

Somalia: The way forward?

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SUMMARY

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There is a great concern about the future arrangements for the government of Somalia as the deadline (August 2011) for the end of the transitional period nears. This date is already an extension of the original deadline, which was two and a half years after the adoption of the Transitional Federal Charter 2004 (TFC). The purpose of this paper is to set out our proposals on the way forward.

WHY PROCEED TO COMPLETION OF CONSTITUTION?

The Constitution process should proceed to completion of and adoption of a Constitution in Somalia. If for no other reason, no credible alternative has been made for Somalia but additionally, to enhance the notion of the rule of law and respect for constitutional and legal procedures by following the processes set out in the TFC. Further, the CDC was drafted by senior Somalis who enjoy considerable status among various communities and brought to the process a variety of expertise and skills. The CDC was negotiated democratically, and proceeded to vote only after laborious efforts at consensus and finally, because the constitution could provide a vision for the future of Somalia with the potential to unite the people around a set of principles & objectives.

WHY THE INDEPENDENT FEDERAL CONSTITUTION COMMISSION (IFCC)?

The Independent Federal Constitution Commission (IFCC) should be the institution to lead the continuation and duration of this process. While, not a perfect body, the IFCC was appointed in accordance with TFC & its members represent the clans and regions of Somalia. Since 2008, it has been working and utilizing all resource available to them and have achieved a level of understanding of constitutional issues that is comparable with many constitutional commission in other countries. On top of those reason, the IFCC should continue its mandate as there is no other body that is representative of various division in Somali society who would be able to do any better. The IFCC is now uniquely qualified after much of study and debate on constitutional issues.

CONSULTATION

Arguably a remarkable degree of consultation has been achieved in view of the grave difficulties of carrying out in South Central Somalia. There are definite limits to what such participation can achieve and it is important to not have excessive expectations. There can be little doubt that the level of public understanding of constitutional issues will remain rather lower among the broad Somali public than in many other countries. What public consultation may achieve, however, is a better understanding on the part of the constitution makers of where the shoe pinches for the ordinary citizen. Secondly, people who feel they have been consulted will have some greater commitment to the product of the process. Thirdly, the people will have a better idea of what a constitution is and what it may require of them. In contrast, it is unlikely that the public consultation will yield much assistance in terms of the technical content of the constitution. Therefore, too much store should not be placed upon further consultation, but upon further discussion- getting people to think about issues and generally enhancing people's understanding.

If there is genuinely a substantial body of public input covering a wide range of issues, it may be worth undertaking statistical analysis. It is not easy to make use of a large number of submissions without some sort of systematic analysis. However, this has some readily apparent shortcomings: it is time consuming, expensive and it can never be statistically reliable in the way a sample survey should be because the respondents are self-selecting and their representativeness may be seriously skewed for other reasons (far more in Somalia than in other countries

¹ Summarized by Robin Gary, Legal & Constitution Advisor, UNDP Somalia SCMSP

because of the security issues). Additional reports and studies will also need to be compiled to effectively use and report back on the information collected.

REVISING THE DRAFT

During the drafting of the CDC, there were issues that the IFCC identified as needing more study and debate even before consultation. Work should be going on now to refine some of these various provisions, even if they have to be changed later to reflect the public feedback. It is suggested to take serious steps to identify experts in these areas that possess the skills and necessary knowledge to make proposals with the IFCC on the following issues: Systems of Government; Transitional & Implementation provisions; Land; Federalism; Status of Mogadishu; and the Situation with Puntland. The IFCC and consultants should undertake a complete internal audit if the CDC in preparation for revision and refinement.

After the public consultation phase has ended, the Commission will need to revise the draft. At the earlier stage the only things the IFCC had to go on was its own perception of the best interest of the country, as well as the messages members were receiving from their 'sponsors'. Now the Commission has a duty to subordinate its own views to those of the people. The thrust of their endeavours must be to reflect the wishes of the people.

According to the (Draft) Act the IFCC should conclude its analysis within four weeks of the end of the period for public consultation and based on above analysis, complete and publish the final document within another two weeks. This time frame for refinement is achievable but is short and it assumes the IFCC is considering responses on an on-going basis and not waiting for the completion of the consultation process.

ADOPTION

Due to the security situation, it is clearly impracticable to hold a referendum in Somalia in the near future. Thus, alternative mechanism for adoption of the Constitution needs to be explored. In this respect, 2 potential processes for adoption are presented: (1) through a constituent assembly; and (2) through a series of events.

(1)Through a Constituent Assembly:

A Constituent assembly (CA) is a body which is formed to adopt a constitution. Many questions must be answered and decisions made before forming a CA: Who would be in the CA? How many members will the CA have? How would a CA be established? Who would write the rules of procedure? Additionally, decisions must be made around the CA decision making rules: What is the status of the draft constitution when it is submitted to the CA? Will the CA vote on each article, on the constitution as a whole or some other formation? Will the CA be a true deliberative body, solely a ratifying body or some other configuration? And, who will resolve any disputes and deadlocks that arise within the CA?

A CA must be as representative as possible; an idea would be to expand Parliament in order to form a CA with the role of adopting the constitution. Additional members will ensure a more representative CA, helping towards legitimacy of the adoption process. However a CA should not be too large, making it impossible to have focused discussions and extremely difficult to make compromises. To keep the CA to reasonable number, yet representative, it is recommended it have a total of 300 people --taking half from Parliament and half from other sectors of Somalia (based on professions, commercial sector, gender, disabled, social activists, intellectuals, Diaspora, refugees, etc).

