

On Reviewing Somalia's Provisional
Constitution
Background, Challenges, and Future Prospects



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“ Constitution-makers, however, legislate mainly for future generations, which have no representatives in the constituent assembly. ”
- Jon Elster

1. Executive summary

Somalia's constitution-making process has become a never-ending and an expensive project throughout the last two decades. The Transitional National Charter, which established the third republic in Djibouti in 2000, called for a new constitution. In 2004, the Transitional Federal Charter established a constitution-making process for the country. Somalia's governments have established various committees: the Independent Federal Constitution Commission, the Committee of Experts, the Technical Committee, and the Technical Facilitation Committee. In 2012, the Special Representative of the Secretary-General of the United Nations and six Somali political leaders finally negotiated the Federal Provisional Constitution,¹ which established the process for constitution review. Since 2012, the parliament's Oversight Committee, with the help of the Independent Constitution Review and Implementation Committee, has completed two reviews of the constitution, in 2016 and 2020. Additionally, Somaliland aside, Somalia's five federal member states have made their own constitutions.

This report was developed by combining a review of documents with information obtained through select interviews. The documents consulted include Somalia's previous constitutions, the current provisional constitution, the two constitution-review documents that were completed in 2016 and 2020 respectively, and the constitutions of the federal member states. Interviews were conducted with experts and policymakers who have worked on constitution-making and on constitution review in Somalia.

Furthermore, this study has found:

- According to the literature on constitution-making and constitution review, it is the process that determines the acceptability of the outcome and the overall legitimacy of the constitution itself. This study finds that, in Somalia, politicians have often hijacked the constitution-making and/or constitution-review processes, resulting in political exclusion, the absence of public participation, a lack of transparency, and a disregard of local expertise.
- In drafting the Federal Provisional Constitution, only six signatories and then the Special Representative of the Secretary-General of the United Nations dominated and manipulated the process, ignoring calls for political inclusion and further deliberations.

1. Ambassador Augustine Mahiga was the Special Representative. The six Somali signatories were: Sharif Sheikh Ahmed, president of the Transitional Federal Government; Abdiweli Mohamed Ali, prime minister of the Transitional Federal Government of Somalia; Sharif Hassan Sheikh Ahmed, speaker of the Transitional Federal Government of Somalia; Abdirahman Mohamed Farole, president of Puntland; Ahmed Alim president of Galmudug; and Abdulkadir Moalim Nur, leader of Ahlusunna Wal-Jama.

Subsequently, political exclusion manifested itself in the review process. Taking advantage of the lack of political will among the country's top leadership, the Oversight Committee has monopolized the review process for the past ten years. In fact, the few competent or interested members within the Oversight Committee had outsized influence in the review process.

- More importantly, the two different oversight committees came to different conclusions and recommendations regarding contested issues of the constitution. The first Oversight Committee, that of the ninth parliament, identified nine contested issues, among them: power-sharing between the Federal Government of Somalia (FGS) and the Federal Member States (FMSs); resource/revenue sharing; powers of the president and the prime minister; role of the senate; status of the capital city; citizenship; and design of the judiciary. The second, two-chamber Oversight Committee increased the number of contentious issues, adding five more for a total of fourteen issues.
- The first Oversight Committee proposed the expansion of federal powers and allocated policy-making and policy implementation in most of the important functions to the Federal Government of Somalia. Additionally, this Committee empowered the national government to legislate in the area of natural resources. In terms of designing the executive, legislative, and judicial branches of the government, the first Oversight Committee merged the two executive offices into one, thus eliminating the office of the prime minister and making the president the head of state and the head of government. Chapter Six of this Committee's report has given all the legislative and oversight powers to the House of the People, thus eliminating the Senate. This Committee also recommended an integrated judiciary system, proposed that Mogadishu becomes a regional state, and enfranchised both men and women—in the case of marriage to a non-Somali spouse—to pass citizenship to their children.
- The second two-chamber Oversight Committee of 2020 disagreed with most of the proposals of the first Committee. The second Oversight Committee gave more substantive powers to the federal member states in the distribution of power, maintained the executive offices (the presidency and prime minister) in their current form, maintained the bicameral system and empowered the Senate, and remained silent on the status of Mogadishu. Moreover, the second Oversight Committee agreed with the first Oversight Committee in the establishment of an integrated justice system and in recommending the establishment of a committee that would harmonize the constitutions of the regions with that of the Federal Government of Somalia. Finally, keeping the Somaliland question in mind, the second Committee added a new clause stating that the constitution will remain provisional until the unity of the country is completed.

- The Federal Government of Somalia and the federal member states clash on almost every aspect of governance. Somalia's federal member states have taken a parallel process when drafting their constitutions. At times, they have not explicitly recognized the supremacy of the Federal Provisional Constitution (FPC) in most competency areas. In practice, the federal member states compete with the central government in the four areas it should legislate: foreign affairs, citizenship, defense, and monetary policy. This study has found, on the other hand, that the FGS legislates every aspect, even though there has not been an agreement on the distribution of power between the levels of the governments.
- In terms of the process, citizens have had limited opportunities to participate in constitution-making or review. Very few, if any, of the diverse views, interests, and voices of civil society, of diaspora communities, or of businesspeople, women's groups, youth activists, and other organized groups, have been represented. Additionally, open debate in the media was limited. Thus, the public knows little about the content of the constitution, the contentious issues within it, or the progress made. In other words, most avenues of ensuring public participation in the constitution-making and review process have been underutilized. Consequently, very few people contributed to the drafting and reviewing of the Federal Provisional Constitution.
- Somalia's constitution-making and constitution-review processes have become a donor-driven exercise. The agencies involved and the donor countries have often adopted a technical approach, thus ignoring the political side of constitution-making and constitution review. Apparently, the assumption that a constitution is a social contract, one that is owned by the citizens, has not been considered applicable in the drafting or reviewing stages of the constitution-making process in Somalia. Ignoring the views, contributions, and suggestions of the civil society or of the public and local experts has resulted in a negative public perception, thus making the constitution appear to be a foreign-engineered project. This has significantly damaged the legitimacy of the process and of the document. But if voluntary compliance with the law is to be realized in Somalia, the constitution-making and review processes should accommodate local concerns and contributions. The constitution cannot be an "external affair" with no connection to those it seeks to govern.

2. Introduction

In the process of establishing the third republic in Djibouti, Somali delegates at the Arta conference chose a committee that was tasked with preparing an interim charter. The committee, made up of well-respected Somalis, could have recommended the adoption of the 1960 constitution with some amendments but instead drafted a Transitional National Charter that was predicated on Somalia's 1960 constitution. Interestingly, this charter called for the Transitional National Government to prepare a new constitution during its mandate.² That was way too ambitious. The Transitional National Government not only missed the deadline, but collapsed before 2003.

