



JUMHUURIYADDA SOOMAALIYA
جمهورية الصومال

The Main Report
of the
Independent Federal Constitution Commission on
Consultation Draft Constitution

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The Consultation Report

The Independent Federal Constitutional Commission has been given the challenging and arduous task of drafting a constitution for Somalia. The Commission completed this task on 30 June 2010 when it published the Consultation Draft Constitution (CDC). The Commission plans to disseminate the CDC widely to enable the Somali people to study its recommendations for the new constitution. The Commission hopes the people will send their submissions to the Commission on these recommendations or make alternatives suggestions.

Due to prevailing circumstances in the country, the Commission was unable to consult the people as it would have wished before producing this Draft. The CDC is therefore not presented as the final draft on which the people must decide. On the contrary, its purpose is to stimulate public debate by focussing on a specific set of ideas and recommendations. After the period of consultations, the Commission will analyse all the submissions it receives before it starts on the process of preparing the final draft of the constitution. This next draft will be put to the people in a referendum to decide whether they would adopt it as Somalia's new constitution.

However, the Commission reflects all elements of Somali society, who have a general understanding of the needs of the country and of the fears and aspirations of the people. They have worked hard to establish a consensus among themselves, and when this has not proved possible, to reach compromises within valuable principles. The Commission believes that the CDC provides a good basis for further discussions and debates.

The aims of this report, called the Consultation Report, are to describe the process by which the CDC was prepared, the objectives of the CDC, and the approach and orientation of the Commission regarding the new constitution. It explains the rationale for its proposals to enable the people to fully understand the text of the CDC. It includes questions relating to its proposals that readers are invited to think about and to send their responses to the Commission, in one of the ways suggested at the end of the report.

The purpose of this report is, by explaining the CDC, to facilitate consultation. The Commission believes that a draft is a good basis for consultation. People may have difficulty in the abstract in proposing structures of government or the relationship between different levels of government (federalism being a mandatory requirement). It would be easier for them to respond to specific recommendations made by the Commission. It would give them an understanding of the nature and scope of constitution and easier to see how different

parts of a constitution are connected. The report will also give them an idea of the approach of the Commission, the alternatives that it discussed, and the compromises that were necessary to achieve a consensus.

The Commission also envisages the report as the principal tool for civic education and therefore provides some analysis of the constitutional issues and institutions and options, on which the CDC is based.



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Part I

The constitution making process

The Inter-Governmental Agency for Development (IGAD) sponsored negotiations on Somali during 2002-2004 which were facilitated by Kenya resulted in the adoption of the Transitional Federal Charter (“Charter”) in 2004. The Charter stipulated that an Independent Federal Constitution Commission would be established within 90 days of the formation of the Transitional Federal Government (“TFG”). Its members were to be nominated by the Council of Ministers and appointed by the President of Somalia. The Charter requires the TFG and the Commission to set up a federal system within two and half years. The Commission has indeed proposed a detailed federal framework of principles, institutions and division powers (which are outlined in this report).

Independent Federal Constitution Commission

The establishment of the Independent Federal Constitutional Commission (IFCC) is authorised by the Charter (Art. 11. 5). Additional provisions are contained in an Act TFP/1/193/06 passed by the Parliament on the 10th of June, 2006 and approved by presidential decree RS-TS-OP/395/2006 on the 15th of June, 2006. The members are to be nominated by the President and approved by the Parliament (although the legislation on the IFCC refers to nomination by the Council of Ministers (Art. 1.2). It has to have 15 members (although after the Djibouti Agreement, the number was doubled). The legislation states that 13 members must be appointed on the 4.5 power sharing formula (i.e., drawn on the basis of clan affiliation) and 2 women, “selected on their qualifications”—it is not clear but most likely that the reference to qualifications extends to the other members). In any case it is clear that all members must satisfy prescribed minimum qualifications, which include being at least 40 years and have a university degree in a relevant subject and five years of experience (although what experience, is not stated). In order to ensure their independence and impartiality, members cannot hold political or administrative office “inside or outside the republic” (Art.2.4 of the legislation). They hold office until the new constitution has been approved by a referendum.

The Commission is the most important institution in the constitution making process. Its function is to draft a constitution which goes directly to the referendum. It is an independent body and thus cannot be instructed on how to discharge its responsibilities. It can make rules of procedure for the conduct of its proceedings, but the decisions on the contents of the constitution must be made by the votes of two thirds of its members.

The second element in accordance with Djibouti agreement, the IFCC expanded to 30 members , 7 being women. The membership was cleared by cabinet in February 2010 and

they were sworn into office on the 2nd March 2010. At the time of publication the new IFCC have been in office for 5 months.

The Commission operates according to rules of procedure determined by itself. But some rules or guidelines are prescribed by the legislation. Its decisions must be made by a two-thirds majority of the commission members (Art. 4.4)—presumably this applies to all decisions, not merely those pertaining to the draft constitution. The IFCC must establish subcommittees of its members for specific tasks (such as to gather information, research or provide civic education). The secretariat, headed by a “director”, is to be recruited in “accordance with civil service employment methods”, and its functions are determined by the Ministry of Constitution and Federal Affairs in consultation with the chair of the Commission (Art. 7). The Permanent Constitution and Federal Affairs Commission of the legislature is to oversee the work of the ministry and have “coordination and constant relations” with the Commission (Art. 5.2).

The legislation provides “guiding principles” of the constitution which the Commission must follow (Art. 5). The constitution should be based on “Islamic principles, the Transitional Federal Charter, democratic principles and social justice”. The IFCC must also reflect “good Somali customs” (Art. 4.3). Moreover the constitution must increase “public participation [in governance], transparency, fairness and accountability”. On process, the legislation says that it must give “various sections of the Somali society a chance to express their views’ and “Enhance stability, peace and reconstruction of the country”.

At first the Commission made little progress, although it studies the past Somali constitutions and the political circumstances surrounding them and held capacity building workshops to acquaint its members with the background to constitutional issues selected for their importance, and relevance to Somalia (including different processes to make the constitution, federalism and the Shari’ah) . The political environment in southern Somalia throughout 2006 and most of 2007 was unstable and volatile, and several hurdles, including division within the Transitional Federal Government, security and access problems as well as the lack of political dialogue prevented any meaningful progress. The National Reconciliation Congress in Mogadishu in July/August 2007 opened up opportunities again. Throughout the Commission was faced with constraints of time, resources, logistics, and above all security.

The actual work on the drafting of the CDC commenced in early 2010. Since then the Commission met regularly and worked long hours, held intensive discussions, interacted with a number of experts, and finished the CDC at the end of June 2010.

The Commission regrets greatly that security circumstances prevented it from travelling around the country to talk with the people and listen to them before they began to prepare the CDC. It intends to promote as extension consultations with the people on the CDC. The CDC will be disseminated for study by the people, who will then have the opportunity to make their submissions to the Commission before the revision of the CDC and the formulation of the final draft, for submission to the people in a referendum.

Moreover, the Commission proposes that a review of the working of the constitution would be started in the sixth year of its coming into force, and hopes that by then the security situation would have improved sufficiently that the people would be fully able to participate in the review.



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Part II

The Approach of the Commission

Somalia embarked on making its constitution in very difficult circumstances. It is widely recognised that the country urgently needs a constitution for the return to normality, and even more importantly, the integrity of the country. At the same time it is clear that the violence which has plagued the country for so many years makes it exceptionally hard to have a good and effective process for making the constitution, including the participation of the people and the building of a consensus. Somalia belongs to a handful of countries in the world which have had to establish a new constitutional order in the aftermath of violent internal conflicts and indeed sometimes during the conflict itself.

In 1969 the army, under the command of Siyaad Barre, seized power, ending the brief but golden period of democratic rule in the country. Some of this regime's policy led to a war between Somalia and Ethiopia in 1977. The aftermath of this war was the beginning of the fragmentation of the armed forces and the subsequent eventual failure of the state. The first armed function was formed in 1978, Somali Democratic Salvation Front (SSDF) by former disgruntled military officers. In the following decade, the country saw the establishment of various functions based on clannism namely, Somali National Movement (SNM) 1981, Somali Democratic Movement (SDM) 1987, Somali Patriotic Movement (SPM) 1988, and lastly Somali United Congress (USC) 1989. With withering political and economic prowess, the regime was overthrown and the state collapsed. This resulted in a disastrous civil war due mainly to the self-interest of certain political leaders who were engaged in the politics of zero sum game. There was utter chaos, and great human suffering. There were periods of famine. Thousands of refugees left the country. With the collapse of the state, society was fragmented, which led to the re-emergence of clans and traditional leadership. Internal conflicts have intensified, with a great loss of human lives. The economy has also collapsed. The emergence of Islamist movements have introduced fresh ideological conflict, and the incessant fighting has led to the displacement of people and the breakdown of human security.

The country now faces serious problems of both radical groups and clan political conflict. It has fragmented into various parts, with one of them, Somaliland, asserting its secession and declaring its desire to be independent. There are now fundamental problems of national unity with when combined with the collapse of the state, has allowed clan politics to take hold at the expense of nationalism and Somalihood.

This means that the constitution must address simultaneously two major problems. The first is building or strengthening Somali nationalism, promoting factors (such as national unity religion, language and a sense of shared history and a common destiny) that bind the various clans and regions together. An important element in this must be reconciliation,

dealing with the wounds of the recent decades. The second is state building, establishing institutions which respond to the needs of the country and whose structures will command the loyalty of the people. The process of constitution making will be critical to nation building, while the constitution itself will be central to state building.

Accordingly, the Commission sees the primary function of the constitution as both to (a) re-establish unity among the Somali people by emphasising values and aspirations common to them all (“nation building”) and (b) to provide for the structure of the state which gives effect to these values and aspirations (“state building”).

While the breakdown of the state has led to unfortunate consequences, the Commission also realises that the state itself has been the source of serious conflicts, and that it was the struggle for control over it that eventually led to the collapse of the state. It also led to the politicisation of clan identities. The state therefore singularly failed to perform its tasks of nation building, consensus building, and ensure fair administration throughout the country.

The collapse of the state has led to major successful attempts at peace making and reconciliation at local levels, namely, Somaliland and Puntland who have successfully used traditional methods of dispute settlement using local leaders. Mostly it is these local initiatives which have enabled people to lead their lives with some degree of normality; in several areas economic investment and activities have increased without state authority, perhaps even because of its absence. There are several different kinds of organisations and mechanisms to maintain law and order, and to settle disputes, at local levels; they may not all be democratically elected, but their members enjoy the respect of, and acceptance, by the people.

The Commission realises that the potential of these developments should also guide it as it considers state structures. At an early stage the Commission discussed and adopted a number of principles to guide its work, known as the Founding Principles, to unify the Somali people, to reconcile and build a more effective and constructive partnerships, and to promote social justice and cohesion and equal opportunities for all. These principles are the basis of the CDC.

One Founding Principle has always been more important than any other, the primacy of the Qur’an and the Shari’ah. It is therefore useful to set out now the way the Commission perceived the relationship between the constitution and the Shari’ah.

Shari’ah and Constitution

At an early stage of its appointment, the IFCC decided that the most important principle of the new constitution would be the supremacy of the Shari’ah—that all provisions of the constitution must be Shari’ah compliant. This became the touch stone of every proposal

that the Commission considered. An expert on Islamic law who advised and worked with the Commission said that he was in no doubt “over the centrality of Islam and the Shari’ah that is demanded and given a prominent role in the constitution of Somalia”.

With the objective of ensuring the supremacy of the Shari’ah, the Commission attended several workshops on the high objectives of Shari’ah and social justice and the application of Shari’ah as a State Law. These workshops, brought together some leading Islamic scholars both from Somalia and other Muslim countries and they covered a range of constitutional issues in the context of the Shari’ah. The Commission followed up with many of these experts, one of which was present for most of the period when the Commission was drafting the CDC, Professor Hashim Kamali, a highly respected and renowned Shari’ah scholar. Professor Kamali’s advice was available and sought during most of the period as the actual drafting was done. With his help the Commission discussed at considerable length models of 13 Muslim countries and their respective constitutions. He briefed the Commission on references to Islam and Shari’ah that are found in the constitutions of Algeria, Bahrain, Egypt, Saudi Arabia, Qatar, Iraq, Afghanistan, Kuwait, Jordan, Morocco, Syria, Tunisia and Oman. The provisions of these constitutions and their references to Islam bear a great deal of uniformity, yet also vary in a way that four or five different models can be identified. His conclusion on the draft constitution was that it met the requirements of the general principles of the Shari’ah.

Some of the critical issues in the connection between the Shari’ah and the constitution are discussed below.

