

COMMENTARY (20 July 2012)

Somaliland Reserved Seats Bill 2012: *Parliament has a second chance that it cannot miss*

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Introduction

1. The Reserved Seats Bill 2012 currently at the House of Representatives provides the Somaliland Parliament another opportunity to pass legislation which will help women and members of minority groups excluded on the basis of birth or descent (EMGs)¹ exercise their rights to stand for elections. The proposed modest number of reserved seats is aimed at realising, in a small measure, the equality rights in the Somaliland Constitution and is no way contrary to any of the provisions of the Constitution. To borrow the words of former US President Johnson, we have talked too long about equal rights and "*it is time now to write the next chapter and to write it in the books of law*".

2. With the fast approaching date of the local government elections, the six week Ramadan parliamentary Recess, and the fact that the parliamentary electoral laws are unlikely to be revised until next year, I urge the House to revise the bill and turn it into amendments to the 2001 [Presidential and Local Elections Law](#) - Law No. 21/2001 (the 2001 Election Law) which can be done through a 5th Annexe to the law following the recent 4th passed by both Houses this month. **To facilitate this process a draft 5th Annexe Bill based on the current Reserved Seats Bill is attached as a suggested text.** The reserved seats for parliament can be considered when the parliamentary elections laws which require considerable changes are being considered. Thorn bushes are better removed, one at a time, from the top (*Oodo dhamceed sidey u kala sareeyaan baa loo guraa*) and the myriad of concerns about the allocation of seats of parliament should not be allowed to delay further the introduction of reserved seats at the forthcoming local councils elections. The current nine Political parties/associations are already anointing their local election candidates and they ought to be aware that if they fail to include at least the minimum number of women and EMG candidates (see table below), they run the risk of not being able to win these reserved seats.

The fate of the 2007 reserved seats bill

3. In September 2007, the House of Representatives approved a [bill amending](#) the 2001 Elections Law which, among other provisions, included an article (Article 22A) that proposed reserved seats at the local elections for women and excluded minority groups (EMGs). The modest Article 22A proposals were that women and EMGs should have the following reserved seats at the local district councils: 4 and 1 respectively at the Capital city (out of a total 25 seats); 3 and 1 at each A districts (out of a total 21 seats); and 2 and 1 at B and C districts (out of a total of 17 seats at each B district and 13 seats at each C district). For women, the percentage of the then proposed reserved seats ranged from

¹ I refer here to the gabooye minority groups such as "Madhiban, Muse Dhere, Yibir, and Tupal" - the EMGs identified in the 2007 Bill who are discriminated against on grounds of birth/descent (or caste).

12% to 16% and was considerably below the 30% goal recommended in the 1995 [Beijing Declaration and Platform for Action](#) and which is commonly nowadays considered as the threshold to achieve a “critical mass” of influence. The House of Elders considered the bill on 1 December 2007 and rejected it on a vote of 62 (over two thirds of the House membership) and 3 abstentions, and on point of principle under [Article 78\(4\) of the Constitution](#). This meant that when the bill was later re-considered by the Representatives on 24 March 2008, they could not muster the two thirds majority they needed to override the Elders’ rejection and so the bill lapsed.

4. Although at the time there were considerable difficulties between the then opposition controlled House of Representatives and the Government at that time, the professed reasons for the Elders’ rejection of the bill was that the reserved seats provisions were unconstitutional. This assertion was also made by Government Ministers. In a [commentary that I wrote on the bill on 3 September 2007](#) I set out in detail my contrary views that the reserved seats provisions of the bill did not conflict with the constitution. I also gave examples of the many countries which have adopted reserved seats or quotas² which include many African, as well as many Muslim countries. Without rehearsing the same points, I shall examine again briefly why the equal rights clause 8(1) of the Constitution cannot be used, in this context, to thwart the necessary modest measures aimed at making the equal rights of women and EMGs (under the same clause and under the other provisions of the Constitution) a reality and not just a formal statement.

Reserved seats and the Somaliland constitution

5. It is now generally accepted that formal equality, by itself, neither ensures that disadvantaged groups actually receive equal treatment in practice, nor does it tackle, at all, the continuing effects of the past discrimination against them. Reserved seats (or quotas for women) are now used in over 100 countries, whilst those for minorities are found in 30 countries³. The majority of these reserved systems or quotas are backed by legal or constitutional provisions, but the fact that there are no explicit reserved seats provisions in the Somaliland Constitution is neither unusual, nor should it, in my view, deter parliament from adopting a system of reserved seats under the electoral laws. No doubt when the time comes for revisions to be made in the Constitution, this will be one of the amendments to be considered, but in the meantime the modest proposed changes are, to use the words of the UN Human Rights Committee⁴ “*action needed to correct discrimination in fact*” and “*a case of legitimate differentiation*”.

