The Basic Law
in Puntland And Jubaland

STATUS STUDY ON THE CONSTITUTION AND GOVERNANCE IN PUNTLAND AND JUBALAND.
THE SOMALIA RIGHTS PROGRAMME – DIAKONIA SOMALIA COUNTRY PROGRAMME
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OCTOBER 2014
Introduction

This analysis seeks to establish the current status of the understanding and implementation of the constitution in relation to good governance in Puntland and Jubaland. The analysis aims to compliment a baseline survey commissioned by Diakonia Somalia to inform the design of the second phase of its Somalia Rights Programme.

The objectives of the Somalia Rights Programme are to i) increase the level of participation and accountability on local and national levels; ii) improve the respect for human rights; and enhance the human security of the population and the resilience of local societies in Puntland and Jubaland.

This analysis falls within the governance and accountability thematic area of the new programme which intends to enhance accountability and community participation by facilitating interventions aimed at increasing the degree and quality of communities’ inputs into local governance processes. To achieve this, the programmes plans to i) raise awareness on democratic and constitutional processes, civil and voter registration, accountability; ii) mobilize citizens, in particular women and youth, to undertake actions aimed at influencing decisions at the local and ultimately, at the national level.

In documenting the current status of the constitutional process, the analysis closely looks at the structures involved, the degree and quality of public participation, the key actors involved and their capacity with regard to good governance, and the effects of the ongoing debate on the Provisional Constitution in preparation for the elections in 2016, as well as the effect this is having, or will have, on the constitutions of both Jubaland and Puntland.

Additionally, the analysis looks at how well the issues of transparency, accountability and participation, are taken up in the various constitutions (Jubaland, Puntland and the Provisional Constitution), and it has identified the opportunities that exist within them that agencies can use in their interventions aimed at enhancing participation and accountability. This analysis is also made in consideration of the New Deal and the Somali Compact.

Background

At its simplest, a constitution is nothing more than a document that sets out the basic principles or established precedents according to which a state (or other organisation) is to be governed. It will usually entrench and institutionalise political agreements, define the state and its population, and frame the rules for the lawful exercise of authority.

In ideal terms, constitutions describe a social contract between rulers and ruled, explicitly formulating the obligations, rights and duties of the two sides. Considering the fundamental importance of ‘contract’ (xeer) in Somali social order, and the multiplicity of contracts that actually regulate social relationships among Somali clans and lineage groups, the constitution making in the Somali context has not been a straightforward undertaking. The interplay between customary, religious and ‘Western’ legal systems has not made it easy either.

Making a constitution in the difficult context such as Somalia is an arduous task. Not only has Somalia experienced more than 20 years of civil war, but its younger generation has grown up in a failed state. Having lived through two decades of dictatorial repression followed by more than two decades of violent conflict, many Somalis living in Somalia do not have the conceptual models or personal experiences of an effective and peaceful Somali state, especially in terms of institutions, governance structures and leadership. The disintegration of the state and the proliferation of small clan fiefdoms characterised by small-group decision making structure of the traditional pastoral society has to some extent contributed to some resentment of a centralised authority.

For a society emerging from civil war, a constitution-building process provides opportunities
Constitutionalism 2014

for reconciliation, for developing negotiated solutions to divisive issues, and for achieving consensus and agreement on the many areas of division.

Constitution making can also symbolise a break with the past by creating an atmosphere of hope and renewal, and helping to devise a legitimate and stable state. Comparative experience shows that constitution-building bodies that are inclusive and representative result in more successful transitions from conflict to peace, and more stable and effective constitutions. Participatory processes in constitution-building increase the legitimacy of the constitution and peoples’ support for it, which is essential for the constitution to play a meaningful role in creating a stable state.

Constitution making

Since the state collapse in 1991, the first meaningful attempt at constitution-making in Somalia began in 2006, through the internationally sponsored peace talks in Kenya which produced the Transitional Federal Government (TFG) and a Transitional National Charter (TNC). This process was envisaged as inclusive and participatory and expected to double as a grassroots peace initiative that would help to solidify the movement towards peace.

It was also hoped that the process would help address a remaining points of conflict, ranging from war crimes, stolen property, occupied territory, conflicting legal frameworks – to the rights of refugees, internally displaced people and the simmering resentment of groups that felt excluded. But there had been little domestic buy-in in this process.

Somalia’s constitution making process more or less follows an international template for state-building after conflict: a peace agreement (Mbagathi Peace Process), the establishment of a power-sharing government under a transitional charter (TNC/TFG), development of a draft constitution by an independent commission with the help of international experts (he Federal Republic of Somalia Provisional Constitution, August 2012).

