



JUMHUURIYADDA SOOMAALIYA  
جمهورية الصومال

**The Summary & Questions Guide  
of the  
Consultation Draft Constitution**

**Drafted by**

**Independent Federal Constitution Commission**

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## **The Consultation Draft of a Constitution for the Federal Republic of Somalia: Summary and Questions**

### **Introduction**

A constitution is not an easy document to read. The Commission hopes that all Somalis who are interested will be able to read the actual text of the constitution, or at least to hear it read over the radio. This pamphlet summarises the main decisions that the Commission made as it drafted what it has called the Consultation Draft Constitution (CDC). And it invites all Somalis to comment on the Draft.

In such a short document it is not possible to give more than the broad outlines of the CDC. If you have the chance, please read the full CDC. You can find copies of the CDC and this booklet on the Commission's website [www.dastuursomalia.org](http://www.dastuursomalia.org).

Each section summarises the main points suggested in the CDC on a certain issue. It does not totally follow the structure of the actual CDC (because some points relevant to a particular concern may be dealt with in different chapters of the Constitution). At the end of each section are some questions – drawing attention to the main topics that might be controversial. But you are of course welcome to think about and comment on any aspect of the CDC.

In the centre of the booklet are some pages on which the questions are reproduced. You can use these pages to give your responses to questions, and remove these pages from the booklet. So you can keep the booklet but send in your responses either by e-mail to [dastuursomali@gmail.com](mailto:dastuursomali@gmail.com) [[info@dastuur.org](mailto:info@dastuur.org)] or through completing the questionnaires on the web site at [www.dastuursomalia.org](http://www.dastuursomalia.org). Extra space is given for further comments after the questions for each section, as well as for overall comments on the whole CDC.

### **A General Introduction to the Consultation Draft Constitution**

The Independent Federal Constitutional Commission has finished one part of its mandate, which is to prepare a Consultation Draft Constitution for Somalia. The mandate of the Commission is set out in the Transitional Federal Charter of 2004. The law on the Commission provides “guiding principles” of the constitution which the Commission must follow. These guiding principles state that the constitution should be based on “Islamic principles, the Transitional Federal Charter, democratic principles and social justice”. The Commission must also reflect “good Somali customs”. At an early stage of its deliberations, the Commission discussed the guiding principles, known as the Founding Principles. Foremost of these is Islam and the Shari’ah. Others are social justice, inclusiveness, public participation in governance, the equality of all before the law, the participation of women in every aspect of public life, and the rule of law.

The Commission regrets greatly that security circumstances prevented it from travelling round the country to talk with the people and listen to them before they began to prepare the Consultation Draft Constitution. However, the Commission tried to understand the concerns of the people and, as representing all the Somali people, the Commissioners discussed at length the problems facing the country and tried to reach a consensus on the way forward.

The Commission wants to make clear that the final decision on the constitution will be made by the people. What it has prepared is a Consultation Draft Constitution (CDC) for consultation with the people, in the hope that the people will read and understand it, with the assistance of its Main Report and this document. The Commission will promote extensive consultations with the people on the CDC. It will carefully study their comments before revising it for presentation to the people in a referendum for their decision.

### *Importance of a constitution for Somalia*

Somali people now have a chance to agree on a constitution which would serve them better. They can learn from their recent history and decide how to re-organise the state. Critical questions include: (a) the relationship of clans to the state; (b) how national unity can be strengthened, and Somali people who have fought or are still fighting can live in peace; (c) how power should be divided between the central government and regional states as part of the federal system; (d) what system of government should be set up at different levels throughout the country; (e) the valuable elements of traditional system that should be preserved, particularly at local levels; and (f) how the violations of the rights of individuals and communities that took place in the recent past can be prevented, particularly with strengthening the protection of human rights, democratic control of the armed forces, the dismantling of militias, fair sharing of resources, and effective systems of dispute settlement.

As you think about the CDC and the questions, think also about how the objectives outlined in the previous paragraph can be achieved by the constitution.

### **Islam and the Consultation Draft Constitution**

The CDC is based firmly on the fundamental principles of Islam. Shari'ah is the source of law, and no law would be valid if it is inconsistent with it. The Commission has scrutinised every provision of the CDC to ensure that it is compatible with the Shari'ah. For this purpose, it had consulted with a number of scholars from both Somalia and other Muslim countries on the Shari'ah compliancy of all the provisions in the constitution. The Commission together with the Islamic scholars found that all the provisions were Shari'ah compliant.

The Commission believes that there is no incompatibility between the idea of a constitution and the Shari'ah. The main purposes of the constitution, to regulate the administration of justice, accountability, good governance, and limits on the exercise of coercive power, are also the objectives of Islam. If the government pursues an objective against the Shari'ah, the constitutional court would strike it down. Nearly all Muslim countries have constitutions and this is evidence of a valid custom which has become authoritative according to a legal maxim of the Shari'ah. Moreover, a constitution is a commitment by the people to follow certain good principles, and according to a well known hadith, "Muslims are bound by their stipulation". Thus, when compliance to Shari'ah becomes a part of the constitution, there remains little doubt over its acceptability and authoritative standing

An important constitutional principle, the separation of powers, is to be found in most Islamic constitutions. The basic idea of Islamic government is limitation and regulation of power;

indeed a fundamental principle is the rule of law under Shari'ah. If the purpose is to establish accountability and justice, then separation of powers is desirable-*Maqsidul Shari'ah*- and has in effect been functionally in existence during much of the Islamic history of state and government.

The same can be said about human rights. The Commission considered a broad outline of the evidence in the sources of Shari'ah supportive of various aspects of fundamental rights and liberties when drafting the Bill of Rights. Support for rights is also found in a number of recent studies of the higher goals and objectives (*maqasid*) of Shari'ah. Among the *maqasid* of Shari'ah that Muslim scholars and jurists have identified and discussed, the one category, namely the *daruriyyat*, or the essential *maqasid*, are to be upheld as a matter of absolute priority. It thus becomes the duty of an Islamic government to uphold and promote them to the extent its capability and resources permit. Everything and every particular of the Islamic Shari'ah law, including the *Maqasid* and the *Daruuriyat*, are intended to promote, protect and preserve the constant immutable five universals otherwise well known as the *Kulliyatul-khamsah*, - the intent of the Shari'ah is: to promote, protect and to preserve Faith, life, reason and intellect; family and human dignity and property.

