed in the Horn of Africa, where rule of law (under clan “*xeer*”) may have existed prior to the arrival of European colonizers.

5. In the period shortly after independence when most of the judges in Mogadishu were non-Somalis, there were some aspects of the rule of law that had some teeth. For example, Somali courts at the time were able to resolve disputes brought against the government without fear of retribution.



The arrival of colonial powers drastically disrupted this tribal legal order, as European imperialists disregarded local customs and enforced laws designed to control the population rather than uphold justice. Colonial courts were established, but their primary focus was to maintain order, often at the expense of justice, sidelining the complexities of Somali society. After Somalia gained independence in 1960, the former colonial powers sought to assist the new government in establishing an independent judiciary to foster the rule of law. However, while the courts initially appeared to operate independently, their efforts were short-lived, failing to leave behind lasting institutions or a culture of legal accountability. Political elites of the time were deeply skeptical of the West's sudden interest in protecting the public from tyranny and subverted these efforts through corruption and clan-based maneuvering, stifling any progress toward establishing the rule of law.

When General Mohamed Siad Barre took power in 1969 in a military coup, the military junta, and later on Barre as he consolidated authoritarian rule, showed little concern for the rule of law,<sup>6</sup> using authority to suppress dissent and control the population. One of his most infamous judicial actions was the creation of the National Security Court (NSC), an entity independent of the judiciary, run by military personnel or security officers with little legal training. These courts handled cases ranging from political dissent to theft of government property, with minimal legal protections for defendants.<sup>7</sup> Legal representation was often nominal, and verdicts were swiftly<sup>8</sup> followed by sentences, sometimes executions, which were carried out almost immediately.<sup>9</sup>

Alongside the NSC, Barre's regime established the National Security Service (NSS), modeled after the Soviet KGB, to exercise extrajudicial powers and target perceived opposition. This combination of judicial and security oppression taught Somalis that those in power would wield their authority ruthlessly.

After Barre's ouster in 1990, Somalia descended into civil war, with clan-based revolts reshaping the political landscape. The United Nations as well as neighboring and distant countries made numerous attempts to mediate peace,<sup>10</sup>

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6. The one aspect of Barre's government that Somalis of a certain age look back nostalgically on was the absence of visible crimes in much of the country, most notably the city of Mogadishu. Indeed, "law and order" prevailed much of the time, even during intense political environment. For example, even during the short few weeks between the arrest and the execution of 14 Islamic leaders in 1974 for publicly disagreeing with the newly passed family laws, there was no major unrest or crime in the city. There was no question where the public stood; yet the city remained largely orderly and there was no wide-spread reaction that showed the public's opposition because repression reached paralysis level. Thus, that the city remained orderly during much of Siad's rule should not be confused with the existence of rule of law.

7. See Somalia—a case Study, Helen C. Metz, Federal Research Division, Library of Congress, 1992.

8. According to at least two stakeholders, the swift execution of sentences is still practiced in Somalia, particularly in terrorism or murder cases involving armed forces personnel, which are tried by the Military Courts. Indeed, one stakeholder considers that trying civilians in Military Courts contravenes Article 127 of the Criminal Code.

9. For example, in 1975, 10 Somali religious clerics were arrested, tried, and executed within a span of 10 days for opposing Siad Barre's newly passed Family Law. See, "Today in HISTORY: Ten sheikhs executed by Siad Barre gov't for opposing secular family law," [https://hiiraan.com/news4/2023/Jan/189613/today\\_in\\_history\\_ten\\_sheikhs\\_executed\\_by\\_siad\\_barre\\_gov\\_t\\_for\\_opposing\\_secular\\_family\\_law.aspx](https://hiiraan.com/news4/2023/Jan/189613/today_in_history_ten_sheikhs_executed_by_siad_barre_gov_t_for_opposing_secular_family_law.aspx).

10. The declarations of secession by Somaliland and autonomy by Puntland, and the clan-centric warlordism that prevailed in the rest of the country during the 1990s, can best be explained as a breakdown of trust between the clans. That distrust still haunts Somalia, and it forever altered the political landscape. The tumultuous period that followed the fall of the regime to the present day served as a fertile breeding ground for political opportunism, providing ammunition for politicians to vehemently oppose any ruling member from a rival clan. This led to a relentless cycle of destructive political conflict and persistent dissent that has continued to plague the nation for over three decades since the fall of Barre's regime.

but conflict persisted for nearly a decade.<sup>11</sup> By 2000, Somalia had fragmented into regions such as the secessionist Somaliland, the semi-autonomous Puntland, and numerous smaller fiefdoms controlled by clan warlords, particularly in the capital Mogadishu and across south-central Somalia. Amid the chaos, localized governance efforts emerged in Somaliland and Puntland in the 1990s, while around 2006 clan-based Islamic clerics<sup>12</sup> provided judicial services in warlord-controlled areas.<sup>13</sup> These local courts would later form the foundation of the Islamic Courts Union.<sup>14</sup>

The turn of the century brought new political developments, beginning with the 2000 Arta Conference<sup>15</sup> and the establishment of the Transitional National Government (TNG),<sup>16</sup> followed by the IGAD-sponsored Somali National Reconciliation Conference in 2002, which led to the creation of the Transitional Federal Government (TFG).<sup>17</sup> This period was plagued with significant challenges, including the rise of the Islamic Courts Union, the US-backed Ethiopian invasion to dismantle it, and the eventual emergence of al-Shabaab as the dominant force in southern Somalia. While al-Shabaab provided some dispute resolution mechanisms,<sup>18</sup> its oppressive rule undermined any semblance of a legitimate legal system. The group has implemented its own version of Sharia law through harsh punishments such as public executions, amputations, and flogging, which has undermined any perception of legitimacy for its legal system. Al-Shabaab's governance practices have been driven by terror and control rather than by any genuine effort to build a just or widely-accepted legal structure. Therefore, while they may have provided some local dispute resolution, the oppressive and violent nature of their rule has destroyed any semblance of a legitimate, functional legal system.

The current political phase in Somalia began on September 10, 2012, with the formation of the first government under the newly adopted federal system outlined in the Provisional Constitution. However, since the Transitional Federal Government, Somalia's brief governance history has been marred by ineffective leadership that has failed to create the necessary institutions or procedures to foster genuine governance or the rule of law. Today, Somalia is plagued by widespread poverty, societal fragmentation, and a persistent absence of the rule of law, worsened by corruption<sup>19</sup> among the political elite and the exploitation of inter-clan divisions.

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11. As used here, Somalia's civil war/conflict is narrowly defined as the fighting along clan lines. However, the civil strife that started along clan lines has since evolved into a corruption-centered complex web that relies on religious and clanistic proclamations to acquire narrow public support to gain or remain in power.

12. The Islamic clan courts would eventually unite against the warlords and form the Islamic Courts Union.

13. Some might contend that Somaliland and Puntland were also under the influence of warlords. However, this argument lacks merit. Unlike the warlords in other fiefdoms, who were content with their power while occasionally clashing with those in Mogadishu, the leaders of Puntland and Somaliland actively sought to establish independent governance. They focused on building institutions and laying the groundwork for sustainable political structures within their territories.

14. The Emergence of Islamic Courts, <https://www.c-r.org/accord/islam-and-somali-social-order>

15. Lortan, F. (2000). Rebuilding the Somali State. *African Security Review*, 9(5–6), 94–103. <https://doi.org/10.1080/10246029.2000.9628085>; Stressing respect for Somalia's sovereignty, independence, unity, security council reaffirms commitment to comprehensive settlement: Arta Peace Process, <https://unis.unvienna.org/unis/en/pressrels/2001/sc7190.html>

16. Transitional Justice Process: Somalia, <https://atjhub.csvr.org.za/somalia/>

17. Ibid.

18. See, for example, "Somalia Country Report on Human Rights Practices for 1998," by U.S. State Department, [https://1997-2001.state.gov/global/human\\_rights/1998\\_hrp\\_report/somalia.html](https://1997-2001.state.gov/global/human_rights/1998_hrp_report/somalia.html), last visited May 19, 2024.

19. For example, Transparency International's Corruption Perception Index scores 180 countries around the world. In 2023, Somalia scored 11 and ranks 180 out of 180 countries. See, <https://www.transparency.org/en/countries/somalia>. Somalia had ranked as the most corrupt or the second most corrupt country for the last 10 years (South Sudan ranked below Somalia in one year – 2020).



## 6. The Rule of Law and the Provisional Constitution

The Provisional Constitution of the Federal Republic of Somalia declares, “[a]fter Allah the Almighty, all power is vested in the people and can only be exercised in accordance with the Constitution and the law and through the relevant institutions” (Article 1). (Emphasis added). This article emphasizes the critical role of the people in governance and the requirement for the government to operate strictly within the boundaries of the Constitution and legal frameworks. Additionally, Article 2 of the Provisional Constitution states that “[n]o law can be enacted that is not compliant with the general principles and objectives of Sharia,” highlighting the central importance of Sharia in Somalia’s legal system. While the Constitution mandates compliance with Sharia, it also empowers the people to shape the laws, thus encouraging democratic participation in the country’s governance.

Moreover, the Provisional Constitution further supports this framework by stating that “[t]he Constitution of the Federal Republic of Somalia promotes . . . the rule of law” (Article 3). This provision reinforces the significance of establishing a legal system where laws are applied fairly, consistently, and within the parameters set by both democratic principles and Sharia.

## 7. Establishing the Rule of Law

### 7.1 The Allocation of Federalism Powers

In a federal system of governance, power is divided between the federal government and member states. By adopting a federal structure, Somalia’s Provisional Constitution inherently calls for this division of governmental authority. Some powers, known as exclusive powers, can be clearly separated between the federal and member state governments. However, certain areas of governance require both levels of government to function simultaneously, known as concurrent powers. In these cases, federal systems rely on a supremacy clause, which ensures that federal law, as defined by the constitution, takes precedence over state law. Somalia’s Provisional Constitution acknowledges this by stating, “the Constitution of the Federal Republic of Somalia is the supreme law of the country.”<sup>20</sup> Thus, the Constitution aims to create a balance between the powers of the federal and member state governments.

