



# Governance Brief 20

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## Summary

Since the election of Somalia's President Hassan Sheikh Muhamud in mid-May 2022, the National Consultative Council (NCC), a body by the top FGS, FMS, and BRA leaders, has met four times in Mogadishu. The NCC is a de facto high-level platform for executive leaders at FGS and FMS levels in Somalia who negotiate and agree on contentious political issues. In the past five years, the NCC meetings have tended to be ad hoc. The only notable matter its members have deliberated and decided on was the indirect election. NCC members did not discuss any substantive issues in their first two meetings in June and September last year. However, in its third meeting in late October, the NCC agreed on the implementation of the National Security Architecture (NSArch) – which dates back to April 2017 – and established a technical committee tasked with revising the agreement. In late December 2022, the NCC agreed on the judiciary model for Somalia and the power allocation arrangement and has already scheduled for late February 2023 deliberations on other contentious political issues including elections and fiscal federalism. However, Puntland withdrew from the NCC after the agreements on power allocation and judiciary model and froze its role in the NCC. The FGS leadership sees this political forum as a suitable platform that meets once every two months to discuss and agree on the key contentious political issues in Somalia that crippled the review and completion of the provisional federal constitution. This governance brief examines the NCC agreements on the judiciary model and power allocation. It explores the further challenges it faces, and puts forward several policy considerations.

## About Somali Public Agenda

public policy and administration research organization based in Mogadishu. Its aim is to advance understanding and improvement of public administration and public services in Somalia through evidence-based research and analysis.

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## Agreements on power allocation and the judiciary through Somalia's National Consultative Council: how to move beyond the current political impasse

### Introduction

Since the election of Hassan Sheikh Mohamud as President of Somalia in 15 May 2022 and the formation of the new federal government cabinet on 2 August 2022, the members of the National Consultative Council (NCC) met four times before the end of 2022. The NCC is not a legal entity and is a platform for executive leaders of the Federal Government of Somalia (FGS), Federal Member States (FMS), and Benadir Regional Administration (BRA). Its 9 members include the president, prime minister, and deputy prime minister of the federal government, presidents of Puntland, Jubaland, Southwest, Galmudug, and Hirshabelle, and the governor of the Benadir region. Membership of the deputy prime minister is new to the NCC but is seen as a form of representation for Somaliland in the NCC.

In the first two NCC meetings on 11-12 June and 11-12 September, the NCC members did not discuss any substantive issues. In its third meeting on 27-31 October 2022, the NCC agreed to implement the April 2017 National Security Architecture (NSArch). This was surprising to analysts since the NSArch was dormant and unimplemented over the past 5 years and required some review. However, the NCC agreed to form a technical committee both in its third and fourth meetings in late October and late December 2022 that would work on the review and completion of the National Security Architecture (NSArch) agreed upon in April 2017. The committee, which was established on schedule in January 2023, is tasked with producing a report and policy considerations with the NCC to be deliberated in its meeting scheduled for 20-24 February 2023. As articulated by President Hassan Sheikh in his speech to the public on the last day of 2022, the technical committee will draw up a plan for the implementation of the 2017 NSArch. The formation of this technical committee was previously agreed upon in the last NCC meeting where the members consented to implement April 2017 agreed-upon National Security Architecture (NSArch).

Moreover, the NCC's third meeting (27-31 October 2022) communique had an attachment on issues to be discussed in the next two NCC meetings scheduled in late December 2022 and late February 2023. The schedule was ambitious. The NCC planned to discuss and agree on the judiciary model and power allocation in late December 2022, which they did. It also scheduled for late February a dialogue and agreement on fiscal federalism, Mogadishu's status, and elections. For many, agreeing on 5 contentious issues in just two NCC meetings seemed too ambitious.

The fourth NCC meeting took place in Mogadishu between 25 and 28 December 2022 and discussed the previously agreed matters – judiciary model and power allocation. Except for the Puntland President, the other NCC members for the first time agreed and signed arrangements for power allocation and a judiciary model. A detailed 8-9 page separate documents outlining the agreed arrangements were shared. The next two sections analyze the two agreements and their implications. These two are among several contentious issues that crippled the completion of the federal system and the review of the provisional constitution.

### Agreement on Power Allocation

According to the 9-page separate agreement that details the power allocation arrangement, the powers will be divided into federal exclusive, state exclusive, concurrent/shared, and local government exclusive powers. The FGS will have 44 exclusive powers (it only has 4 exclusive powers in the current Provisional Federal Constitution); FMSs will have 29 exclusive powers; 20 powers will be shared by the FGS and FMS; while 32 powers will be exclusive to the local governments. The document also lists the powers exclusive to the legislative bodies of the federal, state, and local governments.

