

Legal and Constitutional Rights That Endorse Puntland Government's Ownership of its Natural Resources

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INTRODUCTION

After twenty-two years of anarchy, civil war, warlord-ism and religious extremism, the leaders of Somalia gathered in Nairobi, Kenya, and signed the country's Provisional Federal Constitution (PFC) on June 12, 2012, in a process led by Somali Roadmap Signatories with the United Nations as a guarantor. The SPFC was negotiated, agreed and signed by the former President of the Somalia's Transitional Federal Government (TFG) H.E. Sharif Sheikh Ahmed, the former TFG Prime Minister H.E. Dr. Abdiweli Mohamed Ali 'Gaas' (the current President of Puntland State), the former Speaker of the TFG Parliament Sharif Hassan Sheikh Aden (the current President of Interim South-West Administration), the former President of Puntland State, H.E. Abdirahman Mohamed 'Farole', the former President of Galmudug, H.E. Mohamed Ahmed Alin, and the former Chairman of Ahlu Sunna Wal-Jama'a (ASWJ) Sheikh Mohamud Yusuf 'Aw-Libah'. The PFC of 2012 is the guiding legal national document of Somalia, and should be respected and obeyed by all Somali authorities and foreigners that are dealing with or have economic or political interests in the country.

At the Consultative Meeting of the Somali Signatories on the Process for Ending the Transition, which took place in Addis Ababa on May 23, 2012, the Puntland Government, together with the rest of the Somali leaders, negotiated with the Federal Government to transfer very limited powers to the Federal Government and retained the rest of its powers. This is consistent with the Puntland Constitution. Article 4 of the Puntland Constitution enables the Puntland Government to negotiate

with the Federal Government, and if agreement is reached, transfer some powers and retain the rest. Article 4(3) further states: “[P]ending the completion of the Federal Constitution, ratified by Puntland, and approved by popular referendum, Puntland State shall have the ‘status of an Independent State’”. In accordance with these provisions, the current PFC was negotiated, agreed, drafted and then signed on June 12, 2012, by the Federal Government, Puntland Government and other Somali stakeholders.

The PFC is a document that sets out, among other things, the country’s federal political structure and the relationships between the Federal Member States and the Federal Government of Somalia (FGS). It restricts the FGS and the powers it can exercise as opposed to those powers that Federal Member States can currently exercise.

It is normal practice that, when one wants to find out the law(s) governing a country’s oil and gas or its minerals sector, the starting point is always the constitution of that particular country. This may include references to that country’s Federated States constitutions. An article from a negotiated and finalized national constitution, for example, would typically clarify the ownership, management and revenue distribution of that country’s oil, gas and minerals sectors. Then the next step is to check if there are valid petroleum and minerals laws, and regulations. Collectively these laws and regulations would describe how these sectors are governed and the responsible competent authority or authorities that look after these sectors.

In the case of Somalia, the PFC does not give responsibilities to the Federal Government to govern or legislate the oil, gas or minerals sector. Furthermore, that Constitution does not empower the FGS to establish the Ministry of Petroleum, Gas and Minerals, or permit the FGS to enter into oil agreements. Therefore, the Federal Government's Ministry of Petroleum, Gas and Minerals is an entity that is not recognized or allowed under the constitution and therefore is illegal.

This paper discusses the Puntland Government's constitutional rights within the Somali Provisional Federal Constitution, with respect to Puntland's natural resources, specifically in relation to the hydrocarbon and mineral sector rather than the rest of the natural resources.

THE FEDERAL GOVERNMENT'S SUPPOSED "LEGAL ARGUMENTS"

When the Federal Government of Somalia signed the current agreements with UK-based Soma Oil and Gas and Norway-based Spectrum ASA, the FGS has erroneously relied on and referenced three articles from the PFC, which they believe provides the legal basis for them to enter such agreements. We stipulate that the FGS has misused and willfully misinterpreted these three articles.

The first article is Article 7.1, which states;

"The sovereignty of the Federal Republic of Somalia extends over all the territory of the Federal Republic of Somalia, which includes the land, territorial sea, the islands, the subsoil, the air space, and the continental shelf, and any

other land and waters that join the Federal Republic of Somalia in accordance with a law that shall be passed by the Federal Parliament".

