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About this Journal

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Somali Studies provides a forum for publication of academic articles in broad scope of areas and disciplines in Somali studies, particularly focused on the humanities and social science. ***Somali Studies*** appreciates papers exploring the historical background or navigating the contemporary issues; special consideration will be given to issues which are critical to the recovery and rebuilding of Somalia, a country emerging from a devastating civil war.

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Editorial Note

Dear readers and colleagues,

We are pleased to welcome you all to our issue of 2021, volume six of the *Somali Studies: A Peer-Reviewed Academic Journal for Somali Studies*. It contains six articles on various topics, three of which are legal studies which contribute towards providing public institutions with appropriate and updated laws that keep pace with the ongoing challenges and necessities in Somalia.

It is often too difficult to prove complex crimes, such as corruption, organized crimes and terrorism, through the use of conventional investigative techniques. In such cases, it is inevitable to seek alternative techniques which are both effective and legally acceptable that ensure respect for human rights. In the first article, Dr Anton Girginov, an international expert and senior legal adviser on criminal justice, proposes "creation of an efficient legal framework for special investigative techniques". This study contributes to strengthening the capacity of the Somali state ensuring the fight against serious and/or complex offences.

The second article titled "*The General Principles of the Somali Penal Code in the Light of the Islamic Sharia*", compares Somali law and Sharia since the constitution binds compliance of the laws of the state with the general principles and objectives of Islamic Sharia.

The third article is on the relations between Sufism and politics. The author points out that the belief that Sufi tariqas are apolitical is some kind of *"myths"* and it must be "*deconstructed"*. He presents that Sufi tariqas in Somalia have often joined politics and played in different ways.

Usually, in imaginative writing, the writer produces his stories from his experiences. What will it be like when he is in exile for decades? How

does this affect his creativity and artistic imagination? The fourth essay titled *"In Praise of Exile? The Case of Somali Writer Nuruddin Farah"* explores how exile shapes a writer's work in Nuruddin Farah's case, a famous novelist and playwright, who was forced to exile in mid 1970s. How has his fiction suffered from his *"being in exile"*? Has this long absence turned him into "*a mere capsule of ideas*". This essay *"emphasizes how exile can be a multifaceted, even contradictory experience".*

The fifth article titled *"Contradictions and Ambiguities in the Constitutions of Somalia: A Preliminary Survey of the Federal and Member States' Constitutions"* is a comparative study on the federal provisional constitution of Somalia along with the constitutions of the member states to determine the degree of divergence and contradictions in these constitutions. It underlines the necessity of harmonizing between these constitutions *"to attain complete constitutional framework which is necessary for political and institutional stability"*.

The sixth article examines how sustained public management reform impacts on quality of public service delivery in Somalia. It recommends several measures for reforms which are necessary to enhance the quality of public service delivery and, consequently, development in Somalia.

Finally, I would like to express my sincere gratitude to our respected authors, reviewers and the editorial team for their contributions, hard work and dedication. Thank you, everyone!

Mustafa Feiruz
Editor-in-Chief

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Special Investigative Techniques as Sources of Admissible Evidence in Somalia (*Lex Lata and Lex Ferenda*)

 Anton Girginov

Abstract

This paper explores special investigative techniques as sources of admissible evidence, especially in complex criminal proceedings. Nowadays, such techniques produce admissible evidence in many countries under their national laws. Their laws provide for the conversion of information acquired by special investigative techniques into documentary evidence admissible in court. Thus, contemporary law introduced a new investigative means of obtaining admissible evidence and laid the foundations of its subsequent transfer across the border with preserved admissibility in the receiving country. Now in Somalia, only Articles 11–13 of the Puntland Anti-piracy Law regulate the deployment of special investigative techniques as sources of admissible evidence. However, the entire country needs such a legal framework, especially for the collection of admissible evidence of organized crime (including piracy) acts, terrorism, corruption and other major crime.

This paper aims at assisting the legislative efforts of Somali authorities in the creation of an efficient legal framework for special investigative techniques, which also guarantees the rights of the persons involved.

Keywords: Somali law, admissible evidence, criminal proceedings.

I. Introduction

In organized crime, corruption and terrorism cases, usually, no one is a candidate to testify as a witness; accused persons do not confess either. The lack of necessary evidence is most understandable in cases of corruption[1]. In practice, bribery is never committed in the presence of third persons who may testify someday. Organized crime and terrorism cases are not different. The lack of evidence in such cases results from the so-called conspiracy of silence. It does not refer only to the members of organised crime and terrorist groups and organizations themselves, who remain silent after the arrest. Silence is also typical of the potential witnesses of their crimes. Such persons are seriously afraid of retaliation if they testified against the members of such groups or/and organizations.

Therefore, oral evidence is rarely available in corruption, organized crime and terrorism cases. As a result, it is often too difficult to prove such criminal offences through the use of conventional investigative techniques. This makes it necessary to look for alternative sources of evidence, admissible in court. Such an alternative is the special investigative techniques. To encourage their use, Article 50 (1) of the UN Convention against Corruption, for example, expressly stipulates that

> "*In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*"

What qualifies these investigative techniques as special is the fact that their use is often costly and complicated, requiring specialized expertise and often advanced technological knowledge and instruments. Such expertise, knowledge and instruments are required, mostly because of the overt or secret nature of the special investigative techniques. Authorities always attempt to conceal what is being done to avoid alerting the targeted person, in particular. The tailing of persons, their telephone tapping and filming are by nature secret. The secrecy may vary: the accused may be informed *post facto* of the results of telephone tapping, tailing and filming while the identity of an infiltrated/undercover agent (the "walking special investigative technique") will usually be kept secret up to and including the trial phase of criminal proceedings.

The aim of the secrecy is not to alter the behaviour of the presumed offender but to deprive him/her of information. Secrecy is not deception because it does not involve falsifying/distorting information. However, accompanying deception is not ruled out altogether. It might be necessary, sometimes, e.g. in case of secret searches (subjecting a vehicle to a compulsory road security check in order to search it surreptitiously).

II. **The Special Investigative Techniques as Sources of Admissible Evidence**

1. In content, the special investigative techniques are the well-known police methods of obtaining information secretly. Such methods are: tapping for overhearing phone conversations, bugging for overhearing conversations in open spaces or premises, filming, photographing and suchlike activities. However, these methods alone are not any source of evidence yet. They may become sources of evidence, admissible in court, only if three conditions are met simultaneously. Which are these three conditions under which secret police methods of obtaining information become sources of evidence, admissible in court?

First of all, the secret methods of obtaining information must be expressly recognized by national law as sources of evidence. It is this law that upgrades these traditional reconnaissance methods to methods of obtaining evidence admissible in court. This upgrading result is produced when the Criminal Procedure Code [CPC] or some special criminal law, such as the Puntland Anti-Piracy Law, determines these methods as an independent investigative action. When these methods become investigative action recognized by law, they are designated as special investigative techniques.

Most of the CPC-s contain an exhaustive list of all investigative actions. The Codes also stipulate that evidence is admissible only if obtained through such investigative actions. At the same time, statements obtained by special investigative techniques from persons who, in accordance with Law, have been relieved from the duty to testify, may be eliminated from admissible evidence.

Secondly, the use of special investigative techniques shall be granted at the application of the investigator or the investigating prosecutor (Article 8.1, "a" of the 1962 Organization of the Judiciary Law of Somalia) for which the evidence is needed. For example, in accordance with Article 12 of the Puntland Anti-piracy Law in conjunction with Article 24 (4) of the Somali CPC, the investigator "*shall apply to the competent Court for such warrant, at the same time informing the Office of the Attorney General*". If non-judicial police services obtain in some way information on their initiative by using special investigative techniques, the result may never be admissible evidence.

Moreover, such actions would constitute, at least, an "arbitrary interference" with the right to privacy and eventually, violate Article 17 (1) of the International Covenant on Civil and Political Rights acceded by Somalia in 1990. This Paragraph reads: "*No one shall be subjected to*

arbitrary or unlawful interference with his privacy, family, home or correspondence..."

Thirdly, special investigative techniques shall be permitted by the competent court. The court decided on the targets and the timeframe of the measure. Anything obtained beyond the court's permission is not admissible into evidence. In view thereof, Article 12 of the Puntland Anti-piracy Law in conjunction with Articles 24 (4) and 53 of the Somali CPC, in particular, also requires a warrant for the use of special investigative techniques. In the absence of such a warrant, their use would constitute an "unlawful interference" with the right to privacy and eventually, violate Article 17 (1) of the International Covenant on Civil and Political Rights[2]. As a result, the evidence obtained would be inadmissible in court.

It is noteworthy that Article 12 of the Puntland Anti-piracy Law redirects to the legal regime of searches and seizures. This is understandable as, like the use of special investigative techniques, these investigative actions also involve coercive measures affecting the right to privacy.

If all three aforementioned conditions are met, the result of the deployment of the respective special investigative technique might be the production of documentary evidence. The conversations of the targets are recorded and the text is transferred onto paper. This specific paper is inserted in the case file and its content regarded as evidence.

If this evidence is relevant for the criminal case, all records and other documents, collected by the Police through Special Investigative Powers, shall be deposited with the Attorney General Office. Otherwise, if the evidence obtained is not relevant for the criminal case, all these records and other documents shall be immediately destroyed unless they contain information relevant for an investigation of any criminal offence defined under Article 35 of the CPC of Somalia.

2. There are two possible solutions regarding **the value of this evidence** obtained through the deployment of some special investigative technique. Most often, this evidence alone may be sufficient for a guilty verdict (the issue is a matter of court discretion only). The Puntland Anti-piracy Law does not require, in addition, any corroborative evidence either. This solution is based on the concept that no evidence shall have a value predetermined by law: the so-called free evaluation of evidence principle.

However, under the law of some foreign countries, the evidence obtained by special investigative techniques is not sufficient for a guilty verdict, e.g. Article 177 (1) of the Bulgarian CPC. Corroborative evidence is also needed to find the accused guilty (regardless of the court opinion) in such countries. This solution guarantees the suspect against abuses. A similar one, for example, is the provision of Article 199 [Accomplices] of the Somali CPC. This Article reads as follows:

> "*The persons who have participated in an offence may be witnesses in the proceedings. However, the Court shall not convict an accused person on the basis of the testimony of an accomplice unless such testimony is corroborated by other evidence*".

Several years ago, I discussed this issue in Baghdad with some Iraqi colleagues: judges and prosecutors. They told me that when the deployment of special investigative techniques becomes an investigative action in their country, the evidence obtained shall not be sufficient for a guilty verdict, at least, during the initial several years. Obviously, careful consideration must be given to the value of the evidence from special investigative techniques and the problem needs to be expressly solved by law.

III. The Targets of the Special Investigative Techniques and Their Rights

1. Traditionally, only a suspect might be the target of special investigative techniques. However, many countries allow – under specific conditions – targeting also: (a) a person who may be communicating with the suspect, (b) a person whose telephone or point of access to a computer system the suspect may be using, (c) a person, the monitoring of which, could lead to the discovery of the full identity of the suspect or the location of the suspect if s/he is in hiding. At the same time, some foreign countries expressly prohibit the use of special investigative techniques against certain categories of persons. These restrictions usually apply to the so-called privileged communications, such as between the defence lawyer and his/her client in criminal matters[3], or privileged witnesses, such as members of parliament and other top officials. In Somalia, such officials are the Somali judges as per Article 175 of the CPC.

2. It is an unavoidable reality the deployment of special investigative techniques, by their very nature, involve a degree of invasion of the target's privacy. Therefore, their deployment inevitably affects his/her right to privacy which is enshrined in Article 17 (1) of the International Covenant on Civil and Political Rights.

Undoubtedly, this right to privacy cannot be an absolute one. The European Court of Human Rights [ECHR], for example, has consistently stated that the right to privacy must be weighed against the restrictions imposed on it to protect society. This is why in some serious investigations the target's right to privacy might be restricted by law. According to Article 17 (1) of the International Covenant on Civil and Political Rights, "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*".

It follows **per argumentum a contrario** that if an authorizing law is in place (Articles 11-13 of the Puntland Anti-piracy Law are the beginning of such a law) the interference would not be unlawful. It would be in accordance with the legal order and must be accepted. Such a law must exist, though. This law should be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, public authorities are empowered to resort to covert methods. The law also must indicate the scope of any discretion conferred on the authorities, and the manner of its exercise, with sufficient clarity to give the individual(s) affected protection against arbitrary action.

Restricted or not by such a law, the right to privacy always exists and the target of the special investigative techniques has the procedural right to defend it against unlawful or arbitrary actions by proving that his/her privacy was unjustifiably infringed if s/he thinks that it has been the case. Any such action for which legal framework does not exist would be unlawful (in conflict with Article 17.1 of the aforementioned Covenant), whereas arbitrary would be any action which, although provided for by law, is not reasonable because it does not correspond in the particular circumstances to the aims and objectives of Article 17 and the other provisions of the Covenant.

Therefore, any person, targeted by the deployment of a special investigative technique, enjoys **the right to defence** to protect his/her right to privacy. Article 17 (2) of the International Covenant on Civil and Political Rights expressly stipulates that "*everyone has the right to the protection of the law against such interference*".

Because unlike ordinary (non-covert) searches and seizures, for example, the deployment of any special investigative technique is a secret operation[4], the laws of most countries have found a specific way to guarantee this right to defence. They prescribe that, once the deployment

is over, the targets shall be notified by the authorities of what has been undertaken towards them, e.g. § 126 (1) of the Estonian CPC, Article 96 (4) of the Kosovar CPC and Article 145 of the Romanian CPC. Such legislative implementation of Article 17 (2) of the International Covenant on Civil and Political Rights should be expected in Somalia also: not only in relation to the Puntland Anti-piracy Law but in relation to any other Somali law which would introduce special investigative techniques. Indeed, the provisions of the international human rights conventions, incl. Article 17 of the aforementioned Covenant, are in theory directly applicable in the territories of their Parties. In practice, though, these provisions acquire actual legal force only if implemented in domestic law.

If after the use of a special investigative technique no prosecution and trial follow, the subsequent notification of the target is important because it is the only way to learn that s/he was subject to intrusion into privacy, to challenge the legality of this intrusion and eventually, seek compensation. In case of a trial against the target, if it was found in any way that the special investigative technique was unlawfully used, the evidence obtained from its deployment shall be excluded as inadmissible. Such violations of law shall render the evidence null and void – Article 178 of the Somali CPC.

However, the immediate notification of the target is not an absolute rule. Some laws provide exceptions to the obligation of immediate notification of the targets. The exceptions refer to cases where the notification is likely to pose a threat to the success of the ongoing criminal proceedings or to endanger the security of some person(s) involved. Such laws allow keeping the operation of special investigative techniques secretive for a longer time, e.g. Article 101 (6) of the German CPC. In Europe, such exceptions are in conformity with the judicial practice of the ECHR in Strasbourg. Thus, the Court in question maintains that it might be impossible to immediately meet the demand for providing information to

the person(s) concerned in all cases because such an act may threaten the purpose for which the secret surveillance was conducted or may lead to the exposure of the methods of surveillance (see *Klass v. Germany*, No. 5027/72, p. 58).

IV. The Need to Know the Special Investigative Techniques

1. Somali investigators, prosecutors and judges need to know because, sooner or later, they will be recognized not only in Puntland and for the investigation of piracy; these techniques will be generally recognized by Somali law as investigative actions, as sources of evidence, admissible in court. It is always better to know in advance what devices you shall apply. Moreover, it would be good if investigators, prosecutors and judges take part in the drafting of the legal framework for the special investigative techniques.

Also, Somali investigators, prosecutors and judges need to know about the existence of the special investigative techniques as they may turn for legal assistance to other countries which make use of them, nowadays. In particular, one may write an international letter rogatory to such a foreign country to request it to collect evidence for you in its territory through some special investigative technique. The lack of such an evidentiary action in Somali law would not impede the execution of the request. It is sufficient that the evidentiary action exists in the law of the other country, the requested one. It is noteworthy that the other country is likely to require dual criminality. This means that the offence, in respect of which a judicial actor requests assistance, is a crime both under his/her law and under the law of the other country as well. However, no foreign country is expected to also require any double existence of the requested investigative action: to be an action found in the law of each of the two countries, simultaneously.

Besides, it must be known that once the deployment of the requested special investigative technique is over, the targets are mandatorily notified by the local authorities of what has been undertaken towards them. This is a general rule which applies also to the special investigative technique deployed in the execution of foreign requests. At the same time, in some foreign countries, the notification may be postponed by the local court. Therefore, if one considers sending a request for some special investigative technique to a foreign country, s/he must learn the exact situation there and how to use this situation to the benefit of his/her criminal proceedings.

2. International legal assistance constitutes the typical means to obtain evidence from abroad, especially evidence collected through a special investigative technique, as most foreign countries have already developed the technical and legal capacity to deploy them. Hence, more and more foreign evidence is likely to originate from the deployment of special investigative techniques abroad. In view thereof, the legal provisions regulating the recognition of any evidence received from abroad must be sufficiently precise not to undermine its admissibility in court. This recommendation is applicable to Article 15 of the Anti-piracy Law, in particular. According to its text, "*All evidence, including forensic and foreign evidence, is admissible only if it stays in compliance with the principles of law applicable in the Puntland State of Somalia*".

Presently, this Article 15 may refer only to evidence obtained from the execution of this state's/country's letters rogatory abroad. Other ways of receiving admissible evidence from foreign countries are non-existent in Somalia/Puntland; in particular, these are: (i) the transfer of criminal proceeding [5] and (ii) joint investigative teams[6] in which Somalia/Puntland may participate.

However, no foreign evidence, even the obtained from the execution of letter rogatory, should be filtered as prescribed by this provision requiring that this evidence shall be admissible only if it is "*in compliance with the principles of law applicable in the Puntland State of Somalia*" (as the requesting country). Actually, it is solely the other way around: this is a requirement that only the requested country makes use of it. In general, the requested country grants incoming letters rogatory, if their execution would be "*in compliance with the principles of law applicable in*" its territory, e.g. Article 227 (1) of the Somali CPC and Article 17 (b) of the 1983 Riyadh Arab Agreement for Judicial Cooperation – in force for Somalia as of the 21-st of October 1985.

None of the Muslim countries has any such legal filter for incoming foreign evidence either. They may only request from the country that they approach to apply their own rules in the execution of their letters rogatory. Thus, according to Article 20.8 of the Arab Anti-corruption Convention, *"the request* (the letter rogatory) *shall be acted upon in accordance with the domestic legislation of the requested State Party as well as in accordance with the procedures specified in the request* (the letter rogatory)*, wherever possible, as long as this does not conflict with the domestic legislation of the requested State Party*." In any case, it is solely the requested country that decides whether to grant the additional request for applying the procedures of the requesting country – see, for example, Article 54 (2) of the UAE Law on International Judicial Cooperation in Criminal Matters. But even if this additional request was not granted and the letter rogatory has been executed in accordance only with the procedures of the requested country, no Muslim country would consider the foreign evidence, obtained through the execution of the letter rogatory, inadmissible on the grounds that its additional request was not granted.

Also, no violation entailing inadmissibility of evidence obtained exists, even if the requested country, initially, decides to apply the requesting country's procedures but subsequently, applies only its own. As this country is not legally bound by its initial decision (no such international agreement exist), it can always validly withdraw it afterwards even if it has notified the requesting country of its taking.

3. The actual problem, though, is not that the legal filter under Article 15 of the Puntland Anti-Piracy Law is unique. The problem is that this filter is detrimental to the interests of Puntland and, as a result, to the interests of Somalia as a whole. If this filter stays in Article 15 of the Puntland Anti-Piracy Law, it would mean that foreign countries may spend in some cases one or two weeks in executing a letter rogatory from Puntland and learn, in the end, that their work has been totally ignored on the grounds that they had not complied with rules that they had never heard of. It goes without saying that as soon as foreign countries learn of the possibility that their work might be totally ignored, although it has been done punctually and in compliance with the right procedure (their own), none of these countries would seriously work for Garowe and eventually, Mogadishu as well. To mitigate the negative effects of this requirement, the requesting authorities of Puntland should, at least, request the application of their own rules and state that, if this is not possible, their letter rogatory should not be executed at all. However, this may also create unpredictable confusions. Either way, Puntland as well as the entire Somalia would always experience serious negative consequences. It is beyond any doubt that if something goes wrong with international partners of Garowe, this would, inevitably, affect the whole country.

V. Special Investigative Techniques *Per Se*

Two main types of special investigative techniques [SIT] exist. They are: interception of communications and surveillance.

1. The covert interceptions

A/ Interception of telecommunications is a means of technical obtaining of sound (voice) and/or pictures (texts, photos) during the course of transmission through technical devices. Most often, it includes:

- Interception of ordinary telephone communications ("wire-tapping" of telephone calls) - acquiring the contents of oral communication by secretly connecting to the telephone line used by the target, the person subject to the measure, whose conversations are to be monitored

- Article 11, letter "f" (i) of the Puntland Anti-piracy Law.

- Real-time collection of data transmitted through some computer network (by mob-phones, SMS, e-mails) resulting in obtaining copies of their contents- Article 11, letter "f" (ii) of the Puntland Anti-piracy Law.

B/ Covert interception of conversations is the other type of covert interceptions. This is the "bugging" in public/open spaces or private premises - monitoring (listening to) oral communications between persons and/or only recording them by installed technical means - Article 11, letter "g" of the Puntland Anti-piracy Law.

However, the rules and restrictions on covert interceptions do not apply to any of the public speeches and conversations as they are addressed to anyone and investigative authorities are not excluded. This is why, usually, surveillance in the Internet 'chat rooms'/forums is not restricted and does not require any specific permission. The European countries, in particular, generally, take the view that authorisations are not ordinarily required for participating in Internet 'chat rooms' or other social networking websites, even where one's true identity is concealed. The same is arguably true about surveillance in such settings. Persons participating in open online chat or posting on a social networking site

have no reasonable expectation of privacy regarding content. Thus, each comment or posting is effectively published to a given group of participants many of whom may not have revealed their true identity. Again, with surveillance, as with the undercover agent, the position will certainly change once steps have been taken to restrict access to a few known or verifiable individuals.

Lastly, interception is applicable not only to communications *per se* but also to postal items (physical objects) as well - Article 11, letter "a" of the Puntland Anti-piracy Law. This is a covert examination of a postal item, whereby evidence derived from the inspection of the item is collected. If necessary, the item may be replaced. Usually, the activity is video-recorded, photographed or copied or recorded in another way. Once the covert examination of the postal item is over, this item or the replaced one shall be sent to the addressee.

It is sometimes forgotten that seizure of or interference with postal items during the course of their transmission amounts to a form of communications interception in *sensu largo*. To that end, Germany provides a lawful basis for this in Section 99 (Seizure of Postal items, order by the public prosecutor) of its CPC.

2. Covert photographic or video surveillance (in public/open spaces and private premises). This surveillance, whether or not by means of electronic or other devices, is used to establish the whereabouts of targets (persons, vehicles, etc): their locations by positioning devices and movements by tracking devices. This is achieved by secret photographic, film or video recording of persons in public/open places or the use of surveillance devices for determining the whereabouts (e.g. electronic or binoculars or similar ones).

Surveillance, by its very nature, is likely to involve some breach of the Right to Privacy under Article 17 of the International Covenant on Civil and Political Rights [Somalia acceded thereto in January 1990], unless it is expressly provided for in the law, is appropriately authorised and is both necessary and proportionate.

3. Other deployable SIT-s:

A/ Such ones which do not involve obtaining information about the contents of conducted communications between targets:

A covert metering of telephone calls – Obtaining a record of telephone calls from a given telephone number about the number of calls (dialled and received), the time and length of each call without the knowledge of the correspondent who is the subject of the measure.

A covert collection of computer traffic data – Obtaining computer data beyond the contents of the communications. Usually, this information is generated automatically by the computer system; it indicates the communication's origin, destination, route, time and length of each communication, size, duration, etc.

B/ Secret Examinations:

Covert search of (private, usually) premises – Performing a careful examination of a house or other premises without the knowledge of the owner or the user who is the subject of the measure.

Covert search of postal items – Performing a careful examination (including X-ray search) of letters or/and other postal items or consignments without the knowledge of the persons who are the subjects of the measure. See also Article 11, letter "a" of the Puntland Anti-piracy Law.

