

An institutional analysis on the Constitutional Court of Somaliland

Mohamed Farah Hersi is an attorney and human rights researcher. He holds an LL.B (Bachelor of Laws) from the University of Hargeisa in Somaliland, an Honours degree from UP, an LL.M (Master of Laws) from the University of Pretoria in South Africa, and is currently a Ph.D. candidate.

‘Life, reality and future of the constitutional charters of our time rely on constitutional justice’

Mauro Cappelletti

Law is respected and supported when it is treated as the shield of innocence and the impartial guardian of every civil liberty---- of the law be dishonestly administered, the salt has lost its flavour, if it be weakly or fitfully enforced, the guarantees of order fail—if the lamp of justice goes out in darkness, how great is the darkness.

Lord James Bryce

1. Introduction

A constitution enjoys a special place in the life of any nation. It is the supreme and fundamental law that sets out the state’s basic structure including the exercise of political power and the relationship between political entities and between the state and the people. As the former Chief Justice of South Africa, Justice Ismail Mohamed, once observed, ‘a constitution is not simply a statute which mechanically defines the structures of the government and the relations between the government and the governed, but it is: ¹a Mirror reflecting the national soul, the identification of the ideals and aspiration of a nation; the articulation of the values binding its people and disciplining its governments.’

This notion has been reflected by many constitutions adopted in Africa in late in 1990s. The constitution of Uganda is an example, which provides that the constitution is to build a better future by establishing a socio-economic and political order through a popular and durable constitution.² Principally the constitution is the supreme document of the land, which enhances and protects the democratic values and principles. As result, it has been renowned that viable and durable constitutions play a vital role on the effectiveness of democratic

¹ John Hatcherard, Muna Ndulo and Peter Slinn Comparative constitutionalism and good governance in the commonwealth an eastern and southern African perspective 2004 Cambridge university pp 23

² Ugandan Constitution

institutions. Furthermore, it has been realized widely that effective and capable governance need a well designed constitutional justice. Theoretically a written constitution needs a body which promotes, develops and strengths the values and principles enshrine in the constitution. It is from this background that the constitutional courts have been established as a democratic institution, which mainly promotes and protects the constitutional principles and ensures their compliance by the other constitutional entities. It is a place where inter-institutional conflicts are resolved. Therefore, the paper shall analyse the institutional capacity of the Constitutional Court of Somaliland. In doing so, the paper will enumerate the importance of the court in promoting democratic governance and the protection of the constitutional principles. The paper will highlight the functions, powers and mandates of the court. It will also analysis the institutional effectiveness and its structure. Finally, the paper will find out challenges and achievements made by the court since its constitutionalization.

2. Institutionalization of the Constitutional Court of Somaliland

In state of nature as John Locke observes in his book, ‘Two Treatise of Government’ there was a system of governance in Africa before the colonization. Somaliland as a British protectorate had a traditional system of governance, which encompass the powers, and functions of the modern democratic governance. Unlike the current contemporary political structure, Somaliland had no a written constitution which guarantees the fundamental rights and freedoms of its inhabitants. Moreover, there was no unified and centralized political authority. On the contrary, the political structure was divided into clans and sub-clans. It is therefore, impracticable to have a constitution and its monitoring institution (constitutional court) in this traditional political structure. It is highly reasonable to argue that, it is the current democratic system, which requires a written constitution and its monitoring institution.

During the colonial epoch, Somaliland was governed directly by the queen’s representative, the governor, who exercised all legislative and executive powers.³ In 1946 an advisory council was established which consisted of 48 selected by the governor from different sectors of the community. This council had no legislative and executive power.⁴ In 1955 the legislative council was set up under the ‘Somaliland Order in Council 1955’. The council

³ Accessed on 23 July 2009 (www.somalilandlaw.com)

⁴ (n 2 above)

composed of 15 members and presided by the governor. In addition, there was another two orders, which came into force in 1959 and 1960 respectively. None of these two orders established a separate body such as constitutional court or other relevant institution, which protects the rights and freedoms of the citizens. The only reasons that can be justified why these orders or constitutions did not institutionalize a constitutional court are the two political systems are different. Before the restoration of the independence of Somaliland in 1991, Somaliland had practised a parliamentary system, which did not separate the powers of the state. Conceptually the doctrine of separation of powers obliges the division of power into three different branches (legislative, executive and judiciary). Judiciary is one of the key institutions of this presidential system by which Somaliland adopted in Borame in 1993. It is the constitutional court, which protects, develops, enhances and promotes the constitution and constitutional justice.