The Commission noted the fresh emphasis on the revival of Islam and the demand of Muslim masses almost everywhere to integrate and enhance the relevant aspects of Shari'ah in their otherwise western-law oriented laws and constitutions. This is a demand that seeks to rectify the imbalances of colonialism and their aggressive downgrading and suppression of the Shari'ah. The Commission recognises the need to take cognizance of the reality also that the Muslim world has interacted with other countries and civilizations over long periods of time. The Commission had sought to retain and protect the wisdom we can gain from them for our betterment and appreciate what is in common between us- and contribute in the same spirit toward greater harmony of civilizations for the benefit of all. This is the spirit that underlies all of the work the Commission has undertaken on the relationship between the Shari'ah and human rights.

### **Values and Principles (The Preamble and Chapter 1)**

The Preamble of a constitution usually sets out why a new constitution is needed and the hopes for the future that the constitution is intended to help to realise. It is a commitment of the people to the values of the constitution. The CDC Preamble begins with reaffirming faith in God Almighty and in the Prophet (pbh) as the messenger of Allah. It expresses a commitment to rejecting violence, and to peace and unity, and recognises the past struggles of the people and the leaders.

The first chapter, "Declaration of the Republic" which includes founding principles of the Constitution, which must guide the country as it uses the constitution in setting up and operating its new system of government,.

. The main points other than the principles are:

- The constitution is supreme - meaning all laws must be consistent with it and therefore with Islam;
- Islam is the religion of the state;
- The Somali language in both its versions, with Arabic, are the official languages;
- Mogadishu (Hamar) is the federal capital (there is more about the capital in the federal structure chapter).

### Questions

1. *Is there anything else that you would like to see mentioned in the Preamble bearing in mind that it should be short and eloquent?*
2. *Are there other founding principles that you would wish to see explicitly stated?*

### Citizenship (Chapter 2)

A state is not only territory but also its people. Citizens have some rights which may be denied to residents who are not citizens (e.g., the right to vote and sometimes the right to own land). They have a right to the passport of their country. And they may have obligations which others do not (e.g., conscription in the armed forces).

Most people get one citizenship (or more) at birth. Citizenship can also be acquired (or at least applied for) as a deliberate choice of a person. In recent decades millions of people have left the country of their origin and settled in a foreign state (including many Somalis). Some countries allow their citizens to have more than one citizenship.

The Commission recommends that

- all persons born in the Republic of Somalia are citizens;
- all persons with at least one parent, father or mother, born in the Republic are citizens;
- all persons of Somali origin are citizens;
- those who have lived in the country for a long time may apply for citizenship;
- a child adopted by Somali citizens would have the right to become a citizen;
- a child who seems to be under 8 years old and is without any known parents would be considered a Somali citizen;
- all Somali citizens have all the rights of citizenship including a passport and identity document;
- Somali citizens by birth can retain that citizenship even if they become citizens of another country (dual nationality).

### Questions

1. *Do you think that these provisions make it possible for anyone who ought to be able to be a Somali citizen to do so?*
2. *Is there a risk that people who ought not to be citizens will have a right to do so? If yes please explain*

### Fundamental Human Rights (Chapter 3)

The Commission believes that rights must be central to the new Constitution of Somalia because rights are God given to every human being. Rights are necessary (if not sufficient) for human beings to live in dignity, to fulfill their potential, to satisfy their physical and spiritual needs.

It is important to understand that rights – and other provisions of the constitution – restrict what government and parliament are able to do.

It is also important to realize that rights are not absolute: each right may be limited by law; but if a free hand is given to parliament to limit rights, those rights become - if not worthless - much less well protected.

In the end it is for the courts to decide whether a right has been violated, and whether a limitation on the right can be justified – though parliament as it makes law, and all other public bodies and officers, should have the importance of rights in their minds. A competent and independent court system is therefore crucial for the protection of fundamental rights – Further discussion on this can be found in the judiciary chapter of the CDC. Adjacent to the Judiciary, the human rights chapter of the CDC creates a specialized independent entity with the authority of promoting knowledge of human rights; setting the standards for fulfilment of human rights obligations; monitoring human rights within the Republic; and investigating allegations of human rights violations. Somali citizens have the possibility to address any violation of their rights to the independent Human Rights Commission which had the power to investigate.

The major features of this chapter include –

- Compliance with Shari'ah – sometimes explicit, but always Islam was in the minds of the Commission;
- Rights particularly concerned with the community: freedom to speak and to write, to associate with others, to assemble and to demonstrate, to practice religion and culture together with others and to vote, found in most constitutions;
- Rights more directly concerned with ensuring human dignity, including in lifting people from poverty; these include the right to education, to health, food and water and housing\*. They also include the right to reasonable working conditions;
- Equality – because being treated unequally is an affront to human dignity. There must be no discrimination whether this is because of race, color, clan, ethnic or social origin, culture, dialect or language, sex, birth, disability, religion or political or other opinion, , occupation and property. Clan and language were especially introduced because of Somali circumstances;

- Special policies and measures to ensure that those affected by discrimination or disadvantage are not to be regarded as discrimination (in some countries special measures have been attacked as discriminatory);
- Rights of children, within the family and those who have no family, and more generally the importance of the family, and the duty of children to support parents in need;
- Clear statements that female genital mutilation and abortion are contrary to Islam and prohibited (abortion may be permitted to save the life of the mother, as permitted in Islam);
- The right to information (particularly that which the government holds), and the right to be treated fairly by public officials, and the right to a healthy environment;
- There must be effective remedies – the ability to go to court, even to protect the rights of others, and, an effective human rights commission with the mandate to educate about and protect rights;
- Few rights in the Consultation Draft Constitution say that the realization of the right is “according to law” which gives a free hand to the law makers;
- In many constitutions, each right is accompanied by a statement about when it may be limited – a technique that sometimes makes the limitations appear more important than the rights. Instead the CDC has a general principle stated in one article at the end of the chapter expressing that rights may be limited only in the interests of the greater public good and that the limitation is necessary and the greater good cannot be achieved by methods that interfere with rights less. Furthermore, as Shari’ah is the backbone of the constitution, there remains the additional and constant balance in terms of evaluating the limitations of rights of determining: if they are consistent with the overall values of the constitution including Islam?
- All state bodies must respect the rights and in some cases positively fulfill them. The intention is to “mainstream” rights into the work of the government and institutions at all levels.