VI. Related Operations

1. Controlled delivery [see also Article 11, letter "c" of the Puntland Anti-piracy Law] is a widely used operation. However, it is not a distinct SIT, a source of admissible evidence acquired secretly, although it is often described as such. Actually, it is a means that utilizes SIT-s *per se*, such as surveillance (of reception and/or distribution of items), incl. the cross-border observation and also hot pursuit, where necessary, as well as interception (of telecommunications, of conversations and/or some item).

The controlled delivery is an operation of allowing the transportation of illicit or suspect consignments to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in its commission. Most often, the probable offence is the contraband of drugs, weapons, currency, or monetary instruments.

Controlled deliveries are conducted to:

- Broaden the scope of an investigation, identify additional and higher level violators, and obtain further evidence;

- Identify the violator's assets for consideration in asset forfeiture proceedings and

- Disrupt and dismantle by the competent law enforcement authorities criminal organizations engaged in smuggling contraband, currency, or monetary instruments across borders.

Most often, controlled deliveries are across the border; they are cross-border controlled deliveries. Such controlled deliveries are performed in cooperation with customs. The customs authorities are permitted to allow,

under their control, import, export or transit through the country's territory of illegal goods. Controlled delivery can be carried in the country in the framework of the criminal investigations into extraditable offences at the request of another country, in accordance with its procedural law, as well as can be requested by Somali investigators and prosecutors as part of their investigation and then use the obtained evidence in court.

Controlled delivery could be carried out by: (i) recruiting a cooperative suspect after initial recovery of the contraband, (ii) using a suspect or another person as a blind courier, who does not know that the contraband was discovered, or (iii) using, where feasible, the cooperation of the courier company for conducting the controlled delivery operation.

Cross-border controlled deliveries, usually, are performed in cooperation with customs and other authorities of foreign countries based on international agreements. Regretfully, the only such agreement that Somalia is a Party to [this is the 1983 Riyadh Arab Agreement for Judicial Cooperation] does not contain any rules on such controlled deliveries. Besides, even the domestic law of Somalia, the Criminal Procedure Code (Book 5), does not mention cross-border controlled deliveries in any way. Moreover, the CPC does not regulate at all any international transfer of admissible evidence (from one jurisdiction to another), although this is a typical modality of international judicial cooperation in criminal matters. It is usually called "(international) transfer in criminal proceedings".

It is noteworthy, in the end, that each country has somewhat different laws and approaches in performing controlled deliveries. For example, there are two types of controlled delivery, namely: *live* controlled delivery, e.g. Egypt, Malaysia and Indonesia, that allows the original contraband to be moved to its final destination under control of law enforcement officers and *clean* controlled delivery, in which case law

enforcement agencies remove and substitute drugs with a harmless one before allowing the consignments to be delivered, e.g. Japan and Estonia {**Group 2**, Countermeasures against Organized Crime, in UNAFEI Resource Material Series No. 65, 2005, Tokyo, p. 182}.

2. The Joint Investigation is a typical method of investigative work related to cross-border controlled deliveries. It is a very appropriate (flexible and efficient) way of gathering evidence in such cases as well as other cases where criminal activities concern two or more different countries. This evidence gathering, including through SIT-s, is performed in the form of the so-called joint/international investigation team. According to Article 19 [Joint Investigations] of the UN Convention against Transnational Organized Crime and Article 49 [Joint Investigations] of the UN Convention against Corruption,

"*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected*".

The joint investigation body/team is set up for a fixed period of time. It is presentable as an advanced form of an international letter rogatory (see Articles 276-277 of the Somali CPC). However, in contrast to it, this team works as follows:

a. The team collects pieces of evidence not only for the country where it operates but for the other participating countries as well.

b. Pieces of necessary evidence are not collected in one of the participating countries only but, usually, in the territories of all other countries.

c. There is no letter rogatory and a granting decision. Instead, the interested countries sign an international agreement. In the implementation of this agreement, team members are able to directly request all necessary investigative actions, dispensing with the need for letters rogatory.

d. Most often, the team works at a time in the territory of one country; its officials with investigative powers are tasked with the execution while other participating countries' officials, esp. those with investigative powers are only present at the execution.

Letter Rogatory - vs. - Joint Investigation Team

COMMON FEATURES
Serve justice through collection and delivery of valid evidence across state border – from one country to another
The existence of pending criminal proceedings in the interested country (-ies) is necessary
Dual criminality is not a must
Evidence is collected by local judicial authorities
No transfer of competence takes place

	DIFFERENCES	
	Producing Evidence by:	
Criteria	**Execution of a Letter Rogatory**	**A Joint Investigation Team**

Territory of Action	In a requested foreign country	In the participating countries
Start of the Procedure	A letter rogatory dispatched by the interested country	An agreement by the interested countries for setting up of the team
Direct Availability of Collected Evidence	No, it must be provided to the requesting country	Yes, it is automatically at the disposal of the participating countries through their representatives
Obtainability of Evidence from a Third Country as well	NO	YES
Benefiting Country	Only the requesting country	All participating countries
Necessity of Domestic Legal Framework	YES	NO

Lastly, controlled delivery is very similar to cross-border observation. However, their objects are different. The cross-border observation allows investigators within the framework of a criminal investigation to monitor even beyond the boundaries of their country a person who is suspected of having taken part in a criminal offence, or a person who may lead to the identification or location of the above-mentioned suspect. These investigators may continue their observation in the territory of another country if its authorities agree to such observation.

3. The undercover operation is the infiltration of an agent (undercover officer or another person cooperating with the competent authority) under a false identity into a criminal group. The typical role of such agents is to become part of an existing criminal enterprise.

Like the controlled delivery, the undercover operation is not any distinct SIT, any source admissible of evidence acquired secretly. It is an investigation activity that also prepares the ground for the utilization of SIT-s *per se*, such as surveillance and interception, as well as stimulated purchases, but most often, it is done for the posterior interview of the undercover agent as **an anonymous witness** (or identify persons which might be interviewed as such), a typical method of his protection. Besides, if duly authorized by law, s/he may also produce other admissible evidence. In particular, the agent might be tasked with taking pictures (monitoring, observing, or recording of persons, their movements or their other activities by means of photographic or video devices) or installing bugging devices (interception of conversations by monitoring or recording them by technical means). The products would be admissible evidence if applicable law recognizes them as such. In any case, the undercover operation is closely related and, actually, dependent on the witness protection activities [see also Chapter IV (Article 14) of the Puntland Anti-piracy Law].

Usually, the key source of information as a result of the undercover operation is the anonymous witness. On the one hand, s/he enjoys administrative protection, incl. measures of keeping his/her identity secret. Thus, according to § 136 (3) of the Slovak CPC, "*Before examining a witness whose identity should remain secret, the criminal procedure authority and the court shall take the necessary measures to ensure the protection of the witness, in particular by changing the physical appearance and voice of the witness, or conducting an*

examination with the help of technical equipment, including audio and video transmission technology".

On the other hand, and it is more important when it comes to evidence law, the evidence obtained from this witness, usually, is not equal in procedural value to the evidence obtained from ordinary witnesses. Often, the value of such evidence is limited. Thus, according to Recommendation No R (97) of the EU Committee of Ministers from 25 Nov. 1997 to the Member States concerning Intimidation of Witnesses and the Rights of the Defence, „...*When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons* ...". Article 23 [Verdict Requires Other Evidence] of the Bosnian Law on Protection of Witnesses under Threat and Vulnerable Witnesses and Article 262 (3) of the Kosovar Criminal Procedure Code are the same sense. These provisions require corroborating evidence for a guilty verdict.

Apart from the possible insufficiency of his evidence for a guilty verdict, this person enjoys a specific immunity while participating in the respective criminal association. He is not punishable for assisting crimes by the members of the association but not justified for and perpetration or incitement to crime. Unrealistic restriction but this is the situation in Europe, currently. Like it or not, this situation must take it into account.

According to the law and judicial practice in Europe, the infiltrated person shall not act as an 'agent provocateur': to incite the perpetration of crimes, e.g. CASE OF SEPİL v. TURKEY (Application no. 17711/07), *European Court of Human Rights Judgment,* STRASBOURG, 12 Nov 2013. This means that such persons are not permitted to encourage suspects to commit crimes they would not ordinarily commit. The use of infiltrated persons as agent provocateurs is expressly prohibited also under the North Macedonian legislation and the use of such a technique in

bribery cases would fall under Article 358 of the Criminal Code of that country. This method of exposing offenders is often used in the US but is less common in Europe.

Additionally, it is important to know that the use of an agent provocateur cannot result in the production of any admissible evidence. In its Chamber judgment in the case of Furcht v. Germany (Application no. 54648/09) the European Court of Human Rights held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned the complaint by a man convicted of drug trafficking that the criminal proceedings against him had been unfair, as he had been incited by undercover police officers to commit the offences of which he was convicted. The court found that the undercover measure in Furcht's case – going beyond a passive investigation of criminal activity – had indeed amounted to police incitement. The German courts should not have used the evidence obtained in this way to convict him.

In 2007, Furcht, who had no criminal record, was approached by undercover police officers in the context of criminal investigations against six other people suspected of drug trafficking. One of the suspects was a friend and business partner of Furcht and the officers intended to establish contacts with the suspect via him. They initially pretended to be interested in purchasing real estate and later in smuggling cigarettes. During one of the meetings with the undercover officers, Furcht offered to establish contacts with a group of people trafficking in cocaine and amphetamine (including his friend suspected of drug trafficking), while stating that he did not wish to be directly involved in the drug trafficking, but that he would draw commissions.

The undercover officers expressed an interest in transporting and purchasing drugs. In a subsequent telephone conversation, on 1 February 2008, Furcht explained to one of the officers that he was no longer interested in participating in a drug deal but a few days later, on 8 February, the officer dispersed his fears and Furcht eventually arranged two purchases of drugs for them in February and March 2008. In the meantime, a district court had authorised criminal investigations in his respect. Following the second transaction, Furcht was arrested and, in October 2008, he was convicted of two counts of drug trafficking and sentenced to five years' imprisonment.

At the same time, beyond the prohibition of turning the undercover agent into an 'agent provocateur', no general restriction exists when it comes to using him/her as a means for acquiring admissible evidence. The lack of such restriction may be illustrated by the following example. Two German nationals we arrested in Italy on drug charges. Both were placed in a prison cell with an undercover agent, posing as a cell-mate, who pretended not to understand the German language. He heard one of them speaking about a murder that he had committed. Thereafter, the undercover agent was questioned as a witness and repeated the extra-judicial confession of the German. At the trial, this German sought to argue that the cell confession had been unlawfully obtained and its admission would breach his right to a fair trial. In response, the court held that the undercover operation of the Italian police had not constituted any illegal method of acquiring evidence. The suspect had the interest in not talking to the other German arrestee about his crime in the presence of a third person. If he nevertheless freely did so, it is his own risk and responsibility that this turned against him. The undercover agent did not make him talk about the murder which he had committed. This is why the court accepted that the suspect's freedom of will was not affected by the operation of the Italian police. Therefore, the use of the evidence obtained through the undercover agent could not deprive him of his right to fair

trial {**Council of Europe**, Economic Crime Division, Directorate General – Legal Affairs I, SPECIAL INVESTIGATIVE MEANS IN SOUTHEAST EUROPE, Strasbourg, 2003, p. 30}.

Finally, if the undercover agent does not produce any admissible evidence, s/he would play the role of a secret informant only. There is always some confidential cooperation with individuals to obtain information about crimes being plotted or already committed; informants can operate openly or secretly, free of charge or for a fee, can be hired as permanent or non-permanent staff. Such individuals can also be used to identify potential witnesses which might be exposed. The restriction against the agent provocateur activity is valid for the secret informants as well.

Both secret informants and anonymous witnesses should be distinguished from the so-called **cooperative witnesses**. In some countries, when a member of an organized group, gang or another criminal enterprise, who voluntarily collaborate before or after the detection or during the criminal procedure, if his/her cooperation and statement are of essential importance for the criminal procedure, this person may not be prosecuted on the decision of the judge or the prosecutor in charge, e.g. Article 129 of the Iraqi CPC and Article 44.3 of the North Macedonian CPC. In this situation, s/he will not be treated as a suspect. Instead, this person becomes a witness (a cooperative one)[7].

Most often, the use of cooperative witnesses goes in combination with the deployment of SIT-s. Usually, such a person has already participated in some continued corrupt activities and at a given time, becomes aware of a corrupt or terrorist act that s/he is going to be involved with together with another corrupt person or terrorist. The cooperating witness agrees to maintain his/her relationship with him/her under the supervision of the investigators. The target of the investigation is recorded either by audio, video, or both, while participating in corrupt or terrorist behaviour and

transactions together with the cooperating witness. Once the target sufficiently tied his/her own noose, then the arrest is made.

The cooperative witness's primary motivation is to alleviate his/her own legal troubles by obtaining procedural immunity. One characteristic distinct to this pattern is the desperation of the cooperating witness. Since the cooperating witness is already in trouble, s/he risks less by going to the police. The increase in danger that the cooperating witness faces may oftentimes be outweighed by the benefits received from the government.

The witness in question is not free from prosecution unconditionally. On the contrary, s/he would lose his/her immunity "*if it is established that the testimony of the co-operative witness was false in any relevant part or that the co-operative witness omitted to state the complete truth*" (Article 238.1 of the Kosovar CPC).

The immunity of the co-operative witnesses resembles the immunity of extraditees – see Article 278 (2) of the Somali CPC. Both immunities are procedural being conditional and revocable. The big difference between the two immunities is the following: the extraditee's immunity is general: it covers all his/her criminal offences except for the one(s) in respect of which s/he has been extradited, whereas the cooperating witnesses' immunity is specific: it covers only the criminal offence, s/he will testify of, and, exceptionally, some other closely related offence.

Basically, it is good to grant procedural immunity in exchange for their testimony against others, especially upper-echelon organized crime figures. This result where the alleged offender does not remain prosecution target any longer is achievable easier and safer if based on a comprehensive set of specific rules that clearly regulate the prerequisites and the conditions for the cooperating witness's procedural immunity. These rules are designed to reduce risks while granting immunity.

Finally, the following risks, related to the cooperative witnesses, are worth mentioning. As 'immunized' witnesses, they are often unpredictable, their examiners cannot be sure in advance of the precise value of the withheld testimony. Also, prior to the testimony, there is no way of knowing what crimes are likely to be exonerated. Furthermore, there are risks of granting an "immunity bath", whereby a witness mentions a wide range of crimes he has engaged in knowing that he is immunized from prosecution for any crime s/he refers to. Moreover, there may be a perception that his/her testimony is unreliable because it has been purchased.

4. Financial investigation[8] or obtaining financial data is not any SIT either, although it has been mentioned among them in the Puntland Anti-piracy Law (Article 11, letter "e"). This investigation comprises a set of measures, which may include undercover operations as well direct use of one or more SIT-s, for the collection of information and evidence "*on deposits, accounts or transactions from a bank or another financial institution or remittance service provider*"**.**

A. The collection of the necessary financial data might be performed not only within criminal proceedings. Such data might be collected in a separate financial investigation for the confiscation of assets under penal law even without a criminal conviction. As per Article 54.1, letter "c" of the UN Convention against Corruption, each Party, should "*Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases*".

Therefore, when Somalia accedes to the aforementioned Convention it may implement the quoted Article 54.1, letter "c" by prescribing in its domestic law confiscations of assets in cases when criminal proceedings are not allowed. Such subsidiary legal proceedings ending up in confiscation under

penal law without any criminal conviction (non-conviction based confiscation) constitute the so-called financial investigations.

Moreover, such investigations might be initiated not only when criminal proceedings shall not be instituted or concluded. Financial investigations may take place even in cases when the owner of the assets liable to confiscation is convicted but because of their larger amount, it would have been too difficult to collect evidence of them within the criminal proceedings against him/her. Thus, in line with Article 31 (8) of the UN Convention against Corruption each Party, incl. Somalia may opt to introduce one of the two modern forms of confiscation, namely: extended confiscation or unexplained wealth confiscation[9]. Under these modern forms, the amount of confiscatable property is too large to be traced and detected in full. This makes it necessary to have special legal proceeding to ensure the successful constraint and confiscation of the whole property wherever and under whatever form it is.

To this end, financial investigations are focused solely on asset searches. Any such investigation aims at finding where the money comes from, how it moves, and how it is used. Also known as forensic accounting, this specific type of investigation is most supportive to ordinary criminal investigations into fraud, embezzlement, bribe, money laundering, tax evasion, terrorist financing and many other crimes conditioning confiscation. In turn, successful criminal investigations and prosecutions of criminal offences conditioning confiscation open the way to confiscating the assets of offenders.

It is to be taken into consideration that, usually, such confiscation is the final part of a long and complex process. The full process of confiscation includes the following actions: [i] Identification of Assets – establishing the holder of a given physical item or bank account; [ii] Detection of Assets – locating the physical item(s) and/or finding the bank account(s) of a given person; [iii] Preservation of Assets – the seizure of some

movable physical item(s) and/or freezing the deposited money in some bank account(s) or/and immovable physical items of a given person; [iv] Confiscation Order - a judicial order for the final deprivation of property, namely: of some physical item(s) and/or of deposited money in some bank account(s) of a given person; [v] Enforcement of the Order to actually confiscate the targeted asset(s); and [vi] Redistribution of confiscated assets, including their sharing and recovery.

B. The major methods that can be employed within a financial investigation are summarized as follows: (i) Analysis of a specific payment, (ii) Analysis of the income and expenditures, (iii) Analysis of fraudulent financial transactions.

1. Analysis of a specific payment

This analysis is used to trace a concrete payment of a bribe from or to the suspect. A good example is a case investigated and prosecuted in a European country, where a company paid a kickback to a local public official in order to receive a public procurement contract for the reconstruction of the city's water and sewage system. The kickback as a percentage of the total contract value was paid to another company, associated with the public official.

The use of the method in question allowed the investigators to establish the direct paper trail of money transfer from the bribe-giver to the corrupt official, which could be used as evidence in court. It is important to note that in addition to the evidence of the receipt of an undue advantage, investigators needed to provide evidence of the violation of the public procurement rules by the corrupt officials, which involves other investigative techniques.

2. Analysis of the income and expenditures

This specific method involves the analysis of the lifestyle, income, assets and expenditures of the suspect. It can be used if the payment of a specific bribe cannot be traced directly to the suspect.

There are various models used in the determination of an individual's assets and expenditure. The following methods are the most common:

- Analysis of income, also known as *"Net-worth analysis method",* is used to establish if there has been an increase in the total income of the suspect over a specific time period. Known lawful income is subtracted from the total income and the remainder represents illicit proceeds. This is a very complex method as it is difficult to establish total income, property and other assets that a suspect owns and benefits from. The results of this analysis can be used as a part of the evidence in conjunction with other evidence that established corrupt activity such as bid-rigging or misappropriation of funds.

- Analysis of expenditures, also known as *"Source and application of funds method"* or *"total expenditure analysis",* is used to establish the total amount of suspect's spending in a given period of time, and compare this amount to the income available from known lawful sources. The difference will also represent illicit proceeds. This method is easier to use than the analysis of income since it is easier to establish the total amount of expenditures and the legal income of the suspect. Like the analysis of income, the analysis of expenditures can generate only additional evidence for the competent court. This analysis can be used to analyse both cash and non-cash expenditures:

a. *Cash Expenditure Analysis* can be useful where the bribe or another form of illicit payment was provided in cash. By adding together all of the suspect's cash expenditures and subtracting all of his known sources of income, the amount of cash expenditure made in excess of legitimate sources of cash for a given period can be ascertained.

b. *Bank Deposits Analysis* examines expenditures by the suspect made in the form of bank deposits. However, given the increasing sophistication of criminals and possibilities of transformation of bank deposits, this method is less reliable than cash expenditure analysis.

3. Analysis of fraudulent financial transactions

Analysis of the financial transactions of a suspect can be used to establish if any of the transactions which increased the wealth of the suspect are fraudulent and disguise the payment of bribes. The suspect may have received various payments which appear legitimate, for instance, consultancy fees or payment for the sale of a house. In such cases, the investigation may analyse these transactions to establish their true nature and to detect if any of these transactions were fraudulent.

For instance, the investigator can establish which consultancy services were provided by the suspect in reality, if the price for the services corresponds to the market prices, and who the owner is of the company paying the fees. In case of the sale of the house, the investigator may explore if the house exists in reality, what is its market value, who were its past owners, and other elements to establish if the suspect was indeed the legitimate owner and the sale price corresponds to market prices, if the sale was used to disguise the payment of some bribe. It is important to bear in mind that such a method would require serious resources and the involvement of outside expertise to investigate and prepare evidence for presentation in the court.

VII. Concluding Observations

1. The special investigative techniques [SIT-s] are efficient methods of evidence collection but their deployment may endanger the right to privacy and other human rights as well. This is why the deployment of such techniques cannot be always justified. It is justifiable only within the

investigations of organized crime, terrorism and other serious and/or complex criminal activities. Moreover, their deployment would be justifiable only if less severe measures would not be effective, i.e. when the necessary evidence to prove the afore-mentioned crimes cannot be obtained in another way. In any case, the law shall restrict their duration and introduce a strict system for obtaining approval for their use.

At the same time, the SIT-s must not be too restrictively deployed either, as their evidentiary effect would be insignificant and, in the end, their existence would remain on paper. Therefore, it is always a matter of constant weighing what is more valuable:

- strengthening the individual's freedoms and rights, which imposes limitations on the repression the criminal law necessarily entails, or

- strengthening the powers of the state ensuring the fight against crime is more efficient but at the expense of the individual's freedoms and rights.

The legal provisions regulating the SIT-s must be of sufficient clarity. Because of the constantly evolving techniques of electronic surveillance, legislators have to take particular care in crafting a legal framework that is sufficiently precise while maintaining a degree of flexibility that ensures its ability to remain relevant as technologies evolve.

Lastly, all these techniques are largely unknown. This is why a punctual plan should be drawn before starting the actual activities concerning their implementation. This plan should eliminate all of the ambiguities and unknown elements as well as procedural errors.

2. The introduction of the SIT-s is probably the most difficult measure for the implementation of the UN Convention against Corruption as required by Article 50. However, their introduction shall not be the only such a measure. There are also some other difficult to implement measures also. These necessary measures shall go hand in hand with the introduction of

the SIT-s and the general strengthening of the Somali investigative capacities as a result of their introduction.

First of all, in accordance with Article 66 (3, 4) of the aforementioned Convention, Somalia should decide what Declarations and Reservations to the Convention it must prepare and submit. Some of them are likely to affect the deployment of SIT-s. The Somali authorities have the advantage of seeing what other Parties have already presented as their declarations and/or reservations to the Convention.

Secondly, the other appropriate measure would be the expansion of the property liable to confiscation. This should result from the introduction of some modern forms of confiscation, including non-conviction based confiscation as encouraged by Articles 31.8 and 54.1, letter "c" of the Convention. The strengthening of the Somali investigative capacities would make much more sense if the law allows for the confiscation of more assets.

Thirdly, certain legislative measures would be needed for the criminalization of some acts as well as for the extraterritorial application of the Somali Penal Code to them as required by Articles 15 – 30, and Article 42 of the Convention. Only after these necessary amendments take place, it might be decided for which of these new crimes SIT-s are to be deployed.

Fourthly, appropriate legislative and operational measures should be taken for the drastic improvement of different modalities of the international judicial cooperation rendered by Somalia. The measures are required by Articles 43-49 of the Convention. The strengthening of the Somali investigative capacities would, in turn, enable the provision of more efficient international judicial cooperation to other countries and *vice versa*: the intensification of this cooperation would make strengthening of the Somali investigative capacities more necessary.

Notes

[1] It is noteworthy that on 04 June 2020, the Federal Government of Somalia approved the joining and signing of the UN Convention against Corruption.

[2] The laws of some countries allow also the initial deployment of such techniques without a warrant: in cases of urgency. These are usually cases of an imminent threat, immediate danger or other exceptional conditions where it is not possible to obtain authorization in the legally prescribed manner. In such circumstances, the investigating body may commence surveillance without any prior permission before the official authorization is granted: within 24 hours in Estonia or 48 hours in the Czech Republic.

