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ORIGINAL RESEARCH

The Challenges Posed by the Provisional Constitution of Somalia's Federal System

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ABSTRACT

The Somali federal system has been a source of both hope and frustration since its establishment in 2012. Lack of clarity around the division of powers between the central government and the federal member states and even within the federal level institutions, against this backdrop, the ongoing constitutional-making process in Somalia represents a critical opportunity to address these challenges and to strengthen the federal system. The questions of this research are what are the key features of the Constitutional making in post conflict federal system, and how do they impact power sharing and resource sharing among different levels of government and clans? The Objective of this study is to explore the conundrum of the federal system in the context of the constitutional-making process and analyze the challenges posed by the federal system in the context of the process. The research will employ a qualitative approach on both theoretical and practical analysis. For the theoretical insights a literature survey of secondary materials, including books, journals, articles and others will be used. Hopefully the findings of this research will contribute to a better understanding of the Somali federal system and its relationship to the ongoing constitutional-making process.

1.0 Introduction

This paper discusses the challenges that posed by the Federal System of Somalia's Provisional Federal Constitution in which realistically begun after the adaptation of the federal system of governance. Such challenges are a silent feature of the very constitution and assume that the constitution attempts to manage different interests between societal groups and individuals as well as federal member states by means of fair rules and neutral institutions.

1.1 Lack of transparency and absence of public participation

Comparative studies on constitution-making processes define public participation as “the public’s ability to express its views in a format people believe could influence the constitution’s substantive content.” This public participation happens in three ways: First, organized segments of society – such as civil societies, women, youth, and minority groups – are invited to represent the public voice and interest. Second, commissions and parliamentary committees directly engage the public, either formally or informally. Third, a constitutional assembly is drawn from the citizens.¹

The most important deficiencies in Somalia’s constitution-making and review processes are failures to conduct public consultation, limited consultation, and ignoring the results. In particular, the avenues of ensuring public participation in the constitution review process have not been utilized. The two oversight committees did not share educational materials or information about the process with public. Consequently, the constitution review debate has not been thrust into the national limelight. It remains a privatized and a project exercise with no public face. However, Public involvement in constitution making is increasingly considered to be essential for the legitimacy and effectiveness of the process.²

1.2 The disagreements between the Federal Government of Somalia and the Federal Member States

The Federal Government of Somalia and the federal member states clash on almost every aspect of governance. Somalia’s federal member states have taken a parallel process when drafting their constitutions. At times, they have not explicitly recognized the supremacy of the Federal Provisional Constitution (FPC) in most competency areas for **example under Article 142 of Somali Constitution** states that until such time that all the Federal Member States of Somalia are established and the adopted Federal Member State Constitutions are harmonized with the Somali Federal Constitution,

¹ Max Planck Institute Report, 2020

² Tom Ginsburg, Justin Blount & Zachary Elkins, "The Citizen as Founder: Public Participation in Constitutional Approval," 81 Temple Law Review 361 (2008). https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2451&context=journal_articles. Accessed 28/7/2023

The Federal Member States existing before the adoption of this Provisional Constitution by a National Constituent Assembly shall retain and exercise powers endowed by their own State Constitution. In practice, the federal member states compete with the central government in the four areas whereby the Federal Government had full power under the constitution namely Foreign affairs, citizenship, defense, and monetary policy. In many countries with federal systems of government, the central government retains some exclusive powers as is necessary to enable uniformity in governance.³

1.3 The Constitution's completion is hampered by the absence of Somaliland

Somaliland, a former protectorate of Great Britain, gained its independence on June 26, 1960, and united with Somalia's southern region on July 1, 1960. After a long dictatorship, which used warplanes to attack cities such as Hargeisa and a brutal civil war that resulted in thousands of deaths, Somaliland seceded from the rest of Somalia on May 18, 1991. It has acted as a *de-facto* state since that time and has held successful presidential, parliamentary and local elections. It also has its own currency and legal system, and security forces. However, no state has recognized Somaliland as an independent and sovereign nation. Additionally, since its withdrawal from the union in 1991, the Somaliland administration has not been part of Somali conferences and constitution making processes. However, individuals from Somaliland have been members of the parliaments and national governments in Mogadishu.⁴

While Somaliland intends to secede from the rest of Somalia, the Mogadishu-based government sees it as one of many regions that will eventually be part of Somalia's federal government. Moreover, many unionists from Somaliland have called for some form of confederation or federation. The UK, the United Arab Emirates (UAE) and Turkey have sponsored talks between Somaliland and Somalia's Federal Government but genuine and comprehensive debates are yet to start about its status in future political dispensations.⁵

