

G. Somalia

1. Background

Having gained recognition in the region through its Sudan missions, the Max Planck Institute was requested by Somali decision-makers in 2003 for assistance in the constitutional process in Somalia.

After Somalia's transitional constitution, the Transitional Federal Charter (TFC) came into force at the start of 2004, the exchange of ideas became more substantial, especially with the Somali president, the speaker of the parliament, and the minister for constitutional affairs. The Institute's Africa Team organised the first "Symposium on Federalism and Other Forms of Decentralisation" for Somali parliamentarians in Nyeri, Kenya in 2005. Following on from the establishment of this knowledge exchange, the Max Planck Institute conducted a workshop for the newly founded Independent Federal Constitutional Commission (IFCC) in Yemen in 2005. The team's cooperation with the IFCC was subsequently resumed through a consortium of international partners and intensified through a capacity-building programme in 2008 and 2009. In order to structure the constitutional process as inclusively and integratively as possible, the team organised an extra conference on the subject of Sharia law in the future Somali constitution in 2010. The attendees of the conference were mostly Muslim scholars, who up until that point had not participated in the negotiations.

After the continuation of the capacity-building programme ceased to be viable due to political circumstances in 2011, the Max Planck Institute intensified its cooperation with the United Nations Development Programme Somalia (UNDP). Since the end of 2011, the Max Planck Institute has been regularly sending members of the Somalia Team to Nairobi as legal advisors to assist the Joint Constitutional Unit (JCU), a working group established by the UNDP and the United Nations Political Office for Somalia (UNPOS).

The team's main objective is to inform the Somali actors in a neutral and unbiased manner about different constitutional options as well as their consequences. This is done on the basis of comparative legal research and analysis. In this way, the team is enabling the Somali actors to make political decisions in the form of constitutional regulations that meet international standards. The team also makes use of its expertise in international law and comparative constitutional law in this context. Examples of constitutional law in Islamic and African states usually serve as the basis of discussion and work for this knowledge exchange with the Somalis. In this process, the Max Planck Institute team integrates the specific social, cultural, political and religious interests and needs of the Somali actors into the discourse on constitutional and legal issues.

As participation and inclusivity are fundamental requirements of all successful constitutional processes, it is essential that the Somali people draft their future constitution themselves. The team gives active support in this process but does not contribute in relation to political matters. Nevertheless, human rights standards and standards of democratic legitimacy are dealt with in order to reinforce the constitutional process's peacemaking effect.

The legal support given to the constitutional process in Somalia is of considerable interest to the development of international legal studies. In such a case, issues like the duties of the international community (e.g. "the responsibility to protect") or the standards for modern constitutions set in international law (e.g. "the right to democracy") can be discussed with reference to a textbook example of a "failed state".

In addition to this, the region of Somaliland, which declared independence from Somalia 20 years ago, raises questions about both the emergence and recognition of states. The inclusion of the Somalia projects in the broader agenda of academic research results in synergy effects which are reflected in the results of theoretical research.

2. Projects

a. Symposium on federalism and other forms of decentralisation

The Max Planck Institute Somalia Team held the first week-long symposium on different forms of decentralisation for Somali parliamentarians in April 2005. The event took place in Nyeri, Kenya and was organised in consultation with the Intergovernmental Authority on Development (IGAD) and with financial support from the German Organisation for Technical Cooperation (GTZ). 25 parliamentarians, who were selected by the parliament speaker in a representative manner, as well as five representatives of civil society took part at the symposium.

The subject matter of the symposium was a comparative legal overview of federal forms of government with special consideration given to the challenges which Somalia must face in its constitutional process and which were not dealt with on the TFC of 2004. In view of this, the objective was to present the participants with options which could serve as solutions to problems in the drafting of a constitution.

The symposium also resulted in production and distribution of the first edition of the “Max Planck Manual on Different Forms of Decentralization”.

b. Further training of IFCC members

In 2007, the Max Planck Institute organised a workshop in Yemen in order to assist members of the newly established IFCC in their work. The workshop was financed by the GTZ and was organised in cooperation with the UNDP and IGAD. As the TFC expressly provides for the establishment of a federal system, the workshop focused on the various options for decentralised government structures.



Somali workshop participants in Kampala June/July 2008

The IFCC made a request for more further training courses. The Max Planck Institute Somalia Team fulfilled this request by designing a capacity-building programme within the framework of the constitutional process, which was supervised by an international consortium led by the UNDP. Together with international partners, which included the UNPOS, the National Democratic Institute, Oxfam Novib (a Dutch organisation for international development cooperation) and Interpeace, as well as the UNDP, the Max Planck Institute took on the responsibility of the further training of the IFCC in constitutional law. In addition to this, the Max Planck Institute assisted in the development of a draft constitution.