In October 2012, Somalia turned a new and promising leaf by enacting a progressive interim constitution, selecting a lean, more representative, parliament that elected a new speaker and president. The peaceful end to the eight-year old transitional arrangements, coupled with the defeat of extremist al-Shabab in most parts of south-central Somalia, has ushered in a new era of hope, peace and normalcy.

The new administration of President Hassan Sheikh came up with a six-point Agenda and a Vision 2016 plan. The New Deal and the Compact for Somalia which was endorsed in Brussels in August 2013 provides a framework for achieving peace and stability in Somalia and a framework for international engagement.

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The Status of the Constitution Process in Puntland

Established in mid 1998 at the Garowe Community Constitutional Conference, the Puntland State of Somalia brings together communities inhabiting North Mudug, Nugal, Bari, Eastern Sanag, and Eastern Sool regions. A Transitional Charter, endorsed by the conference, defined the structures and functions of the government of Puntland, which was envisaged as a federal entity of a future Somali Federal State. The Charter outlined a three year timetable for drawing up a constitution and holding elections. These tasks were not completed by the time the administration’s mandate expired in July 2001. Subsequently, a new state constitution was produced and ap-
were witnessed to democratization who questioned by local populations. In the build up to the key milestones, Elections Law – these are all Referendum Act, the District administration for political parties, the political association bill and registration system, the passing of a political draft constitution, which ushered in a multi-party political process.

The state has also been hard pressed to democratization were witnessed. Puntland’s constitution made in April 2012 through a four-day constitutional convention. The establishment of the Puntland Electoral Commission represented a key step in the democratization process. Puntland’s constitution making process presents a different case, where a constitution has not yet been defined legally and practically a highly complex matter because of its geographical and clan structure. On the one hand, Puntland is inhabited by the Darood clan which, together with the Hawiye, claims high stakes in the Federal State in Mogadishu. On the other hand, Puntland borders with, and is in territorial dispute with, the break-away Somaliland. Threats of spread of insecurity from al-Shabab and a sense of neglect from the international community also pose significant challenges to Puntland.

Generally, the Puntland local populations, especially those living in key towns of Garowe, Bosaso and Galkayo, support the democratization process. In the build up to the abandoned local elections, a number of violent demonstrations by local populations who questioned Farole’s commitment to democratization were witnessed. The Puntland government’s reaction of excessive force, using the disputed security forces, the Puntland Maritime Police Force, was widely condemned. The opposition is largely fragmented.

Among the many challenges are: i) lack of clarity about the size and make-up of the population, because no census has been conducted; ii) no national identity card; iii) no voter registration; (iv) absence of a constitutional court to resolve potential disputes. Considering that most Puntlanders have never experienced an election process, and there being very little civic education for the population and no training of the new political associations, the process could turn chaotic.

The situation in the disputed Sool region is currently calm but undercurrents still exist. The conflict pits Puntland and Somaliland against each other, on the one hand, Puntland and both of them against Khatumo State (Sool, Sanaag and Cayne - SSC) on the other hand. This conflict has potential to disrupt attempts by either of these states to consolidate regional state boundaries.

Puntland is keen on securing a federal system with a strong federal state. However, a common understanding of how to achieve this has not always been easy to accomplish with their counterparts in Mogadishu. Key areas of potential conflict are the control of natural resources, particularly oil, the unclear statements from the Federal Government on federalism, the sharing of national resources, including those envisaged under the New Deal/Compact arrangement, and the potential increase in military power of the FGoS due to the lifting of the arms embargo against Somalia.

Federal matters

The recent visit of Prime Minister Shirdon and the ‘Seven Point Agreement’ between the Federal Government and Puntland, committing to establish the Upper House (which will deal with Federal matters) and to support the democratisation process in Puntland, will be a first step in improving relations. According to some respondents, there are arguments that Puntland’s tacit support for the ongoing Jubaland State discussions is a self-serving reinforcement for its own push for stronger federal states.

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In April 2013, a delegates’ conference in Kismayo approved a draft provisional constitution and, in May 2013, an overwhelming majority of 500 delegates elected Ahmed Mohamed Islam (Madobe) as the President of Jubaland.

The establishment of the Jubaland administration was not well received by the nascent Federal Government of Somalia administration, largely because of its close ties with both Kenya and Ethiopia. In August 2013, through an IGAD-brokered deal, the Jubaland administration signed a national reconciliation agreement in Addis Ababa with the Federal Government of Somalia to establish an Interim Juba Administration (IJA) under President Madobe for a two year period.

