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Discussion Paper :

The Somaliland Constitution: Experience To date and Future Developments

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Introduction

Since its re-assertion of independence, Somaliland has been slowly developing its Basic Law or Constitution from the Interim Charter of 1991 to the National Charter in 1993 through to the Interim Constitution of 1997 and the revised final Constitution of 2000. Yet since 2000 (and before) it has become very common for all prominent politicians and others to ascribe some of the political and constitutional arguments or occasional crises that arise in Somaliland to defects in the text of the Constitution. Whilst it is fairly obvious that some changes may need to be made, in respect of, for example, the independence of the judiciary, there are many other matters which have led to these arguments. This paper examines some of main constitutional issues that have arisen since 2000, the key factors that led to or fuelled the arguments and the lessons learnt. The fundamental principles underlying the Somaliland Constitution are widely accepted, but the journey to constitutionalism is being made all the more lengthy by the often undeserved criticisms of the Somaliland Constitution. The lack of appreciation of the principles of constitutionalism, the continuing absence of the primary and secondary legislation required to implement many of the provisions of the Constitution, the misinterpretation of some of the constitutional provisions at a time when the judicial body assigned to interpret the Constitution is practically out of action, the ease with which the Executive can sidestep the constitutional checks & balances or occasionally act with impunity are some of the factors which need addressing before major revisions of the constitution are undertaken. Nonetheless as elections approach, a debate on the necessary constitutional amendments that will strengthen the Somaliland institutions and democracy and help realign some of its provisions to the various immutable and widely accepted principles of the Constitution, is needed and this paper is aimed at facilitating that discussion

An example of a more measured statement by a prominent Somaliland politician about the various shortcomings of the Constitution was made on 31st May 2008 by the UCID Party leader who said at a public meeting commemorating the late President Egal's life (and among his achievements, the Referendum on the Constitution on 31 May 2000) the following¹:

“Our Constitution, which is the only “thing” we have now, is “unfinished” (*qabyo*), but we will review it with calm minds and in the national interest. We will keep what we consider to be good for us, and will change the rest even if that means allowing parties to be formed or keeping the Guurti (House of Elders). Is the current

¹ Reported at Waheen.com on 1 June 2008 -

<http://www.waaheen.com/index.php?action=view&id=733&module=newsmodule&src=%40random4729192cca120>

presidential system worth keeping or should we change it? We can debate everything, but it is incumbent on us now that we should respect what we have. If we defend what we have today, we can achieve something better, but if we do not accept what we have now, we will not accept what we get tomorrow, either. Therefore, I say to you that we should all respect the Constitution and defend it”

Opinions may differ about how extensive the constitutional changes needed should be, but it is widely accepted that changes must be made, and the debate should therefore focus, after the elections, presumably, on the pace and procedures for such changes.

The Making of the Constitution

Although we hear the Somaliland Constitution being described as “qabyo” (unfinished), a more apt phrase, in my view, is “curdin” i.e young or growing². It is certainly finished as a complete basic law or constitution with its roots going back to the 1993 National Charter and with some of its provisions, for pragmatic reasons, going further back to the 1960 Somali Republic Constitution³. Article 5 of the 1993 National Charter stated that the Charter shall be in force for only two years beginning from the date of its signature and shall be replaced by a Constitution, which will be endorsed through a referendum. As it was not possible to draft a constitution during the first two year period, the period of the Charter and the term of then President (who was elected at Borama Conference) were extended for a year and half. In 1994, the then House of Representatives appointed a constitution committee consisting of 10 members and was advised by a consultative body of 25 members from various backgrounds⁴. Later that year, the President appointed a Sudanese lawyer who proceeded to draft a different version, with the two drafts being different in the balance of power⁵ they accord to the legislature and the executive. As noted in the preamble to the constitution, on 26 November 2006, the third Grand conference of the Somaliland communities enjoined the constitutional committee to sift the two draft versions of the constitution and to present to them one final version, which was later endorsed by the conference⁶ as the Interim Constitution of the Republic.

The Interim Constitution was to be implemented, for a period of three years⁷ so that a national referendum can be held⁸. The Government produced in August 1999 a draft

² See, for example, Gordon, R (1999) *Growing Constitutions*, *University of Pennsylvania Journal of Constitutional Law*, vol 1, 528.

³ For example, the provisions relating to the judiciary and the special organs of the state.

⁴ WSP International (2005) *Rebuilding Somaliland Issues and Possibilities*, Lawrenceville, NJ & Asmara, Red Sea Press, page 10

⁵ The disputes on the texts led to the resignation of two Chairmen of the constitutional committee – see Bryden *Somaliland and Peace in the Horn of Africa: A Situation Report and Analysis ... based upon observations from an informal visit to Somaliland by M. Bryden, Consultant to UN-EUE, during September and October 1995.*

⁶ This conference which took place between October 1996 and February 1997 was attended by a constituent assembly of 315 voting delegates representing all the Somaliland communities and also undertook the presidential elections, as well, in the same way as the 1993 Conference. This time the President was elected for a term of five years (from February 1997), the term set out in the new Interim Constitution. The Conference also selected the 164 members of the two Houses – this was the number set out in the Interim Constitution and was 14 more than the total number set in the National Charter (Article 10 & 11).

⁷ Article 151.

revised constitution which reduced considerably the 156 articles of the Interim Constitution⁹. The amendments went through a process of considerable debate and consideration by a 24 member joint committee of both Houses chaired by the second Deputy Speaker of the House of Elders' and almost all the changes made by the government were rejected and a final 130 article Article constitution was approved by both Houses on 30 April 2000 and, in a referendum held on 31 May 2000, was endorsed by an overwhelming majority.

It is worth noting here also that the considerable peace building initiatives from 1991 to 1997 underpinned the constitutional process and whilst the latter was not as widely participatory as the former, it was crucial in driving forward the "the transformative process from conflict to peace"¹⁰ and in shaping the governance framework that can regulate access to power. The Constitution also put in place institutions and mechanisms for dealing with disputes and conflict and how well it has done that is one of the starting points for any review of the Constitution.

