



Review of Somalia's draft national election bill

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Summary

The National Electoral Bill is currently under parliamentary review. Once approved, the law will be the foundation for one-person-one-vote (OPOV) national elections scheduled to take place in Somalia in late 2020 and early 2021. The bill consists of 7 chapters and 61 articles and discusses issues of electoral design, management processes, voter registration, candidate eligibility, regulations for election campaigning, voting processes and vote counting, among others. This governance brief critically reviews technical issues of election design contained in the bill, including voter registration, seat allocation, announcement of election results, dispute resolution mechanisms, independence of NIEC, and election observation. It also makes broader comment on the framework for democratic governance in Somalia (election of the President, election of the Upper House, and election delays) and puts forward options for policy consideration.

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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Introduction

On May 2, 2019, the Council of Ministers approved both the National Electoral Bill (NEB) and the revised political parties bill. The National Electoral Bill was submitted to the House of the People and is currently under parliamentary review. If it is approved by the House of the People, the bill will go to the Upper House for review before a final ratification by the President.

The NEB is the centrepiece of the broader legislative framework for holding elections to the federal parliament and presidency. The NEB provides the greatest detail on many aspects of electoral management, but is best analysed in combination with the Political Parties Law, the Electoral Commission Law (2015), and the relevant articles in the Provisional Constitution (2012). The National Electoral Law therefore represents a significant legislative turning point that demands serious scrutiny and public deliberation in order to ensure the law promotes democracy and good governance in Somalia. This governance brief is written with that objective in mind.

Overview of the law

The National Electoral Bill consists of 7 chapters and 61 articles. The following is an overview of the bill:

1. Chapter one (articles 1-5) defines the aim of the bill and asserts its conformity with the Constitution.
2. Chapter two (articles 6-14) discusses the election management processes including: the powers and responsibilities of the National Independent Electoral Commission (NIEC); the establishment and management of electoral offices and voting centres; the design of the electoral model (closed-list proportional representation); the process for electing the president and the two chambers of the parliament; and specification of election dates.
3. Chapter three (articles 15-23) outlines the voter registration scheme based on biometrics, and how voter lists will be created.
4. Chapter four (articles 24-33) stipulates: the criteria for candidates (not less than 25 years and that each candidate must put forward a \$2000 deposit); the regulation of electoral campaigning; the role of the political parties, including the representation of women in party list; and the submission of list of candidates.
5. Chapter five (articles 34-44) discusses the preparation for the elections and voting process.
6. Chapter six (articles 45-53) details the process of vote counting and verifying election results.
7. The final chapter (articles 54-61) outlines the consequences of infringing the law, election delays, and security.

Technical issues of election design

The National Electoral Bill provides the detail on technical issues of election design, such as registration, seat allocation and vote counting. However, there are a number of ambiguous and flawed provisions that conflict with the desire to hold inclusive and credible elections.

Limitations of voter registration

Somalia's voter registration system must account for several limitations including: a lack of a census; the absence of a national ID system; insecurity; limited infrastructure; and high levels of illiteracy in the population. In these circumstances, the NEB provision for a biometric registration system (article 17[5]) is well-attuned to these complexities as it does not require documentation or literacy on the part of the citizen. A biometric system was also successfully piloted during Somaliland's recent Presidential Elections in 2017 (Walls, et al., 2017), and is similar to humanitarian systems for beneficiary registration, already used by many people in parts of Somalia

affected by drought (World Food Programme, 2017).

Nevertheless, the use of sophisticated technology can also be problematic if NIEC does not have the human and financial resources to ensure their appropriate and sustainable use into subsequent electoral cycles (UNDP, 2014). The successful roll-out of biometric registration in Somaliland took almost ten years and multiple attempts to be successful (Walls, et al., 2017); it was ruled out as unfeasible in Afghanistan (Worden, 2018).

Indeed, the NEB implicitly recognises the difficulty of implementing such technology, and refers vaguely to the prospect that NIEC will decide on an alternative method of registration (Article 17[6]), if required. This opens the door to the establishment of a registration system without sufficient deliberation and transparency, one that is not enshrined in law, and which would likely reduce the credibility of elections – a weak registration process could enable serious electoral misconduct such as ballot stuffing and multiple voting (UNDP, 2014).

