

An opportunity for peacebuilding dialogue?

Somalia's constitution-making process

Dr Kirsti Samuels

Somalia is one of the most difficult contexts for a constitution-building process. Not only has it experienced 20 years of civil war, but its younger generation has grown up in a failed state. Having lived through two decades of dictatorial repression followed by two decades of violent conflict, many Somalis living in Somalia do not have the conceptual models or personal experiences of an effective and peaceful Somali state, especially in terms of institutions, governance structures and leadership.

For a society emerging from civil war, a constitution-building process provides opportunities for reconciliation, for developing negotiated solutions to divisive issues, and for achieving consensus and agreement on the many areas of division.

It can also symbolize a break with the past by creating an atmosphere of hope and renewal, and help devise a legitimate and stable state. Comparative experience shows that constitution-building bodies that are inclusive and representative result in more successful transitions from conflict to peace, and more stable and effective constitutions. Participatory processes in constitution-building increase the legitimacy of the constitution and peoples' support for it, which is essential for the constitution to play a meaningful role in creating a stable state.

This article describes the efforts in 2006 to develop a constitution for Somalia. This was a period of relative peace in the country, but there had been little domestic buy-in to the internationally sponsored peace talks in Kenya, which produced the Transitional Federal Government (TFG) and a Transitional National Charter (TNC).

The constitution-making process was envisaged as inclusive and participatory and expected to double as a grassroots peace initiative that would help to solidify the movement towards peace. It was also hoped that the process would help address remaining points of conflict, ranging from war crimes, stolen property, occupied territory, conflicting legal frameworks, to the rights of refugees, internally displaced people and the simmering resentment of groups that felt excluded.

The 2006 constitution-building process

By the time the Somalia Transitional Federal Parliament

convened for the first time in the town of Baidoa on 26 February 2006, the constitutional process was high on the list of urgent business. In 2004 parliament had been sworn in, and according to the transition timetable a draft constitution had to be ready by October 2007.

Reliance on a constitutional process as part of a transition from a peace agreement to a legitimate elected government is an increasingly common methodology. It acknowledges that those at the table during peace negotiations may not represent all the interests in a country, that in many cases the range of issues that need to be debated in a constitution are too vast for a peace negotiation, and that many of these issues are best debated at a slower pace, in a more inclusive fashion.

This was certainly the case in Somalia. The peace agreement took the form of a transitional constitution – the Transitional Federal Charter of the Somali Republic – and set out many provisions that could be part of a constitution, including a federal governance structure and Islamic *Shari'a* as the basic source for legislation.

However the Charter had been adopted by unelected participants in a peace negotiation. It did not have the approval and involvement of the Somali people and lacked the legitimacy required to establish a workable peace and a viable state. Hence Article 71(2) of the Charter provided that a federal Constitution based on the Charter was to be drafted (within 2.5 years) and adopted by referendum during the final year of the transitional period. The TFG had a three-year window and a consortium of donors, NGOs and international agencies was formed to support this process. I was brought in as lead legal advisor to assist on the project.

The Charter provided for the creation of a Federal Constitutional Committee (FCC), the members of which were to be proposed by the Council of Ministers and approved by the parliament. The first step therefore was to create this commission.

Undoubtedly some difficult negotiations took place among the ministers and parliamentarians in putting together a list of 15 members, who were ultimately chosen on a clan basis using the '4.5 formula', like the parliament. An early list did not have any women on it, but in response to advice about the importance of having a representative commission, two women were included in the list sent for parliamentary approval.

Part of my role was to explore with the TFG the sorts of processes and methodological options available to them in setting up the constitution building process, and to enrich

their understanding of these options through comparative discussions of other constitutional processes.

Discussions with Somalis revealed that many of the core concepts that had been negotiated during the peace agreement were not well understood. Federalism, and in particular the fact that federalism requires relinquishing some power and control by the central government in favour of the states or regions, had not been internalized, as became clear in discussions with members of the TFG.

A lot of emphasis was put on the need for a public dialogue and an inclusive process in order to ensure that the final draft had legitimacy and would be accepted at referendum. At the time, Kenya was considered a cautionary tale as the people of Kenya had just rejected their new constitution at referendum.

In June parliament established the FCC in the Somalia Constitutional Commission Act (June 2006). This established guiding principles for the Commission, namely that it was to take account of: the Charter, the principle of Islam, democracy and social justice, and a process that “(a) promotes public participation, transparency and accountability to the people; (b) accommodates the diversity of Somalis and their opinions; and (c) promotes stability, peace and reconstruction”.

The members of the FCC would not be powerbrokers within their clans, but they were respected clan members with professional backgrounds that ranged from former judges to religious elders. They convened for the first time at a week-long workshop hosted by the UN Development Programme (UNDP) in August. The members of the commission proved to be engaged and interested, aware of the risks and challenges they faced and determined to take their responsibilities seriously.