Constitutional principles

Equally important are also how far the agreed constitutional values and principles are still reflected in both the text and the implementation of the constitution. Leaving aside the short lived State of Somaliland Constitution¹¹, the current constitution is an example of a third generation constitution built on the experiences of both the post colonial 1960 Somali Republic constitution and the 1979 military/dictatorship one party constitution¹². Former Chief Justice of South Africa, Justice Ismail Mohammed, observed in a judgment¹³:

"The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government."

⁸ If the referendum cannot be held within the set period, the interim period in which the Constitution is implemented may be increased by the two Houses (the Representatives and the Elders), which was done in February 2000 (an extension of one year) and again in February 2001 (an extension of 6 months).

⁹ For my 1999 article by article analysis of the proposed changes and the submissions made on the changes by the Somaliland Forum constitution committee which I chaired, please see:

http://www.somalilandlaw.com/Constitutional_Developments/body_constitutional_developments.html

¹⁰ Samuels K (2006) Post-Conflict Peace-Building and Constitution-Making, *Chicago Journal of International Law*, Vol.6 No.2, Winter 2006

¹¹ For a copy, of the full text, see:

http://www.somalilandlaw.com/Somaliland_Constitution/Somaliland_Constitution_1960/body_somaliland_constitution_1960.HTM

¹² By 1992, shortly after Somaliland was re-born as an independent state, 30 out of the 53 African countries experienced military dictatorships in what Nigerian constitutionalist, Prof B.O.Nwabueze termed "as the second colonisation of Africa, albeit of its own indigenes" and 42 out of the 53 countries have at one time or another been, under one-party rule – Nwabueze B (1993) *Ideas and facts in Constitution Making*, Spectrum books Ltd, Ibadan.

¹³ State v. Acheson, 1991 N.R. 1, 3B (Namib.).

In the Somaliland context, some of the values and aspirations¹⁴ listed in the preamble are:

- The Somaliland nation is a family that has everything in common and is ready to build a state in which everyone has equal status;
- The need for vigilance against the return of dictatorship and policies of divide and rule;
- Awareness of the struggles and sacrifices made for the reassertion of independence of Somaliland so that the nation can enjoy a governmental system which meets its needs;
- The need to have a constitution grounded on the nation's beliefs, culture and aspirations;
- The desire to create a state which fulfils the aspirations of the nation, and which is founded on equality and justice;
- Recognition that lasting stability and peace can be achieved through a synergy between the economic system and the aspirations of the nation.

The constitutional principles identified at the 1997 Hargeisa Conference and which are also recorded in the preamble are:

- a) The Islamic Sharia.
- b) The separation of the powers of the state as between the legislative, the executive and the judiciary.
- c) The decentralisation of the administration of the government.
- d) Guarantees of private property rights and the protection of the free market.
- e) Sanctity of human life through the entrenchment of fundamental rights and individual freedoms.
- f) Peaceful and proper co-existence with the states in the region and worldwide.

Also of the four immutable principles found in Article 127 (which confirm that constitutional amendments conflicting with them can be made) two - the principles of Islamic Sharia and fundamental rights and individual freedoms – are listed above and the remaining two are:

- a) Unity of the country (territorial integrity).
- b) Democratic principles and the multi-party system.

We can add to this list also Article 9(1) which states that the political system of the Republic shall be based on “peace, co-operation, democracy and plurality of political parties”.

These nine principles (and the aspirations above) not only assist in the interpretation of the constitutional provisions, but can also be used in reviewing the extent the current provisions are aligned with these principles and where there is a mismatch, how best this should be addressed either through an amendment or clarification in primary legislation. In this paper, however, whilst I shall not overlook the importance of “peace and co-operation” which, Somalilanders put above all other considerations, I shall only be addressing the following three principles:

- a) The separation of the powers of the state.

¹⁴ The post colonial constitutions were criticised for “focusing on the loci of power” and “thereby failing to resolve the important ideological issue of how to locate people’s expectations and aspirations within its compass” - Okoth-Ogendo H (1993) *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in *Constitutionalism and Democracy: Transitions in the Contemporary World* (Greenberg et al. eds., 1993) at page 72.

- b) Democratic principles and the multi-party system.
- c) The entrenchment of fundamental rights and individual freedoms.

The Separation of Powers

Form of Government

I shall start first with the choice of governmental system which has considerable implications for the degree of separation of powers. The first Constitution of the independent State of Somaliland set up a parliamentary state in which the Government was part of the legislature¹⁵. The Somali Republic 1960 Constitution also set up a system which was primarily parliamentary in nature, with a Government headed by a prime minister who although appointed by the President, needed to obtain and keep the confidence of the Legislature (the National Assembly) for his Government to survive¹⁶. The President himself was also elected by the legislature¹⁷. Leaving aside the long period of military dictatorship when for some period, there was a so called people's assembly with very limited powers, Somalilanders were therefore more familiar with the 1960s "parliamentary" systems of government, until May 1991 when, during the May 1991 conference¹⁸ in which Somaliland re-asserted its independence, a "presidential" system of government¹⁹ was adopted. This presidential system was further enshrined in the Somaliland Charter of 1993 and then later in the Constitution. Somalilanders are therefore becoming familiar with a presidential system of government with a high degree of separation of powers and which, in many ways, is similar to the United States form of government. Yet, because of the 1960s experience and also because of many Somalilanders' familiarity with the Westminster parliamentary system, one often heard, especially during the first popular election of the House of

¹⁵ See Article 16 of the Constitution of Somaliland 1960 -

"16. Legislative authority of Somaliland: The legislative authority of Somaliland shall be vested in a Legislature consisting of the Council of Ministers and a Legislative Assembly. "

¹⁶ Constitution of the Somali Republic 1961 – Article 82.

¹⁷ Ibid, Article 70(2).

¹⁸ This was the Burao Grand Conference of the Somaliland Communities when the representatives of all the communities decided formally that the union with Somalia will end and that Somaliland will re-claim its sovereignty as an independent African state. This conference was followed by a series of others in which the peace in the country was restored, with no assistance from the international community, which at that time was busy spending millions of dollars in Somalia.

