



Role of Somalia's Constitution in Resolving the Kenya-Somalia Maritime Boundary Dispute

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Executive Summary

This paper examines the strategic leads that the Somalia constitution provides to Kenya and Somalia on the delimitation of the ongoing maritime dispute. The leads include delimitation of the territory of the Somalia; simmering conflict over federalism; handling Somalia post-2021 elections fallouts and; simmering conflict over petroleum legislative processes. Key findings are drawn from expert opinions and comprehensive desktop review of documented sources. The paper concludes that implementation of the Somalia's provisional constitution faces a number of challenges which offer leverage for the Kenyan government in seeking alternative mechanisms for the resolution of the maritime dispute through institutional-level dialogues. Key recommendations include the need for Kenya to use the constitutional provisions to intensify engagements with United Nations to bring Somalia back to the negotiation table; Influence

African Union (AU) to pursue mediation between Mogadishu and the opposing Federal Member States and; put in place appropriate mechanisms for managing post-election fallouts in Somalia.

Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) provides for bilateral and multilateral dispute resolution options available to states. Similarly, the provisional constitution of the Federal Government of Somalia (FGS) provides leverage for bilateral negotiations between Kenya and Somalia in the maritime dispute, while premised on UNCLOS. The constitution of Somalia has been key in her quest to establish efficient political institutions and introduce governance that is more responsive and accountable to its people (Kouroutakis, 2014). The constitutional making



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process has been one of the longest and most complicated since her independence from Britain in 1960. Unfortunately, political tensions and insecurity have characterized governance in the FGS thereby jeopardizing the stability of the long walk to constitutionalism.

Background

The Somali constitution comprises 15 chapters and 143 articles. In article 7 the constitution outlines the territory of the Federal Republic of Somalia (FRS). It also provides how to resolve international boundary disputes in a peaceful and cooperative manner, in accordance with international law.

The disputed maritime zone between Kenya and Somalia is a case of an overlapping

border. The dispute dates back in 2009 when a Memorandum of Understanding (MoU) was established seeking a negotiated settlement to the maritime claims as provided for in the UNCLOS. Kenya maintains that the maritime border should move easterly from land to Indian Ocean while Somalia insists that the border should move continuously south-easterly into the ocean. The zone has huge deposits of hydrocarbons and Tuna fish resources. Despite the available constitutional provisions for dispute resolution, Somalia has taken a unilateral non-diplomatic approach in the resolution of the row (Sabala, 2019).

Methodology

The paper used both primary and secondary data to draw inferences on the strategic leads

that the Somalia constitution can provide to Kenya and Somalia on the delimitation of the ongoing maritime dispute with Somalia. Primary data was collected through interviews with key experts. Secondary data was collected through a comprehensive desktop review of documented sources. The data was analyzed thematically as per the research questions.

Key Findings

The following discussion examines key issues emanating from an analysis of the constitution of Somalia in relation to the maritime dispute. They remain of strategic relevance to both Kenya and Somalia as far as their diplomatic approaches to the resolution of the maritime dispute are concerned.

Delimitation of the Territory of the Federal Republic of Somalia

Article 7(4) of the constitution outlines that boundaries of Somalia shall be as provided for in 1960. It states that territorial sovereignty shall extend to continental territory, islands, territorial waters, the subsoil, the airspace above and the coasts. Article 7(5) further states that the boundary of Somalia with Kenya is to the south west. The constitution is silent on the extent of the continental shelf in the Indian Ocean, particularly the boundary of her territorial waters with Kenya (PCS 2012). By principle, the constitution also acknowledges the delimitations provided for in the UNCLOS. Even though Somalia took a strictly legal approach at the International Court of Justice (ICJ) to settle the maritime dispute with Kenya, there is still an option for her to adopt more peaceful and cooperative approaches as provided for in the constitution and UNCLOS. This was not fully exploited even as she lodged the dispute with the ICJ. Returning Kenya and Somalia to the negotiation table based on Somalia laws and constitutional principles is thus an option for both countries to explore.