³ John Campbell, 'Nigeria's Unitary Federalism' (2020), available at <https://www.cfr.org/blog/nigerias-unitary-federalism>. Accessed on 29/4/2023

⁴ Mary Harper, 'Somaliland: Making a success of However, this will be a difficulty that has prevented the federal republic of Somalia's transitional constitution from being finished up-to date.' independence' (2016), available at <https://www.bbc.com/news/world-africa-36300592>. Accessed 5/5/2023

⁵ Afyare Elmi, "Decentralization Options for Somalia," Heritage Institute for Policy Studies (HIPS) (2014), <https://www.heritageinstitute.org/wp-content/uploads/2015/03/HIPS-2014-Annual-Report-ENG..pdf>. Accessed 10/9/2023

The central government of Somalia was criticized by stakeholders and the Somali Politian for lacking the political will to revive talks between the two sides. However, the reality is that since the end of 2022, the government has taken the lead in combating al-Shabaab,⁶ impeding these negotiations. Furthermore, this government is only one-year-old and has already faced numerous difficulties, such as debt relief as well as lack of agreement(s) between the levels of government and its federal member states on fiscal federalism, lack of transparency in several oil and gas deals are the main current challenges that could jeopardize and hinder Somalia's progress towards winning reliable financial credibility.⁷

1.4 Barriers to Somali citizenship and the Constitution

One of the sticking points in the finalization of the Constitution is the lack of definition of who is a Somali citizen. Concerns about Somali citizenship was present throughout the last one century and remains on the agenda today. this notion of citizenship is an essentially contested concept and sensitive issues among Somalis since the independence of 1960's up-to present time. The concept of citizenship and its legal justification have resurfaced in recent years as a source of political debates and legal issues pertaining to the definition of who is a Somali in significant way visa-a-vis non-Somalis. The current reform of legislation on citizenship which determines who is, or is eligible to be, Somali citizens are still before the House of parliament of Somalia since 2016.⁸

Somalia adopted a policy under the independence Constitution of 1960s which reinforces commitment of unification of all Somalis ethno-cultural identity that had been divided into five different colonial zones Such commitment would put a fundamental impact within the meaning of citizenship because every citizen has rights and responsibilities within the boundaries of their national state; non-citizens and denizens do not have the same.⁹

⁶ International Crisis Group, 'Sustaining Gains in Somalia's Offensive against Al-Shabaab' (2023), available at <https://www.crisisgroup.org/africa/horn-africa/somalia/b187-sustaining-gains-somalias-offensive-against-al-shabaab>. Accessed 5/11/2023

⁷ [Mohamed Olad Hassan](https://www.voanews.com/a/somalia-s-hope-for-debt-relief-under-threat-experts-warn-/7090405.html) 'Somalia's Hope for Debt Relief Under Threat, Experts Warn' (2023), available at <https://www.voanews.com/a/somalia-s-hope-for-debt-relief-under-threat-experts-warn-/7090405.html>. Accessed on 5/11/2023

⁸ Ahmed Kheir Osman, 'Legal Analysis of Citizenship and Immigration Laws in Somalia', (2022) Asia Pacific Law & Policy Review, ISSN: 2581 4095 VOLUME 8 – at Pp. 1-13

⁹ Law Commission of Canada, 'Law and Citizenship' (2007), Published by the University of Chicago Press, <https://press.uchicago.edu/ucp/books/book/distributed/L/bo70062758.html>. Accessed 8/9/2023

1.5 State-building and status of Mogadishu

The status of Mogadishu as a separate State has yet to be determined. Before the collapse of the Siad Barre regime, Mogadishu, the national capital, was also known for being multi-clan city. Owing precisely to its role as the federal capital, its substantial contribution to the economy of the federal State, its complex clan structure and the fact that it is now claimed by the Banadir clan, the status of Mogadishu is today one of the most contentious issues of the constitutional review process. The Independent Expert was informed that the State-building process was ongoing. Besides the regional States that already exist, there are plans to form the State of Hiraan/Middle Shabelle, which are now being finalized.¹⁰

According to **Article 49(6) of the provisional Constitution of the Federal State of Somalia**, states that two or more States may agree to form a federal State within the federation. In this context, the federal government's mandate extends over the entire national territory and the subnational governments' mandates extend over the individual parts of it.