[3] See also Article 136 of the Turkish Criminal Procedure Code.

[4] Also Article 135 (5) of the Turkish Criminal Procedure Code.

[5] Articles 23-25 of the Turkish Law on International Judicial Cooperation in Criminal Matters might be a good example for the formulation of the missing Somali rules for this modality of international cooperation.

[6] See also Jesenični̇k, J. & A. S. Ranzinger. Handbook on Joint Investigation Teams, TDP, Sarajevo, 2014.

[7] In some countries, however, s/he is a participant in the crime(s) who testifies against other participants not only for waiver of the punishment. His/her procedural cooperation might be for punishment mitigation only.

[8] On this point see OECD. Investigation and Prosecution of Corruption Offences: Materials for the Training Course, Ukraine, 2012, p. 25.

[9] The Extended Confiscation has been introduced in Bosnia and Herzegovina, Romania, Serbia and some other countries as well. The other type of new confiscation is the so-called Unexplained Wealth Confiscation. It has been introduced in Bulgaria, Italy, Ukraine, the UK and some other countries.

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The General Principles of the Somali Penal Code in the Light of the Islamic Sharia

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Abstract

The Somali Penal Code in its Book One, contains a number of general principles that guide the court when applying and interpreting the Law. The article closely examines the following four principles; "The Presumption of Innocence" which considers that the accused person is innocent until proven guilty of a criminal offense, the second principle is "Legality Principle" which means that only the law can define a crime and prescribe a penalty, the third principle is "The Retrospectivity Principle", it means that laws should not have retrospective effects, the last principle the study examines is "The Double Jeopardy Principle" which prohibits trying a person twice for the same crime.

This article examines whether the general principles of the Somali Penal Code are compatible with the Islamic Sharia since the constitution binds compliance of the laws of the state with the general principles and objectives of Islamic Sharia.

Keywords: Islamic Sharia, law and Sharia, Somali penal code, Somalia.

1. Introduction

The Somali Penal Code, promulgated in early 1962, became effective on April 3, 1964. The basis of the code was the Constitutional premise that the law has supremacy over the state and its citizens. The code placed responsibility for determining offenses and punishments on the written law and the judicial system. The penal laws applied to all nationals, foreigners, and stateless persons living in territorial borders of Somalia. The population of the Federal Republic of Somalia is 100% Muslim. Its Provisional Constitution states that Islam is the religion of the State (Article 2(1)), and binds that the laws of the country must comply with the general principles and objectives of Islamic law (article 2 (3)), and above that, affirms the supremacy of the Sharia before the supremacy of the constitution (article 4 (1)).[1] In this regard, it is important to examine whether the general principles enshrined in the Penal Code are compatible with the Islamic Sharia.

The article describes and critically analyses the general principles of the Somali Penal Code and its adherence to Islamic Sharia. The Somali Penal Code accepts *inter alia* the following principles as general principles guiding the judge when applying and interpreting the Code; (1) The Presumption of Innocence principle, (2) Legality Principle, (3) Retrospectivity Principle and, (4) Double Jeopardy Principle. I will discuss each principle in detail and see how compatible these principles are with the Islamic Sharia.

2. The Presumption of Innocence

The presumption of innocence has long been regarded as fundamental to protecting accused persons from wrongful conviction. The basic principle is that the accused is to be considered innocent until proven guilty of a criminal offence. The reason why this principle is considered fundamental

is that it is generally seen as better for the guilty to go free than the innocent be convicted. [2] The presumption of innocence is the legal principle that one is considered "innocent until proven guilty". Many countries including Somalia, the presumption of innocence is a legal right of the accused in a criminal trial, Article 35 (1) of the Federal Constitution provides that: "*The accused is presumed innocent until proven guilty in a final manner by a court of law"*. The principle also enshrined in the International Human Right Laws under the Universal Declaration of Human Rights (UDHR)[3], Convention on the Rights of the Child (CRC)[4], International Covenant on Civil and Political Rights (ICCPR)[5], Cairo Declaration on Human Rights in Islam[6], and The African Charter on Human and Peoples' Rights[7].

Under the presumption of innocence, the legal burden of proof is thus on the prosecution, which must present compelling evidence to the trier of fact (a judge). The prosecution must in all cases prove that the accused is guilty beyond a reasonable doubt. If there is an iota of reasonable doubt, the court must acquit the accused. Under the Somali criminal proceedings the accused is presumed innocent unless the prosecution presents concrete evidence. In civil proceedings (like breach of contract) the defendant is initially presumed correct unless the plaintiff presents a moderate level of evidence and thus switches the burden of proof to the defendant on a balance of probability.

2.1 The Presumption of Innocence in Islamic Sharia

One of the basic presumptions in the Islamic criminal law is that the accused is presumed innocent unless proven guilty. This maxim is deduced from the original maxim [8]" الأصل براءة الذمة " that is, *'The basic presumption is innocence'*. A person is born pure and innocent and he has to guard his innocence and purity. Unless a person is proved guilty by a competent court, in accordance with the strict rules of evidence and due

process of Islamic criminal law, he is innocent. The concept of (الاستصحاب), that is, presumption of continuity is a corollary of this maxim. Under *'Istishab'* "a situation existing previously is presumed to be continuing at present until the contrary is proven." The Prophet ﷺ has laid the foundation of this maxim by his saying:

" البيّنة على المدّعي واليمين على من أنكر "[9]

"The onus of proof lies with the claimant and denial shall be supported by oath".[10]

The famous letter of 'Umar b. Al-khattab to Abu Musa Al- Ash'ari (R.A.) has referred to this *Hadith*. It says,

كتب عمر بن الخطاب إلى أبي موسى الأشعري رضي الله عنهما:

" البيِّنة على مَن ادَّعى، واليمين على مَن أنْكَرَ ".

"The burden of proof is on the accuser, and he who negates should be asked to take the oath."

If the claimant is unable to prove his claim against someone, his claim is defeated and the respondent's innocence continues as before. As a matter of fact, it is a presumption and could be rebutted. For example, there could be a situation in which a man comes out of a building with blood on his body or a weapon in his hand. He may be arrested and investigated for the murder of a freshly murdered person inside the same building. In this case, circumstantial evidence will be against the accused and the presumption of innocence might not save him.

The presumption of innocence has many aspects. First, fixed penalty offences (*hudud*) cannot be implemented in case of any doubt. This is based on the saying of the Prophet Muhammad ﷺ, [11](ادرءوا الحدود بالشبهات) *"Repeal the hudud punishments from Muslims as far as you can, so if*

there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him". Muslim jurists have written in minute details of repealing *hudud* punishments in case of the slightest of doubt and suspicion. Any doubt in the criminality or the evidence produced in the court will benefit the accused. Shawkani has put this concept in a maxim: "It is better for an *Imam* (Head of a Muslim State) to err in pardoning (the accused) than to err in punishing (him)".[12]

Muslim jurists argue that this doctrine is not confined to *hudud* offences only, rather it covers all other types of litigation including "the rights of citizens, القصاص (retribution), الحدود, التعازير *Hudud* and *ta'aziir* offences, all types of assertions, and all types of acts."

Another aspect of the presumption of innocence maxim is that it is better to pardon the accused erroneously rather than to punish him erroneously. We have just quoted the saying of the Prophet ﷺ above while discussing the first aspect of this maxim. One more aspect of this maxim is that a very strict evidentiary criterion must be met for proving a *hadd*. Moreover, the principle of legality and the due process of law must be adhered to in letter and spirit. The evidentiary criteria for certain *huduud* offences are so strict that it is virtually impossible to prove them through evidence, for instance, to prove the offence of adultery or fornication four eye witnesses must have seen the act of penetration themselves failing which they will be charged with *qadhf* (accusing a chaste person of *zina*). Thus, the idea is not to punish but to guard the principle of innocence unless proven guilty. Should the slightest of doubts arise during the investigation, trial, examination or cross-examination, the charge of *hadd* shall not be implemented. Doubts could arise about the validity, soundness, credibility or conclusiveness of the evidence. In such a case the accused is to be declared innocent. In the case of confession to *zina*, if

the accused runs away during the execution, it is presumed as retraction of his confession and he or she is not chased.[13]

As a consequence of the presumption of innocence unless and until a definitive judgment is given by a competent court the accused is considered innocent. He cannot be called guilty or convicted till a final decision of his guilt is given. Moreover, the principle of legality and the procedural requirements of Islamic criminal justice system must be fully observed. In addition, the accused has the right to use all the technical as well as legal means available to him to refute the charges and the evidence against him. Finally, the accused must be given the benefit of any doubt if it exists, in the evidence. Thus, it should not be considered a foregone conclusion that once a person is charged he must definitely be guilty as charged.

3. Legality Principle

The principle of legality is one of the most fundamental concepts related to the criminal law. It's enshrined in the Provisional Federal Constitution[14] and in the Penal Code[15]. The principle is also embodied in the International Human Rights Law and in particular UDHR[16], ICCPR[17] and Cairo Declaration on Human Rights in Islam[18]. The law offers protection of the legal rights of a person who faces a criminal charge. The main purpose of the principle of legality is to prevent a person from being wrongly charged with a crime. It ensures that the state does not violate the basic tenets of human rights. No person no matter what is his or her nationality, race, age, gender, or class can be convicted of a crime without a fair trial. Another connotation of the principle of legality is that a person cannot be charged with a crime if it does not constitute a criminal offense at the time the crime was being committed. Also, a heavier penalty may not be imposed on a person than the one that was in force at the time the crime was committed. The principle of legality implies that

the judge cannot issue a verdict against a person if the action was not prohibited when the crime was committed. Also, it disallows a judge to lean in favor of any verdict that has been given without any reasonable or clear justification that is not anchored in law.

3.1 The Principle of Legality within the Islamic Criminal Justice System

The principle of legality also known as the 'Rule of Law' is to protect the interest of the individual by restricting the authority of the state. The principle is stated in the two postulates: *nullum crimen sine lege,* or no crime without law, and *nulla poena sine lege,* or no punishment without law. Another postulate that is the natural outcome of the above two is 'no retroactive application of criminal law'. These three postulates are inseparable and their fundamental objective is to protect an individual's liberty, dignity, life and property from any abuse or loss by state's authorities. Thus, the individual cannot be charged if the alleged act was not a crime when committed nor will he be punished for that act. According to the principle of legality, 'the judge may not punish anyone on the basis of his own wishes and whims without lawful evidence and proof. Even then, the legal text that is applied must have been in existence and promulgated at the time the offence was committed." The principle of legality is recognized as one of the most basic principles of human rights law, international conventions, and states' constitutions of all countries of the world. However, we have to focus on the role of this principle in Islamic Sharia and whether and how it is rooted in the primary sources of Islamic Sharia, especially the Qur'an and the Sunnah of the Prophet. The majority of jurists agree that prohibitions in Qur'anic verses and Prophetic sayings, acts or confirmation are prospective. The general arguments in support of this view are mentioned here.[19]

3.1.1 The Principle of Legality in the Qur'an

Allah says in the Qur'an,

"وَمَا كُنَّا مُعَذِّبِينَ حَتَّى نَبْعَثَ رَسُولا[20]

"And never do we punish any people until we send a Messenger (to make the Truth distinct from falsehood)."

According to Muhammad b. Ahmad al-Qurtubi, it means that the rules cannot be proven except on (the basis of) law." [21] Rules include obligations, prohibitions, and punishments. Muhammad Abu Zahra argues that it is against "the blessing of God to punish people without sending a messenger who teaches and explains the right path." The majority of Muslim jurists argue that the punishment mentioned in the above verse is the punishment in this world and not in the hereafter. The Qur'an also says,

" وما كان ربك مهلك القرى حتى يبعث في أمها رسولا يتلو عليهم آياتنا وما كنا مهلكي القرى إلا وأهلها ظالمون[22] "

"*Your Lord would not destroy a town until He had sent to its center a Messenger who would recite to them our verses. Nor would we destroy any town unless its inhabitants were iniquitous."*

In addition, the Qur'an says,

(وَمَا أَهْلَكْنَا مِن قَرْيَةٍ إِلَّا لَهَا مُنذِرُونَ , ذِكْرَى وَمَا كُنَّا ظَالِمِينَ)[23]

"We never destroyed any habitation but that it had warners to admonish them. We have never been unjust. " Allah states in the Qur'an:

(ولو أنا أهلكناهم بعذاب من قبله لقالوا ربنا لولا أرسلت إلينا رسولا فنتبع آياتك من قبل أن نذل ونخزى[24])

"*Had we destroyed them through some calamity before his coming, they would have said: "Our Lord! Why did you not send any Messenger to us*

that we might have followed your signs before being humbled and disgraced?".

The above verses are quite clear that Allah never punishes people unless He had warned them earlier. Thus, there can be no crime without law, no punishment without law, and no retroactive application of criminal law in the Qur'anic scheme in general.

3.1.2 The Principle of Legality and the Sunnah of the Prophet ﷺ

The Sunnah which is the second source of the Islamic sharia has many incidents showing the existence of the Principle of Legality in Islam. The Prophet ﷺ is reported to have said in his last sermon:

" وربا الجاهلية موضوع، وإن أول ربا أضع ربانا ربا عباس بن عبد المطلب فإنه موضوع كله"[25]

"Beware! All riba (usury) of jahili (ignorance) era is annulled, and the first claim of riba which I annul is that of my uncle 'Abbas.»

In another hadith the Prophet ﷺ says, الإسلام يهدم ماكان قبله[26]

"Islam destroys whatever has been before it." Upon conversion from infidelity to Islam all the previous sins are washed away. The Prophet had therefore pardoned his enemies such as Abu Sufyan and his wife Hind for the crimes in the past. It is reported in another hadith that when 'Amr b. al-'Aas came to embrace Islam, the Prophet ﷺ while shaking his hand, asked him the reason for his decision. 'Amr said he wanted the Prophet ﷺ to pardon him. The Prophet ﷺ replied that he should know that Islam washes away all the sins of the past, and that migration to Madina washes all the sins before it, and that hajj (pilgrimage) washes all sins before it.[27] Thus, the Sunnah of the Prophet ﷺ endorses the Qur'anic injunctions that there shall be no retroactive application of the law.[28]

4.0 Retrospectivity Principle

One of the general principles recognized and respected by the Somali Penal Code is the principle that law should not have retrospective effect.[29] This principle has another derivative namely *nulla poena sine lege* (there shall be no punishment without law) that is similarly respected by nations. Most Constitutions of sovereign states have incorporated these two principles as the fundamental rights of citizens. Legal systems always try to effect a compromise between the rights of a citizen and that of the society. On the one hand, individual interest is protected and guaranteed, and on the other, the interest of the community is protected and preserved. In the event of a clash between the two, it is the interest of the community that prevails over that of an individual. The interests of the community as a whole take priority over the interests of the individual and various groups when these cannot be reconciled[30]. Similarly, among the juristic principles of Islamic Sharia we find: "priority should be accorded to preserving the universal weal over particular interests," and "the general welfare takes priority over individual welfare". From this is derived the principle that "a private injury is tolerated to avert a general injury to the public." It is because of these principles of Islamic Sharia that the general principle that 'law should not operate retrospectively' is not regarded as absolute and has some exceptions. Making a certain action criminal only after it has been carried out, means that law is made after the event and is given effect from a back date to cover that event.

Article 11 (2) of the Universal Declaration of Human Rights and Article 7 of the European Convention on Human Rights, which are in identical forms, provide that "no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed"[31]. In Somalia, Article 15 (13) of the

Federal Constitution of 2012 provides protection against retrospective laws although it provides some exceptions.[32]

4.1 The Position of Islamic Sharia Regarding Retrospective Laws

The classical books on Islamic jurisprudence are silent about retrospective laws. This is not astonishing because the basic sources of Islamic Sharia viz. the Qur'an and the Sunnah sometimes mention general principles that can be easily applied to specific cases. The question of retrospective law and the principle of ***nulla poena sine lege*** can, therefore, easily be deduced from the general provisions of laws laid down in the Qur'an and Sunnah. The governing principle in Islamic Sharia, as deduced by the contemporary Muslim jurists on the basis of their *ijtihad*[33] that criminal law does not operate retrospectively. [34] However, there are some exceptions. In the following sections, we will discuss the evidence available in the Qur'an and the Sunnah regarding this general legal principle as well as the cases of exception. We will first look into the Qur'an and then to the Sunnah.

4.1.1 Qur'anic Verses and Retrospective Law

The Qur'anic rule seems to be that no one can be said to have violated any law as long as that law does not exist. Once the law is there, then someone could be said to have violated it. If anything was made illegal, then it means that it was legal before that specific time, and no one could be blamed for its violation before it was prescribed. Thus, prohibitions do not have retrospective effect. This is a special blessing of Allah the Almighty on his servants. The Qur'anic verse goes thus:

{وَمَا كُنَّا مُعَذِّبِينَ حَتَّى نَبْعَثَ رَسُولا[35]}

"and We never punish until We have sent a Messenger (to give warning)."

It is argued that Allah the Almighty does not punish people until they are guided first, because of his mercy on them. This is clear evidence which establishes the rule that if anyone does not know Allah's guidance and commands revealed to his prophet, then there is no punishment for him. On the other hand, there are so many verses in the Qur'an expressly stating that Allah has forgiven whatever happened in the past as long as a person has mended his ways. The Qur'an says:

{قُل لِّلَّذِينَ كَفَرُوا إِن يَنتَهُوا يُغْفَرْ لَهُم مَّا قَدْ سَلَفَ وَإِن يَعُودُوا فَقَدْ مَضَتْ سُنَّتُ الْأَوَّلِينَ[36]}

'O Prophet! Tell the unbelievers that if they desist from evil, their past shall be forgiven and if they revert to their past ways, then it is well known what happened with the people of the past".

Similarly, Allah says in the Qur'an:

{ولا تنكحوا ما نكح آباؤكم من النساء إلا ما قد سلف إنه كان فاحشة ومقتا وساء سبيلا[37]}

"Do not marry the women whom your fathers married, although what is past is past. This indeed was a shameful deed, a hateful thing, and an evil way"

Allah repeats the same in the next verse which goes thus:

{حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُم مِّنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُم مِّن نِّسَائِكُمُ اللَّاتِي دَخَلْتُم بِهِنَّ فَإِن لَّمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَن تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ ۗ إِنَّ اللَّهَ كَانَ غَفُورًا رَّحِيمًا (23)[38]}

"... It is also forbidden for you to take the wives of the sons who have sprung from your loins and to take two sisters together in marriage, although what is past is past."

In addition, the Qur'an prohibits *riba`* (usury) and allows business transactions and forgives what has already passed. Allah says in the Qur'an,

{وَأَحَلَّ ٱللَّهُ ٱلۡبَيۡعَ وَحَرَّمَ ٱلرِّبَوٰاْۚ فَمَن جَآءَهُۥ مَوۡعِظَةٞ مِّن رَّبِّهِۦ فَٱنتَهَىٰ فَلَهُۥ مَا سَلَفَ وَأَمۡرُهُۥٓ إِلَى ٱللَّهِۖ وَمَنۡ عَادَ فَأُوْلَٰٓئِكَ أَصۡحَٰبُ ٱلنَّارِۖ هُمۡ فِيهَا خَٰلِدُونَ[39]}

"Even though Allah has made buying and selling lawful, and interest unlawful. Hence, he who receives admonition from his Lord, and then gives up (dealing in interest), may keep his previous gains, and it will be for Allah to judge him.

There is a third set of verses in the Qur'an that prohibit most of the criminal offences, regarded as such in Islamic Sharia, but do not give the law any retrospective effect. The Qur'an says:

{ليس على الذين آمنوا وعملوا الصالحات جناح فيما طعموا إذا ما اتقوا وآمنوا وعملوا الصالحات ثم اتقوا وآمنوا ثم اتقوا وأحسنوا والله يحب المحسنين[40]}

"No blame shall be attached to those that have embraced the faith and done good works in regard to any food they may have eaten, so long as they fear Allah and believe in Him and do good works".

Jalaluddin Al-Suyiti while commenting on this verse, mentions that the Prophet Muhammad ﷺ was asked about those who got killed for the cause of Islam in the early days, and they used to drink alcohol and gamble (as drinking alcohol and gambling were not yet prohibited). In order to answer this question, Allah revealed this verse and stated that they are forgiven for what had passed. This means that they did not commit any offence before drinking and gambling were declared illegal.

What is clear in the Quranic verses, is that the command was not applicable retrospectively. The Qur'anic verses cited above, show that

Allah punishes people only when He had warned them earlier, and that once something is prohibited by Allah, then He has forgiven what happened in the past (that is before that specific revelation). Moreover, from the Qur'anic verses regarding criminal offences, such as fornication/adultery, drinking, gambling, theft, and prohibition of killing games in pilgrimage, it is crystal clear that all these prohibitions had no retrospective effect. Instead, they became operative only after they were made known to the Muslims.[41]

4.1.2 Sunnah of the Prophet and the Conduct of *Sahabah* Regarding Retrospective law

The Prophet Muhammad ﷺ as we already mentioned in above is reported to have said in his last *haj* Sermon (the farewell *hajj):* "Beware! All *riba* (usury) of *jahili* era is annulled, and the first claim of *riba* which I cancel is that of my uncle Abbas". This shows that warning precedes punishment in Islam, and that a person cannot be punished for something that is not prohibited by an express rule. In another *hadith,* the Prophet ﷺ says*, "Islam destroys whatever has been before it"*[42]. In other words, if someone embraces Islam, his previous sins are washed away, and he will not be answerable for them. The Prophet ﷺ had, therefore, forgiven his enemies such as Abu Sufyan and his wife Hind for what they had done when they were non-Muslims. He had also forgiven the killer of his uncle (Hamzah), during the battle of *Uhud,* in which infidels had mutilated the body of Hamzah, which had shocked the Prophet ﷺ so much. There is one more *hadith* that shows that laws do not operate retrospectively. One of the leading companions of the Prophet ﷺ was 'Amr Ibn al-'Ais (the commander who subsequently conquered Egypt and remained its governor for some time). It is reported that he narrated the story of his conversion to Islam at the time of his death. He says that he came to the Prophet ﷺ and asked him to shake hand with him as a mark of his accepting Islam. The Prophet ﷺ, while shaking his hand, asked him the

reason for his decision. 'Amr said that he wanted the Prophet ﷺ to pardon him. The Prophet ﷺ replied that he should know that Islam washes away all the sins of the past, and that migration to Madinah (along with the Prophet ﷺ) washes all the sins before it, and that *hajj* (pilgrimage) washes all sins before it". All these examples show that rules in Islamic Sharia do not operate retrospectively, as people could only be punished once rules are prescribed and not before it.[43]

From the above Quranic verses and Ahadith, Muslim Jurists have derived the general principle that there shall be no punishment before the promulgation of law. This principle is similar to *nulla poena sine lege.* There is an important maxim of Islamic Sharia as well which guides us in this matter. According to this maxim, everything (act) shall be deemed as permissible until it is specifically prohibited.

4.1.3 The Juristic Opinion Regarding Retrospective Law

According to some eminent Muslim jurists of our time, such as Prof. Muhammad Salliim Madkur and 'Abd al-Qadir Awdah, the governing principle in Islamic Sharia is that criminal law does not operate retrospectively except in two situations. First, offences that endanger the peace of land or law and order, or when giving retrospective effect would be necessitated by the interest of the community rather than the individual, for instance, in cases of القذف, واللعان والظهار In all such cases, criminal law has a retrospective effect. Second, if the application of the criminal law is beneficial for the accused. If the new law allowed an act that was prohibited before, and the accused was punished under it, the punishment shall not be carried out. However, if the new law is not beneficial for the accused, it shall not apply to his case retrospectively. If the new law enhances the punishment of the accused, then it shall not be applicable to him because the accused should be punished according to the law in force at the time when the crime was committed.

a. ***Accusing Innocent Woman of Adultery*** **- القذف**

The punishment of defaming innocent woman is prescribed in the Qur'an in the following words:

{وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا ۚ وَأُولَٰئِكَ هُمُ الْفَاسِقُونَ (4) إِلَّا الَّذِينَ تَابُوا مِن بَعْدِ ذَٰلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ (5) [44]}

"Those that defame honorable women and cannot produce four witnesses shall be given eighty lashes and do not accept their testimony ever after, for they are great transgressors- except those among them that afterwards repent and mend their ways. Allah is Forgiving, Merciful."

