



Governance Brief 03

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Summary

Somalia adopted a federal system of governance in 2004, although the formation of regional states only began in 2013. Four states have been formed under the auspices of the provisional constitution, in which the separation of executive powers and responsibilities between the different tiers of government remains unclear. Amidst this state of constitutional ambiguity, power struggles between the federal government and regional states have been – and remain – persistent. The constitutional review commissions reviewed the power-sharing options and presented scenarios to the parliament in 2016, but they have yet to be adopted and offer only a limited solution. In response to this protracted absence of a clarified governance structure, this brief presents new options to distribute powers and responsibilities to the different levels of government.

About Somali Public Agenda

Somali Public Agenda is a non-profit 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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Division of powers and responsibilities in a federal Somalia

Background

Somalia had a centralized form of governance for thirty years (1960 - 1990). With the exception of the residents of Bay and Bakool regions, historically federalism was not a demand or aspiration of the majority of citizens.

The history of a decentralized form of governance for Somalia dates back to the year 2000 when a transitional national government was formed in Arta, Djibouti, following a decade of chaos and clan conflicts. The civil society leaders who met in Djibouti agreed on a Transitional National Charter and a clan-based power-sharing formula. The National Charter encouraged regional autonomy, but the transitional government failed to function because of the dominance of armed clan warlords who remained in control of much of Somalia.

In 2004, and after various reconciliation conferences, Somali intellectuals and clan warlords adopted a federal system of governance and a federal charter in Kenya. But, again, the transitional federal government had only a limited presence in the country, managing to operate only in Jowhar and Baidoa.

Despite the adoption of a federal system in 2004, there was no federal constitution. In 2006, therefore, president Abdullahi Yusuf appointed the Independent Federal Constitution Commission (IFCC) to draft a federal constitution. A Committee of Experts was later formed in 2011 to support the work of IFCC. A number of constitutional conferences were organized and finally a draft constitution was endorsed by the six signatories of the 2011 roadmap in June 2012 (Elmi, 2012); the roadmap was endorsed by Sharif Sheikh Ahmed (President of the Transitional Federal Government), Sharif Hassan Sheikh Aden (Speaker of the Transitional Federal Parliament), Abdiweli Mohamed Ali (Prime Minister of the TFG), Abdirahman Mohamed Mohamud (President of Puntland), Ahmed Alin (President of Galmudug) and Abdulkadir Moallim Nur (leader of Ahlu Sunna Wal Jamaaca) in September 2011 to end the transition. The constitution was later provisionally endorsed by a National Constituent Assembly in Mogadishu in August 2012.

The provisional constitution also established the selection process for members of the federal parliament who then elected Hassan Sheikh Mohamud as the President of Somalia in September 2012.

However, the constitution deferred many issues to later negotiations and legislation. It also contained many ambiguities including on the specifics of power-sharing between the federal government and future federal units. To remedy these issues, the review and finalization of the constitution was entrusted to a Parliamentary Oversight Committee (OC), an Independent Constitutional Review and Implementation Commission (ICRIC) and the Ministry of Constitutional Affairs (MoCA).

Although the federal system was adopted in 2004, the establishment of federal units started after the election of President Hassan Sheikh Mohamud, and in a context of ambiguity on the division of powers. In 2013, Jubaland state was formed in Kismayo followed by Southwest State (2014), Galmudug (2015), and Hirshabelle (2016) administrations. These states were established while the federal constitution was still in a review process, creating significant new governance units without clear roles and responsibilities. To add to the ambiguity, the newly formed de facto federal units were not legally endorsed by the federal parliament as stipulated in article 49 (1) of the federal provisional constitution.

The division of powers under the provisional constitution

The absence of clarity on the division of responsibilities between the federal government and the regional states has contributed to recurrent power struggles between the two levels of government (although leaders at different levels bypassing the constitution has also contributed to divisions). In October 2017, it reached the point where five regional states formed the Council of Inter-State Cooperation in Kismaayo, in direct defiance of Mogadishu. And in September 2018, this Council suspended its relationship with the federal government in a meeting in Kismayo (Hassan, 2018). These developments were the result of a confluence of several divisions that arose in part as a result of the Gulf crisis and regional state presidents seeking support from Arab countries.

