

Towards Constitutional Reform for South Sudan
Speaking Notes of Minister Fasil Nahum
June 7, Addis Ababa

This paper will highlight constitutional classification and suggest options for constitutional reform.

Classification implies broad theoretical categorization and is useful as a starting point. To come down to the factual realistic level, examples can be taken from the sub-region itself. The experience of three countries in the sub-region in terms of constitutional reform may be significant. The three countries here presented are Ethiopia, Kenya and Somalia. We will start by a short constitutional tour to these three countries and then extend the discussion as necessary. But to start with let us have a theoretical frame of reference.

It has become standard to classify modern constitutions as being presidential or parliamentary in nature. The one providing major powers to a popularly elected head of state and/or government, the other assuming that governmental power rests with the assembly of elected representatives of the people.

Then constitutional systems can be classified as being unitary or federal. The federal system would recognize two levels of government i.e. national and regional. While a unitary government would have administrative units, federal systems would provide powers and duties that are constitutionally guaranteed.

It goes without saying that all modern constitutions are written formal documents, ratified by popular referendum or promulgated by a constituent assembly.

Parliaments can be unicameral or bicameral. All federal systems without exception provide for bicameral parliaments, the second house reflecting the particular nature of the federation.

Electoral laws are pivotal to the constitutional system as they provide for a fair and just system of representation. Since there are many options for electoral laws it is important to strive to arrive at a wise choice.

It is standard to provide for an independent judiciary, with several material jurisdiction hierarchy, and an enforceable bill of rights in the constitution.

Jumping from theory to practice, as they say, the devil is in the detail. A practical workable constitution has to be tailor-made to fit the specific circumstances and solve the problems at hand. It has to take into account the specific realities on the ground and cannot simply rely on general principles. The historical, demographic, economic, social and political overall realities of the nation, as well as its future aspirations, have to be fully understood and made the basis of the constitution.

Now then to the constitutional tour. The choice of three eastern African countries is not arbitrary and is based on their show of interesting signs of constitutional development. They each bring a rich experience that is being exploited via a constitutional model and system of governance that they consider optimal for advancing the values of their respective societies.

We start our tour with Kenya. Kenya is currently under its third constitution, that of 2010. Earlier it had the constitution of 1969, which in turn had replaced the independence constitution of 1963.

The 1963 constitution, which was based on the standard Lancaster House template had established a federal type of government locally known as *Majimbo*. The governor-general of Kenya represented the British monarchy. The bicameral parliament was made up of the Senate and House of Representatives. Each province had an elected Assembly.

But already one year later, in 1964, the constitution was amended to make Kenya a republic with the president becoming head of state and head of government. A further amendment of the constitution in 1966 united the two houses of parliament creating a unicameral National Assembly.

These changes paved the way for a total replacement of the independence constitution. Thus in 1969 a new constitution was adopted and the system and structure of the state was changed from the *Majimbo* or federal to a unitary system.

The constitution reinforced the earlier semi-presidential system with a powerful presidency. This 2nd constitution was further amended in 1982 to institutionalize a *de jure* single party government. But as can be imagined, the single party system encountered strong opposition and came to an end by 1991, paving the way for fresh presidential elections in 1992.

In time, constitutional development in Kenya required a new constitution. The new constitution was promulgated in 2010. This 3rd constitution since independence, in 264 articles and six schedules, provides a compromise solution between the 1963 federal and the 1969 unitary arrangements. In principle, the 2010 constitution comes up with a unitary politico-legal concept. Two levels of Government are recognized i.e. national and county. Parliament reverts back to being bicameral: the National Assembly and Senate. Moreover the 47 counties each have their own Assembly and a county Governor directly elected by the people. The President, who is head of state and head of government, is popularly elected for five years and can serve a second term. The constitution incorporates a progressive bill of rights. The Kenyan constitution stipulates that there shall be no state religion. Revenue raised nationally is shared equitably among national and county governments. The courts of law have the duty to interpret the constitution.

As one can easily conclude, the Kenyan state in its 50 years journey has travelled a zigzag path from being a *Majimbo* federal system to being a one party unitary

system arriving at a devolution-based unitary system. The term 'unitary' some think, should be employed with tongue in cheek, as the devolution the constitution unfolds is strongly coloured and makes the system appear to be moving along federal lines in spite of the absence of the term 'federal' and the constitution opting for a unitary system.

Next stop Somalia. The first constitution of Somalia was enacted on July 20, 1960, creating the unity of the two newly independent territories. This constitution provided for a parliamentary democracy. The popularly elected legislature appointed the president and the council of ministers, which were drawn from the legislature. On 21st October 1969, after the assassination of the second president, the military staged a coup d'état and the Supreme Revolutionary Council (SRC) was established. Subsequently, the former constitution was suspended and the Somali Democratic Republic was established.