The Inter-Governmental Authority on Development (IGAD) sponsored, and Kenya hosted, a reconciliation conference that resumed the constitution-making process. Article 71(9) of the Transitional Federal Charter mandated the Transitional Federal Government to prepare a federal constitution within its first thirty months.³ As a result, the government established a fifteen-member committee that would draft a constitution for Somalia. Political and security impediments forced the president of Somalia, Abdullahi Yusuf Ahmed, to resign in 2008, paving the way for another reconciliation conference in Djibouti in 2009, which resulted in the merger of the Transitional Federal Government and the Alliance of the Re-liberation of Somalia. Subsequently, the government increased the constitution commission to thirty members. In 2010, the Constitution Commission submitted a draft to the leadership of the federal government. However, this draft had undergone many revisions. Through a questionable process and in a hasty manner, six signatories and then the Special Representative of the Secretary-General of the United Nations signed the agreement that led to the current provisional constitution. On August 1, 2012, an advisory constituent assembly provisionally adopted the Transitional Federal Constitution without any changes.⁴



The mistrust among political stakeholders and the secret and hasty process employed during the making and adoption of the constitution have made the Provisional Constitution of 2012 an incomplete one

The mistrust among political stakeholders and the secret and hasty process employed during the making and adoption of the constitution have made the Provisional Constitution of 2012 an incomplete one. Moreover, in Articles 133 and 134, the Provisional Constitution established the Parliamentary Oversight Committee (OC) and the Independent Constitutional Review and Implementation Commission (ICRIC) for the purpose of reviewing the document. The Oversight Committee consists of five members from each chamber of the parliament while each federal member state sends one member.

2. See Article 30, Transitional National Charter, adopted in 2000.

3. See Article 71(9), Transitional Federal Charter, adopted in 2004.

4. For a detailed analysis of the process of constitution-making, see Afyare Elmi, "The Limits of the UN-Controlled Constitution-Making Process," <https://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/>. See also Mohamed Isse Hussein, Ahmed Ali M. Khayre, and Abdi Ahmed Siyad, "Review of the Somali Provisional Constitution: Appraisal of Contentious Articles and Contested Issues," SSRN 3397637 (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397637.

The ICRIC comprises five experts selected by the FGS and one member from each of the existing federal member states, but the federal member states never had the opportunity to appoint their members to this commission. The ninth parliament (2012–2016) had only one functioning chamber (the House of the People), which elected the ten-member Oversight Committee.⁵ Additionally, President Hassan Sheikh Mohamud’s government established the ICRIC Technical Commission in 2014.⁶ In 2016, the ninth parliament’s Oversight Committee revised the constitution and presented it to the parliament and to the National Leadership Forum. Since the terms of the government and of parliament were about to end, the National Leadership Forum decided to defer the constitution-review process to the tenth parliament.

However, in the latter part of 2016, Somalia moved from a unicameral to a bicameral legislature for the first time. The National Leadership Forum established the second chamber, the Senate, for the tenth parliament. As a result, the House of the People and the Senate have elected separate constitution committees of five members each. Then, these two committees joined forces under one leadership.⁷ They have received and discussed the three-option report from the previous Oversight Committee. Yet, the committees and the Somali government have dismissed the three-option report by the previous committees of the ninth parliament for political reasons that have not been explained. In other words, the parliament’s Oversight Committee, the Technical Committee, and the Ministry of the Constitution have “reinvented the wheel” and started the review process afresh. In 2020, the committees submitted a second review of the provisional constitution to the parliament and the government.



The second Oversight Committee reported that its revision added two new chapters, one new section, thirty new articles, 190 new clauses, and two schedules. Additionally, the Committee removed sixteen articles, sixty-five clauses, and two schedules

In their report, the second Oversight Committee of the tenth parliament explained its approach in reviewing the Provisional Constitution. It identified articles requiring technical revision (language and writing corrections), articles needing clarification, and articles requiring political agreement between the Federal Government of Somalia and the federal member states.⁸ The second Oversight Committee reported that its revision added two new chapters, one new section, thirty new articles, 190 new clauses, and two schedules. Additionally, the Committee removed sixteen articles, sixty-five clauses, and two schedules.⁹ Finally, the committee noted the three main challenges they faced while reviewing the constitution: the persistent political disagreement between the federal government and the federal member states, the security problems in the country, and budget-related issues.¹⁰

5. The members of the ninth parliament’s Oversight Committee were Maryan Arik Kassim, Ibrahim Salah Dayfallah, Mohamed Abdi Yusuf, Abdullahi Sheikh Ismail, Bibi Khaliif Mohamed, Yakub Ali Mohamed, Yasin Abdi Sed, Fawziya Yusuf Haji Adam, Bashir Addow Alasow, and Ahmed Mayow Abdulle.

6. On August 5, 2012, the ninth parliament passed the legislation that established the ICRIC (REF: 618-XG-08-13). Article 4 states that the Committee will consist of five members and that federal member states will each send one delegate who will become a member of the committee. For a short, useful background, see Jan Amilcar Schmidt, “The Somali Constitutional Review Process: Taking Stock,” 2017, <https://constitutionnet.org/news/somali-constitutional-review-process-taking-stock>.

7. The members of the tenth parliament’s Oversight Committee were five senators (Abdi Hassan Awalle, Hussein Sheikh Mohamud, Abdullai Sheikh Ismai Fartaag, Iftin Hassan Baasto, Abdikarim Mohamed Hassan) and five MPs from the House of the People (Burhan Adan Omar, Osman Haji Ali, Mohamed Abdullahi Kamil, Said Mohamed Heyd, and Sayid Ali Abdulkadir).

8. See the report of the second Oversight Committee (2020) chaired by Senator Abdi Qeybidd. Senator Qeybidd’s committee submitted the document to the political leaders in 2020. Although those interested can obtain from the Somali politicians, the report has not yet been publicly released.

9. Report of the second Constitution Oversight Committee, 2020, p. 16.

10. Ibid, p. 24.

3. Note on the Methods Used for This Study

Research for this study combined content analysis of the primary documents with select interviews and secondary resources. The study relies on primary documents, reports, and draft constitutions produced by different committees since 2000: the 2000 Transitional National Charter; the 2004 Transitional Federal Charter; the 2012 Federal Provisional Constitution; and the two drafts produced by the committees of the ninth and tenth parliaments in 2016 and 2020, respectively. Also used were the constitutions of all federal member states and interviews with some of the experts on constitution development in Somalia; participants were selected based on their knowledge of and involvement in the constitution process. Finally, where necessary, secondary literature on this subject was consulted.

4. Two Review Committees: Conflicting Prescriptions on the Contentious Issues

This section summarizes the reports and the drafts of the first Oversight Committee of the ninth parliament (2016) and the second Oversight Committee of the tenth parliament (2020). As mentioned above, the first committee (2012–2016) consisted of ten members of the House of the People plus the six representatives of the federal member states. The second committee consisted of five members from each chamber of the Somali parliament – that is the House of the People and the Upper House – plus the six representatives of the federal member states. This change resulted from the fact that Somalia’s National Leadership Forum, which led the 2016 political dispensation, formed the fifty-four-member Upper House.

Even though it made numerous changes, the first Oversight Committee of the ninth parliament identified nine contentious issues of which seven were major: power-sharing between the FGS and federal member states; resource/revenue sharing; powers of the president and prime minister; role of the senate; status of the capital city; citizenship; and the design of the judiciary. For the first Oversight Committee, these areas required political agreement among the stakeholders. The second two-chamber Oversight Committee increased the number of contentious issues, adding five more for a total of fourteen issues.