¹⁹ With all the momentous events happening at the May 1991 Conference and the practical decision made to establish a government consisting of the Somaliland National Movement, there was no time to discuss fully the merits of a presidential versus parliamentary government as, other than the SMN Central committee, there was no body that could become an assembly or be seen as one. It was clear that in the circumstance the Chairman of the SNM would have to be the Head of this interim government, but Drysdale notes in *Whatever happened to Somalia*, Haan, 1994 mentions (page 141) that the SMN Executive at Burao, "as a whole had a preference for an executive president. Tuur, to begin with, backed the idea of prime minister nominated by the president. Silanyo was also in favour of a constitutional president and a prime minister. But he did not put forward his name for office. One day before the issue was due to be discussed in Burao by the SNM central committee; Tuur changed his position and came out in favour of an executive president. Tuur was in advantageous position of being the movement's incumbent chairman. Thus, the point at issue before the Central Committee was whether the Somaliland Republic ... would be best governed by an executive president or by a prime minister with a non-executive president as head of state. Tuur put the principle of an executive president or by a prime minister to a vote on 26 May 1991. The majority, 46 votes to 33, was in favour of an executive president". The Presidential system was fully endorsed at the 1993 Borama conference and enshrined in the 1993 National Charter.

Representatives in 2005, misconceived claims about the powers of the House over the Executive. These claims were motivated by a desire on the part of some of the people to see some changes in the Executive, and particularly in the leadership of some of the Ministries. Nonetheless, whatever concerns the public and the newly elected opposition members of the new parliament might have about the performance of the President and his Government/ministers, the fact was that whilst the new House has some powers of oversight of governmental action, its election could not change the president's fixed term of office and neither could the Representatives change the ministers²⁰. This disappointment with the lack of any political changes after the 2005 parliamentary elections has led to increasing voices in Somaliland for change to a parliamentary system of government. These voices may well become muted if a new president is elected in 2009 as political changes in presidential systems could often be potentially far more reaching than those in parliamentary systems. In any case, a parliamentary system, in the Somaliland context, may well have led to more instability and political crises.

Respective Powers of the House & the President

Under the doctrine of the separation of powers set out in our Constitution²¹ the House (and the Elders), as the legislature, the President (as head of the Executive) and the judicature must each "exercise the exclusive powers accorded to it under the Constitution"²². The respective powers of the House and the President are set out mainly in Articles 53 to 55 and 90 of the Constitution. But understandably there are a number of areas where the two share aspects of the same power. The House (together with the Elders) has, under Article 38 of the Constitution, the exclusive legislative powers of the state – a power which cannot be transferred to anyone outside the Parliament²³. This Article is similar to others found in many other constitutions²⁴, but is often circumvented by an Executive which is more comfortable with unrestrained powers by decree. In my view²⁵ the recent numerous decrees creating regions and districts are an example of this trend.

²⁰ As Walter Bagehot, the British Constitutional expert observed, whatever the leadership needs of a country are, even at times of an emergency, in a presidential system, like that of the United States, "You have got a congress elected for one fixed period, going out perhaps by fixed installments, which cannot be accelerated or retarded - you have a president chosen for a fixed period, and immovable during that period: . . . There is no elastic element. . . you have bespoken your government in advance, and whether it is what you want or not, by law you must keep it . . ." He added that in contrast in a parliamentary system, at an emergency, "... we want, at the sudden occurrence of a grave tempest, to change the helmsman - to replace the pilot of the calm by the pilot of the storm." - Walter Bagehot (2002) *The English Constitution*, OUP.

²¹ As set out in the preamble and also in Article 37(2) of the Constitution.

²² Article 37(2).

²³ The Somaliland parliament has, as yet, not taken up this with the Executive in a systematic way, so to challenge the law making of the Executive through decrees. In May 2008, however, the House Economy & Finance Committee publicly declared that government decrees raising taxes in September 2007 and again in April 2008 without parliamentary approval were unlawful.

²⁴ For a very apt interpretation of the identical article in the Irish Constitution, and an examination of the extent of delegation the parliament (Oireachtas) can give to the Executive, see the Irish case of *Cityview Press Limited v. An Chomhairle Oiliúna* [1980] 1 IR 381 .

²⁵ Jama I (2008) Somaliland Local Government Organisation through Presidential decree in an Election Year, available at: http://www.somalilandlaw.com/Article_on_the_new_districts_regions_060408.pdf

Despite the strictures of separation of powers²⁶, Article 74 of the Constitution allows the Council of Government²⁷ (in effect the President and his appointees) to introduce bills at the House of Representatives and, in a state like Somaliland, where the Executive with its resources, is likely to be the main initiator of legislation, this probably makes sense, but the Executive has still to rely on the members of the legislature to take the bills through its legislative journey in the two Houses. Secondly, in line with the checks and balances which are found, for example, in the US Constitution²⁸, the President has a role in signing and approving legislation passed by the Legislature, and on other side, the House has power to approve or reject the ministerial and other high office appointments made by the President. The President and the House have also various roles assigned to them in respect of, for example, the budget, the making of international agreements/treaties, and the declaration of emergencies.

There will of course be disagreements between the House (as well as the Elders) and the President, but, on many issues, co-operation is likely to get the machinery of government moving more smoothly²⁹. Co-operation and consensus has however not been seen in abundance since the election of the opposition dominated House of Representatives in September 2005. I have explored some of the many disputes that have arisen between the House, on the one side and the President (and the Elders, on the other) in an article³⁰, but for brevity, I would examine only one of these disputes, the unresolved arguments about the 2007 budget, which illustrates the complexity of some of these so called “constitutional arguments”.

The arguments about the budgets

I should mention first that the 2008 (calendar year) budget was finally presented to the House on 6 May 2008³¹ and the House which has high on its priority the holding of elections

²⁶ In the US, the President has no power to introduce legislation at Congress, but of course the Executive draft often bills and gets members of the Congress to introduce them.

²⁷ Incidentally under the Article 74 of the Constitution and the current House Rules (Article 7) 11 members of the House can introduce bills, and except for financial bills, 5000 electors may also introduce a bill.

²⁸ This concept of “checked separation” was explained by James Madison on the basis that Montesquie who propounded the concept of separation of powers did not mean that the various parts of the state cannot have “partial agency or no control over the acts of each other. His meaning ... can amount to no more than this, that where the whole power of one department is exercised by the same hands which posses the whole power of another department, the fundamental principles of a free constitution are subverted” – Federalist No.4: “The particular Structure of the New Overnemnt and the Distribution of Power among its Different parts” New York Packet, Feb. 1, 1788.