To these ends, the Max Planck Institute Somalia Team organised a series of workshops for members of the IFCC in Kenya and Uganda. The aim of this programme was to work out and compare different options in relation to constitutional law and thus give an overview of the different possibilities for the formation of a constitution. The constitutional structures of federal and decentralised states, the formation of government institutions, the horizontal separation of powers and the fundamental characteristics of federalism were analysed using a comparative law approach. In this way, the Somalis' particular interest in questions of federal order was taken into account. This interest reflects the specific problems of the country in

respect to the integration of centrifugal powers and independent or partially independent regions. The question of the future status of Somaliland and Puntland were intensively analysed. Different options for a future Somali constitution were worked out and the implications they would have for the country's constitutional structure were discussed. Following a request from the IFCC, the Max Planck Institute Somalia Team offered a workshop on the integration of Sharia and customary law into the future Somali constitution.

The successful peace efforts in Djibouti between the Transitional Federal Government (TFG) and the Alliance for the Re-liberation of Somalia (ARS) in 2008 resulted not only in new presidential elections being held and the nomination of a new prime minister, but also in the expansion of the parliament and IFCC. However, the agreed restructuring and expansion of the IFCC was delayed. This meant that the Max Planck Institute's capacity-building programme with the commission had to be postponed for some months.

Nonetheless, during this transitional period the Max Planck Institute was active in the different activities of the UNDP-led international consortium, which gave assistance in the constitutional process. Members of the Max Planck Institute Somalia Team were therefore able to contribute their expertise on international law to the consortium by contributing at conferences in Naivasha and Mombasa. The team was also able to assist the parliament with the "Draft Act to Provide for the Draft Constitution of the Republic of Somalia".

Following the restructuring of the IFCC, the Max Planck Institute Somalia Team began holding refresher workshops in Nairobi in 2009. These were especially aimed at new members of the IFCC.

Simultaneous interpreting was used for all workshops. In order to make participation and understanding easier for attendees, the Somalia Team prepared handbooks and PowerPoint Presentations which were also translated into Somali. In addition to this, the Max Planck Institute compiled readers which contained texts from the constitutions of different

countries that dealt with the subject areas. With the help of these texts, the different options for the formulation of a constitution could be discussed in smaller groups.

c. Visit of the Somali Minister of Constitutional and Federal Affairs

The Max Planck Institute maintains close contact with the Somali institutes involved in the constitutional process. One result of the continuous exchange of ideas was a visit by the Somali Minister for Constitutional and Federal Affairs, Madobe Nunow Mohamed, to the Max Planck Institute from 30 April to 1 May 2009.

The meeting in Heidelberg served the purpose of giving the minister a comprehensive and direct impression of the expertise of the Max Planck Institute as well as its activities and its approach in relation to the Somali constitutional process. During his visit, the minister requested that the Max Planck Institute contribute to this process by defining the roles and functions of the different institutions involved in the constitutional process more clearly. With a view to this, it was necessary to specify the respective responsibilities of the ministry itself (MCFA), the Parliamentary Constitutional Commission (PCC) and the IFCC. The Max Planck Institute fulfilled this request by taking steps to deepen the coordination and cooperation between these different actors through advice and recommendations.

d. Workshop for members of the IFCC, the PCC and the MCFA

At the request of the Somali government, the Max Planck Institute invited representatives of the IFCC, the PCC and the MCFA to Heidelberg. A workshop was held here from 24 to 30 July 2009 to develop ideas for supporting cooperation between these different parties, all of whom are important actors in the Somali constitutional process.

The event was aimed at improving the structures, processes and workflow between the institutions in order to enable them to cooperate in the most

efficient, result-orientated and expedient way possible in relation to the constitutional process. Therefore, the workshop offered the different parties a platform to formulate their respective positions and to promote understanding between the institutions. Representatives of the IFCC also used this opportunity to present the progress made to that date on the development of a first draft constitution. In discussions on further approaches to the constitutional process, the participants agreed that extensive cooperation between the different institutions was necessary. In addition to this, there was a need for the PCC and the MCFA to be included in future events so as to ensure that all the institutions involved in the Somali constitutional process would have the same level of knowledge.

e. Symposium on Islamic law in the constitutions of Muslim countries

The Max Planck Institute organised a symposium on the subject of “Sharia Law in Constitutions of Muslim Countries: Challenges for the Somali Constitution-Building Process” in Djibouti from 6 to 10 February 2010. The aim of the event was to involve further sections of Somali society in the constitutional process and thus to ensure the inclusivity and increase the legitimacy of the future constitution. The participants were Somali ulema (legal scholars), members of the Transitional Federal Parliament (TFP) and members of the TFG.

As the Somali ulema were the main target audience of the symposium, the event presented an opportunity to initiate a constructive dialogue between Islamic groupings, the TFG and the TFP. This dialogue served to overcome the prejudices of the ulema in relation to the constitutional process and the constitution. Important actors, who were formerly not involved in the constitutional process, could be addressed and drawn into the discussion in this way.

In a discussion presided over by Prof. Wolfrum, the Somali participants and a team of international legal experts dealt with questions on the integration of Sharia law into the future Somali constitution. A lecture on

“Sharia and the separation of powers” was given by the renowned expert on Islamic law, Prof. Kamali (Malaysia). He described regulations from Sharia law, which reflect and confirm the basic concept of the separation of powers. Building on this basis, he outlined different prospects for the development of the constitution with reference to numerous examples from the constitutions of different Muslim countries. Other contributions dealt with the subjects areas of “Sharia and Human Rights” (Prof. Khalil, Sudan) and “The Judiciary in Constitutions of Muslim States” (Prof. Ebeku, Nigeria, and Prof. Khan, Pakistan). Prof. Wolfrum contributed to the symposium with a presentation on the subject of “Lawfulness and the Compatibility of Laws with Sharia and the Constitution”.