As such, the status of Mogadishu – in terms of its control and representation in the national administration – needs to be resolved in order to promote Somalia's broader political settlement and post-conflict development. Currently, Article 9 of the Provisional Federal Constitution (PFC), approved by the Constituent Assembly in 2012, only states that Mogadishu is the capital, but leaves the ongoing constitutional review process and final status to Parliament to determine. Since 2012, however, there has been no dialogue necessary to reach a consensus on the matter. so Mogadishu is currently run by the FGS – the governor of Banadir (who is also the mayor of Mogadishu) and the FGS appoints all the district commissioners who also manage the revenue collected by the city. This has raised concerns that the Banadir Regional Government (BRA) is not representative of its citizens, especially since there are no systems of local elections and accountability, and the city's revenue is mostly used to finance FGS, not citizens. Of population deepening the history of Mogadishu of natural resources.¹¹

¹⁰ Human Rights Council, 'Report of the Independent Expert on the situation of human rights in Somalia' (2016) <https://riftvalley.net/sites/default/files/publication-documents/SDP%E2%80%A6Policy%E2%80%A6MogadishuStatus%E2%80%94EN%E2%80%94A01.pdf>. Accessed 24/7/2023

¹¹ SPA report "Policy options for resolving the status of Mogadishu" (Sep 2022), Accessed at <https://riftvalley.net/sites/default/files/publication-documents/SDP%E2%80%A6Policy%E2%80%A6MogadishuStatus%E2%80%94EN%E2%80%94A01.pdf>

There have been two main arguments on the status of Mogadishu in a federal Somalia. One is to regard the city as one of the federal member state units in the country. The other argument contends that Mogadishu remains the capital city and under federal government jurisdiction. Both arguments have proponents and opponents from Somali policy makers, politicians and the general public.

1.6 Distribution of Powers, Resources and Responsibilities

The process of assigning revenues to subnational governments and designing intergovernmental transfers is highly political, where different federal systems have their own idiosyncrasies. The draft constitution divides powers and responsibilities to the Federal Government and the federal regional governments. The constitution gives exclusively to the Federal Government the powers and responsibilities of foreign affairs, national defense, citizenship and immigration and monetary policy. In addition, it calls for further discussions on the distribution of powers, responsibilities, and resources.¹²

The parliamentary Oversight Committee and the Independent Review Commission have completed their separate reviews of the constitution. 39 ICRIC revised chapters of the draft constitution and submitted them to the OC as per their terms of reference. The OC revised and finalized the draft and then submitted it to the ninth parliament. The final draft of the OC proposed that another layer of local governments be established. The rationale for this, according to an interview with a member of the OC, is that the regional governments have not devolved powers to the local governments. The committee concluded that some form of constitutional protection for the local governments was necessary.¹³

A number of revenue-sharing guidelines are established by the June 2018 Baidoa Agreement on Petroleum & Mineral Revenue Sharing, and these guidelines will serve as a guide for the redrafting of the Constitution. Among them are:¹⁴

1. "Different needs of regions with and those without access to natural resources are considered" implies that states that produce natural resources ought to get a larger portion of the money generated by those resources in order to offset the effects of production.

¹² Article 54 of the constitution

¹³ The Heritage Institute for Policy Studies (HIPS), 'Somalia's Parliament should produce a constitution by and for the People' (2017), available at <https://www.heritageinstitute.org/wp-content/uploads/2017/02/Somalias-parliament-should-produce-a-constitution-by-and-for-the-people.pdf>. Accessed 12/10/2023

¹⁴ Report< Ministry of Constitution Report. (2021)

2. "Ensure that essential services are delivered in an equitable manner" means that, while producing and non-producing regions should have their needs taken into account, there should be little overall fiscal inequality among Federal Member States.

3. "Being aware that the nation's future needs should determine how natural resources are shared suggests that part of the country wants to set aside money for investments in the future for its future generations."

Specific revenue shares for various petroleum and mineral revenues are also included in the Baidoa agreement, and they are allocated among the Federal Government, Federal Member States, and the Banadir region (refer to Annex C). It makes no mention of how long the agreement will last.¹⁵

1.7 Puntland as Special Status

Puntland is an autonomous region in Somalia, which was created on August 1, 1998. Unlike Somaliland, Puntland did not secede from Somalia. But since it was established before the current Federal Government, Puntland considers itself as the only fully-fledged federal member state in Somalia. Thus, notwithstanding its squabbles with Mogadishu, Puntland has been probably the most influential actor in the drafting and reviewing of the current provisional constitution, putting its weight strongly behind the establishment of a federal system in Somalia. Before the end of the transition, Puntland hosted two constitutional conferences in Garoowe known as Garoowe I and II.¹⁶

Problems arise from Puntland State's decision to hold separate constitutional negotiations with the federal government. First, for various reasons, it encourages other FMS to demand the distinct treatment. Second, through the NCC, it erodes the cooperative working relationship between the FGS and FMS leaders. Thirdly, it compels the FGS to stray from the appropriate course of reaching an understanding regarding the constitutional matters. A cohesive stance from the NCC makes the constitutional amendment process go more quickly. The completed version ought to be released for official public discussion.¹⁷