Compatibility of Constitution with Shari’ah

The Commission raised the question of the relevance and acceptability of a superior law such as a constitution to the Shari’ah. He said that this not a new question, referring to the discussion in Egypt in the mid-1920s when the eminent scholar and commentator on the Qur’an, Muhammad Rashid Rida, was asked whether having a constitution is at all acceptable to Islam. He issued a fatwa on this which is recorded in his collection of published fatwa to say this: if the purpose of a constitution is to regulate the administration of justice, accountability and good governance, and also to place limits on the exercise of coercive power, then these are equally objectives of Islam and the Shari’ah. Rida added: should there be any clause in a constitution that is contrary to Shari’ah, one should try to draw attention to it and rectify it as soon as possible, but not to reject the whole of the constitution due to a minor repugnancy. For after all, when we find errors in many of the renowned works of the ulama of the past, we surely try to correct them but not to reject them and throw out the whole of their worthwhile endeavours.

He noted that since the days of Rashd Rida, there has been the development of a general practice to the effect that nearly all Muslim countries have adopted a constitution and some have revised and amended it many times. This then becomes a generally accepted convention and custom that is upheld by the vast majority of Muslim countries. A valid custom is authoritative and becomes the basis of judgment and action, according to a legal maxim of the Shari'ah. Constitution-making is now seen as an instrument of good governance which inspires compliance and support. Furthermore, constitution is a commitment, a national charter and a document that signifies determination of a nation over a set of principles and priorities. And when a constitution contains a clause demanding its own conformity to the principles of Islam and that of the parliament and law-makers to abide by and observe the Shari'ah, it becomes a hukum of the uli'l-amr (ordinance of those in charge of the community affairs – cf. Q 4:59). Then also according to a renowned hadith, 'Muslims are bound by their stipulations' which evidently means that they may agree on and incur commitments on what they deem to be desirable – a duly ratified constitution thus becomes a Shari'ah compliant commitment for a desirable purpose. Without a specified charter and text in matters relating to the administration of the state (*Siyasa Shari'ah*), a general reference to Shari'ah is bound to be vague and prone to wide-ranging disagreement and differences of opinion - simply because the Shari'ah, as a body of laws, has not been codified nor ratified in the same way as a constitution is, and when compliance to Shari'ah becomes a part of the constitution, there remains little doubt over its acceptability and authoritative standing

In his review of the constitutions of Islamic states, Professor Kamali pointed to considerable uniformity among these countries and their constitutions over the provision that adopts Islam as the state religion. There is also much in common between them over adopting Shari'ah as a principal, or the principal, source of legislation. Some constitutions also adopt a repugnancy clause to the effect that parliament may not pass any law that contravenes the basic principles of the Islamic Shari'ah, whereas others provide for the head of state to guarantee protection of Islam in his oath of office. Only some constitutions contain references to particular subjects, such as the position of women and that of the family, the laws of inheritance, religion of the head of state, formation of a high Islamic council to supervise Islamic affairs and the conduct *ijtihad*, and protection of the (Arab and) Islamic culture. Saudi Arabia's basic law of 1991 has so many references to Shari'ah so much so that Shari'ah is made the only authoritative law of the land.

Separation of Powers

The Commission also discussed with Professor Kamali the history and practice of the principle of the separation of powers in Muslim countries, and the various approaches taken towards it. The Commission explored also the Shari'ah position/s over the basic idea of limitation on state powers and its division among the various organs of state. He explained

that the basic idea of an Islamic government is one of limitation and regulation of power, and indeed a fundamental principle under Shari'ah is the rule of law. In line with the Maqasid of Shari'ah, if the purpose is to establish accountability and justice, then separation of powers is desirable, and has in effect been functionally in existence during much of the Islamic history of state and government.

Human Rights

The Commission spent many hours, in committee and plenary sessions, discussing the basis of human rights in Shari'ah. The Commission explored extensively the compatibility of rights with the Shari'ah in other constitutions and under international law. The Commission sought Professor Kamali's advice and that of other experts while drafting the Bill of Rights, to ensure compatibility with the Shari'ah. Professor Kamali provided a broad outline of the supportive evidence that is found in the sources of Shari'ah on the various aspects of fundamental rights and liberties and other wide-ranging themes of relevance to human rights in Shari'ah. His conclusion is that the whole chapter on human rights is visibly compliant with Shari'ah, not only in general terms but also over specific issues that were discussed with him.

The Commission noted that the cause of human rights is also supported by the newly burgeoning study of the higher goals and objectives (*maqasid*) of Shari'ah, a subject that is elegantly articulated by Imam Ibrahim al-Shatibi in late 14th century CE and much recent scholarship on Islamic jurisprudence. 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. The *daruriyyat in the five unchangeable universals of Shari'ah* are as follows: protection of life, protection of religion, human intellect, property, and family. One other objective that some scholars have added to this is human dignity (Chapter 17(70) Q). These are basic Shari'ah commitments and they assign a place of central importance to what also represent the major headings of any constitution. The bill of rights aspect of contemporary constitutions in almost all Muslim countries thus provides to all intents and purposes a distinctive commitment to the *maqasid* of Shari'ah. This is another way of saying that the lines of convergence between the constitution and Shari'ah are unmistakably obvious.

Part III

Overview of the Consultation Draft Constitution

Part V of this Consultation Report explains the main points of the Consultation Draft Constitution, with an emphasis on why the Commission has proposed these provisions. In this section we give a quick overview of the document.

Introduction

This will be the first constitution that Somalia has had for many years. The only constitution that operated for any length of time was the 1960 Constitution – the product of the independence period, with considerable Italian influence. It had to deal with a very different situation from that which faces the constitution makers, and the country, now. Nineteen-sixty was the great year of African liberation, when people still hoped for a bright future and looked forward not just with hope but with optimism.

The last fifty years have seen not only the turmoil in Somalia, but events in many countries that have cast doubt over many things, including the value of constitutions. It may not be so hard to awaken hope, or maybe hope never dies, but it is harder perhaps to arouse optimism. Although it would be challenging for people to put all their faith in a constitution, the Commission believes that a constitution can still be a cause for hope and even for optimism. But certainly a constitution of 2010, or its makers, will have to work harder to gain popular belief and support than in 1960.

However, much has been learned in those 50 years, including about constitutions, and even about constitution making. The Commission has been able to tap into some of this knowledge and experience, which have informed their work, and the document that the people are asked to study and comment on is a very different document from the 1960 Constitution. But it does use some of the ideas from that Constitution, which was not at all a bad constitution for its time, and which many Somalis look back at with some nostalgia, partly for what it contained, and partly for what it signifies: an era of peace, hope – and optimism.

Reaching out to the people – language, values and rights

Perhaps the most immediate difference is language – the 1960 Constitution was never available in Somali, but only in Italian, and Arabic and English. The new constitution, like the current consultation draft, will be a Somali document in language (published in all three of Somalia's official languages: Mahiriti, Maay & Arabic) as well as in inspiration. The CDC reaches out to the people in other ways: through the preamble, which emphasizes the struggles and sufferings of the past, and through its repeated reference to Islam, the rock to

which Somalis have clung during those struggles and sufferings, and to which the Commission has tried to be faithful, and made the central focus of its work. It reaches out through its stress on fundamental values, and through its concern for various sections of society, and its inclusive view of Somali society, and insistence on inclusivity in governance. It does so through its focus on ending injustice and discrimination, and its care for the vulnerable – with provisions on the rights of the child, and the straightforward prohibition of female genital mutilation, and prohibition of discrimination on the ground of language or disability, neither mentioned in 1960 and which are concepts that the Shari’ah propogates.

It is in the area of human rights that the experience of the last decades shows most clearly – decades in which most nations became politically independent. Decades in which rights were more fully spelled out, with the participation of those independent countries, through the many covenants, including those on Civil and political Rights and Economic Social and Cultural Rights to which Somalia became a party to early on. The country that has made the most thoughtful use of these elaborated rights in its constitution has been the one at the other end of the continent, and the Commission has drawn on the human rights provisions of the Constitution of South Africa. Among the lessons that the past has taught are that it is unwise to leave rights to the legislators to fulfill, for they may have no interest in doing so. So few rights in the Consultation Draft Constitution say that the realisation of the right is “according to law” which gives a free hand to the law makers. The most marked difference from older generations of constitutions is the stress on economic and social rights - and the duty of the state to realize those rights, as well as the duty to allow citizens to fulfill them for themselves.

The Commission believes that Somalis are concerned with duties as well as rights – that the principles of justice, so central to the Shari’ah, require that duties as well as rights be recognized. They have therefore proposed a separate, though short, chapter on duties, setting out duties of the citizen to the state, their communities, and their fellow citizens. The fundamental rights also are to be respected not just by the state but by all.

Before even dealing with rights, the CDC defines the people in the sense that it deals with citizenship. It takes a broad approach, allowing everyone of Somali origin to be recognized as a citizen, thus welcoming into the national fold all those who were forced to flee over the years, and their children. And it permits Somalis to have a foreign nationality as well as Somali citizenship. It is this chapter that treats women and men alike – not favoring men over women as many constitutions have done in the past, though less so now.

A federal Somalia

In the Djibouti peace agreement it was decided that the future Somalia should be a federal country. There are about 25 federal countries in the world, including the United Arab

Emirates, Nigeria, Nepal, Sudan, Brazil, India, Malaysia, Mexico, Ethiopia, Canada, Germany, and the USA amongst others.

A federal country does not have just one, national government, but a number of governments at different levels, such as the central and regional state level, with their own legislatures and other institutions. Powers are shared between these different levels of governments. There is still one overall national government, but the country consists of a number of federal units, each with its own elected government and legislature. Those other governments have powers to make laws on certain topics, to collect certain taxes, and to run many of their own affairs. Those powers are given to them by the constitution and cannot be taken away by the national government.

Each federal system is different, according to the history of the country, its geography, culture and traditions. Certain powers will virtually always be given to the national government: matters of defense and foreign affairs, currency and other financial matters. Schools and hospitals may be matters for the lower level governments, though overall policy may still be a national matter. In one federation making the criminal law might be a matter for the national government and in another a matter for the lower level governments. Some federations have many lower levels governments (Nigeria has 36 states and a federal capital territory and the US 50 states), while some have only a few.

To strengthen the unity of the country, the Commission has made some broad decisions about the system: they propose a strong emphasis on cooperation between the various governments, and they have suggested some broad categories of powers to be allocated to the different levels. They propose a flexible system and one that can change and develop over time. They have not proposed a specific way of dividing the country because that is a delicate matter. The Commission proposes that it should work with the Boundaries Commission on this sensitive issue – and they invite the public to comment on this.

The Commission proposes that the regional states should have some room to design their own institutions of government, provided that they fit into the broad framework of the national constitution. But they suggest just one system of courts – partly because of the demands that having different systems of courts at the two main level of government would place on the country's human resources and finance of its citizens.

Another important dimension is local government – that is, for smaller units than the regional states. No details are given in the CDC, but it does suggest that the main responsibility for this should be with the regional states; it says that there must be such governments, and that they should be supported and encouraged by the regional states. The CDC also speaks of even more local initiatives – elders and other community institutions are specifically mentioned. Over the recent years these have been very important in much

of the country, and it is important that the contribution that communities can make to their own governance should be both respected and used.

An important aspect of federalism is the matter of funding. If governments are given powers but have no money those powers are worthless. However it is clear that for some time to come most of the money available to any governments will be raised at the national level. A fair system of funding all levels of government is therefore essential. The CDC proposes guidelines to ensure that funding is fairly distributed, and a mechanism to carry out the distribution. That body would represent the various regional states, so it would be a forum for negotiation, but it would also have technical expertise.

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. It is also a home for its people – usually very many of them. A few capital cities have no special legal status (Ottawa in Canada is a city in a province like any other). A few capital cities are states themselves. Many are in a federal capital territory or district – the federal government makes all the laws for it, though it will have its own local government and mayor. The Commission has set out all the three possibilities, but has not made a definite decision – though it does assume that Mogadishu (Hamar) will be the capital of Somalia.

The government and its institutions

The core of any constitution will be its provisions on government and governance. It must set up a system of executive, legislature and judiciary.

The Commission felt that it would not be appropriate to put into the constitution all the details of how governments and lawmakers were to be elected. But it has set out some basic principles both for the election systems and for the conduct of elections.

When it comes to the structure of government, the Commission was very aware that there are strong arguments both for and against the various systems. Each system (systems can be broadly divided into parliamentary systems, presidential systems and systems that have features of both (mixed or hybrid)) is used by many countries throughout the world. Indeed, Somaliland is currently operating something like a presidential system and Puntland something similar to a parliamentary system- though it has vice-president and not a prime-minister. France has a mixed system, Germany a parliamentary system and the United States a presidential system. There is no “right” system. The Commission decided therefore not to make any firm recommendation but to place the issues before the people – and to give details of both a parliamentary and a presidential system. You will find some discussion of the pros and cons of each in the section on systems of government below. The table

below sums up the main differences between the systems in general. Later there is a table that compares the two systems specifically put forward for Somalia in the CDC.