\*These rights are often misunderstood: they mean the state must not interfere with people’s efforts to feed, clothe and educate their families, and must protect those rights from being interfered with by others. It must take positive and continuing steps to improve conditions, as its resources permit.

### Questions

1. Are you satisfied that the rights of Somalis will be adequately protected by this chapter? Would you like to add any other rights? If yes please explain.
2. There is no provision that states that marriage should be with the full agreement of the parties. Do you believe that this right should be there?
3. There is no “right to work” in this chapter. Would you wish to see it included?
4. Would you wish to see specific mention of any other groups in the country whose rights need to be protected?
5. Should the freedom of press and media be protected in the constitution?

## Duties (Chapter 4)

The Commission was aware that, from the perspective of Islam, rights must be balanced by duties. The Fundamental rights chapter proposes that everyone must respect the rights as well as benefit from them. The Commission also proposes express statements of the duties of citizens, although a person could not be punished for not fulfilling them (unless under a separate law). These duties are intended to convey a powerful message about the vision for the Somali society and the people's contribution to that vision.

In brief the duties are to

- be patriotic and loyal to Somalia and to promote its well-being
- engage in useful work for the good of themselves and the family and generally to contribute to the community where they live as well as the broader community
- promote responsible parenthood
- foster national unity
- promote accountability and respect for the rule of law
- know and uphold the Constitution
- contribute to the public expenditure according to the citizen's capacity to pay
- defend the territory of the Republic when necessary
- Chapter 5 adds that citizens have a responsibility to protect the environment;

### Questions

1. Do you think citizen's duties listed in chapter 5 are comprehensive?
2. Would you like to add any other?

## Land and Environment (Chapter 5)

Fierce competition for land and grabbing of land are problems in Somalia as in other countries. Unregulated predation on the country's resources, as well as illegal dumping of waste has added to environmental degradation in Somalia. The Commission recommends for discussion, provisions slightly changed and carried forward from the Transitional Federal Charter.

The Consultation Draft Constitution calls for:

- consultative development of a national land policy
- policies and laws to protect interests in land
- policies and laws to ensure that land is used efficiently and productively



- steps to restore land to its rightful owners, whether the owners are the government itself or others
- laws to protect Somali's environment and biodiversity
- reversing the effects of illegal dumping of hazardous waste in the past
- compensation from those responsible for dumping for the benefit of those who have suffered
- public land must only be disposed of under a law that clearly regulates it, and no government land must be sold – it can only be leased or in other ways temporarily parted with by the government

### Questions

1. *Should the right to property in the human rights chapter state clearly that it does not protect property that has been seized illegally?*
2. *Should there be express provision for the review of the past, including of laws that may have resulted in unjust derivation of land?*
3. *Should ownership, management and administration of public land be a matter for the regional state governments under the federal structure? Should there be any role at all for the federal authorities?*
4. *Should property disputes advance through the normal court circuit or is there a role for a property claims commission who would work solely on such issues?*

### **Elections, Representation and Participation (Mainly Chapter 6 – also Chapters 3, 10 and 16)**

Apart from “direct democracy” where the people can be personally involved in decision making, usually at the very local level or through a referendum, representation of the people is usually achieved by means of voting for their members of parliament or for local councils. Political participation involves the right to vote; the right to be elected; the right to be a member of a political party; the right to advocate for political programs and ideology; the right to be represented at all levels of government; the right to participate in fair and transparent elections and to have transparency in campaign financing. “Participation” can be more direct, and is not impossible even in the work of an elected parliament.

The Commission has not prescribed a method of election (as that might be too difficult to change if circumstances change). Instead, it has recommended the essential principles.

The main Commission's proposals regarding elections and representation are:

- all Somali citizens of adult age, should have the right to vote;
- in order to vote individuals must be registered and registration must be accessible for all qualified voters;
- as far as possible all votes must be of equal value (a list system of proportional representation achieves this more than others, but even within other systems it is an important aspect of the design);

- voting must be by secret ballot;
- the system must be one that the people can understand and the procedures also must be designed so that they are understood;
- all sectors of society must be able to be represented through the system;
- campaigning must be fair;
- every adult citizen must be able to vote;
- as far as possible money should not influence the outcome;
- a single national Election Commission would run national, regional state and local government elections;
- the Constitutional Court would formally ratify the result of elections
- a law shall be enacted providing appropriate mechanisms for timely settling of electoral disputes; the Elections Commission would be charged with developing codes of conduct for everyone involved in the elections process

Parties can be a force for good, helping the people to formulate their political ideas, and helping to keep the peace. But they can also be divisive, and are sometimes just vehicles for the political ambitions of individuals.

Proposals on parties in the CDC include:

- law must require registration of political parties before they can take part as contestants in an election;
- rules must be fair: any party that satisfies reasonable requirements must be allowed to register, and the procedure for de-registration of a party must be fair;
- no clan or military based parties permitted;
- parties must themselves be governed in a democratic way, and they must have their accounts audited;
- law may require parties to reveal formally where large financial contributions come from;
- behavior of political parties should also be regulated by Codes of Conduct.

The Commission proposes that there is not a need for a referendum if the constitution needs to be amended, but sets forth other procedures around this which will be explained later in this report. Nonetheless, sometimes a referendum could be a useful tool in other scenarios. In order to reserve the right to hold a referendum when deemed necessary (but never in the case of constitutional amendment), the Commission decided to mention the possibility, and to add some guidelines:

- the referendum question must be clear;

- the question must not disguise the real issue;
- the process must not suggest - in the way the question is phrased or the ballot paper is organized – which way voters should answer the question.

In many countries there is dissatisfaction with the sort of democracy that means the people just vote and then have no chance to express their views of the way government is functioning. The CDC includes (in Chapter 3 (fundamental rights) and 8 on Parliament) provisions that encourage broader public participation, including -

- rights to expression and association;
- right to petition the authorities;
- the right to public information; and
- duty of parliament to facilitate public participation.