The provisions on voter registration also potentially exclude certain parts of the population from the electorate. The bill does not clarify mechanisms for voter registration of the national army in the frontline, the diaspora, refugees, and diplomats working in Somalia's diplomatic missions outside of the country. Moreover, the provision that voters only vote in the area where they are registered, potentially excludes mobile and often vulnerable populations from voting, such as displaced groups and pastoralists.

Method for seat allocation

Article 11(1) proposed the “Proportional Representation - Closed List” and one national constituency as the electoral model for national elections. This model was agreed by the federal government and federal member states in the National Security Council meeting in Baidoa in June 2018.

While this model may well be workable in Somalia, one of the most critical issues that the election bill discusses is the operationalization of proportional representation through a seat allocation method. After votes are collected and counted, the number of votes must be transformed to seats for the political parties. Article 52(4) proposes that Sainte-Lague formula will be used for counting parliamentary seats. In this formula, seats are allocated through a series of rounds, in each round each party's total votes are divided by one of a series of ascending odd numbers (1, 3, 5, 7, ...) based on the number of seats already allocated to them. In each round, the party with the largest number of votes is allocated a seat. What is proposed is a pure Sainte-Lague system, which is rarely used. It is biased toward the mid-level parties. This will be further accentuated by the relatively high 7% threshold (article 13) for parties to be eligible for seats outlined in the law.

The key consideration for Somali democracy in terms of seat allocation is whether to allow for bias towards larger parties or smaller parties, with the former perhaps enabling better functioning governing coalitions, whilst the latter encouraging diversity in representation (Gallagher, 1992). Common alternatives to what the NEB proposes include the modified Sainte-Lague method (it reduces the overall proportionality by replacing the first integer 1 of the pure Sainte-Lague with 1.4) which is mostly associated with Scandinavian countries and creates more biases towards larger parties (Farrel, 1997). Another alternative is the d'Hondt method (the divisors of the d'Hondt system are 1, 2, 3, 4,) which is used for European Parliamentary elections and is even more favorable to larger parties (Kotandis, 2019). The “largest remainder” methods offer an additional alternative, whereby a “quota” of votes per seat is used to allocate seats to parties in an initial round. Subsequently the remaining seats are allocated based on the votes left over. Amongst the largest average methods, the use of the Hare quota (dividing the number of votes by the number of seats) produces the results that are most likely to favor smaller parties in instances of bias (Farrel, 1997).

There is therefore no “correct” method for seat allocation. What is more important is that the method chosen reflects the democratic model that Somalis are striving for – be it

functioning and stable governments with greater longevity that risk excluding minority voices, or more fluid and dynamic governance with greater inclusion and diversity. Currently, it could be argued that the combination of “pure” Sainte-Lague and a 7% threshold do not sufficiently protect the need for inclusion as Somalia seeks to solidify its post-conflict settlement.

Ambiguity on the announcement of results

The Electoral Commission Law mandated the NIEC to announce the results officially, whilst the NEB (article 7f) mandates the “competent court” to approve “provisional” results from the NIEC, creating an ambiguity in terms of who would announce the final election results. Moreover, article 6-10 of the NEB, outlining the role of the NIEC in the management of elections, are very similar to several articles in the Electoral Commission Law of 2015, resulting in an unnecessary duplication.

Lack of clarity on dispute resolution mechanisms

The process of dispute resolution around complaints related to elections is also unclear. In the NEB, there is an ambiguous reference to “a court with such jurisdiction” to pass judgement on election-related disputes and complaints. This also potentially conflicts with article 14 of the Electoral Commission Law, which mandates the NIEC to resolve disputes relating to the nomination of candidates. Furthermore, the article does not differentiate between complaints in relation to the elections of the House of the People, the Upper House and the President.