²⁹ President Gerald E Ford, opined “Coordination between the two branches was obviously to be encouraged. The brilliant system of checks and balances which the Founding Fathers devised was not meant to breed constant, paralyzing confrontation between the President and Congress of the United States” - “The War Powers Resolution: Striking a Balance between the Executive and Legislative Branches” John Sherman Cooper Lecture, Delivered by Gerald R. Ford, University of Kentucky, Louisville, April 11, 1977 <http://www.ford.utexas.edu/library/speeches/770411.htm> (last accessed on 20/12/2006).

³⁰ Jama I (2006) The Sheikh Concordat – Settling Somaliland Constitutional Disputes in the Somaliland Way? SomalilandFocus Newsletter, May, <http://www.somalilandfocus.org.uk/>

³¹ The Financial Law ((Law No: 87 of 1996) & its allied Regulations of the State 1996 lay down that the budget must be submitted to the House no later than 31 October each year (see Article 11(1) of the Law and Article 4(1) of the Regulations). The House of Representatives, however, uses a deadline set in Article 48(1) of the

rushed through its approval and agreed to pass the budget unchanged on 29 May 2008. Nonetheless, the controversy surrounding the 2007 budget “that never was” will recur as none of the arguments have been settled. The dispute started with the President returning to the House of Representatives on 11 April 2007 the House budget resolution³² for reconsideration after the House made some modest changes to the budget allocated to the Presidency when it approved the budget on 19 March 2007. The Deputy Finance Minister promptly issued a ministerial circular on 19 April 2007 and announced that the Government will continue operating on the 2006 budget- an option, which, under Article 55(2) of the Constitution, can only be used if the new budget is not approved by the House. The House Deputy Speaker, in his written response to the President dated 19 April 2007, strongly refuted the President’s assertion that the latter has the power to veto the approved budget, and insisted that that the House resolution was final and did not require presidential endorsement. Various “mediation” talks were entered into, but the matter was never resolved.

The main legal issues appeared to be the degree to which the House can amend the budget proposal; the procedures for passing the budget and the method used to give its provisions legal effect and whether or not the President has veto powers over the House budget resolution. Like many other Somaliland constitutional controversies, however, although these questions look simple enough, the constitutional budget provision (Article 55) is clouded by old laws and by comparisons with the budgeting procedures of other countries, which sometimes overlook the unique eclectic mix of the various legal transplants in Somaliland Constitution. The Somaliland House of Representatives has exclusive powers to legislate in financial matters and the Guurti (House of Elders), unlike the second Houses in presidential systems, has no role in financial legislation³³. Article 54, which is not an exhaustive list, states that the financial matters the House may legislate on include:

- “1. The imposition of taxes, duties and other schemes for raising revenue.
2. The establishment of a Somaliland Income Fund or other Funds which are earmarked for specific issues. The management, collection and disbursement of these Funds shall be determined by law.
3. The printing of currency, and the issue of bonds, other certificates and securities.
4. The regulation of the economic and the financial systems.”

As Article 38 of the Constitution makes clear that the legislative powers of the Republic are vested exclusively in the two Houses and that such power cannot be transferred to anyone outside the Parliament, no taxes or duties and no other methods of raising public revenues shall be introduced or changed by the Government without the specific approval of the House of Representatives. Like all other legislation, however, financial bills must also be

House Rules which says that the budget should be submitted to them by no later than the month of December in the preceding year.

³² The House Budget Resolution (Ref: GW/KF-QC2/344/2007) was passed on 19 March 2007

³³ As financial matters are within the exclusive legislative powers of the House and the House of Elders has no role in such matters (see Article 61(2) and 78(1)), any resolution passed by the House does not need consideration by the House of Elders. The powers of the latter House resemble those of the UK House of Lords, rather than the US Senate.

submitted to the President for his signature before they are promulgated³⁴. Such bills may be introduced³⁵ at the House of Representatives by Government, which shall forward it the House, or by 11 members or more of the House itself. But the Somaliland Constitution deals with the budget (which, in Somaliland, is the estimates of both revenue and expenditure³⁶) separately in Article 55 and states unequivocally that:

“1. The House of Representatives may debate and amend the Budget³⁷, and approve it by a resolution of the House.”

The Somaliland House of Representatives has, ostensibly, an unlimited power to amend the budget and shall approve the budget by a resolution of the House (on a simple majority of those voting in at a quorate meeting³⁸, as there is no provision in the clause for any qualified majority). This is not unusual³⁹, especially in presidential systems. The question which lies at the centre of the controversy, however, is having amended and passed the budget, does the Somaliland Constitution allow for a presidential veto of the House resolution? The answer would seem to depend on whether the budget resolution is a special one which does not require presidential endorsement or whether it is one which is, for all intents and purposes, passing a financial bill under Article 54 of the Constitution.

To rehearse the pros and cons of this matter, I shall set out what I consider to be the main legal arguments:

1. The plain words of Clause 55(1) are clear. There is nothing in there which says that the Resolution shall be forwarded to the President for signature or endorsement.
2. There is no link between Article 55(1) and Article 54 which deals with financial bills. Neither says that the budget is a species of a financial bill.
3. On the whole although resolutions of the House do not amount to a binding law, there are some resolutions specifically mentioned in the Constitution as being the final decisions on a specific matter and are not subject to endorsement by either the Guurti (the House of Elders) or the President. These are:
 - a. The confirmation of appointments listed in Article 53(1) of the Constitution and other laws (such the Election Law 2002).
 - b. Resolutions relating to the partial or total changes of the flag, the emblem and the national anthem (Article 7(4) of the Constitution).
 - c. Resolutions relating to initial proposals for changes to the Constitution (Clauses 3 and 5 of Article 126 of the Constitution).
4. If the President can veto the House resolution, this negates the power given to them on Article 55(1) and there is nothing in the article which points out what the further options the House have are in such a scenario. In contrast, Articles 77 and 78 which deal with bills have a procedure for dealing with such scenarios, which states that if

³⁴ See Articles 76, 77 and 78 of the Constitution.