### Questions

1. *Should the Constitution include further guiding principles on elections? If so, what do you think those further guiding principles should be?*
2. *Should there be some provision requiring that election monitoring be facilitated – by local bodies? Or by foreign bodies as well?*
3. *How is a “citizen” identified for voter registration?*
4. *What representation arrangements should be available to the nomads?*
5. *Will the Somali diaspora be entitled to vote and have representation?*
6. *Should there be a period of constitutional lustration, that is, formal sanctions denying political rights, for those individuals known and proven to be part of terrorists groups?*
7. *Should there be special provisions outlining how the Somali military and police vote?*
8. *Should the Election Management Body be enshrined in the Constitution? If so, how should its membership be appointed and composed? Powers and mandate?*
9. *Should there be reserved seats in the parliament for women according to a constitutional quota?*
10. *Should the Constitution require that the ballots and official election forms be in both all official languages set out in the constitution?*

## JUMHUURIYADDA SOOMAALIYA

### Federal Structure (mainly Chapter 7, 13 and Schedule 2)

The mandate of the IFCC is to establish a federal system. A federation is a system of government in which powers of the state are divided between governments at two principal levels, federal and state. At each level there are institutions of government. The structure of federal government is designed to represent all the people of the country and the states as separate entities. This is most obvious in the legislature, which usually consists of two chambers, one representing the people and the other the states. The powers of federal and state governments and the relations between them are set out in the constitution

Two major themes run through the IFCC proposals: cooperation and flexibility. The Commission was determined that federalism should strengthen not weaken national unity, and a cooperative relationship between the various governments was essential. They also recognised that establishing a federal system from a previously unitary country, with very different levels of capacity in different parts of the country, would be made easier if all the regional states that will make up the federal Somalia did not all have the same responsibilities at the same time, but could gradually take on new powers.

The IFCC recommends the following principles of federalism –

- government institutions established on principles of democracy;
- powers allocated to the level where they are likely to be most effectively exercised;
- taxes and other sources of revenue collected where this is more efficient;
- maximum co-operation between and among different levels of government;
- inter-governmental organisations for consultations on matters of policy and law;
- similar levels of services and equitable distribution of resources throughout the country;
- disputes between two or more governments to be resolved peacefully and where possible through mediation.

In terms of the structure of the federal system the Commission recommends -

- three levels of government local, regional state and federal;
- at the local level the institutions of local groups and communities may form the basis of, or be involved in, government, and formal local government councils may be established;
- regional states to be created by the merger of two or more regions (referring to the 18 administrative regions in existence before the 1990 civil war);
- system of government at the regional state level to be decided by the regional states themselves in their own constitutions;
- 

Powers are distributed between the centre and regional states, in the usual way for federal systems. The IFCC has not proposed the detailed list of allocation of powers, but proposes broad categories or principles for distribution. After public feedback the Commission will make detailed lists of powers which will then appear in the final constitution. An important aspect of the proposals is that many powers should be available to both the federal and the regional state governments. Some of these will be matters on which in the end national laws will prevail in case of conflict, on others the regional state law will prevail. This is designed to allow for a gradual shift of responsibilities to the regional states as they gain capacity and

experience. Consultation is important and necessary where there are such “concurrent” powers. In a little more detail -

- Matters of national interest and significance should belong to the centre, as would matters that involve much international connection, complex technology, or where it is important that national standards exist;
- Matters of particular interest to regional communities would belong to the regional states;
- Matters of a purely local nature would be granted to the municipal or local government level – this could be done by the regional state governments or the federal government;
- Normally the administrative power follows the legislative power, for example, if one level of government has law making power over primary education, it is then also responsible for the building and staffing schools;

A critical aspect of a federation is having the finances necessary to run governments and implement their policies. The CDC allocates taxing power between the federal and the regional states’ powers (again details will be worked out after public consultation). For the regional states, the primary source will for long remain redistribution from the centre. For the immediate and foreseeable future, a major source of finance will be grants and loans from the international community. Some of the proposals on financial matters are -

- National and regional state governments must by law provide for local governments to collect, retain and use appropriate taxes such as market license fees, taxes on buildings, etc;
- Regional states should play a role in the negotiations for international grants and loans.

Further details on finance, distribution of resources and other resources are included in the section on public finance.

Other matters include –

- a unified judicial system (in part because of lack of economic and human resources, and in part for simplicity); regional states to be represented in the process for the appointment of judges and that judges would be drawn from all parts of the country;
- federal and state governments may cooperate in the deployment of staff between levels, especially to ensure that expertise and experience are available where needed, national unity enhanced; and
- the national public service commission to provide guidelines on qualifications for jobs, recruitment practices and salaries and other benefits.

A critical role in elaborating the framework of the federation and in settling disputes will be played by the Constitutional Court. When there is a doubt about which level of government

has which power or how that power should be exercised, any government can refer the matter to the Constitutional Court for its determination.

When the federal government intends to intervene in a state which has failed to discharge its functions in a responsible way and a crisis has arisen or is threatened, it should first try persuasion and offer help, and only in the last resort use sanctions. Before imposing sanctions, it must have the support of the House of Regional States.

### Questions

1. Do you think that a federal system is better than a unitary system?
2. How many states should be created?
3. Once states are created should it be possible to create more or adjust boundaries?
4. Of the following governmental powers, which do you believe belongs to the federal government? Which belong to the state government? Which should belong to both?
  - a. Matters affecting the national security of the Republic?
  - b. Matters affecting the national institutions of education, health, etc?
  - c. Matters relating to taxation?
  - d. Matters regarding citizenship?
  - e. Matters affecting the equal treatment and equal status of citizens?
  - f. The power to make and administer laws?
  - g. Matters affecting international relations?
  - h. Matters relating to land and natural resources?
5. Do you agree that most taxes should be imposed and collected by the central authorities?
6. Do you agree that the taxes and other sources of revenue collected by the central authorities should be distributed equally to all states?
7. What should be the role and powers of traditional authorities at the local level, and are you satisfied with the CDC in that connection?
8. Do you have views on a question yet to be resolved: how should any minerals (e.g. oil, coal, metals and precious stones) be dealt with – should they belong to the people as a whole or to the regional states where they are located? And if to the regional states, how could they be used, in part, for the benefit of the nation as a whole? If they should belong to the nation, should the regional state or states where they are found receive a guaranteed share of the proceeds?