The constitutional ambiguity on power-sharing is a result of deliberate gaps and less deliberate ambiguities, which directly contributed to this schism. Article 54 of the provisional constitution provides four exclusive powers to the federal government, namely: (1) foreign affairs, (2) national defense, (3) citizenship and immigration, and (4) monetary policy. The same article, however, defers further clarification on the allocation of power and resources for future negotiations between federal units and the federal government, leaving the power-sharing arrangement almost entirely undefined. Article 53 (1), however, complicates the matter and states that the federal states must be consulted on foreign aid, trade, treaties and other matters that relate to international agreements (The Federal Republic of Somalia, 2012).

Beyond these conflicting clauses, the only further guidance on power-sharing comes from Article 52 of the provisional constitution, which lists 10 powers to be shared by the federal government and the regional states. These responsibilities include (1) water sources, (2) agriculture, (3) animal husbandry, (4) pasture and forestry, (5) the prevention of erosion and the protection of the environment, (6) health, (7) education, (8) relations and dialogue amongst traditional leaders, and the protection and development of traditional law, (9) relations amongst religious scholars, and (10) youth (The Federal Republic of Somalia, 2012). The article categorizes these 10 areas as issues that require a 'cooperative relationship' between the federal government and various federal member state governments. In federal constitutions, such mandates are usually codified as 'concurrent powers'. Beyond these limited clauses, there is no clear framework for power-sharing in the constitution.

Review commissions' recommendations for the division of powers

In an effort to resolve the ambiguities of the provisional constitution, in 2016, before the end of the term of the former president and parliament, the Parliamentary Oversight Committee and ICRIC reviewed a number of chapters including chapter five of the constitution (devolution of the powers of state in the federal republic of Somalia) and put forward options for devolution of powers. The two chambers of the incumbent federal parliament were delegated to deliberate and agree on the matter. However, this has not yet happened. Somali

Public Agenda has received hard copies of the options developed, examined chapter five thoroughly, and consulted with members of the current review commissions.

Firstly, the review commissions suggested the division of powers and responsibilities to three levels of government: federal, state and local levels. This was meant to empower local authorities since the constitution largely ignored this level of government and federal states failed to decentralize power to local authorities.

Secondly, the constitutional review committees recommended the formation of a coordination office between the Federal Government and the Regional States, which would be part of the Office of the President. This office would replace the Interstate Commission stipulated in article 111F of the current provisional constitution. This was seen, according to the revised documents examined, as lacking independence for its work despite the fact that it has not yet been formed. The proposal also outlines that further legislation to be enacted by the federal parliament would clarify the specific mandates of the office.

Thirdly, the constitution commissions divided the powers and responsibilities between the federal government and regional governments. According to the documents handed over to the Parliament, the commissions proposed 21 exclusive powers and responsibilities for the federal government and 7 exclusive powers for the regional states. The suggested federal exclusive powers were:

1. Protection of the national constitution
2. Formation and implementation of national policies and plans for economic and social development
3. Creation and implementation of national policies on health, education, research, and technology, as well as protection and preservation of culture and history
4. Establishment of monetary policy and foreign investment plans
5. Development of legislation to protect land use and other natural resources
6. Building and governing the national defense and security forces and the federal police
7. Managing the central bank, printing cash and minting coins, the issuance of loans, and regulation of foreign exchange and currency
8. Formulation and implementation of foreign policy; the signing of international and bilateral treaties and their implementation; diplomacy, consuls; and the United Nations
9. Development, management, and regulations of air, rail and sea transport, air traffic and highways connecting two or more states, as well as post and telecommunications, including telephone, internet, and media services
10. Levying tax to special Federal Government revenue sources; issuance, approval, and administration of the Federal Government budget
11. Managing water, rivers and lakes linking two or more states or crossing the national boundaries
12. Organizing the commerce between states and foreign trade
13. Coordinating all supporting agencies providing services to two or more states