³⁵ See Article 74 of the Constitution and Rule 37(2) of the House Standing Rules.

³⁶ See Article 12 of the Law No: 90 of 1996.

³⁷ According to Standing House Rule 48(1), the draft annual budget must be submitted to the House by, latest, December every year, but the deadline in the financial laws is 31 October

³⁸ See Article 45(3) of the Constitution.

³⁹ See the table in Appendix 1, produced by the Inter-Parliamentary Union in 1986 shows that a fair proportion of parliaments have unlimited powers to amend the budget and this trend has increased since then.

the President does not return the Bill within 21 days, the bill becomes law and that even if he does return a bill, the House may override his objection by a two thirds vote.

5. The 1962 financial laws pre-date the Constitution and are in any case linked to the 1960 Constitution and the then parliamentary system of government. Article 65(2) of the 1960 Constitution referred specifically to “the law approving the budget...” and hence the financial laws followed that and reiterate that “the Assembly” shall approve by law the estimated budget not later than the 31st of December of the said financial year”. No comparable provisions exist in the Somaliland Constitution and the House has power to approve and amend the budget by a resolution.

The arguments for the second option are as follows:

1. In line with international practice, the budget requires an appropriations bill to put into legal effect. Any such bill must therefore be dealt with in line with the procedures of other financial bills and requires presidential signature under Article 75 to 78 of the Constitution.
2. The fact that the Government also proposes other bills, which after consideration must be signed into law by the President does not necessarily negate the House power to amend these bills in the first instance.
3. Article 55(4) of the Constitution states that the preparation of the budget (and the financial year) shall be determined by law. The existing relevant laws are the Financial & Accounting Procedure of the State (Law No: 90 of 1996) and the Regulation for the Accounts of the State (Law No: 87 of 1996). Both laws⁴⁰ which were passed in 1962 refer to the budget as a “law” to be passed by “the National Assembly”.
4. Article 54 states that the imposition of taxes requires legislative approval, and if the House amends the budget by raising expenditure overall, then this needs to met by new taxes.

The fact remains that, read on its own Article 55(1) (and its identical predecessor, Article 80 of the 1997 Interim Constitution) is clear and unambiguous in stating the powers of the House and also in how the budget will be passed by means of a House resolution. Although, in general, in presidential systems, resolutions of the one or two Houses of parliament/congress do not become a binding law until approved by the president, as well, there are some exceptions where the decision made by the resolution has a binding effect outside the House/s. The practice of budget submissions and approval in Somaliland has also been through the submission of Ministerial letters (e.g those for 2006⁴¹ and 2007⁴², copies of which are available) which set out a summary of the Draft Estimates and Expenditure and finishes with a request that the House approve the budget estimates. No appropriations bills accompanied the submissions and the House resolution was always

⁴⁰ Article 13(12) of the first Law reads: “... the national Assembly shall approve by law the estimated budget not later than the thirty first of December of the said financial year”. Article 4(1) of the second law states “The draft budget law, approved by the Council of Ministers, shall be presented to the National Assembly not later than the 31st of October each year, accompanied by a statement of the Minister of Finance”.

⁴¹ Reference: WM/02/08-01/38/2006, dated 01/02/2006.

⁴² Reference: WM/02/08-01/59/07 of 13/02/2007

considered to be binding. There is, however, still the issue that if the House budget changes require the raising of further taxes, Article 54, will kick in and the House will not have it all its way. Normally when the Minister is proposing the raising of the taxes, these are set out in his letter.

I have gone in length into this budget controversy because the underlying issues were essentially about accountability and the new House's determination to ensure that all the Government taxes are in the exchequer and that parliament should have a say about how the budget is allocated. The new House Finance Committee pursued these issue in earnest in 2006 and then again in 2007. This issue also illustrates how old laws have a considerable effect on how the constitution is interpreted. The House has since drafted a new Budget Bill, but the chances are that there will be considerable disagreements about it until there is a consensus about the respective role of the House and the President in financial matters. The Somaliland House is, no doubt, worried about the fact that although presidential systems (except in South America, where Presidents have been referred to as "virtual budget dictators"⁴³) tend to give parliaments more powers to amend the budgets, these are often counterbalanced by presidential legislative veto. The separation of powers in presidential systems does have, however, a built-in propensity to lead to confrontation on budgets and legislation, especially at times of cohabitation of different parties controlling the presidency and the parliament⁴⁴.

The lack of co-operation between the elected House on the one side and the President (as well as the House Elders) on the other could also be seen in the legislative process. Many bills passed by the Representatives were returned by the President and even in the last few months when the President and the House tried to reach amiable agreements on some of the much needed legislation (like the 2003 Organisation of the Judiciary Law), and accepted the objections the President raised, the President adopted a new power of signing into law only selected provisions of the laws. For example, the Presidential Decree⁴⁵ relating to the Organisation of the Judiciary Law (Law No: 24 of 2003) purports to bring into force only one Article of the whole Law relating to the Supreme Court. This selective "line item" approval of legislation is not a power given to the President under the Somaliland Constitution. In another Bill, the Livestock Husbandry Law (Law No: 34 Of 2006), the House still rejected the President's objection, which meant that the whole bill will lapse under Article 78(4), as the House needs a two third's majority to override presidential objections to a bill, but, for some yet unexplained reason, the Bill was considered passed and the President rather implementing it all chose in his decree to bring into force only one article of the law, which was needed for the smooth running of the controversial animal export monopoly given to a Saudi trader. If the House accepts this new power⁴⁶ the President has arrogated to himself, its legislative powers will be severely curtailed.

The Representatives and the Second Chamber, the Elders

⁴³ Cox and Morgenstern

⁴⁴ Whener J (2004) Back from the Sidelines? *Redefining the Contribution of Legislatures to the Budget Cycle*, World Bank Institute

⁴⁵ Decree No: 337 Of 4/20/2008

⁴⁶ An article on this issue will be published shortly in www.somalilandlaw.com.