### Federal Capital (last article of Chapter 7)

The position of the capital city in a federal country may raise some issues. That city must offer a hospitable environment for the national government, and for all the activities that such a government must carry out, including having a place on the international stage. The Commission has set out the three possibilities, but has not made a definite decision – though it does assume that Mogadishu (Hamar) will be the capital of Somalia.

- The first option would be having Mogadishu as a city within a regional state. Citizens would elect their own representatives at various levels, like any other citizen of any other state. The people of Mogadishu would be represented by a city council according to the law on Mogadishu, at the regional state level, and at the federal level, in both houses of parliament;

- Under the second option, Mogadishu would become a federal capital district under the exclusive authority of the federal government. It would not be a part of any regional state. Topics on which regional states would make law would be made by the federal government and parliament for Mogadishu. Citizens resident in the federal capital district would be represented in the lower house of Parliament on the basis of population, but would not be represented in the upper house of parliament. The federal government, would almost certainly establish a system of city government, specially designed for Mogadishu;
- Under the third option Mogadishu would become a full regional state in the federation. It might not be necessary to separate the government of the regional state and that of the city. Citizens would have representation at the federal level in both houses of parliament.

### **Question**

*What do you think would be the most appropriate arrangement for Mogadishu as the capital city?*

### **The Regional States and their structures (Chapter 13)**

In some federations the national constitution sets out all the governmental structures for the states as well as those of the federal government. Most federations allow the states/regional states to craft their own, which usually set up systems of government rather like that at the federal level. The Commission decided to leave it to the regional states to set up their own institutions. These structures, and other parts of the constitution, would have to be consistent with the CDC and the Founding Principles in the national constitution, and in no way inconsistent with the constitution as a whole. A state constitution would have to be negotiated in a democratic way and it would come into effect only if the Constitutional Court declares that all these conditions are satisfied.

### **Questions**

1. *Are you in agreement with the idea that the regional states should make their own constitutions?*
2. *They might also want to have their own flags and other symbols. Would you support this?*

### **System of Government Parliament (Chapters 8 and 9)**

For the purpose of this section, by the “system of government” we mean the way in which the legislative and executive powers of the state are vested and exercised. The IFCC was unable to agree on the system of government, despite long discussions and decided to leave the decision until after public consultation.

The relationship of the executive to the legislature is different in each case, although the differences are limited. The CDC contains only one set of proposals for the legislature but two for the executive.

## Parliament

The legislature is subject only to the constitution, which will regulate how it is formed, probably make some provision about how it operates, and will also set some limits to its powers. Those limits will include preventing the legislature from infringing the fundamental rights of the people, limiting the powers of legislatures, because each level of government has certain law making powers that other levels cannot interfere with.

The main features of the IFCC proposals are –

- two houses in the new parliament – a second house being common in federal systems;
- the House of the People with 200-300 members; the system of elections has not been decided;
- the House of the Regional States comprising a delegation from each regional state made up of the head of the government of each regional state, and 9 others chosen by the regional state assembly, but not be members of that assembly; its function is to represent the interests of the regional states;
- the House of the People has a life of five years; there would be only one situation in which it could cease to exist earlier (which would mean an early general election): this would be if it was unable to agree to accept the proposed government and its program, and was still unable to do so after it had been given three opportunities – applies only to a parliamentary system
- Ministers should not be members of Parliament – or if members they must resign from the House when appointed. This is to ensure that they are able to concentrate on being Ministers
- If the system adopted is a parliamentary one, the House of the People could pass a vote of no confidence in the Government, which would then have to resign (see below). Note, however the CDC does not allow for a vote of no confidence to be introduced during the first and last year of a government;
- In a presidential system Parliament could not remove the President by a simple majority of its members, but it could set in motion the process for removing the President for abuse of power or serious breach of the constitution;
- unless there is very good reason each house would sit in public;
- rules of procedure must ensure that members are able to participate fully;
- the public must be able to participate – giving their views on draft laws, for example, to the House of the People. Legislative procedures as well as governmental procedures should be transparent, public and accessible to all Somalis;
- the government, 10 members of the House of the people, regional state delegations and members of the public must also be able to propose new laws – this would require a large number (as many as 10,000 people);



## The Summary and Questions Guide of the Consultation Draft Constitution

- Parliament would possess the power to draft, pass and oversee implementation of laws;
- The President would possess the power to sign laws into force;
- The President, any 10 members of the House of the People, any one or more delegations of the members of the House of the Regional States could refer any law to the Constitutional Court for rulin on the constitutionality of the substance of the draft law or of the procedure used to adopt it;
- a law could be referred back by the President to the parliament for reconsideration because it was passed by the wrong procedure or is unwise in content;
- Parliament must approve all government spending (not in detail but the overall budget) and all taxation;
- the Auditor General, whose office audits all annual accounts of government bodies, reports to Parliament, giving Parliament information on the basis of which they can investigate possible abuses;
- the House of the People to have committees to draft and analyze proposed legislation, as well as to monitor the work and budget of every government department;
- Parliament to approve a number of appointments made by others – such as appointments of judges made by the President or the Judicial Service Councils.

### Questions

1. *What is your opinion about the proposed two houses of the parliament? Do you think that a two house or a one house parliament would better serve your interest? If no please explain.*
2. *How do you think members of parliament as your representatives would serve your interests and protect your rights? Should the constitution be more explicit on this matter?*
3. *How do you think members of parliament should be held accountable for their actions in office?*
4. *Should the constitution stipulate conditions for candidates aspiring for elected office?*
5. *Should the constitution stipulate incompatibilities for elected officials?*
6. *Do you think the freedom of speech should be extended outside the precincts of parliament?*
7. *Are you happy with the formulation of immunity of elected (president or members of parliament) officials? If not please explain.*
8. *Should the constitution include provisions for removing members of parliament who miss many sessions?*

9. *Are you happy with the idea that Parliament cannot be dissolved even by the Prime Minister (in the parliamentary system)?*
10. *Is the 5 year term the right length?*
11. *Should there be a required number of seats or a certain percentage of members reserved for women in the parliament?*
12. *Should there be a required number of seats or certain percentage of members reserved for minorities?*
13. *Do you think the parliament as representing your interest should have the power to make substantive changes to the draft federal budget during its approval?*

## **Executive (Chapter 9)**

### ***Parliamentary system***

In the parliamentary system the head of state (president) is separate from the head of government (prime minister). The prime minister is appointed either by the president or elected by the more representative of the two house of the federal legislature. In either case the principle is that the prime minister must have the support of the majority of the members of that house. The prime minister chooses the Council of Ministers.