14. Deploying the federal defense forces to (regional) states upon state's request to de-escalate a deteriorating security situation which the authorities of that state are unable to control
15. Developing the necessary legislation for political parties and elections to exercise the political rights set out in this Constitution
16. Imposition and removal of an emergency situation to the country or part of the country
17. Citizenship matters
18. Administering immigration matters, passports, visas, work permits, refugees and asylum seekers
19. Documentation of the protection of copyrights
20. Unifying standards of measurement and weight
21. Issuance of arms embargoes

The powers that were not given to the federal government were designated as (regional) state exclusive powers. These include:

1. The establishment of an administrative system that achieves self-governance, democracy and social development based on the rule of law, protection, and defense of the Federal Constitution
2. The enactment and implementation of state Constitution and laws that do not contravene the Provisional Federal Constitution
3. Develop plans to improve economic and social matters of the state
4. Management of lands and natural resources in accordance with the Federal Constitution
5. Settlement and collection of tax from exclusive sources of revenue for the State and management of the state budget
6. Development and implementation of laws on civil servants and their working conditions in accordance with the standards of the Federal Government
7. Establishment and management of state police forces to maintain peace and stability in the state

The proposed power and responsibility sharing arrangement for federal and state executives has a number of shortcomings. First, despite encouraging the need to divide powers among the federal, state and local levels, they failed to list executive powers for local governments. Districts were not given exclusive powers and their future governance was left to the hands of the state governments. Many of the current states have failed to devolve administrative and financial responsibilities to districts, and this limits the scope for effective local governance in Somalia.

Second, the commissioners avoided listing concurrent powers to be shared by the different levels of government. The executive functions of federal and state governments are interdependent and cannot be completely separated. The fact that an office or commission was proposed to be established to work on the cooperation and coordination of the federal government and states is evidence of the corresponding mandates of these levels of government. Further, the current Provisional Constitution listed ten areas that both levels of government should cooperate. Eliminating such an arrangement and re-assigning these

powers as federal exclusive powers could perpetuate the unhealthy relationship between the center and the periphery at least in the short-term.

Somalia's unique political history

Establishing and revising a constitution is not solely a technical endeavor. It is a response to a unique set of political and historical circumstances, and any solution must take this into account. Like any other country, Somalia has its own unique history, culture, and experience that should shape its governance model. Simply replicating the federal arrangement of other nations, which have little or no similarity with realities in Somalia, would likely fail.

A major drawback in the constitution-making process is that citizens were not given the opportunity to express their views on federalism before and after its adoption. Although regional states were formed, there are still Somalis who believe that federalism is not a viable governance system for Somalia. Segments of the Somali public would prefer a decentralized form of governance, which devolves public services, administration, and finance to the districts and villages. When segments of the society, including politicians, believe that the system does not work in Somalia, it shows the need to genuinely deliberate about the system itself. As long as people are in conflict with the very notion of federalism, a consensus on power and responsibility sharing will be difficult to reach and implement.

One challenge to pushing through new solutions is that federal states have already become established in the constitutional vacuum. Without clear mandates or limitations on their power, state leaders have become central governments in miniature. They have created a large number of ministries, often operating independently from the federal government. Despite the autonomy from federal government, the regional states only have limited authority within their mandated territory – they are often confined to interim capitals, experience persistent infighting, and do not manage to spread their writ across their full territories. The persistence of insecurity and weakness of institutions makes it even more challenging to escape this state protracted constitutional ambiguity. In particular, it makes it harder to trust state governments to empower local authorities when they have so far been unwilling or unable to decentralize governance to local districts and villages.

The experience of Puntland is a clear example of this issue. The state was established over two decades ago and sees itself as a senior, mature state, which should not be treated the same as the newly formed states. Its politicians have historically been advocates for federalism in Somalia, as a modality that guarantees autonomy from Mogadishu. Indeed, in some sectors, Puntland has operated completely independently. For instance, the primary and secondary education system in Puntland is independent of the other regional states. Its politicians recently opposed a proposal of the Federal Minister of Education, Culture and Higher Education to participate in national exams. The challenge would, therefore, be dividing powers among states that are not equal in status, autonomy and institutional capacity. Puntland might refuse powers and responsibilities that are symmetrical with other regional states.