Although the first Oversight Committee produced three options in three separate documents, it stated a preference for the first option, which prescribed three levels of federation: the federal government, regional governments, and local governments.¹¹ In 2020 the second Oversight Committee agreed and recommended the establishment of these three levels of the government.¹²

11. See Article 48 of the report of the first Committee in 2016. This report explains the rationale behind the Committee’s inclusion of the third local level in their proposal.

12. See Article 48 of the second Oversight Committee (2020). The committee provides a similar explanation.

In terms of power-sharing, the current provisional constitution gives the federal government four exclusive functions: foreign affairs, national defense, citizenship and immigration, and monetary policy.¹³ In 2016 the first Oversight Committee proposed the expansion of federal powers and allocated policy-making and policy implementation in most of the important functions, such as education, health, environment, culture, air and sea transportation, telecommunication, taxes, rivers and lakes, ports, boundaries, inter-state commerce, protection of rights, power to declare emergencies, inventions and copyrights, and bearing arms.¹⁴ In Article 55, the first Oversight Committee allocated limited powers to the states: establishing police, administering land, levying taxes, enacting and administering state constitutions, and all residual powers.¹⁵ The first Oversight Committee suggested that the term “Regional States” be used instead of “Federal Member States,” and recommended the title “governor” instead of “president.”¹⁶

The second Oversight Committee, appointed by the two-chambered parliament in 2020, disagreed with the first Committee regarding power-sharing between the levels of the government. The second committee produced two schedules listing powers of the Federal Government of Somalia and those of the federal member states. Overall, the second Oversight Committee gave more substantive powers to the federal member states. Under Schedule 2(A), the second Oversight Committee allocated important powers to the federal government. Among these were foreign affairs, national defense, citizenship and immigration, currency/monetary policy, ports, postal services, and copyright issues. On the other hand, this Committee allocated substantive powers to the federal member states; these powers included those regarding education, health, agriculture, livestock, fisheries, ports, non-international airports, culture, environment, consumer affairs, issuance of transportation licenses, humanitarian affairs, and elections.

With respect to natural resources, Article 44 of the current provisional constitution states that relevant stakeholders will negotiate on the issue. However, the first Oversight Committee of the ninth parliament proposed that the “natural resources of the Federal Republic of Somalia shall be national property and used in a sustainable way and for the benefit of all.”¹⁷ Furthermore, this Committee proposed the national legislature to “enact a law providing for the necessary measures ensuring the sharing process of the use of natural resources based on sustainability and in the public interest.”¹⁸

13. See the Provisional Constitution of 2012, Article 54. https://parliament.gov.so/images/Downloads/Dastuurka_ku_meelgaarka_SOM_03092012-1_2.pdf

14. See the Option 1, Draft of the first Oversight Committee chaired by Maryan Arif Qasim; Article 54 of this draft lists twenty-one exclusive powers of the federal government.

15. Ibid. Article 55 lists seven exclusive powers of the federal member states.

16. Ibid. Article 6(4) and Article 51(4), which proposed the use of “regional states” instead of “federal member states” and “Governors” instead of “Presidents.”

17. Ibid. Article 42(1).

18. Ibid, Article 42(3).

Finally, the committee encouraged the competent authorities to ensure a “fair share” of the natural resources between the levels of governments. Interestingly, the view of the second Oversight Committee is ambiguous on this important issue as well, although it added one article stating the “Federal Government of Somalia should ensure that the federal government, regional governments, and local governments will share the natural resources in a fair manner.”¹⁹

According to the Provisional Constitution, the two-chamber parliament elects a president and then the president appoints a prime minister. The House of the People has the power to give a vote of confidence to the Council of Ministers. Unlike presidential powers authorized by the 1960 Constitution, the president could no longer dismiss the prime minister; this created political conflict between presidents and prime ministers of several administrations. Keeping this in mind, in their proposed review, the preferred option of the first Oversight Committee merged the two executive offices into one, thus making the president both the head of state and the head of government. In other words, with this unified executive, the parliament will elect the president and give a vote of confidence to the Council of Ministers. In case the Council of Ministers loses the vote of confidence, the president will remain in power. The president can be removed from office through impeachment.²⁰ In terms of eligibility, those with Somali parents and spouses can seek the presidency. An elected president with dual citizenship must renounce the second citizenship before court after election.

The second Oversight Committee kept the divided executive institutions. Under their recommendations, the country will retain a semi-parliamentary system where the parliament elects a president, and the president appoints a prime minister. However, the Committee’s draft report states that the president must appoint a prime minister from the majority political party or coalition. Moreover, the second Oversight Committee proposed that those with dual citizenship should not be allowed to run for president without first renouncing the second citizenship prior to the election. Finally, the second Oversight Committee increased the mandate period from four years to five years.²¹

With respect to the design of the parliament, the Provisional Constitution established a bicameral legislature consisting of the House of the People and the Senate. Interestingly, the first Oversight Committee, in its preferred option, proposed reversing this and prescribed a unicameral legislature. In Chapter Six, the Committee gave all legislative and oversight powers to the House of the People. The rationale for this recommendation was that it would enhance the effectiveness and the efficiency of the legislative process.

19. See Article 42, p.44 of the draft produced by Gen. Qeybdiid’s committee in 2020.

20. See the proposed new design in Option 1, Article 72 of the report of the first Constitution Review report (2016).

21. See Article 90(1) of the 2020 Committee report.



In the explanation given in Chapter Six, the first Oversight Committee stated that “the experienced crisis within the executive (between President and Prime Minister) could also happen within the legislature if two Houses are established. It may create unnecessary disputes and delays in the legislation process if there are parallel functions and powers of two Houses.”

In the explanation given in Chapter Six, the first Oversight Committee stated that “the continued crisis within the executive (between President and Prime Minister) could also happen within the legislature if two Houses are established. It may create unnecessary disputes and delays in the legislation process if there are parallel functions and powers of two Houses.”²² In fact, this happened during the tenth parliament when the two houses conflicted numerous times.

The second Oversight Committee disagreed. It not only kept the upper chamber, but increased its powers. For instance, in addition to its legislative powers, the Senate will have to approve the appointment of the leadership of the security forces, and it will have to ratify international agreements. In other words, the Senate enjoys most of the powers of the House of the People.²³ Additionally, the second Oversight Committee takes a position on the local-diaspora competition for power. It limited the rights of those holding dual citizenship in becoming president, prime minister, speaker or and deputy speaker of the two chambers of the parliament.²⁴ Interestingly, most of the Oversight Committee members are not from the diaspora. This is not helpful. In fact, it furthers the polarization of the society when a particular group captures the constitution-making or constitution review and uses it against others whom it is competing.