6. When looking at a provision in the Somaliland Constitution, one must avoid interpreting each provision on its own as this might fail to give effect to other relevant provisions and to its principles and purposes. The following purposive sentiments of the South African Constitutional Court Deputy President Langa⁵ have their parallels in the Somaliland Constitution preamble :

² See for example: <http://www.quotaproject.org/> ; <http://www.idea.int/gender/quotas.cfm> .

³ See, for example, [Bjarnegård and Zetterberg \(2011\)](#) “Women and minorities as challengers to the partisan representation model: An analysis of group representation and electoral quota design” http://www.ecprnet.eu/conferences/general_conference/reykjavik/paper_details.asp?paperid=1707

⁴ [General Comment 18 \(37th session 1989\)](#) Report of the Human Rights Committee, Vol. 1, UN doc A/45/40.

⁵ Investigating Directorate: Serious Economic Offences and others v Hyundai Motors and others (CCT 1/100) [2000] ZACC12, 2000(10) BCLR 1079 (available at: <http://www.saflii.org/za/cases/ZACC/2000/12.html>)

“The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”

Furthermore, Article 21(2) of the Somaliland Constitution also explicitly states that the provisions of the Constitution relating to fundamental rights and freedoms must be interpreted in “*a manner which is consistent with the international conventions on human rights*”. This will involve taking note of, for example, the International Convention on Civil and Political Rights – [ICCPR](#) - (and its [Human Rights Committee General Comments](#)) to which Somaliland is committed to be bound⁶. Like other constitutions, the Somaliland Constitution accepts, under Article 25(4) that the freedoms and rights of one person, may, on occasions conflict with the freedoms and rights of another person in which case it is inevitable that, on these occasions, there may have to be some limitations which have to be considered under the internationally accepted standards.

7. I mention these points because the reaction of the House of Elders to the 2007 bill was simply based on advice given to them to the effect that as Article 8(1) of the constitution guarantees “*equal rights and obligations before the law and shall not be accorded precedence on grounds of colour, clan, birth, language, gender, property, status, opinion etc.*”, then reserved seats discriminate against, presumably, men and the majority communities. What this view overlooks is that Article 8(1) must not, as I mentioned above, be looked at on its own but must be interpreted within the context of the other provisions in the Constitution which further entrench the fundamental rights and freedoms of women and EMG. It also overlooks the fact that reserved seats are one way of ensuring that women and EMGs also receive in reality the very equal rights which are guaranteed to them by Article 8(1) and so a holistic a more nuanced approach in reconciling these various rights in the Constitution is required.

8. These constitutional provisions, other than Article 8(1), that come into play in respect of this issue are:

- Article 8(2) which prohibits discrimination on grounds of, among other things, birth and status and makes it a national obligation that “*these long lasting bad practices*” should be removed. This applies particularly to discrimination against communities excluded because of their birth/descent and minority status, such as the EMGs.
- Similarly, for women, Article 36 re-affirms their constitutional rights and enjoins the state to legislate for their rights be free from practices that are contrary to Sharia and which are injurious to their person and dignity. Whilst clearly this covers matters which are physically harmful, it also extends to

⁶ The commitment is expressed in Article 21(2) of the ³ Constitution, but in any case Somaliland accepts that is bound by [the international conventions acceded to by the pre 1991 Somali \(Democratic\) Republic](#). These included the ICCPR, (acceded to on 24 January 1990) but not the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which was never signed by the S(D)R.

practices, such as discrimination and exclusion, which affect the dignity of women.

- Article 22 guarantees every citizen's right to participate in the political affairs of the country and the right to be elected to a public office.
- Article 21(1) makes it clear that the state (including the legislature, the executive and the judiciary) is specifically bound by the Constitution's provisions relating to fundamental rights and freedoms.

9. Constitutional (and Appeal) courts deal frequently with cases which may seemingly raise possible conflicts of two rights and the answer is often a balancing exercise which gives effect to the principles of the constitution and follows the internationally accepted norms⁷ relating to situations where one right may have to be limited so that another right could be enjoyed. An example of an African Appeal court which dealt with a challenge on a law setting one third quota of local government seats for women on the basis that this discriminated against a man was the Lesotho Court of Appeal⁸ which upheld in 2005 the constitutionality of law by considering the relevant international conventions and the rules relating to acceptable limitations of rights. In the Somaliland context, the modest reserved seats flow from the above constitutional provisions and are a justifiable measure to improve the rights of women and EMGs. In the 2002 local elections, of the 332 local district seats contested, only one was won by a woman, and in the 2005 House of Representatives elections only one out of the 82 seats was won by a woman through the election⁹. As for EMGs, the picture is worse although, of course, they are smaller in number than the female population. One seat was held by an EMG person at the House of Representatives which was elected indirectly in 1997, but at the general election in 2005, no EMG person was elected to the House.