After the unilateral secession from the rest of Somalia, Somaliland developed its first post-Barre constitution in 1997. A committee nominated by the former House of Representative drafted a draft constitution. In it a constitutional court was constitutionalized which serves as a watchdog of the constitution. Article 126 of the 1997 constitution and article 78 of 1999 constitution established a constitutional court. Finally, a constitutional court was incorporated into the final constitution of 2000.

3. Dual functions of the Supreme Court

Article 101 of the Somaliland constitution provides as follows, 'The Supreme Court is the highest organ of the judiciary and is also at the same time the Constitutional Court'. The Supreme Court of Somaliland has dual constitutional functions. Firstly it is the Supreme Court of the republic, which has different legal functions. Secondly, it is the Constitutional Court, which has different constitutional functions from the Supreme Court. There is one reason why Somaliland has adopted this model of establishing a constitutional court. The drafters of the constitution argue that the political system in which Somaliland adhered to is similar to the one of the United State of America. This is the only reason, which can be justified on why Supreme Court serves at the same time the constitutional court of the nation. It is my argument that it was rational to separate the two courts. The reason why I prefer the division of the two courts is that firstly, the procedure of nomination may have been different. If the nomination and the approval of the judges of the constitutional court were more rational, then there would have been some sort of independence from the other two branches

of the state specifically the executive. This would enable them to judge them specifically the executive. It is my understanding that the constitutional court is more important than the Supreme Court. Constitutional court has mandates to decide cases concerning the constitution. Furthermore, the constitutional court is the highest institution, which decides the constitutionality of any decision, act and laws promulgated by the legislative and executive. It also plays a vital role on the protection of the concept of constitutionalism and the rule of law. Secondly, the US model of constitutional dispute settlement is more advanced and culturally rooted than the Somaliland model of constitutional dispute settlement, which is almost similar to the US model. The drafters of the constitution should have carefully analysed the compatibility of the Somaliland traditional political structure and the modern system of dispute settlements through constitutional means.

4. Structure of the Constitutional Court

The constitution states the structure of the court. It provides that the Supreme Court serve at the same time the constitutional court. Under article 14 of the Law of Organization of Judiciary as well states that the judges and the venue of the court is same as the Supreme Court. The Chief Justice is as well the Chief Justice of the Constitutional Court. The dual functions of the Supreme Court have been criticized as one of challenges of lack of independence of decisions pertains to constitutional matters.

4.1 Structural problems of the constitutional court

Unlike other constitution in Africa, the Supreme Court and the Constitutional Court are separate institutions. The main objective of separating the Supreme Court from the constitutional court is to have an independent, neutral and impartial constitutional justice. Conceptually the functions of the constitutional court are different from the Supreme Court. Firstly, it is a political institution in the judiciary, which has the sole obligation to monitor and receive individual and other communications from the public. It is therefore, different from the other courts in terms of their nomination procedure, tenure of the office and process of removal from the office.

Justice Mohamed Omar Geele stated in an interview that the oppositions and other relevant individuals do not have trust in the court for the fact that the same judge who decides a civil and criminal case is the same judge who sits as a constitutional judge. With regard to this, the

dual functions of the Supreme Court undermine the independence and the integrity of the constitutional court.

4.2 Nomination of the Chief Justice

Mostly in African constitutions, the chief justice nominates by the president and approves by the parliament. The Somaliland constitution also provides the same process with regard the nomination and removal of the chief justice. The constitution provides in article 105 the constitutional appointment of the chief justice. It states as follows:

‘The president of the republic shall, in consultation of judicial committee, appoint the president and judges of the Supreme Court and the *constitutional court* by taking into consideration the level of their education, professional experience and good behaviour. The appointment of the president of the supreme court shall be approved by the two houses in a joint session that is to be held during a period that is not more than three months from the in which the appointment has been announced.’

Furthermore, the Law of Organization of Judiciary under article 11 provides the same process.

5. Challenges of not having an independent constitutional court

There are various challenges, which will not allow the justices of the constitutional court to be more independent, neutral and impartial. These elements have been pointed out both by the oppositions and as well the justices at the court. These are the identified elements, which contribute to the lack of an independent, impartial and neutral court.