Threats to independence for NIEC

Several articles of the NEB weaken the independence of the National Independent Electoral Commission. Article 14(2) stipulates that while the NIEC will propose the election date, the president will issue a decree officially pronouncing this. Similarly, article 18(2) indicates that the president will issue a decree announcing the beginning of voter registration after listening to the reasoning of the NIEC. Both articles diminish the independence of the NIEC and empower the sitting president who would likely be interested in competing for the top office of the country. Finally, the role of the Ministry of Interior, Federal Affairs and Reconciliation (MoIFAR), as specified in Article 22 in verification of voter registration, needs to be carefully considered as it may subject the process to political interference.

No provisions on electoral observation

The bill does not clarify and codify the role of national and international observers in overseeing the electoral process. The Electoral Commission Law specifies it is the role of the NIEC to authorise monitors, but provides no further details.

Issues with Somalia's framework for democratic governance

The process of election management design continues in the absence of a finalized constitution that defines the institutions of governance in Somalia, a common sequencing problem in post-conflict contexts (Underwood, et al., 2018). The election modality is therefore being designed without full clarity on the final shape of Somalia's institutions, with significant discussion and review taking place on the Somali political dispensation (presidential versus parliamentary) and the structure and mandate of the legislature (bicameral versus unicameral) that would have critical impact on election design. With these issues still in play, there is the broad risk that the finalization of the constitutional review might render aspects of the NEB defunct or unconstitutional. Moreover, it leaves a number of aspects of the NEB in need of far greater deliberation and thought to ensure they are aligned with the broader vision for Somalia's democracy.

Election of the president

Article 12 of the NEB discusses the election of the president. It states that the presidential candidate of the political party that wins the majority of seats in parliament (whether by winning them outright or through forming a coalition of parties) will automatically win the presidency. The NEB is also not explicit about whether this will be based on the combined seats of the House of the People and the Upper House, or the House of the People alone.

This conflicts with article 89 of the current provisional federal constitution, which details the electoral process of the president as one where both chambers of parliament elect the president through several rounds of voting, with no reference to party affiliation in the process of government formation.

The NEB makes explicit reference to the fact that the constitutional review process is on-going and hints that the constitutional review commissions will review the articles concerning the presidential elections and will ensure conformity with the current electoral bill. While it is true that the articles in the constitution regarding presidential elections would inevitably be amended, the exact system to be adopted – presidential, parliamentary or mixed system – is not a straightforward decision and remains under discussion. It is among the contentious issues in the constitution that require deliberation and consensus, and cannot be easily resolved in the NEB before this is achieved.

The election of the Upper House

The NEB makes no specific differentiation between electoral design for the Upper House and the House of the People – article 13 only states that the election of the Upper House will be conducted in accordance with article 72(c) of the Provisional Constitution, which does not provide sufficient clarity and detail. Currently, the role of the Upper House, as mandated in the Provisional Constitution, is to protect the interests of Federal Member States, but there is no specification in the current law on how elections would be designed to achieve this.

The notion that the Upper House protects regional interests introduces greater complexity in electoral design when it comes to defining constituencies or electoral districts. Implicit in the National Electoral Bill is the adoption of one national constituency based on closed-list proportional representation, in line with the National Security Council meeting in Baidoa in June 2018. This approach is well-suited to a fragile context like Somalia as it reduces the challenges of electoral implementation and encourages political groupings to build allegiances across the country.

However, organising elections based on one national constituency may be a flawed approach for the election of the Upper House, if it is to meet its current mandate to represent Federal Member States. Protecting this role for the upper chamber likely remains crucial given the on-going tensions between FGS and the Federal Member States. Constituencies would therefore need to be established at least at the Federal Member State Level, if not the regional level, in order to support election to the Upper House as currently defined. This would require greater election management resources, definitions of electoral districts, attention to boundary demarcation, and control on voter movements.

The difficulties of conducting elections for the Upper House are further compounded by the ongoing ambiguity on the allocation of seats in the chamber. The Provisional Constitution states that seats should be allocated based on Somalia's 18 regions, and ensure equality in number at the Federal Member State level (The Federal Republic of Somalia, 2012). During the 2016-2017 s/election process, seats were controversially allocated in defiance of the constitution creating notable inequalities, namely: 11 seats for Puntland and Somaliland, compared to 8 for the other states, and no seats for Banadir. The unresolved status of the latter in particular makes the allocation of seats particularly challenging. The NEB makes no provisions to attempt to resolve or refer to this standstill with the exception that article 13(4) mentions that a special regulation will detail the allocation of the Upper House seats.