The 2012 bill

10. Unlike the 2007 bill, the current bill is drafted as a standalone bill dealing with reserved seats for women and EMGs for both local district councils and for the House of Representatives. The bill came out of the recommendations of an advisory committee set up by the President on 7 September 2011 to advise on the raising of the participation of women and minorities in political life. The 9 member Committee included ministers and parliamentarians and was chaired by Mr Ahmed Muhumad Madar. In March 2012 the President passed on the recommendations of the advisory committee to the House of Representatives for legislative action. The modest recommendations of the advisory committee proposed the following reserved seats for women and EMGs:

The Reserved Seats Bill (2012) as proposed by the Committee – Arts. 5 & 6			
	Local Councils Res. Seats	HoR Res. Seats	HoE Res. Seats
Women	Capital - 4 out of 25 A districts - 3 out of 21 B districts - 2 out of 17	8 out of 82 (10%) Maroodi Jeex &	<i>If the House of Elders changes from its traditional character,</i>

⁷ The general test is that the limitation of the right is authorised by law and is reasonable and demonstrably justified in a free and democratic society.

⁸ [*Molefi Tsepe v the Independent Electoral Commission, and others*](#) (2005) C of A (Civ) No. 11/05, which upheld the legality of a 2004 Electoral Law amendment which introduced a one-third quota of all local government council seats for women for the next three elections.

⁹ Another woman was appointed to a seat in one of the areas where no polling took place in some of the parts of the region.

	C districts - 1 out of 13 D districts (unelected - not included) ? out of 9	Togdher – 2 each Awdal, Sanaag , Saaxil and Sool – 1 each	<i>then 10% of the seats (equivalent to 8)- same regional allocation as for the HoR</i>
EMGs	Capital - 1 out of 25 A districts - 1 out of 19	1 out of 82	1 out of 82

11. On 9 July 2011, the House Internal Affairs Committee submitted a bill titled “*the law the quotas for women and minority communities in the participation of the country’s politics*” for first reading. The House had a brief discussion on the bill and then asked the Committee to re-consider the text of the bill and the way it was submitted. It has been reported that some of the representatives objected to the format of the bill and others, rather ominously, objected to its contents. The Deputy Speaker later confirmed that press reports to the effect that the bill was rejected were inaccurate and that the referral back to the Committee was simply to bring the bill in line with the House legislative technical procedures. On 17 July 2012, the House started a 6 week recess, for Ramadan. With the approaching local councils elections, women and EMGs have expressed their concerns about the delays and are campaigning for its adoption soon after the recess. The EMGs have specifically criticised the “single seat” allocation. The bill will be put to the House again after the recess, in early September 2012.

Comments on the bill

12. The bill, as currently drawn up consists of 5 main articles. Leaving aside any (justifiable) criticisms by women groups or by EMGs of the low number of reserved seats, the bill requires, in my view, some re-drafting and additional clauses to make it fit with the electoral laws. My comments therefore are as follows:

12.1 In view of the urgency of getting all the laws relating to the forthcoming local elections ready, I would recommend that rather than having one law covering the reserved seats allocations for all the elections, the priority now should be in drafting amendments to the 2001 Presidential and Local Elections Law (the 2001 Election Law).

12.2 It should be made crystal clear that women and EMGs candidates are also be eligible for election to the non-reserved seats and are not just consigned to competing for reserved seats. Conversely men and non-EMG candidates are not eligible to be considered for the reserved seats. This may seem self-evident, but in Afghanistan, there were reported allegations that women candidates were pressured not to stand for election after their candidacy was submitted and then the parties asked that men should then fill the reserved seats.

12.3 As there is not going to be a separate roll or voting for women candidates, there is no need for the current bill’s Article 7(1) stipulation that the association/parties should forward a separate list for female candidates.

12.4 In contrast, there is a need for candidates eligible for the EMG reserved seats and willing to be considered for them¹⁰ to be identified as such to the National Electoral Commission ONLY but that information will not be on the ballot paper. Furthermore, the definition of who is eligible for consideration for the EMG reserved seats must be specified more clearly in the bill. The definition in the 2007 bill which is specifically mentioned as the Gabooye - “the Madhiban, Muse Dheriyo, Yibro and the Tumul¹¹ communities” - is, in my view, narrow enough and clear, but provision should also be made for tweaking the definition in a Presidential Decree, if that is needed in the future.