Moreover, the status of the capital has been one of the most contentious issues. Article 9 of the Provisional Constitution states that Mogadishu is the capital of Somalia, stipulating that its status will be settled through the constitution-review process and that the parliament shall “enact a special law for the issue.” The first Oversight Committee of the ninth parliament examined three options: Mogadishu as part of a regional state, Mogadishu as a district under the federal government, and Mogadishu as a regional state. The first Oversight Committee recommended that Mogadishu becomes a federal member state to “guarantee the political rights of its local population.”²⁵ The second Oversight Committee did not take a position on this important issue. Instead, it reproduced the three options and then left the federal member states and the federal government to reach a political agreement on the status of the capital.²⁶

The Provisional Constitution unequivocally states that citizenship falls within the jurisdiction of the Federal Government of Somalia, although most federal member states create their own citizenships.

22. See the comments on Article 56, Option 1, written by the first Committee (2016).

23. See Article 73 of the 2020 Review Committee Report.

24. Ibid, Articles 70 and 75.

25. See Article 9 of the first Review Committee Draft (2016). See also the Committee’s explanation of Article 9.

26. See Article 9 of the second Review Committee Draft (2020).

The first Oversight Committee expanded this by adding clarification phrases. For instance, it added Article 8(4) that states “every child born to a father or a mother with Somali citizenship has a right to Somali citizenship.”²⁷ This is an important addition as the article allows Somali women to pass citizenship to their children. Interestingly, the second Oversight Committee of the tenth parliament disagreed and dropped that clause. It did not provide any explanation as to why it did not allow women to pass citizenship to their children. To their credit, the second oversight committee has included the gender quota in the revised draft but they should retain the article that allows women to pass citizenship to their children.

Furthermore, the Oversight Committee of the ninth Parliament recommended an integrated judiciary system where the federal government would “finance and administer both federal laws and regional state laws.” In terms of court structure, the Committee proposed the following: “Constitutional Court, a Supreme Court, Courts of Appeals (in the capitals of Regional States) and first instance Regional and District Courts.”²⁸ The second Oversight Committee agreed with the first Oversight Committee in the establishment of an integrated justice system.²⁹ The rationale for recommending this option, according to the Committee, was to minimize jurisdictional dispute and society’s experience with this structure. In terms of structure, both committees created a constitution court, high courts at the regional level, an appeals court, and a first instance court.

The first Oversight Committee proposed a rigid constitution amendment formula. It recommended that the House of the People initiate the process. Then, the parliaments of the regional states would vote on the amendment; this would be followed by a two-thirds vote of the House of the People. Interestingly, since the first Oversight Committee, in its preferred option, recommended a unicameral legislature, the assumption here is that there is no upper house. On the other hand, for the second Oversight Committee, the federal parliament (House of the People and Upper House) and the parliaments of the regional states are empowered to amend the constitution.³⁰

Besides the contested areas outlined above, the two committees disagreed on several issues. For instance, in 2016 the first Oversight Committee proposed changing the national anthem to the song “Soomaaliyey Toosoo” while, in 2020, the second Oversight Committee recommended “Qoloba Calankeed.”³¹

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27. See Article 8(4), Option 1 of the first Review Committee Draft (2016).

28. Ibid. See the Introduction. The committee explains the structure of the court system and provides the rationale for adopting that option.

29. See Article 108 of the Committee Draft (2020).

30. See the second Constitution Review Committee (2020) Draft, Chapter 16

31. See Article 6(3) of the first Oversight Committee Draft Constitution (Option 1), 2016; see also Article 6(3) of the second Oversight Committee’s Draft Constitution, 2020.



The second Oversight Committee recommended the establishment of a committee that would harmonize the constitutions of the regions with that of the Federal Government of Somalia. Keeping the Somaliland question in mind, the Committee added a new clause that states the constitution will remain provisional until the unity of the country is completed

The first, “Soomaaliyeey Toosoo,” is the song preferred by the liberation movement for the mobilization of the people against colonialism. The second one, “Qolobaa Calankeed,” praises and blesses the Somali Republic’s flag. As part of the review, Somalis should debate a suitable national anthem. Moreover, the first Oversight Committee suggested that the Constitution Court should determine whether a given law is consistent with Sharia but the second Oversight Committee was silent as to which body would adjudicate this matter. More importantly, the second Oversight Committee added a chapter on customary law. This is an important addition as most Somalis use customary law for resolving conflicts among individuals and communities. The second Oversight Committee recommended the establishment of a committee that would harmonize the constitutions of the regions with that of the Federal Government of Somalia.³² Keeping the Somaliland question in mind, the Committee added a new clause that states the constitution will remain provisional until the unity of the country is completed.³³

5. Federal Provisional Constitution versus the Constitutions of the Federal Member States

The Federal Provisional Constitution and the constitutions of the federal member states differ in many ways.³⁴ This study focuses only on the power-sharing aspects. The FPC allocates four exclusive powers to the Federal Government of Somalia.³⁵ These powers are foreign affairs, citizenship and immigration, monetary policy, and national defense. The FPC grants consultation and representation rights to the federal member states. On the other hand, according to their constitutions, the federal member states contest all four exclusive powers legally and practically. In other words, their constitutions have provided similar competencies to their parliaments and governments.



Federal member states have conducted aspects of foreign relations independently. In fact, some have legalized (in their constitutions) the powers to perform legislative and executive functions in regulating aspects of the foreign affairs of their respective states

The Federal Government of Somalia has the exclusive power to conduct the foreign relations of the state. The FPC demands that federal government consult with the member states when executing foreign relations. Additionally, in the event an agreement affects one or more member states, the affected states must be represented in the delegations.³⁶ In contrast, in practice all of the federal member states have conducted aspects of foreign relations independently. In fact, some have legalized (in their constitutions) the powers to perform legislative and executive functions in regulating aspects of the foreign affairs of their respective states. For instance, the parliaments of Puntland³⁷ and Jubbaland³⁸ have the power to ratify international agreements.

32. See Article 155 of the second Constitution Review Committee Draft, 2020.

33. Ibid, Article 158(2).

34. For those interested Mohamed Riyad M. Almosly, “Comparative Analysis of the Constitutions of the Federal Member States of Somalia and the Federal Provisional Constitution of Somalia,” Max Planck Institute Report, 2020. The Max Planck Institute has produced a comprehensive report that covers all aspects

35. See Article 54 of the Federal Provisional Constitution.

36. Ibid, Article 53(2).

37. Puntland State’s constitution has several articles that explicitly empower different organs in international affairs. Article 20 allows Puntland to grant asylum and implement extradition agreements. Article 64(4) authorizes the parliament to ratify international agreements. Article 80(8) allows the president to negotiate and sign an international agreement.

38. Article 31 of Jubbaland’s constitution empowers the parliament to ratify international agreements. The parliament has the power to approve debt agreements that Jubbaland enters into with international partners.



All federal member states have ministries that are tasked to deal with development and international cooperation. The presidents of the member states regularly travel to overseas capitals and conduct international relations – often without the knowledge or approval of the federal government

Additionally, the presidents of these states can enter international agreements, although the Jubbaland constitution is not clear on this. Galmudug,³⁹ South West,⁴⁰ and Hirshabelle commit to respecting international agreements, but their constitutions do not grant their president and parliament the powers of entering and ratifying international agreements.