Parliamentary and Presidential systems compared

Parliamentary	Presidential
The Head of State is usually a separate person from the head of government (the Prime Minister). The Head of State (usually the monarch or President) has mainly formal and ceremonial powers and makes few important decisions about governance, but must act on the request of the Council of Ministers	The Head of State is also the head of government, so has both formal ceremonial powers and governmental powers
The Prime Minister is the person who has the support of the majority of the directly elected house of Parliament – usually the leader of the largest party.	The President is usually directly elected by the people
The people vote mainly for parties or for candidates put up by parties, but the quality of the leader, as a possible Prime Minister is important	The people vote directly for the President but may focus more on the personality of that person. They also vote, separately, for the Parliament
Ministers are usually also members of Parliament, and are called to defend their ministries' policies and actions before Parliament	Ministers are not usually members of Parliament but chosen from outside. Often they would come before a Parliamentary committee is summoned to help and investigation but otherwise have little to do with Parliament
The Prime Minister – and the government – can be removed if they lose the political support of Parliament, and usually for no other reason. Usually a vote of over 50% is needed to remove the Prime Minister	The President does not need the support of the Parliament to survive in office. Removal involves a more complex procedure, and is supposed to be not for loss of political support but for wrong doing and violation of the constitution. More than a 50% of the Parliament will be needed to do this.
The Prime Minister has the support of the majority in Parliament, usually through parties, and party loyalty is often strong.	The President may not have strong support in Parliament and will have to negotiate with it to get his policies and proposals for laws adopted.

<p>The leadership is a more collective matter as the Council of Ministers is made of up people from the parties in Parliament.</p>	<p>Leadership is very much focused on the President.</p>
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Briefly, the presidential system outlined involves a president, directly elected by the people who is the head of state possessing both formal and symbolic roles and serving as the head of government. The parliamentary system divides the ceremonial from the head of government functions (like choosing Ministers, giving political leadership and making major decisions). It gives these functions to a Prime Minister, though in the parliamentary system they are shared with the Council of Ministers.

The parliament in the two systems as proposed in the CDC is broadly similar. The size should be between 200 and 300. Ministers would not be members of Parliament in either system, but would be appointed from outside – or members of Parliament who are appointed as Ministers would have to resign from Parliament. There is some emphasis on the role of Parliament as the monitor of government: it must have committees watching over the various government departments. It is also given the role of approving certain government appointments.

In a federal system it is usual to have two separate chambers in the parliament. One includes all the members directly elected by the people in the usual way (here it is called the House of the People). The other is more representative of the states into which the country is divided (called House of the Regional States in the Consultation Draft). Different countries have different approaches to selecting or electing the members of such a second chamber. The proposal here is for members chosen by the legislative body of the regional states, one of whom is the head of government of that regional state. The main function of the second chamber (the House of the Regional States) is to represent the interests of the regional states and the whole system of federalism. It does this by having an important role in passing laws that affect the regional states: it can stop such laws being passed, while it cannot do so with laws that do not affect the regional states particularly.

Judiciary

The system of courts under the CDC would have a new body: the Constitutional Court. That would be the highest court for constitutional matters, and the Chief Justice would be the most senior judge in the country. There would also be 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, which would deal with ordinary criminal and civil cases, under all systems of law. But in view of Somalia’s well established system of customary law, *xeer*,

especially valuable in dealing with clan disputes, the decisions of local tribunals are to be generally recognized by the courts as long as they are compatible with the constitution and the Shari'ah.

Indeed the Shari'ah is recognized as underpinning the constitution, and therefore the entire system of law. Thus, when it is said that laws must be consistent with the constitution they must also be consistent with Shari'ah.

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 the wealthy. The CDC protects the independence of the judiciary by making the appointment system largely independent of government, by protecting the judges from dismissal except for serious misbehavior, and then only through a fair and independent process. It also makes the Attorney General, who has the very important function of enforcing the criminal law by bringing prosecutions before the courts, 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.

Other issues

The CDC includes important rules and guidelines on public finance, including the important principle that all taxation and expenditure must have the authority of Parliament. All public bodies' accounts must be audited by the Auditor General, who must be protected like judges from being victimized for criticizing government.

Other independent bodies such as the Electoral Commission and the Human Rights Commission – are both bodies that are guarantors of the integrity of the constitution.

The peace and security of the nation depend to a considerable extent on the police and the armed forces. But they must also be controlled – they must be responsible ultimately to the people through their elected government. This principle, along with discipline, professionalism, and respect for the rights of the people are values that are emphasized in the chapter on Peace and Security, and also protected by the institutions proposed.

A constitution that can be easily changed would be worth little. Like all constitutions this one would be hard to change. The Commission proposes that a few vital aspects should not be changeable at all, and that other changes must involve public consultation, strong support in both houses of parliament, and should take some time. They do not propose the expensive and often divisive referendum as a method of amendment.

The circumstances in which this draft constitution has been prepared have not been ideal and even the final constitution may be adopted under pressure of time and circumstances. The CDC proposes that after 6 1/2 years a process of review of how the constitution has worked should be begun. That might lead to changes. But the time lapse makes it possible to try to make the constitution work, rather than rushing to change it at the first sign of any difficulty.

It will take some time to bring the constitution into full effect. Details of this process cannot be worked out until closer to the time..,



JUMHUURIYADDA SOOMAALIYA

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Part IV

Introducing and Explaining the Consultation Draft Constitution

A constitution is not an easy document to read, even for lawyers. 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. But it may help to have an introduction that explains why certain approaches were taken, and also how the constitution is designed to work. Experience unfortunately shows that not only do people find it hard to understand constitutions without some sort of assistance, but that some people who are hostile to a constitution may deliberately misrepresent what it says.

Founding Principles (Chapter 1)

The founding principles of the CDC are set out in the first chapter, as part of the “Declaration of the Republic” as that chapter is called. Those principles must guide the country as it uses the constitution in setting up its new system of government, passes the laws and creates the institutions, and as the people try to use their rights and perform their duties. The foundational importance of the Shari’ah and Islam more generally is the key principle. Social justice, inclusiveness and the rule of law – including that everyone is equal before the law – are among those principles. The importance of women being involved in every aspect of public life also has a prominent place.

Question

Are there other founding principles that you would wish to say explicitly stated?

Declaration of Republic (Chapter 1)

The supremacy of the constitution – meaning that all laws must be consistent with the constitution is drawn from the constitution being rooted in Shari’ah – the status of Islam as the religion of the state, the nature of the state as a federal republic, the place of Somali in both its dialects, and Arabic, as official languages and of Mogadishu as the federal capital are the most important features of the declaration of the republic.

Citizenship (Chapter 2)

Introduction

Citizenship signifies a special relationship between a person and a state. 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). Citizenship is often the basis of loyalty to the state. A state constitutes not only territory but also its people—its citizens.

Most people get one citizenship (or more) at birth. Usually they get the citizenship of the state where they are born, or they have citizenship because one of their parents is a citizen of that state). Citizenship can also be acquired (or at least applied for) as a deliberate choice of a person, for example if they move to a country not of their original citizenship and where they wish to establish their home. Most states have some provisions for the acquisition of citizens by foreigners, not necessarily a right but at the discretion of the state. In recent decades millions of people have left the country of their origin and settled in a foreign state. In response to this, some countries allow their citizens to have more than one citizenship (only, of course, if another country would grant its citizenship to such persons).

The Commission decided to define citizenship of the Somali Republic in accordance with Somali culture, values, history and modern state practice informed by human rights principles. It was determined that equality should be central to citizenship.

Issues

Who is or can be a Somali citizen?

The two main ways in which most people acquire citizenship are by being born in a country or by having a parent who is a citizen of the country. The Commission recommends that either of these would be enough to pass citizenship: any person who was born in the Republic of Somalia or whose either of whose parents was born in the Republic. Because over the last 20 years so many of the countries citizens have fled, they also propose that any person of Somali origin would automatically be a citizen. Any person who has been living in Somali Republic for a period of it least 5 years and who satisfies the conditions prescribed by Parliament i is entitled to apply for citizenship. Additionally, a child below the age of maturity who is adopted by Somali citizens would have the right to become a citizen. And, in line with international practice, any child found in Somalia who is believed to be under 8 years old and the citizenship of whose parents is unknown will be presumed to be a citizen.

What are the rights and obligations of citizens?

All Somali Citizens must enjoy equal rights, privileges and benefits of citizenship – these should include a passport and any document of registration or identification issued by the government to citizens. Matters such as immigration, and procedures for taking citizenship

away are to be defined by law. Many issues of rights, and the extent to which citizen's rights may be different from those of non-citizens are addressed in the chapter on human rights.

Should dual/multiple citizenship be allowed?

The Commission recommends the principle of dual or multi-citizenship. The Commission noted that a great amount of Somali citizens who have fled from Somalia to many countries across the world have acquired citizenships of those countries, married citizens of those other countries, and have had children who are now citizens of those countries. The Commission recommended that they and their families not have to renounce their other citizenship in order to become or remain also Somali citizens.

How could someone lose their Somali citizenship?

Citizens who acquired citizen by naturalisation would lose their citizenship if they had obtained it by fraud or if they commit treason against the Republic. Citizens by virtue of birth in Somalia or whose heritage is Somali could not be deprived of citizenship.

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?
3. Any other comment on citizenship?

Fundamental Human Rights (Chapter 3)

Rights are central to all modern constitutions, and the Commission believes that they must be central to the new Constitution of Somalia because rights are God given and inherent in the every human being. A constitution, in a formal legal way, establishes the mechanisms of the State and gives power to those mechanisms; rights define the relationship of the State to the people, and place limits on the powers of the State and give guidance for the exercise of those powers; they empower citizens, by giving them a central role in decision making. And 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. This is what it means to say the

constitution is supreme: laws and actions that are inconsistent with it are automatically not valid.

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. Modern constitutions tend to insist that any limits on rights are justified in terms of the greater public interest that must be protected. But since the rights of citizens are also a public interest, the limitations should be consistent with the philosophy and broader objectives of the constitution as a whole – with the vision that the constitution sets out and is intended to help the people of Somalia realize.

Who is to decide whether a right has been violated, and whether a limitation on the right can be justified? In the end it is a matter for the courts – 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 and independent human rights commission are therefore crucial for the protection of fundamental rights – for this the reader should see the chapter on the judiciary.

The Mandate of the Commission

The Transitional Federal Charter gives high priority to human rights and basic needs. The agenda, as set out in the Charter includes: “Protection of human rights and fundamental freedoms vested by Almighty God in every person, and as expressed in international human rights instruments, without discrimination on the grounds of race, colour, gender, language, religion, political or other opinion, origin, or other status” and “Ensuring the basic needs of all Somali citizens”.

Particular concerns

The proposals were made by the Thematic Committee on Human Rights, which began its work by looking at different concepts and categories of rights and the historical evolution of rights in different political, cultural and social environments. The Committee noted that across the world constitutional provisions on human rights are becoming more complex and comprehensive. It also observed that, in almost all countries, national provisions on human rights have been supplemented and reinforced by international instruments which impose obligations on States to promote and protect rights. These instruments include the Universal Declaration of Human Rights, which Somalia accepted when it joined the United Nations when it became independent in 1960. That instrument covers most of the rights in the main human rights treaties: the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights. The Committee studied carefully the human rights

provisions of some other countries, and also referred to Universal Declaration and the two Covenants. It also noted that the 1960 Constitution of Somalia said that Somalia must “comply, in so far as applicable, with the principles of the Universal Declaration of Human Rights”.

The Committee also studied Shari’ah and Islamic values regarding human rights, especially with the help of Professor Mohammed Hashim Kamali, expert on Shari’ah and human rights.

This background in human rights and Shari’ah was important to the deliberations of the Committee as it prepared its recommendations adopted by the Commission.

The fundamental human rights provisions in the Consultation Draft of the Constitution, were drafted carefully to meet the concerns of the Committee about the following issues.

Need to ensure compliance with Shari’ah

The Commission discussed in detail, in consultation especially with Professor Kamali, the issue of ensuring that the fundamental rights complied with the Shari’ah. The Commission is aware that in some quarters “human rights” are considered to be some sort of western import, but they themselves believe that the idea of fundamental rights is fully compliant with Shari’ah. A fundamental theme of the Holy Qu’ran is justice, and human rights with their emphasis on dignity are ways of realizing that justice.

Some of the rights that were looked at through the lens of the Shari’ah are freedom of expression, and the right to physical integrity. The committee decided not to adopt a provision that everyone has the right to control their own body, fearing that this might give the impression that individuals can be irresponsible with their bodies, which is contrary to Islam.

Meeting the needs of Somalis

The Commission believes that though fundamental rights are universal, there are some particular concerns that Somalis have that ought to be reflected in the constitution. One issue that has given rise to much heart-searching among Somalis has been female circumcision or genital mutilation. The Commission believes this practice to be contrary to Islam, and it proposes that this position should be made clear within the CDC. Another area which is important for the people to confront is clan issues – and the Consultation Draft says that there must be no discrimination on the grounds of clan. Similarly, it is prohibited to discriminate on the basis of language – to protect those minority dialects that do exist in Somalia, and to ensure that speakers of both Maay-arti and, Maxaa-tiri have equal rights to information and in other ways.