¹⁵ Ibid

¹⁶ The Heritage Institute for Policy Studies (HIPS), 'Somalia's Parliament should produce a constitution by and for the People' (2017), available at <https://www.heritageinstitute.org/wp-content/uploads/2017/02/Somalias-parliament-should-produce-a-constitution-by-and-for-the-people.pdf>. Accessed 12/10/2023

¹⁷ Mohamud M. Uluso, "The decade-long delay in the completion of the Provisional Federal Constitution (PFC) is major threat to statebuilding in Somalia" (2023) published by Jowhar, Accessed at <https://jowhar.com/any-further-delay-in-completing-the-constitution-will-lead-to-total-failure-of-somalia-statebuilding/>

However, Puntland considers itself a mature administration and therefore asserts itself to secure its interests within the federation. The region's assertiveness, however, irks elements within the federal government who interpret Puntland's hardball negotiations as another secessionist administration. Some aspects of Puntland's tactics suggest that the region wants some form of asymmetric federalism - constituent states within the federation that have different powers.¹⁸

1.8 Justice Model

On January 24th 2018, in Jowhar, the FGS Minister of Justice and the five justice ministers of the current FMS preliminary agreed upon and signed the "Jowhar Version," also known as the "Political Agreement on Justice and Correction Model of Somalia." As of October 2023, there is no clear structure of the Somali court systems since the country adopted the federal system of governance. Under article 108 of the Somalia constitution provides that there shall be three court systems which includes the constitutional court, the federal government level court and the federal member states' level courts.¹⁹

1.9 Prolonged process and project sense of review

According to Article 136(1), during the first term of the Somali Federal Parliament, any proposed amendment to the Provisional Constitution must be approved through a final vote in the House of the People. This approval requires a two-thirds (2/3) majority vote of the existing members of the House of the People. Additionally, the proposed amendment must also be approved in a final vote in the Upper House of the Federal Parliament, again requiring a two-thirds (2/3) majority vote of the existing members.

Also, article 136(2) states that before the end of the first term of the House of the People, a referendum will be held to determine the fate of the Provisional Constitution as amended. In this regard the review was supposed to accomplish first term Federal Parliament which was between 2012 to 2016, the review process has already taken more than 12 years, (2012-2024) and as well the Constitution making process (2000-2012) this mean the process of building the Somali Constitution has already taken more 24 years, well not agreed all Somali people upon referendum.

¹⁸ Ibid

¹⁹ Ahmed Kheir Osman, 'Procedures of Becoming Legal Practitioners in Somalia: Analytical Reflection' (2023), Journal On Contemporary Issues of Law [JCIL], Volume 7 Issue 11

The constitutional making process requires significant resources, both financial and human. In the early initiative of the constitutional making the process was been dependent to the financial support from international community both UN agencies and other donors, over 50 million dollars paid by the donors used only 6 years between 2006 to 2012 for constitutional building²⁰

Dr. Afyare Elmi is a Somali scholar and political scientist who has written extensively on Somali politics and state-building. Believes that a legitimate and Somali-owned constitution could help address challenges in Somalia.²¹.

Conclusion

The constitution-making process in Somalia presents particular challenges. Somalia has had no effective government for more than two decades. A generation of Somalis has never lived under the formal governance and so may have a distorted concept of what this means. The draft constitution and the adoption of the provisional constitution is also being developed during a time of conflict when few people can move freely in Somalia and participation in constitution processes is dangerous. Members of civil society assume real risks in reaching out to their communities with public consultation and civic education activities. Furthermore, civil society is fragmented along clan lines and weakened by the security situation.

The Transitional Federal Charter requires a new constitution to be ratified by referendum; however, the security situation makes that impossible in the foreseeable future. Alternative means of provisionally adopting the constitution, such as ratification through a constituent assembly, are being canvassed. Ultimately, the goal is to generate confidence in the larger Somali population that this constitutional process may present an agreed-upon and long-awaited framework for a process of nation and state building in Somalia

²⁰ Abdiwali M. Ali, "A Challenging transition in Somalia: A story of my Personal courage and Conviction" (2017) Published by the Red Sea Press, New Jersey, 74-76,

²¹ Dr Afyare Elmi, 'Revisiting the UN-Controlled Constitution-Making Process for Somalia, (2012) published by E-international, Accessed at <https://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/> 15/08/2023.

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Law Commission of Canada, 'Law and Citizenship' (2007), Published by the University of Chicago Press, <https://press.uchicago.edu/ucp/books/book/distributed/L/bo70062758.html>. Accessed 8/9/2023

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