Although Somaliland has adopted a constitutional system which is similar to the US style presidential system, the second House (the Elders – Guurti) has different powers and roles than the Representatives⁴⁷. It is still a revising chamber for all legislation, except for finances, which, it has no role whatsoever, but even in legislation, it is more like the UK House of Lords in that it cannot block legislation which the Representatives are determined to pass. In fact the Guurti can only return a bill once and if the Reps push it back unchanged in the following session, the bill shall pass. So the Guurti have a delaying power only, and even when they refuse a bill on "a point of principle" and by a 2/3's majority, the Representatives can return it back and pass it with a similar 2/3's majority, but that majority is not easily mustered by a divided House as happened when the Elders rejected their Election Bill in 2006 and also again in late 2007 when they rejected the House Amendments to the Election Law introducing, for the first time, reserved seats for women at local council elections.

The relationship of the Elders and the Representatives was also affected by the various disputes between the latter and the President and was crowned by the yet unresolved dispute about Elders' extension, in 2006, of their own term for another period of 4 years⁴⁸. There is no constitutional provision which allows the Elders to extend their own term or that of the local district authorities, which they did on 12 December 2007 when they extended the term of office of the District authorities which was due to expire in December 2007 to 1 July 2008. The House acted under a request from the President to "make legal" the terms of an accord reached by the National Electoral Commission (NEC) and the three political parties. No similar proposal was put by the President to the House in connection with the presidential election date delayed in the same NEC/Parties accord until four months later when the House considered, on 10 April 2008, proposals submitted to them by the President and decided to extend the term of office of the President, which was due to expire on 15 May 2008, by one year to 6 May 2009. This time, however, the NEC/parties second accord was to the effect that the presidential election will be held on 31 December 2008 so as to allow for the voter registration process to be completed. In extending the presidential term, the House relied on Article 83(5) of the Constitution which allows the Elders to extend the term of office of the President & Vice President but only in exceptional circumstances where the election cannot be "because of security considerations". This was found unacceptable by many because the reasons for the delay in the elections as set out by the NEC was entirely due to the desire to undertake a voter registration exercise – no security considerations existed which caused the delay in the elections.

Whatever gloss the Government may put on this situation, this has all escalated to one of the most serious constitutional crisis that Somaliland has faced. The Somaliland way of

⁴⁷ The Representatives have also exclusive power under Article 7(4) of the Constitution to approve any changes to the national symbols, such as the flag, the emblem and the anthem; they have a preeminent position in respect of changes to the Constitution under Article 126 of the Constitution; other than the appointment of the Chairman of the Supreme Court (and teh Ulema Council), the Elders have no say in the confirmation of presidential appointments; and, other some international agreements, the ratification of treaties and international agreements lies with the Representatives.

⁴⁸ For more information on this, see Somaliland Forum paper (2006) A Term Extension Too far: Guurti Resolution is Unconstitutional and Unacceptable, available at: <http://somalilandforum.org/sl/2006/05/15/the-decision-to-extend-the-guurti-term-has-no-constitutional-validity/>

“wada-tashi” (co-operative discussions), kicked in as May 15, the last day of the term of office of the President/Vice-President arrived and, by 1 June 2008, another accord was reached to re-schedule the presidential election to April 2009. This illustrates again the Somaliland people’s desire to maintain their peace, at all costs, but, yet again, the underlying constitutional issues remain unsolved. Above all, the House of Elders’ usurpation of term extension powers that the Constitution, does not, in my view, give them will rear its head again in 2010, which is not that far off. The Elders have also over the years increasingly got involved in, for example, the appointments of Electoral Commissioners under the 2001 Election Law and have increasingly added a new role for themselves in various legislation in the appointments processes of other boards such as that of the Disaster Agency (NERAD - Law No: 35 of 2006). Many are now questioning the role of the House of Elders and this will be central to any constitutional review. The Elders’ original traditional role was unique and there is still wide support for re-capturing that peace making traditional mediator’s functions⁴⁹ which were lost to the attractions of government or party support. It may well prove impossible to get the current Guurti agree to any reform, but that debate must start soon.

The independence of the judiciary

This is one of the areas in which the provisions of the current Constitution do not match up to the aspirations and constitutional principles set out above. I shall only mention some key constitutional shortcomings⁵⁰:

1. In giving free hand to the President to appoint and dismiss at will all the justices of the Supreme Court, except for the Chief Justice, Article 105 of the Constitution is woefully inadequate. Article 101 also does not give an upper number for the justices of the court and, with an additional of 4 more justices appointed in July 2007, the court, at the last count, consisted of 11 justices.
2. The President rejected the House proposal in the Organisation of Judiciary Law to make the appointment/dismissal of Supreme Court justices subject to confirmation by parliament as is the case with the Chief Justice. But, the tenure of chief justices has not been made any more secure by this constitutional protection – President Rayale, since 2002, dismissed three chief justices.
3. The office of Attorney General is, in line with Italian influenced 1960 Somaliland Republic Constitution, still considered to be part of the judiciary under Article 99(1) of the Constitution.

⁴⁹ The Elders’ special role under the Constitution relates “religion, traditions and security” and to “consulting the traditional heads of the communities” (Article 61(4)). This are areas they have excelled in the past. Their foray into initiating legislation on “culture, traditions and religion”, however, sadly led to “hudud” punishments, getting on to the statute book, for the first time in modern Somaliland, without much debate, corporal punishment for drug/alcohol offences (Law on Combating Intoxicants - Law No: 21 of 2002). No such punishments have been carried out in the country and it is clear that the law is contrary to Article 24 of the Somaliland Constitution which prohibits degrading or inhuman punishment. The House has, to its credit, rejected approaches for making illegal all kinds of activities which some self appointed “morality committees” have proposed.

⁵⁰ For a workshop report, see The Judicial System in Somaliland, Academy for Peace and Development (APD), Hargeisa, April 2002. <http://www.apd-somaliland.org/docs/judiciaryreport.pdf>

4. Article 106 of the constitution leaves to another law the independence of the judiciary from Ministry of Justice, and as pointed out by the Chairman of Supreme Court recently the budget of the courts is still controlled by the Ministry.
5. "Security" Committees set up by Ministers⁵¹ under the practices prevalent during the dictatorship era still send people to prison.