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20. More accurately, Sharia is the supreme law of Somalia but the framers of the Provisional Constitution chose to codify the law. As has become tradition in the Muslim world, the Provisional Constitution requires the constitution and the laws passed under it to conform to Sharia’s norms. Indeed, except for suggesting that the judges may consult with Sharia when dealing with fundamental rights (Article 40) and expressly relying on Sharia for making abortion illegal in Somalia (Article 15), the Provisional Constitution codifies all the laws.

A key requirement for the rule of law is a government that serves the people, upheld by laws that are clear, just, and impartial. This legal framework promotes accountability and ensures access to justice. At its core, a constitution must clearly define and allocate powers, forming the foundation for all other legal mechanisms. Unfortunately, Somalia's Provisional Constitution falls short in this area. It lacks clarity in defining the boundaries of federal authority and fails to establish a precise division of powers between the national government and that of the federal member states or provinces. Instead of offering clear responsibilities (albeit some may be overlapping), the Constitution vaguely allocates powers to “the level of government where it is likely to be the most efficiently exercised” (Article 50), without providing any specific standards to guide these decisions. Article 51 further complicates matters by prohibiting any level of government from “assuming more power than the constitution allocates.”

Adding to the uncertainty, Article 54 requires that the distribution of powers and resources be “negotiated and agreed upon by the Federal Government and the Federal Member States.” However, despite over a decade under the federal system, Somalia's leaders have yet to finalize this distribution. As a result, both the federal government and member states often act according to their own interpretations of the Constitution, with little guidance beyond the ambiguous directive to operate at the most efficient level. This has created confusion around the legitimacy of federal legislation, particularly outside narrowly-defined areas like foreign affairs, national defense, citizenship, immigration, and monetary policy. Similarly, laws enacted by member states may lack a solid legal foundation, further contributing to an uncertain legal environment.

Federalism depends on cooperation and compromise, rather than simple assertions of sovereignty. While member states retain the right to govern their own affairs, they must do so in a way that supports national cohesion. Refusing to cooperate with the federal government on national issues undermines the very principles of federalism. To create a stable and functional federal system, member states must engage in negotiations to finalize the allocation of powers. Without this collaboration, Somalia's federal system risks instability, potentially leading to a breakdown reminiscent of the turbulent 1990s—a scenario all parties are eager to avoid.

## 7.2 Independent Judiciary

It is widely recognized that, while many government institutions play a role in maintaining the rule of law, the judiciary is the most critical branch for its establishment. The effectiveness, competence, and impartiality of courts are fundamental to realizing the rule of law. Courts interpret and apply laws to uphold justice and ensure accountability, while also serving as a crucial check on the legislative and executive branches, and preventing any overreach beyond their constitutional limits. The rule of law not only requires government officials to act within legal boundaries, but it also guides citizens' behavior when laws are clear, fairly applied, and consistently enforced.

The judiciary can also serve as a driving force in strengthening other institutions essential to upholding the rule of law in Somalia. For example, if judges demand that evidence against defendants be properly collected and preserved for it to be considered admissible, investigators will be compelled to meet these standards. Similarly, by holding prosecutors accountable to legal compliance in charging practices, judges ensure that the rule of law is upheld across all levels, reinforcing the integrity of the legal system.

### 7.3 The Judiciary: the Third Branch of the Government

Chapter Nine of the Provisional Constitution outlines the judiciary's critical role and powers within Somalia's government structure. It calls for the establishment of both the Supreme Court and the Constitutional Court, while enshrining the principle of judicial review. This crucial mechanism allows courts to evaluate the constitutionality of laws and governmental actions, as detailed in Articles 105 to 109. Judicial review is fundamental to the rule of law, ensuring that all legislative and executive actions adhere to constitutional standards.

Article 3 of the Provisional Constitution further reinforces the structure of the federal government, which is divided into three branches: executive, legislative, and judicial. Each branch is meant to serve as a counterbalance to the others, upholding the rule of law. The executive branch is responsible for the equitable enforcement of laws, ensuring that they apply uniformly to individuals, institutions, and government entities. Meanwhile, the judiciary is tasked with resolving disputes and determining their compliance with the law. This dual obligation—equitable enforcement by the executive and impartial adjudication by the judiciary—supports the fundamental principle that no one is above the law, and all are subject to it. Additionally, the rule of law serves as a critical check on the powers of police, prosecutors, and judges.

Regrettably, the first two federal administrations in Somalia were only able to govern a portion of Mogadishu<sup>21</sup>. Despite some unsuccessful efforts to remove militant groups, these administrations, along with their international partners, focused primarily on securing the city. While progress was made in enhancing key institutions — such as the presidency, parliament, various ministries, and law enforcement — the judiciary received limited attention. Initiatives were largely confined to refurbishing the aging Benadir trial and appeals courts, as well as re-establishing the Supreme Court, leaving significant gaps in the rebuilding of this essential institution.

The challenges surrounding the reconstruction of Somalia's judiciary stem from several factors, including a lack of appreciation for the judiciary's role, ongoing political discord between federal and member state governments, and a general disinterest in upholding the rule of law.

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21. It was only during the current administration that the war against al-Shabaab finally became a reality. Although there have been some tangible successes and unfortunate setbacks, the public's expectation and hope are that the militants will finally be defeated within this term of Hassan Sheikh Mohamud's presidency.

Additionally, there was little recognition of the constitutional requirement for an independent judiciary. Although the National Consultative Council (NCC<sup>22</sup>) acknowledged the need for judicial independence in the preamble of its December 28, 2022 political agreement, which emphasized its necessity for public confidence, the agreement did not address the constitutional mandate for such independence.

Moreover, the judiciary's status as the third branch of government has been largely ignored in Somali political discourse. This has resulted in a judiciary that lacks its own budget and remains financially dependent on the executive branch, further undermining its independence. Despite not reporting directly to the Minister of Justice and Constitution, the judiciary relies heavily on the Ministry of Finance for its budgetary needs.<sup>23</sup> This dependency illustrates how the political branches have failed to treat the judiciary as an equal partner in governance, compromising its autonomy. As a result, Somalia's governance framework remains incomplete, with the judiciary effectively subordinate to the legislative and executive branches. In practice, Somalia's federal government operates as a two-branch system, with the judiciary acting as an appendage of the executive branch.

This imbalance not only undermines judicial independence but also reflects a broader neglect of the judiciary's fundamental role in government. Throughout Somalia's federal history, none of the three administrations have upheld the principles of separation of powers or judicial independence, violating the Provisional Constitution.<sup>24</sup>

The judiciary's exclusion from the core functions of government remains a significant barrier to building a fully functional state and reinforcing the rule of law in Somalia.

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22. It should be noted that Puntland and Somaliland do not participate in the NCC. Puntland refused to participate in the council and Somaliland is absent from all proceedings in Somalia. Although the NCC is the creation of the current president, it would appear to have a constitutional underpinning. Under Article 132 of the Provisional Constitution, "[t]he Federal Government or a Federal Members State government, a member of the Federal Parliament or a petition signed by at least 40,000 citizens may initiate the amendment process" (Underlining added). Thus, the federal government or even a member state can propose an amendment. The NCC includes the head of the state, the head of the federal government, and the presidents of five member states despite the absence of the heads of states of two member states. For obvious reasons, Somaliland would not participate in such proceedings. Puntland's absence is voluntary, even if its asserted basis are legitimate and, thus, cannot be the basis for questioning the proceedings. As such, the NCC appears to be an entity that may initiate an amendment process within the meaning of Article 132 of the Provisional Constitution.

23. For example, there is a \$6.2 million line item in the 2023 budget for "judicial authorities", right under the Ministry of Justice and Constitution, and just above those of the attorney general and the solicitor general, two distinct executive functions. Indeed, the current government structure in Mogadishu is essentially the same as that of Somalia's pre-1991 government, with the member states converting the national courts in their territories to member state courts, leaving no federal courts.

24. It is well-known that some ministers in Somalia's three federal administrations were also members of one of the two legislative houses. This violates the separation of powers clause outlined in Article 3 of the Provisional Constitution. Federalism is the negotiated system of government and central to the constitution. Thus, any provision that contradicts it should be removed. To understand why federalism is the core governance structure in Somalia, one must examine multiple provisions within the constitution. For example, Article 3 requires separation of powers, while the constitution remains silent on parliamentarianism as a system of government—despite containing some articles that align with it. Although the word "parliamentary" appears in the constitution numerous times, it is mentioned only in the context of the Parliamentary Service Commission designed to "ensure the efficient and effective functioning of the Federal Parliament." See Article 111D.

Additionally, Article 132 prohibits any amendments to the Founding Principles in Chapter 1 (including Article 3) by stating, "neither House of Parliament may consider an amendment to the Founding Principles mentioned in Chapter 1 of this Constitution." Since the separation of powers cannot be amended, provisions like Article 59, which allow parliamentarians to serve in the executive and undermine the separation of powers principle must be amended. Rather than upholding federalism, Somalia's three federal governments have disregarded Article 3 entirely.

Indeed, despite the use of the 4.5 system of representation, the creation of a legislative branch with a lower house based on proportional representation and an upper house with equal state representation clearly indicates that the Provisional Constitution is establishing a federal government. The 4.5 system acts as a surrogate for proportional representation, which, in turn, makes the composition of the upper house one of the more clumsy structures in Somalia's government.

Unfortunately, public outcry regarding this issue has been limited, as most Somalis have limited understanding of governance and view the judiciary as just another component of a government that suppresses them, rather than as a crucial branch meant to check the power of political entities.