12.4 The current Schedule 4 amendments¹² to Article 22 of the 2001 Election Law passed recently by both House are not adequate enough to explain the allocation of seats in the proportional representation open list system, where the votes for each candidate also count as a vote for the party/association so as to work out the number of seats won by each party/association. The seats are then allocated within each party/association on the basis of the highest votes garnered by each candidate on the list, regardless of whether the candidate is or is not eligible for consideration for a reserved seat.

12.5 Consequently, as it is only the non-reserved seats that are being allocated at the first stage, it should be made clear that when working out the quotient for each seat, the quotient formula that should be used is the total valid votes cast in the district divided by the total number of the non-reserved seats. This is not currently clear.

12.6 When it comes to the allocation of the reserved seats, the 2007 bill proposed that these were to be divided among the parties/associations in proportion to the total votes that each party/association garnered at the election. If we retained the closed party/association list system, this would have been the only option. But although the 2007 bill also proposed an open list system for local district elections (in the same way that the 2005 Election Law introduced it for the House election), it did not explore further the intricacies of the seat allocation process through the proportional representation (PR) open list system of a very small number of candidates (mostly 1 or 2, except at the capital city).

12.7 In view of the low number of reserved seats and the large number (9) parties/associations contesting the election, it is preferable, in my view, to allocate the few reserved seats on the basis of the what is nowadays termed “the best winner” method (but was often referred to as the “best loser” method) i.e. the reserved seats go to the eligible women and EMG candidates who have not gained a non-reserved seats but have secured the highest number of votes in comparison to other women or EMG candidates. With the open list voting, this system will keep the link between

¹⁰ There have been some reports that the leaders of one of the EMG communities do not wish to include in reserved seats provisions, but the leadership could change and candidates from all the EMG communities should be eligible for the seats but also free to choose to contest only the non-reserved seats should they wish to do so – hence the need for the candidates’ confirmation of their intention.

¹¹ I understand that the representatives of the Tumul communities informed the Madar Advisory Committee that they were not in favour of reserved seats, but their exclusion from the list will be disadvantageous to the future leaders or to those members who may wish to be considered for the seats.

¹² The 2001 Election Law has been amended previously three times in 2009, 2010 and 2011. The latest amendments (schedule 4) are yet to be signed by the President, but have been passed by both Houses.

getting a seat and getting the highest number of votes¹³. When the number of reserved seats is increased to, say 30%, then the party PR system could work as well¹⁴.

12.8 Currently Article 22(3) of the 2001 Election Law states that any vacancies of elected councillors shall be filled by the next candidate in the party/association list, which shall apply equally to the reserved seats winners. If, however, the “best winner” method used for the reserved seats, then it follows that the vacancy will go to the next eligible women or EMG “best winner” who could belong to another party/association. The effect of these changes on the parties/associations will, however, be minimized after the local elections as all the successful candidates must then either belong to or join one of the new three national political parties.

12.8 The 2001 Law should also be amended to lay down an obligation on the parties/associations to include in their candidates’ lists of a minimum number of women and EMG candidates which can be, as a minimum, the same number as reserved sets in each district council.

Draft Bill – Annexe 5 of the 2001 Election Law

13. I attach a bill in Somali which is 2001 Election Law Amendments – Annexe 5. It is my fervent hope that the House Committee will consider adopting some or all of the provisions of this draft bill when they return from the Ramadan recess. In the meantime, it is incumbent on both the NEC and the political parties/associations to add to their plans the passage of this amending Law.

14. A final word. The House of Elders objections the 2007 bill are no longer current and I trust that when the bill reaches them, they shall look at it with fresh eyes. When the women’s groups met the House last year about reserved seats, the speaker/deputy speakers and members of the House were very open in their support of reserved seats. The House itself has, since 2007, gained its first female member and one hopes that a bill limited to the more pressing issue of local council seats would get the support of the House.

20/07/2012

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¹³ Distribution of reserved seats through the party total vote system could actually lead to women or an EMG getting a seat on the basis of the total votes of a party without attaining the highest number of votes in comparison to women or EMG candidates in other lists.

¹⁴ In Tanzania, where currently the quota seats for the national assembly is 30%, the seats are distributed in proportion to the number of votes obtained under a closed party list; whilst the non-reserved seats are won under the first past the post system, indicating that different methods could be used in filling reserved or non-reserved seats.