As a matter of fact, "Aishah (May Allah be pleased with her) was accused by some of adultery. The accusation was such that the Muslim community was shaken, as the Prophet ﷺ himself was saddened and deeply disturbed. The Muslim community was confused and some people verged on a clash with each other over this issue. Thereupon, ten verses of the Qur'an were revealed stating that A'ishah was totally innocent and that this was a false accusation.) The Prophet ﷺ, thereafter, punished two men and one woman for the said offence. Abdi al-Qadir Awdah argues that since the Prophet ﷺ punished the accusers of Aishah after the verses were revealed, therefore, they were given retrospective effect, as the issue was very serious and endangered peace and security of the community. However, opinion varies about the revelation of these verses. Tabari, while commenting on these verses, argues that there is a difference of opinion regarding the exact time of the revelation of the verses about defamation. It is said that the verses of defamation were revealed before the incident. While others contend that they were revealed after the said incident.)) 'A'ishah reports herself that when Allah revealed her innocence to the Prophet ﷺ, he stood on the pulpit, announced it to the companions, and punished two men and one woman after coming down from the

pulpit." According to the latter view, therefore, this verse has had a retrospective effect. However, according to 'Abd al-Qadir Awdah, the verses of defamation and the innocence of 'A'ishah was revealed at the same time, that is after she was accused. This may not be the case, as there could be an interval between the two. This is the view of another contemporary scholar, Salim 'Awwa who argues that defamation might have been prohibited first, while Aishah was accused later, and when she was proved innocent, the slanderers were punished. In this case, the verses will have no retrospective effect.

b. *Endangering the Public Peace and Security* (Robbery) - تخريب وإفساد الأرض

The Qur'an strictly prohibits endangering the public peace and security. It says,

{إِنَّما جَزاءُ الَّذينَ يُحارِبونَ اللَّهَ وَرَسولَهُ وَيَسعَونَ فِي الأَرضِ فَسادًا أَن يُقَتَّلوا أَو يُصَلَّبوا أَو تُقَطَّعَ أَيديهِم وَأَرجُلُهُم مِن خِلافٍ أَو يُنفَوا مِنَ الأَرضِ ۚ ذٰلِكَ لَهُم خِزيٌ فِي الدُّنيا ۖ وَلَهُم فِي الآخِرَةِ عَذابٌ عَظيمٌ ۙ إِلَّا الَّذينَ تابوا مِن قَبلِ أَن تَقدِروا عَلَيهِم ۖ فَاعلَمُوا أَنَّ اللَّهَ غَفورٌ رَحيمٌ[45]}

"Those that make war against Allah and His Apostle and spread disorder in the land shall be put to death or crucified or have their hands and feet cut off on alternate sides, or be banished from the land. They shall be held in shame in this world and sternly punished in the next, except for those who (having fled away and then) came back with repentance before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful".

Some commentators of the Qur'an argue that these verses were revealed after a particular incident when the Prophet ﷺ sent a group of people to a place outside Madinah where they used to drink milk from the 'camels of charity' and stayed there for some time.[46]

c. Zihar (Pre-Islamic Form of Divorce) - الظهار

Zihar had been a pre-Islamic form of divorce and consisted of certain words of repudiation, such as: “you are to me like my mother's back”.[47] In the pre-Islamic era, *zihar* meant that neither the same man could re-marry her, nor could she be married to anyone else. This was too harsh for the woman. The Qur'an abolished this form of divorce. A man upon divorcing his wife by *zihar,* was required to do *kafara*[48] to expiate his sin which is one of the three things; (a) "should free a slave before they touch each other again, or (b) if he does not have (a slave), should fast for two successive months, or (c) if he cannot do this, should feed sixty poor people."[49]

The Occasion of the revelation of this verse was an incident relating to Aws bin Samit. Relying on this fact, Abdi al-Qadir Awdah argues that the punishment of *zihar* was applied to the case of Aws bin Samit, which arose before the verse was revealed and, therefore, it had a retrospective effect.

The Prophet ﷺ is reported to have asked Aws bin Samit, "Can you afford to set a slave free"? "No" he replied. The Prophet ﷺ asked him, "Can you fast for two months in a row"? He replied, "O! Prophet of Allah, if I do not eat three times a day, I am afraid my eye sight will be lost". The Prophet then asked him, "Can you feed sixty poor people"? He said, *"O!* Prophet of Allah yes, provided you help -me in this regard". The Prophet ﷺ helped him to feed sixty poor people and, thereafter, he started living with his wife. It is very clear that this verse was applied to the case that had already arisen, and thus it had a retrospective effect. This is, therefore, an exception to the general principle that law does not operate retrospectively.

d. *Li'an* (Sworn allegation of adultery committed by either husband or wife) - اللعان

It is reported that a man came to the Prophet ﷺ and said, *"O Prophet of Allah if a man finds another man with his wife and kills him (the adulterer), he (the killer) may be killed in retribution, and if he talked about it (that is he accused his wife of adultery), he is punished (for accusation), and if he kept quiet, he will be unable to control his anger!"* Saying this, he urged the Prophet to solve this problem. Thereupon, Allah revealed the following verse regarding *li'an,:*

{وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الصَّادِقِينَ ۝ وَالْخامِسَةُ أَنَّ لَعْنَةَ اللَّهِ عَلَيْهِ إِنْ كَانَ مِنَ الْكَاذِبِينَ ۝ وَيَدْرَأُ عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعَ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الْكَاذِبِينَ ۝ وَالْخَامسةَ أَنَّ غَضَبَ اللَّهِ عَلَيْهَا إِنْ كَانَ مِنَ الصَّادِقِينَ ۝ وَلَوْلا فَضْلُ اللَّهِ عَلَيْكُمْ وَرَحْمَتُهُ وَأَنَّ اللَّهَ تَوَّابٌ حَكِيمٌ[50] }

"And those who accuse their wives (of adultery) and have no witnesses except themselves, let each of them testify by swearing four times by Allah that his charge is true, calling down in the fifth time upon himself the curse of Allah if he is lying. But they shall spare her the punishment if she swears four times by Allah that his charge is false and calls down Allah's wrath upon herself if it be true".

5.0 Double Jeopardy Principle

The rule against double jeopardy is an important part of the Somali Criminal Procedure Code[51]. It means that a person cannot be tried twice for the same crime. Once they have been acquitted (found not guilty), they cannot be prosecuted again even if new evidence emerges or they later confess. The double jeopardy rule is an important protection for individuals against the abuse of state power and it has been embedded in ICCPR[52]. It stops police and prosecutors from repeatedly investigating

and prosecuting the same individual for the same crime without very good reason. The rule encourages them to prepare the case properly on the first occasion, and to accept the court's verdict. Equally, when a person is found not guilty in court, they know that the case is really over. Being the subject of a criminal accusation can be a difficult and distressing experience, with significant consequences for the accused who may be innocent.

5.1 Islam and Double Jeopardy Principle

There are in every judicial dispute at least two litigating parties, the plaintiff and the defendant. The first claims what is contrary to the apparent fact; the second holds to the apparent fact and denies the claim. In Islam, the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation). The Prophet ﷺ Mohammed said:

عن ابن عباس رضي الله عنهما أن رسول الله صلى الله عليه وسلم قال : {لو يعطى الناس بدعواهم ، لادعى رجال أموال قوم ودماءهم لكن البينة على المدعي واليمين على من أنكر.[53]}

"Were people to be given according to their claims, some would claim the wealth and blood of others. But the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation)."

This *hadith* forms an important maxim. The text of the *hadith* has been expressed in the following way: "Evidence is for the person who claims; the oath is for the person who denies." The *hadith* also shows the supreme importance of proof to the administration of justice. If the claimant has no proof for his allegation, then the defendant has to swear an oath that the allegation is not true as per the *hadith*. If the defendant refuses to take the oath, then the *Hanafis* and *Hanbalis* say the judge takes the claimant's claim forward, but the *Shafi'ees* and *Malikis* say if he refuses, then the

claimant has to make an oath that he is telling the truth, and if he refuses, then it is ruled in favour of the defendant. Once the defendant swear, the judge releases him. If the plaintiff finds after a time evidence for his claim, then the judge will consider such evidence because the oath in Islam removes the litigation and does not eliminate the right.[54]

6.0 Conclusion

From the elaborate discussion above, I conclude that the general principles enshrined in the Somali Penal Code are almost in conformity with the Islamic Sharia. The first principle examined was "The Presumption of Innocence", which means the accused is to be considered innocent until proven guilty of a criminal offence. The Islamic sharia has accepted this principle and later developed into a maxim. The second principle examined was "The Legality Principle"**,** which means that only the law can define a crime and prescribe a penalty *(nullum crimen, nulla poena sine lege)*. According to that principle, an offence must be clearly defined in the law. In the Islamic Sharia, Allah says in many Quranic verses that he will never punish a people until he sends a messenger. This shows how Islam promotes this principle. The third principle we have taken was "The Retrospectivity Principle", this means that law should not have retrospective effect. Islam has forgiven whatever happened in the past. Muslim jurists of our time, such as Prof. Muhammad Salliim Madkur and 'Abd al-Qadir Awdah, the governing principle in Islamic Sharia is that criminal law does not operate retrospectively except in two situations. First, offences that endanger the public peace and security or law and order, or when giving retrospective effect would be necessitated by the interest of the community rather than the individual, for instance, in cases of القذف, واللعان والظهار. In all such cases, criminal law has a retrospective effect. Second, if the application of the criminal law is beneficial for the accused. If the new law allowed an act that was prohibited before, and the accused was punished under it, the punishment

shall not be carried out. The last principle we have examined was "The Double Jeopardy Principle"**.** This principle means that a person cannot be tried twice for the same crime. In this regard, Islam does not recognize this principle as it is considered against justice. If the claimant fails to prove his case the defendant will swear and be acquitted. If the claimant finds evidence supporting his case he has the right to bring such evidence to the judge and the judge considers because the oath in Islam removes the litigation and does not eliminate the right.

Notes

[1] See articles 2 and 4 of the Provisional Constitution adopted in 2012.

[2] Victor Tadros and Stephen Tierney, "The Presumption of Innocence and the Human Rights Act" Published by Wiley on behalf of the Modern Law Review, p.403.

[3] Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

[4] Article 40 (2) (i): To be presumed innocent until proven guilty according to law;

[5] Article 14 (2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

[6] Article 19 (e): A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

[7] Article 7(1)(b): Every individual shall have the right to have his cause heard. This comprises: The right to be presumed innocent until proved guilty by a competent court or tribunal;

[8] كتاب القواعد الفقهية وتطبيقاتها في المذاهب الأربعة - محمد مصطفى الزحيلي- المكتبة الشاملة الحديثة ص - 142

[9] Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System", Hamdard Islamicus Journal, Vol. XL, No. 4, p.46.

[10] Quran English Translation by Talal Itani, Published by Clear Quran Dallas, Beirut. It is the main reference on which I relied in the translation of the Qur'anic verses in this article.

[11] كتاب الدراية في تخريج أحاديث الهداية، ج:2 ، ص:94

[12] نيل الأوطار شرح منتقى الأخبار من أحاديث سيد الأخيار للإمام الشوكاني – بيروت, ص: 188

[13] Ibid

[14] Article 35 (13): No person may be convicted of a crime for committing an act that was not an offence at the time it was committed, unless it is a crime against humanity under international law.

[15] Article 1: No one shall be punished for an act which is not expressly made an offence by law, nor with a punishment which is not prescribed therefore.

[16] Article 11 (2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

[17] Article 15 (1): No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

[18] Article 19 (d): There shall be no crime or punishment except as provided for in the Shari'ah.

[19] Muhammad Munir, "The Principle of Legality in Islamic Criminal Justice system" Article in SSRN Electronic Journal · January 2015, p.108.

[20] سورة الإسراء - الآية 15

[21] الجامع لأحكام القرآن للقرطبي, م 15, ص:52

[22] سورة القصص - الآية 59

[23] سورة الشعراء – آية 208-209

[24] سورة طه – الآية 134

[25] كتاب المسند الجامع , محمود محمد خليل، ج:18 ، ص: 586

[26] صحيح مسلم, كتاب الإيمان, ج:1, ص: 112

[27] The text of this hadith is mentioned in several places in this article.

[28] Muhammad Munir, "The Principle of Legality in Islamic Criminal Justice system" Article in SSRN Electronic Journal · January 2015, p.109.

[29] Article 2 (1): No one shall be punished for an act which, in accordance with the law in force at the time when it was committed, did not constitute an offence.

[30] Muhammad Munir, "The Principle of Legality in Islamic Criminal Justice system" Article in SSRN Electronic Journal · January 2015, p.109.

[31] J. T. Woodhouse, "The Principle of Retroactivity in International Law", Transactions of the Grotius Society, Vol. 41, Problems of Public and Private International Law, Transactions for the Year 1955 (1955), pp. 69-89.

[32] Article 15 (13): No person may be convicted of a crime for committing an act that was not an offence at the time it was committed, unless it is a crime against humanity under international law.

[33] *Ijtihad* (Arabic اجتهاد) is a technical term of Islamic law that describes the process of making a legal decision by independent interpretation of the legal sources, the Qur'an and the Sunnah.

[34] Muhammad Munir, "The Principle of *Nulh Poem Sine Lege* in Islamic Law and Contemporary Western Jurisprudence", International Islamic University. Islamabad. p. 40.

[35] سورة الإسراء - الآية 15

[36] سورة الأنفال – الآية 38

[37] سورة النساء – الآية 22

[38] سورة النساء – الآية 23

[39] سورة البقرة، الآية 275

[40] سورة المائدة – الآية 93

[41] Muhammad Munir, "The Principle of *Nulh Poem SineLege* in Islamic Law and Contemporary Western Jurisprudence", International Islamic University. Islamabad. p. 40.

[42] صحيح مسلم, كتاب الإيمان, ج:1, ص: 112

[43] Mohamed Munir, Ibid.

[44] سورة النور – الآية 4

[45] سورة المائدة – الآية رقم 33

[46] تفسير الطبري, ص:113

[47] The Five Schools of Islamic Law" by Muhammad Jawad Mughniyya, Ansariyan Publications. http://ijtihadnet.com/wp-content/uploads/The-Five-Schools-of-Islamic-Law-2.pdf

[48] Kafara is a general term which means "what is paid to redress an imbalance or to compensate for commissioning a sinful act, i.e. a kind of punishment or penalty".

[49] Mohamed Munir, Ibid.

[50] سورة النور – الآية 6-10

[51] Article 13 (3): An accused, after having been finally convicted or acquitted or after orders not to proceed with the case have been lawfully given, cannot be charged again on the same facts, even if those acts may be regarded as constituting a different offence, except under the provisions of the following paragraph of this Article or under the provisions of paragraph 2 of Article 77.

[52] Article 14 (7): No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[53] السنن الكبير للبيهقي، ط: 1 ، ج:11 ، ص: 42

[54] مختصر الفقه الإسلامي في ضوء القرآن والسنة، للشيخ محمد بن إبراهيم بن عبد الله التويجري، ط:12 ، ص:1014

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"Political Sufism": The Interplay of Sufism and Politics in Somalia

 Ibrahim Abdirahman Mukhtar

Abstract

Sufism and its adherents have long been considered as being mainly engaged in mystical activities and disinterested in politics. This argument has however been challenged by a number of scholars as history proves that Sufis have not been always detached from politics. This is an exploratory research on the relations between Sufism and politics in Somalia. The purpose of this article is twofold: To deconstruct the myth surrounding the apolitical nature of Sufis and; to explore the interplay between Sufism and politics in Somalia in the pre-colonial era, the colonial, post-independence, and after the civil war periods. I argue that Sufis and Sufi movements in Somalia have often joined politics. This is not to say that their mystical aspect is exaggerated, rather, joining politics has often been a necessity Sufis could not avoid.

Keywords: Somali politics, political Sufism, politics, Sufism.

1. Introduction

Somalis are Muslims with majority of the population traditionally adhering to Sufi understanding of Islam. In the second half of 20th century, the spread of Salafism and other forms of *sahwa Islamiyah* (Islamic awakening) have gained strong foothold in Somalia consequently the role of the Sufi orders has declined. Most of the studies on Islamist movements in Somalia in the past decades have focused on militant groups such as Al-Shabaab. Sufi groups and their role in politics have subsequently been understudied. Ahlu Sunna Waljama'a, a paramilitary group in Galmudug State in Central Somalia, has since 2008 been one of the significant actors fighting Al-Shabaab in the country. Their emergence as a militant group and their participation in local politics have ignited my interest to study the relationship between Sufism and politics in Somalia and hence this article.

Before examining Sufism and politics generally and particularly in Somalia, it is important that we first understand the concept "Sufism" which is the anglicized version of *Tasawwuf.* The term is contested both within Muslim and non-Muslim literatures. They are used interchangeably with concepts such as mysticism and Islamic mysticism and through other Christian prisms which could be misleading (Anjum, 2006, p. 222). It is important therefore to be careful when applying terms such as 'mysticism', 'saint' and 'sainthood' since they have different connotations in Christianity and other religions.

The root word *Tasawwuf* is derived from the word *Sufi* and there are various opinions on the etymological derivations of the words *Tasawwuf* and *Sufi*. The main derivations can be summed up as follows: "*Safa'* (purity), because of the purity of their hearts; *Saff* (rank) as they are in the first rank before God; *Suffah* (the platform) as the qualities of the Sufis resembled those of the *Ashab Al-Suffah* (People of the Platform, a group

of the Companions of the Prophet (peace be upon him) who had devoted their lives to worship and learning); *Suf* (wool) because of their habit of wearing wool, and *Safwah* (the chosen, the select) owing to their being the elite, or the chosen or selected ones" (Ibid, pp. 224-5). While there is no consensus regarding the origin of the term, the most widely accepted opinion is perhaps its etymological derivation from the word *Suf* (wool) which symbolized rejection of worldly desires through appearing as poor people (Renard, 2009, pp. 4-5).

A simple definition of Sufism is difficult because of the contentious nature of the term. However, it is generally agreed that the aim for Sufism is to achieve qualities such as inner purification, engaging with the Divine, displaying Godly virtues such as "kindness" and "love" and emphasizing on individual or collective remembrance of God (*dhikr*) (Muedini, 2015, p. 20).

2. Deconstructing Myths

In the Muslim world, being the dominant religion, Islam has had a profound effect on state, governance and politics. The collapse of the Ottoman Empire and the abolishment of the Caliphate were accompanied by the sidelining of Islam and the diminishing of its role in politics in the new emerging nation-states. This led to the emergence of "political Islam", which according to Beinin and Stork represents politically motivated movements that seek "to revitalize and re-Islamize modern Muslim societies" based on the main Islamic sources i.e. The Qur'an, the Hadith and other reliable sources (Beinin & Stork, 1997, pp. 3-4). This does not however mean that Islam was previously apolitical. According to Abdurahman Baadiyow, political Islam entailed the attempts by Islamic movements in Muslim majority countries to revive Islam in the political sphere and that Islam's role in politics is not strange as assumed by many Western scholars (Abdurahman, 2017, p. 26). By extension, Sufism has

long been assumed, particularly in the West, as apolitical. The political role of Sufis as followers of Islam has thus been understudied. Marietta Stepanyants (2009, p. 166) highlights this scenario of overlooking the role Sufism played in politics of the Muslim world. She argues that, while the political life of Sufis was disregarded in academia, historical accounts indicate that Sufis, depending on circumstances, have often given up their neutral stance as apolitical and actively joined political wrangles.

The popular aspect of Sufism that emphasizes on the detachment from the material world is important in promoting the debate surrounding the relation between Sufism and politics. Some of the historical Muslim Sufis promoted the idea that individuals should disengage with all worldly attainments including power if they wanted to experience "God's immanence" (Awn 1983, p. 241). This point was stressed because most early Sufis believed that the inner part of the human is good, but it is the outside world and its material dimensions that corrupts him and sways him away from God. Peter Awn noted the extreme tendencies of some Sufis denouncement of the world as a "devil", while others such as Ibrahim ibn Adham abandoned his kingship to live a life of complete dependence on God (*Tawakkul*) and abstained from marriage and family for fear that they will distract him from God (Ibid, p. 245). Similarly, Alexander Knysh notes that a famous Sufi author Abu Bakr Muhammad al-Kalabadhi sought to prove in several passages in his treaties that Sufis do not harbor any political goals and are strictly concerned with improving their souls and perfecting their acts of worship (Knysh, 2010, p. 124). Such extreme tendencies of total detachment from world affairs still persist within some Sufi circles, "the revivalists" (Muedini, 2015, p. 25).

These perceptions have gained prominence particularly after the September 11 attacks blamed on violent extremist Muslim individuals and groups. As a way of countering religious extremism, there have been attempts at supporting and promoting Sufi groups to counter these

extremist ideologies both in the Muslim world and in the West. This is because the Sufis have been perceived as primarily engaging in 'mysticism' and as 'moderate', 'quietist' and 'tolerant' (Philippon, 2018). For instance, governments of Morocco, Syria, Algeria and Pakistan have promoted certain Sufi orders to varying degrees in an attempt to ward off Salafi groups and weaken their political parties because they associate them with extremism. This approach is also shared with some in the American foreign policy circles who consider Sufis as 'friendly' and apolitical (Ceballos, 2014, p.334).

However, the assumption of Sufis total detachment from the material world has not often been the case. According to Milad Milani (2017, p. 2), Sufis are political in that they actively engage in promoting their interpretation of Islam and by aspiring to shape the Muslim polity. With the establishment of Sufi orders (*tariqa*) in the medieval era, Sufis and Sufi orders became active tools of spreading Islam and established 'bases' in strategic regions and along trade routes in the world with names such as *zawiya* and *ribat* in their attempt to pursue the interests of 'Islamdom'. The Sufi orders have hierarchical organizational structures in which a *Sheikh* leads a group of followers or disciples known as *murids.* The sheikh is powerful and is able to exercise authority both within the order and outside the order while having control on all the donations offered to the order (Muedini, 2015, p. 27). The leaders or sheikhs of the orders are important in understanding the political role of Sufism. They are highly revered and considered to be *awliya' allah* (friends of God) for their piety and accumulation of spiritual knowledge often inherited from pious ancestor(s) or from connection to a late Sufi leader, which are enough to elevate them to lead the order (Ibid, pp. 27-8). The orders continue to exist today and their numbers are many. Milani remarks that, in the medieval period, some of these orders were either 'patronized' – received political backing though not openly involved in politics – or 'politicized'

by actively engaging in politics hence arguing that "Sufis and Sufi orders can be quietist, but are never apolitical" (Milani, 2017, p. 14).

According to Carl Ernst, many Orientalists, through their literal analysis of Sufis, assumed the Sufis as part of "Oriental culture that the Europeans found attractive" and as "free-thinkers" (Ernst, 2003, p. 110). However, after facing resistance from Sufi orders during the occupation of countries such as Algeria, Somalia and Sudan, Orientalists tended to separate Sufism from its institutionalized versions, the Sufi orders, because of their staunch resistance against colonialism (Ibid). The colonialists woke up to the reality that Sufis are not apolitical as they assumed.

The rise and growth of Sufism is seen as being political since it attempted to redefine important concepts within the Islamic theology. But it is after the formation of Sufi orders particularly in medieval period three centuries after the Abbasid revolution that Sufis gradually started expressing political actions (Anjum, 2006, pp. 237-8). Anjum notes that even early Sufis such as Ibrahim ibn Adham and Abdullah ibn al-Mubarak who were considered to be solely focused on self-purification and known for detaching themselves from politics were known to have participated in battles against the Byzantine Empire.

In the medieval era, the relationship between the Sufi orders and the state or the rulers was not homogenous across all Sufi sects. According to Anjum (2006, p. 257), Sufis of various orders and regions engaged differently with political authorities. While many Sufis avoided and discouraged any cooperation with rulers among their followers, many others considered forming associations with rulers and political authorities as a means to impact positively on the rulers and their policies. Therefore, the relationship between Sufis and state were of two approaches: "the conflictual or oppositional relationship and cordial or friendly relationship" (Ibid, pp. 260-8). On the other hand, the

relationship between the state and Sufis was also not homogenous. At times the state sought to collaborate with Sufi orders as was the case with Seljuk and Mameluke empires who patronized Sufis in exchange for religious legitimacy. While at other times, the state regarded Sufi orders and their sheikhs as a threat to their political supremacy and sought to contain and subordinate them (Ibid).