Somalia is a poor country, but we know that our people have a strong belief in social justice, and believe that it is for both the state and the community to ensure that everyone has the opportunity to provide for themselves, and that the community and the state should provide for those who are really unable to provide for themselves. The Commission noted the emphasis on “basic needs” in the TFC, and it notes that basic needs can only be achieved if it is possible for people who are victims of injustice in connection with health, education food and housing to go to court or otherwise to assert their rights. The economic social and cultural rights should not be thought of as “hopes” only. But because the country is poor, and because the primary responsibility for satisfying basic needs must rest on the individual, the duty of the state is to realize these rights gradually, taking into account its resources. But the state must also not violate those rights itself, and it must protect the rights from interference by others. Because economic and social rights are often misunderstood (people seem to assume that they mean that the government must feed everybody for example) the chapter explains briefly but, the Commission hopes, clearly how those rights are to be achieved.

The 1960 Constitution

The Commission turned to the 1960 Constitution for inspiration. It was a progressive document for its time, but it was not always clear and forceful enough in stating rights and sometimes it reads more like exhortation to government and seems to give too much scope to parliament to limit rights by law. Various rights are drawn from that Constitution but fitted into the overall design of the Consultation Draft.

Ensuring that rights are really respected

The Committee considered the importance of giving sufficient powers to institutions which will enforce rights. The Committee is convinced that people must be able to go to court and principle regarding the right to bring an action must be stated in the Draft Constitution, and in a way which is not restrictive. The Committee is convinced that future courts must not interpret the principles in a limited way, but must endeavour to make the rights effective. The Human Rights Commission is another body with special responsibility for enforcing rights. The Consultation Draft would set up an independent commission, which could protect the people even against the government, and also educate the people about the constitution and their rights.

In the end the main protector of human rights will be the government itself – under the influence of moral and religious standards, political pressure and the Human Rights Commission and the courts. The Consultation Draft insists that all state bodies must observe the rights – respecting them, protecting them and in some cases positively fulfilling them.

The intention is to “mainstream” rights into the work of the government and institutions at all levels, the federal and the state, as well as local government.

Limiting rights

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. The Commission is convinced that there should be a general principle stating that rights may be limited but that this must be only if the limitation is for an important public purpose, only if necessary to achieve that purpose and only if the limitation is clearly justifiable – and justifiable in a Somalia based on the values underlying the constitution so fulfilling the vision that the constitution embodies.

Overview

The Commission believes that the reader of the fundamental human rights chapter will be able easily to see a vision: a society in which the state respects the people, and supports especially its weaker members, and in which members of the community support each other.

Some of the rights are particularly concerned with the community: freedom to speak and to write – which implies there must be an audience - to associate with others, to assemble and even to demonstrate, to practice religion and culture together with others and to vote. Other rights are more directly concerned with ensuring human dignity, including in lifting people from poverty in which dignity is so hard to maintain. There are many provisions about children, within the family and those who have no family. Further, the CDC establishes the right to information (particularly that which the government holds), and the right to be treated fairly by public officials. One of the most basic human rights, and one to which Islam attaches great importance, is equality. 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, political or other opinion, occupation and property,. It also states that special policies and measures to ensure that those affected by discrimination or disadvantage are not to be regarded as discrimination (because in some countries special measures have been attacked as discriminatory).

And there must be effective remedies – the ability to go to court, even sometimes to protect the rights of others who cannot protect themselves, and, as we mentioned earlier, an effective human rights commission with the mandate to educate and protect.

Questions

1. Are you satisfied that the rights of Somalis will be adequately protected by this chapter?
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?
6. Any other comments on fundamental rights?

Duties (Chapter 4)

Aware that from the perspective of Islam rights must be balanced by duties, the Commission proposes express statements of the duties of citizens. The Commission does not envisage that these statements create legal duties – a person could not be punished for not fulfilling them (unless under a separate law, for example to pay taxes). But the duties are intended to convey a powerful message about society and the people’s place in it. And people have duties in another way: human rights are binding not only on the state but on citizens. 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 the citizen, the family and the common good and to contribute to national development;
- contribute to the well-being of the community where the citizen lives;
- promote responsible parenthood;
- foster national unity in harmony with others;
- promote accountability and the rule of law;
- become acquainted with the provisions of the Constitution and to uphold and defend the Constitution and the law;
- contribute to the public expenditure according to the citizen’s capacity to pay;
- defend the territory of the Republic

Land, Property and Environment (Chapter 5)

Like many countries Somalia faces some serious issues about land, and about land degradation. Fierce competition for land in Mogadishu, and other parts of the country, particularly in the south, was rife before the 1990s. The absence of government over the intervening years has resulted in seizing of government land, and the land of people who have fled violence. Peace and stability, as well as justice, will require not only the restoration of land to its rightful owners, but a review of practices and even laws that led to the dispossession of many. At the same time, unregulated predation of the country's resources, as well as illegal dumping of waste, has added to environmental degradation.

Further consideration should be focused on these issues during the consultation period. Meanwhile, the Commission has suggested for discussion provisions carried forward from the Transitional Federal Charter with slight changes.

The proposed provisions:

The provisions in the Consultation Draft call for:

- the development of a national land policy in a consultative way;
- that policy must protect interests in land but also ensure that land is used efficiently and productively;
- the federal government must take steps to restore land to its rightful owners, whether the owners are the government itself or others;
- laws must protect the environment and the biodiversity of the country;
- the government must take the steps necessary to reverse the effects of illegal dumping of hazardous waste in the past, and seek compensation from those responsible for 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;
- citizens have a responsibility to protect the environment.

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?
5. Do you have other suggestions to avoid the problems of the past?

Representation and Participation of the People (Chapter 6)

Introduction

Governance where the people have a voice requires a system under which representatives of the people are chosen. Perhaps at a very local level this may not be necessary, because the community is small and everyone could attend. Sometimes this is described as a form of “direct democracy”. (Referendums are another form of this, but very different: they involve the people as a whole voting on one or more narrow issues, rather than for their representatives.) Some local level decisions might be made by community leaders and elders and have the support of the community. The Consultation Draft Constitution does envisage that such local level structures could have a role into the future, and might even be given functions by the regional state or federal governments.

Above that very local community level, the usual way to form bodies to represent the people is for the people to elect their representatives. The constitution must provide a framework for those elections. The main decisions to be made in designing a system of elections are:

- who can vote;
- how often elections are to be held;
- what electoral system is to be used: an electoral system concerns whether people vote for individual or parties, and how the country is divided into areas for elections; it affects how the votes of the people lead to the formation of the body – in terms of the representation of parties and others;
- who is to organize the election;
- how the fairness of the elections can be safeguarded, to avoid intimidation and corruption and to ensure that everyone can vote and that the vote is counted;
- who is to decide disputes about the election.

Usually most candidates are supported by political parties, and a system of regulating parties is also important.

In the past Somalia has used mainly a proportional representation electoral system. This means, for example, that if 30% of the voters support a particular party when voting for the parliament or a regional state assembly, that party will have 30% of the seats in the assembly. There are different ways to achieve this – including the system where each political party puts forward its list of candidates and the voters vote not for named individuals but for a party and its list. Other systems include one where the country is divided into small areas each of which elects a single member to the parliament or assembly.

The issues

Who can vote

The Commission decided that the right to vote should be available to all Somali citizens of adult age. And in order to vote individuals must be registered.

Electoral system

The Commission discussed whether the Consultation Draft should prescribe the electoral system. In fact, not many constitutions actually include such details. The Commission bore in mind that elections are a matter for experts to some extent, as well as a matter for political judgment. And, constitutions are hard to change. It is unfortunate if experience shows that there are problems with an electoral system but it proves impossible to change it. The Commission decided to include only principles.

The elections

Elections are an important event in the life of any nation. They are on the one hand a moment when the people, at the same time, express their will about who should govern them: about who is best fitted to fulfill the people's aspirations, and to do so in accordance with the letter and the spirit of the constitution. Unfortunately, this event that seems as though it ought to be a nation building moment is very often a very divisive moment. And the divisiveness is all too often made worse by politicians for whom elections represent the chance to get into power, and because divisions in society can often be exaggerated by the campaigning. And, in many societies, elections are occasions for violence – which makes it hard for the country to work together once the government is elected, and also discourages women, and probably others from participating.

In view of these considerations, the Commission decided that it was important for principles to be laid down for elections, which must be followed by the law makers and by those who administer the elections.

Who is to run elections?

Detailed rules cannot be laid down in the constitution but will be the responsibility of Parliament as it makes law, and of the Electoral Commission that must run the elections. The Commission had to decide whether to have one national Electoral Commission or to propose separate commission for each state. In view of the need for applying the same standards everywhere, and of the need not to multiply commissions and offices, the Consultation Draft recommends that there should be one national Electoral Commission.

Political parties

In the past constitutions rarely mentioned parties, but the Commission decided that they should be included – indeed the 1960 Constitution also included something on parties. There have been parties in Somalia for many years, though sometimes only for elections, so the constitution should not ignore their existence and relevance. 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, especially wealthy individuals, and may be influenced by money in a way that is not in the national interest.

Referendums (Chapter 16)

Referendums are another form of direct democracy. The Commission decided that there should be no referendum required if the constitution needs to be amended. But sometimes a referendum might be useful. They should be used very rarely, because they do tend to be very divisive. And if a nation is very divided, to seek the people's view on an issue will not help resolve the tensions if the result is very close. A referendum would not be unconstitutional for any issue other than constitutional amendment. But to remove any doubts about this, the Commission decided to mention the possibility, and to give some guidelines. Many referendums (including one when Australians were asked about becoming a Republic, or when the UK asked its citizens about joining the European Union) have been criticized for almost dictating the response expected.

A final issue: wide participation

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. Without using the expensive device of the referendum, there can be many opportunities for the people to make input, and the Commission was anxious to include these.

Overview

On the electoral system, the principles that are proposed in the Consultation Draft include that the system must try to ensure that as far as possible all votes are 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. Other important principles mentioned are that the system must be one that the people can understand and that it enables all sectors of society to be represented. This would be important for women, for example, but also for other groups.

The Consultation Draft states clearly that the law and the procedures must ensure that as voters understand the system of voting and the issues on which they must vote. Campaigning must be fair. Every adult citizen must be able to vote (in a country with a large pastoral population this requires careful planning, of course), and they must have the confidence that their vote is secret, which is not an easy task in a country with many voters who cannot read. As far as possible money should not influence the outcome (voters should not be bribed and a limit may be placed on how much may be spent in campaigning, though the constitution does not require this).

The single national Electoral Commission would run regional state and local government elections as well as national elections. The Constitutional Court would formally endorse the result of elections and appropriate mechanisms would be provided by law for timely settling of electoral disputes

Codes of Conduct would have to be drawn up, in a consultative way, by the Electoral Commission for everyone involved in elections, including the media to be guidance for responsible behavior.

The Consultation Draft requires that there is law about the registration of political parties; and no unregistered party could offer candidates for election. But rules about registration can be abused (governing parties may block the registration of opposition parties, or get them deregistered for trivial reasons). So any party that satisfies reasonable requirements must be allowed to register, and the procedure for de-registration of a political party must be fair.

To try to avoid the misuse of identity issues, and to prevent parties using force – or the military using parties – no clan or military based party is to be permitted. Parties must themselves be governed in a democratic way, and they must have their accounts audited.

The law may require parties to reveal formally where large financial contributions come from.

The behavior of political parties should also be regulated by Codes of Conduct, not just for election time but more generally.

On referendums the constitution says that care must be taken to ensure that the referendum question is clear, does not disguise the real issue and does not suggest by the

manner in which the question is phrased or the ballot paper is organized - how the people should vote.

Elsewhere in the Consultation Draft there are provisions that encourage broader public participation. These include the rights to expression and association, the right to petition the authorities, and the 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 say?
2. Should there be some provision requiring that election monitoring be facilitated – by local bodies? Or by foreign bodies as well?
3. Any other comments on elections?

Federal Structure (mainly Chapter 7)

The mandate of the IFCC under the Federal Transition Charter is to establish a federal system for Somalia. A federation is a system of government in which powers of the state are divided between governments at two principal levels, federal and state. Federalism is a system of shared rule (at the federal level) and self-rule (at the state level). At each level there are institutions of government. The structure of federal government is designed to represent all the people of the country as well as 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. Thus to some extent the federal institutions are the forum for negotiations between the federal and state authorities. On the other hand, the structure of the state is to represent the people of that state. While both the federation and the states have their own legislative and executive bodies, in some federations the judiciary is unified so that one set of courts serves both levels and protect the rights of federal and state governments. The powers of federal and state governments and the relations between them are entrenched in the constitution, which the judiciary upholds, and in this way the judiciary plays an important role in resolving conflicts between them.