The symposium acted as the starting point of a political training programme which was planned and carried out by the UNDP-led consortium for the Somali constitutional process. It was financed by the Federal Foreign Office of Germany and organised in cooperation with the Somali Ministry for Constitutional and Federal Affairs.

f. Cooperation with UNDP Somalia and UNPOS

In 2011, the Max Planck Institute continued its support of the Somali constitutional process, including collaboration with UNDP within the project’s framework to support the Somali constitutional process. Political changes in Somalia, such as the extension of the TFP’s mandate, the resulting election of a new president, the subsequent reshuffle of the Somali government and, last but not least, the humanitarian disaster caused by the drought made the implementation of the support projects more difficult. Nevertheless, the Max Planck Institute brought its legal expertise into the Somali constitutional process.

Staff from the Africa Team created an options paper for UNDP (Max Planck Paper on Constitutional Adoption and Transition Options for Somalia) as an internal working document. This paper presents options for adopting a constitution from a comparative perspective. With the use of examples, adoption of a constitution by referendum, parliament,

presidential decree and a constituent assembly were explained, while different design models for a constituent assembly were also presented. In addition, the options paper deals with design options for an interim period against the background of the TFC. Options for the realisation of constitutions in particular are presented as well as for the (re-)building of state powers in terms of structure and personnel.

Furthermore, the Max Planck Institute has been regularly sending staff to Nairobi since the end of 2011 to work with the joint UNDP and UNPOS, Joint Constitutional Unit (JCU) working group stationed there. Members of the Africa Team aided the JCU with the textual preparation of the various conferences that were carried out in the context of the constitutional process, including the National Constitutional Conferences Garowe I & II, the International Expert Forum in Djibouti, the International Contact Group Meeting in Djibouti and the Civil Society Conference in Entebbe, Uganda. The Max Planck Institute provided support with the creation of the draft constitution and is involved in the preparation and organisation of the constituent assembly.

3. Further planning

The region of Somaliland, which unilaterally declared its independence in 1991, published a “ten-point agenda of reform strategy for justice” in 2008 to improve the quality of the judicial and extra-judicial settlement of disputes in Somaliland. Following this, an international justice conference was held in Hargeisa from 14 to 16 June 2011, which served as a discussion forum for national and international experts regarding the various judicial reform options.

Ten members of the Max Planck Institute Africa Team took part in this conference and this, as well as the first journey to Hargeisa in March, served to provide an overview of the status quo of the judicial system in Somaliland and, based on this, to develop a strategy for how the Max Planck Institute could support the implementation of a potential judicial reform in Somaliland. The Somalia Team of the Max Planck Institute plans

to develop a capacity-building programme to improve the legal qualifications of officials and thereby contribute to the development of democracy and rule of law in Somaliland.

At the same time, the Somaliland region is posing interesting jurisprudential questions. In Somaliland, there are partially conflicting legal systems, such as Sharia, different common law regulations as well as laws remaining from the Italian or British colonial period. This means that questions arise regarding the resolution of these conflicts and the systematisation of tribal laws. The lack of recognition of Somaliland as a state and the matters of international law associated with this are also, in light of the independence of South Sudan, becoming topical once more.

4. Academic works and publications

a. Handbooks

Several publications and research projects have arisen from the Max Planck Institute's Somalia Project. The Africa Team put together the following comparative handbooks which were made available to members of the IFCC at each workshop:

- *Max Planck Manual on Constitution Building – Options for the Structure of the Executive Branch of Government.* 2008.
- *Max Planck Manual on Constitution Building – Options for the Structure of the Judiciary.* 2008.
- *Max Planck Manual on Constitution Building – Shari'a and Customary Law in a Constitution.* 2008.
- *Max Planck Manual on Constitution Building – Structures and Principles of a Constitution.* second edition 2010.
- *Max Planck Manual on Constitution Building – The Formation of Sub-Units in Federal Systems* 2008.
- *Max Planck Manual on Constitution Building – The Legislature.* 2008.

- *Max Planck Paper on Constitutional Adoption and Transition Options for Somalia*. 2011.

b. Publications

Jan Schmidt wrote the following article during period covered by this report:

- Somalia unter der Übergangsverfassung von 2004, in P. Scholz and N. Naeem (eds.), *Jahrbuch für Verfassung, Recht und Staat im islamischen Kontext*, Volume 1, 2011.

c. Works for academic qualifications

Alongside the documents compiled by the Africa Team, the team's members dealt with thesis projects on topics relevant in a Somali context, where knowledge gained during practical work was integrated into the theoretical research.

Jan Schmidt's work compares the interim constitution of Somalia with that of Sudan in its role as an instrument for peacekeeping.