## 7.4 Judicial Independence and Impartiality Under Sharia and Modern Governance

Islamic scholars widely agree that Sharia advocates for an impartial judiciary, strongly opposing arbitrary arrest, detention, coercion, and other unlawful intrusions into individuals' private lives.<sup>25</sup> Central to this framework is the principle of the presumption of innocence, along with the right to a fair and speedy trial before a competent and impartial judge. The responsibility to uphold these principles lies squarely with the judiciary, forming the foundation of the rule of law.

Judicial impartiality, which is as crucial as judicial independence, is recognized by Islamic scholars as a cornerstone of justice, exemplified by the practices of the Prophet Muhammad and his companions. While judicial independence refers to freedom from external influence, impartiality emphasizes the fairness perceived by those involved in legal disputes.<sup>26</sup> During the Prophet's time and shortly afterward, judicial independence was not a pressing concern; the expectation was simply for judges to be impartial. It was only with the rise of tyranny under subsequent rulers that the concept of judicial independence became critical.

The concept of judicial independence as practiced in many countries (such as Türkiye, Malaysia, Morocco, Botswana, South Africa, South Korea, India, Japan and many western nations) can be traced back to the 1701 Settlement Act in England, which sought to shield the judiciary from the Crown's influence. Similarly, the doctrine of separation of powers is credited to the 18th-century French judge Montesquieu,<sup>27</sup> who famously stated, "Nor is there liberty if the power of judging is not separate from legislative power and from executive power." Shortly thereafter, the United States adopted its Constitution, separating the judiciary from the political branches and creating an independent judiciary as the third branch of government.<sup>28</sup> The framers of the US Constitution were motivated to create an independent judiciary largely due to the British monarchy's abuses of power. They understood that consolidating all governmental power within a single executive branch risked subjecting the people to arbitrary and oppressive actions. Somalia's history of government overreach bears a striking resemblance to these early American experiences under British rule. Had Siad Barre's executive power been balanced by co-equal legislative and independent judicial branches, Somalia's history might have followed a very different trajectory.

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25. See Muhammad Munir, "Fundamental Guarantees Of The Rights Of The Accused In The Islamic Criminal Justice System," *Hamdard Islamicus* 45 Vol. XL, No. 4, 2017. See also, "Criminal Justice in Islam," Muhammad Adel Haleem, Adel Omar Sherif, and Kate Daniels, Eds., I.B.Tauris (publisher), 2018.

26. An independent judge who is not impartial is tyrannical and his/her rulings would not be enforced by the other branches of the government. A judge cannot be impartial unless he/she is independent. Thus, independence and impartiality often go hand in hand.

27. Montesquieu, *The Spirit of the Laws*, Cambridge Texts in the History of Political Thought series, page 157.

28. The importance of judicial independence is further underscored by the prescription in Article 10 of the Universal Declaration of Human Rights: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (Emphasis added).



The drafters of Somalia’s Provisional Constitution recognized the importance of establishing these three co-equal branches, as reflected in the text: “The Constitution of the Federal Republic of Somalia promotes... the separation of powers between the legislature, executive, and an independent judiciary” (Article 3). The emphasis on an “independent judiciary” is significant. By explicitly describing the judiciary as independent, the Constitution clearly sets this branch apart, not just from the legislative and executive branches but as a distinct entity free from their influence. The principles outlined in Article 3 mirror those found in many liberal democracies, where individual rights and freedoms are protected through the clear separation of powers. Furthermore, Chapter 2 of the Provisional Constitution guarantees fundamental rights for citizens, reinforcing the commitment to safeguarding personal liberties.

While the powers of the three branches of government are clearly delineated, their functions are interconnected, relying on each other to maintain a balanced and functional system. The executive sets the government’s agenda by proposing legislation and executing laws; the legislative branch enacts laws and allocates funding; and the judiciary protects individual liberty and ensures that these laws and policies align with constitutional principles. The legislative branch, in particular, plays a vital role in enabling both the executive and judiciary to fulfill their duties by controlling funding. Rather than working against one another, these branches are designed to collaborate when necessary. This interdependence highlights the importance of cooperation and balance, ultimately strengthening the rule of law and supporting democratic governance. When each branch functions effectively within its role and supports the others, the government can promote a stable, prosperous society.

## 7.5 The Provisional Constitution and the Judiciary

The Provisional Constitution of Somalia is notably sparse when it comes to outlining a specific court structure for either the federal or state governments. It merely identifies three levels of courts<sup>29</sup> and delineates the judicial powers of the Constitutional Court in relation to federal courts. Significantly, Article 109 of the Provisional Constitution places the responsibility for defining the relationship between federal and member state courts on the federal government, specifically tasking the federal parliament with this duty.

Articles 109B and 109C lay out the formation and powers of the Constitutional Court, primarily granting it the authority to adjudicate constitutional issues. Federal courts, on the other hand, are empowered to handle all cases arising under federal law, with the Constitutional Court retaining the final say on matters of constitutional interpretation. While these allocations of judicial power seem reasonable and are largely uncontroversial, they prompt an important question: is there truly a need for a separate Constitutional Court, or could its functions be integrated within the powers of the federal courts?

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29. The importance of judicial independence is further underscored by the prescription in Article 10 of the Universal Declaration of Human Rights: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” (Emphasis added).

Moreover, the Provisional Constitution does not suggest that any entity, other than the FMS governments, is responsible for establishing their respective court systems, including member state supreme courts. Allowing the federal government to dictate how member state judiciaries operate or are organized would fundamentally undermine the principles of federalism and could lead to significant legal and political challenges. Such federal imposition would raise serious concerns about the autonomy of member states and their ability to govern themselves effectively within the federal structure.

## 7.6 Federal Judiciary's Undemocratic Role: Judicial Review

The judiciary's capacity within a federal system to check the powers of both the legislative and executive branches assigns it an inherently undemocratic role, even within a framework that is otherwise assumed to be democratic. A key criterion for evaluating the democratic nature of governmental actions is whether the authority derives from the consent of the governed, often embodied by the principle of one-person-one-vote. In this context, majoritarian rule is frequently equated with democracy.

However, federalism — as implemented globally and codified in Somalia's Provisional Constitution — creates tension with majoritarian democratic principles for two key reasons. First, the structure of the upper house of parliament ensures equal representation for each member state, regardless of population size. This means that the largest and smallest states have an equal voice in this chamber (Article 72 of the Provisional Constitution gives each of the pre-1991 regions three senatorial seats). This design serves as a safeguard against the tyranny of the majority, with the upper house able to prevent the more democratically oriented lower house from<sup>30</sup> infringing on minority rights. Indeed, one of the fundamental purposes of these non-democratic elements in federalism is to protect minority interests.

Secondly, federal courts add another layer of non-democratic oversight, as they have the power to annul legislation or restrict actions by state or federal governments.<sup>31</sup> While Somalia's Provisional Constitution explicitly grants courts the authority to review legislation, the extent of their powers over executive actions is less clearly defined. Significantly, the judiciary plays a crucial role in balancing power, but its ability to override legislative and executive actions can create tension within a democratic system. This delicate balance between protecting minority rights and upholding majoritarian democratic ideals poses a complex challenge in federal systems, and Somalia is no exception.<sup>32</sup>

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30. Although representation in Somalia's lower house is currently based on the 4.5 system, it serves as the proportional representation body in the federal system. In other words, the 4.5 system acts as a surrogate for proportional representation.

31. For Somalia's constitutional clause authorizing judicial review of the executive and legislative branches, please refer to Chapter 9 of the Provisional Constitution. This report further discusses the pertinent clause in detail, examining how it enables the judiciary to act as a check on the other branches of government and uphold the constitution.

32. Although it may make sense to give the Constitutional Court the ultimate authority on the constitutionality of legislation, making it the court of the first instance for such matters may overwhelm it. Thus, consideration should be made for allowing parliament to make a lower court the court of first instance for such litigation.

## 1. Judicial Review of Legislative Actions

Under Article 109C, the Constitutional Court is given the authority “[t]o hear and decide cases as stipulated in Article 86 concerning challenges to the constitutionality of a law passed by the Federal Parliament.” Article 86 further clarifies that “legislation that has been passed in accordance with the legislative procedure . . . may be challenged only if it is alleged to contradict the Constitution.” This framework places non-elected judges in a position of significant influence over the decisions made by Somalia’s elected legislative branch within the federal system. Granting an unelected judiciary the power to intervene in the actions of elected representatives raises critical questions about the balance between democratic representation and judicial oversight. This tension underscores the complexities of sustaining a functional democracy within a federal system, where balancing the distribution of power with the protection of individual and minority rights is key. Striking this balance is essential for ensuring that democracy not only survives but also thrives.

One crucial issue deserving further scrutiny is who has standing to challenge legislation under Article 86 of the Provisional Constitution. This article specifies four categories of individuals who can initiate such challenges:

- (a) All members of the Upper House of the Federal Parliament or one representative of a Federal Member State;
- (b) A third of the members of the House of the People of the Federal Parliament;
- (c) The Council of Ministers of the Federal Republic of Somalia; or
- (d) Ten thousand or more registered voters.

This government-centric approach to standing limits the rule of law by restricting the groups entitled to challenge legislation. The rule of law typically implies that any person adversely affected by a law should have the right to contest it. By limiting standing to these four groups, Article 86 undermines this principle.

Consider the scenario of an individual being arrested under a particular law. According to Article 86, that person lacks the standing to contest the constitutionality of the law, even though their freedom may be at risk. Similarly, if parliament passes an unconstitutional law that threatens someone’s livelihood, Article 86 raises a critical question: why should that individual be prohibited from challenging the enforcement of a law that harms them directly?

At a minimum, individuals who are directly impacted by a law—such as those facing criminal charges or suffering economic loss—should have the right to challenge its constitutionality. Without such provisions, the judicial review process becomes less effective and fails to act as a safeguard against legislative overreach. Allowing those directly affected to seek judicial recourse is vital for ensuring that the judiciary upholds the principles of justice and accountability within the legal system.