Election delays and alternatives to OPOV

There remain many challenges to overcome before elections can be implemented, and these make delays highly likely, even in a positive scenario. The approval of the current National Electoral Bill by the Council of Ministers and its deliberation in the parliament was a much-needed step towards democratic elections in Somalia. However, the review and ratification of the election bill itself will take time as it will go through three readings at the House of the People of Somali Federal Parliament. It will go to the Upper House for a similar process

before it is ratified by the President. Furthermore, political parties will need to be officially registered after meeting with the conditions in the political parties' law (Law No. 19 of 27 June 2016).

The implementation of the electoral process will likely be lengthy as well. The draft election bill proposes the establishment of a unique biometric voter registration and preparation of the final list of voters by the NIEC within two months prior to the elections. As outlined above, voter registration can be a complex and fraught process, that can take years and multiple iterations to implement credibly. The NEB also adds the timeframe for election campaigning, which starts 45 days before the election and ends 48 hours before the election day. All these milestones are envisaged to happen before 27 December 2020 (within 17 months).

Article 56 of the NEB outlines the circumstances that can delay the elections beyond this date. The article identifies widespread insecurity, natural disasters such as earthquakes, epidemic diseases, pervasive droughts and floods, and hurricanes and anything else (not defined) that can be recognized as a national disaster as reasons for election delays. Crucially, the same article adds that one of the things that may delay the election is if it "cannot be held for technical reasons". While natural disasters might be an understandable and unavoidable reason for delaying elections, the fact that the technical implementation, as currently outlined, will almost certainly not be completed in the next 17 months, means that the bill risks enshrining in law an inevitable and protracted delay to the holding of elections.

Crucially, if the election is delayed, the article does not propose a timeline for the extension. Article 56 states that if election is delayed, the members of the parliament will resume their mandate and the mandate of the president will be extended in parallel. The NIEC will then announce a new election date. This is among the most critical and sensitive articles in the electoral bill.

Furthermore, the bill does not present an alternative option which can be followed if one-person-one vote elections fail to be organized on time. This could create a protracted political crisis, in which the ruling administration, regardless of its other successes and failures, struggles to govern due to the absence of a consultative or democratic legitimacy.

Policy options and recommendations for legislators

1. Voter registration

- Specify an alternative to biometric registration for voter registration in the National Electoral Bill. If credible alternatives cannot be found given the current context, authorities could consider making elections contingent on the addressing of one of the key dependencies for registration, such as the roll-out of national ID or the conduct of a census.
- Include specific provisions in the bill detailing how Somalis abroad (diaspora and diplomats) and armed forces will be registered and vote.
- Ensure the full inclusion of mobile populations by removing restrictions on voting in the same place as registration.

2. Seat Allocation Methodology

- Re-consider and justify the seat allocation methodology in line with a broader vision for Somalia's democracy. The use of the largest remainder method, using the Hare quota, might be more appropriate given its greater propensity to favour smaller parties, especially if combined with a lower threshold for parties (perhaps 4%) to be allocated seats.

3. Announcement of results

- Resolve the ambiguity in the bill on which organ of government announces the official results. To ensure consistency with previous legislation, this would mean specifying the NIEC.

4. Dispute resolution

- Clarify the framework for dispute resolution around election results. Given the current weakness and lack of clarity of Somalia's justice system, it may be preferable to elevate the role of the NIEC in dispute resolution. If and when a constitutional court is established and functioning, their exact mandate should be clearly clarified.

5. Independence of the NIEC

- Ensure the independence and autonomy of the NIEC by amending provisions that ascribe power to the sitting president in determining the election date and the start of voter registration.
- Clarify the role of Ministry of Interior, Federal Affairs and Reconciliation (MoIFAR) as a technical implementing agency without the power to vet registration to avoid enabling political interference in the creation of voter lists.

6. Electoral observation

- Include new provisions in the NEB for both domestic and international monitors, specifying how their access will be ensured and their impartiality protected and respected.