Moreover, the case of Somaliland presents another unique challenge. Somaliland, having declared its full independence in 1991, has not been part of Somalia's state-building processes for close to three decades. Its politicians

continue to demand de jure secession from Somalia, whilst negotiations between Mogadishu and Hargeisa remain stalled. It would be a major constitutional challenge to agree upon a power-sharing arrangement without an answer to the Somaliland question.

Policy options and recommendations

There is no ideal off-the-shelf model for the distribution of powers and responsibilities to different levels in federal nations, and practical power allocations for federal states vary. Historical background and social fabric generally define the governance model and power distribution. Political realities and processes at times lead to constitutional reform. Therefore, Somalia needs a system and distribution of powers that is in line with its historical past, social structure and political realities.

In the short term, Somalia needs a division of powers to federal exclusive, concurrent, state exclusive, local government exclusive, and residual powers. The federal government could be allocated a list of exclusive powers including national defense, foreign policy, monetary policy, citizenship and immigration, posts and telecommunication, natural resources, aviation, extradition, implementation of treaties, marine shipping and navigation, and regulation of political parties.

Concurrent powers are the center of cooperation of different levels of government. Intergovernmental interdependence is inevitable in every federation. Some executive functions cannot be separated and should be designated as concurrent powers. These are the collection of taxes, electric power, environmental protection, water resources, health, education, industrial, commercial, and agricultural development, marriage, and divorce regulation, forest and wildlife protection, and social welfare. These responsibilities must be shared by

the federal government, regional states, and local governments.

On the other hand, the regional states could be allocated a list of exclusive executive authorities. These could include elections of the state parliamentarians and local councils, state security, state civil services, and public health and sanitation.

Local governments could be exclusively designated a list of powers such as town planning, construction permits, and business licenses at the district level.

Finally, residual powers – which are authorities that are not included in the power distribution – could be designated as federal government powers. Usually, when countries with a previous centralized government devolve powers, residual powers are left with the federal government. Canada, India, and Belgium are prime examples of states that designated residual powers to the federal government (Watts, 1996).

While the proposed power distribution may not be the optimal solution for the multilayered and complex challenges of power-sharing, it could be an inclusive approach that responds to the current political realities in the short term for a number of reasons. First, the federal government would exercise more exclusive powers, beyond the four powers listed in the provisional constitution. This would strengthen the mandate of the federal government across the country. Second, states would have their own exclusive powers, ensuring that they are able to administer their regions with some level of independence. Third, coordination and interstate collaboration would be cemented as the federal government, states and local governments would collaborate on critical areas such as taxation, health, and education. Fourth, local governments are empowered with exclusive powers and get a voice at both concurrent and state exclusive powers.

In the long term, and probably when Somaliland's status is confirmed, the federal constitution should be reviewed to reflect Somaliland's resolution as well as the aspirations of all Somali citizens. It could be an opportunity to revisit how the arrangement worked and what needs to be changed. This is similar to what Nigeria did in 1972. There were three territories with separate entities: the

Lagos colony, the Oil Rivers Protectorate, and the Royal Nigeria Protectorate. After two years of civil war, the Nigerians rejected the federal power-sharing arrangement, which failed to function. Thus, in 1972, Nigerians decided to give considerable powers to the federal government. Military governments, civil wars and the creation of more local states among other factors resulted in a federal system with a strong federal government (Blindenbacher & Saunders, 2006).

The power division proposed, however, requires negotiation among political stakeholders. While the suggested options could be workable within the current political climate in Somalia, it would require consensus and agreement among the incumbent leadership of the federal government (federal parliament and council of ministers), regional states, and other political stakeholders. The constitutional review commissions could create the platform for such a discussion or a national leaders' forum could be re-established to discuss and agree on contentious constitutional issues including executive power sharing.

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