Moreover, all federal member states have ministries that are tasked to deal with development and international cooperation. The presidents of the member states regularly travel to overseas capitals and conduct international relations – often without the knowledge or approval of the federal government. Besides Somaliland, which has been pursuing secession since 1992, the presidents of Puntland, Jubbaland, Galmudug, South West, and Hirshabelle have traveled to Kenya, Ethiopia, and the United Arab Emirates without the consent of the federal government. The member-state leaders also meet with the international donor community and talk to them on various issues.

Furthermore, the constitutions of the federal member states contradict that of the federal government when it comes to citizenship and immigration. The federal constitution establishes Somali citizenship. It gives the Somali parliament the authority to legislate citizenship and immigration issues. On the other hand, Puntland and South West have established parallel citizenships and tasked their parliaments to legislate this area of competency.⁴¹ Galmudug and Hirshabelle, in substance, have also adopted a discriminatory system where they exclude Somalis from other regions by using the term “originate.”⁴² This means, for the four states above, only members of the clans that traditionally settled in that state or those who obtain their citizenship or residency have political rights – that is the rights to elect and be elected.

Jubbaland is unique in its approach. It created a “Jubbalander” citizen, and defines this as “any person who has resided in the State of Jubbaland for at least six consecutive months.”⁴³ The Max Planck Institute report points out that even non-Somali citizens can become Jubbalanders.⁴⁴ In practice most, if not all, of the federal member states limit the rights of Somali citizens who are not members of clans that settled in their states.

39. We found three constitutions for Galmudug State that were prepared in 2013, 2015, and 2018, respectively. The first, the 2013 constitution, was made for Galmudug when it represented part of the former Mudug region; it is similar to that of Puntland in the powers and responsibilities provided to its parliament and executive. However, when the region expanded in 2015, delegates of the newly formed Galmudug approved a revised constitution. Again, when Galmudug and Ahlu-Sunna Waljama'a reached agreement, the two sides approved a revised constitution in 2018. After a violent conflict in 2021, the parliament decided to use the 2015 version. For this study, we will use the 2015 version. This revised version commits Galmudug to respect international laws and treaties to which Somalia's federal government is part. See Article 5(3) of Galmudug Constitution, 2015.

40. Like Galmudug, the South West and Hirshabelle states commit to respect international law. See Article 35 of the South West Constitution, 2014 and Chapter Seven of the Hirshabelle state constitution, 2016.

41. Several articles establish parallel citizenship and limit the rights and responsibilities of citizens from other regions. Article 35 of the Puntland Constitution states that citizenship can be obtained through legal means. During the pilot local elections in Qardho, Ufeyn, and Eyl, the Puntland government allowed hundreds of internally displaced citizens from other regions to vote. One council representative was elected to the Qardho city council. That said, the law establishes “Puntlander” citizens as including those from clans that originated in the region and residents who legally obtain citizenship. The residency requirement is five years. See also Articles 8 and 9 of the constitution of the South West state.

42. See Article 30(4) of the Hirshabelle constitution, 2016. See also Article 29(4) of the Galmudug constitution, 2015.

43. See Article 5(1 and 2) of the Jubbaland constitution.

44. For detailed discussion, see Max Planck Institute Report, “Comparative Analysis of the Constitutions of the Federal Member States of Somalia and the Federal Provisional Constitution of Somalia,” 2020, p. 13.



Third, according to the Federal Provisional Constitution, Somalia's federal parliament has the competency to legislate while the Central Bank has the power to regulate the country's monetary policy



The FPC also allows federal member states to establish their own police. However the practice and the constitutions of the member states contest these federal powers. Member states have created intelligence forces, emergency forces, coastal guards, border police, custodial forces, and/or dervish forces

Third, according to the Federal Provisional Constitution, Somalia's federal parliament has the competency to legislate while the Central Bank has the power to regulate the country's monetary policy. But the member states contest this, giving the authority to legislate and regulate the financial policy of their states to their own parliaments and governments. For example, the Puntland and South-West constitutions have established their own central banks.⁴⁵ In particular, according to its constitution, the Puntland parliament has the power to issue currency.⁴⁶ The member states have also empowered their executive bodies to manage economic policy and to collect various taxes from their residents.

Finally, the Federal Provisional Constitution grants the federal government the powers to legislate and regulate the country's national defense and to create a police force, armed forces, intelligence services, and prison forces.⁴⁷ The FPC also allows federal member states to establish their own police.⁴⁸ However the practice and the constitutions of the member states contest these federal powers. Member states have created intelligence forces, emergency forces, coastal guards, border police, custodial forces, and/or dervish forces.⁴⁹

Furthermore, Article 54 of the Federal Provisional Constitution states that the Federal Government of Somalia and federal member states will negotiate on the "allocation of powers and resources."⁵⁰ To date this negotiation has not happened. Yet, each level appropriated as many functions and powers as possible. The federal government has enacted a great deal of legislation on multiple issues over the last eight years. For example, the petroleum law is a recent controversial bill passed by the central government. On the other hand, some member states (particularly the more developed state of Puntland) have enacted their own laws, although the negotiation between the two levels has not taken place yet.

Besides the constitutions, actual practice reveals that the Federal Government of Somalia and the federal member states clash on almost every other aspect of governance. This study also examines the Council of Ministers of the two levels of the government and found that these two jurisdictions seek to create duplications in most institutions. The central government and the member states have parallel institutions that work on security, finance, development, energy, agriculture, livestock, fisheries, ports, and other areas of competencies. The Max Planck Institute's comparative analysis report argues that some of the member states, in some cases, do not "explicitly" recognize the supremacy of the Federal Provisional Constitution. According to the report, "although Article 4(1) of the FPC stipulates that 'After the Sharia'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country,' the supremacy of the FPC was not explicitly recognized by all Constitutions of the FMS"⁵¹

45. See Article 109 of Puntland constitution, 2012. See also Article 58e of South West state's constitution, 2014.

46. See Article 64(20) of Puntland Constitution, 2012.

47. See Article 126(1) of the Federal Provisional Constitution, 2012.

48. Ibid. Article 126(2).

49. For detailed discussion, see the Max Planck Institute's Report, 2020, p. 55–56. See also the constitutions of the federal member states of Puntland, Galmudug, Hirshabelle, South West, and Jubbaland, which create different types of forces.

50. See Article 54 of the Federal Provisional Constitution of Somalia.

51. See Max Planck Institute Report, 2020, p. 7.

6. Analyses: Process Matters

During the transition period, the six signatories highjacked the process, drafting and imposing the current provisional constitution through “haste” and a “secret and expedient process.”⁵² This compromised the quality and the legitimacy of the document, and the suitability of the institutions and processes it established. At the end of that process, the signatories agreed to establish a constituent assembly that would temporarily ratify the constitution. That last step could have been used as a corrective measure, had the signatories provided the constituent assembly with the authority to make changes. Instead, the constituent assembly became a useless body since their observations were put aside. The six signatories controlled the process to the extent that they dictated that the final document was the one they had agreed upon and they (the six signatories) initialed every page.