The debate over the relationship between Sufis and politics resurfaced strongly during the colonial era. Reaction towards European conquest manifested itself through formation of Sufi-led anti-colonial resistance movements. In Algeria, the Qadiriyya Sufi order under the leadership of Abdul-Qadir led a rebellion against the French colonizers while in Libya the Sanussi Sufi order militarily confronted the Italian occupation. Their aims were not limited to the removal of the occupation, but also to gain political power in their respective states (Muedini, 2015b, p. 138). Other examples include the resistance by the Salihiyya Sufi order which conducted military campaigns against the British and colonialists under the leadership of Sayyid Mahammad 'Abdille Hasan (Samatar, 1982, p. 93) and the Mahdiyya movement in Sudan against the British led by Muhammad Ahmed (Muedini, 2015, p. 35). Other parts of the Muslim world such as the Middle East and South East Asia also witnessed the resistance of Sufi orders to colonialism (Ibid, p. 137). In Northern Caucasus, Sufis in Dagestan led resistance against Russians in the region (Knysh, 2002). The colonial period arguably witnessed the peak of Sufi political activity through their formation of anti-colonial movements. This could be interpreted as an attempt by Sufi orders to defend Islam by preventing the ‘Christianization’ of their respective population. Engaging in military activities means engaging in politics.

The relationship between Sufis and politics has been vague over the centuries. Often, Sufis warn against the moral liabilities of cooperation or association with rulers, however, they have frequently felt compelled to

engage in politics as advisers to rulers, state propagandists, and sometimes seeking to be rulers themselves (Heck 2011, pp. 103-5). Milani agrees that Sufism is largely assumed by many, and promoted by many Sufis, as spiritually oriented and emphasizing on developing the self. He refutes this arguing that Sufi orders have historically engaged in political activities (Milani, 2017, p. 5). And while Sufis might appear politically inactive, it doesn't mean that they are apolitical, it's only that some are passive and others assertive (Ibid, p. 14). According to him, the fact that Sufis generally promote Rumi poems of love is an act of biasness by the 'new age' and cannot hide the reality that "Sufi orders, groups, and organizations are political, active in inter-faith dialogue, and engage in changing society" (Ibid, p. 5).

Sufis and their engagement in politics were, as mentioned earlier, either in the form of being patronized or politicized. In Ottoman territories the Mevlevi order, and to some extent, the Bektashi order forged close alliances with the ruling power, while the Naqshabandi order in Moghul period were close associates of the kings and greatly influenced religion and politics and called for the waging of Jihad against the Sikhs (Stepanyants, 2009, p. 166). In some circumstances, Sufis went as far as revolting against the existing authorities and establishing their dynasties as was the case with the Safavid dynasty in Persia and the Qaramanoghlus in Turkish city of Konya (Ibid, p. 167).

In medieval India, while the *Ulama* (Muslim scholars of jurisprudence) urged the Muslim Sultanate of the period to force the Hindus into either accepting Islam or choose death, the arrival of the Sufis, particularly the Chishti order, urged the Sultan not to use force in converting the general population to Islam, an alternative that was more appealing to the Sultan (Aquil, 2020, pp. 42-3). While this supports the view that Sufis are generally peaceful, it also confirms their political influence. At times, differences between the Sufi orders and the monarchs on religious or

political matters led to conflictual and complex relationship between the two because the Sufis considered themselves responsible to assist in alleviating the sufferings of the people they live amongst (Ibid, p. 56).

3. An Overview of Sufism and Politics in the Modern Muslim World

As discussed earlier, the wider perceptions about Sufism being apolitical which is shared by many policy makers both in the Muslim World and in the West is just but a myth. In this subsection, I will mention some cases in the Muslim world that demonstrate the political aspect of Sufism before later on discussing Sufism and politics in Somalia. While in the case of Somalia, I will breakdown my analysis of the interplay of Sufism and politics into different eras or periods, for the purpose of clarity and simplicity, in this short overview I will randomly cite a number of cases in different countries without giving particular attention to the period.

Beyond the medieval era, Sufi orders were crucial in resisting European colonial expansion in the nineteenth century from Algeria to the Caucasus to Southeast Asia (Voll, 2008, p. 317). Most Orientalist writers on Sufism assumed the resistance against colonialism by Sufi *tariqas* as a deviation "from the "quietist" and "pacifistic" tendencies of a "classical" or "authentic" Sufism." (Knysh, 2002, p. 171). Ceballos demonstrates the representations of politics and *jihad* in the writings of the Moroccan Sufi Muḥammad ibn Yaggabsh al-Tazi who called for *jihad* against Portuguese imperialism in Morocco (Ceballos, 2014, p. 333).

The "Mahdiya" movement in Sudan led by Muhammad Ahmed, who belonged to the Samaniyyah order, was one of the most successful anti-colonial movements against British and Egypt occupation and was eventually successful in establishing an Islamic government between 1885 and 1898 (Muedini, 2015, p. 35). Once the British regained control, the Sufi brotherhood were strictly monitored and were regarded as

dangerous and fanatics who caused uprisings, chaos and instability (Manger, 2001, p. 145). In Central Asia, Sufi orders formed resistance movements against the tsars and the Soviet occupation who had to respond with greater military power to weaken them. The Soviets also branded Sufis as extremists, strictly monitored their activities through surveillance, stripped them of their wealth, detained and executed key Sufi figures, and directed religious officials to issue fatwas against Sufism (O'Dell, 2016, p. 99). This is how much the Sufis politically and militarily threatened the tsars and the Soviets. When Central Asian states gained independence after the collapse of the Soviet Union, the governments embraced Sufism as part of their national identities and sought the support of Sufi leaders in combating the threat posed by Wahhabism as they considered them to be extremists (Ibid, pp. 101-2).

The Sanusi order in Libya politically and militarily challenged the Italian colonialists by declaring *jihad* on the invaders (Muedini, 2015, pp. 37-8). On the other hand, in Algeria the Tijaniyya Sufi order, among other Sufi groups, played a primary role in resisting the French colonists in Algeria (Ibid, p. 43). In Senegal, Amadou Bamba founded the Mouride Sufi Brotherhood in 1883 and politically challenged the French colonialists by leading a peaceful struggle against their presence in the country (Judah 2011).

In recent times, particularly with the rise of jihadist Salafi groups and other political Islamist groups, Sufi movements have been considered as alternatives by some Muslim majority countries, tendencies that have promoted Sufis participation in politics. Muedini notes in various chapters in his book that governments in Morocco, Algeria, Pakistan and in countries in Central Asia have increasingly sought the support of Sufi orders to ward off the threat of other Islamist groups such as the Salafis and the Muslim Brotherhood as they consider it easier to deal with Sufis.

During the Arab Spring, Sufi orders in Egypt such as Al-Azmiyya and al-Bashrawiyya encouraged their followers to take part in the 2011 January revolution that was part of the Arab Spring which ultimately led to the overthrow of Mubarak (Aljazeera Arabic 2017). However, the increase in popularity of the Muslim Brotherhood party during the preceding elections prompted Sufis to establish political parties such as Al-Tahrir and Al-Nasr parties for fear that the Muslim Brotherhood, their long-term enemy, will rule the country (Ibid). The antagonism between Sufis and the Muslim Brotherhood and Salafi groups is so deep that the former would rather form an alliance with liberal groups instead of other Islamist parties (Brown, 2011, p. 12).

The aforementioned cases show us how much Sufism is often intertwined with politics. This is not to say that the mystical part of Sufism is not true, it is just meant to show that there is also another side of the coin. Sufis are political whether actively or passively, whether they attempt to promote their teachings, align themselves with rulers, establish political parties or take part in military activities in form of *jihad.*

4. Somalia, Sufism and Politics

As in the previous examples, Sufism and its interplay with politics is very well demonstrated in Somalia, yet, understudied. In recent years, the interest has been revived after a Sufi group in the country known as *Ahlu-Sunna wal-Jama* took up arms to defend themselves from Al-Shabaab insurgents and have fought alongside the Somali government soldiers (CNN News 2010). To discuss the interplay between Sufism and politics in Somalia, I will breakdown the section into four different periods to understand how Sufi orders engaged in politics in different periods in history. These periods are: pre-colonial era, colonial era, post-independence era, and finally in the era of 1991 - 2021.

4.1 Pre-colonial Era

Islam came to Somalia in the seventh century shortly after *hijra* (Abdullahi, 2017b, p. 67). According to I. M. Lewis, historically, Islam in Somalia has been associated with Sufi *tariqas* or orders which are characterized with a hierarchical organization (Lewis, 1998, p. 63). Said Samatar argues that the organizational structure of the brotherhoods or orders was strictly hierarchical with the founding Sheikh or representative exercising absolute authority over the members (*murids* or *ikhwan)* of the brotherhood (Samatar, 1982, p. 97). The sheikh possesses "the apostolic chain (*silsila*) and the commission (*ijaza*) to propagate the tenets of the order" which allow him to connect "with all the recognized saints of the order and ultimately to God through the prophet." These make his followers completely dependent upon him (Ibid, p. 98).

Abdurrahman Baadiyow notes that Sufi orders came to Somalia in the fifteenth century from the Arabian Peninsula and it was in the eighteenth century that they vibrantly impacted on "the illiterate and pastoral Somali society" thanks to their "innovative mobilization techniques and cultural sensitivity" (Abdullahi, 2017b, pp. 67-72). The Sufi orders had massive political influence on the society establishing settlements and promoting "urbanization of the pastoral population through establishing permanent Islamic education centers" (Ibid, p. 72). They engaged in peaceful propagation of Islamic spiritualism, undertook religious reforms and their learning centers graduated teachers and judges. It often accorded the status of sainthood to clan elders making it widely appreciated by the people (Lewis, 1998, p. 63). In this way, Baadiyow questions the idea that Sufis are apolitical which is popular in conventional historiography. He gives two reasons for this: first, every Muslim has a duty to enjoin others to do what is good and forbid what is evil, and second, Sufi leaders were politically influential at times more than the clan elders (Abdullahi,

2017b, p. 74). In addition, their transformation of pastoral societies into settled communities is in itself a proof of their political influence.

The Sufi orders political influence was not always peaceful. They engaged in armed conflict at times with established sultanates over various issues. For instance, the Bardheere Jama'a Sufi group, under the leadership of Sheikh Ibrahim Yabarow, implemented a plan to establish Islamic order by banning "tobacco, the ivory trade, and popular dancing" while also enforcing rules on Islamic women dress code (Ibid, p. 75). It is the outlawing of the lucrative ivory trade that provoked the wrath of traders and clans alike who allied with the Geledi sultanate and mobilized up to 40,000 men to attack and burn down Bardheere in 1843 (Ibid, p. 76).

In conclusion, Sufism in Somalia in the pre-colonial era was political on many accounts. The arrival of Sufi orders led to rapid urbanization, religious institutionalization, and political influence over clans and their elders. At times, certain Sufi orders went into conflict with clans or sultanates over a clash of interests mainly based on trade.

4.2 The Colonial Era

The colonial era has seen the most aggressive form of Sufi political engagement in Somalia. This is because, as we shall discuss, it was the Sufi orders which were the first to resist the European colonialists in the Somali peninsula. There were different orders in Somalia, but in the years that followed 1890 the Qaadiriya and the Ahmadiya orders (Saalihiya is an offshoot of Ahmadiya) which traced their roots to Sayyid 'Abd al-Qadir Jilani and Ahmad Idris al-Faasi respectively, commanded the greatest number of followers (Samatar 1982, p. 96)).

The Somali resistance to colonialism became better organized under the leadership of the Islamic scholars of the Sufi orders, particularly the two aforementioned orders. For instance, Sayyid Mohamed Abdulle Hasan famously known as Sayyidka who was the leader of the Saalihiya order created a movement known as Darwish and relentlessly led insurgencies against the colonialists for more than two decades consequently becoming "a symbol of Somali nationalism" and a pioneer of "anti-colonial movement" in Somalia (Abdullahi, 2017b, p. 92). Sayyidka was able to rally massive support from pastoralist communities by warning them of the colonialist intentions to encroach their country and Christianize its people (Lewis, 1998, p. 69).

On the other hand, the Qaadiriya order under the leadership of Sheikh Aweys Muhammad al-Barawi called for resistance against European colonizers, not only in Somalia, but also in German-occupied Tanganyika, parts of Uganda and Congo. Other followers of the Qadiriyah Sheikh Ahmad Haji Mahadi carried out an operation against Italian troops stationed in Lafole in 1896 (Abdullahi, 2017b, p. 94). Seen as the reviver of the Qaadiriya tariqa in the country, Sheikh Aweys found his own branch of the tariqa called *Uweysiyya* which spread across East Africa. His *manaqib* (hagiography) is still widely recited among followers of Qadiriya (Mukhtar, 2003, p. 163). Sheikh Aweys was opposing two fronts domestically a rival tariqa, the Saalihiya, and also the foreign powers particularly the Italian and German colonialists. He was multilingual speaking various Somali dialects as well as the *Chimbalazi* language spoken in Barawa which partly explains his great influence beyond Somalia into the hinterlands of East Africa (ibid 221).

Another Qaadiriya Sufi named Sheikh Faraj, also known as Sufi Baraki, carried a military campaign against the Italian colonial presence in Banadir setting up his base in Barawa, the birthplace of Sheikh Aweys. He was able to unite a number of "Jama'a settlements: Buulo Marerto,

Golwiing, [and] Muki Dumis" among others and his followers were trained both religiously and militarily to stop the Italians from advancing to Lower Shabelle region (Mukhtar, 2004, p. 79). His military campaign was aided by being the first successor of Sheikh Aweys upon his death. Sheikh Faraj formed a coalition with another movement led by Sharif Alyow Issaq al-Sarmani based in Tiyeglow town south of Somalia to resist the Italian occupation. The two introduced a number of reforms, pushed for unification efforts among different tribes and clans, and built fortresses to counter the Italian Fascist rule (ibid, 208).

Another Sufi leader and a poet, Sheikh Ahmed Abiikar "Gabyow" became famous for his religious poetry known as *masafo.* He composed anti-colonial poems and inspired residents of Warsheikh to rise and resist the Italians forcing the latter to withdraw its troops (Mukhtar, 2003, p. 204). One example of such poems was "Dariiq" meaning "The right path." It goes as follows (ibid):

Somaliyaan u dagaallamaeyna
Kuwa dulmaaya la dood galeyna
Kufriga soo degey diida leenahay
Dabeysha mawdka intey i daandeyn
Hilibka duud cunin oonan deeb noqan
Dadka tusaan danihiisa leenahay
Kuwa dambaan u dariiq falaaya

(Fight against the enemy of Somalia!
Reject the infidel colonial settlements!
Do something before you die;
Soon you will turn into ashes
and worms will eat your flesh
Set a model for later generations!)

Italians responded by killing more than 80 people in Warsheikh and Adale prompting Sheikh Gabyow to compose another poem "Rafaad" meaning "Suffering" in which the Sheikh criticized those who did not take part in resisting the colonial troops (ibid, p. 204).

Sheikh Bashir Yusuf in Burao is another Sufi religious figure famous for leading anti-colonial insurrections in northern Somalia. Being a Salihiya, he followed on the footsteps of Sayidka waging jihad against the British in the Burao area (Abdullahi, 2017, p. 94).

Another religious Sufi leader who led anti-colonial resistance is Sheikh Hassan Barsane. A son of a *tariqa* leader himself, Barsane was greatly influenced by teachings of famous Sufi reformers such as the Morrocan Sheikh Ahmad bin Idris during his time in Mecca where he was performing the *hajj* pilgrimage and also met Sheikh Muhammad bin Salah, the mentor of Sayyidka and founder of the Salihiyya order (Mukhtar, 2003, p. 209). Upon his return to Somalia, Sheikh Barsane adopted a "militantly millenarian message" and assembled a *shir* (meeting) aimed at countering colonial expansionism into Lower Shabelle with fighters recruited from his own followers. The Sheikh was eventually defeated by the Italian fascists in 1924 (ibid, p. 210).

In sum, Sufi leaders and orders formed organized resistance movements against colonialists and created obstacles for the colonial powers to administrate the country and westernize the system of education. By mid-1920s, the resistance led by Sufi orders failed to defeat colonialists but peaceful approaches to resistance continued. However, the Sufi influence persisted even during the peaceful resistance that eventually led to the formation of the Pan-Somali political party in 1943 known as the Somali Youth League (SYL) of which four of its members were prominent Sufi scholars (Abdullahi, 2017b, pp. 92-96). This shows the extent at which Sufism was influential in political history of Somalia.

4.3 Post-independence Era (1960 – 1990)

In the years that followed independence, Sufi orders largely retreated from political involvement turning their focus instead on matters of jurisprudence and mysticism. This could be explained by the end of colonialism, which Sufi groups in Somalia regarded as threats to Islam in the country and thus the need to resist them. The newborn nation-state was ruled by Somalis which gave the impression that the country was no longer under external threat. Nonetheless, Sufi sheikhs played an important role in ensuring that the Somali constitution adhered to Islamic principles and also advocated for the use of the Arabic script instead of the Latin in writing the Somali language. In fact, it is reported that former Somalia's prime minister and president Abdirashid Sharmarke himself belonged to the Qadiriyah order and enjoyed good relations with many Islamic scholars and Sufi leaders who advised him not to allow legal issues that contradicted Islam (Abdullahi, p. 159, 2015).

However, during this period, other Islamic movements apart from the Sufi orders also existed in the country and were beginning to thrive. Salafists opposed many of the Sufi rituals denouncing them as un-Islamic and some elements among them going as far as questioning their Islam (Marchal and Sheikh 2015, p. 142). The new trend of Salafism was attracting many youths and its preachers were increasingly becoming famous and hostile to Sufism. This pushed the Sufis to align themselves closely with the government particularly after president Mohamed Siad Barre came to power. Barre promoted Sufi orders to curb the increasing influence of Islamists and appointed respected Sufi *ulama* from the main Sufi orders of the Qaadiriya and Saalihiya to government positions such as that of director of Religious Affairs at the Ministry of Justice responsible on religious matters including monitoring mosques and the *Hajj* pilgrimages (Ibid, p. 144).

Barre's adoption of scientific socialism as the doctrine of governing the country infuriated Islamists particularly the Salafists. It was the enactment of the Family Code in 1975 that brought the government to direct confrontation with Islamists including Sufi orders. Key Sufi leaders such as Mohammad Farah Olosow of the Qaadiriya order organized protests to denounce the Code and the regime used violence to disperse the protests and executed the main organizers including Olosow (Ibid, p. 143). However, it was the Islamists that suffered the most as the state took control of mosques and monitored the content of sermons and teachings to ensure that they do not bear Salafi ideas. Consequently, non-Sufi Islamic groups were forced into underground activities to safeguard themselves from the state's security apparatus (Ibid, p. 137).

This period was characterized by Sufis engagement in politics mainly by being patronized by the state to act as alternative to other stricter ideologies that threatened the regime. The Sufi groups on the other hand were assured of the government's protection and were able to maintain their influence within the society. Little has been written about Sufism and politics in Somalia during this period. However, it is clear that Sufi orders still engaged in political activities whether by being politicized or patronized. This costed them a lot as they lost their popularity among the youth who viewed Sufis as tools in the hand of the regime.

4.4 In the Era of 1991 - 2021

Sufi scholars have been part and parcel of the Muslim scholars (the *Ulama*) since independence. After the collapse of the central government in 1991, Sufi scholars took two different approaches: a group that remained quietist and confined itself in their religious and education centers (*mawlac*); and a group that involved itself in politics (Gurbiye, 2015). Sufi group known as Ahlu Sunna Wal Jama (ASWJ) forms the second group. While information about ASWJ's origins is scant, it is

believed that the group was created in 1991 (Stanford University, 2019). In the early 1990s, the group alongside other Sufi leaders and clan elders attempted to mediate between Ali Mahdi Mohammed and General Mohammed Farah Aideed, two political rivals who fought over control of Mogadishu (Conciliation Resources, 2021). The group also sent observers to the 1993 Addis Ababa conference and the 2000 Arta conference while also founding some of the clan-based Islamic Courts in Mogadishu in 1998 (Ibid).

However, ASWJ was not primarily a military organization until in 2008 when the group, in response to Al-Shabaab attacks against their practices and sacred places, created an armed force acquiring good number of soldiers and were able to oust Al-Shabaab from the towns of Guriceel and Dusa Mareeb of the Galgaduud region (Hassan, 2009). The group's desire to defeat Al-Shabaab drew it closer to the Somali government and the AMISOM peacekeepers particularly the Ethiopian army and they signed an agreement to fight Al-Shabaab (CNN News, 2010). In the years that followed, ASWJ became a formidable force and was able to retake swathes of land from Al-Shabaab, consequently becoming the de facto dominant power in Galmudug state of Somalia. ASWJ's increased influence brought it at odds with the Federal Government of Somalia and the Galmudug administration over a number of issues including salaries for soldiers, parliamentary representation and key leadership positions in the region among others (Tres, 2018). Through the mediation of Intergovernmental Authority on Development (IGAD), some sets of agreement were signed between the parties in December 2017 (Ibid).

As Galmudug elections approached, disagreements between the Somali government and ASWJ heightened and after rounds of talks an agreement was reached between the two parties including allocating the Sufi group 20 members out of 89 Galmudug parliamentarians (Shabelle Media Network, 2019). The ASWJ presented Sheikh Mohamed Shakir Ali as its

own regional presidential candidate in the elections, and amidst allegations towards the Somali government that it influenced the regional elections to have its preferred candidate elected, ASWJ declared its own candidate as the president (BBC Somali, 2020). The Somali National Army attacked the base of the ASWJ leader forcing him to surrender and disarmed the group in February 2020 (Garowe Online, 2020).

The Sufi militia's absence from the political scene did not last for so long. In August 2021, some indications emerged that the ASWJ was seeking to reclaim land from the Galmudug state administration on the grounds that it had failed to protect citizens from Al-Shabab; and on 1st October, the group took control of Guriel town and some adjacent villages from Galmudug security forces (Mukhtar & Salah, 2021). Following the arrival of reinforcements from Mogadishu, Galmudug security forces with the support of units of the Somali National Army engaged ASWJ in a bloody conflict that defeated the latter and forced to withdraw its forces from the town on 27 October, 2021. This defeat may put an end, may be temporarily, to the group's authority on the field.

ASWJ, a Sufi group, emerged as a group of unorganized Sufis who took up arms to protect themselves, their rituals and sacred places from Al-Shabaab, to seeking political influence in Galmudug state of Somalia. The reasons for this could be their need to ensure the dominance of their order and religious thought in a region marred with uncertainty, and to be able to protect itself from any future threats against its religious practices from Al-Shabaab. Whatever the reasons, history has shown that Sufi orders often engaged in politics to secure certain interests.

5. Conclusion

The literature on Sufism and politics is largely scant particularly in comparison to studies on other Islamic movements. The concept of

political Islam is mainly linked to non-Sufi Islamist groups whether radical or moderate. Hence, the role of Sufi movements in politics remains understudied. The events of 9/11 have brought to fore the study of militant Islamist groups such as al-Qaeda, DAESH, Boko Haram, and Al-Shabaab among others. Political Islam was in many ways associated with these extremist groups. Following the Arab Spring, political Islamist groups such as the Muslim Brotherhood in Egypt and Ennahda in Tunisia came to power leading to more attention given by scholars to the study of these groups. In this article, I attempted to explore the relations between Sufism and politics particularly in Somalia in a bid to contribute to the understudied topic of Sufism and politics.

This paper has discussed the interplay between Sufism and politics by beginning with deconstructing myths about Sufism being apolitical, to discussing a number of examples that demonstrate the engagement of Sufis in politics across Islamic political history. In the second part of the paper, the case of Sufism and its relation with politics in Somalia was analyzed with particular attention across four eras namely: the pre-colonial; colonial; post-independence and the period between 1991, at the collapse of Somalia central government, up to now.