The government does not have a fixed term of office. The legislature can dismiss the government before the normal life of government and parliament ends by a majority vote. The IFCC recommends that a motion for a vote of no confidence in the government is not valid unless the successor to the prime minister is nominated in the motion—in this way, the necessary votes are hard to obtain and there is no gap in government if the vote is successful.

In brief the proposals for a parliamentary system are:

- a President elected by the two houses of Parliament, and having mainly formal powers – the only power where the President would make a choice would be to refer a law back to parliament because it seems to be unconstitutional or unwise, or to refer it to the Constitutional Court for a ruling on its constitutionality;
- a Prime Minister with the support of the House of the People who chooses the Council of Ministers;
- Ministers cannot be members of Parliament;
- the House of the People to approve the Council of Ministers and the government's program; if it cannot do so at the third attempt there must be a new election;
- the Prime Minister and government can be removed by a vote of no confidence which must propose the name of the new Prime Minister.

### ***Presidential system***

In the presidential system, there is total separation between the executive, that is, the president, and the legislature. The President and the majority of the legislature are not necessarily from the same

political party, and the president has far less control over the legislature than is the case in a parliamentary system. But, since all laws, including the adoption of the budget, have to be passed by the legislature, the president has to work with the legislature to ensure that the president's policies and plans can be carried out. There are more checks and balances in a presidential system but there is continuing accountability of government to the legislature in the parliamentary system.

The main features of the proposed presidential alternative are –

- a President who is both head of state and head of government elected by the people;
- President could be removed only by a process that involves a trial before the Constitutional Court, at the instance of both Houses of Parliament;
- President chooses the Council of Ministers, who must be approved by the House of the People;
- a fixed term of 5 years for both executive and legislature;
- no President to serve more than 2 terms.

### Questions

1. Do you feel that the parliamentary system or the presidential system would be more suitable for Somalia? Please explain.
2. What do you think of the following proposal: The first seven years, the federal system should be a parliamentary system; after 7 years a public referendum is held on whether the system should continue to be based on a parliamentary system or switch to a presidential system? Would this be a good solution as to how to begin in Somalia? What are your main concerns with this proposal?
3. In the parliamentary system do you believe it is a good idea for Ministers not to be members of Parliament?
4. In the parliamentary system, do you think it is a good idea for the President to have very little in the way of powers involving the exercise of any personal judgement, or should there be some other powers to make the President more the guardian of the constitution?
5. In the parliamentary system is it a good idea that the vote of no confidence should be rather restricted, as is proposed?
6. Do you think that the checks and balances established by the CDC are strong enough to prevent the establishment of a dictatorship? What are your main concerns on this topic?
7. Do you think that the qualifications enumerated in the draft constitution are satisfactory for a presidential candidate?
8. Should the constitution stipulate conditions for candidates aspiring for elected or appointed office (president or members of the cabinet)?
9. Should the constitution stipulate incompatibilities of appointed office (president, members of cabinet or others)?
10. How do you think the president or members of the cabinet can be held accountable for their actions while in office?

11. *In the presidential system are the grounds for removing the president, and the procedure satisfactory?*

12. *After reviewing the 2 options of system of governments (presidential and parliamentary) set forth in the CDC, what do you see as the most attractive features of each system? What are the negative features of each system? What problems do you envision that Somalia will encounter with each system? Which system do you think is the most viable for Somalia?*

## **System of Justice (Chapter 10)**

The judiciary is not just one of the arms of government; it plays a very important role in protecting the constitution, as well as the rights and duties of citizens. It is a crucial aspect of the checks and balances system in the constitution. It cannot perform this role if it is controlled by the government or by parties or even by any segment of society. In order to function effectively, the judiciary must be independent.

The main features of the judiciary under the CDC would be –

- the Constitutional Court – a new court, the highest court for constitutional matters and can only hear matters of a constitutional nature. The Chief Justice would be the most senior judge in the country;
- the Supreme Court – the highest court for non-constitutional issues;
- the Court of Appeal and the lowest level of court, the courts of first instance, would deal with ordinary criminal and civil cases, under all systems of law;
- decisions of local customary dispute resolution mechanisms to be generally recognized by the courts, but they must be compatible with the constitution and the Shari'ah.

In order to protect the independence of the judiciary -

- the appointment system of judges would be largely independent of government;
- judges would be protected from removal from office except for serious misbehavior, and then only through a fair and independent process;
- the Judicial Service Council and not a Ministry would prepare the budget for the judiciary; this must go to the Finance Minister who will have to put together the overall federal budget, but it must also go to the relevant committee in parliament so that they can ensure that the judiciary gets what it needs to function effectively.

The Attorney General, who has the very important function of enforcing the criminal law by bringing prosecutions before the courts, would be independent of the government. This is important in order to avoid “impunity” – that is the ability of the wealthy and the well connected to escape from the consequences of wrongdoing.

## **Questions**

1. *Do you believe it is necessary to have a separate Constitutional Court?*
2. *How many members the Constitutional Court should have and how long the mandate of a constitutional judge should be?*
3. *Should the functions of the courts be spelled out in greater detail?*
4. *Is the independence of the judiciary adequately protected? Do you think this will help judges to serve justice better?*

### **Independent commissions (Chapter 11)**

States set up independent commissions to perform vital roles in regulating particular sectors of society or government and to provide expertise in policy-making. Some commissions also have a role in monitoring the activities of government. The main important and unique feature is their separation from politics and the other business of government.

In deciding on commissions, particular attention was paid to the financial and resource capacity of the country. The Commission recommends that only those commissions which are essential should be established by the constitution, however decided to reserve the ability to create additional Commissions as necessary as long as resources allow and it goes through the appropriate process. Priority was given to those concerned with fundamental rights, democracy and transparency.