The dire need for resources, training and capacity building initiatives in the judicial system is apparent. The lack of clear and coherent body of laws that the courts can enforce, including, the basic organisational law, which has been stuck in parliaments since 2003 have all affected the judicial system. Other than criminal and the civil procedure codes (of 1964 & 1974), the Supreme/Constitutional Court has no clear rules of procedure. The Supreme/Constitutional Court has been selective in what plaints it accepts in constitutional and administrative matters and has given no coherent and authoritative reasons for the few cases that it has dealt with so far. The secret advisory opinion that the court chose to give to the President on the Elders' term extension in 2006 has damaged its standing. The Court has also refused to accept in 2007 human rights claims relating to the security committee activities.

Democracy and the Multi-party system

The elections held so far and the freedoms enjoyed by the three parties which are now the only three accepted under Article 9(2) of the Constitution show that Somaliland has made tremendous progress towards democracy when compared to the neighbouring countries of the wider Horn. The artificial three party limit⁵² is fundamentally contradictory to the commitment to democracy and the multi-party system set out in Article 9(1), the preamble and the immutable principles and is unlikely to be a justifiable limitation under international human rights law⁵³. A linked restriction that arises from the three party limit is the ban on

⁵¹ This is allegedly done under the Public Order Law 1962, but si in reality based on Siyad Barre practices – see Jama I (2004) Public Order Law in Somaliland : Learning the Lessons of Democracy, http://www.somalilandlaw.com/PUBLIC_ORDER_LAW_IN_SOMALILAND_Article.htm

⁵² Neither the early government draft of the 1997 Interim Constitution nor the Government proposed constitutional amendments in 1999 included the three party limit. In 1996/7, the initial draft of the then Article 11 contained only the first Clause, but the 15 member Constitution Drafting Committee added the second Clause limiting the number of parties to 3 and the third Clause. When the Government published its revision of the Constitution in 1999, Clause 2 of the Article which was numbered 11 in the Interim Constitution was deleted and Clause 3 simply stated that "Political parties and their structure shall be determined by a law".

⁵³ The limitation on the number of political parties involves a restriction of the right of persons to stand for elections (set out in Article 22(2) of the Constitution), and implicitly a restriction of the right of association enshrined as a fundamental right under Article 23(3) of the Constitution. These rights are also protected international conventions such as Article 22 of the International Covenant on Civil and Political Rights (ICPCR) and article 10(1) of the African Charter on Human and People's Rights. In so far as these Constitutional and legal limitations restrict freedom of association, they can only be held valid in international law (under Article 22(2) of the ICPCR) if it can be said to be "necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others". Article 25 of the ICPCR guarantees the right and opportunity to vote and to be elected *without unreasonable restrictions*. Elections laws often include some restrictions, but there is wide difference between restrictions on how one can stand for election and total denials of such a right. (For the relevance of international covenants and human rights treaties to this Constitution, see Articles 10(2) and 22(2) of the Constitution and the relevant footnotes).

independent candidates, which was confirmed in Article 7(1)(b) of the Political Parties and Associations Law (Law No 14/2000)⁵⁴. The Supreme Court has considered and rejected without any detailed reasons a challenge to this rule against independent candidates shortly before the last presidential elections, and fresh challenges are likely to be made again⁵⁵. The Somaliland Government also appears to have interpreted the constitutional limit of three parties as meaning that no one can associate with each other, assemble, meet, criticise, campaign for a political cause individually or as a group unless they do it through the three parties.

QARAN'S case, so far, has been not to challenge the constitutional three party limit, but to point out that as the Constitution does not say that the current three parties must always be three allowed under Article 9(2) of the Constitution, there must be a way in which "political associations" aspiring to become one of the three parties can be allowed to be formed. They argue Law no: 14 of 2000⁵⁶ does provide that mechanism. Law No 14/2000 has indeed set up a workable system of allowing new political associations to be formed, registered and ready to compete but unfortunately the registration committee was disbanded, under the express provisions of the Law, six months after the 2002 local elections and needs to be re-appointed again. QARAN's argument to the effect that by failing to follow an option which can, at least, ameliorate the limitations to political and civil rights imposed by the three party limit, the state is contravening both the principles of the constitution and international human rights law is, in my view, a valid argument. Otherwise, we will end up with the position that the current three parties will, forever and amen, be the only three parties allowed in Somaliland unless we change the Constitution or introduce a new law, and there is nothing in the Constitution which supports that interpretation. The Government rejected repeatedly QARAN's claims and as is widely known detained and imprisoned its leaders. The Supreme/Constitutional Court indicated informally that this was a matter for Parliament and the House of Representatives' Deputy Speaker endorsed QARAN's claim and stated that Law N:: 14/2000 was still in force and applicable to QARAN's case.

So here we have an important political and legal issue, but QARAN and any other new political associations, cannot find any definitive avenue of redress. Whilst reviving the process set out in Law no:14/2000 is perfectly feasible⁵⁷, amendments to the Law will always be needed, if only to address the new situation where there is now representatives

⁵⁴ See also the Presidential and Local Elections Law (Law No: 20 of 2001) and the House of Representatives Election Law (law No: 20-2 of 2005) which limit candidacy for elections to those who appear in the lists of the three registered parties only

⁵⁵ On 30 May 2008, for example, Abdiraxmaan Maxamed Axmed X. Samatar, a former UDUB member, and a colleague declared themselves as independent candidates for the offices of President and Vice-President – Haatuf Issue 1743, 1/06/2008, www.haatuf.net,

⁵⁶ See The Regulation of Political Associations and Parties Law (as amended) Law No: 14 of 2000. The three parties accepted under the Constitution and this law are UDUB (the current government party) KULMIYE and UCID. These were the three parties that won the highest number of votes at the first nation-wide local elections in December 2002.

⁵⁷ The agreement announced by the three parties and the NEC on 1 June 2008 now states that the Presidential election will be held before the local elections in April 2009. It was always possible the presidential election may come before the local elections, if, for example an incumbent president dies during the first three years of his term, an election will ensue within 6 months (Article 98(1)).

from the current three parties in the House. The 2000 Law and the 2001 Elections Law dealt with what would happen to the successful local authority councillors who belonged to the unsuccessful associations, and who were obliged to join one of the three successful parties. This formula will work again for the local councils, but If one or more of the current parties lose their recognised position after the local elections, the question of how we deal with their parliamentary Representatives and/or possibly the sitting President/Vice President needs to be addressed in a law. This again illustrates that the real underlying problem is the constitutional three party limit.