## 2. Judicial Review of Executive Actions

While the Provisional Constitution explicitly grants courts the power of judicial review over legislation — allowing them to annul laws deemed unconstitutional — the authority to review executive conduct is both limited in some respects and overly broad in others. The only provision empowering courts to assess executive actions is Article 109(2)(d), which states, “[a]ny individual or group, or the government may submit a reference application directly to the Constitutional Court on matters concerning the public interest.” While this clause allows individuals and groups, including civil society, to challenge executive actions in court, conditioning judicial review of executive actions on the vague criterion of “matters concerning the public interest” is problematic under rule of law principles.

On one hand, permitting public challenges to executive actions based on this criterion infringes on the executive’s prerogative to set public policy, especially in areas where no specific laws exist. In a federalist system, the proper mechanism for limiting executive power should be through the courts’ ability to annul actions that violate existing laws or constitutional provisions. If no law prohibits a particular action and the action does not violate the Constitution, the executive should have the discretion to implement such public policy until the legislature addresses the issue. Allowing executive actions to be challenged solely on the basis of public interest encroaches on the executive’s powers. If the legislature wishes to restrict executive actions, it should do so through clear legislation.

Conversely, the absence of broader provisions allowing courts to exercise judicial review over executive conduct creates a situation where the executive branch could act unlawfully without facing accountability, particularly in instances that do not raise public interest concerns. This limitation leaves individuals without recourse when the government acts improperly but outside the narrow scope of what is considered a public interest issue. Restricting judicial review in this way allows the executive branch to operate beyond legal constraints in circumstances that may not be deemed of public interest, undermining accountability and potentially allowing harmful government actions to go unchecked.

Furthermore, requiring the Constitutional Court to hear all public interest cases—presumably as the court of first instance—risks overwhelming the court and distracting it from its core constitutional duties. A more effective approach would be to allow lower courts to initially handle cases of judicial oversight, with opportunities for appeals to higher courts. This would enable the Constitutional Court to maintain its focus on critical constitutional issues, exercising discretion and hearing cases only after they have been processed through the appeals system. This tiered approach would prevent the court from becoming overburdened, ensuring it can concentrate on upholding the most important constitutional matters.

## 8. Independence of the Judiciary

Judicial independence can be understood in two key dimensions: individual independence and collective independence. Individual independence refers to the autonomy of each judge, ensuring that they can make decisions free from external pressures, allowing them to rule fairly and impartially. On the other hand, collective independence emphasizes the judiciary as an institution, ensuring that the judiciary as a whole operates without interference from other branches of government or external forces.

As important as judicial independence is, it must be balanced with accountability. Many legal scholars caution against placing judicial independence and accountability in the hands of political branches, fearing that such oversight could lead to overreach and compromise judicial independence. While self-regulation, as seen in systems like the US and UK, relies on a strong culture of judicial independence—which Somalia currently lacks—structural features to ensure both independence and accountability should remain apolitical. The Provisional Constitution strikes a noteworthy balance, providing for both judicial independence and accountability through the establishment of the Judicial Service Commission (JSC), which is designed to safeguard the integrity of the judiciary without compromising its independence.

The creation of a JSC as an independent body has proven effective in promoting judicial independence, particularly in developing countries. South Africa, for instance, established its Judicial Service Commission in 1994, granting it the authority to select and appoint judicial candidates. To enhance the effectiveness of the commission, South Africa convened international legal scholars in Cape Town to study appointment and discipline processes in various countries.<sup>33</sup> This collaboration produced the Cape Town Principles of Independent Commissions,<sup>34</sup> which advocate for commissions that operate independently from government institutions, with proper resources and a well-rounded composition.

The Cape Town Principles highlight the importance of diversity within the commission, ensuring the inclusion of lay members to prevent undue political influence. Furthermore, the commission should adopt clear criteria for selecting candidates based on evidence provided by the candidates and external sources. A secretariat and support staff should assist in vetting candidates, organizing interviews, and maintaining records. A professional vetting process enhances transparency and public trust. Public candidate interviews can further strengthen public confidence in the judiciary. The commission should also establish a clear deliberation process, outlining meeting locations, quorum requirements, and voting mechanisms. After interviews and discussions, it should ideally select one candidate for each judicial vacancy, who is then appointed by the relevant authority. A commission that is both diverse and independent is more likely to gain public support for its judicial appointments.

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33. South Africa brought together scholars from South Africa, Kenya, Canada, Malaysia, Nigeria, and the UK to examine the process by which judges are appointed in their countries. The project was supported by the Birmingham Center for Rule of Law of the British Institute of International and Comparative Law. The conference concluded with the Cape Town Principles of Independent Commissions in the selection and appointment of judges in British Commonwealth.

34. [https://constitutionnet.org/sites/default/files/cape\\_town\\_principles\\_-\\_february\\_2016.pdf](https://constitutionnet.org/sites/default/files/cape_town_principles_-_february_2016.pdf)

## 8.1 Independence of Individual Judges

From the perspective of an individual judge, judicial independence is fundamentally about making impartial decisions without fear of government retribution or pressures from the disputing parties. An independent judge must also be able to operate free from executive interference or financial concerns that could compromise objectivity and fairness.

To protect this independence, it is critical that the terms of judicial appointment, tenure, and compensation are clearly defined. Judges should be appropriately compensated and protected from litigants, defendants, and government officers. Judges may serve until a designated retirement age, for a set number of years, or for life, depending on the legal framework. Moreover, a strong judicial ethos is essential to ensure that financial considerations do not entangle or influence judges, thus preserving their ability to remain impartial and uphold justice with integrity.

## 8.2 Independence of the Judicial System

In stark contrast to the failures of Somalia's political elite, the framers of the Provisional Constitution positioned an independent judiciary as a central pillar of the federal government. They identified judicial independence as one of the "Founding Principles" of the Constitution. Article 3 explicitly promotes "the separation of powers between the legislature, executive, and an independent judiciary." The term "independent" is universally understood to signify a judiciary free from external interference, particularly from the political branches. Reinforcing this, Article 106 declares that "[t]he judiciary is independent of the legislative and executive branches of government whilst fulfilling its judicial functions."

The Constitution further guarantees that "[e]very person has the right to a fair public hearing by an independent and impartial court" (Article 34). To ensure judicial independence, Article 106 stipulates that "[m]embers of the judiciary shall be subject only to the law" and protects judges by stating that "[n]o civil or criminal proceedings shall be instituted against a judge in respect of the exercising of any judicial function."

### 1. The Judicial Service Commission

Short of physical threats to judges or their families, the powers to appoint, discipline, compensate, and determine work conditions can greatly influence judicial independence. Article 109A of the Provisional Constitution grants the JSC the authority to "[a]ppoint, discipline and transfer any member of the judiciary at the Federal level;" to "[d]ecide on remuneration and pensions;" and to "[d]ecide on other work matters of the judiciary." The JSC is thus the entity tasked with upholding both the independence and accountability of Somalia's federal judiciary.

Beyond the powers outlined in Article 109A, Article 106 further protects judges by requiring the JSC's consent for searches of their homes or persons. Article 111A also mandates that the JSC be “independent, neutral, [and] non-partisan” to ensure judicial independence. The commission's independence is vital to safeguarding the judiciary it is intended to protect. The composition of the JSC, as described in Article 109A, includes nine members: the Chief Judge of the Constitutional Court, the Chief Judge of the High Court, the Attorney General, the Chair of the Human Rights Commission, two members from the Somali Bar, and three from civil society. This diverse membership should provide strong protection for the judiciary. However, the requirement that the Chief Judge of the Constitutional Court be a member means that the JSC cannot be fully established until the Constitutional Court itself is in place, further delaying the judiciary's development.

Notably, the JSC shares its name with South Africa's Judicial Service Commission, established in 1994 for similar purposes. This parallel underscores the influence of international legal experts in drafting Somalia's Provisional Constitution, reflecting the adoption of a constitutional feature that has become a norm in many developing countries. By following this established model (see above for details of South Africa's model), Somalia avoids the need to “reinvent the wheel” in setting up an independent judiciary. However, the political elite's failure to establish the JSC has left the judiciary and the country in a vulnerable position, hindering the full realization of judicial independence.

## 2. The Constitutional Court

Article 109B of the Provisional Constitution establishes the Constitutional Court, which “is composed of five (5) Judges including the Chief Judge and the Deputy Chief Judge.” These judges elect the Chief Judge from among themselves. The Constitutional Court holds the critical authority to interpret the Constitution and has the power to “declare the legislation invalid from the time of enactment, or from the time of the judgment, or, to enable appropriate action pending invalidity, from a date specified in the future” (Article 109C). Additionally, the Court plays a pivotal role in determining the legal grounds for impeachment proceedings against the President before any vote by the two Houses of Parliament. Therefore, the Constitutional Court is meant to have a significant influence on how power is exercised in Mogadishu. Its absence negated the Court's crucial function of judicial review and has left a dangerous vacuum that is too often filled by the arbitrary decisions and actions by the federal and Member State governments.

The JSC, empowered under Article 109B to nominate judges for the Constitutional Court, requires approval from the Federal Parliament before the President can formally appoint the judges. According to Article 90, the President is granted the authority to appoint the chairman of the Court.<sup>35</sup>

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35. Article 90's granting of the power to appoint the chairman of the constitutional court to the President upon recommendation by JSC appears to be inconsistent with Article 109B, which allows the five judges of the constitutional court to elect the Chief Judge of the Court. This conflict could be reconciled if the JSC uses the result of the election of the judges of the Constitutional Court as the recommendation to the President to appoint the Chief Judge. The use of the term “Chairman” in Article 90 and Chief Judge elsewhere merely shows some hastiness in the drafting.

However, the establishment of the Constitutional Court depends on the prior formation of the JSC, which itself requires the Chief Judge of the Constitutional Court as a member.