The IFCC proposals are –

- National Electoral Commission; Boundaries and Census Commission; Human Rights Commission; Civil Service Commission; Land and Property Disputes Commission and Judicial Service Council;
- each independent commission to have a minimum of 3 and a maximum of 9 full time members of the commission, out of which, at least 1 of the commissioners shall be a women if the commission comprises of three or four commissioners and it least 2 commissioners shall be women if a commission comprises of five or more commissioners;
- Commissioners would serve a 5 year term, which would be renewable one time;
- independent funding and accountability for Commissions should not be subject to the direction or control of any person or authority.

These various bodies will report to Parliament. But they are not accountable to Parliament in the same way as Ministers are. They should report to the people and do so in a way that the people will understand.

### **Questions**

1. *Do you agree that Commissioners should be eligible to serve a second term?*
2. *Do you think that the size of commissions suggested is about right?*

3. *Do you think that the grounds and the procedure for removing a commissioner are reasonable?*
4. *Do you think that the CDC's requirement of women commissioners does enough to promote women's participation within the independent commission structure?*
5. *Do you think any other independent commission should be established by the constitution? If yes please explain.*

## **Public Finance (Chapter 14)**

The management of the money of a country is as important as the management of a family's finances, but more complex of course. It is a central aspect of good governance, one of the main objectives of a constitution. The issue of financial management will be more complex in a federal Somalia.

The proposals include -

- a statement of basic principles of good financial management, and also the principle that money must be spent fairly;
- taxes to be collected by all three levels of government: the federal, the regional state and the local government level; no final proposals about exactly which taxes the various levels of government will be able to raise;
- law must regulate transfer of funds from the federal government to the regional states, satisfying principles of fairness and efficiency, and guidelines on ensuring that regional states get the resources they need, but are not wasteful, are able to offer roughly similar levels of services to their people, and that the plans and circumstances of the various states are taken into account;
- government to put before the parliament or regional state assembly a budget that will be clear about what the government's expenditure plans are, at least two months before the end of the preceding financial year;
- the responsibility of the Parliament to scrutinize the financial aspect of government carefully;
- the equivalent of one quarter of the previous year's budget could be spent, over a period of up to four months, even without budget approval, in case the budget cannot be approved before the financial year begins;
- all laws involving money to be introduced by the government;
- all government bodies to keep proper accounts, which must be audited; the Auditor General must be independent, and the person cannot be dismissed easily;
- a commission with representatives of the various regional states to make recommendations on the distribution of funds;;
- federal government are able to make grants to regional states to carry out programs;
- regional states able to borrow money only if the federal government guarantees the loan.

## Questions

The Commission hopes that finance experts will scrutinize the Consultation Draft carefully and make suggestions for improvement. The general public is also welcome to make their suggestions as it is for them that the money will be managed. Here are a few questions that may be worth considering:

1. Should there be any further provisions to ensure that money is responsibly handled?
2. The Cabinet is responsible for implementing the budget and managing state finances. What constitutional tools you think should exist in order to hold the Cabinet accountable for managing state finances and make the process more transparent?
3. Are there more provisions that could reasonably be included to try to ensure that the federal parliament members can understand financial matters and contribute to responsible financial management?
4. Should there be a limit on federal government borrowing?
5. Is the ban on anyone except the government introducing money bills too restrictive? Most bills will have a financial implication, are you concerned that this would then give the government grounds to prevent any other entity from introducing any bill?
6. Do you think the parliament as representing your interest should have the power to make substantive changes to the draft federal budget during its approval?
7. Is the idea of a Finance Commission to propose allocation of revenue collected federally satisfactory? Specifically should it be an expert commission rather than a representative commission?
8. Are there ways in which the constitution could provide for members of the public to be more informed and involved in this aspect of governance?

## Peace, Security and the Constitution (Chapter 15 with relevant articles elsewhere)

There are risks in the existence of large bodies of people with weapons. These include the military interfering in politics, or the politicians using the military to oppress the people and defeat democratic choice, or the military abusing their powers – or even armed conflict between political factions.

Ultimate control by the government of the use of organized force is a key principle in the CDC. The military and other disciplined forces are subject to the constitution and the law like the rest of society. Control should ideally not be a matter solely for the government, because of the risk of government abuse of the use of force. Legislators, as the elected representatives of the people, should also be involved, and in many countries ordinary members of society may also be part of the supervision mechanism. This is especially true of the police, because of their close connection with the people.

There is a specific chapter in the CDC on Peace and Security (15). The main features of this are –

- Statements of values: the importance of discipline and patriotism, of respect for human rights, support for the constitution and the rule of law, and political neutrality;
- A single national military (this may take time);

- Human rights abuses alleged to have been committed by members of the armed forces against the people must be tried in ordinary courts;
- Heads of the forces are appointed by the government;
- A special committee of parliament must have supervision over the forces;
- There must be a Minister of Defence (who could not be a serving soldier);
- A decision to use the forces externally or internally must be approved by the government, and Parliament must be kept informed, or even in some cases must approve;
- A clear distinction is made between the police and the armed forces. A federal police force is proposed – but regional states could also have their own police;
- No armed security force, including a commercial company, could be formed without authority under law.

In other parts of the Constitution there are also relevant provisions including the ban on military political parties; the general principle that public expenditure must be approved by parliament; the right to information; the rule that no courts may be set up outside the constitutional procedures (special courts set up by the military have been a source of abuse in many countries); and military tribunals must not try civilians. Recognition of local tribunals such as decisions of elders means that the traditional lens of control of force can still be used.

Finally anti-terrorism and even anti-piracy, as well as control of organized crime generally, are made matters for the federal not regional state government – to ensure that the country can fight effectively against threats to national security.