The second process started as soon as the ninth parliament was elected in 2012. The House of the People elected ten MPs in 2016 for the first Oversight Committee, which was tasked with reviewing the Federal Provisional Constitution.⁵³ Moreover, in 2014, the government appointed the technical ICRIC as well.⁵⁴ As constitutional scholar Lorianne Toler has observed, “excluding groups, especially elites, seems to reliably result in poor outcomes.”⁵⁵ Since 2014 these two committees (consisting of about twenty individuals) have monopolized the process of reviewing the provisional constitution. In other words, successive committees failed to create national ownership of the constitution.

Finally, federal member states have used separate constitutional development processes. Four months before the finalization of the FPC, Puntland State drafted its constitution, which was adopted through a constituent assembly in 2012.⁵⁶ Additionally, four more states emerged at different times: Jubbaland in 2013, South West in 2015, Galmudug in 2015, and Hirshabelle in 2016. As at the national level, groups and/or individuals within each of these states have dominated the constitution-making of each region. Interestingly, even though the national government has installed or assisted these four states, it seems that it had no role in drafting the constitutions of the states it helped establish. Thus, the constitutions of the federal member states often contradict the Federal Provisional Constitution.

As reflected in the literature on constitution-making and constitution review, the process determines the acceptability of the outcome and the overall legitimacy of the constitution itself.⁵⁷

52. See Afyare Elmi, “The Limits to UN-Controlled Constitution-Making,” 2012.

53. Since the Upper House had not been established in 2012, the House of the People elected all ten members. Maryan Arif Qasim became the chair of the first review committee in 2012. The committee produced three drafts (Option 1, Option 2, and Option 3); they preferred Option 1.

54. The FGS passed the establishment law for the Independent Constitution Review and Implementation Commission (ICRIC) in 2014 and selected five members from outside the parliament. Asha Gelle became the chair of the committee. When she resigned, Dr. Mohamed Dahir Afrah became the chair; he passed away in 2021.

55. Lorianne Updike Toler, “Mapping the Constitutional Process,” *Cambridge International Law Journal* 3, no. 4 (2014), p. 1284.

56. A constituent assembly of 478 members ratified the Puntland constitution in April 2012. See Interpeace, “A Historic Moment: Puntland’s Constitution Now Ratified,” <https://www.interpeace.org/2012/04/a-historic-moment-puntland-s-constitution-now-ratified/>.

57. See Max Planck Institute Report, 2020.

The scholar Bereket Salassie has stated that “process and product are dialectically linked: the ends prescribe the means, and the means impinge on the ends.”⁵⁸ Brandt, Cottrell, Ghai, and Regan have identified four distinct elements, deemed as necessary ingredients for a successful constitution-making process: inclusivity, public participation, transparency, and the use of local experts.⁵⁹ Toler, after comparing eighteen constitutions, came to a similar conclusion. Besides transparency, inclusivity, participation, and the use of local experts, Toler identified two more elements for a successful constitution-making process: promise-keeping and a realistic timeframe.⁶⁰ These basic process-related frameworks have been used in analyzing Somalia’s constitution-making and the constitution-review process.

Finally, Jon Elster, a leading expert in constitution-making, writes in his comprehensive study: “Constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures. Nor should the legislature be given a central place in the process of ratification.”⁶¹ Unfortunately, in Somalia, a few politicians monopolized the constitution-making process. On the other hand, through the Oversight Committee, the legislature has controlled the constitution-review process. Elster has observed that “unicameral and bicameral constituent assemblies will tend to create, respectively, unicameral and bicameral constitutions – a prediction that is largely born out.”⁶² In Somalia, this prediction was true as the first committee (under a unicameral legislature) recommended the elimination of the senate while the second review committee (under a bicameral legislature) empowered the second chamber.

7. Political Exclusion in the Constitution-Making Process

At the political level, exclusion from the constitution-making process manifests itself in two ways: regionally and nationally. Some regional political actors consider the FPC to be incomplete and nonbinding; therefore, its supremacy over regional constitutions is yet to be conceded. From this viewpoint, the constitution-making process was not inclusive as few politicians controlled it. Also, the constitution-review process has not created an inclusive platform for the competing political forces. Different groups/individuals that captured the constitution-making and constitution-review processes have instrumentalized them in excluding the views of their rivals. Some federal member states have protested that they have been locked out of the process; the result is the confinement of the constitution to a very few cliques in a process marred by mistrust and secrecy. To the excluded groups, the oversight committees seem to have been acting as if they had been entrusted with a “classified document.”⁶³

58. Selassie, Bereket Habte, “Framing the State in Times of Transition: Focus on Five Core Values,” *Journal of Third World Studies* 28, no. 1 (2011), p. 21.

59. Brandt, Michele, Jill Cottrell, Yash Ghai, and Anthony Regan, *Constitution-Making and Reform: Options for the Process*, Geneva: Interpeace (2011).

60. Toler, Lorianne Updike. “Mapping the Constitutional Process,” *Cambridge International Law Journal* 3, no. 4 (2014), p. 1260–1286.

61. Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal* 45 (1995), p. 395.

62. *Ibid.*, p. 381.

63. Interview with an expert, Nairobi, Kenya, October 2021.

Rather than making the deliberations within the constitution-making process as inclusive, transparent, and open as possible, different committees opted for a clandestine constitution-review process. This aspect has been largely attributed to the domination of the Oversight Committee and the powerlessness of the Independent Constitutional Review and Implementation Commission.

In this regard, the importance and benefits of inclusivity in all phases of the constitution-making process – such as the representation of various political actors in decision-making – has been ignored.⁶⁴ The confinement of the process to a few individuals has resulted in tendencies to sabotage its legitimacy and to finalize the constitution at the elite level. In fact, comparative evidence suggests that the success of any constitution lies in the inclusivity of competing elites across the political spectrum and of various segments of the society – a cardinal rule that has not been followed in Somalia’s constitution-making process. More importantly, inclusivity increases the degree of legitimacy in the process, paving the way for acceptability of the constitution.

On the other hand, the federal parliament of Somalia failed to put the constitution-making activities on the national political scene. The two oversight committees did not initiate debates on the slow-moving process. Comparative studies of constitution-making reveal that exclusion of political actors and other relevant segments of the society has the potential to unravel the outcome, a prospect that Somalia might not escape unless the current trajectories of constitution-making and review are reconsidered in line with the principle of inclusivity.

Andrea Bonime-Blanc, an expert on global strategic governance, argues that constitution-making is laden with political activities, rigorous parliamentary debates, elite bargaining, agreements, and disagreements between various groups and leaders.⁶⁵ In the case of Somalia, these characteristics of constitution-making are by and large absent. Political actors are disengaged from dialogue on contentious issues and the whole process attracts little public attention. It is as if the constitution-making affair is a sideline activity, an isolated event and not a national process.

The exclusion and marginalization of citizens, women’s groups, civil society, diaspora communities, and regional states has damaged the credibility and legitimacy of Somalia’s constitution-making and constitution-review processes. One example that illustrates the importance of including all stakeholders is the difference between the 2016 and 2020 review reports regarding whether women and men are equal in passing citizenship to their children.