The intent of this article is to define the establishment of the sovereign Nation-State of the Federal Republic of Somalia as a physical entity, not to define the Federal Government's executive powers in Somalia. The article is essentially articulating the existence of the Federal Republic of Somalia, which is to be governed by laws passed by the Federal Parliament in accordance with the powers vested in the Parliament by the negotiated, agreed and finalized Federal Constitution (which has yet to happen) and the constitutions of the of the Federal Member States. It does not give the Federal Government the full authority to legislate or regulate all aspects of what happens in Somalia with impunity, disregarding the Federal Constitution, Federal Member States constitutions, and violating the two-tier federal government structure (Federal Government and the Federal Member States).

In a similar way, the Federal Constitutions of the United States, Canada or Australia (to name a few countries which also operate under a federal system), do not regulate all aspects of governance in these countries. Rather, the Constitutions of these countries empower the Federal Member States and Local Governments to make laws for what happens within their borders. In the United States, a federal member state, private individual or the Federal Government can hold hydrocarbon ownership rights. However, it is a different ball game when the issue concerns the sovereignty of the United States as a country. This is the same model that has been used in establishing the PFC.

Somalia is a nation-state made up of a group of established or soon-to-be established Federal Member States, each with its own constitution and institutions. The Federal Constitution does not replace the existing and proposed State Constitutions; in fact careful consideration was given to the division of powers between the Federal Government and the existing States (which is only Puntland in 2012). Secondly, the Federal Constitution review has not commenced, which requires the Federal Government to negotiate power and position with the Federal Member States, agree and finalize the Federal Constitution in order to build national cohesion. This has not happened yet. Third, the process of harmonizing Federal-State constitutions and defining power allocation and sharing between them has not commenced (because the constitutional review process has been delayed by the current Federal Government since coming to power 2012).

However, the PFC has areas clearly articulated four areas where the Federal Government may exercise power, which does not include natural resources. As a result of this, it is unconstitutional for the Federal Government to regulate or legislate any sector within natural resources. It is illegal for the Federal Government to enter agreements with foreign companies by using this article, with respect to the natural resources of the country.

The second article used by the Federal Government is Article 44(2), which states: *“The land shall be held, used and managed in an equitable, efficient, productive and sustainable manner”*. We respect and agree with this article because the article is talking about utilizing the land properly. This article establishes a principle about

the manner in which future land management should be covered in the Federal or State constitutions, but it does not vest the power to regulate or legislate exclusively with the Federal Government. It is noted that this article specifically refers to land and therefore does not include land covered by water, which would include inland waters (rivers, lakes etc.) and sea areas such as territorial, contiguous and Economic Exclusion Zone (EEZ). This area has not yet been finalized, although the Federal Constitution allows the Puntland Government to exercise its own constitution that covers sea areas up to the EEZ. Therefore, it is not possible to argue that this article empowers the Federal Government to legislate, regulate or have ownership of the natural resources within any area (onshore or offshore) of a Federal Member State.

The third article used by the Federal Government to support their entering into hydrocarbon agreements is Article 205, which states:

“All laws in force immediately before the effective date shall continue to be in force and shall be construed and applied with such alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution until such time as such laws are amended or repealed.”

The Federal Government uses this article to justify the validity of the Somali Petroleum Law (2008). Jay Park, who represented the Federal Government when negotiating the agreement with Soma Oil and Gas (which is currently under investigation for corruption), debated this article with me when both of us were attending the Somalia Oil, Gas and Minerals Conference in London in late April 2015.

Jay Park claimed that the 2008 Somali Petroleum Law was valid because the above article recognizes it to be valid, and, therefore, according to Mr. Park, the Soma Oil and Gas deal was valid. I informed him that he was wrong to use this article to justify the Soma Oil and Gas deal for many reasons. To begin with if, “all laws in force[d] [in Somalia] immediately before the effective date [of the SPFC] shall continue to be in force[d]”, then all laws in Somalia are also valid. But what about those brutal laws enacted by Siyad Bare’s dictatorship from 1969 to 1990? Can we use them now? Why have we, the Somalis, elected to govern ourselves under a Federalist political system if Siyad Bare’s laws are or could be in force in the country? What about our customary laws, which have been in force for a long time?