Simmering Conflict over Federalism

Chapter 5 of the Constitution devolves state powers to create two levels of government - the Federal Government and the Federal Member States (referred to as Member States). The constitution in Article 120 distinguishes their capacities and further guides the establishment of the member state institutions, including the legislative and the executive bodies. Similarly, to harmonize their functions, Article 121 gives the guiding principles to be adhered to by the constitutions of the Member States and federal government.

Article 50 provides for both levels of government to observe the principles of federalism in all their interactions between themselves and while exercising their legislative functions and other powers. These principles include: resolution of disputes through dialogue and reconciliation; fair distribution of resources; mutual cooperation and support to promote national unity. Unlike other forms of political decentralization, this combination of shared rule and regional self-rule is guaranteed and protected by the constitution in a federal system, and cannot be revoked by the central government, without constitutional amendments, which require the consent of the regional governments (UN Political Office for Somalia, 2012).

Federalism establishes two centers of power which should have concurrence in all governance matters. This is in the spirit of promoting national interests and national unity. Concurrence has not been the case since President Mohamed Abdullahi Mohammed "Farmaajo" has been pursuing a centralized governance approach and a nationalist agenda. The President has created a bandwagon of allied Member States that includes South West, Galmudug, and Hirshabelle. This move threatens the autonomy of the Member States. As a result, autonomous and semi-autonomous regions such as Jubaland, Puntland and Somaliland have been victimized by the Federal Government. They are hardly consulted on issues affecting

their territories which is contrary to Article 54 which advocates for consensus between the federal government and Member States.

The political leadership is keen on exercising predatory politics to consolidate and personalize power over the Member States. This has escalated conflicts between Mogadishu and some Member States (Kalmoy, 2021). The persistent struggle for power and authority between Mogadishu and the key Member States appears to be a key factor in the maritime dispute. President Farmaajo is focused on consolidating power by dividing Somalia into smaller states and rallying the people to defend their territory against Kenya, thereby winning a second term in office (Kalmoy, 2021). There exists an opportunity for mediation between the two levels of governance. Kenya has the prospect of pursuing conflict resolution mechanisms meant to bring Mogadishu and the disputing Member States to negotiations for the sake of stability in Somalia. This could help rekindle the stalled negotiations over the maritime dispute.

Simmering Conflict over Petroleum Legislative Process

In February 2020, President Farmaajo ratified the Somali Petroleum Law, 2020, paving the way for licensing of exploration blocks (The Somali Petroleum Law, 2020). The law was approved by Parliament in May 2019 but the Upper House did not pass it until January 2020. Delays in the legislation process of the petroleum law were as a result of the contents therein including the Production Sharing Agreement, Resource Sharing Agreement, and the establishment of the regulatory institutions, such as the Somali Petroleum Authority.

Using the controversial petroleum law, President Farmaajo has fully taken control of the Ministry of Petroleum by appointing close allies to key positions in the Somali Petroleum Authority whose tenure is four years. This implies the incumbent ruling faction is able to exert control on the hydrocarbon resources income streams

to fund their projects including the forthcoming and future elections campaigns even if they lose the February 8th presidential elections (Gundel, 2020). This questionable funding exposes Somalia to pressure by external actors. It explains the lopsided response by President Farmaajo in the Kenya-Somali relations.

The revenue-sharing agreement provides for revenues from any eventual oil production to be distributed throughout the country's federal states. Somalia will retain 55% of revenue from future offshore oil production and 30% from onshore output, with the Member States and the local communities receiving the remainder (The Somali Petroleum Law, 2020). The 2020 Somali Petroleum Law remains contentious since some of the Member States were not effectively represented in the negotiations. The enactment of the law breaches Article 44 which declares that the principles of federalism rather than centralism should be the key principle in governance of natural resources (Reitano & Shaw, 2013).