The exclusion and marginalization of citizens, women’s groups, civil society, diaspora communities, and regional states has damaged the credibility and legitimacy of Somalia’s constitution-making and constitution-review processes

64. Some of the interviewees for the study argued that the Oversight Committee intended to include all groups, but the political atmosphere did not allow for this.

65. Andrea Bonime-Blanc, “Constitution-Making and Democratization: Spanish Paradigm,” in Miller, Laurel E., and Louis Aucoin, eds., *Framing the State in Times of Transition: Case Studies in Constitution Making*, US Institute of Peace Press, 2010. Chapter 15.

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While polarization is inherently embedded in constitution-making, Somalia's case is unique. Avenues to air communal aspirations or to express political views and suggestions on the constitution were not utilized

In 2016, prominent women were members of the Oversight Committee. Maryan Arif Qassim chaired the first Oversight Committee and Fawzia Yusuf Haji Adam, former deputy prime minister and minister of foreign affairs, was a member. This committee affirmed the equality of genders by adding a clause allowing both women and men to pass citizenship. In contrast, the second Oversight Committee did not add a clause allowing both genders to pass citizenship to their children. The presence of active and competent women on the 2016 committee was clearly beneficial.

While polarization is inherently embedded in constitution-making, Somalia's case is unique. Avenues to air communal aspirations or to express political views and suggestions on the constitution were not utilized. Additionally, the assumption that the constitution is a principal authority in governance has been neither propagated nor incorporated into the process. Judging by the assertion that the constitution is the principal authority, the underpinning ideal is that those the constitution seeks to govern must have a say in how it is formed. In the context of Somalia's current constitution-making, these ideals have been disregarded, resulting in widespread stakeholder disinterest in the entire process.

8. Absence of Public Participation and Lack of Transparency

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This public participation happens in three ways: First, organized segments of the society – such as civil societies, women, youth, and minority groups – are invited to represent the public voice and interest. Second, commissions and parliamentary committees directly engage the public, either formally or informally. Third, a constitutional assembly is drawn from the citizens

Comparative studies on constitution-making processes define public participation as “the public's ability to express its views in a format people believe could influence the constitution's substantive content.”⁶⁶ This public participation happens in three ways: First, organized segments of the society – such as civil societies, women, youth, and minority groups – are invited to represent the public voice and interest. Second, commissions and parliamentary committees directly engage the public, either formally or informally. Third, a constitutional assembly is drawn from the citizens.

In Somalia, according to Jan Amilcar Schmidt of the Max Planck Institute for International Peace and the Rule of Law, the Independent Federal Constitution Commission (IFCC) has conducted some civic education and public consultation by employing BBC Media Action, Star FM, Universal TV, and Souktel.⁶⁷ As a result, the IFCC received “many comments and recommendations relating to the draft constitution through phone calls and personal follow-up meetings, information sessions, and workshops...”⁶⁸ Participants gave their views on the ownership of the process, the role of Sharia, citizenship, federalism, the status of Mogadishu, women and youth, and the territory of the Somali Republic.

66. See Max Planck Institute Report, 2020.

67. Jan Amilcar Schmidt, “Mission Impossible? Opportunities and Limitations of Public Participation in Constitution-Making in a Failed State – The Case of Somalia,” in *Public Participation in African Constitutionalism*, p. 194–209, Routledge, 2018, p. 199.

68. Ibid, p. 199.

Schmidt concludes that the six signatories captured the constitution-making process and ignored the results of the public consultation. He writes that “the results of the extensive public outreach and consultations campaign did not translate into the content of the final constitution, which certainly did not serve its legitimacy and acceptance.”⁶⁹ Edmond Efendija, an expert who advised the different committees, agreed and wrote that “the Provisional Constitution was perceived as a document imposed from outside, not Somali-owned.”⁷⁰ Had the views of the public been incorporated, Somalia would have made significant progress in finalizing the constitution.

The most important deficiencies in Somalia’s constitution-making and review processes are failures to conduct public consultation⁷¹ and/or, in the case of limited consultation, ignoring the results. In particular, the avenues of ensuring public participation in the constitution-review process have not been utilized. The two oversight committees did not share educational materials or information about the process with public. Consequently, the constitution-review debate has not been thrust into the national limelight. It remains a privatized and a project exercise with no public face.

The project nature and privatization of the constitution have continued for a long time. Since 2012, there have been limited open consultations, comments, or editorials about the content of the constitution. Public scrutiny of any kind is nonexistent. The constitution-review commissions and parliamentary committees have confined the review process to themselves, failing to take the debate beyond their secluded and often unnoticed sessions. They have not created a space for participants or for expanding the consultation process, so the public has no means of knowing what progress has been made in the constitution-review process. Meetings of the review commission or the parliamentary committees are not televised or publicized. The advertisements, media debates, and political and social commentaries rarely appear on the screens of state-owned or private media.

Further, the agencies and donor communities that financially supported constitution-making and constitution review processes have not pressured the oversight committees to expand the consultation and transparency aspects of the process. It seems that the fact that a constitution is a social contract, one owned by the citizens, is inapplicable in the drafting, adopting, or reviewing stages of the Somali constitution-making process. The result is a loss of interest in the whole exercise. Ironically, many from the political class have also lost interest because they perceive the whole process to be a donor project. The project nature and the privatization aspects of the constitution-making process have also given the political elite the pretext to bypass its content and contest its legality.

69. Ibid, p. 206.

70. Edmond Efendija, *The Implementation of the Provisional Constitution of Somalia from 2012–2016: A Critical Assessment*, 2016, p.26; report on file with the Heritage Institute.

71. The Oversight Committee’s final report includes a section summarizing its engagements with civil society, federal member states, organized groups and the parliament. The Committee also argues that it has conducted civic education for the public. See section five of the Oversight Committee’s Report on the Second Phase of the Review Process. There are a few messaging clips (about two minutes,) some talk shows, two radio dramas, and one documentary. Universal TV, Somali TV, and Dalsan TV have carried these messaging programs. Based on what literature considers public consultation, this is far from sufficient.

Experience elsewhere, however, indicates that public participation in constitution-making fosters a sense of ownership and enhances the legitimacy and effectiveness of the constitution even where there has been a minimal political will to implement it.⁷² This is to say that public participation and transparency add layers of legitimacy, credibility, and substantive content to the constitution. More importantly, public participation in the constitution-making and constitution-review processes is not an option; it is a necessary ingredient in state building. In post-conflict countries like Somalia, the public voice is necessary, for it provides democratic cover to the constitution-making process.⁷³

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Public engagement in this sense creates a platform for what Alexander Hudson describes as ‘legitimization from below.’⁷⁴ Such legitimization entails citizen participation in the drafting or the reviewing stages of the constitution-making process through petitions, public consultations and debates, and written and oral submissions

Public engagement in this sense creates a platform for what Alexander Hudson describes as ‘legitimization from below.’⁷⁴ Such legitimization entails citizen participation in the drafting or the reviewing stages of the constitution-making process through petitions, public consultations and debates, and written and oral submissions. In Somalia, the roles of civil societies and the public are hardly acknowledged in the form of public hearings or consultations. The social and the political base of the constitution-making process is also extremely limited. This implies that the process falls outside of the tradition and the modern frameworks of constitution-making. The process is not premised on democratic negotiations, neither is it mediated by political parties or by ideology-driven groups. It is not imposed authoritatively or adopted in revolutionary upraising.