In order to establish a CA, the TFC must be amended and it is important that these amendments ensure that the CA is as representative as possible. As a general election is not feasible in Somalia for same reasons a referendum is not (see above), selection could be made in similar ways that the Parliament and to some extent the IFCC were done – via the informal traditional methods of choosing leaders based on clans. Since this mode is already reflected in parliament, some component of Parliament could be included in the CA with the same amount of representation based on professions, commercial sector, gender, disabled, social activists, intellectuals, Diaspora, refugees, etc in the same manner added.

In principle it is important that the CA should decide on its own rules of procedure, but to save time, the rules for the Somali CA could be drafted by the IFCC in consultation with experts having comparative knowledge of the working of CAs. Thereafter, when the CA is first convened, its members would be introduced to the rules to approve, which they would be free to amend when necessary.

Regarding the decision making of the CA, it should aim for consensus but in the event of failure to achieve this, the voting should be two thirds of those present and voting. An important question that needs to be answered is: what is the status of the draft constitution submitted to the CA? There are two options in this regard: (1) CA uses the draft as a basic working document, but, to adopt any Article (it must have a two thirds vote); or (2) the draft has some binding effect (the default position), so that it becomes the constitution unless particular Articles are rejected/amended (by a two-thirds or majority vote). As to the method of review, if the CA will vote on each Article or on the constitution as a whole, a compromise might be voting by chapters. If there is a committee system (as there is almost always in CAs), the voting could be by Articles in the committee (with ultimately majority voting) but at the plenary when the reports are presented, the voting could be chapter by chapter. A constitution is essentially a package, so the important thing is that the overall package is acceptable, not necessarily individual provisions. Additionally, should the CA a true deliberative body, a ratifying body or something else? A deliberative body discusses all its provisions in detail and last for a long time, with intense and even acrimonious debates, whereas a ratifying body would work on the assumption that key and final decisions have been made elsewhere, and therefore take only a cursory examination of the draft and sign off on it—ratifying CA's typically lasts only a week or even less. Alternatively, Somalia could adopt a middle course; say convening for a month, with much of the discussion in committees, and formal endorsement in the plenary. If this approach is opted for, it should be clearly reflected in the rules of procedures. Finally, it is important to provide for a dispute resolution mechanism. Except where there is a dispute about a legal provision, courts should be avoided in this respect. There should be a formal mechanism for setting disputes, and this same body could also be used to assist in breaking a deadlock in the CA.

Through a Series of Events:

Another suggested approach to consider revolves around holding a series of events that in sum would lead to a public confirmation and adoption of the constitution. The first event would be to convene a sort of “jury” of Somali & foreign experts to certify that the document, as far as they could tell, expresses the wishes of the Somali people. This would be followed by events held throughout the country to consider and gain approval of the document. The Country could be considered as a series of separate units for which different approaches could be used, for example: in Puntland perhaps the Assembly could approve (or perhaps even a referendum could be held); in Galmadug it might be possible to hold some sort of convention to ratify; in some other areas it might be possible to hold meeting of clan elders; maybe in some areas a body of the Diaspora would be able to give temporary endorsement; and for some areas it might be best to be quite open and say it is not possible to hold any ratification exercise that would carry any credibility. In such an area it would be unlikely that the writ of any new government would run anyway: why pretend that the document has the endorsement of the people when they cannot be asked in any way?

Such an exercise would involve a commitment to revisiting the Constitution after a certain length of time. This is not the same as making the constitution another “transitional” document. In the case of Somali it would perhaps be wise not to fix a rigid date for revisiting the constitution. Perhaps there could be a provision that, 5 years after someone (the UN?) has certified that stability has been largely achieved throughout the country, a review must be undertaken – or that it may be undertaken if people initiate a review.

TRANSITION

Whatever the final adoption mode, the process of working towards a final implementation must be a gradual one. Possibly a gradual Implementation occurring over the course of about 2 years, beginning at the lower levels of government and gradually moving to the central federal authorities.

Final structures should be built over a period of time taking account of what exists on the ground, building on institutions that Somalis have trust in. The constitution can provide for this, in a flexible way. During a phasing in process, the national government should play a minimal role, while independent mechanisms designed to “grow the constitution from the bottom” do their work. The exception would be the national judiciary which must be established as soon as possible, in part to guide the implementation process.

Implementation would begin with the recognition of existing mechanisms/institutions at the local level, or establishment of new institutions consistent with the constitution. The next step would be the establishment of regional/state governments, and at this point consideration would be given to the election of the House of Regional States. Only when the governments at these levels are set up and begin to function, should national/central institutions be elected/appointed.

Once at the point of establishing the national institutions, the main stages/steps would include the following: Election to the House of the People; The Council for Regional States must be formed; formation of the government (either by appointment of the prime minister or the election of the president); establishment of various independent and executive commissions etc, some jointly by the federal and state governments; enacting and implementing legislation to secure the goals of the constitution and; a constant review must be carried out of how the constitution is being implemented and how it is working. Additionally, as is proposed in the CDC, a review of the constitution will be instituted six and half years after its commencement.

With regards to implementation institutions, these institutions should be built-in to the constitution text. There should be an implementation Commission, which should include some carry-over of knowledge from the IFCC; an Electoral Commission and; a consultative/oversight body which includes senior Somalis and some international experts. The functions of this consultative/oversight body would be to mediate, encourage and assist in the implementation, it would report both to the (minimalist government) and the UN.