The 125 powers were divided into the following 6 sectors as summarized in the table below:

	Federal Exclusive Powers	State Exclusive Powers	Concurrent (FGS-FMS) Powers	Local Governments Exclusive Powers
<b>General Powers</b>	18 Federal Exclusive Powers	7 State Exclusive Powers	8 Shared Powers	2 Local Governments Exclusive Powers
<b>Economic Powers</b>	8 Federal Exclusive Powers	6 State Exclusive Powers	6 Shared Powers	9 Local Governments Exclusive Powers
<b>Transportation and Infrastructure</b>	5 Federal Exclusive Powers	5 State Exclusive Powers	None	2 Local Governments Exclusive Powers
<b>Security and Justice</b>	6 Federal Exclusive Powers	3 State Exclusive Powers	2 Shared Powers	2 Local Governments Exclusive Powers
<b>Health and Social Services</b>	5 Federal Exclusive Powers	5 State Exclusive Powers	4 Shared Powers	14 Local Governments Exclusive Powers
<b>Education</b>	2 Federal Exclusive Powers	3 State Exclusive Powers	None	3 Local Governments Exclusive Powers
<b>Total</b>	44 Federal Exclusive Powers	29 State Exclusive Powers	20 FGS-FMS Shared Powers	32 Local Governments Exclusive Powers

There are several merits to the agreed power allocation arrangement. First, the agreed power allocation model incorporated most of the proposed power allocation arrangement put forward by the constitutional review bodies in 2021. Therefore, the agreement has some legal and political legitimacy since it was developed by the relevant constitutional bodies that also undertook consultations. The 2021 proposal was 44 federal exclusive powers, 29 state exclusive powers, and 12 shared powers. The two main differences are that the concurrent/shared powers were increased and some exclusive powers were allocated to the local governments, i.e. regions and districts.

Second, the new agreement allocates 32 exclusive powers to the local governments. This is the first time that powers were allocated to local governments although the governor and mayor of the Benadir region is the only member of the NCC representing a local government. The constitutional review bodies, in their 2016 and 2021 proposals and options, failed to list powers to local governments. Allocation of exclusive powers to local governments is a positive development that could advance the devolution of public services at local levels in the future. This is also a key development for the discussion on fiscal federalism in Somalia as local governments would also play a key role in the implementation of any fiscal federalism arrangement agreed upon.

Third, the agreed power allocation arrangement provides key national powers to the federal government. On the other hand, the FMSs would hold 29 exclusive powers and share 20 with the FGS. This amounts to a total of 49 executive powers, which could be seen as a fairly distributed power-sharing arrangement. The agreed arrangement creates a lot of room for collaboration between the FGS and FMSs. The concurrent or shared executive powers include natural resources, fisheries, marine resources, trade, farming, and quality control.

On the other hand, there are three limitations of the agreed-upon power allocation arrangement. First, number 12 of the general powers – stating that there will be one national electoral body that will administer elections at federal, state, and local governments – was understood to now be allocated exclusively to the FGS. However, in the agreed document, this power is listed in both federal exclusive and state exclusive powers, i.e. it is a duplicate. However, this is the first time such a unified election body arrangement has been agreed upon by most of the executive leaders, and this would have major implications for the conduct of elections in Somalia. The current practice diverges significantly from those now outlined as several FMSs already have electoral bodies that have jurisdiction over managing FMS elections.

Galmudug has recently formed a 7-member state-level Independent Electoral Commission led by Halima Ismail Ibrahim (Halima Yarey), the acting chair of the dissolved National Independent Electoral Commission (NIEC) chair. Puntland is already in the midst of party political competition, managed by the Transitional Puntland Election Commission (TPEC). This conducted pilot local government elections in three districts – Qardho, Eyl, and Ufeyn – in late 2021. Having one national electoral body would mean dissolving these bodies and then significantly altering the political influence of FMSs' leadership over such bodies. However, this arrangement may be seen to be reasonable if the NCC can agree on a model for unified/integrated FMS-level elections.

Although one election body was agreed upon in principle, elections at federal and state levels are scheduled to be discussed and agreed upon separately. The NCC planned to deliberate on elections (both federal and state elections) in late February 2023. A technical committee was formed to prepare options and processes for models and approaches for national and state elections. The NCC members would then deliberate on the recommendations of the technical committee before they take a decision.

Second, since most of the power arrangement was appropriated from the 2021 handover report written by the constitutional review bodies, it seems that there was no intense dialogue and deliberation on which level of government is most suited for which executive power. Relevant institutions did not get the opportunity to contribute to the current deliberation, and this may negatively affect the implementation of the agreement particularly since the agreed power allocation arrangement may be construed as one that gives more executive powers to the center.