Ten years later, in 1979 a new constitution was promulgated, which provided for a presidential system; the President being both head of state and head of government. The presidential term was for 6 years, renewable by a 2/3 majority vote of the legislature. But the system of governance became increasingly centralized and repressive.

After the overthrow of the dictator, a Provisional Government was established calling for a new constitution to replace the 1979 constitution. But, in the ensuing two decades of anarchy Somalia degenerated into a failed state with strongmen vying for power in their respective fiefdoms. Repeated military interventions from various states also failed to bring peace and security to the country. Finally, a Transitional Federal Government (TFG) was established under the Transitional Federal Charter of November 2004. The Government was headed by the president, to whom the cabinet reported through the prime minister. Backed by the UN, the African Union, the EU and the USA, the TFG battled Al Shabab insurgents and succeeded to fully control Mogadishu. The mandate of the Transitional Federal Government extended until the summer of 2012. On August 2012, the 825 member National Constituent Assembly approved the new constitution of Somalia.

The constitution of 2012 establishes the Federal Republic of Somalia. Structure of government is composed of two levels, federal and state. Local government is given special emphasis. Foreign affairs, national defence, citizenship and immigration and monetary policy are mandated to be the exclusive responsibility of the federal government.

The federal parliament is bicameral and consists of the House of the People and the Upper House. The House of the People has 225 ordinary elected members and its term runs for four years. The Upper House has a maximum of 54 elected members; member states having equal number of seats. The duties of the upper house include participation in passing laws, in electing and dismissing the president, in amending the constitution, in declaring war and states of

emergency and in the appointment of members of various government commissions.

The term of office of the president is four years. He is elected by a joint session of the Houses of Parliament with a quorum of 2/3 of each house and a 2/3 majority vote of members of both houses required. The president appoints the prime minister who in turn appoints members of his cabinet.

The national court structure is of three levels and consists of the Constitutional Court, Federal Courts and State Courts. The Constitution is the supreme law preceded by the *sharia*, as Islam is the official religion of the state.

With respect to raising revenue the constitution defers the issue by stating that the responsibility of raising revenue shall be given to the level of government where it is likely to be most effectively exercised.

Of the various commissions established by the constitution such as judicial service, human rights, anti-corruption, boundaries and federation etc. interestingly there is the Truth and Reconciliation Commission to foster national healing, reconciliation and unity and ensure that triggers of violence such as revenge are addressed through the legal system.

To sum up, after the long and protracted derailment, Somalia is again back on the constitutional path. The transitional provisions of chapter 15 of the constitution aim at a smooth transition, and without completely blocking the way, make the possibility of constitutional amendment pass through various gates. The review mechanism proposed at the expiry of the first term of the Federal Parliament of Somalia in 2016 has raised the issue of a transition to a transition, but it must be said that a healthy constitutional development is finally taking place in Somalia.

Now let us turn to Ethiopia. After emerging from its centuries long feudal past Ethiopia had a short but intense experience as the military junta known as the *Derg* experimented with Marxism. The political and economic fiasco that ensued plunged Ethiopia into a civil war that did not abate until the early 90s of last century.

In terms of constitutions, the first written monarchical constitution dates from 1931, which was then replaced by another monarchical constitution: the Revised Constitution of 1955. That constitution was suspended in 1974 and the monarchy abolished. A Marxist constitution was issued by the *Derg* in 1984 and lasted until 1991 when the Transitional Charter took control. The Constitution of the Federal Democratic Republic of Ethiopia came into full force and effect on 21 August 1995 and remains the supreme law of the land.

The constitution provides for a republican, democratic, multi-party system of government. As a parliamentary democracy and a federal system it has a bicameral parliament consisting of the House of Peoples' Representatives and the House of Federation. The special feature of this constitution is its accommodation of ethno-linguistic diversity. The states or federal units the

constitution recognizes are based on ethno-linguisticity. Moreover, members of the House of Federation represent ethno-linguistic entities. The paramount significance of ethno-linguistic identity is boldly stated in the preamble of the constitution, which begins with, 'We the Nations, Nationalities and Peoples of Ethiopia...'

Another interesting departure is how it deals with the issue of constitutional interpretation. Unlike the systems providing for Constitutional Courts or mandating Supreme Courts to interpret the constitution, the Ethiopian constitution makes the House of Federation the interpreter of the constitution. However, constitutional issues have first to pass by a constitutionally mandated Council of Constitutional Inquiry made up of the president and vice president of the Federal Supreme Court, six lawyers of high standing appointed by the House of Representatives and three members of the House of Federation.

Finally, to conclude this constitutional tour, one should ask, what have we learnt from it? One can say that constitutional reform is a live experiment with society as the laboratory. The stakes are high and time is of the essence. Mistakes result in dire consequences and ultimately it is an existential issue.

Theoretical frameworks provide alternative possibilities and the variations are endless. The important thing is to have a good understanding of the society – its resources, challenges and aspirations – and carefully make the best possible choices as one frames, piece by piece, the many components of what is called the constitution.