Fundamental Rights & Freedoms

The Constitution includes an extensive bill of rights (Article 8 and articles 21 to 36) which is to be interpreted in a manner consistent with the international conventions on human rights⁵⁸ and also with the international laws referred⁵⁹ to in this Constitution. All branches of the state and other public bodies are expressly bound by these provisions (Article 21(1)). On the whole these need tidying up as the last 2000 revision has unfortunately combined various articles⁶⁰, and the limitations Article 25(3)) needs re-drafting so as to bring it in accord with modern international human rights law.

The major gap, however, is the lack of any provisions providing clear mechanisms for redress in case of infringements of these rights and the courts have shown, so far, no flair for enforcing human rights. A bill proposing the setting up a Human Rights Commission has been to Parliament, but yet again the appointment of what ought to be an independent Commission meeting, at least, the fairly minimum standards set out in Paris Principles of 1991 has been totally undermined by the power given to the President to have considerable control over the appointment of the Commissioners.

Conclusion

The Somaliland Constitution is indeed a growing constitution, and does require revision in some areas, but there are a considerable number of other issues relating to good governance, accountability, clearer laws, raising the capacity of the judiciary that need to be

⁵⁸ This links the interpretation of these rights to the relevant international human rights conventions, and is not confined to the few that Siyad Barre's Somali Democratic Republic acceded to mainly during that regime last dying days, which were the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (CCPR) and its Optional Protocol (all acceded to on 24 April 1990); the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (CAT) acceded to on 23 February 1990, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) acceded to on 25 September 1975. Somaliland considers itself bound through succession by these conventions and is prepared to go beyond that and has already indicated that it will comply with a number of other UN conventions, as signified by this constitutional provision. Also as Somaliland is an African, Arab and Muslim nation (see Article 10(6) of the Constitution), this constitutional commitment also includes regional human rights conventions.

⁵⁹ These are the UN Charter and the Universal Declaration of Human Rights which are specifically mentioned in Article 10(2) of the Constitution.

⁶⁰ When the Gov't published its revisions of the Constitution in 1999, it reduced all articles relating to rights and freedoms to a single unwieldy article which was far inferior to the 18 articles in the 1997 interim constitution. The Parliamentary Constitution Committee reinstated all the articles relating to the human rights, but in a bid to reduce the total articles of the Constitution they combined various articles and hence this clause ended up with another one relating to important rights not to be deprived of one's liberty.

addressed urgently. In the absence of an authoritative interpretation of the Constitution, Somalilanders were ever willing to look for pragmatic solutions that ensure a continuing peace and have preferred not to delve too deeply into the correct interpretation of the Constitution. Accepting successive unconstitutional term extensions, the hasty but pragmatic succession decision on the death of President Egal in 2002 to follow the more practical Article 89(2), rather than the more technically correct Article 130(4)⁶¹, settling partially constitutional and legal disputes through discussions are examples of this pragmatic approach. But in the light of the increasing disillusionment with the Supreme/Constitutional Court, the danger is that authoritative constitutional interpretation will never develop and calls for constitutional amendments, as well as disputes over its provisions will continue, if, for example, issues like the House powers over the budget and the powers of the Guurti are never settled one way or the other.

The mechanism for amending the Constitution is essentially a two thirds majority of both Houses (Article 126) and is therefore not unwieldy or difficult. What is more difficult, however, is arriving at a consensus on what needs changing and an incremental process, rather than wholesale changes, is likely to garner more support. In this respect, I echo the words of Nathan J Brown⁶² in relation to Arab constitutions that,

⁶¹ Article 130(4) was transitional provision which was valid before the first direct elections of the President through the political parties system took place on 14 April 2003. After this first presidential election, Article 89(2) is the standard Clause which deals with succession on the occurrence of the eventualities listed in Article 86. Nonetheless, the circumstances described Article 130(4) did arise in 2002, before the three political parties allowed under Article 9 of the Constitution could be chosen through the first nationwide local elections, when President Egal sadly died on 3 May 2002 with 8 months of his extended term remaining. Although Article 130(4) was the obvious Clause applying to these circumstances, the decision was then made at an urgent meeting on 3 May 2002 attended by the Speakers of both Houses to follow Article 89(2), in preference to the former Article. Surprisingly this decision was not taken by the two Houses and neither did the Supreme Court give any formal advice/decision. The main reason for the decision appears to have been the overwhelming need to ensure a smooth transition of power and the perceived difficulties associated with implementing Article 130(4). This was a time when a number of political parties were just created and were getting ready for the first nation-wide elections, which under the Registration of Political Parties Law would decide which among the parties could become the three allowed under the Article 9 of the Constitution and will then move on to contest the presidential and parliamentary elections. There were also the obvious difficulties posed by implementing Article 130(4). There were no procedures or laws laid down anywhere for the election of a President by the two Houses within the time limit of 45 days set under Article 130(4). It may have been feasible for the two Houses to pass urgently a law setting out the procedures, such as the number of candidates, the voting procedures etc, but what about the term of office of the new President? Under Article 88, the Constitution sets out a fixed term of 5 years for any president, but there was no specific provision that a President elected under Article 130(4) will serve any shorter term. It was possible for Parliament to amend Article 88 so that the elected President will have a shorter term, but amendments take time (at least 2 months under Article 126) and require a qualified majority of both Houses and might not have been effected within the 45 day period set for elections under Article 130(4). Also it was highly unlikely that the new parties gearing themselves for popular elections would have accepted another president selected under procedures similar to 1997 and 1993, rather than one popularly elected as laid down in this Constitution. Although there were no publicised disagreements with this decision at the time, this decision has remained highly controversial, but it was very much a pragmatic "Somaliland" solution at a sad and difficult period for the young nation.

⁶² Brown J N (2002) *Constitutions in a Nonconstitutional World*, State University of New York Press, Albany.

“the prospects of any fully fledged constitutionalism are not bright, but the prospect for evolution in a constitutionalist direction are much stronger than might be expected.”

(paper to be updated as an article)

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