A third issue is the FGS's exclusive control of ports/airports. While this may be appropriate, it seems very detached from the current practice in Somalia. The Federal Member States currently manage the ports and airports under their jurisdictions. Previous agreements about the FGS's exclusive authority to manage ports and airports in Somalia have been made in various forms before, but these have never been implemented. For instance, the Addis Ababa agreement on Jubbaland in 2013 handed FGS control of Kismayo airport and port, which did not happen. Again, this power is closely tied to the fiscal federalism arrangement. Ports and airports revenue collection, administration, and sharing are scheduled to be clarified in the fiscal federalism deliberation and agreement in late February 2023.

## Arrangement for the Judiciary

The NCC has also settled on an integrated judiciary model, which replaces earlier models (explained below). The agreed model arranges the judiciary as follows:

1. There will be one Supreme Judicial Council. This council will replace the constitutionally mandated Judiciary Service Commission outlined in articles 109A and 111A of the constitution, which was dissolved by president Hassan Sheikh on 9 October 2022. The Supreme Judicial Council will be the highest body that administers the country's judiciary.
2. There will be one constitutional court. The Federal Member States will not have their own constitutional courts and their high courts cannot adjudicate on constitutional matters.
3. There will be one Supreme Federal Court, which will adjudicate on cases appealed from the FMS-level High Courts.
4. Each FMS will have its own Supreme Court, Appeal Court, and First Instance Courts (in each district and each region).
5. There will be a national Office of the Attorney General while each FMS will have its state-level Office of the Attorney General.
6. Courts at all FMSs will have the jurisdiction to adjudicate cases that relate to both federal and state jurisdictions.

The table below summarizes the agreed justice model:

	Federal Level	State Level	Local (regions and districts) Level
<b>Judicial Council</b>	Supreme Judicial Council	None	None
<b>Constitutional Court</b>	National Constitutional Court	None	None
<b>Supreme/High Court</b>	Supreme Federal Court	High Court	None
<b>Appeal Courts</b>	None	Appeal Courts	None
<b>First Instant Courts</b>	None	None	First Instant Courts
<b>Attorney General Offices</b>	Federal Attorney General Office	State Attorney General Offices	None

This judiciary model differs from three previous models:

1. The Jowhar model signed by FGS and FMS Ministries of Justice on 24 January 2018;
2. The cabinet model endorsed by the cabinet on August 6, 2018; and
3. The hybrid model proposed by the constitutional review bodies in 2021.

Jowhar Model	Cabinet Model	Hybrid Model
<ul style="list-style-type: none"> <li>• FGS and FMS level Judiciary Service Commissions</li> <li>• FGS level High Court</li> <li>• FGS Level Constitutional Court</li> <li>• FMS Level High Courts with the mandate to adjudicate matters relating to FMS constitutions</li> </ul>	<ul style="list-style-type: none"> <li>• One Judiciary Service Commission</li> <li>• One Constitutional Court</li> <li>• One federal Supreme Court</li> <li>• Appeal Courts are the highest courts at FMS.</li> </ul>	<ul style="list-style-type: none"> <li>• One Supreme Judicial Council but each FMS would have ad hoc members in the Supreme Judicial Council</li> <li>• Federal Constitutional Court</li> <li>• National Supreme Court</li> <li>• FMS-level High Courts, which could serve as the first-instance courts for constitutional matters</li> </ul>

The agreed integrated judiciary model, which combines elements of the previous models, has several merits. First, it allows each FMS to have all three hierarchies of courts: first-instance courts, appeal courts, and high courts. This is an advantage for the FMSs as it aligns with their current court structures including high courts.

Second, the model creates one Supreme Judicial Council, which steers the judiciary work and serves as the highest body of the judiciary. This could be seen as reasonable both from financial and administrative perspectives because it allows a unity of leadership in the judiciary. Representatives from the Federal Member States are members of the Supreme Judicial Council, which makes it inclusive and representative of FMS views.

Third, all courts have the jurisdiction to adjudicate cases that fall under the jurisdiction of the federal, state, and local authorities. This necessitates a closer collaboration and working relationship among all levels of courts. It fits with the current court structures and is also financially viable.

Notwithstanding these merits, the agreed judiciary model has some drawbacks. First, the federal parliament has no role in the appointment and approval of the Supreme Judicial Council.

Although most of the members of this body, which would be the highest body in the judiciary, come from offices and judiciary institutions, there are members from the lawyers association and civil

society, which would be appointed by the federal Minister of Justice and Constitutional Affairs and would be approved by the Council of Ministers. As per the agreement, these members would not require parliamentary approval.

Second, Puntland has recently established a constitutional court and has a high court (other FMS have also high courts). The current agreed judiciary model would necessitate the dissolution of this nascent institution, which could partly be one of the reasons that the Puntland President did not endorse the agreement.