One of their first decisions was to change their name to the Independent Federal Constitutional Commission. During the workshop, the IFCC drafted their rules of procedure and agreed on the following methodology and procedural steps:

1. A civic education program that would run the entire three years (to late 2009) and empower the people of Somalia to understand why a constitution was being made and what their governance choices were. This was to be overseen by the commission but implemented by a Secretariat with civil society collaboration.
2. A consultation process of nine months following an initial period of civic education, in which the commission would initiate a national dialogue to bring divided and fragmented groups together to discuss a common future for the state.
3. The preparation of the draft constitution itself would

take six months, and the commission would request comparative and expert assistance as they identified their needs. The draft would be the subject of further civic education before the referendum. There was discussion of a representative validation meeting before the referendum, but it had not been decided on.

These decisions were well received by Minister Derro, the Minister for Constitutional Affairs, and represented a hopeful start for the constitutional process. The international consortium agreed to support the process on this basis and allocated a substantial budget to so do, in the order of 10 million Euros.

However all of this activity was taking place against the background of the rise of the Islamic Courts Union (ICU) in Mogadishu (June 2006) and its standoff with the TFG. Even as the constitutional process seemed to be opening up an opportunity for dialogue and negotiation between all Somalis, including the Islamists, it was apparent that the ICU and the TFG were facing off for another round of conflict.

In fact the Minister for Constitutional Affairs became one of the first casualties of the renewed war in Somalia. He was assassinated after Friday prayers in August a few days after the launch workshop of the IFCC. It remains unclear whether he was targeted because of his involvement with the constitutional process or whether he was simply an accessible target. In the chaos that followed, the constitutional process was essentially put on hold, as the transitional parliament and government turned all their attention to the crisis.

Since 2006, the commissioners have attempted to continue with preparations, but with the TFG on the verge of collapse there was little impetus to run a complex constitutional process in such an unstable environment. With a new government in place since January 2009 there may be an opportunity to re-launch the process, but it will depend on whether the country is stable enough to conduct of a participatory constitution building process.

Key challenges

Even if the country had not returned to war Somalia would have faced substantial hurdles to building an effective constitution. Putting in place elections, designing new institutions and choosing the best constitutional language will not necessarily result in conditions for peace and stability.

The clan nature of Somali society provides one of the challenges to envisioning a coherent Somali state, as does Somalia's negative experience of governance. For instance, in interviews on the design of the constitution some Somalis



the current reality. This should not mean that there is no scope for improving the existing laws and interpretations to better comply with international standards of human rights, but rather the reality must be taken into account when designing the constitutional rules on these issues.

Somaliland provides another challenge to achieving consensus on a vision for the future of the state. Although Somaliland has in effect been operating separately since 1991, many people in Somalia do not accept Somaliland's declaration of independence and consider it to be part of what should become the unified state of Somalia. In 2006 demarches to the Somaliland government seeking to involve them in the constitutional process were rebuffed, and the practice of including members of Somaliland clans in Somali institutions will not change the reality that those in power in Somaliland currently reject unification.

Some of these challenges may be ameliorated by an extended period of civic education and dialogue. But it remains uncertain whether attempts to transfer models, lessons and institutional structures from other stable and developed societies to Somalia will ever be successful. Given the weak, mistrusted formal legal and judicial structure and the lack of bureaucratic capacity, the prospects for implementing a constitution are very low. Furthermore the informal traditional structures are likely to compete with any new institutions or rules adopted in the constitution.

A public education campaign could inflame divisions if it adopts extremist views rather than encouraging moderation and compromise. A process could be rendered illegitimate by the exclusion of the voices of women or minorities. Also, the constitution adopted may be unrealistic and unenforceable if it is too ambitious and too expensive. Finally it may also induce conflict if it does not fairly address issues of land ownership, war crimes, or the division of power and resources.

Nevertheless, despite the disappointments so far, as well as the risks, there remains a valid role for constitution building in peacemaking in Somalia. But such a process could prove divisive if it is not sufficiently representative, participatory or consensus based.

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maintained that while they did want a state, they did not want one that had “anything to do with them”.

A key question that arises is whether Western governance models will ever be implemented effectively in Somalia or whether it will be necessary to seek endogenous solutions. This dilemma exists to some degree in any democratization process supported by the international community.

Divergence between local ideas and values and a Western, Westphalian vision of a state often means the institutions created are not sustainable when the international community leaves. To be successful the institutions cannot be mere shells imposed from outside, but must be bodies that are understood and trusted by the population.

In Somalia a stark division has arisen between formal power structures and the reality of power on the ground. For the most part informal and traditional systems of governance have more or less managed power, dealt with disputes and often ensured a minimum of predictability and governance.

There are both informal clan-based governance structures and criminalized warlord power structures. Whether or not specific provisions are included in the constitution to recognize these local power structures, modify them, or seek to override them, it is clear that their existence must be taken into account. Attempts to dissolve or ignore informal mechanisms that have served the public effectively can produce chaos. New structures that are neither trusted nor understood and undermine informal systems may leave society worse off than before.

In Somalia this issue also arises with respect to the sources of law. Some codified law exists but in the absence of a functioning judicial system, *xeer* (traditional law) and *Shari'a* are currently the dominant sources of law. Making progress will require careful weaving of a hierarchy of laws that builds on