Since its formation, the IJA has been preoc-
occupied with establishing its institutions and securing its territory. Sheik Madobe is assisted by three deputies, along with governors for Lower Juba, Middle Juba and Gedo. The administration has 10 ministers. Emerging from a backdrop of al-Shabab insurgency, the new IJA administration lacks even the basic facilities – offices, vehicles and staff – for proper operation. It faces challenges, including ensuring security, demobilising militias and integrating them into national army, reconciling various clans, and generating its own revenue.

Access to international organisations beyond Kismayo is still hampered by insecurity. Faced with these challenges, the administration is unable to provide basic services to the local population who have suffered years of neglect, civil war and oppression at the hands of the al-Shabab. IJA is yet to establish a Parliament, and a meeting has been planned later this month to discuss this and resolve other outstanding clan conflicts and pave the way for the formation of a parliament.

External interests of both Ethiopia and Kenya also influence the internal politics of Jubaland and strain its relationship with the Federal Government. Both of these countries hope that a secure Jubaland will act as a buffer zone against al-Shabab attacks threatening the economy and stability.

Key Challenges, Constraints and Gaps

Unlike the rest of Africa where states created by colonialist powers are struggling to be nations, Somalia is a nation struggling to be a state. For most countries emerging from conflict, the territorial definition of the state and its population is a given. This is not the case in Somalia.

Reliance on a constitutional process as part of a transition from a peace agreement to a legitimate elected government is an increasingly common methodology. In the case of Somalia, however, the Provisional Constitution had been adopted by unelected participants in a constituent assembly. It did not have the approval and involvement of the Somali people, and it lacked the legitimacy required to establish a workable peace and a viable state. A lot of emphasis was put on the need for a public dialogue and an inclusive process in order to ensure that the final draft had legitimacy and would be accepted in a referendum. The most successful case of constitution making to-date is that in Somaliland, where the act of agreeing a constitution through a plebiscite was intimately linked to the formalisation of separate statehood. Though Somaliland’s autonomy has not been recognized internationally, the process leading to its formation holds a lot of lessons for the rest of Somalia.

The main challenge with the constitutional process in both Puntland and Jubaland is in making the link with the federal constitution process. While the Puntland process is significantly ahead of the federal process, the Jubaland process lags behind. Similarly, since the Provisional Federal Constitution is currently under review, and bills that are supposed to operationalize it are not fully been completed, there is a risk of disjointed implementation.

Many of the Islamist groups now in the ascendant in south-central Somalia favour a unitary rather than a federal state. The more militant Islamists oppose the Western-style constitution making process itself as an implicit challenge to Shari’a law. Some would go further to reject the existing territorial definition of Somalia in favour of an Islamic emirate embracing all the Somali peoples in the Horn of Africa.

Aside from identity problems there are the difficulties of re-establishing forms of central government for a society where political authority is traditionally decentralised. The regulation of political power is never easy, but even the basics of statehood – the government’s right to monopolise force and its duty to protect citizens, the concept of individual rights, responsibilities and obligations under the law – are tempered in the Somali context by the primacy of clan and xeer, which provide the basis not only of political solidarity but also the foundations of law and order and personal security.

After endorsement by the relevant legislative bodies, the constitution is often submitted for formal public approval through a referendum. Even before that, many agree that there is need for a widespread public consultation process which is regarded as part of the democracy and peace-building process. The Federal Government Vision 2016 hopes to undertake this as one of its goals. Once adopted, elections are normally held on the basis of the new constitutional arrangements. Many observers think that this timeline is extremely ambitious and may not be achievable.

For the purposes of this analysis, Puntland and Jubaland are at different stages in a process of a constitution-making, holding a referendum and elections. Despite a reasonable level of political consensus, the making of a formal constitution has taken very much longer than anticipated. The results have been and generally disappointing from the perspective of the practitioners involved in them.

Term extensions and political compromises in breach of constitutional provisions have been the hallmark of the constitution making process thus

Many of the Islamist groups now in the ascendant in south-central Somalia favour a unitary rather than a federal state. The more militant Islamists oppose the Western-style constitution making process itself as an implicit challenge to Shari’a law.
Ideally, the Provisional Federal Constitution process is supposed to set the pace and the agenda for the constitution making processes in the regions, including those of Puntland and Jubaland. Unfortunately, this is not the case.