7. The relationship between the constitutional review and the elections

- **Option 1:** Achieve broad and inclusive agreement that current elections would take place under the framework of the Provisional Constitution, and therefore ensure the NEB is explicitly and comprehensively harmonised with it.
- **Option 2:** Ensure the NEB accounts for the fact that the conclusion of the constitutional review will have major implications for electoral design, and provisions should be flexible to accommodate multiple outcomes, as well as specify when and how additional or amended legislation would be put in place to match a completed constitutional review process.

8. Election of the President

- **Option 1:** Ensure the NEB is in full alignment with the Provisional Constitution's description of the election process.
- **Option 2:** Ensure the NEB is flexible and open to accommodate the final structure of the executive as decided in the constitutional review.

9. Election of the Upper House

- Include provisions in the NEB that cover how electoral districts would be defined for voting for candidates in the Upper House, if it is to represent the Federal Member States, as mandated in the Provisional Constitution, as well as add specific provisions on the system of voting and seat allocation for the Upper House.
- Recognise the importance of resolving the ambiguity around seat allocation and the status of Banadir and prioritise dialogue to ensure a settlement on this issue can be reached that is fair to all regions in Somalia.
- Consider the possibility that, if the debate around seat allocation and voting system for the Upper House is fraught, it may be necessary to conduct one-person-one-vote (OPOV) elections for the House of the People only, via one national constituency (this being in accordance with the governance dispensation as prescribed in the Provisional Constitution). At the same time, the Upper House could continue to be selected based on the consultative use of the 4.5 (clan quota) system, led by the Federal Member States themselves. Given that the Upper House would be chosen through a consultative process, and that it is not uncommon for Upper Houses

to be unelected, this would be a short-term compromise to allow NIEC to focus on a simple election process focused on the House of the People.

10. Postponement of the election

- Provide an alternative political process to one-person-one-vote (OPOV) elections, and enshrine it in law at this early stage. The 2016 indirect parliamentary (s)elections decentralized the elections to the capital cities of the regional states and increased the electoral college to over 14,000 delegates. Lessons learned from this process could be implemented to create an enhanced version of the consultation process for 2020-21 (Saferworld, 2018). Regardless of one's political stance or judgment of the current government, any administration would find it difficult to govern if its legitimacy is in question. It is therefore crucial to ensure there is not a protracted limbo without any consultative or democratic process of government formation.
- Fast-track all aspects of electoral management design to maximise the chances of holding OPOV election on time, making pragmatic compromises that carefully balance credibility with feasibility, such as keeping OPOV elections focused on the House of the People (see above).

References

Farrel, D. M., 1997. The List of Systems of Proportional Representation. In: Comparing Electoral Systems. London: Macmillan Press Ltd, pp. 59-68.

Gallagher, M., 1992. Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities. British Journal of Political Science, Volume 22, pp. 469-496.

Kotanidis, S., 2019. Understanding the d'Hondt method: Allocation of parliamentary seats and leadership positions. European Parliament, June.

Saferworld, 2018. Domestic Electoral Observation Mission: Final Report on Somalia's 2016-2017 electoral process. June.

The Federal Republic of Somalia, 2012. Provisional Constitution. [Online] Available at: <http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf> [Accessed April 2019].

Underwood, W., Bisarya, S. & Zulueta-Fülscher, K., 2018. Interactions between elections and constitution-building processes in fragile and conflict-affected states. Institute for Democracy and Electoral Assistance.

UNDP, 2014. The Role of UNDP in supporting democratic elections in Africa.

Walls, M. et al., 2017. Report by International Observers on the 2016 Voter Registration Process in Somaliland. Progressio, March.

Worden, S., 2018. Afghanistan Election Conundrum (13): New voter registry too good to be true. Afghanistan Analyst Network, 28 August.

World Food Programme, 2017. SCOPE in Somalia: cash-based transfer assistance. ReliefWeb, February.

Election Series: Parliamentary and presidential elections are expected to happen in Somalia in late 2020 and early 2021. At Somali Public Agenda, we have begun a series of commentaries and briefs concerning these elections. Each commentary or brief analyses election-related themes. This is the first brief of this series. SPA welcomes and very much appreciates comments, feedback and ideas relating to Somalia's anticipated elections.