5.1 Constitutional challenges

One of the main impediments of not having an independent court is the constitution, which gives all power such as nomination and removal of justices from the office to the president. In the constitution, the president nominates and the House of Representative approves. The later is always underestimated or ignored. It is my argument that the drafters of the constitution should have given a confident space to the justices at court so they can be more

independent and neutral. In relation with the removal from the office, the power should have been given to the Judicial Commission and the House of representative. In this, the president has no any interference and mandate to remove the chief justice and the other constitutional justices from the office. The justices at court will then feel some sort of independence and this will play an instrumental role on having a functional and independent court. Therefore, the constitution is one of the impediments and it needs to revisit in the future time.

5.2 Financial challenges

The court has no separate budgetary system. The Ministry of Justice as administration of the justice manages the budget of the courts as whole.

5.3 Retirement and benefits

In an interview held in the Supreme Court proves that there is no benefits and retirements. As one of the justice of the constitutional court states, ‘ the lack of retirement and benefits is one of the source of the lack of independence’ he further states, ‘ if the justices at the constitutional court and as well the supreme court have these benefits, there would have been some sort of independence’. It is evident that the lack of such benefits plays a major in the administration of justice and as well the independence of the court.

6. Independence of the court

It has been argued by the oppositions and as well the people that the court does not have independence to determine a case impartially. The oppositions argue further that the court has been serving only one part (the executive) for the fact that it is the president who nominates and removes the Chief Justice and other judges from the office. Therefore, the court is not independent constitutionally.

On the other hand, there is lack of practical independence. It is clear from the registry of the constitutional court that there have been three cases in which the court ruled. Hence, the people and other concerned parties do not have trust to submit a constitutional petition to the court.

7. Functions of the Constitutional Court

Unlike other constitutions, Somaliland constitution did not explicitly mention the constitutional functions of the constitutional court. It is not clear why the constitutional drafters did not insert the importance and the mandates of the court in the constitution. Article 101 of the Somaliland constitution, which establishes the constitutional court as part of the Supreme Court does not explicitly, enumerates the constitutional functions of the constitution court. However, Somaliland parliament enacted the Law of the Organization of Judiciary.⁵ This act of parliament provides the hierarchy and as well the powers and functions of the courts. Under article 15 of the Law of the Organization of Judiciary provides the functions and the powers of the court. The following are the constitutional functions of the court.

- Hearing and judging decisions and laws those are contrary to the constitution
- Constitutional interpretations
- Temporary suspensions of laws which are not complying with constitution

8. The role of the constitutional court of inter-institutional conflicts resolution

The marriage between tradition and modernity has faced dilemma in the recent political tensions in Somaliland. Some scholars argue that this test is very crucial to the rest of Africa. Their arguments have been based on the notion that modernity can be incorporated to the traditional political governance. Undoubtedly, it has been working since the adoption of the new political system in 2001, yet there are shortcomings and various challenges that will have negative impact on the realization of a successful marriage. It is evident from the current political crisis in Somaliland that there are elements and signs of incompatibility of tradition and modernity. Negative and horrific outcomes have been witnessed which caused the loss of

⁵ Law No: 21 of 2003

lives and mistrust between the three political parties. The central hypothesis is tradition should be incorporated to modernity but modernity cannot be incorporated into tradition.

The constitutional court, which has been established in the constitution as a court of last solution to the constitutional crisis, failed to implement its constitutional function effectively. Its role remains unrealized and the procedure is untested and unexplored. It is an institution, which has not been utilized by the parties, which the law give a right to file a constitutional petition if their rights have been violated or transgressed. On the contrary, neither the public nor the political parties have tested the effectiveness and the independence of the court. One may argue that the president has nominated the Chief Justice and as result, he works for the government. On the contrary, one may argue that the House of Representative approves and appoints the Chief Justice and justice of the constitutional court. Theoretically, it is a system, which has check and balance, but the doubts remain the effectiveness of the institutionalization of the concept of constitutionalism.

The role of the constitutional court is clear in Law No: 24 of 2003. It has a jurisdiction to determine the constitutionality of acts issued by the parliament and decisions made by the government if such acts and decision are in contrary to the purpose and the spirit of the constitution. The opposition parties have raised questions after the suspension of the voter registration list by the National Electoral Commission. There was no constitutional case filed before the constitutional court. However, it was a constitutional obligation of the court and as well the parties to submit their cases to the court. In this case, the constitutional question had to be, does the Commission has the legal authority to suspend the voter registration list, which has been legalised by an act of parliament Law No: 27 of 2008. In this case, the oppositions argued that the court has lacks of independence and a case cannot be filed to such court. As result, the court has been ignored based on the argument of lack of independence. I agree to some extend that the court lacks the minimum required independence and institutional capacity to entertain and determine such cases. However, it is clear that modernity has failed and as result, tradition has been activated. There should be a close relationship between the modernity and tradition in relation with determination of the constitutionality of a given case.