Within these principles, there are considerable differences of detail among the 25 or so federations in the world. These differences are due to various factors, like history, period of the establishment of the federation, whether the federation was formed by the coming together of previously independent entities or by the division of a unitary state into sub-

national units, the size and resources of the country, and most importantly, the reason for the formation of the federation. Federations have been formed for several reasons, particularly defence, decentralisation, economic development, and to maintain the integrity of the state against claims of secession. Several recent federations have been created by sub-dividing a unitary state, to resolve conflicts among the people on grounds of religion, language or ethnicity, and to promote the participation of minorities in public affairs by giving them a measure of self-rule. The structure of institutions of government, the method for dividing powers between the federal and state authorities, the actual allocation of powers, the relationship between the federal and state authorities, and procedures for resolving differences are often determined by the reasons for forming the federation.

With a view to determining the most appropriate form of federation for Somalia, the IFCC studied the organisation and experiences of a number of old and new constitutions and consulted leading experts on federalism. It took account of the circumstances of Somalia (including the emergence, after the collapse of the Somali state, of various forms of self-governance in some regions or combination of regions) as well as the limited capacity and resources of Somalia to establish and sustain a federation. Federalism is new for Somalia; all previous Somali constitutions were unitary. However, with the collapse of the state, pockets of self-administration at local levels are emerging, resulting in more diverse forms of authority.

Realising that its decisions on federalism would have a major impact on a number of other constitutional issues (such as the legislature, judiciary, and public finance) the IFCC gave it a high priority. Only when the broad framework of the structure of federalism had been agreed did it turn to other matters, to ensure overall harmony of the constitution.

Proposals in the Consultation Draft Constitution

Two major themes run through the IFCC proposals: they are cooperation and flexibility. The Commission was determined that federalism should strengthen not weaken national unity, and felt that encouraging a cooperative relationship between the various governments was essential for this. And 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.

Principles of Somali federalism

The IFCC recommends that government institutions at all levels should be established on principles of democracy. Powers should be allocated to the level where they are likely to be

most effectively exercised. Taxes and other sources of revenue should be collected where this is more efficient.

Knowing that there can be acute tensions in federations between the centre and states, or between the states themselves, the IFCC has proposed maximum co-operation between and among different levels of government. It recommends consultations between them through inter-governmental organisations, on matters of policy and law. Disputes between two or more governments must be resolved peacefully and where possible through mediation. Courts cannot consider these disputes unless convinced that negotiations and meditation have failed to resolve them. 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.

To reduce tensions which arise in federations due to unequal opportunities, the IFCC recommends mechanisms to ensure similar levels of services and equitable distribution of resources throughout the country. The section on public finance discusses ways in which there could be equalisation of opportunities and development in the states.

Levels of government

Three levels of government are recommended: local, 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. The federal government would establish guidelines for these governments, but the responsibility to set them up belongs to the regional states (though depending on the timing for the implementation of the constitution it may be necessary to involve the federal government more in the process). The structure and powers of the other levels are contained in constitutional laws.

States and state boundaries

The Transitional Federal Charter assumes that the states would be created by the merger of regions (referring to the 18 regions), but prescribes no number. The IFCC discussed the basis on which states should be established (a matter which is closely connected with the question of their boundaries).

The original decisions on the size or number of states or their boundaries can come under pressure from with economic, demographic and social changes (such as identity). If boundaries or the number of states are altered to accommodate these changes, the federation may break up. It is therefore not uncommon to provide for rules to achieve

changes smoothly. A State Boundaries Demarcation Commission is called for to resolve all existing and future boundary disputes. Additionally, due to the sensitive nature of state boundaries, the IFCC recommends that this subject is studied further and that the IFCC, or its successor, in consultation with other national commissions, shall assist the federal government in determining the minimum and maximum number of regional states allowed to exist within the Republic.

Structure of governments

The fundamental principles for the system of government would be the same at the federal and state levels, to facilitate inter-governmental negotiations and co-operation. But the IFCC makes no firm recommendations on what that system should be. As discussed in the section on the system of government, the IFCC has referred this matter to the people for their suggestions. However that section analyzes the relative merits of two systems that it discussed: the presidential executive and parliamentary cabinet, to assist the people in their discussions and submissions to the IFCC.

One constitution or many constitutions? (Chapter 13)

After considering the merits and disadvantages of having only one constitution which would cover the structures of federation and states, the IFCC decided that states would have their own constitutions (this is the standard practice in federations, but there are notable exceptions: India, Nigeria and Pakistan). State constitutions would deal principally with the structure of government as the powers of the state will be set out in the national constitution. These structures, and other parts of the constitution, would have to be consistent with 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.

The advantages of separate regional state constitutions are that this gives the choice to the people of a regional state, the constitution can to some extent be related to local traditions and circumstances, and can express the values and identity of the state. A key benefit of federalism is diversity in policies and laws, and opportunities to try out different options in different states.

House of Regional States

The IFCC recognized that an upper house of parliament has a key role to play in the effective operation of a federation. The house of regional states is discussed in the section on parliament, but its existence will be critical to the new Somali federation. Composed of delegates from the regional states, its role is to protect the federal system, participate in

passing federal legislation and approving the national budget, and generally supervising the work of the federal government.

Judiciary

In addition to guaranteeing the rights of citizens, the courts have a critical role to play in protecting the federal system. The recommendation on the judiciary was made in a joint meeting of the committees on federalism and judiciary. The federalism committee favoured a unified system while the other supported separate court systems for the federation and states. After a lively debate, it was decided to have a unified system, in part because of lack of economic and human resources, and in part for simplicity. But it was agreed that states would be represented in the process for the appointment of judges and that judges would be drawn from all parts of the country so that it would be truly national. The Consultation Draft Constitution also provides that local, traditional dispute resolution mechanisms would be recognised, subject to suitable limitations. The details of the judiciary are discussed in another section.

Civil service

The IFCC proposes that the federal and state governments should have their own public services. However, the 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. Moreover, the national public service commission may provide guidelines on qualifications for jobs, recruitment practices, salaries and other benefits.

Distribution of powers

Powers are distributed between the centre and states. Normally there is a list of powers for the centre and a list for states, each having exclusive authority to make laws on them. Sometimes there is a third list over which both levels have authority. If the laws of the centre and a state on a concurrent topic conflict, the constitution would specify which law would prevail. The normal rule is that federal legislation would prevail, but it is possible to give supremacy to state laws, or to divide the concurrent list into two, one over which the centre has supremacy and the other the state (this option is recommended by the IFCC). In traditional federations there is a strict separation of functions and powers of the centre and states, but in recent federations, more inclined to co-operative relations, the concurrent list is large. For this to work properly, government at different levels and at the same level need to co-operate and co-ordinate, and the law making process needs to reflect this co-operation. The IFCC has adopted this second approach (the rules for legislation over concurrent matters are discussed in the section on systems of government).

The CDC sets out in the scheme for the allocation of the respective legislative powers of the centre and the state. The general principle is that matters of national interest and significance belong to the centre, matters of interest to regional communities would go to the regional states, and matters of a purely local nature would be granted to the municipal or local government level. As mentioned above, another principle is that powers should be allocated to the level where they are likely to be most efficiently exercised. The precise powers will be spelled out after consultation on the CDC. This will leave a wide area where both levels have an interest (concurrent powers). One problem with the traditional method of division is that there is not enough flexibility to reflect the dynamics of the development of needs, capacity or changing priorities. One way in which the IFCC deals with this is to include a large number of topics under the concurrent list. Flexibility is also achieved by giving the centre overarching powers in relation to some powers not under its exclusive list in certain circumstances and following a special procedure. Yet another technique is to transfer powers not immediately granted to states but for which they are eligible if they have the capacity to exercise as they develop the necessary capacity.

In the spirit of cooperation, a regional state that wishes to enact law on any topic that falls within both its powers and those of the federal government must consult with the federal government. And, in the case of topics where in case of conflict the regional state law will prevail, a federal law must be passed to establish a procedure by which a regional state may assume responsibility to make law; this is because on those topics the federal government may not step in to pass a law that will supersede regional state laws. Such a process must involve an assessment of the capacity of the regional state to take responsibility for the enactment and administration of law on the topic.

Normally the administrative power follows the legislative power, so for example, if a level has power over primary education it is also responsible for the implementation and administration over the legislation. Sometimes governments can agree with another that another level of government would administer its laws on a particular matter.

Delegation of powers

Another way, recommended by the IFCC, to achieve flexibility is through the delegation of powers from one level to another. A regional government could confer administrative powers and responsibilities on the federal government (which would have to agree). The federal government could pass responsibility for administration of a federal law to one or more of the regional state governments, after consultation, and making sure that the regional state governments will have the necessary finances resources.

Similarly the federal government may pass its power to make law on a particular matter to one or more of the regional state governments, again making sure that resources are

available for this. One or more state governments may request the federal government to take responsibility for enacting laws on a particular matter.

Financial aspect of the federation

A very critical aspect of the federation is the finances necessary to run governments and implement their policies. The IFCC recommends that whenever possible each level of government should have sufficient financial and other resources to carry out their responsibilities. State finances and resources are most easily collected by the federal authorities. There are often wide differences in the capacity of states as among themselves to raise money. As equitable distribution of finances and equal services throughout the country are adopted by the IFCC as two underlying principles of the Somali federation, it is necessary to have mechanisms to redistribute resources from where they are easily collected or have a sound economic base to the less developed parts, the IFCC has recommended a mechanism for it. The mechanism, discussed in the section on finance, is based on certain principles such as equity, national cohesion, equalization of development, and a commission, representing the federal and state authorities, to implement the principles.

The CDC allocates taxing power between the federation and the states, but for states the primary source will for long remain redistribution from the centre. For a long time also, a major source of finance will be grants and loans from the international community and the CDC proposes that states should play a role in the negotiations for these grants and loans. It also says that national and regional state governments must provide by law for local governments to collect and retain for their use appropriate taxes such as market license fees, taxes on buildings etc. Further details on finance and other resources are included in the section on public finance.

Resolution of disputes

It is inevitable that in a federation there will be disputes between government at different and same levels. And as the Somali federation will emphasize co-operation and joint action in some areas, there will be large number of issues that they would have to negotiate (much more than in older type federations). Consequently there may be a larger number of disputes than in older federations. Disputes are not a problem so long as there are fair and efficient ways of resolving them; such resolution in fact strengthens the federation. Disputes can be resolved in a number of ways, by political, administrative or judicial means. The CDC places a special emphasis on the political, by providing inter-governmental organisations for negotiations, and on mediation. Resorting to the courts would be allowed only after these means have failed. Nevertheless 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.

The future

The decision to establish a federal system in Somalia, taken in the Federal Transitional Charter and elaborated by the IFCC, is momentous. It will be a system different from any other that Somali has experimented with. It will require political commitment and considerable technical skills to establish the federation, and that will not happen overnight. It will depend on goodwill and tolerance, respect for the rule of law and close adherence to the constitution. There will be need for much public education so that people understand its objectives and structures. A number of the most successful countries in the world are federations, such as US, Canada, Germany, Switzerland, India, and Australia, where federalism has strengthened national unity and promoted democracy. But there are also examples of the failure of federations, often with disastrous results (such as the former Yugoslavia or the original Pakistan). So whether federalism succeeds in Somalia will depend on whether there is political commitment to national unity and the willingness and skills of citizens and leaders to tolerate differences, to make compromises and to cherish cultural and social diversity in Somalia.

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?
 - i. Matters affecting the national security of the Republic?
 - ii. Matters affecting the national institutions of education, health, etc?
 - iii. Matters relating to taxation?
 - iv. Matters regarding citizenship?
 - v. Matters affecting the equal treatment and equal status of citizens?

- vi. The power to make and administer laws?
 - vii. Matters affecting international relations?
 - viii. 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?
 9. Any other comment on federal structure?

Federal Capital (Chapter 7)

Introduction

While the Commission agreed that Mogadishu would be the federal capital, it could not agree on the constitutional status and structure of the capital. Having considered the three ways in which a federal constitution can deal with the status of the capital city, it decided to refer this matter for consultation with the people. The issues set out below explain the three options for the future status of Mogadishu and the impact they may have on the people and geographic area.

First Option

The capital is located within a regional state

- Mogadishu would be a both a conventional municipality within a regional state, and at the same time serve as the federal capital of the republic;

- The city's formal political status as a municipality would be based on regional state legislation, like any other municipality in the federation;
- Citizens would have representation at the municipal level, at the regional state level, and at the federal level, in both houses of parliament;
- The federal government would develop the city's status as a capital through the construction of its buildings and the development of the land it owns, and it could have expropriation power to permit it to expand as necessary;
- However, the federal government would not have any comprehensive planning authority for the capital region, unless it was agreed to by the relevant regional state.

Second Option

The capital is located within a Federal Capital District

- 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, nor would it be authorized to combine with any other district or territory to form a 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;
- Citizens resident in the federal capital district would not have representation in the upper house of parliament;
- The federal government, if it chooses, would establish democratic municipal structures for the district, or alternatively deliver municipal services directly, but would almost certainly establish a system of city government, specially designed for Mogadishu;
- The federal government would also probably make extensive use of powers to pass responsibility for administering federal laws to Mogadishu.