This creates a paradox: the JSC cannot be established without the Constitutional Court, but the Constitutional Court cannot be formed without the JSC. Despite some attempts, the Federal Parliament's failure to set up either entity within the timeframe outlined in Article 35 has left Somalia in a deadlock, which can only be broken through political negotiation and resolve. More than a decade after the establishment of the first federal government, neither the JSC nor the Constitutional Court has been created, leaving the judiciary effectively under the co

## 9. The Current State of the Judiciary and Proposed Changes

The court structures in the five federal member states of Somalia (excluding Somaliland) currently follow a traditional model consisting of trial courts (courts of first instance),<sup>36</sup> appellate courts, and a supreme court, with each state maintaining its own judicial system. While trial and appellate courts operate in the Benadir region, Mogadishu itself lacks a dedicated supreme court. At the federal level, there is a Supreme Court in Mogadishu; however, no federal courts currently operate within the federal member states or Mogadishu.<sup>37</sup>

In a typical federal system, federal member states would have their own court systems alongside a federal court system serving the entire nation, each consisting of trial courts, appellate courts, and a supreme court. While Somalia's federal member states have established their own courts, their capacity is often limited and insufficient to meet the population's needs. Furthermore, there are no federal trial or appellate courts in the member states or the Benadir region. If Somalia adheres to a classic federal court structure that allows for parallel state and federal court systems, reconstructing Somalia's judicial system under its new federal framework would require a significant expansion of courthouses across various cities and towns. Somalia's limited financial and human resources make such undertaking a monumental, if not impossible, task.

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36. Trial court, district court, and a court of first instance are often interchangeable terms. However, Somalia used to have both district and regional courts as courts of first instances. The jurisdiction of these two courts of first instance is ordinarily based on the subject matter (severity of the crimes or the amount of money in a civil dispute), where the district court hears less serious crimes and smaller disputes. Puntland combined the district and regional courts of first instance and maintains one type of court of first instance which hears all cases at trial level. Other member states appear to maintain district and regional courts of first instance.

37. Whether the absence of a supreme court for the Benadir region is a relic of pre-federalism or by design is unclear. In addition to the Benadir region not having its supreme court, the region does not have its legislative branch. The executive branch is directly controlled by the president of the federal government. Thus, the people of the Benadir region do not have their government. Instead, the region has a ruler in the form of a mayor appointed by the president. The mayor flexes his powers as he sees fit without any other government entity (other than the president) having any say in what he does.

One potential solution, outlined in the 2018 Jowhar political agreement<sup>38</sup> and subsequent modifications, is an integrated court system. Rather than maintaining separate trial courts for state and federal matters, this agreement proposes a unified trial court framework shared by both levels of government. Additionally, state supreme courts would be granted the authority to handle federal appeals, allowing state courts of first instance and supreme courts to exercise federal jurisdiction. This approach aims to streamline the judicial process, reduce costs, maximize the use of judicial talent, and enhance the efficiency of Somalia's legal system. Judges in this system would handle cases involving both state and federal laws, similar to classic federal systems where overlapping evidence is adjudicated. However, this integrated model departs from traditional systems by granting original jurisdiction over both state and federal cases to state trial courts, while assigning federal appellate jurisdiction to state supreme courts. This unified approach would enable courts to address a broader range of legal issues concurrently.

Another possible solution is the establishment of circuit courts, wherein judges travel to various towns or cities to hear cases. These circuit courts could have both original and appellate jurisdiction, effectively addressing the challenges posed by dispersed populations outside major urban centers. In this model, the same judges could serve as both trial and appellate judges, with the stipulation that a judge who has heard a case at the trial level cannot participate in its appeal.

Combining the circuit model with an integrated court system could significantly address Somalia's fiscal and human resource challenges while creating a judiciary that effectively meets public needs.<sup>39</sup> By beginning with a few integrated district courts in each member state, supplemented by a circuit system for appeals, resources could be optimized. Trial and supreme court judges could also engage in the appellate process, as long as they did not oversee the same case at both levels. This hybrid approach would enhance accessibility to justice while making the best use of limited resources.

Implementing such a complex court structure will require strong leadership and capable jurists. The addition of a circuit feature within the integrated court system would reduce the number of judges and facilities required while enhancing the accessibility of justice for Somalia's citizens. This approach would create a more financially efficient system that remains responsive to the needs of communities across the country, fostering trust in the judicial process and strengthening the rule of law.

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38. The absence of Somaliland and Puntland from the agreement calls into question whether they will acquiesce with a key agreement made in their absence. Further, the federal government took complete control of the state judiciaries under this agreement albeit unwittingly because while the agreement integrates the state and federal courts, it did not integrate the JSC, making the federal JSC in full control of the integrated court system. This was likely an oversight.

39. Of course, security is a complicating factor in moving around the country. However, the security resources necessary to move judges and their assistants around the country pales in comparison to building and manning many court systems.



Most judicial stakeholders in Somalia recognize the complexities associated with implementing an integrated court system. One recurring concern is whether other components of the justice system—such as prosecutors, police, investigative agencies, and prisons—would also be integrated into this framework. If these entities are expected to function as part of a unified system, questions arise about how they will be managed and whether a centralized authority would oversee them, potentially threatening the autonomy of state justice systems.

This leads to broader questions about the balance of power within the federal structure. Stakeholders are understandably concerned about the potential for federal overreach, a common issue in federal systems. If the federal government assumes control over all organs of justice, this could undermine the principles of federalism, which are designed to distribute power and allow for local governance to respond to regional needs. Centralizing the justice system also risks diluting the autonomy of states and weakening their ability to administer justice in line with local values and circumstances.

Moreover, integrating justice organs could reduce accountability. In a federal system, local authorities are typically better equipped to address the specific challenges they face, as they have a deeper understanding of their communities. A centralized approach could hinder responsiveness, creating a disconnect between justice administration and community needs.

Thus, discussions about an integrated court system must be tied to broader issues of governance, accountability, and federalism's role in fostering justice. Stakeholders are calling for consultations to clarify what integration would entail, emphasizing the need for solutions that address related issues, such as finalizing the constitution's power-sharing chapters in a way that builds consensus among member states.

There is a strong call for transparency about how this integration would function in practice, along with assurances that the principles of local governance and accountability will not be compromised. While an integrated court system offers potential benefits in terms of efficiency and coherence, maintaining a balance that respects the autonomy and unique characteristics of state-level justice systems is essential. This balance is crucial to ensuring that the integrated approach genuinely serves the needs of all communities while upholding the foundational principles of federalism.

## 10. Integrated Courts and the Provisional Constitution

Somalia's domestic legal system has yet to be fully transformed to align with the newly adopted federalism, largely due to a lack of political will and insufficient financial and human resources, including technical and legal expertise. The current system struggles to adequately meet society's judicial needs. However, the proposed integrated court system offers a promising path forward for Somalia to establish a functioning judiciary within its new federal framework. If the necessary mandates and political commitment can be mobilized to implement this integrated structure, it could serve as a solid foundation for a society grounded in the rule of law and human rights. By reinforcing respect for the rule of law, integrated courts could play a pivotal role in fostering sustainable peace and facilitating Somalia's full transition to democracy.

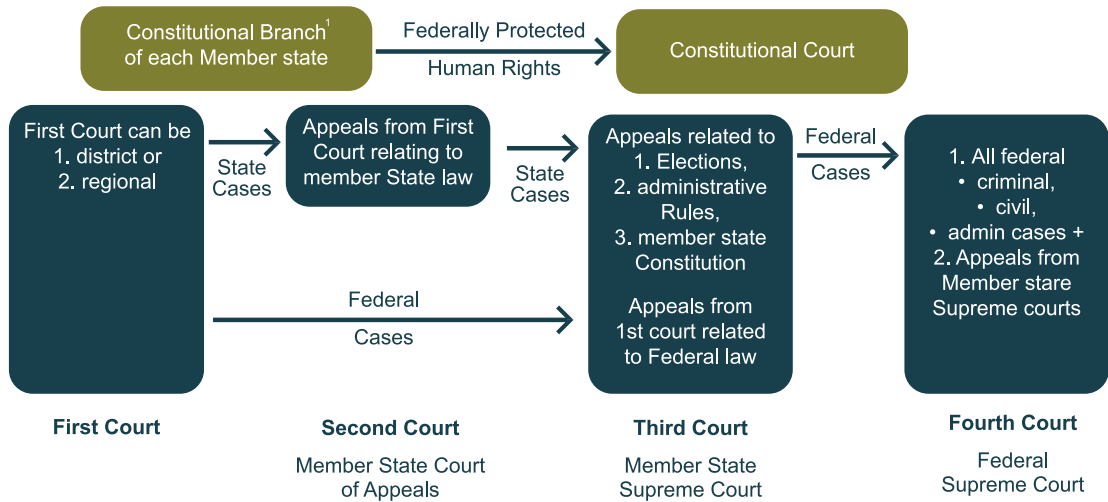
It is important to recognize that the Provisional Constitution provides limited guidance concerning member state courts, simply stating that “[t]he highest court at the Federal Member State level shall be the Federal Member State High Court,” without specifying its role in handling federal cases. This language suggests an expectation of separate court systems for member states and the federal government. Furthermore, the Constitution does not clarify who is responsible for establishing these member state courts. Despite these ambiguities, efforts are ongoing to establish an integrated court system in which a single court would handle both federal and state cases at the trial level, with member state supreme courts having federal appellate jurisdiction. In this model, the same judges at the trial and state supreme courts would adjudicate both federal and member state legal issues. Conceptually, this arrangement is no more complex than managing federal and state matters in separate courts.