Further, the Petroleum law breaches Article 53(2) which states that 'where negotiations particularly affect Member State interests, the negotiating delegation of the Federal Government shall be supplemented by representatives of the Member States governments'. Member States such as Puntland, Somaliland and Jubaland have viciously contested the Petroleum Law based on these provisions. This presents an opportunity for Kenya to offer legal support on constitutionalism and reconcile Mogadishu and the opposing Member States on the controversial Petroleum Law. Within this platform, Kenya and Somalia may consider return to diplomacy on the maritime dispute.

Handling Somalia post-2021 elections Fallouts

Article 47 outlines the regulations concerning elections at the federal government level, political parties, and their registration. Similarly, the article states that the National Independent



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Electoral Commission shall be defined in special laws enacted by the House of the People of the Federal Parliament of Somalia. The regulations are paramount in promoting the independence and impartiality of the electoral body in Somalia against manipulation by interested parties or partners.

In November 2020, Somalia got a new Prime Minister Mohamed Hussein Roble, after his predecessor Hassan Ali Khaire was voted out of Parliament for failing to negotiate a one-person, one-vote system for the upcoming 2021 elections (Voice of America 2020). Previously, in December 2019, the House of the People had approved the election law on universal suffrage for presidential elections and slated them for February 2021 (Legacy Center for Peace and Transparency, 2019). The universal suffrage comes 50 years since 1969 when the government was overthrown in a bloodless military coup. However, political infighting between President Farmaajo and the country's regional leaders especially from Jubaland and Puntland are advocating for the indirect election model. They want the UN-backed universal suffrage model to be implemented after the

2021 elections (Somali Dialogue Platform and Somali Public Agenda, 2020).

Despite the consensus on the electoral model, political indifferences between the Federal Government and member states remain unresolved. Opposing groups such as Jubaland, Puntland and clan based organizations have contested electoral preparations and the impartiality of electoral commission which the federal government is likely to use to manipulate the electoral process (International Crisis Group, 2020). Similarly, the threat of COVID-19, Al-Shabaab, and the withdrawal of US troops from Somalia complicates the stability of Somalia in 2021 post-election period.

Since governance in Somalia is defined by clan affiliation as opposed to political ideologies, a win or a loss by President Farmaajo in the coming elections will have ramifications on the stability of Somalia (International Crisis Group, 2020). This is further complicated by the high stakes in the presidential elections since key opposition figures such as immediate former Prime Minister Khaire, and former finance minister Hussein Abdi Halane have positioned

themselves as candidates. A win for President Farmaajo will make him a hero to those groups that had confidence in the integrity of the electoral process. This may lead to an end or radical change in federalism while attracting condemnation from the dissenting voices who perceive the election's outcome as illegitimate. However, if President Farmaajo is re-elected, opposing groups may trigger a clan based post-election crisis. The Al-Shabaab and the Islamic State in Somalia will take advantage of any political instability to cause more disruption (International Crisis Group, 2020). Similarly, if Farmaajo loses power, federalism and clan-based political disputes will persist and any new leader has to deal with such divisions (Kalmoy, 2021).

Kenya, being a regional peace ambassador, has an opportunity to steer Somalia to a path

of political stability in the post-election period by reconciling the winners and losers of the presidential elections. Kenya can also assist in developing post-election dispute resolution mechanisms for Somalia.

Conclusion

This paper concludes that the implementation of 2012 provisional constitution of Somalia faces a series of hurdles. This offers an opportunity for Kenya to support the reconstruction and constitutional process in Somalia. Pursuing alternative mechanisms for the resolution of the internal constitutional disputes Mogadishu faces with Member States offers Kenya a better platform for advancing a diplomatic resolution of the maritime dispute.

RECOMMENDATIONS

The following recommendations are offered:

1. Kenya to intensify engagements with United Nations to return Somalia to the negotiation table on the maritime dispute under the guidance of Somalia Constitution and UNCLOS, 1982.
2. Kenya and Somalia to pursue African Union-led mediation processes between Mogadishu and the opposing Federal Member States for the sake of peace and prosperity in Somalia.
3. Kenya to pursue appropriate mechanisms for managing post-election fallouts in Somalia should elections go on as scheduled. This could help bring back negotiations on the maritime dispute.

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