While this is not entirely a bad thing, as it may help push the Federal Government to speed up its own processes, it may lead to a proliferation of processes. The frustrations with the lack of sufficient progress within FGOS and the reality that different regions are at different points in their constitution making processes, have forced the international community to support the processes as they are.

Initially this means more collaboration with established regional authorities such as Puntland and Jubaland. However, the emergency of numerous other regional entities such as the South-West Region, and others which might come up, could raise challenges for achieving a smooth implementation. The Federal Government has attempted to take the lead on this by enacting a law on the establishment of regions and districts, but the implementation of this law has hit a snag as the law itself is deemed unconstitutional.

Key Actors

Many internal and external actors are involved in the constitution making process in Somalia in general, and in Puntland and Jubaland in particular. A number of those key actors are discussed here:

**INTERNAL ACTORS**

**Federal Government of Somalia**

Through the Vision 2016 and the New Deal/Compact for Somalia, the FGS has taken active leadership of the constitution review and federalism agenda. The Federal Parliament, in consultation with the Executive and Presidency have come up with an action plan of enacting the relevant laws that will ensure a smooth review and implementation of the Provisional Constitution in preparation for a national referendum and elections in 2016.

The Ministry of Justice and Constitutional Affairs has the oversight over the Independent Constitutional Review Commission and is coordinating efforts to achieve this.

**CSOs**

A number of CSOs have been involved in public participation/civic education/consultation and women's participation in the political process. The Women’s Development Organisation (IIDA), together with the Civil Society Coalition (CRD), and a network of non-state actors supported by Saferworld (PUNSA, SOSCENSA, and SONSA) continue to engage in civic education, advocacy and lobbying on overall good governance and the inclusion of more women in various constitutional bodies as well as ensuring that the women’s constitutional quota in representation is respected.

**EXTERNAL ACTORS**

**UNDP/UNPOS**

The UN, especially through UNPOS and UNDP, has been in the forefront in supporting the constitution making process. It has already provided the FGOS with a complete set of background documentation to the Provisional Constitution and it plans to take the lead on the constitution making process by providing further support to establish and operationalize the Constitution Commission.

**Interpeace – Democratization Working Group**

Interpeace has secured a considerable niche and demonstrated expertise in supporting the democratization across Somalia. Through the Democratization Working Group (DSG), it is involved in the successful processes in Somaliland and Puntland. The DSG brings together all key actors, including donors, international NGOs, as well as local partners involved in the democratization processes across Somalia.

The National Democratic Institute (NDI), the Association of European Parliamentarians (AWEPA) and the Max Planck Institute of Law (MPIL)

These international organisations are in partnership with the Federal Parliament to capacitate the MPs and support the technical process of drafting the relevant laws. Together with the UN, they have been instrumental in moving forward the constitution making process.

Conclusions and Programmatic Recommendations

To be successful, a bottom-up process to constitution building in Somalia, taking lessons from what worked successfully in Somaliland and drawing upon positive elements in Islam and traditional conflict resolution methods, is highly recommended. To a great extent, the process must be led by Somalis themselves.

The constitution making process is as political as it is technical. To mitigate the risks of making the exercise externally driven by substituting external experts for internal actors, a fine balance needs to be struck between what ensuring that the process is technically sound and respecting local ownership and control of the process.

It is important to recognise the impact of the social structure in the constitution making process. Modern constitutions are based on concepts of ‘citizen’ and ‘state’ and presume the supremacy of the constitution over any other legal norms. However, in Somalia the clan rather than the individual is the primary bearer of rights and responsibilities. This factor manifested itself throughout the constitution making process.

Although the text carries the usual dispositions on individual rights, the structures of clan power had to be taken into consideration so that the traditional systems remained valid instruments for exercising power.

Puntland, and to a lesser extent Jubaland, have a fragile and simple governance structure with limited capacity in which the exercise of power by the president is highly personalised.
To achieve inclusivity, both the Puntland and Jubaland administrations must ensure all clans are included in the process and products of the constitution process, in the making of appointments and pursuing reconciliation among locals.

Finally, and most importantly, a robust, focused civic education programme modelled around the social cultural realities of Somalia needs to be developed and implemented. While the CSO is an appropriate avenue for delivery of such a programme, there is need for strong involvement and support from the Federal Government as well as regional administrations for a civic education initiative to succeed.

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Diakonia was established in 1966 under the name of Swedish Free Church Aid. Ever since, its focus has been on people exposed to injustice and their opportunities to change their situation. In 1984 the name of the organization was changed to Diakonia. The word “diakonia” is Greek, meaning care and service.