The Somali Provisional Constitution aspires to create an independent judiciary, as outlined in Articles 3, 105, 106, and 108, but its structure is left to be defined by a yet-to-be-formed nine-member JSC, as specified in Articles 109A and 111A. The proposed integrated court structure stems from the 2018 Jowhar Agreement, which envisions a system where federal and member state courts share facilities and judges at the trial level. Under this plan, each state would maintain its own appellate courts, a supreme court with federal appellate jurisdiction, and a branch of the Constitutional Court, whose decisions on constitutional matters would be final, except in cases involving federally created human rights. The federal government would have its supreme and constitutional courts based in Mogadishu, but with state Supreme Courts assuming the function of federal court of appeals.



The structure of the court system envisioned by the Jowhar Agreement can be summarized as shown in the scheme below:

### 2018 Jowhar Political Agreement on Courts



1. Constitutional branch at DXF is the highest court for most constitutional issues, raising the specter of inconsistent outcomes.

The agreement also establishes a nine-member JSC with the same membership as outlined in the Provisional Constitution. However, since the integration of member state and federal courts was not originally envisioned, the JSC’s composition remains limited to federal officials. As a result, the JSC functions as a federal body within the framework of an integrated court system.

Allowing a federal JSC to oversee integrated courts poses a risk to the independent judiciary of member states as envisioned in the Provisional Constitution. Additionally, the existence of multiple branches of the Constitutional Court with final authority could lead to inconsistent rulings and confusion, which could ultimately undermine the rule of law. Thus, both the composition of the commission and the absence of a discretionary appeal process to the Constitutional Court for decisions made by its member state branches present significant concerns in the Jowhar Agreement.

The Council of Ministers later modified the Jowhar Agreement by retaining the integrated nature of the courts but removing the branches of the Constitutional Court in the member states. While this adjustment makes sense, as it eliminates the potential for inconsistencies between constitutional court rulings, the unchanged composition of the JSC still raises critical questions about the integrity of the judicial framework and the balance of power between federal and state authorities.

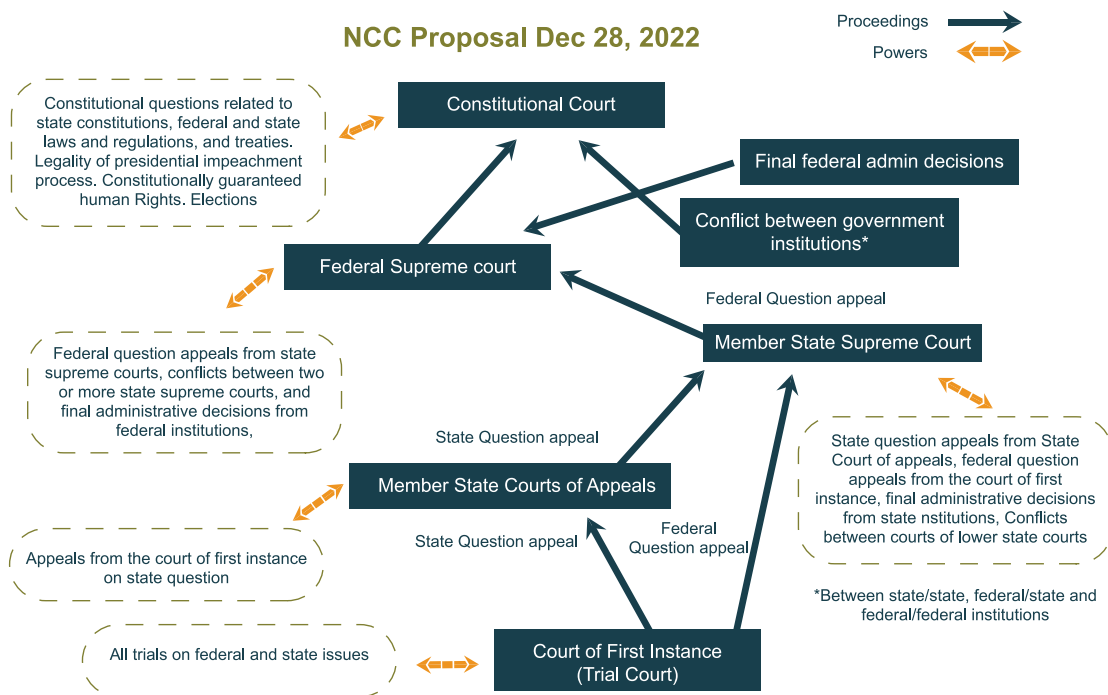
The NCC further addressed the issue of JSC composition by establishing an integrated commission that includes representatives from both federal and federal member state governments.

The final NCC agreement maintains the integrated court system, omits the branches of the Constitutional Court at the member state level, and creates a 24-member JSC comprising officials from federal member states, the federal government, and the city of Mogadishu. This revision enhances representation within the JSC and aligns more closely with the Provisional Constitution’s intent to ensure judicial independence at all levels of government.

It is important to note that Somalia’s adoption of the JSC model was originally intended for a federal court system governed by a single legal framework—federal law. The integration of courts of first instance introduces substantial challenges related to federalism. Using the JSC to oversee a combined state-federal court system will require extensive cooperation between the member states and the federal government, extending well beyond agreement on the integration of courts.

Judges hold significant power, making their appointments a key point of influence for both state and federal leaders. Striking a balance between state and federal interests, while selecting legal professionals proficient in the complexities of federal-state dynamics, will be a considerable challenge during the appointment process. This complexity underscores the need for a thoughtful and collaborative approach to ensure the judiciary operates effectively within the integrated framework.

The proposed court structure from the NCC, including associated powers and procedural steps, is outlined below. Solid arrows indicate the steps for appeals, while dotted double-sided arrows represent the distribution of powers within the system.



Most of the powers and procedural processes proposed for the new court system are logical; however, granting the Federal Supreme and Constitutional Courts original jurisdiction over routine proceedings could pose significant challenges. Such cases, which are often fact-driven and detail-oriented, are better suited for trial courts, which are designed to handle the complexities of initial litigation.

Moreover, if these higher courts are responsible for managing disputes arising from federal agencies or ministries decisions, they could become overwhelmed by the volume of cases, impairing their ability to address issues of greater national importance. To prevent this, original jurisdiction for matters involving agency decisions and conflicts between government institutions should be vested in the trial courts. This would allow the Supreme Court and Constitutional Court to focus on matters of broader national significance, rather than being consumed by administrative conflicts or intergovernmental disputes.

The court structure proposed by the NCC provides a solid foundation for re-establishing Somalia's judiciary. However, it is important to acknowledge that Puntland and Somaliland did not participate in the negotiations leading to the original integration of court systems in the 2018 Jowhar Agreement, nor in the subsequent NCC discussions that addressed key deficiencies in that agreement and the modifications made by the Council of Ministers.

Although Mogadishu lacked representation in the original Jowhar Agreement, the city's Mayor did participate in the NCC negotiations. To ensure the success of the integrated court system, a comprehensive political negotiation that includes all member states, Mogadishu, and the federal government is essential. Without the support and consensus of all stakeholders, the system is unlikely to function effectively. Building consensus is critical to ensuring the judiciary's integrity and functionality in the future.

**Table 1: Composition of the JSC in the provisional Constitution, and in the 2018 Jowhar agreement and its progeny.**

Source	Provisional Constitution** (9 members)	2018 Jowhar Agreement (9 members)	2021 Council of Ministers (9 members)	2022 NCC (24 members)
<b>JSC Membership</b>				
Chief Judge of the Federal Supreme Court	✓	✓ Chair	✓	✓ Chair
Chief Judge of the Constitutional Court	✓	✓	✓	✓
Federal Attorney General	✓	✓	✓	✓
Chief Judges of Member State Supreme Courts	✗	✗	✗	✓
State Attorney Generals	✗	✗	✗	✓
Chief Judge of Mogadishu Court	✗	✗	✗	✓
Mogadishu Attorney General	✗	✗	✗	✓
Members of Human Rights Commission	✓ Chair of Human Rights Commission	✓	✓	✓ Members of Human Rights Commission selected by Justice Minister and approved by Council of Ministers
Experienced lawyers from the Bar	✓ 2 members	✓	✓	✓ 3 members
Three legal experts	✗	✗	✗	✓
Three people of high reputation within Somali society	✓	✓	✓	✗

✓ Yes ✗ No

\*\* Under the Provisional Constitution, the JSC elects its chair.

# Except for appointing the Chief Judge of the Federal Supreme Court as the chair of the commission, the 2018 Jowhar agreement doesn't modify the membership of the commission in the Provisional Constitution. The 2021 Council of Ministers modification of the Jowhar Agreement kept the commission membership as provided by the Provisional Constitution.

A significant conundrum that requires a political solution lies in the interdependent creation of the JSC and the Constitutional Court, as outlined in the Provisional Constitution. According to the Constitution, the JSC is tasked with nominating and evaluating judges for the Constitutional Court, while the Constitutional Court elects its chief judge—who is also a member of the JSC. This interdependence creates a situation where neither the JSC nor the Constitutional Court can be formed without the other. As a result, a political resolution is necessary to break this deadlock, allowing for the effective establishment of both institutions and ensuring that the judiciary can function as intended.

## 11. Creating an Integrated Court System

Even if the political branches establish a solid constitutional foundation for an integrated court system, the actual creation of these courts,<sup>40</sup> alongside providing basic legal training to reform the judicial system and foster a culture of rule of law and respect for human rights, will take years to achieve. The integration of federal and member state courts, coupled with the introduction of a circuit feature, is likely the most efficient judicial model Somalia could adopt. However, this complex undertaking will require significant political backing, legal expertise, and financial investments.

Somalia is not the first nation to face the challenge of rebuilding its justice institutions from scratch. The United Nations has produced numerous guides for situations similar to Somalia's judicial challenges. This report will highlight well-documented strategies for reestablishing non-operational justice systems, emphasizing that the primary goal of any reconstruction effort should be to firmly establish the rule of law.

To begin the process of rebuilding the justice sector, an assessment of the current system is crucial. This involves gathering data from the Benadir region and member states, interviewing key justice personnel, observing trials and court proceedings, and visiting other justice-related institutions. The research conducted by the Heritage Institute for Policy Studies between 2020 and 2021 offers a valuable foundation for this necessary assessment.