Third Option

The Federal Capital as a full Regional State

- Mogadishu would become a regional state in the federation and would also serve as the federal capital;
- Citizens would receive local services from a municipality created by the regional state of Mogadishu, unless the regional government chose to deliver the services directly;
- Citizens would enjoy political representation and receive services as members of a regional state;
- Citizens would have representation at the federal level in both houses of parliament.

How to decide this difficult question?

You might find it helpful to know that many capital cities of federations fit into the second category. Washington D.C., Canberra (Australia's capital) and Abuja are examples. Ottawa is an example of a city that is simply part of the surrounding province. This is also true in South Africa where the institutions of government are in four cities and three of them are called capitals. And some national capitals are in fact states – including those of Belgium and Germany.

Reasons for reluctance to give the federal capital the full status of a state include a fear of conflict between the state government and the federal government (a battle for powers and resources is not unknown). There may also be a fear that the original residents of the capital may feel that this is their territory and they have a right to exclude others. This ought not to happen with a citizens' right to free movement under the Fundamental Rights chapter. There may be a fear that if law and order in the national capital is not in the hands of the federal government, but in the hands of a state government and its police, it may be hard for the federal government to guarantee the safety of national institutions and important visitors.

Arguments in favour of its being a state include fairness to the residents – if they do not have representation in the House of the Regional States they may feel this is unfair.

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 or provinces as well as those of the federal government (this is true of India, for example – except for Kashmir, and Nigeria). Most federations allow the states/regional states to craft their own constitutions though they must be consistent with the federal constitution, and usually set up systems of government rather like that at the federal level.

The Commission decided to adopt the more common approach and leave it to the regional states to set up their own institutions. But it does provide that those constitutions must be democratically made, with public input, and democratic in form. Generally they must respect the Fundamental Values of the national constitution.

System of Government including Parliament (Chapters 8 and 9) Introduction

Perhaps the most important decision about designing a constitution is the system of government. The system of government is largely about how the country will be ruled: how laws will be made and who would exercise the powers of the executive (or as we sometimes say, the “government”). The system of government determines the composition and powers of the institutions of the state (particularly the executive and the legislature) and the manner of the exercise of these powers. It also regulates the relationship between the organs of state, and between them and the people. 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. There is a separate section in this guide to the Consultation Draft Constitution on the legislature (which is not very different in the parliamentary or the presidential system) and in the Constitution itself the legislature is in a different chapter from the Executive.

Because the system of government determines who and how state power will be exercised, it is often the most controversial aspect of the constitution. This is particularly the case in Africa where for many the easiest way to become rich and influential is to control the government. The post-colonial history in Africa is largely about the struggle to capture the apparatus of the state, to which Somalia is no exception. The struggle for the state has been a cause of much conflict, not infrequently armed conflict, and caused much misery to the people. It has also led to the rise of tribalism or clannism, as politicians mobilize their communities for political support, which, unfortunately, is often easier to do by inciting them to hatred of other tribes or clan than by offering them choices of policies and development programmes. Therefore the future of Somalia depends on making the right decisions about the system of state and government.

What is a right decision is not easy to determine. The rise of the colonial state in Somalia (as elsewhere in Africa) removed most communities from the traditional system of authority and government (at least at the central level) and greatly weakened the rights and protection of the people. After colonialism, most countries retained the essential features of the colonial state and a fight began among politicians for the capture of this state because of financial rewards. This has made it very hard to reform the state to make it inclusive and accountable. And when these objectives are accepted on paper (for example in a constitution) they are almost impossible to implement.

The IFCC was faced with this difficult situation. It made one very important decision which affects the nature of the colonial state. It proposes that Somalia become a federation; this will mean that the powers of the state will no longer be concentrated in one government but shared between several governments, at same and different levels. It will also bring power closer to the people and give them more opportunity to influence policies. It also recommends that the same principles for the system of government should apply at the federal and state levels.

After long and lively discussions both in thematic committee and plenary sittings, the commission, because of the importance of the system of government, decided to refer the matter to the people for their views. The Commission debated two alternatives as far as the executive is concerned—the presidential executive and the parliamentary cabinet (referred to in this section respectively as presidential and parliamentary). Neither of these systems is indigenous to the Somalia people but ever since the end of colonialism one or the other has been in force (and today one is in force in Somaliland and the other in Puntland), and therefore it is possible to assess their strength and weakness in the context of Somalia.

The relationship of the executive to the legislature is different in each case, although the differences are limited. The IFCC found it easier to agree on the legislature than the executive. So the CDC contains only one set of proposals for the legislature but two for the executive. This section does not comment on the two versions of the executive discussed by the IFCC, but presents their essential features to assist the people to understand the two options so that they can make their submissions to the Commission. This section has first a general discussion of the two systems, then focuses on the legislature that the Commission has agreed, and finally has the proposals on the executive.

There is a small comparative chart in the Overview of the Constitution in this Guide (see page 17).

Despite disagreement on the forms of the executive, there is consensus within the IFCC on underlying principles of the system of government, as reflected in Founding Principles and the Bill of Rights. Among the principles are that the system must be democratic; based on the separation of powers (principally of the legislative, executive and judiciary); must have 'checks and balances', so that each institution can keep a check on the other, and some key decisions may require the participation of more than one institution; the judiciary must be independent and competent; and independent commissions must have responsibility for functions which are politically sensitive or liable to be abuse (such as elections, audit, prosecutions, and the protection of rights). The IFCC is also agreed that while the state authorities need sufficient powers and resources to promote economic, social and cultural development, ensure people their basic needs and a life in dignity, protect the environment, and safeguard national sovereignty, there must be limits on the powers of state institutions. These limits are important for a free economy, the protection of human rights, and communities to organize their life as they deem appropriate (subject to the constitution itself). The principles on system of government also provide essential safeguards against abuse of power.

In discussing the two alternatives, we begin with the structure of Parliament which will be largely similar in both, except in the relationship with the executive, and then consider the options for the executive.

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?

Parliament (Chapter 8)

The legislature in any country (whether it is called Parliament, Congress, National Assembly or something else – some countries use their own native word for their legislature, even in English) is the nation's highest law making body. It 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. And a federal system sets limits on the powers of legislatures, because each level of government has certain law making powers that other levels cannot interfere with. It is important to realize that in a constitution that is based on the sovereignty of the people, the parliament is not all powerful: the people choose to shape the institutions of government, and to give them powers, and it would be

most unusual in the world today to find that the people have handed unlimited powers to parliament.

Issues

The structure and size of Parliament

In the past Somalia's parliament had only one house. The decision to have a federal system almost inevitably meant that there must be two houses in the new parliament. Most federations have a second house, which has the special role of representing the interests of the lower level of government, though it may also play a full part in law making on all topics. The Commission's recommendation is for a second house that is called the House of the Regional States. The members would be the head of the government of each regional state, and 9 other members from each state. These would be chosen by the assembly of the regional state, but they would not be also members of that assembly.

The other house – the House of the People – would not be as large as the present Transitional Parliament. That has 550 members, but the proposal is for 200-300 members. This leaves some room for meeting changing needs without having to change the constitution. The system of elections has not been decided (see Representation and Participation).

Life of Parliament

Parliament in the Consultation Draft would have 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. Most likely this threat – of having to go back to the people for an election – would ensure that eventually they were able to agree. **Note:** this applies only to the parliamentary system. Incidentally, other countries with parliamentary systems have been considering the possibility of fixed term parliaments, feeling that allowing the Prime Minister to pick the moment for elections is not right.

The relationship between the parliament and the Government

In most parliamentary systems the Prime Minister and the Ministers are members of Parliament. The Commission has proposed however, that Ministers should not be members – or if members they must resign from the House when appointed. This is to ensure that they are able to concentrate on being Ministers. Ministers would have the right to speak in parliament but not to vote. And they would actually be required to come to Parliament to answer questions about their responsibilities, and to appear before committees that are investigating matters on which they could supply useful information.

However, 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. In that system it is important that the government works closely with the Parliament that is made up of the representatives of the people. To prevent Parliament being tempted to try to remove the government without a good reason, they must propose the name of another person to be Prime Minister if they succeed in removing the person in office.

In a presidential system the relationship between President and Parliament is more distant. The Parliament cannot remove the President by a simple majority of its members. But it can set in motion the process for removing the President because he or she is guilty of abuse of power or serious breach of the constitution.

The working of Parliament

Parliament will make most of its own rules of procedure. But the constitution would require that unless there is very good reason each house would sit in public. And the rules must ensure that members are able to participate fully (experience shows that women often find it harder than men for various reasons) and that in the case of the House of the People, the public must be able to participate – giving their views on draft laws, for example.

Members of the public must also be able to propose new laws – this would require a large number (as many as 10,000 people).

How will Parliament fulfill its role of supervising the government?

Parliament not only passes all laws but it 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. This gives Parliament information on the basis of which they can investigate possible abuses. Many other bodies will also report annually to Parliament which should study the reports carefully, on behalf of the people.

The House of the People must have committees to monitor the work of every government department. Those committees, like other committees would be able to insist that people appear to give evidence or to supply them with information.

Parliament has to approve a number of appointments made by others – such as the appointments of judges made by the President or the Judicial Service Councils.

Regional state assemblies

The regional states will also have elected legislatures. But since, according to the Consultation Draft, it is the responsibility of the states themselves to develop their

constitutions, this constitution does not say how those lower level governments will be formed.

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?
14. Any other comment on Parliament?

JUMHUURIYADDA SOOMAALIYA

Executive (Chapter 9) جمهورية الصومال

Parliamentary cabinet system

In the parliamentary system the head of state (president) is separate from the head of government (prime minister), (although in South Africa the two posts are combined). The president is normally elected by an electoral college (composed in a federal system

of both houses of the federal legislature and members of state legislatures). The prime minister is appointed either by the president or elected by the more representative of the two house of the federal legislature (in Somalia under the Consultation Draft Constitution that would be the House of the People). In either case the principle is that the prime minister must have the support of the majority of the members of that house. If the largest party does not have a majority, it may be able to join with another party to form the government (“coalition government”). The prime minister chooses his or her cabinet; typically in this type of system, the prime minister and the minister are members of the legislature. However, it is not essential that ministers be from the legislature and indeed the recommendation of the IFCC is that they should not be.

Neither the government nor the legislature has a fixed term of office. The legislature can dismiss the government by a majority vote, and the government can dissolve the legislature, before the normal life (which varies from 4 to 5 years). These rules have created instability in the parliamentary systems, which reforms in some countries have modified. Following these reforms 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 for the vote of no confidence—in this way, the necessary votes are hard to obtain and there is no gap in government if the vote is successful. On the other hand, some countries have introduced restrictions on the ability of governments to dissolve the legislature before the end of its normal term (which is also the recommendation of the IFCC).

As for powers, the role of the president is ceremonial and the powers are formal (that is, the powers formally given to the president must be exercised on the recommendations of the cabinet). But the president symbolizes the nation and its unity and in informal ways the president can emphasize national values, promote national unity, and urge the government to protect human rights and respect the constitution.

The real power of government is vested in the cabinet, acting under the prime minister. The cabinet operates on the principle of collective responsibility, which means that decisions on policy must be made by the entire cabinet and defended by all ministers. In this way the executive can include members from different regions and communities, and can be more inclusive than the presidential executive where all executive power is vested in one person. The government is at all times responsible to Parliament and must explain and defend its policy to its members.

Presidential executive system

In the presidential system, the executive power is vested in the president. There is total separation between the executive, that is, the president, and the legislature. The president is elected directly by the people as is the legislature. Neither the president nor any member of his or her cabinet can be a member of the legislature. The life of the president and the legislature are fixed. The president

cannot be removed by the legislature on a vote of no confidence (but may be removed for serious misconduct by a formal process known as impeachment) and the president cannot dissolve the legislature. The president appoints his ministers and senior administrators, although their appointment requires the approval of the legislature. Normally the role of the cabinet is merely to advise the president. 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 usually 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.

The proposed parliamentary and presidential systems compared

In the parliamentary system there is no sharp separation between the executive and the legislature as there is in the presidential system, as members are drawn from the legislature (although in Somalia ministers, but not the prime minister, would have to come from outside).

There are more checks and balances in presidential system but there is continuing accountability of government to the legislature in the parliamentary system. The prime minister would sit in the legislature, and the Ministers would be expected to come to answer questions, and be able to speak (though not to vote). And because of the possibility of the vote of no confidence they should be constantly defending their policies.

There would be a fixed term for both executive and legislature in the presidential system, producing a kind of stability. In the alternative parliamentary system proposed the term of the parliament would be fixed, but losing the support of the parliament could lead to the government being voted out of office. Stability in a parliamentary system is usually reasonably assured because the government has a majority in the legislature, but it can be undermined if there is acute fragmentation of parties.