One main limitation of this paper is that there is limited academic work on Sufis in Somalia let alone Sufism and politics. Secondly, information about Sufi activism in Somalia has been hardly documented and interest in Sufism and politics is low. Also, interviewing key informants such as active Sufi leaders in the country as well as accessing archival documents and records could have strengthened the research. Since this is exploratory research, it is my hope that future research on the subject will do better in mitigating these limitations.

The paper concludes that Sufism and Sufi orders have played a great role in the Somali political sphere. They have immensely contributed to

literacy, education and urbanization in the country, and led long anti-colonial resistance while also contributing to state-building and fighting terrorism. The rise of Salafism in Somalia which is hostile to Sufi groups has pushed the latter towards closer cooperation with the state especially during the Siyad Barre regime. They engage in politics in different ways from influencing leaders or being patronized to challenging state authority. Somalia, which is recovering from decades of conflict, the political role of Sufi groups may be expected in a way or another.

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In Praise of Exile?
The Case of Somali Writer Nuruddin Farah

 Helmi Ben Meriem

Abstract

Throughout his fiction, essays, and interviews, Nuruddin Farah, who was declared "persona non grata" in 1976 by Siad Barre and who has returned to Somalia only a few times since then, elucidates the advantages of being in exile and its benefits to his fiction. Nonetheless, as much as Farah celebrates exile, his fiction has suffered from Farah being outside of Somalia, especially observable in certain gaps in relation to day-to-day life and the evolving political scene in Somalia. Exile has isolated Farah from witnessing firsthand the unraveling and the rebuilding of Somalia and severed him from what he writes about, reducing him to 'a [mere] capsule of ideas,' to quote Farah himself. Thus, by juxtaposing the advantages and the shortcomings of exile in Nuruddin Farah's case, this essay emphasizes how exile can be a multifaceted and, at times, contradictory experience.

Keywords: Exile, Nuruddin Farah, Somalia, literature.

> *"Du sollst, um die Wahrheit sagen zu können , das Exil vorziehen . To be able to speak the truth, you should choose exile."*
>
> *Friedrich Nietzsche*
> *(qtd. in Hirschfeld 5)*

"In Praise of Exile," a 1988 article by the Anglophone Somali writer Nuruddin Farah (born in 1945), illuminates how exile enabled him to write, had positive effects on his writings, and made it possible for him to deeply explore his Somali identity. As much as Farah commends his experience as an exile, however, it also had negative effects, as this article aims to highlight. The condition of exile cannot be simplified but needs to be seen, with Farah as a case study, as an evolving and all-encompassing situation.

Indeed, Farah's exile offers a rich ground to explore how exile shapes a writer's life and is shaped by a writer's commitment to voice his country. Farah's life as an exile started in 1976 when Somali president Siad Barre declared him a *persona non grata*. As he was preparing to return to Somalia, Farah phoned his brother who told him "not to come back" ("Democracy?" 41) and to "forget Somalia, consider it dead, think of it as if it no longer exists for you" (Alden 34). Being threatened by a man who is believed to have ordered the killing of his own son (Qabobe 111), Farah postponed his return and, eventually, remained outside of the country until after Barre's overthrow in 1991. The reasons behind Barre's régime blacklisting Farah, a young, little-known fiction writer back then, a *persona non grata* require explanation.

By 1976, Farah had only published *Amikimido*, a novel in Somali serialized in Somali News, and two novels in English, *From a Crooked Rib* (1970) and *A Naked Needle* (1976), in which the former is an

apolitical novel and the latter represents, as Derek Wright observes, "something of an oddity in Farah's fiction, [in that] *Needle* is the only one of Farah's books to take anything like a benevolent view of the dictator" (*The Novels* 43). Koshin, the protagonist, advocates for "loyalty to the revolution [that he considers] a necessity in order that unification of the different sectors of this society be made a reality" (*Needle* 16). He even bestows on Barre exceedingly positive attributes: "The Old Man is decent, honest, wishes to leave behind a name, wishes to do something for the country" (80). This description begs the question: Why would Farah be exiled given such glorification of the 1969 revolution?

In a 1998 interview, Farah reflects on one possible trigger for his long exile: "I was returning home when I published a novel called *Amikimido* [1975] then unbeknownst to me it had been decided that the novel was inimical to the government of Siad Barre" ("Millennium" 28). Another plausible reason for Barre's antagonism to Farah can be located in *Needle* because, while defending Barre as an individual, Koshin addresses the widespread corruption and financial plundering of the state funds, directing his criticism at an official who "spent [. . .] a fat amount of the government funds on ornamenting all the Ministry's gates, ceilings, etcetera with imported Zanzibarian colour-paints" (95), and at another official, who, despite "graduating [. . .] from a university in Central Europe," cannot "write his monthly and three-monthly reports" because of his illiteracy in the "official written languages here [Italian and English]" (134-5). Such criticisms, although not directed at Barre himself, were considered as attacks on him as he and the state were interchangeable. Barre's frustration with Farah would be magnified with the publication of his first trilogy, *Variations on the Theme of an African Dictatorship*, which comprises *Sweet and Sour Milk* (1979), *Sardines* (1981), and *Close Sesame* (1983). As the title of this trilogy suggests, it focuses on dictatorship in Somalia, its causes and the measures to counter it.

Farah's exile was initially driven by his fear for his freedom and security as he indicates in "Praise of Exile": "I had to leave the country. If I hadn't, in all probability I would have spent many years in detention centers" (67); also, part of Farah's fear is linked to his concerns for his family as expressed in a 1976 letter: "I've been postponing the publication of the novel [*Needle*] for a political reason. I could not bring myself to publish it without risking the government's paranoia claws on me, say, or my brothers or sisters" ("Letter 1976" 1).

Furthermore, in justifying his self-imposed exile, Farah highlights how "prison [is] another form of exile" ("In Praise of Exile" 67). The prison, though located within Somalia, has a more alienating effect than exile itself, because it isolates detainees from the general community, unlike exile that offers the possibility to connect with Somalis and non-Somalis. In fact, Farah has always maintained that "I may be physically absent, but [Somalis] have a high respect for the principles by which I stand and still retain their trust in me" ("Combining of Gifts" 183); similarly he has stated that "I am a non person for the government, but an honored person for the people, who revere my political stand the dictatorial régime" ("Feroza" 46). Farah has made it his life's work to speak on behalf of his people, to voice their concerns, and to call for the overthrowing of Barre's dictatorship; in return for voicing Somalis, "copies of [Farah's] book[s] clandestinely entered the college [in Mogadishu] and were read by many students" (Ali Qabobe 120), a testament to the need of Somalis in Somalia for a writer like Farah with the freedom to speak on their behalf.

If any statement clearly summarizes Farah's endeavors while in exile, it would be the following: "If I am not in my country and it's because of politics, I should write something worthy of the sacrifice that I am making" ("Dreaming on Behalf" 6); Farah's balancing act of writing is an act of forever reminding himself of the country and its people with whom he looks forward to rejoining. As he went into exile, Farah carried

Somalia with him, imprinted his fiction with all things Somali, and examined his country from afar. In fact, he has made it his mission to "remain loyal to the idea of Somalia" ("Appiah" 57) that unites him with other Somalis in a quest for a better Somalia.

Indeed, one of Farah's first acts of loyalty to Somalia was his third novel *Milk*, where the character Loyaan seeks justice after his brother is killed by the régime. Farah describes how Mogadishu "is broken into thirteen cells [where] the Security deems it necessary to break this sandy city into these, have each house numbered, the residents counted—and everybody screwed!" (*Milk* 87); by illustrating how Mogadishu has changed into a place, where surveillance and scrutiny abound, Farah explores the ways that even those who remained were suffering the effects of exile—some of which he shares with the internally exiled Somalis. Throughout *Milk*, misinformation, lack of trust, and uncertainty about what was happening results in "people [being] kept in their separate compartments of ignorance" (199); for this reason Farah stresses: "My novels are about states of exile" ("In Praise of Exile" 66), whether exile from the homeland, exile inside prison—"prison [is] another form of exile" ("In Praise of Exile" 67)—exile in death, or exile by restriction of information. Rather than succumbing and allowing exile to reduce him to passivity, Farah has opted to use his newly-acquired freedom to liberate fellow Somalis by voicing them.

Farah's second act of loyalty to Somalia as well as the expression of his dissent was his changing the setting in *Sardines* from Milan to Mogadishu (Alden 35). Similar to its deployment in *Milk*, Mogadishu is depicted as Somalia writ large; in fact, the very inscription of Mogadishu in his novels counters the effects of exile by tracing Somali lives within the city that he could no longer physically access.

More to this point, *Sardines* presents the reader with a quasi-fictional depiction of Farah himself in the protagonist Medina. As the editor of *Xiddigta Oktoobar*, the mouthpiece of Barre's régime, Medina fights for democracy through her journalistic writings as well as within her home, facing an act of domestic silencing exacted by her mother-in-law Idil, who, as argued by Felicity Hand, ensures that the family is "the very structure that keeps Somali men and women [as represented by Samater and Medina] very much in check" (116). In the same stream of thought, in a 2001 interview, Farah echoes Medina's life: "So what exile has done for me is that it has somehow freed me from the family constraints" and from "the pressures of family and friends who would counsel caution" ("Country" 4) and, as such, one "couldn't plot the overthrow of a tyrannical régime from [a] mother's home" ("In Praise of Exile" 65). An example of the liberating effects of exile is seen in Farah's father's comment: "Nuruddin, you're a small boy, but this is a big man's world'" ("I. Samatar" 94).

In this respect, Farah asserts, "If I am standing on the ground, I will not be able to see the ground I am standing on—as much as I can see the ground I am not standing on" ("Gray" 134); such a classic reading of exile foregrounds Farah's idealization of his experience as an exile, arguing that "distance had distilled [his] ideas, and that it was salutary for a writer to be away from home" ("Country" 4); the beneficial distancing effect of exile can be observed in the extent to which Farah and his writings are, as Farah expresses it, "confident and detached" ("In Praise of Exile" 67). Farah had to be severed from being in Somalia physically in order "to write a truly inspired work of fiction about Somalia ("In Praise of Exile" 67), offering him the chance to observe without being caught in the midst of the scene, which encourages objectivity; it also gives him the certainty of being able to pursue his ideas without fearing persecution, a self-assurance that signals freedom.

On the one hand, isolation or exile's distancing effect takes the writer on a journey of inward-exploration and meditation of the meaning of Somaliness and of the position of the intellectual in an environment hostile to freedom of expression; much like the character Deeriye in *Sesame*, Farah's "lifelong self-invention, the history of world and self that he narrates, is created out of and in continuing relation to a whole, complex society of voices and ideas" (Alden 174-5), which are both indigenous to Somalia and learned from Farah's travels.

On the other hand, temptation, that is being attracted and enticed by new ideas, is at the core of Farah's experience of exile and his writings; his novels are not just a commentary on the political scene in Somalia but also examinations of very personal and usually shunned subjects within Somali culture, because his "mission has always been to go [. . .] into the hidden secrets, into taboos" ("I. Samatar" 91). In this respect, the exile dynamics of confidence and detachment also gave Farah, as he puts it: "The possibility of becoming myself, a writer with a wider, more inclusive world vision" ("Sense of Belonging" 21).

It is noteworthy to locate Farah's inclusiveness within the overall landscape of an exile who did not seek asylum in a particular country but chose to keep to the tradition of his ancestral Somalis and became a modern day nomad. Here, it is also of utmost importance to underline that Farah's first voyage abroad took him to India, a country "where there had been a plurality of truths," as he indicates in "Why I Write" (10). Also, his stay in Jos, Nigeria, where the Muslim North meets the Christian South and which is constantly "torn apart by violence between Christians and Muslims" (Griswold 18), consolidated his views on the urgency to develop a secular society. In fact, in his 1989 "Les Affaires Khomeini," Farah rejects any individual or group claiming to represent an "Islamic collectivity" (1) and calls for Muslims "to assist the[ir] community in reaching an accord of tranquility" (3) free from religious oppression.

Additionally, this Somalia forged from a writer's uprooting is as much the by-product of exile as it is a fundamental answer to an existential question articulated in *Yesterday*: "What becomes of those who are incapable of creating another country out of their sense of displacement?" (Farah 49); at the beginning, Farah's exile reduced him to a non-entity—ejected from his country and rejected by his government—that came face to face with, as Yussuf, the protagonist of Farah's play "Yussuf and his Brothers" (1982) puts it, " a universe of doubt [where] man drowns in it unless he finds a cause for which he must die [but] I am a man, and [. . .] at one and the same time a woman and a child rolled into one" (100) . In fact, exile has motivated Farah to face being a pariah for the governing elite, which, in its turn, bonded him with the suffering of all Somalis living under the tyranny of Barre's dictatorship—regardless of gender, tribal affiliations, or political stances; thus, despite, and actually due to exile, many exiles like Farah, according to Edward Said, "feel an urgent need to reconstitute their broken lives, usually by choosing to see themselves as part of a triumphant ideology or a restored people" (140-1), which keep them attached and devoted to their homeland. Exile has ridden Farah of any doubt about his convictions about democracy and freedom and it has committed him to the betterment of Somalia from the outside, by not only portraying the status-quo but also providing his and Somalis' visions of a new Somalia.

"Born out of psychic necessity, this new country stole in upon my senses [in] an exile which perforce jump-started the motor of my imaginative powers," as Farah expresses it in *Yesterday* (49); Farah, an exile, employs his creative talents for the service of his country because: "As a Somali I do reside in my Somaliness" ("Gray" 134), a Somaliness that is sustained through writing and that sustains Farah throughout his displacement. During such displacement, exile becomes the site where Farah develops, what he calls, a "loyalty to an idea" of Somalia built on "working hypotheses" (*Yesterday* 48), that he maintains may or may not succeed;

while awaiting his return to Somalia, Farah turns exile on its head and claims it as a space/time to engage home from afar: "I've grown accustomed to 'domesticating' the deep depressions of an exile by making these feed the neurosis upon which my creativity flourishes" (*Yesterday* 192-3).

Despite Farah's emphasis on the benefits of exile, one cannot overlook the drawbacks that being a full-time exile has had on his fiction. Indeed, responding to a question by James Lampley on the effects of exile on his works, Farah puts forward the rhetorical question: "I have written all my major works about Somalia. Do they read to you, as though they were written by an exile?" ("Lampley" 81). This essay, at this point, argues that Farah's fiction, anchored as it is in Somali culture, politics and history, has, undeniably, suffered from his exile. Some of Farah's novels, or at least parts of them, indeed do appear as if they "were written by an exile".

First of all, earlier in this article Farah's fiction has been linked to his insistence on a "loyalty to an idea" of Somalia (Farah, *Yesterday* 48); actually, this idea of Somalia is at the core of exile's detrimental effects on his fiction because rather than having Somalia as its setting, Farah's fiction is largely set in his own constructed and imagined Somalia, one that, at times, seems to lack accuracy and bears little resemblance to the Somalia that Somalis were and are witnessing. As a matter of fact, Farah compares himself to an "exiled novelist [. . .] writing about an imagined place, which she/he equates to its invented reality" ("Sense of Belonging" 19); Farah's statement shows a difference between his Somalia and the real Somalia which can be traced back to exile's distancing him from witnessing first-hand the Somalia that emerged following his exile, with the strengthening of Barre's régime and the ensuing civil war.

In the same stream of thought, Farah's Somalia can be linked to the multitude of experiences that he had during his exile, and even earlier.

Responding to Ahmed I. Samatar's question, "What does exile mean to you" [in terms of] exile and the contradiction of exile" (94), Farah relates a story from his childhood:

As a young boy, I was sent to school in Ethiopia away from home. On my first return, I discovered that I was bursting with stories I wanted to tell people. However, the second time I didn't want to share because I realized that many of the things that I saw could not be explained to people who have never seen it. ("I. Samatar" 94)

During his early years in Kalafo, as an impressionable young student Farah experienced the West, its culture and values without having to leave Ogaden or Somalia; by returning to his family and the native culture again, Farah's fascination with the West intensified because Western ideas and values seemed distant, formless and irrelevant to those who were ignorant of them. In his short story "America, Her Bra! [Land Beyond]" (2001), which is loosely based on his experience in Kalafo, the protagonist, crossing the Shabelle River separating the native Somali from the Westerners and arriving at the American Missionary School in Kalafo, expresses the reality of being exposed to the West: "We were abandoning our eating habits [. . .] Our vocabulary was enriched daily by new words of foreign derivation" (61). If as Farah writes in *Yesterday*, "in Somalia, language is the linchpin of identity" (53), then what happens to a writer who not only adopted few new words from foreign languages but actually made a foreign language, English in this case, his adoptive language?

Indeed, much like the protagonist in "America, Her Bra!" Farah argues that he is forever exiled from Somalia because his experiences cannot be incorporated into a Somali culture that is homogenous and mono-cultural. As he expresses it: "Even if I returned, I would still be in exile" (qtd. in Alden 40). Farah is much more at ease at the "Land Beyond" the Shabelle

River and Somalia than within Somalia since his values and perceptions have become more attuned to and compatible with the land beyond. Therefore, one could argue that exile for Farah moved from being an inescapable necessity—for fear of being imprisoned or killed—to an inescapable escape; exile imprinted Farah's mind and knowledge in such a way that, ultimately, exile, as an escape from Barre, becomes an inescapable condition that is self-generating.

Moreover, subsequent to his few returns to Somalia, Farah has become preoccupied with his identity as an exile, who can cease being one and permanently reside in Somalia: "I ask myself if I am losing the art because I am no longer a full-time exile" ("Appiah" 58). Farah's questioning his position as an exile is an inquiry into the meaning of exile for him, into the changes that occurred in his life since he first exiled himself and their implications for his exile status, and into his future life as a former exile. Actually, Farah's exile could be perceived as a blessing in disguise, that is, exile is now part and parcel of his identity as a writer and cannot be severed from his life—because exile and Farah's life have been feeding each other for decades. Within this framework, one can locate Farah's affirmation in "Country": "Perhaps it is a rank heresy to assume that all exiles long to return to the country they thought of as 'home' [. . .] It is a fallacy to believe that the die of an exile's mind is forever cast around a distant mold, that of a faraway homeland" (7). Even though Somalia provides the background for his fiction, Farah does not wish to be a full-time resident of Somalia because his idea of home has been evolving over the years so that Somalia, the physical land with its people and values, no longer represents his advanced understating of home.

In fact, in "If All Stories. . .!" (2001) Farah argues that "we'll not have heard the whole story [. . .] if we divide the world into cantons and the continents into markets of sectional interests" (19); exile encourages

Farah to pursue an idea of home not based on a nationality, ethnicity, religion, or color, but founded on common values, such as democracy, human rights, freedom of speech, and emancipation of the oppressed. Somalia is not Farah's home because he dwells in a home of ideas, which does not have physical boundaries and which is ever-evolving: "I felt more joined to my writing than to any country" ("Country" 4).

In defending his decision not to write about Nigeria, where he lived for a few years, Farah states: "One has to know a lot more about a place and her people before one writes creatively about it" ("Millennium" 30); it is here that exile's detrimental effects manifest themselves, in Farah's apparently limited knowledge about Somalia. In fact, the question of Farah's knowledge about his homeland is as old as his debut Anglophone novel, *Rib*, since "may Somali readers criticized the book, saying that she [Ebla] was not at all a typical Somali nomad woman" (Kelly 71).

In this respect, having been in exile since 1976 and having only returned to Somalia in 1996, it is curious to apply Farah's own judgment to his fiction about a Somalia that he did not witness. In other words, to what extent can Farah write novels, dealing with a war-ravaged Somalia, when he lacked the knowledge about the suffering of people caught in the war? Farah has drawn on his memories of Somalia in order to write his novels in the belief that, as he puts it, "memory is active when you are in exile, and it calls at the most awkward hour, like a baby waking its parents at the crack of dawn" ("In Praise of Exile" 65) and "memories are like springs. The more water comes out the more it continues" ("Millennium" 33). However, even Farah acknowledges the shortcomings of memory: "Admittedly, there have always been gaps in my anthropological knowledge of these people's day-to-day existence" ("Savaging" 17).

It is of importance here to qualify Farah's "these people" and to understand its implications for an exiled writer; if Farah's fiction can be

summed up in one word, it would be 'elitist,' in the sense that he writes novels that deal mostly, if not exclusively, with well-educated, well-positioned, and well-off Somalis, the only exception being *Rib*. Farah's "these people" does not refer to lower-class Somalis unable to provide the basic necessities, to Somalis who know only Somali, or to individuals whose perception of the world goes as far as their settlement; instead, Farah's "these people" is about "an extremely limited [group], that of a narrow circle of a 'privilegentzia' in Mogadiscio who all know one another, are well-to-do, sophisticated, widely travelled" (Turfan 277).

Even the novels published after Farah managed to return to Somalia remained centered around a privileged group of Somalis; for example, *Links* (2003) is the story of Jeebleh, a Somali American returning to Somalia, bringing with him "a few thousand US Dollars" (6) and paying "four dollars a minute" for calling his wife back in the US (47); also, in *Knots* (2007), Cambara, a Somali Canadian going to Mogadishu, brings twenty thousand dollars (201). One might argue that Farah's exile has not allowed him to "have the experience of living like an ordinary person," a criterion for a serious writer according to Farah himself ("Millennium" 28); in fact, Farah's inability or reluctance to write a novel from the point of view of underprivileged or uneducated Somalis might be traced to his views regarding African writers: "In Africa, the writers themselves belong to the same elite as the people about whom they are writing, the politicians" (qtd. in Alden 191), who occupy a privileged space of power that the best part of Somalis have no access to.

As a matter of fact, exile has only made Farah more distant and isolated from the ordinary, common Somali; he is unable to write about a Somalia that is the one experienced by the majority of Somalis and of which he has no practical knowledge, because even his memories, even if they were not defective as they are at times, are about a peaceful Somalia, albeit suffering from political tyranny. It is reasonable to inquire, using Stephen

Gray's own question to Farah in a 2000 interview: "How real is the Somalia you continue to depict, or has it by now become a fictional construct?" ("Gray" 134); in response, Farah argues that "it is as real as the very photograph of a person you know, taken at an occasion at which you were present" ("Gray" 134). But it is not as real because Farah's Somalia has become more exclusive and excluding because as he puts it in another interview: "The Somalia I bring into my imagination and bring forth into the world is more orderly, less chaotic, more truthful" ("Binyavanga" n.p.); it is this orderliness and truthfulness that need to be scrutinized since they do not refer to a lived Somalia but rather to Farah's Somalia imagined from his place in exile, where famine, drought, and fear of periodic mortar shelling is not part of his daily life.

Moreover, Farah, an exiled writer, who has chosen to live mainly in Africa, has been critical of African writers residing outside of Africa: "To talk politics as some Africans do while living in Europe is an absurdity, it is a betrayal of Africans to choose to speak on their behalf while living in the West" ("Combining of Gifts" 187); one can further develop Farah's reasoning to question Farah's continuing to live in and write from exile when Somalia's war ended and a process of recovery was initiated, and some of whose positive effects are visible in modern day Somalia. In fact, to use Farah's own words: "When you lose touch with the realities in which you must be grounded, your books would become, you know, uninteresting" ("Millennium" 28), less genuine, and more artificial. Also, contrary to Farah's assertion that "it hasn't mattered to [him] for two decades whether or not [he] knew the physical layout of the cities that serves as the background of the stories [he]told" ("Savaging" 17), knowledge about this aspect of Somali cities is of utmost importance because a keen sense of place, where the actions are set, draws attention to elements of the story that, otherwise, might not be as appreciated. Perhaps this is why Farah acknowledges that "some of [his] novels could with little change be set somewhere else if you like" ("Feroza" 49); this

lack of spatial anchor reduces the emphasis on Somalia and makes it appear almost like a non-descript political entity.