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40. Regarding the eventual creation of an integrated court system in the member states, it is important to acknowledge that the states are not in similar situations. While Puntland (and Somaliland) have established institutions with some judicial capacity, other member states lag significantly behind in this regard. Consequently, the creation of courts will be necessary in most states, whereas Puntland (and Somaliland) will require differentiated support tailored to their more advanced systems. Indeed, Puntland could serve as a model for how the court system should be established across Somalia. By building on its existing judicial framework, Puntland could play a leading role in recreating court systems elsewhere in the country. This approach would allow Puntland's established institutions to serve as a launching point, helping to guide the development of the judiciary in states that are currently less equipped, while sharing best practices and lessons learned from its own experience.

## 11.1 Assessing the State of the Judiciary

The first step in planning the rebuilding of Somalia's justice sector is to thoroughly understand its current operations and assess the specific weaknesses and deficiencies facing the system. Some of the prevailing injustices may be deeply rooted in historical contexts, making it essential for knowledgeable Somalis to collaborate and evaluate the status of the justice sector in each member state.

This assessment should examine the functionality of key institutions—police, prosecutors, courts, and prisons—looking for evidence of shortcomings and inefficiencies. A thorough evaluation is critical to understanding the strengths and weaknesses of the current justice sector, ensuring that reform efforts are based on a solid comprehension of existing practices and challenges. With the anticipated creation of the Constitutional Court and the JSC for appointing judges, the assessment should also focus on the factors influencing judicial appointments and any dysfunction within court administrations. Additionally, conducting limited surveys in key cities to gauge public perception of the justice system's credibility would provide valuable insights.

Key issues for the assessment team to explore include:

- **Judicial Functionality:** Assessing the functioning or dysfunctionality of the judiciary and identifying any credible staff members who could support reforms.
- **Police Practices:** Examining the extent to which the police violate individual liberties and human rights, and evaluating how judges and prosecutors can address these violations.
- **Prison Conditions:** Reviewing the state of prisons, including issues of overcrowding, poor sanitation, abuse of power, and how long individuals are held without charge or trial, along with identifying ways the judiciary can address these problems.
- **Civil Society Oversight:** Identifying local civil society organizations that monitor justice institutions and exploring how they can be supported to enhance transparency and accountability.
- **Corruption and Organized Crime:** Investigating the prevalence of corruption and organized crime, especially in areas like human trafficking, drug smuggling, and other contraband activities.

The assessment should pinpoint the necessary steps for reform and provide authorities with a comprehensive analysis of the justice sector, highlighting issues related to fair trial standards as recognized internationally. Furthermore, the assessment team could organize workshops for judges, prosecutors, and police on relevant laws, fair trial rights, and the rule of law. Bringing representatives from these core institutions together will foster mutual understanding of each other's roles in the administration of justice and encourage collaboration toward a more effective and just system.

## 11.2 Reforming Key Institutions of the Justice Sector

To reform Somalia's justice sector, representatives from the member states, Mogadishu, and the federal government must first find a political solution to address the system's failings. The immediate priority is to disentangle the judiciary from the executive branch and recognize it as an independent branch of government. Other essential political steps include agreeing on a court structure, establishing the JSC, forming the Constitutional Court, and amending the Constitution where necessary. These amendments should address the unresolved issues of power sharing, the role of the JSC, and the court structure. Once a constitutional foundation is laid for the court structure, efforts to reform the judiciary should begin in parallel with addressing these larger structural concerns.

While many institutions contribute to the justice system and the rule of law, the investigative (police and prosecutors), prosecutorial (prosecutors), adjudicatory branch (the courts), and punishment (prisons)<sup>41</sup> branches play a central role in a functioning justice sector. Any team tasked with rebuilding Somalia's justice sector should initially focus on the adjudicatory branch (i.e., the courts), as establishing the rule of law begins with courts that can fairly and competently adjudicate disputes. The prosecutorial branch is also deeply connected to the courts, and the performance of its duties is inseparably tied to the functionality of the court system. Reforming these two branches together will create a stronger foundation for broader justice sector reform, ensuring that the rule of law can take root effectively.

### 1. The Courts

Several key personnel and institutions are crucial to the effective functioning of Somalia's courts, including judges, lawyers, prosecutors, investigators, and court administrators. Therefore, any assessment and reform efforts should focus on:

- Improving court management and administration to streamline operations, manage cases, and enhance efficiency.
- Assisting in the recruitment of judges, prosecutors, and court staff to fill critical gaps in the judicial workforce.
- Providing comprehensive training for all judicial personnel to ensure competency and adherence to the rule of law.
- Establishing the Judicial Service Commission to uphold judicial integrity and accountability.
- Implementing effective systems for record creation and maintenance to ensure transparency and proper documentation of legal proceedings.
- Educating the public about governance and the rule of law to foster trust in the judicial system and encourage civic participation.

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41. Of course, prisons come to play only in criminal prosecution. In a rule of law assessment, if the criminal justice system is working well, the civil litigation responsibilities of the courts will likely be working well.



During the assessment phase, the reform team should observe trials and pretrial procedures, paying special attention to adherence to criminal procedures, including limits on pretrial detention and ensuring access to legal counsel. They should evaluate the investigatory quality of trials and identify any factors that hinder compliance with pretrial processes.

It is essential to recognize external factors impacting the Justice Sector, such as interference or intimidation from outside forces, and the pervasive corruption, bribery, and extortion that undermine the rule of law. The assessment should include prosecutors, defense attorneys, court clerks, notaries, bailiffs, and other key players in justice administration.

Addressing threats and violence against individuals working in the justice sector must be prioritized. Those in the justice sector could be instrumental in creating mechanisms to counter these threats, ensuring the safety of personnel and the system's integrity.

The reform team may initially focus on the criminal justice sector, as Somalia's need for law and order is critical. Basic security is consistently challenged, and public protection is a pressing necessity without further abuse of governmental authority. Police intimidation, the arbitrary use of power, and bribery are rampant. It is not uncommon for officers to use their weapons to intimidate civilians or resolve personal disputes, and the arbitrary demand for bribes is pervasive.

The team should closely examine arrest and detention procedures, the treatment of prisoners, access to legal counsel, and the rights of detainees, including access to medical care and family members. Ensuring compliance with fair trial standards, victim participation in legal proceedings should be priorities. Additionally, the legal framework governing demonstrations, freedom of the press, and the operation of non-governmental organizations should be assessed to ensure these rights are protected. Accountability for government officials, including the police and military, for human rights violations should also be a focus.

A particular concern is violence against women and girls,<sup>42</sup> which is widespread in lawless societies like Somalia. Legislators have struggled to enact effective laws against rape—the oldest and the most common sexual violence—often getting bogged down by debates over consent, which some fear could inadvertently legalize adultery. This misplaced focus on how criminalizing rape could decriminalize adultery is a grave disservice to women and girls. If the goal is to protect women and girls, effective laws against rape must be enacted and enforced. Conditioning the criminalization of rape on criminalizing adultery ignores the complex social dynamics of these acts. The reform team should assess and reform laws surrounding the investigation and prosecution of sexual violence, ensuring they effectively protect women and girls from harm.

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42. Although boys and men can be sexually assaulted, it would make sense that the initial reform limits itself to the most prevalent sex crimes in Somalia—rape and other sexual violence against girls and women. Policymakers should focus on low hanging fruits lest the whole process gets derailed.



Moreover, the reform team will likely find that most Somalis' interactions with the justice system are limited to encounters with the armed forces, which often leads to a disconnect from the judiciary. Public perception may view the courts as secondary governance institutions. Workshops aimed at educating the public about the judiciary's role and fostering trust in the courts are crucial. Bringing the courts closer to the people by resolving disputes swiftly, fairly, and affordably will help shift these perceptions and strengthen the rule of law in Somalia.

## **2. The Judges**

To establish an independent judiciary, the JSC must begin by identifying the most qualified candidates for judgeships, starting with the current pool of judges in the country. The SJC's primary task should be to select individuals who can operate impartially and free from governmental retribution or influence from the parties involved in disputes.

The SJC must create an environment that fosters judicial independence, ensuring judges are protected from executive interference, political pressure, and any entanglements that could compromise their impartiality. Safeguarding judges from financial pressures is equally crucial to prevent any undue influence on their decision making.

Clear guidelines regarding judicial appointments, tenure, and compensation should be established to promote transparency, judicial independence, and stability within the judiciary. The SJC should also define judicial norms and ethical standards, ensuring that judges adhere to the highest levels of integrity. It is important to outline consequences for violations of these standards to maintain the credibility of the judiciary.

Furthermore, the SJC should implement independent oversight and disciplinary mechanisms to address breaches of ethical standards. This system will reinforce the integrity of the judiciary and ensure that judges remain accountable while safeguarding their independence from external pressures. By establishing these safeguards, the SJC can lay the groundwork for a judiciary that is both effective and respected in its role as a cornerstone of the rule of law in Somalia.

## **3. Court Administrators**

In light of the proposed integrated court structures, a reform team must prioritize the establishment of a cohesive trial court system, alongside member state appellate courts and state supreme courts. It is crucial that the courts in Mogadishu are structured similarly to those in the member states to ensure consistency and fairness across the judiciary. Implementing this integrated court system will require amendments to both federal and member state constitutions to align with the new framework.

Each court, including trial courts, will be presided over by one or more judges. Additionally, effective legal administrators, commonly known as court clerks, will play a pivotal role in the successful operation of the courts. These administrators will be responsible for managing case flow, maintaining judicial records, liaising with external stakeholders, overseeing resources and budgets, handling human resources, and ensuring proper education and training. They will also manage information technology systems, which are integral to modern court operations.