8.1 The possibility of incorporating tradition to the constitutional justice mechanism

Scholars have widely supported that the culturally rooted internally driven bottom up approach of state building has deep positive impact on the sustainability of peace and the realization of well functioning democratic governance. On contrary, it has been proven that internationally driven top down approach on state building had failed in south central Somalia.⁶

It is highly unlikely to find tradition incorporated in the modern system of governance. The latter is more emphasised while the role of tradition is ignored. The constitution and as well the law of organization of judiciary have not provided the importance of incorporation of the traditional elements to the formation and the powers of the court. In every country, which has a constitutional court, is different from one another. The tradition and political system are different from one another. This denotes the importance of establishing a constitutional court, which has elements of tradition.

8.2 Without a functional and independent court peace cannot be maintained

The central element of having well function democratic governance is to have an independent, effective and impartial constitutional court. As I mentioned earlier it is the central organ of the state, which has the ultimate power to rule and determine all constitutional matters. Since the beginning of the democratization process in Somaliland neither Somaliland government nor the international community felt and considered the importance of establishing an effective and independence constitutional court. A court, which will have the capacity to mediate the contesting, parties in the presidential elections. Without the modernity will not be able to exist and last longer. I strongly argue that the donors and the government should consider operationalization of the court. In this year, Somaliland witnessed several inter-political conflicts in Somaliland, which caused unprecedented events. The only solution that we can prevent and manage such conflict is to have a functioning and independent constitutional court. It promotes and keeps peace and order.

9. Institutional achievements

⁶ Iqbal Jhazby Somaliland: an African struggle for nationhood and international recognition pp 67

For the fact that there are no published annual reports by either the Supreme Court or the constitutional court, it is difficult to know the accurate achievements made by the court. Since its institutionalization, the court has not received communications from either the public or the political parties. There has been multifaceted conflict between the House of Representative and the government, but there was no case submitted to the court in order to determine the disputed issue.

It is evident that the court has not been able to dissolve such inter-state organs conflicts. One of the reasons why it has not been submitted the cases to the court is lack of independence of the court. The opposition and other individuals are not confident the independence of the court and as result, the court has not been functional. It is believed that the independence of the court has been undermined by influences from the government. As enshrines in the constitution the president has absolute power to nominate and remove the chief justice and justice in the court with the approval of the parliament. The approval of the parliament has had little practical application. Therefore, the chief justice and other justices at the court have no other options but, to abide by the demands of the president. A constitutional reform will only change this situation.

10. Conclusion

Many governments that emerged after independence soon became undemocratic, over-centralized and authoritarian. Predictable, political monopolies led to corruption, nepotism and abuse of power. As result, repressive regimes and one party system emerged. Constitutions in these countries have been amended so it can be applied to a new reality. Somaliland as an example of a failed union with Somalia witnessed such misgovernance and abuse of power. Later it withdrew the union and re-established a democratic state, which protects the rights and freedoms of its citizens.⁷

A new constitution was adopted in 2001.⁸ The political transformation has had a positive as well a negative impact upon the development and as well the effectiveness of the post-Barre democratic institutions. As explored in this paper, the central machinery of the current system is the implementation and enforcement of the values and principles enshrine in the

⁷ John Hatcherard, Muna Ndulo and Peter Slinn Comparative constitutionalism and good governance in the commonwealth an eastern and southern African perspective 2004 Cambridge university pp 34

⁸ Somaliland constitution 2001

constitution. To promote the rule of law and constitutionalism, there should be an effective and independent constitutional court, which has powers and constitutional mandates to determine constitutional issues. Institutionally this court has been set up, but the question remains its effectiveness and independence. As I pointed in the paper, since the inception of the democracy in Somaliland, there have been challenges and problems face the political transformation in the country. Constitutional crisis has started and apparently, there was constitutional means to resolve such crisis. Traditional conflict resolution has been applied to resolve the constitutional crisis in the country. Apparently, the court has not been active since its institutionalization. The challenges are wide range and multidimensional ranging from financial to political. Only a constitutional reform will have a positive impact on the realization of an independent, impartial, effective, neutral and functional constitutional court.