Ideally, the parliament would have publicized the process, creating an alternative platform for public awareness and for political stakeholders’ engagement. The national parliament has not demanded transparency or accountability on the progress of the constitution-review process; ironically, it seems to have been excluded from the very same process it was entrusted to safeguard. Whether this exclusion stems from a collective disinterest in the constitution-making process is open to debate. But the federal parliament has not been an alternative avenue for a broad representation in midwifing the constitution-review process. In short, parliament’s absent role reduces transparency, delegitimizes the outcome, and falls short of creating a sense of national ownership in the country’s constitution-making process.

Like the state, the constitution-making process has not been extended beyond the confines of the fortified compounds and heavily guarded hotel lobbies in Mogadishu. The process has, therefore, lost credibility in the eyes of the public. The political class considers the constitution as a document that is incomplete and, to an extent, nonbinding. Additionally, the subsequent parliamentary oversight committees that reviewed the constitution have conducted limited public consultation.

72. Joanne Wallis, *Constitution Making during State Building*, Cambridge University Press, 2014.

73. Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq*, Columbia University Press, 2019.

74. Alexander Hudson, *The Veil of Participation: Citizen and Political Parties in Constitution-Making Processes* (Comparative Constitutional Law and Policy series), Cambridge University Press, 2021.

Conversely, the donor community has treated the constitution-making process as a development project. Comparative evidence attests that extensive public participation in the constitution-making process plays a positive role in reconciliation, reduces the temptation to politicize the process, and enhances legitimacy and state building. In this regard, constitution-making is intertwined with state building. The two are not separate, parallel processes. Instead, interdependent and public participation, democratic negotiations, and political compromises are integral parts of the process. In Somalia, the failure to create platforms for public participation in a transparent manner has eroded legitimacy and trust in the constitution-making process.

9. Conclusion

As Donald Horowitz argues, the objective of the constitution-making process is not to score points against a rival group. Instead, the goal is to establish institutions that advance durable democracy and reduce the chances of a return to violent conflict – competing groups are committing to live together for a long time. In this spirit, for all groups to commit to the constitution, Horowitz underscores the importance of including every group that could undermine its implementation. Additionally, models of consensus and compromise should be adopted for reaching important decisions. Horowitz writes, “In constitutional processes, compromise is the fallback criterion for decision when consensus cannot be achieved, and voting is the fallback criterion for decision when neither consensus nor compromise can be achieved.”⁷⁵ Unfortunately, Somalia’s constitution-making and constitution-review processes have failed to meet the basic standards for inclusion or for consensus and compromise.

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In 2012, the whole process was overseen by six signatories and the Special Representative for the United Nations Secretary-General for Somalia, creating the negative public perception that the constitution was indeed a foreign project imposed on the Somalis

As wisdom goes, “constitutions are chains imposed by Peter when sober on Peter when drunk.”⁷⁶ Since the establishment of the third republic in 2000, Somalia’s constitution-making process has been a never-ending project. From the transitional charters to the current provisional constitution, political mistrust and lack of public participation have dogged the process. Secrecy and confinement of all the constitution-making aspects to the whims of a few actors have derailed the completion of the constitution and eroded legitimacy. At the drafting stage, key actors excluded all other segments of society and did not conduct wider consultations. The constitution was hastily adopted without adequate national deliberation and without input from the various segments of civil society. In 2012, the whole process was overseen by six signatories and the Special Representative for the United Nations Secretary-General for Somalia, creating the negative public perception that the constitution was indeed a foreign project imposed on the Somalis.

75. Donald Horowitz, *Constitution Processes and Democratic Commitments*, New Haven: Yale University Press, 2021, p. 8.

76. Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal* 45 (1995), p. 384.

Subsequent parliamentary oversight committees and the Independent Constitutional Review and Implementation Commission that led the review process failed to bridge the political divide or to extend the constitution-review process to the people. In other words, the oversight committees, in particular, did not include all groups in reviewing the constitution. The exclusion of many groups, the contradictory recommendations of the successive commissions, the project nature, and the lack of parliamentary debates on the constitution cast doubt on the legitimacy of the constitution-making process. The most serious deficiency in the constitution-making process has been the absence of public participation, a deficiency that impedes democratic negotiations, reconciliation, and the state building process. In short, the practice of special interest groups that capture the constitution-making and constitution-review processes and instrumentalize these against their competitors must end if Somalia is to achieve a viable constitution that is respected by its people, now and in the future.

10. Recommendations

1. Political will is a key for finalizing the constitution. Somalia's political actors must prioritize the constitution-review process. This means negotiating in good faith, appointing competent individuals to the relevant committees, and accepting the input of organized groups and citizens. To this end, either the Office of the President or that of the Prime Minister must lead the constitution-review process.
2. For the country to have a permanent constitution, the parliament must find a way to expand the committees that are reviewing the constitution. This necessitates amending constitutional Articles 133 and 134 that established the Oversight Committee and the Independent Constitutional Review and Implementation Commission and other relevant articles. Citizen groups, civil society organizations, women's groups, diaspora communities, and emerging political parties must participate in the constitution-review process. Bringing these forces to the process will enhance the legitimacy of constitution-making and of state building.
3. To depoliticize the constitution review, parliament alone should not have the final say in reviewing the constitution. Final approval should be the responsibility of an empowered constituent assembly that includes delegates from states, civil society, political parties, diaspora communities, women's groups, youth, and professional organizations.
4. Those who are tasked to review the constitution must bring the constitution into the national limelight and create a platform for public participation. Members of the general public must be given opportunities to contribute to the constitution-review process. Citizens can be engaged through public events and media campaigns.

5. The project nature of the constitution review must end. Somalia's government must make constitution review a priority. To do so and to send a strong message, the government should contribute to funding the constitution review process.
6. The incoming, and preferably expanded, committees that are leading the process must not reinvent the wheel. They must build on the previous work done during the last two decades. In particular, the committee must consult with the IFCC's public consultation report and the Constituent Assembly's 2012 recommendations.
7. There are many contentious issues: the distribution of powers; the designs of the executive, judicial, and legislative branches; resource sharing; and the status of Mogadishu. To finalize these issues, it is necessary to convene multiple forums and platforms where politicians, interest groups, and society at large can debate these important issues.
8. The constitutions of the federal member states should be harmonized with the federal constitution. One approach would be to ensure that federal member states play a role in the constitution-review process, which would involve bringing the legislatures of the federal member states to the review process.
9. The parliament must also revisit the chapter that deals with the ratification of the constitution. Referendum is not the only way to achieve this. Perhaps assemblies of the federal member states can be empowered to ratify the constitution.
10. Somalia's constitution-making process has taken more than twenty-two years. Somalia's government must now share a realistic timeline with its people. With political will from the leadership and appointment of competent members to the review committees, the constitution can be finalized within two years.

HERITAGE

I N S T I T U T E