Recordkeeping will be central to the functioning of any court, requiring specific rules and technologies to maintain the integrity and confidentiality of records. Clear guidelines on accountability, access rights, retention, and disposition of records must be firmly established to ensure transparency and efficiency. Court administrators, typically skilled managers with legal training, will need to navigate the complexities of legal proceedings while ensuring the smooth operation of the courts.

Given the wide-ranging duties of court administrators and the essential role they play in court operations, a substantial budget will be necessary to ensure the functionality of the courts. This will cover not only salaries but also the infrastructure needed for case management, recordkeeping, and other critical functions. To ensure success, engaging seasoned court administrators to develop tailored plans for each courthouse will be essential in the recreation of Somalia's court system. This strategic approach will support the reform team in building an effective, sustainable judicial infrastructure capable of upholding the rule of law.

#### **4. Prosecutors**

Prosecutors play a pivotal role in upholding the rule of law, and the UN Eighth Congress on the Prevention of Crime and the Treatment of Offenders underscores the importance of selecting prosecutors who exhibit both integrity and competence.<sup>43</sup> These individuals must be supported by adequate training and qualifications, and safeguards must be in place to prevent appointments influenced by bias or prejudice.

In Somalia, issues like sexism, clannism, and corruption often fuel partiality within the justice system. Clannism, in particular, can marginalize minorities, making the UN's call for integrity in prosecutorial appointments especially relevant. By prioritizing the selection of individuals of integrity, Somalia can work toward combating discrimination, particularly against vulnerable groups.

Beyond personal integrity, prosecutors must receive comprehensive education and training. They should be well-versed in their ethical responsibilities, as well as in the constitutional and statutory protections provided to both suspects and victims. Prosecutors must also have a strong understanding of human rights and fundamental freedoms as recognized by both national and international law.

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43. <https://www.ojp.gov/pdffiles1/Digitization/143341NCJRS.pdf>, last visited June 14, 2024.

If an integrated court system is adopted at the trial level in Somalia, a critical question arises regarding whether prosecutors should also be integrated into this new framework. This issue was raised by at least one justice stakeholder during discussions about the proposed system. Since all criminal cases will be presented in a unified court of first instance, typically by a local prosecutor, it is important to consider whether prosecutorial authority will rest with member state prosecutors or if an alternative structure is needed. Understanding the implications of such a prosecutorial framework is key to ensuring that the system enforces the law effectively while respecting the principles of federalism and the coexistence of two levels of governance.

Several countries, including Canada, Australia, Switzerland, India, and Malaysia, allow for dual jurisdiction within a single trial court, offering potential models for Somalia. India and Malaysia, in particular, feature integrated court systems, with Malaysia uniquely having a unified prosecutorial structure that operates at both the member state and national levels. However, Malaysia's monarchy-based federalism diverges from the traditional principles of federalism on which Somalia's system is likely to be modeled.

In the absence of comprehensive consultation among Somalia's leadership, the country may face significant challenges in establishing a cohesive prosecutorial framework that meets the needs of both the individual member states and the federal government. A straightforward approach would be to allow member states to appoint their own prosecutors, while the federal government forms a separate team to handle federal criminal cases. This strategy could strike a balance between local and national prosecution needs, but it would require careful coordination to ensure consistency and effectiveness within the integrated court system. By taking this approach, Somalia could more easily manage the complexities of building a justice system that respects both federal and state authorities.

## 12. Ethical Duties for Justice Personnel and Trainings

Ethics are foundational to establishing and maintaining the rule of law. Across the globe, ethical responsibilities are imposed on judges, lawyers, prosecutors, investigators, police officers, and prison wardens, each of whom plays a crucial role in ensuring a fair and impartial justice system. To foster a robust justice sector, the reform team should develop specific ethical duties for each role, along with mechanisms to enforce these standards.

For example, in adversarial legal systems where lawyers lead the proceedings and judges serve as neutral arbiters, it is common for judges to be prohibited from engaging in *ex parte* communications—interactions with one party without the presence of the other—to avoid any appearance of bias. Similarly, lawyers must avoid conflicts of interest that could compromise their duty to zealously represent their clients.

Somalia can draw from numerous ethical models used around the world, both in secular and Islamic countries, adapting and tailoring them to fit the country's unique cultural and social context. Upholding ethical standards should be a key criterion for appointing and dismissing judges, prosecutors, investigators, police officers, and prison wardens. Lawyers must also adhere to stringent ethical obligations, with violations subject to consequences, including potential disbarment.

The reform team should craft clear ethical guidelines specific to each professional within the Justice Sector and ensure that these individuals receive the necessary training to uphold these standards. Establishing and enforcing ethical obligations will enhance the integrity of the judicial process, foster public trust in the system, and promote a justice sector rooted in fairness and accountability.

## **13. Strengthening the Rule of Law Through Education**

Cultivating a culture of lawfulness is crucial for establishing the rule of law and good governance in Somalia. One of the significant challenges the country faces is a widespread misunderstanding of governance. The relationship between the government and its citizens is often unclear. Beyond witnessing the ostentation of politicians, the contentious 4.5 clan-based power-sharing representation, and the visible presence of armed forces on the streets, many Somalis have a limited understanding of the roles and functions of government. This disconnect is understandable, given Somalia's history of authoritarian rule and a lack of substantive education on governance. To cultivate a culture of lawfulness, comprehensive public education that promotes lawful behavior and ensures access to fair and impartial justice is necessary.

To bridge this gap, the government must take proactive steps to enhance the public's understanding of its functions. The prevailing perception of government as synonymous with corruption fosters a culture of lawlessness. When individuals in power see their positions as avenues for personal gain, it undermines the rule of law and creates a dangerous fusion of governance and corruption. In such an environment, where there are few consequences for abuses of power, a widespread disregard for the law naturally follows.

To instill a culture of lawfulness, Somalia should prioritize education on governance and the rule of law from an early age. Beginning in elementary school, students should be taught about governance structures, the importance of legal compliance, and the role of citizens in a functioning democracy. However, these lessons must be reinforced at home, where children need to witness laws being respected and fairly enforced. If children grow up seeing power abused or feel mistreated by government institutions, the lessons learned in school are likely to fall flat.

An introductory course on government in elementary school could cover the basic structure outlined in the constitution, explaining the roles and responsibilities of both citizens and government officials. As students progress to high school, the curriculum should explore constitutional principles in greater depth, offering a platform for debating governmental structures and the roles of various branches. Discussions on individual rights, protections under the law, and criminal procedures would help illuminate the nature of government-citizen interactions, fostering a sense of empowerment and legal awareness.

At the university level, institutions should focus on producing well-trained lawyers and serving as forums for public discourse on lawfulness and governance. Professors and experienced legal practitioners should facilitate these discussions, helping to explain the legal processes and the interplay between prosecutors, defense attorneys, and other actors in the justice sector. By engaging students and the broader public in dialogue about government functions, Somalia can work toward enhancing the overall culture of lawfulness, promoting the rule of law, and strengthening public trust in the justice system.

## 14. Recommendations

### 1. Focus on completing the draft Constitution

Finalization of the draft constitution should be prioritized. This should specifically address articles related to power division between the federal and state governments, as well as the separation of powers among the three branches of government within each sovereign state. A key focus must be ensuring the judiciary's independence by fully separating it from the executive branch.

### 2. Prioritize the creation of the Judicial Service Commission (JSC)

A political solution is urgently needed to establish the Judicial Service Commission (JSC) and the Constitutional Court, recognizing the judiciary as the third branch of government, equal to the legislative and executive branches. Clear rules should be put in place for how both the JSC and the Constitutional Court may be restructured in the future, ensuring that the judiciary operates independently, free from external influence, and remains a critical pillar in the governance framework. This will help guarantee the long-term stability and autonomy of the judicial system.

### 3. Agree on a court system as initially recommended in the Jowhar Agreement of 2018 and subsequently improved by the NCC

With the adoption of an integrated court system, Somalia should amend its constitution to include representatives from the judicial systems of each member state on the JSC. Until Mogadishu's status is resolved, it should receive treatment equal to that of member states. The 24-member commission proposed by the National Consultative Council (NCC) offers a solid foundation. While some adjustments to commission membership may be made, the key members have already been identified and should not be undermined by disagreements over control.

#### **4. Resource the judiciary**

The commission should receive adequate administrative support, including the legislative creation of a secretariat role with a support staff. The secretariat would be responsible for executing the commission's mandate. Regulations should be established to define how the commission will carry out its mandate, and the commission should have a sufficient budget to administer the judiciary effectively.

#### **5. Public education on governance**

Somalia should launch a concerted effort to educate the public about governance, the role of clans, and the importance of nationhood. Universities and high schools can be a starting point, with the introduction of government courses at all educational levels—from elementary through university—focused on the Somali Constitution. These courses should not serve as government propaganda but as analytical tools to understand the Constitution and its implementation in courts.

#### **6. Role of Somali leaders in public education**

Somali leaders must take an active role in educating the public about governance, even in the face of political disagreements. By working to mold the Provisional Constitution to fulfill its original intent—establishing a federal government in Somalia—leaders can help shift the public's focus from clan-based politics toward a national identity.

#### **7. Establish constitutional forums for public discourse**

Somalia should create forums where constitutional and governance issues can be debated. The government should support universities in developing these platforms for learned Somalis to discuss governance with a focus on practical solutions rather than theoretical debates. Furthermore, universities should be encouraged to conduct anthropological research on clannism and its impact on governance and the rule of law.

#### **8. Financial and human resource planning for integrated courts**

Given Somalia's limited financial and human resources, both the federal and member state governments must develop a comprehensive financial and human resources plan for an integrated court system. A few well-functioning courthouses staffed by competent and independent jurists, and supported by adequate funding will demonstrate the government's commitment to governance. This system can be gradually expanded as needed.

#### **9. Utilize a circuit court system**

Somalia should consider using a circuit court system to further reduce the need for a large number of judges and courthouses. This approach would allow Somalia to efficiently use its limited human and financial resources while ensuring access to justice for all Somalis.



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