Indeed, Farah is conscious of the negative effects of exile on his fiction, denying him access to the day-to-day lives of Somalis and to the changing landscape of Somali cities, especially war-torn Mogadishu. In a 1996 interview, he highlights the double-edged nature of exile in the exchange of safety for genuineness: "I put it [*Milk*] on hold on the assumption that I would go to Somalia and finish it in Somalia, in other words, with some authenticity" ("Democracy?" 41). If Farah realized the need to anchor *Milk*, a novel published approximately three years after his exile, in a directly experienced Somalia and Somaliness, one can ponder the effects of so many decades of exile on the authenticity of Farah's fiction. Actually, Farah's own insecurity about authenticity can be detected in his statement in 1998 about his eight novel *Secrets* (1998): "I finished it in 1991 [. . .] I more or less sat on it until 1996, when I went back to Mogadishu for the first time" (qtd. in Stoffman n.p.) only after which, according to Stoffman, "Farah says he was able to cut and reshape *Secrets*" (n.p).

The effects of Farah's exile on his fiction can be summed up using Edward Said's words: "The achievements of exile are permanently undermined by the loss of something left behind forever" (137). What is left behind is the milieu around which fiction is structured. As Farah himself admits, "if you studied the structures of the novel [*Milk*] you could see that you could have done it in just two rooms" ("Democracy" 43), an admission that is also valid for *Sesame*, where "a third of the book has passed before the protagonist emerges from the house where he lives" (Alden 44), as well as for *Links*, *Knots*, *Hiding in Plain Sight* where actions mainly take place within enclosed spaces of safe houses, restaurants or well-guarded hotels.

It is within this framework that one can situate Farah's recognition of the positive effects of occasionally immersing himself in the Somali environment: "My writing has benefited in the six or seven years I've been able to go back, becoming sharper where before it may have been dull around the edges" ("Appiah" 58); as a consequence of these stays in Somalia, "the rift, ultimately, between [him]self and [his] country," that Farah describes in his 1992 "Country" (7) is healing and producing a more authentic and genuine Somalia that is closer to the lived-Somalia. Furthermore, in contrast to his 1987 idea of the over-stimulation that he would have suffered from had he stayed in Somalia—"if I lived in Somalia, it would be in my eyes, my throat, my blood, my food, everywhere, and I would be so obsessed that I wouldn't be able to write" (qtd. in Alden 40)—Farah's long exile has demonstrated to him the need, especially since he is now free to return to Somalia, to find equilibrium between over-stimulation and under-inspiration.

As this essay has argued, exile is not a monolithic experience. Farah's exile and its implications on his writings cannot be taken to represent all exiles, or as Farah puts it: "I could not say whether or not my approach is healthier or 'better' ... [It] has been of use to me but [. . .] I doubt very much whether it could be of use for any [other] writers" ("Armando" 71). Instead of painting exile with a broad brush as either a positive or negative experience, one needs to perceive exile in its totality as a complex and, at times, paradoxical state. One must continuously weigh the gains and losses incurred by a physical removal from a particular place despite an intellectual and psychological attachment to its people, culture, and memories.

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Contradictions and Ambiguities in the Constitutions of Somalia: A Preliminary Survey of the Federal and Member States' Constitutions

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Abstract

This is a comparative study on the federal provisional constitution of Somalia along with the constitutions of the Somalia member states namely Puntland, Galmudug, Jubaland, South-West State, and Hirshabelle, to determine the degree of divergence and contradictions in these constitutions. It has shown that there are significant contradictions and ambiguities in these constitutions which are potential issues for political crisis and disputes at the federal and state levels governments.

This paper recommends the necessity of harmonizing between the constitutions of federal and member state levels to attain complete constitutional framework which is necessary for political and institutional stability.

Keywords: Somali constitution, Somalia federalism, federal system.

1. Introduction

Constitution is a written document which defines the relationship between government units and protects basic rights for the citizens in a given nation, and it is considered as a social contract. Hence, it is a supreme law with binding articles which regulates the power of the government branches; it is an umbrella that hosts the laws of the country[1]. The constitution is the authority permitting legislatures to enact statutes, generate regulations and other mediated laws to implement the constitutional agenda. Usually, the structure and type of a constitution is dictated by the kind of government a country wants to have. If a country has a unitary form of government it will have a different constitution than the one with the federal system[2].

In a federal system constitution, member states have powers, obligations and responsibilities whereas the federal government has rights, powers, obligations and responsibilities dictated by the federal constitution[3].

The constitution is one of the tools to achieve political and societal stability; it frames the kind of government that satisfies the people. Hence, introduction of a constitution appropriate to the political, societal and cultural circumstance is inevitable. For instance, in South Africa, in 1993, the political parties negotiated to come up with an interim constitution and then finally adopted a permanent constitution; also, a constitutional court was established to overcome difficulties throughout the process[4]. Similarly, in Sudan in 2005, preliminary peace accord between the Government of the Sudan and the Sudan People's Liberation Movement led to the creation of an interim constitution which ended the prolonged conflict[5]. In East African states, Ethiopia is one of the recent emerged ethnic federal states. After a long civil war, the military regime was ousted and a transitional charter drafted in 1991, and latter national constitution was adopted in 1995[6].

Somalia is a country emerging from a long-running civil war. Constitutionally, it is defined as a federal state; it consists of following member states: Puntland State of Somalia, Galmudug State of Somalia, Jubaland State of Somalia, Hirshabelle State of Somalia, South-West State of Somalia and Benaadir Region, in addition to Somaliland of special case. About Somaliland, there are differences in political positions between the Federal Government of Somalia and Somaliland. Somaliland declared its independence unilaterally from the rest of the country in 18th May 1991[7]. Although Somaliland is a de facto state but has not received the recognition of the world or that of the Somali federal government. Therefore, this study does not address the case of Somaliland and Banaadir Region for their dissimilar situations.

The purpose of this study is to examine the contradictions and ambiguities in the constitutions of Somalia. It explores the harmony between the federal constitution and the constitutions of the member states, as well as the clarity of the federal constitution and the harmony between its articles and provisions. Micro comparison is the method to be employed for this desk review.

2. Somalia is a Federal Republic

Federal countries across the globe use a variety of federal systems. Take the case of the government of India; the use of the word union has made the federation strong where no state has the right to withdraw from the federation[8]. It has a federal system with strong central government where states are subordinates to the union government, and this has enabled it to avoid national states disintegration. On the contrary, In USA, in order for their federation to be indestructible and from confederation to the federal system, it took them into civil war with the intention of dissuading states from cession from the federation. Note that there are both administrative and political differences between the type of federation in India and that

in USA. In the USA, the states are original whereas the federal government works to coordinate and unify the efforts of the states which have the complete sovereignty to safeguard its citizens and territories without the intervention of the federal unit.

The type of federalism for Somalia is described in Article 1 of the provisional Federal Constitution drafted in 2012. According to this article, section one states that "Somalia is a federal, sovereign, and democratic republic founded on inclusive representation of the people, a multiparty system and social justice"; section two states "After Allah the Almighty, all power is vested in the people and can only be exercised in accordance with the Constitution and the law and through the relevant institutions. It is prohibited for a person or a section of the public to claim the sovereignty of the Federal Republic of Somalia, or to use it for their personal interest", and section three states that "The sovereignty and unity of the Federal Republic of Somalia is inviolable".

3. The Evolution of Constitutions of Somalia

Coinciding with independence, Somalia drafted a new constitution in 1960 and ratified by a popular referendum in June 1961. Later in 1979, the revolutionary government drafted a new constitution and ratified it in August 1979 with popular referendum. After the collapse of the central government in 1991, two charters were adopted during the reconciliation process, the Transitional National Charter in 2000 in Djibouti and the Transitional Federal Charter in 2004 in Kenya. Lastly, in 2012, the provisional Federal constitution was introduced where federal system is proposed and today it is the official national constitution for Somalia.

Federal system of Somalia consists of several member states, some of them were founded before the adoption of the provisional federal constitution. Article 142 gives the states legitimacy and the right to

override federal constitution during its transition to the completion (for details please see article 142 of the provisional federal constitution of Somalia).

The tentative draft of the federal constitution of Somalia was delivered in early 2012 and put into consultative process where 825 national constituent assembly gathered from all clans of Somalia; and later adopted the current provisional constitution of Somalia in August 2012[9]. In Puntland, a provisional Charter was drafted in 1998, same year of the creation of the state. Then a transitional constitution was adopted by the House of Representatives of Puntland in June 2001. The current constitution was revised in 2009 and adopted in April 2012 and later it was approved by a general assembly (elders gathered from the constituent regions and districts in Puntland state territory)[10]. Conversely, Galmudug State of Somalia constitution was approved in July 2015[11] , South-West State of Somalia constitution was officially approved in November 2014[12], Jubaland State of Somalia constitution was adopted in August 2015[13], and the constitution of Hirshabelle State of Somalia was approved in October 2016[14].

As mentioned before, article 1 of the Somali Provisional Federal Constitution denotes that Somalia is a federal state, with sovereignty, a democratic government and with public representations in bicameral parliamentarians. At the same time, article 54 of the Constitution elaborates that the power sharing, politics and economy is subject to negotiation among the federal government and member states except foreign affairs, national defense, immigration and neutralization, and monetary policy management which falls within the federal jurisdiction. Contrarily, federal member states, in their constitutions, extend to have power to manage their foreign affairs, state defense, immigration and monetary policies[15].

Overall, every nation across the globe has the doctrine of constitutional supremacy where the basic requirement for every law from anywhere is to confirm and satisfy the articles postulated in the constitution[16]. The supremacy of the Somali Federal Provisional Constitution is undermined by the political chaos between the federal organs and the member states and between the member states themselves. See article 4 of the Provisional Constitution clearly communicating the supremacy clause as shown in the below terms:

(1) "Besides the Islamic Sharia, the federal constitution of Somalia is the highest law of the country, the government will comply with it, and it will direct the initiatives and political decisions with all parts of the government".

(2) "Every law or every management action against the constitution, a constitutional court has the power to repeal such law or management action in accordance with the constitution".

In federal systems, states are crucial organs and without generic unanimity among states and federal subjects may lead to political chaos[17]. That is what is happening here in Somalia where the member states resisted the weak federal government of Somalia in such a way the mandatory obligations have not been achieved yet.

4. Contradictions and Ambiguities Between the Two Levels of Constitutions

In a federal system, member states are members of a federal government which governs the entire nation and the basic concept is that efforts of all states are unified by the federal unit to respond to the need for solidarity, defense, public well-being and economic sustainability.

The constitutions of member states of Federal Republic of Somalia, each one of them, acknowledges that the concerned state is part of Somalia and committed to the unity of the country, at the same time some articles of those constitutions are opposing or conflicting with the Provisional Constitution of the Federal Republic of Somalia.

The contradictions and ambiguities within the two levels of the constitutions indicate in one way or another that power sharing is misled and confused, additionally it leads to real political crisis from time to time. These contradictions within the two levels of the constitutions are discussed in detail in the sections below.

4.1 Puntland State and Federal Constitutions

Puntland State of Somalia was founded in 1998 and its constitution was adopted in June 2001 before the 2004 Transitional Federal Charter was drafted, later draft revisions began in early 2007 and continued until June 2009 which was ratified by 478 delegates in April 2012[18]. In Puntland state constitution, there are some articles which conflict with the federal provisional constitution of Somalia. In the paragraphs below some of these articles will be elaborated.

In the field of foreign relations, article 80/8,9 of Puntland state constitution gives the state president a political right to the ratification of treaties with international partners[19]. This is ultra vires and works against the federal provisional constitution of Somalia. It intervenes into one of the major federal government responsibilities and powers as mentioned in article 54 of the provisional constitution of Somalia[20].

In the education system of the state, according to article 32/6 of Puntland state constitution denotes that “It is the responsibility of the government to set and supervise a common syllabus at the primary and secondary

levels of education"[21] while article 30/6 of the Provisional Federal Constitution indicates that the federal government of Somalia is relied on to extend standardized education across the nation. In Puntland constitution, there is no any article connoting linkage of its education system to the federal education system.

In the citizenship, article 39 of Puntland constitution describes Puntland citizenship portfolio and consists of different laws in acquiring and losing Puntland citizenship. It dictates specific citizenship rules and regulations in an independent way violating the Federal citizenship law[22]. Conversely, article 8/2 of the provisional federal constitution of Somalia pinpoints that only one Somali citizenship exists obliging the federal parliament to enact special law governing the acquiring, suspension and losing this citizenship.

On the supremacy of the constitution, article 2 of Puntland constitution describes that the state constitution is the supreme law above all other laws and all government organs must adhere to it. This gives the impression that Puntland is equivalent in sovereignty and independence to the federal government of Somalia. One thing shouldn't be mixed with the need for each level of a constitution to become supreme in its sphere. It goes without saying that federalism involves two levels of autonomous government levels where the sovereignty is divided between them.

In-depth, see article 120 of the federal provisional constitution which orders that member states have constitutional rights to create and manage their own legislative and executive branches but the management of the judiciary branch falls within the competence of the federal government of Somalia. On the contrary, article 89 of Puntland state of Somalia constitution describes that the state government composes of three main branches including the legislative, executive and judiciary branches. Note that in article 108 of the provisional federal constitution of Somalia, the

court structure at the national level is well defined giving legitimacy to member state court structure similar to the federal government courts structure but with less superiority. At the federal level, the constitutional court is left to stand alone to manage and handle matters relating to the constitutional issues from all government levels.

Noteworthy, inferring from the above points, Puntland constitution seems at it is formulated for an independent nation. Contrariwise, it declares in article 4/1 "Puntland State is part of Somalia; its duty is to contribute to the establishment and protection of a Somali government based on a federal system". Therefore, Puntland constitution also contains self-contradictory and disruptive articles in which formal coordination is inevitably required.

Article 142/1 of the provisional constitution of Somalia empowers all states including Puntland state of Somalia to remain functional even if it is against the provisional constitution of Somalia.

4.2 Galmudug State of Somalia and Federal Constitutions

Galmudug state of Somalia is one of the states established by the federal government of Somalia during Hassan Sheikh Mohamuud's presidential term. It is the ultimate outcome of several attempts, and finally formed in 2015, its constitution was adopted in 28 July 2015[23]. Harmonization of Galmudug state of Somalia constitution with the provisional federal constitution seems to be oriented since Galmudug state constitution adoption occurred after the provisional federal constitution was ratified. For sure, Galmudug state of Somalia is part of the federal government of Somalia, see article 1 of Galmudug state of Somalia constitution. It is one of the main principles of the state that it is a member state; unlike Puntland state constitution, article 6 of Galmudug state constitution

bestow supremacy in conformity with the provisional federal constitution of Somalia.

Article 120 of the federal provisional constitution directs that member states have constitutional rights to create and manage their own legislative and executive branches and in precedent in article 108 national court structure is composed of federal and state levels with more superiority vested to the federal court structure. In contrast, articles 64-66 of Galmudug state constitution describes that the state government deals with the foundation of its judiciary system in the absence of a law regulating the interaction of the member state courts with the federal government courts.

In the acceptance of this typology of government style, then the federal system of Somalia is a dual rather than integrated federalism where the federal legislature shall have the power to be involved in the creation of the state administration and judiciary systems. The provisional constitution of Somalia has explicitly separated competencies between federal governments and member state governments as shown in article 48. Hence the existing structure of the state shall contain different categories of powers composed of the federal government powers, member states government powers, shared powers and residual powers. Getting down, for real the power is constitutionally apart but the main issues arise from the existing refutations in the provisional constitution of Somalia (for details see section 4.6 below).

4.3 South-West State of Somalia and Federal Constitutions

South-West State of Somalia is an ultimate outcome of several initiatives and attempts. It was finally formed in 2014, and 370 delegates adopted its constitution in November 2014[24]. According to article 35/1 of South-West state constitution, the state is authorized to supervise all international

treaties which the federal government of Somalia admits. Glancing at article 54 of the federal provisional constitution of Somalia; it is clear that the federal government of Somalia presumed that it is the only government organ assigned constitutionally to respond to the needs for international treaty organizations.

Treaty supervisory role is the sole responsibility of the house of the people from the federal parliament of Somalia. According to article 90/q, the federal president "signs international treaties proposed by the council of the ministers and approved by the house of the People of the federal parliament". Therefore, it goes without saying that the actual supervision is vested into the federal house of the parliament and for sure the upper house is the real representation of the member state in the federal arena. Hence article 35/1 is conferring to the state powers beyond its constitutional mandate which is ultra vires.

Similar to Puntland state Constitution, South West state constitution confers its social contract complete supremacy without subordinating to the provisional federal constitution of Somalia and that is a breach of a constitutional article 4/1, *"After the Shariah, the constitution of the federal Republic of Somalia is the supreme law of the Country. It binds the government and guides policy initiatives and decision."*

4.4 Jubaland State of Somalia and the Provisional Federal Constitution of Somalia

Jubaland was formed officially in 2013 and its revised constitution was adopted in August 1 2015[25]. Unlike abrogated state charter, the revised provisional constitution of Jubaland state is standard and is actually linked to the provisional federal constitution of Somalia. But still there are certain divergencies if glanced at article 48/7 of Jubaland state constitution, the state council of Ministers is vested with legal

responsibility to present nominated judges of the state constitutional courts for approval to the state general assembly. This clause contradicts articles 109B and 109C of the federal Provisional Constitution of Somalia. The country shall possess only one constitutional court which is at the federal level and this court deals with matters relating to the interpretation of constitutions. Here there is a need to clearly state which constitution does the constitution court deal with and the answer is that the constitutional court handles all cases relating to constitutional matters whether the case is at the federal government level or at the state government level. More specifically, if a case is presented before any court anywhere in the court and that case concerns constitutional matters then that court must submit the case to the constitutional court[26].

Emphatically, article 108 of the provisional constitution of Somalia declares clearly the structure of the courts at both federal and state levels. For states, the highest court is the member state high court; there are appeal courts with the state level government and the courts of the first instance [27] . The formation of the federal constitutional court is procedurally narrated in article 109B of the provisional constitution of Somalia. This article gives special direction and steps to be taken in the foundation of the constitutional court which is consisting of 5 judges and among them are the chief judge and his/her deputy. The judicial review committee has the role to make the proposal for the chief judge and then initial proposal is submitted to the house of the people and if the confidence vote is granted the federal president officially nominates that person to become the chief judge. Among the powers of the constitutional court is to handle cases relating to disputes between the federal subjects; cases arising from disputes between the federal organs and member states and/or cases concerning disputes within the member state governments[28]. Therefore, only federal organ with constitutional legitimacy can handle disputes arising among the member state governments for the purpose of attaining impartiality and administrative justice.

4.5 Hirshabelle State of Somalia and the Federal Constitutions

Hirshabelle State of Somalia was formed in 2016; its constitution was approved in October 2016. Article 5/2 of Hirshabelle state of Somalia constitution declares that the legislative, executive plus judiciary are structured following the procedures and methods revealed in the state constitution. This is directly conflicting with article 120 of the federal provisional constitution of Somalia because this article highlights that the member states of Somalia are exempted from the organization of the judiciary sector structure in their constitutions. Article 59 of Hirshabelle state constitution gives details of the structure of the state judiciary sector making it the third jurisdictional integrity constitutionally covered; but this article doesn't follow the constitutional instructions given to the member states which is to administer only legislative and executive institutions in their constitutions leaving the judiciary sector to the federal government where the constitution directly vests to the federal parliament the power to create laws governing the integration between federal government level courts and member states level courts[29].

Then it must be clear that due to the sensitivity of the judiciary sector and the need to have unified judiciary scheme for the whole country the formulation of the structure must come from the top level and it is then taken to the lower levels such as states and then to the local government. Notoriously, if the two levels of government produce variety of court structure then the enforcement of the laws and the spread of the decentralization will show disorder and lack of uniformity.

Most of the political contentions have their initial roots in constitutional divergences created by the two levels of governments existing in Somalia. Globally, countries with the federal systems have unified and well-structured constitutions to avoid political disagreements. The people of Somalia are part of the constitutional review committees and without their

inputs and acceptance of the provisional constitution of Somalia it remains a draft constitution.

4.6 Contradictions and Ambiguities in the Federal Constitution

There are bulleted contradictions within the federal constitution and this include article 53/1, which connotes that the federal government of Somalia must negotiate with the federal member states on the various aspects of the international relations such as foreign aid, international agreements, and other vital international relations. This means that the federal government of Somalia must make this negotiation with the federal member states before providing final signature or approval for any international relations. On the contrary, article 54/A of the federal constitution of Somalia mandates that all foreign relations shall be solely administrated by the federal government of Somalia.

The international treaties administration falls under the federal government jurisdiction but as mentioned in the above paragraph and according to article 53 of Federal Constitution, the federal government of Somalia shall consult with member states on the international treaty management. Hence, the member states require supervising the international treaties in which the federal government of Somalia engages with external counterparts while the federal government of Somalia executes its constitutional mandate. Legally, there is the upper house which has the constitutional duties to supervise the performance of the federal organs on international treaties having that the upper house is the real political representation for the member states[30]. From the other side, article 53/1 empowers the member states with all the rights and privilege to make contributions prior the approval of any international agreements; while article 54/A mandates the federal government complete jurisdiction to manage all foreign relations and interference of member states in foreign affairs management is illegitimate. Therefore, it can be inferred

from here that besides the contradictions between federal constitution and some articles of member states constitutions, the federal constitution show internal inconsistency as the above explanations prove.

In accordance with this federal provisional constitution, the national court structure is supposed to be dual structure whereas the judiciary system of the country is totally disintegrated (for details, please see article 108 of the provisional constitution of Somalia). Yet member states are exempted from establishing their judiciary system details into their state constitutions. Note that article 120 of the provisional federal constitution of Somalia envision the likely member states constitutional formulation, "The establishment of the legislative and executive bodies of government of the Federal Member States is a matter for the Constitutions of the Federal Member States." This means member states have the constitutional right to organize only the legislative and executive organs of their states in state's constitution. The envisaged judicial structure is unified court structure where the Supreme Court at the federal government level dictates to the rest of the courts in the lower government levels. At this end, the result will be to really deny the application of a true decentralization in good governance.

These differences in the constitutions of both government levels mentioned in the above pages show the need for constitutional harmonization. This is what the federal constitution confirms in article 121 which states that "Principally, the Constitution of the Federal Republic of Somalia and those of the Federal Member States shall be harmonized".

5. Conclusion and Recommendations

Article 120 of the provisional federal constitution of Somalia has given basic procedure which the member states have the full right to lay down

by themselves their state constitutions enacting acts to form the legislative and executive branches within the state autonomy. On the other hand, article 121 of the constitution expresses the lawfulness and legitimacy of the member states constitutions integration into the federal provisional constitution of Somalia. Obviously each state has constitutional articles making its constitutions the supreme law above all which is directly breaching the supremacy of the Provisional Federal Constitution of Somalia. The main reason why states show constitutional priority over the federal unit is, among other reasons, that some constitutions were drafted and adopted before the manifestation of the federal constitution. Additionally, it can be good justification to mention these differences in the constitutions of both government levels indicating that the country is stepping into its first phase of federalism and leaving behind the unitary state systems. So, there are no surprises in these contradictions between the two levels of the constitutions.

Of course, the contradictions and ambiguities within the federal and state constitutions show the need for constitutional harmonization. In this regard, the federal constitution confirms the vitality of harmonizing constitutions in the two government levels[31].

Article 133 of federal constitution, the Oversight Committee (OC) and the Independent Constitutional Review and Implementation Commission (ICRIC) are the constitutionally established committees taking constitutional roles to the process of revising the federal constitution of Somalia. Hence, the need to have review committees at the state level to cooperate with the federal commission is deemed crucial but it is not marked into this federal social contract. Therefore, there is the gap of constitutionally envisioned bodies to review state constitutions to connect to the federal committees mentioned in the above paragraphs. But fortunately, there is the constitutional articulation of the Inter-State Commission; this commission will be very useful body to accelerate the

possible joint cooperation between the two levels of the governments in Somalia [32] . Ideally, federal and member states constitutions are complementary documents which its coordination is compulsory to attain complete governmental constitutional law framework mechanism.

Obviously, a wider harmonization of the constitutions in both levels is a collective responsibility although constitutional review committees exercise the power of constitutional updates at the federal level in Somalia and from the other side states may have dedicated government organs to review their constitutions. Yet the need for coordination among the constitutional reviewing committees in both government levels is very vital and indispensable.

The finalization and updating of the constitution, the basic social contract, is an effective solution for a political unrest and to regain wide national accord. Somalia's federalism has come after prolonged conflicts through incomplete consultations; additionally Somaliland is outside of the whole process and does not recognize it. Hence, Somalia has long way to go to achieve political consensus and constitutional stability.