Third, some Federal Member States preferred that their high courts could have the mandate to adjudicate constitutional matters within the FMSs. This could, in the short term, serve the interests of the incumbent presidents who may change some provisions or extend their office terms. However, if elections are unified and the FMSs constitutions are aligned with the federal constitution, it makes sense that the national constitutional court adjudicates all constitutional matters at all levels of government. The proposal that the FMS high courts could serve as the first instance courts for constitutional matters could also be considered a viable option in the future when these courts are established.

## Key challenges

It is promising that the majority of NCC members agreed on a way forward regarding the judiciary model and power allocation. The regular NCC meetings also indicate the seriousness of the new FGS leadership in regard to deliberating and finding a consensus on contentious political issues in Somalia that would lead to the completion of the federalization process and finalization of the provisional federal constitution. However, there are critical challenges that the NCC in general, and the FGS leadership in particular have to deal with and find solutions for.

First, without specifying the provisions in the agreements that the Puntland president disagrees with, the Puntland government issued a position paper. The essence of the paper was that Puntland will no longer sit in the NCC meetings. Puntland stated that it will discuss issues of mutual interest with the FGS. The paper also indicated that Puntland disagrees with the sequence of issues to be deliberated. For instance, the position paper made Puntland's participation in the NCC deliberations conditional on addressing the Somaliland-Somalia and Somaliland-Puntland question, defeating al-Shabaab and ISIS, as well as agreeing on the state-building roadmap (the type of federalism Somalia should adopt). Although Puntland's leadership did not object to the content of what was agreed, the position paper illustrates that Puntland sees the agreed arrangement as something that empowers the FGS and limits the executive and judicial powers of the Federal Member States. President Deni appointed a Puntland Technical Committee for Federal Negotiations that would bilaterally discuss contentious issues with the federal government. Puntland's absence from the NCC meetings would be a setback for the ambitious plan of discussing and agreeing on contentious political issues, which would lead to the completion of the provisional federal constitution.

Second, for the NCC to continue deliberating on the contentious issues, it was agreed to harmonize the FMS elections. On one hand, state elections every year deviated from the focus of the federal government. It also changes the membership of the NCC, so harmonizing state elections makes sense for the NCC members to continue the ongoing deliberations as well as reduce the time and resources spent on state elections every year. On the other hand, the mandates of the presidents of the Federal Member States end in different timeframes. The extension is also likely a red line and presents a challenging problem because the opposition political stakeholders of each FMS don't want the terms of incumbents lengthened. This FMS's election harmonization agenda would be another key challenge for the NCC dialogue on contentious political issues.

Third, the FGS's core priority is the ongoing offense against al-Shabaab. The FGS wants the support and collaboration of FMS presidents to mobilize resources and forces and to participate in the fight. The NCC deliberations on FMS election harmonization would be a key factor for the center and periphery relationship and also the FMS leadership collaboration in the fight. Balancing the two would be challenging for the federal government leadership.

Fourth, the FGS leadership is quite ambitious in its approach to addressing five contentious political issues in just two NCC meetings. The participation of relevant institutions is limited, and the FGS approach may be seen as a hasty process that will not be sustainable and enduring. The speed with which the FGS leadership wants to agree on a contentious issue and complete the constitution itself could be seen as a challenge to successful dialogue and agreement on political matters that have crippled Somalia's state-building efforts in the past.

## Ways forward: Policy considerations

To capitalize on the initial gains made in addressing contentious issues and dealing with the remaining matters through an inclusive and participatory process, the FGS and FMS leaders could consider the following policy considerations.

First, the NCC should address one contentious issue at a time. The discussion and agreement on the judiciary model and power allocation in one meeting led to Puntland's withdrawal from the NCC. Discussing federal and state elections, fiscal federalism, and Mogadishu's status in late February is not seen as realistic. With the participation of relevant institutions, the NCC could schedule the deliberation and agreement of one contentious issue every two months. That would lead to agreement on six contentious issues in one year, which would be very significant if achieved.

Second, the federal leadership should make sure that Puntland's concerns are addressed and that its president joins the NCC's upcoming meetings. Failure to bring Puntland to the NCC meetings would be a huge setback. On the other hand, Puntland should also articulate the provisions in the agreed-upon judiciary model and power allocation arrangements that it disagrees with. The NCC should be open to discussing with Puntland its concerns.

Finally, the NCC needs to expand participation in the discussion of contentious issues. It has to make sure that relevant government institutions, as well as civil society actors, contributed to the agreements because the contentious points are not issues that the NCC has an exclusive right to discuss. While the NCC is the highest political platform for the executive body at FGS and FMS levels and can take political decisions, different stakeholders should participate and contribute to its agreements on contentious political issues.



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