### **Questions**

1. *Is there adequate protection in the CDC for the fundamental rights of the people?*
2. *Would you want to see provisions for the involvement of non-government people in the monitoring of police?*
3. *Is the right balance struck between professional decision making and effectiveness and civilian control?*
4. *What are your main concerns regarding the development, management and behavior of the security forces?*
5. *Should the members of the armed forces and security services be banned from exercising their right to vote?*
6. *Who do you think should be the commander in chief of armed forces?*
7. *Would you agree that members of armed forces, intelligence services and security services as police should be banned to be affiliated to any political party or movement?*
8. *Should Somalia have a Federal/National Security Council? If yes who should be members of this Council? Individuals or representatives of institutions? How members should be nominated appointed ratified?*
9. *Which institution should be responsible for developing and implementing policy decisions on national security/defense? The president or Cabinet?*
10. *Which institution shall exercise the oversight on military and security forces?*
11. *How shall the high ranking military/security officials be appointed?*



12. *Does Somalis wish to have a compulsory or professional/permanent army?*
13. *Should the constitution refer to the incompatibilities of members of army and security forces?*
14. *Should the Somali Constitution ban or allow establishment of armed militias?*
15. *Should the Somali Constitution refer to terrorism or piracy as major security issue?*

## **Constitutional Amendments (Chapter 16)**

If it was as easy to change a constitution as an ordinary law, the aspects that restrict law makers and the government would not remain for long! And it is important that the government and the people try to make the constitution work. So, usually it will need a large majority (perhaps 65%) of the legislature to change the constitution. Some changes usually require an even higher vote in the legislature, or a public referendum. It is necessary to have some possibility of making changes, because in any constitution some things may prove not to work so well, or changing circumstances may require change. The Commission decided not to include any requirement of a referendum on constitutional amendments as referendums are very expensive and often very divisive.

The proposals on amendment in the CDC include –

- The founding principles including such things as the constitution and Republic being based on the unity of the republic, democracy, Islam and human rights can never be amended;
- During the first seven years, no amendments will be allowed with the exception of amendments which may become necessary after negotiations in connection with Puntland and/or Somaliland;
- The decision on amendments would be made by the federal parliament;
- The process of amendment may be initiated by the federal or a state government, a member of the federal legislature or by means of a petition by at least 20,000 Somali citizens;
- Amendment must involve public consultation;
- The support of at least two thirds of the members of each house of the federal legislature is required for an amendment;
- At the end of six and half years, the federal legislature must set up a commission to review the implementation and operation of the constitution and to consult the people on possible changes.

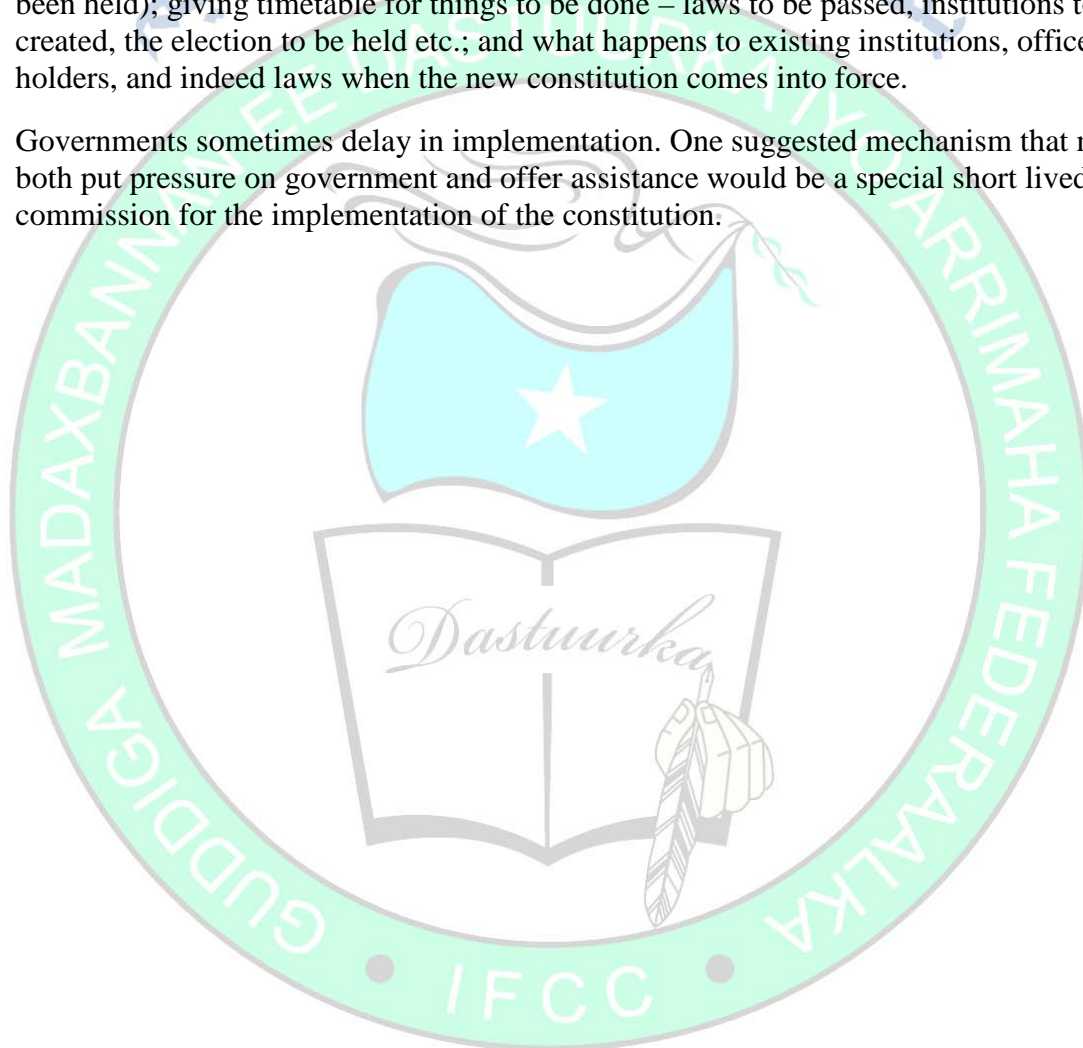
## **Questions**

1. *Are 6-7 years long enough to enable the country to judge how the constitution is working?*
2. *Or it is too long – should change be possible sooner?*
3. *Would you favor a requirement of a referendum for constitutional amendment?*

## Bringing in the new Constitution and making it work (Chapter 16)

A new constitution will come into effect gradually. Many processes will be taking place at the same time or in succession. It is not possible to propose detailed provisions on bringing in the new constitution before the details and the circumstances are clear when it is finally adopted. Things which could be included at the appropriate time are the following: postponing some parts coming into force (for example until elections have been held); giving timetable for things to be done – laws to be passed, institutions to be created, the election to be held etc.; and what happens to existing institutions, office holders, and indeed laws when the new constitution comes into force.

Governments sometimes delay in implementation. One suggested mechanism that might both put pressure on government and offer assistance would be a special short lived commission for the implementation of the constitution.



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