

AHMED ISSACK HASSAN
LLB (Hons.) Nbi, Dip. Law (Ksl)
Advocate, Commissioner for Oaths,
Notary Public and Certified Public Secretary (K)

Hughes Building
8th Floor
Kenyatta Avenue
P. O. Box 66975-00200
NAIROBI

Tel: 254-020-2219714
2219715
2212131
2230334
Fax: 254-020-2219720

E-mail: braissac@ibrahimandissackadv.co.ke
ahmedissack786@yahoo.com

WORKSHOP ON FEDERALISM AND DECENTRALIZATION –
OPTIONS FOR SOMALIA
27 – 29 November 2008
Safari Park Hotel, Nairobi, Kenya

DISCUSSION PAPER ON SESSION ONE – FORMS OF FEDERAL (AND
OTHER) SYSTEMS

By Ahmed Issack Hassan
Advocate, High Court of Kenya

Introduction

It is my privilege and honour to address this August Conference. My role is to respond to the presentations made. However, I must confess that I did not have the opportunity of reading the papers presented before this morning. I will however attempt to respond to some of the pertinent issues arising out of the presentations and make my own other observation on the topic under discussion.

I was privileged to have participated in a workshop organized by UNPOS in May 2006 in Baidoa for Somali parliamentarians together with the lead Consultant Prof. David Ijalaye of Ile Ife University, Nigeria. I prepared a report after the workshop and presented the same to the then Special Representative of the Secretary General (SRSG) – Ambassador Fall. The issues raised in that workshop on Federalism as a system of Government for Somalia are as alive today as they were then. I dare say that the Principle/concept of Federalism for Somalia is far from achieving any semblance of consensus.

Forms of Federal and other Systems of Government

The theme of the Workshop is quite appropriate coming now at a time when Somalia is making its new Constitution. The resolution of this very important theme will go along way in resolving what is obviously one of the contentious issues in the Constitution making process in Somalia.

Constitution making has been described as the continuation of politics by other means. This means that the Constitution making process, including a debate on the form of Government, cannot be divorced/separated from the prevailing politics of the day.

Whatever form of Government that is adopted for Somalia, whether purely federal, quasi-federal, unitary, or otherwise, must be informed by the history of the country and the present prevailing political realities.

The metaphor of the Kenyan in Kakamega giving views to CKRC on federalism – Equated it to athletics – high jump, long jump or triple jump – one has to take few steps back before running to either jump high or long – for Somalia to design a Form of Government for its future, we cannot ignore the past history of the Country.

At independence Somalia, was a Unitary State with the objective of uniting all territories inhabited by Somalis in the region. Indeed, when the Act of Union brought together British Somaliland with the South – this could be seen as two states forming to create a federal state. But it was not and never intended then.

Today after close to 2 decades of civil strife in Somalia, the situation is different. The formation of the transitional federal Government (TFG) in 2004 and the adoption of the Interim Charter was the state's first concrete step in re-establishing the ground norm – the basic foundation of the Law and Civil authority which had been destroyed before.

Article II of the Interim Charter appears to provide for the form of Government for the TFG. It states that, ***“The TFG of the Somalia Republic shall have a decentralized system of administration based of Federalism.”*** It then sets out in Schedule I, the powers of the Federal Government and in Schedule II, the powers of the State Governments.

Article II (2) then sets out the composition of the Somali State as the “*The TFG, State Governments (2 or more regions federate based on their free will), Regional administration and district administrations.*”

This Article II appears to specify the Form of Government for the TFG of the Somali Republic. However its wording is a fertile ground for misinterpretation depending on one’s perspective on the system of Government most appropriate for Somalia. Does this Article create a Federal State as understood in the context of federalism or it establishes in reality a Unitary State with a decentralized system of administration. Federalism is not the same as decentralization and to use the two in the same provision is truly an oxymoron – a contradiction in terms. Federalism means a system of Government in which several states form a unity but remain independent in internal affairs while decentralization means transfer of powers from a central to a local authority.

The Kenyan experience on Federalism – called Majimbo at Independence and later devolution at the Bomas draft Constitution.

The socio-economic and political realities prevailing in Somalia today will obviously shape the form of Government that will be eventually established. There are obviously several competing interest at play in Somalia today. There is The TFG, there is the Self Declared Independent State of Somaliland and then there are established regional Governments like Puntland while others are yet to get started. Puntland and Somaliland have their own executive, legislative and judicial institutions that are working under their own constitutions. The form of Government that is adopted will

have implications on the existing institutional structures in Somaliland and Puntland. The design of such a Government must be alive to these realities. Of course, if there is agreement on the general principle on the future status of Somalia, the future of the existing institutions in these autonomous regions or states, can be addressed in the Transitional and consequential provisions of the new constitution. These transitional provisions will provide the bridge linking the new with the old or existing structures. For example in Kenya, the Bomas Draft contained detailed provisions on how to transit from the old constitutional order to the new one. It had provisions on the President, Parliament, Judiciary, Local Councils, etc. The same will be the case for Somalia.

In addition to the above, the Form of Government for Somalia must be one that is viable and capable of being implemented taking into account the economic base and financial resources of the country. It will also be expected to heal the wounds of the civil war, bring a just and lasting peace and above all enhance the unity of the Somali people. It will be a tragedy if the form of Government adopted becomes one that enhances the divisions within the society and deepens the disunity, mistrust and suspicious among different sections of the Somali community. This will be a challenging task given the change in circumstances in Somalia from what it was at Independence to what it is today. The 1960 Constitution and the 1990 Constitution had clear provisions meant to enhance the unity of the Somali people. However, the Interim Charter appears to have awakened to the realities in Somalia and left out the provisions meant to achieve the dream of Greater Somalia. Article 1.1 (3) pays lip service to this dream by stating, ***“The Government shall encourage the unity of the Somali people by promoting their cultures, customs and traditions.”*** How this can be

achieved in the context of the proposed federal structure of Government in Article II is not clear. It can only be said that the two articles read together clearly mark a watershed in the shift from the dream of Greater Somalia and unity of the Somali people to one that now promotes unity in diversity within the Somali people.

Finally, it has been said that, *“History repeats itself because we have a short memory and every time it repeats itself the price goes up!”* It is important to learn from history with respect to executive power. The curse of the all powerful imperial presidency which has wrecked havoc in many states in Africa, including Somalia, must be avoided in the new structure/Form of Government. The creation of a dual executive of a President sharing power with a Prime Minister, as is the case under the current Interim Charter, has always led to political disputes between the two leading to paralysis in government. The same can be said for the executive President who is not accountable to Parliament. A properly structured executive whose power is clearly defined with checks and balances provided by the legislature will be an important pillar in the success of any form of Government that will be adopted.

Thank you.

DEFINITIONS – OXFORD DICTIONARY

1. Federalism → A system of Government in which several states form a unity but remain independent in internal affairs.
2. Decentralization → Transfer of powers from a central to a local authority.
3. Devolution → The delegation of power, especially by central Government to Local or regional administration.
→ From Latin word “devolution.”
→ Delegate – Agent or deputy or representative – sent or authorized by principal to act.