The head of government in the parliamentary shares responsibility with the rest of the cabinet, but is sole authority in a presidential system. For that reason, the parliamentary system is in some ways more suited for accommodating diverse interest, groups and regions. For example the position of head of state in the parliamentary system can be used to recognise minorities (perhaps by rotating the headship among groups which can never hope to control government). In both the proposed systems of government ministries could be distributed among different groups.

An appeal of the presidential system to some people is that it provides stability and strong leadership. But strong leadership can come with strong risks of abuse of power (as Africans know well). On the other hand, the parliamentary system can be made more stable in the ways mentioned above. The experience of other countries shows that both systems can

work well if there is good leadership and people are conscious of their rights and willing to take action to protect them, and to participate in public affairs and so increase the state of democracy.

Questions

1. Do you feel that the parliamentary system or the presidential system would be more suitable for Somalia?
2. In the parliamentary system do you believe it is a good idea for Ministers not to be members of Parliament?
3. 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?
4. In the parliamentary system is it a good idea that the vote of no confidence should be rather restricted, as is proposed?
5. In the presidential system are the grounds for removing the president, and the procedure satisfactory? 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?

Comparing the Executive under the Parliamentary and Presidential systems proposed		
Complete the statement below by referring to the relevant column to the right	Under the Presidential system	Under the Parliamentary system
The head of government...	is the President	is the Prime Minister
The head of government	may not serve more than 2 terms of 5 years	has no limit on the number of terms
The head of state...	is the President	is the President
The President...	is elected by the people	is elected by Parliament
The Commander in Chief...	is the President	is the President but only

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		as a formal role
Formal functions like receiving ambassadors, signing laws, addressing the nation on solemn occasions...	are performed by the President	are performed by the President
If there is a concern about the wisdom of a law...	the President may ask Parliament to reconsider	the Prime Minister may ask Parliament to reconsider
If there is concern about the constitutionality of a law...	the President may decide to ask Parliament to reconsider	the President may decide to ask Parliament to reconsider
If there is concern about the procedure used to make a law...	the President may decide to ask Parliament to reconsider	the President may ask Parliament to reconsider but only at the request of the Prime Minister
The Judges of the Constitutional Court and the Supreme Court...	are appointed by the President who must act on the recommendation of the Judicial Services Council	are appointed by the President who must act on the recommendation of the Judicial Services Council
A state of emergency is declared by...	the President (Parliament must approve later)	the President on request of the Council of Ministers (Parliament must approve later)
War is declared by...	the President with the approval of Parliament	the President on the request of the Council of Ministers (and with the approval of Parliament)
The Council of Ministers is appointed by...	the President	the President but only on the nomination of the Prime Minister

The Council of Ministers...	must be approved by Parliament	must be approved by Parliament with the government program
The head of the government...	is not a member of Parliament	is a member of Parliament (Prime Minister)
The Ministers...	are not members of Parliament	are not members of Parliament
The maximum number of Ministers...	is 23 including the President and Deputy President	is 23 including the Prime Minister
The head of government may be removed...	only by an impeachment process initiated by the Parliament and taking place before the Constitutional Court	by a vote of no confidence by the House of the People
The ceremonial head of state may be removed ...	Does not apply because is the same as the head of government	only by an impeachment process initiated by the Parliament and taking place before the Constitutional Court

System of Justice (Chapter 10)

The importance of the system of justice

The Commission considered the role of the judiciary in a democracy. Its task is to determine cases involving disputes of fact or law or both, in accordance with the constitution and other laws. In doing so, it clarifies and up holds the law. In this way it does justice among the people. But the judiciary also decides cases which involve the state, sometimes reviewing the validity of the law passed by the legislature, and sometimes the policy and acts of the executive. If either institution steps outside the limits of its powers, the courts declare the act invalid because of inconsistency with the constitution. As Somalia is to become a federation under the CDC, the courts will also have the function of keeping governments at different levels strictly to their powers under the constitution. Courts become the major guarantors of federalism. And when a person is charged before the courts for a crime, it is

the function of the court to ensure the accused a fair trial. The courts protect these and other rights as well as more generally, the Rule of Law. The Rule of Law is particularly important for the market economy as the courts upholds commercial and other agreements (including of employment), providing predictability and certainty in economic transactions. Justice is a very important value in Islam, in the promotion of which courts play a critical role.

The judiciary is one of the three pillars of the state, along with the legislature and the executive. The separation of the judiciary from these other pillars is essential to the proper and impartial discharge of its functions. The independence of the judiciary, and the administration of the courts separate from other parts of the government, are the foundations of an impartial system of justice.

The recommendations of the Commission based on this analysis are as follows.

Judicial Authority

All judicial authority would be vested in the courts. Giving judicial powers to bodies that were not based on principles of judicial independence and competence was a way to suppress the rights of the people. This would not be permitted under the new constitution.

Judicial independence

Judges would be independent of the legislature and the executive in the exercise of judicial functions. They are subject only to the law. They cannot be taken to court in either civil or criminal proceedings for anything they have said or done in the course of judicial functions.

Judges cannot be dismissed except for misconduct and only after an independent tribunal appointed by the Judicial Service Council finds the judge guilty of misconduct.

Judicial Procedure

Judicial proceedings must be open to the public but the court may decide that proceedings will be in private for reasons of national security, the protection of witnesses, or in cases involving juveniles or concerning rape.

No judicial decision shall be made unless all parties have the opportunity of presenting their case. Reasons must be given for all judicial decisions. These are basic principles of any fair system of justice

National Court System

The Commission recommends a Constitutional Court, a Supreme Court, an Appeals Court and courts of First Instance, in the descending order of hierarchy. All judges would be

nominated by the Judicial Service Council, consisting of the Chief Judges of the two highest courts and some from outside the judiciary, including the chair of the Human Rights Commission. The nominations would have to be approved by the House of Regional States. The president of the Supreme Court and the Constitutional Court courts would be elected by the judges of that court.

The Constitutional Court is to have the final responsibility to interpret the constitution and to determine cases on constitutional matters. It would have the power to declare invalid laws that are inconsistent with the constitution; no other court would be able to do this. In case of a dispute between regional states and the federal government or between regional state governments attempts must be made to resolve the dispute by mediation. But if these are ultimately unsuccessful the constitutional court would be the only court with the power to hear and decide the case. It would also have the exclusive power to ratify the result of national elections or referenda.

It would be possible for the federal executive or the legislature government, and a number of other institutions and individuals to bring cases before the constitutional court.

The Supreme Court will have the final say on all matters other than matters which are within the exclusive jurisdiction of the Constitutional Court.

The Judicial Service Council is not just an appointing body but has the responsibility for administration of the judiciary, and for discipline. There is also to be an Inspectorate of the Judiciary – a body existing in the past with the responsibility to check on the functioning of the judiciary.

Military courts may be established by law, but they may try only military offences committed by members of the armed forces during war or peace time.

The importance of traditional dispute resolution mechanisms, and the role of *xeer* in Somali society are recognised by the provisions that the courts may recognise the decisions of customary mechanisms, but a law may limit the scope of this recognition.

An important aspect of the system of justice is the power to bring criminal cases to court. Those who abuse their powers and deprive citizens of rights will often have broken the criminal law, but the powerful are able to escape prison and even trial very often by the use of influence and money. The best safeguard against this is a system of prosecutions that is not dependent on the government or party. This is proposed in the CDC where the Attorney General would be an independent office holder.

Questions

1. Do you believe it is necessary to have a separate Constitutional Court?
2. Should the functions of the courts be spelled out in greater detail?
3. Is the independence of the judiciary adequately protected?
4. Any other comment on system of justice?_

Independent commissions and bodies (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 really important feature is their separation from politics and the other business of government. Although the commissioners may be appointed by a branch of government, the government typically has only limited ability to influence the commission after that appointment; this independence is protected by making it difficult to dismiss commissioners. In this respect commissions are rather like judges.

The work of a commission is not affected by a change of government, as the members do not change every time the composition of the government changes. Independent commissions typically regulate a particular sector or industry and possess differing levels of autonomy and authority depending on their particular task and mission. Because they are not elected, commissions are not accountable to the people in the way that politicians are; setting up a commission, therefore, puts a certain area of public activity not only beyond political interference but beyond popular accountability.

In deciding on commissions, particular attention was paid to the financial and resource capacity of the country. The IFCC recommends that only those commissions which are essential should be established by the constitution. Priority was given to those concerned with fundamental rights, democracy and transparency. Accordingly it proposed the following: Electoral Commission; Boundaries and Census Commission; Human Rights Commission; Civil Service Commission; and Judicial Service Council.

The Commission recommends that each independent commission has a minimum of 3 and a maximum of 9 full time members of the commission, out of which, at least 1 commissioner would be a women, and it least 2 would be women if a commission comprises 5 or more commissioners. It preferred a small over a large member, due to the lack of resources and in the interests of efficiency. It also took into account that in some cases the commissioners

would not work full time on commission work, most of which would be undertaken by commission staff.

On criteria for membership, the Commission recommends that the 4.5 formula be abandoned in favour of merits and qualifications necessary for the task. Commissioners would serve for a 5 year term which would be renewable one time, and they would be dismissed only for serious misconduct and after proper enquiry.

The Independent Commissions are to be national bodies: the Electoral Commission will manage all elections, not just for federal bodies, for example. Independent Commissions must operate be able to operate independently especially when their mandate involves in any degree to provide oversight of a particular section of the government. They should receive independent funding and accountability and not be subject to the direction or control of any person or authority. Specific mandates in-line with these principles shall be determined by law.

The important institutions of Auditor General, Central Bank and Attorney General are provided for in the relevant chapters or elsewhere in the consultation draft constitution. The commissions enumerated in the Transitional Federal Charter will be included in the Transitional Provisions of the CDC.

These various bodies will report to Parliament. But they are not accountable to Parliament in the same way as Ministers are. In the case of the Auditor General the reports are to enable Parliament to understand how effective control of public finance is and to take action if any serious problems are revealed.

The IFCC is also conscious of the importance of the public understanding the work of these independent bodies – that are really supervising government on behalf of the people. So the IFCC says 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 CDC's requirement of women commissioners does enough to promote women's participation within the independent commission structure?
4. Do you think that the grounds and the procedure for removing a commissioner are reasonable?

The Civil Service (Chapter 12)

This chapter deals with the civil services at every level, which is why it is treated separately from the federal executive. It is a brief chapter that sets out the main principles that the Commission believes are important for a professional, competent, non-political public service. It will be possible for the regional states to set up their own civil services, but it also envisaged the human resources could to some extent be shared between different parts of the country, especially when special expertise is needed.

Public Finance (Chapter 14)

Introduction

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 main principles of responsible financial management for a nation are well understood. They are mainly:

- money that is collected – mainly taxes and duties – must be imposed equitably, so that the burden does not fall on certain sectors of the society unevenly;
- money that is collected must be kept safely;
- there must be a budget that plans in advance for public expenditure;
- that all taxation and public expenditure must be approved by the legislature - the representatives of the people;
- the process must be transparent so that the people and the legislature can understand it.

The issue of financial management will be more complex in a federal Somalia. It is necessary to ensure that the same basic principles can be respected, while respecting the idea of federalism, namely that government decision making should be brought closer to the people.

The Commission looked at the 1960 Constitution – which says very little about financial management – and other constitutions.

How does the Consultation Draft Constitution deal with the issue of financial management?

The provisions on public finance are not long and complex, in keeping with the objective of drafting a constitution that avoids excessive detail. The chapter on public finance begins with a statement of principles that mentions some of the basic principles mentioned in the Introduction here, and also the principle that money must be spent fairly. The chapter deals

with financial relations between the federal government and the regional states, in order to have all financial matters together. The organization of the chapter is to move from collecting revenue (mainly taxes) through allocation of resources between the various levels of government and between regional states, and on to management of money. Then it deals with institutions: the Finance Commission, the Auditor General and the Central Bank.

Taxes, according to the Consultation Draft, can be collected by all three levels of government: the federal, the regional state and the local government level. Local governments would be able to collect certain taxes that are common for this level of government – especially taxes on land within their area. Any law about local taxes would be passed by either the federal or a regional state government. And regional states might actually collect taxes under a federal law. Exactly which taxes the various levels of government will be able to raise has not been finalized yet in the Draft.

Very probably, for some time into the future, only the federal government will be in a position to raise large sums of money (a situation that is not uncommon). So it was also necessary to set a framework for transferring funds to the regional state governments. The Consultation Draft proposes that a law must regulate this, but it sets out very clearly the principles of fairness and efficiency. There are guidelines/criteria 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.

It is stated clearly that taxation must be approved by the legislature, as must expenditure, and the same principle is repeated in the chapter on the legislature. This does not mean that every individual item must be approved by the law makers, but that they must approve the broad categories of expenditure. The government must put before the parliament or regional state assembly a budget that will be clear about what the government's expenditure plans are. Finance is not easy for members of Parliament to understand. One way to make this easier is to give them more time; the Consultation Draft says that the budget must be presented two months before the end of the preceding financial year. And in the chapter on the federal parliament it is emphasized that it is the responsibility of the Parliament to scrutinize the financial aspect of government carefully including through its committees.