Notes

[1] Dr. J. N. Pandey and others p16-17 Katabaro, Jackson. The Meaning and Functions of Constitution, p. 1

[2] Some examples of unitary states are Albania and Afghanistan where centralized governments are formed. Conversely, Australia, India and United States of America are good examples of countries where federalism is applied with unions of states.

[3] Max Planck Foundation for International Peace and the Rule of Law, Comparative Manual on Federalism in Somalia, p10.

[4] Max Plank, Manuals on Constitution Building: Structures and Principles of a Constitution, 2009, p8-9.

[5] Max Planck Manual on the Structure and Principles of a Constitution, 2009, p.9.

[6] Max Planck Manual ibid, p. 8.

[7] From 2012, the two sides got political talks in London, Dubai, Ankara, Istanbul and Djibouti but none of these political dialogues resulted in a consensus to visualize the relations of the two parties. For more details refer to "The Somaliland-Somalia Talks in 2012-2015: Acritical Appraisal", Somali Studies: A Peer Reviewed Academic Journal for Somali Studies, vol 4 (2019).

[8] Dr. J. N. Pandey, Constitutional Law of India, 2004, p. 34

[9] Library of Congress, (August, 2, 2012), https://www.loc.gov/item/global-legal-monitor/2012-08-09/somalia-new-constitution-approved accessed on 23 September 2021.

[10] Library of Congress, (August, 2, 2012), https://www.loc.gov/item/global-legal-monitor/2012-08-09/somalia-new-constitution-approved accessed on 23 September 2021.

[11] Provisional Constitution of Galmudug state which is approved by the house of legislature, July 28 2015, p. 1.

[12] Garowe Online, (8th Nov 2014) https://www.garoweonline.com/en/news/somalia/somalia-southwest-state-delegates-adopt-constitution-cherrypick-capital-city> accessed on 25/08/2021.

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[15] For more details please refer to section 4 of this paper..

[16] Constitute, (2008) https://www.constituteproject.org accessed on 12 May 2021.

[17] State Constitutions in the federal Sytem, Advisory Commission on Intergovernmental Relations, 1989. P 1.

[18] Interpeace, (April 20 2012) https://www.interpeace.org/2012/04/a-historic-moment-puntland-s-constitution-now-ratified/ accessed on 19/03/2022.

[19] Puntland Constitution,(revised on June 2009) http://www.ophrd.org/op/wp-content/uploads/2015/10/Puntland-Constitution-ENG.pdf accessed on 19/03/2022.

[20] See article 54, provisional federal constitution of Somalia, p.16.

[21] Puntland Constitution (revised 2009) http://www.ophrd.org/op/wp-content/uploads/2015/10/Puntland-Constitution-ENG.pdf accessed on 19/03/2022.

[22] Dr. Mohamed Isse Hussein and others. Review of the Somali Provisional Constitution: Appraisal of Contentious Articles and Contested issues, SOSCENSA, Date: NA, pp. 29-30.

[23] Dr. Mohamed Isse Hussein and others, Review of the Somali Provisional Constitution: Appraisal of Contentious Articles and Contested issues, SOSCENSA. P. 31.

[24] Garowe Online (Nov 8 2014). https://www.garoweonline.com/en/news/somalia/somalia-southwest-state-delegates-adopt-constitution-cherrypick-capital-city> accessed on 19/9/2021.

[25] Provisional Constitution of Jubaland (August 1, 2015).

[26] See article 109/1,2-provisional constitution of Somalia, 2012, p. 34

[27] See article 108/c, provisional constitution of Somalia,2012, p. 33-34

[28] See article 109C/d, provisional constitution of Somalia, 2012, p. 35

[29] Provisional federal constitution of Somalia, Article 109/3, The proceedings of the National Courts, p. 34

[30] The Roles and Functions of Somalia's Upper House, Somali Studies: A Peer Reviewed Academic Journal for Somali studies, Vol 4 (2019), p. 46

[31] See article 121, provisional constitution of Somalia, p. 43

[32] See article 111f, provisional constitution of Somalia, p. 39

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Public Management Reform and its Effectiveness on Quality Public Service Delivery in Somalia

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Abstract

This paper examines how sustained public management reform impacts on quality of public service delivery in Somalia. It adopted a desk research methodology, which involves reviewing existing literature and collecting data from existing resources to study the research topic.

The paper argues that the public administration in Somalia has been disrupted, which prevents Somalia from making significant progress in providing public services. It recommends several measurements for reformation to contribute to the quality of public service delivery and economic growth and development in Somalia.

The paper aims to guide public institutions, civil societies, policymakers, and international organizations interested in reforming public management in Somalia to achieve the quality of public service and respond to the needs of the society.

Keywords: Public management reform, service delivery, Public management effectiveness.

1. Introduction

There has been a growing interest in reforming public management globally. Its significance has increased in modern life where governments must revise and respond to the rapidly transforming global economy, citizen needs, technology development within other rising issues (Cheema, 2007). Public management is influenced by the political system of the country, the environment, culture, and historical experience (Musa, 2018). In addition, these factors are dynamic and could be changed through the constitution, regulations, the rule of law, good governance, and the willingness of political leaders. Furthermore, public administration is the area in which the policy and law recommendations are conducted and the board directors of public management are politicians who consider political performance rather than public organizational performance (Steven & William, 2002).

The main importance of public management in moderate states involves the implementation of public policy and providing service to the citizens, and it helps to accomplish peace, security, and order in societies and prevent natural disasters by issuing a warning before a crisis (Polinaidu, 2010). Public management is a mechanism in the application of the law and programs set by the government, and the government cannot exist without public management. Furthermore, public management is indispensable to economic growth and development by facilitating infrastructure, regulation, reducing poverty, promoting exports, and protecting the environment.

Public management reform (PMR) is very all-inclusive and takes place in large areas such as institutional structure, human resources management, public finance, decentralization, and organizational culture(UNDP, 2004). The targeted reform of this paper is to focus on civil servant reform, demarcated to include the issue of recruitment, specialization, and

promotion by enhancing the competencies and skills of civil servants to improve public service delivery. Any reform in public management would face resistance and challenge from extractive and corrupt groups who seek to retain the power to extract the resources from the majority of Somalia citizens.

Bollit & Buocckaert (2000) define public management reform as "*is a deliberate change to structure and process of public sector organizations with objectives of getting them and runs effectively*". The institutional structure is a fundamental method for reforming organizations because it involves specialization, formulation, departmentalization, centralization, and vertical and horizontal departments (Hill & Lynn Jir, 2008). Reforming Structure in the area of merit-based system and specialization as a tool to improve public management productivity by segregating functions and tasks.

The significance of public management reform in the area of civil servants should be based on a merit-based system and specialization that could bring and attract qualified and skilled employees who undertake their duties and responsibilities consistent with the constitution and legal framework and contribute to the public management performance effectively and efficiently and more responsive to its citizens. In addition, fair competition and meritocracy give an equal opportunity for all citizens and bring the good educated and trained moderate technology technocrats to work with the government which would increase and improve the quality of public service delivery(Idris, 2018). Specialization and division of labor increase the public organizational performance, and the structure of public institutions in terms of specialization could be suitable for public organizations' context including capacity, objective, technology, workplace, and outcomes orientation of the public organization. An institutional structure creates duties and functions into well-trained specialists in public institutions(Idris, 2018). As well as promotion

requires to be based on competencies, merit, and hard work under article 37 of the law of Somalia Civil Servants in 2006. Quality public administrators contribute to the facilitation of efficient management, responsive to citizens' aspirations and service delivery(Cohen & Eimicke, 2002). Additionally, the entrance to the public administration must be based on competitive exam and professional merit, protection of civil servants from illegal dismissal, and rule of the law-based system increase the public trust in the government and satisfaction of citizens. A fair promotion would increase the morale of employees and their competition which would contribute to individual performance, efficiency, and effectiveness of the public service delivery.

To sustain public management reform is a very significant step and arises from reaction to the shifting international economic, social, political, and technological transformation. Besides, the industrialized economy in the advanced and developing countries moving from mass- production-based on industrialization to the technology and education-based system of production and service as well as moderate technology produce and stimulate new production, transportation telecommunication, and new energy determinate the economic growth and development (Cheema, 2007). Reforming in public management needs leadership commitment, good governance, rule of law, separation of public service from politics, and protection of political neutrality.

In the case of Somalia, public sector reform was implemented in 1964 by then Prime Minister Abdirisak Hagi Hussein. During the reform, many public employees were dismissed. After the collapse of the regime and the public management institutions in 1991 and their reactivation in 2000, the public management reform in the reconstruction process is a matter of significance to the improvement in public service provision, the Somali citizen's aspirations, the reduction of poverty and the contribution to international markets. In addition, the information age and the

transformation of technology require the government to change its approach to providing service to society and delivering service to the citizens centered on technology. (Cheema, 2007).

The significant purpose of reforming public management in Somalia involves promoting efficient and effective service delivery, promoting merit-process recruitment, and empowering bureaucracies with moderate technology. Furthermore, ineffective public management hampers the country's salient recovery. However, the elected and selected politicians in Somalia since the 2000s have never paid the required attention to public management and the upgrading of bureaucracies, which are essential approaches for economic growth and human development. In addition to the political system's transformation from a unitary to a federal system, it also requires public sector reform in Somalia. Somali leaders discredit the role of public management, resulting in institutional collapse, lack of public service, increasing poverty, unemployment, and lack of access to primary education for 70% of Somali children (Education Ministry of Somalia, 2019).

Still, Public administration in Somalia is centralized although the state recovering from a failed state and civil war, a lack of leadership commitment, and corrupted politicians disband Somali public management. Article 27 of Somalia's constitution provides all Somali citizens the right to receive clean water, emergency health care, and social security, but the successive governments failed to provide those services to citizens. Furthermore, Somalia's public sectors are hampered by corruption, nepotism, favoritism, and political patronage. According to International Transparency (2019), Somalia is ranked the most corrupt country in the world.

Previous studies have paid little attention to public management reform in Somalia; they have not considered the role of public service management

in government. My study is intended as an addition to existing scholarship on the issue and subject of reforming the public sector in Somalia. Indeed, most research in Somalia does not consider public management reform. The diffusion of technology on the global and increase in citizens' expectation requires a sustained reform in Public management. Again, moving of centralized system to another system leads to significant public management reform in Somalia. This study examines how sustained reforming in public management contributes to effective and efficient public service provision. It addresses the ineffectiveness of public service in Somalia and how to improve public service delivery which is affected by not merit-based recruitment, underperformance, lack of specializations, political interference in the public management, and lack of public service.

Having provided a context for this paper, I will proceed to the following introduction, the political system in Somalia, an overview of public management in Somalia, the importance of public management reform and quality public service delivery, challenges to the public management reform in Somalia, the control and supervision over public management, conclusion and policy recommendation. This paper focuses on secondary data of public management reforms conducted, literature review, journals, and Somalia media.

2. Political System and Public Management in Somalia

Public management is a non-political bureaucracy supervised by the executive branch; it works under the order and direction of the executive arm. A political system is a tool for determining the success of public management reform because public administration is under the hands of the executive arm of the government, and various functions of bureaucracies are reflected by development in politics and the economy (Polinaidu, 2010.). The political system in the country has a pivotal role

in public management and the effectiveness and efficiencies of service delivery. The form of the political system of a state, such as democracy, autocracy, monarchy, oligopoly, and partial democracy, affects the performance of the public sector. Again, rule of law, separation of power, accountability, and transparency in the public sector influences the quality of public service. In addition, all ministries are responsible to the minister, and he/she is monitoring what is going on in all departments of ministries and the mistakes committed in the public offices (Igbokwe, 2009). The minister has to take measures against the officers who commit mistakes through the constitution, regulations, and ordinary laws enacted by parliament and also has the right to refer to the independent civil service commission.

The context of bureaucracy in developed countries separates politics from public management but in most African public management and its politics are mixed, in the case of Somalia public management and the executive branch are similar and no difference. Furthermore, the offices of top leaders direct and manage the public management in terms of recruitment, promotion, and dismissal, which is contrary to article 37, clause 5 of the civil servant's law, passed in 2006.

2.1 The Political System

Following its independence in 1960, Somalia embraced democracy with a centralized system, the president is elected by parliament, and Prime Minister is nominated by the president with the endorsement of the parliament. The Prime Minister and his cabinet undertake all functions of the government, formulate, and implement the public policy of the state. In 1969, the military ousted the civil government; they underpinned a totalitarian unitary system with a centralized form. In 1991, armed oppositions toppled the military regime, the central government

collapsed, the institutions of public administration completely collapsed, and most of the public infrastructure was destroyed.

In 2000, after ten years of political vacuum, civil society activists, intellectuals, and traditional leaders gathered in Djibouti and formed a transitional national government, but the government faced armed opposition and other obstacles. In 2004, warlords and factional leaders gathered in Nairobi, the capital city of Kenya, they agreed to establish the federal system and established a transitional federal government. In August 2012, Somalia's Federal Provisional constitution was adopted by National Constituent Assembly; the Provisional Federal Constitution is applied in Somalia since 2012. Somalia currently relies on an amorphous political system, based on political patronage and clan-power sharing, which undermines the quality of public service and does not treat the underdevelopment, economic stagnation, and extreme poverty.

2.2. An Overview of Public Management

Public management is not the formation of the moderate period but its track back to an ancient period (Emmanuel .A. Shom, 2012). Moreover, in the period of emerging moderate states the public management was surrounded by political connection, nepotism, political loyalty, and patronage and it was based on a centralized traditional approach.

In Somalia, there are three stages of public management that took place; first, pre-independence and civil government: during the trusteeship time, servant recruitment was done and trained by the Italians in southern regions and the British Protectorate in northern regions. After independence in 1960, the first Somalia Government faced challenges about how to assimilate the civil servants from two regions because they received two different training and experience (Aroma, 2005). In 1960 - 1969, during the nascent democracy, the corruption and nepotism of civil servants in terms of recruitment and promotion spread in all sectors of the

government, although article nine (9) of the Somalia Republic Constitution in 1960 mentioned: "every Somali with qualification can hold the public office". After four years of independence, reforms based on informal law were carried out by then Prime Minister Abdirisak Hagi Hussein. As unqualified officers were fired, some additional achievements were realized in terms of enhanced public recruitment and enhanced public service.

The second stage was during the military regime period from 1969, although, there were some achievements attained in terms of training and promoting the competencies and skills of civil servants, and the government established the Somali Institute of Development Administration (SIDAM), which provides training for the public officials. The citizens had accessed a free public service in terms of education, health care, and other necessary service but the main criteria required for joining civil service was to undertake military training and believe in the ideology of the Somalia Revolutionary Socialist Party. In addition, the high-rank officers such as general directors, district commissioners, and regional mayors have been appointed through their loyalty to a military regime, clan affiliation, political patronage, and the revolutionary ideology (Aroma. 2005).

The third stage was the political vacuum era of 1991-2000, where all government public institutions collapsed and civil servants dispersed. But in the 2000s, a transitional national government formed in Arta, Djibouti, had called previous public servants but armed opposition from warlords and clan militia made the government dysfunctional. In 2004, the Transitional federal government was established in Nairobi, Kenya. The Transitional Federal Government succeeded to establish and approve civil servant Law No.11 in 2006 through the House of the People of Somalia Federal Parliament. Positively, law and legal framework are indispensable for any reform in public management. In 2012-2016,

Somalia started to reestablish and recruit public servants but still the process of hiring and recruitment is based on nepotism, favoritism, group affiliation, and political patronage. Since 2017, public recruitment was suspended due to World Bank and IMF conditionality.

In brief, since 2000, successive governments have done positive forward steps to rebuild public service management. However, this sector suffers, with other factors, from corruption and mismanagement where powerful politicians use their power to get appointed to positions such as general directors, district commissioners, and other high-rank posts.

3. Challenges to Public Management Reforms in Somalia

There are numerous challenges confronting the public management in Somalia; among the main challenges are the following:

3.1 Political Instability and Ineffective Executive Arm

The civil service is under the executive arm because the executive branch determines public policy. On another hand, public policy has been defined as "what government chooses to do or not to do (Dye 1976). Public policy arises in the reaction of policy aspirations and concerns submitted by citizens and other stakeholders (Eneanya, 2010). Furthermore, executive power is pivotal in public service delivery because the minister is the head of the ministry who runs the activities of his/her ministry to serve the citizens. Resources and budget allocation that drive public service are under the hands of the executive arm. Public services are conducted and implemented by the public servant under the constitution and laws of the state and the direction of the executive branch which has the right to control the recruitment, promotion, and removal (Igbokwe, 2009).

Only constitutional practice, rule of law, separation of powers, an independent judiciary, and independent public service commission can

limit the power of the executive branch. Therefore, the success of public management depends on the executive arm; the corrupt and dysfunctional executive in Somalia undermines public service. The embezzlement of the resource allocated to public service, infrastructure, education, and health causes economic stagnation and poverty.

Somalia's judiciary is not independent because the President nominates the supreme judge without the endorsement of the Somalia Federal Parliament. On other hand, political instability in Somalia undermines the main functions of government, and economic growth and development. Finally, political instability induces dysfunctional institutions and leads to damage to the state and society (Daron Acemooglu & James A.Robinson, 2012).

3.2 Underdevelopment of Public Management

Public service still is under development and has the traditional style, machinery, and tools used in public administration in Somalia is not appropriate for national development, engagement of international markets, and economic growth. Equally important, to complete one process service in Somalia you need to deal with several institutions and it takes a long time. However, the government is a factor in national and human development and any development depends on the skills and quality of the public service. Public management in Somalia is incapable to deliver social-economic, poverty reduction, quality education, and a better life because the development needs resources, professional human capital through merit-based recruitment, specialization, leadership commitment, and political stability (Emmanuel .A. Shom, 2012).

3.3 Corruption and Unethical Behavior.

Since 2006, Somalia has become the lowest country on transparency international's corruption perception index (International Transparency, 2019). The definition of corruption "is an abuse of the public office for

private gain". (2005, World Bank) as similarly Lampsdorff (1999) defined corruption as the "misuse of the public power for private gain". Corruption occurs in public sectors in terms of public recruitment based on nepotism, favoritism, and political patronage. Public corruption impedes the viability of the state and brings unskilled staff that works in the public sectors and misuses national resources for individual gain. Moreover, lack of integrity, unfairness, and mistrust of Somali citizens delays the process of public services (Aroma, 2005).

3.4 Political System-Based on Clan Rule

Clan politics remains and makes the Somalia public service ineffective because this system directly shapes the political system which influences the public management. Furthermore, from top leaders to junior civil servants come through this system, and they are giving most of the high jobs to people affiliated with their clans and groups' loyalty to them to persist the power. Additionally, there are many incompetent and unskilled workers in the public sector due to the recommendation of their clans. The influential clans and powerful politicians get high posts as civil servants like general directors and departmental directors, and even military positions and appointed positions such as ambassadors, consuls, and diplomats. This system undermines merit-based system, competition, and equal opportunity employment of the whole people in the country.

4. The Control and Supervision over Public Service

It is mandatory for the public workers to behave ethically and morally in consistence with Islamic values, constitution, laws, and public values because they are responsible for their actions. However, it is necessary to control public service through internal and external control to avoid corruption, none merit-based recruitment, misuse of power, bribing, unethical behavior, delayed service, mistreatment of public workers,

social injustice, and embezzlement of public funds and resources. Internal control is very significant for public management performance. In contrast, it is necessary to find external tools which control the public management to avoid abuse of power against public workers and violation of national laws.

4.1 Internal Control

Internal control operates within the administration itself, and it is the duty of the executive branch, according to article 99 of the Somalia Federal Constitution states the power of the council of ministers is "to set the general policy and implement it". Furthermore, every minister has the mandate to oversee and supervise his/her ministry`s activities because the executive arm is a planner of national and human development and is responsible for delivering quality public service.

4.2 External Control

External control is an essential tool in controlling the public management service. It may be considered from several main angles, namely – the legislature, independent civil service commission, the judiciary, and civil society and media.

a) Parliamentary Oversight

Legislative oversight is very significant in controlling public management performance, and avoiding irresponsibility of public officers, corruption, bribing, non-merit-based recruitment, mistreatment of public workers, and unethical behavior. According to article 69/2 of the Somalia Federal Constitution, the House of the People of the Federal Parliament has the power of *"to hold accountable and monitor the national institutions, and to ensure the implementation of national laws."* as well as *"to hold*

accountable the Prime Minister, members of ministers and chairpersons of independent commissions."

b) Independent Civil Service Commission

Somalia civil commission is established under ordinary law No.11 of Somalia civil servants which passed by parliament in 2006. The roles and mandates of the Civil Service Commission are to ensure public recruitment through impartiality, fairness, and independence, set rules to be followed in the recruitment process suitable for the all applicants, and prevent a public employee from being abused by the executive, and protect the rights of public servants. This commission is nominated by the executive without the endorsement of parliament which hinders its independence.

To get an effective and more independent civil service commission, it needs that the members of the commission and its law be approved by the parliament.

c) Judiciary Control

According to article 106 of the Somalia Provisional Constitution, *"the judiciary is independent of parliament and the executive arm and it carries out its functions under the constitution and laws."* So, the judiciary has the power to look into any legal violations or abuses by public officials. The judiciary is also in charge of applying the law to everyone.

The courts can intervene in the public management acts and orders whenever there are power abuse and unregulated procedures. In addition, if a public worker uses his mandate to damage the dignity and rights of a person, the judiciary has the power to intervene in the case and punish that public official if he is found guilty. Nevertheless, the court cannot intervene in any administrative acts because some administrative conflicts have special procedures (Muçaj & Gruda, 2016).

d. **Civil Society and Media**

Civil society and media are very important in controlling and overseeing public management because the media informs the citizens what is going on in the government institutions. In addition, the media conducts an investigation and delivers news to the public (USAID, 1999). Today, Social media and the internet make people more aware than before and increase public participation in the government. The effectiveness of civil society can symbolize society and influence public service decision-making, and civil society is a key factor that pushes the government to foster the quality of public service because it represents a diverse range of interests, including labor unions, the education sector, doctors, women, and youth. In addition, civil society can inform and mobilize the community while also strengthening public service (D.zatkova, 2016). The media play an important role in the dissemination of information in society and influencing society's attitudes, which may have an impact on public management decision-making.

5. Conclusion and Policy Recommendations

Public management reform is vital to improve the quality of public service delivery and strengthen the public trust in the government. Organizational reform in the areas of merit based-system and specialization would contribute to an increase in the quality of public service delivery. The good quality of public management shapes the direction of the economy. The effects of globalization, information and communication technology necessitate reforms in Somalia's public administration and service delivery methods. Additionally, Somalia's public management has malfunctioned because of nepotism, favoritism, political patronage, and corruption preventing it from making remarkable progress in public service delivery. Public management reform in the recruitment process and specialization might lead to and attract qualified

and professional employees which contribute to the quality of public service delivery and economic growth and development. The effectiveness and efficiencies of public service could be achieved through institutional capacity and the selection of educated and skilled public workers. It is very difficult to achieve sustainable public management reform without leadership commitments, lack of political will, and absence of the rule of law.

In the light of the above challenges, the following policy recommendations are introduced for successful public management reform:

a) Somalia has to move from clan-based power-sharing to multiparty and inclusive institutions because the executive and system of politics shape the effectiveness of public management and its ineffectiveness;

b) Separation of the executive branch from the bureaucracy by avoiding political interference, nepotism, and favoritism from the top officials;

c) Establishing of independent civil service commission nominated by the head of the executive with the endorsement of Somalia's parliament. The commission is responsible for setting recruitment strategies based on fair, open competition, and neutrality in government hiring, it is also responsible for promotion based on merit that is free from political interference, encouraging rewards, and protecting the rights of public staff and job security;

d) The recruitment of all public jobs should be based on an open exam and merit-based system, and have to protect public workers from illegal removal and should follow proper performance management;

e) Building the capacity of the public servants by training and empowering, with increasing and enhancing the condition of the

ethics through professional and ethical standards, and eliminating corrupt officers; and

f) Strengthening public institution accountability through Parliament, judiciary, civil society, and media.

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