If no money could be spent until the annual budget was approved it might happen that the financial year began before the budget was approved, and the government would have no money to spend. So the Consultation Draft provides that 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. It is important not to allow too much to be spent without approval: the effect would simply be to encourage government and parliament to leave approval until later.

Finance is one of the most important responsibilities of the government. They must try to ensure that there is enough money for all the activities they need to fund. Parliamentarians may be tempted to win popularity by introducing programs that involve spending – but they do not have the responsibility to raise the money! So it is normal to restrict the power of parliamentarians to do this – and the Consultation Draft says that all laws involving money must be introduced by the government. On the other hand, government may be tempted to cut important budgets if it needs to save money. They may even want to cut the funding of the judiciary, which would also risk affecting the independence of the judiciary. So the Judicial Service Council and not a Ministry prepares the budget for the judiciary. It 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 watch that the judiciary does get what it needs to function effectively.

The budget process at both the federal level and that of the regional states must be regulated by a law.

An important safeguard for the control of spending is the accounts process. All government bodies must keep proper accounts and those accounts must be audited. The audit must be carried out by an officer who is not dependent on the government – so that the officer is not tempted to be lenient in order to keep the job! The Consultation Draft proposes the office of Auditor General, as under the Transitional Federal Charter. That officer must be independent, and the person cannot be dismissed easily. The option of a single office was adopted rather than an Audit Commission. There seems no need to have several commissioners. Naturally the Auditor General would have the support of a substantial office, most likely with many accountants, which might be called something like the National Audit Office. The scheme adopted is for there to be only one Auditor General, to ensure that national standards of audit are evenly applied.

There is also a proposed mechanism for making the recommendations on the distribution of funds. This would be a commission with representatives of the various regional states. This option for a commission was adopted rather than a highly expert commission. The option chosen would require negotiation between the various regional states, which was adopted as the way that Somalis would prefer to decide. But the commission would not make the final decision: they would make recommendations only. Ideally, they would also have a expert support, including from economists and accountants, and would thus be able to evaluate the submission made by regional states for support, and be able to apply the guidelines. The decision made by the government about allocation of resources would have to be put into a law, and that law would require the approval of both houses of parliament. Money allocated in this way would not be the only way in which money could be distributed to the regional states. Federal government could also make grants to regional states to carry out programs.

Two other important ways in which governments may raise money are through foreign aid and borrowing – commercially or from the IMF or other lender. The Consultation Draft does not propose any limit on the power of the federal government to borrow money (some constitutions do limit the power to a certain percentage of the national budget). It does propose that the regional states should be able to borrow money only if the federal government guarantees the loan (this means that the federal government promises that if the regional state does not repay the loan the federal government will do so). In reality lenders would probably insist on that guarantee anyway.

Like many poor developing countries Somalia will be receiving foreign aid for some time to come. Most aid donors will want to negotiate with the federal government. There is a provision in the Consultation Draft that when negotiating with foreign countries and institutions, including over aid, the federal government must take care to include the voice of the regional states in its own delegation.

Questions

The Commission hopes that finance experts will scrutinize the Consultation Draft carefully and make suggestions for improvement. The general public also are welcome to make their suggestions – it is for them 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. 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?
3. Should there be a limit on federal government borrowing?
4. Is the ban on anyone except the government introducing money bills too restrictive?
5. 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?
6. 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?
7. 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)

Introduction

The Commission is acutely aware that the people of Somalia long for peace, and they would expect the constitution to be clear in its framework on how peace is to be kept, and the security of the people protected.

Everyday keeping of the peace is not the function of the military but of the police. The function of the military is to defend the nation against external attack. In exceptional circumstances the military may be used internally, because of their organizational skills, equipment, training and numbers to deal with civil emergencies. They may also be used internally if, unfortunately, there is some form of unrest or insurgency that the police cannot handle.

The military may also be used in support of peace on other countries under the auspices of the UN or the AU.

The Commission was conscious that even in the absence of unrest or civil war, there are risks in the existence of large bodies of people with weapons. These include:

- if there are more than one body of armed personnel under different command there may be a risk that a political quarrel can become a civil war;
- they (especially the lower ranks) may be tempted to terrorize the local population;
- they may be tempted to mutiny if – for example they are underpaid;
- they may be used by the government to suppress legitimate criticism and dissent;
- they may be used by political parties to dominate elections or even to take over government;
- they may be tempted to take over government (as in a coup) in their own interest;
- in the supposed interests of national defense they may insist on extravagant expenses on military equipment;
- the temptations to take bribes to determine who is to supply very expensive military equipment (very profitable to the suppliers) are great – and there are a number of well-known cases);
- in the supposed interests of the nation they may insist on levels of secrecy that make it easier for corruption especially in procurement of equipment etc to be concealed.

A balance must be struck in any country, but especially one with a history of internal strife like ours, between the need for effective machinery for the keeping of the peace, and the necessity to ensure that force is kept under control and used only for the benefit of the people. When the people choose their government, as they will do when the new

constitution comes into effect, it is that government that has the primary responsibility for keeping the use of force under control.

The issues

The Commission considered the ways in which the use of force can be regulated, and the security and peace maintained. They noted that the best guarantee of both is in fact the same: effective internal discipline and a spirit of professionalism on the part of the forces. The professionalism must include a respect for the limits of the powers of the forces, and for the rights of the people, especially their fundamental rights to be free from violence and intimidation.

Ultimate non-military control, meaning mainly control by the government, of the use of organized force is a key aspect. The military and other disciplined forces are subject to the constitution and the law like the rest of society. But that non-military 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. In some countries cases of human rights abuses by the military must go to the ordinary courts.

One aspect of non-military control is that of budget control. While it may be important that detailed knowledge of the country's defence capability is not widespread, for security reasons, this must not be allowed to become a matter of the military building up the weapons it wants with no accountability. Control and as much openness as possible, is also important to avoid corruption – a feature of many defence supply contracts.

It is also important to keep a clear separation between the military and politics. Just as politicians must not be able to control military force, the military must not be permitted to control government.

Overview of the Consultation Draft Constitution and security issues

There is a specific chapter on Peace and Security (15). One aspect of this is a series of 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. Values are important, and can convey an important message not just to the armed forces and other disciplined services but to the people about the proper role of these services in the national life.

Institutions are also important. One important issue is that of having only one army. A nation with more than one face serious risks. Actually establishing the one national force

may take some time, and require careful negotiation (and the provisions on implementation can recognize this reality). But the CDC does make this ultimate goal clear.

Respect for fundamental rights of all requires mechanisms, and not only the statement of the need for respect. The CDC does provide that serious abuses against the people must be tried in ordinary courts – they are not a matter simply of military discipline to be dealt with internally. And the people are to be able to approach an office that can receive their complaints.

Ultimate non-military control of the military is vital; this does not mean that non-soldiers tell soldiers how to fight or the police how to catch criminals. But it is for the non-military authorities to decide when wars are to be fought, and it is the taxpayers who have to pay for wars, and it is to them that the forces must ultimately be responsible, through the elected government. The chapter on security provides that the heads of the forces are appointed by the government, that a special committee of parliament must have supervision over them, and that there must be a Minister of Defence and because Ministers must not have other jobs, a serving soldier could not be that Minister.

A decision to use the forces externally or internally, including in an international peacekeeping operation, 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 with the authority to operate throughout the country, is proposed – but regional states could also have their own police. No armed security force, including a commercial security company, could be formed without authority under law.

Other parts of the Constitution

Many other aspects of the CDC are relevant to peace and security. Military political parties are not allowed. The fundamental rights chapter, though it has freedom of association, allows reasonable exceptions to rights - and barring senior police and military from political activity would no doubt be considered reasonable.

The general principle that public expenditure must be approved by parliament applies to military expenditure. And the right to information can be useful to extract information from reluctant arms of government, including the police and even the army.

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 the judiciary chapter also says that military tribunals must not try non-soldiers.

Customary institutions have been an important way to control the use of force in local communities. The provisions for recognition of local tribunals outside the formal courts system such as decisions of elders, made in the judiciary chapter, makes continued use of this approach to social control, that is generally accepted in the community, possible.

Finally – the federal system is a way of bringing government closer to the people. But it also divides government. Sometimes that can create problems when coordinated approaches are needed. For this reason, anti-terrorism and even anti-piracy, as well as control of organised crime generally, are made matters for the federal government in the allocation of powers.

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 non-soldier control?
4. What are your main concerns regarding the development, management and behavior of the security forces?

Constitutional Amendments (Chapter 16)

Introduction

Most constitutions contain a chapter describing how to amend the constitution. This is a way in which future changes in the circumstances of a country and the feelings of its people can be reflected in the constitution in a democratic and peaceful manner, and shortcomings in the constitution can be remedied.

This process will probably become important as the people and situations adapt and adjust to a federal state. However, the need to evolve must be balanced with the need for stability especially within the beginning years of the federation.

It is always hard to change a constitution. If it was as easy to change as is an ordinary law, the aspects that restrict law makers and the government would not remain for long! Typically, it will need a large majority (perhaps 65%) of the legislature to change the constitution. It is also common to make it even harder to change some things, especially basic principles like the fundamental rights, and in a federal system the relationship between the federal government and the other levels of government, including the allocation of powers to different levels. For example, a change might

require an even higher vote in the legislature, or a public referendum. This should ensure that a wider national dialogue would take place before significant changes were made, and efforts made to secure a national consensus.

The Commission studied the past constitutions of Somalia as well as the state practice of similar situated nations and the consequences. In making their suggestions, the Commission aimed at creating an environment which would best protect the stability of Somalia while allowing the flexibility to allow the constitution to grow alongside the country.

The Issues

The Commission debated the following questions in order to formulate their recommendations:

Should some articles be completely excluded from amendment?

Some constitutions prevent certain articles from ever being amended because they are so fundamental that their change could alter the basis of the entire constitution and the country. The Commission decided that the founding principles including such things as the constitution and Republic being based on the unity of the republic, democracy, Islam and human rights are the backbone of the consultation draft constitution and they should be excluded from ever being amended. This should not prevent rights being strengthened but should prevent them being weakened.

Should there be a period from the commencement of the constitution during which period there cannot be any amendments made?

To support stability and move the Republic away from transitional and temporary arrangements, the Commission felt there was a need to provide a period of time during which no amendments are allowed. This would encourage the Somali people, and the government and leaders to try to make the system adopted function as best it can. Within the first seven years of the coming into force of the constitution, no amendments will be allowed with the exception of amendments which may be become necessary after negotiations in connection with Puntland and/or Somaliland.

How many methods will there be for amendments? One procedure for all or separate procedures for more fundamental articles?

Some countries distinguish the processes for amending different articles. For instance, the amendment process for issues that affect the regional states could require both regional state and federal government involvement, while solely Federal or national issues would only require the Federal government's involvement. The Commission

recommends that there will be one method for the amendment for the constitution. The ultimate decision on amendments, after a period of public consultation would be made by the federal legislature as it reflects people at both the levels and the regional states and their interests, through the two houses.

Who should be able to start the process of Constitutional amendment?

It is essential to decide who will be able to initiative the process of constitutional amendment. Again, a balance must be struck between making the process one that the people can readily make use of, and the need to avoid the risk of abuse which might create a backlog of amendment proposals, and cost time and money. So the Commission recommends that 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.

Is the amendment to be a matter for Parliament alone?

The Commission propose that amendment should involve public consultation. When a motion to amend is given an initial welcome by Parliament, a joint committee of the two houses must be appointed to review proposals and then to inform and consult the people. Its report must reflect the results of those consultations, and be submitted in two months.

What is the system of voting?

For the adoption of the amendment, a vote of at least two thirds of the members of each house of the federal legislature is required. Where the proposed amendment has a significant effect on the powers or functions of states, state legislatures will be invited to submit their views to the federal legislature.

Will you have a constitutional review process?

The Commission found that some countries provide for periodic reviews of the constitution. Constitutional review periods are used to reflect on how well the constitution is working and how well it fits with the society and adjust accordingly to make it work better. The Commission recommends that at the end of six and half years of the coming into force of the constitution, the federal legislature must establish a commission to review the implementation and operation of the constitution and to consult the people on possible changes. It will submit its report to the federal legislature and to the people by the end of the seventh year of the coming into force of the constitution. As a result of their findings, appropriate amendments, if any, to the constitution will presented.

Questions

1. Is 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 and Schedule 1[TBD])

A new constitution will come into effect gradually. Many processes will be taking place at the same time or in succession. New laws will be needed and old ones reconsidered. New institutions will be needed – like new courts, commissions, a new house of Parliament. People will have to learn new ideas and new practices. Some things should not happen until other things have happened. It is not possible to propose detailed provisions on bringing in the new constitution before the details and clear, and the circumstances when it is finally adopted.

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