A key test of previous laws established in this article that Jay Park is ignoring is the qualifiers “immediately before” and “bring them into conformity with this Constitution”.

“Immediately before” can be defined as without any intervening time or space which limits the extent of laws that can be considered, but certainly allows for the laws in force under the existing State Constitutions to be included. This means any laws that ceased to be in force due to the suspension of an operating constitution are invalid. For example, if we argue that the laws operating immediately before the PFC should include the Somali Petroleum Law 2008, this law operated under the Transitional Federal Charter (TFC) of 2004. The TFC is replaced by the new PFC in 2012 and therefore it is not unreasonable to imply that this law

has not continued to be an operating law, unlike the State Constitutions, which continue to operate alongside the new Federal Constitution.

Even if you wanted to counter this argument by saying the Somali Petroleum Law 2008 can withstand the test of 'immediately before' it is not possible to make this law applicable to the existing States. Puntland State enjoys the 'status of an independent state' under both the PFC (Article 208) and the Puntland Constitution. Therefore the laws in existence under the Puntland State Constitution remain in force until such time the State gives some powers to the Federal Government during the process to finalize the Federal Constitution through negotiation and agreement. This in itself defeats the purpose of saying 'the existing laws'. For example, states of Australia had constitutions and independent powers and it was only through the process of Federation that the Federal entity was given powers. While the PFC has commenced this process it certainly has not been completed, including in the area of natural resources.

Another aspect of this article that both Jay Park and the Somali Federal Government are ignoring is that all those laws that were in force before the PFC need to "conform" to the PFC to be valid. This means that existing laws are to be brought into conformity with this constitution; it is not that the constitution must conform to the prior laws. To "conform" is the condition that is stipulated in this article. If these laws cannot conform to the PFC because of their inconsistency with the PFC then they are invalid and they have to wait until such amendments are made to the PFC and then put before the people to accept or reject. To amend the

PFC, the Federal Government needs to follow certain processes that are expressed in the PFC. Therefore, until then, the Somali Petroleum Law of 2008, which the Puntland Government never accepted as a valid law, is invalid and can't be used by the Federal Government to enter into hydrocarbon agreements. In addition, the so-called Somali Petroleum Law is not valid because under the PFC, the management of Somalia's natural resources is postponed until all Federal Member States are established (Article 45); Puntland State exempted (see discussion under here). Furthermore, the existing States and the Federal Government have not yet negotiated and agreed to either amend or update this law.

SOMALIA PROVISIONAL FEDERAL CONSTITUTION

The Somali Provisional Federal Constitution (PFC) does not define the meaning of the term "natural resource," but according to the Oxford Dictionary definition 'natural resources' means: "Materials or substances occurring in nature which can be exploited for economic gain." It can be safely argued therefore that minerals, oil and gas, fish, water, agriculture, flora and livestock comprise Somalia's natural resources. Further, oil and gas exploration comes under the natural resources sector of the country's economy.

The Puntland Government has legally and reasonably argued that, according to the PFC, the Federal Government does not currently have the legal authority to enter into oil, gas and minerals exploration agreements with foreign or national oil companies. Nor does it have the rights to give seismic data acquisition contracts to foreign companies, such as Soma Oil and Gas and Spectrum ASA, to operate within

the Puntland territory or any other parts of Somalia until such powers is expressly granted to the Federal Government in a negotiated, agreed and finalized Federal Constitution.

In addition, the Federal Government does not have the constitutional legal rights to single handedly engage or open dialogue with former block holders in Somalia. Rather, this right resides with the existing Federal Member States, as well as, the formative states who have the right to take part in any discussion or dialogue about this matter.

It is important to look closely at the PFC and what it says about this sector. The PFC declares: “Somalia is a federal” nation-state (Article 1 (1)) that “is founded upon the fundamental principles of power sharing in a federal system” which governs the Somali Federal Government and the Federal Member States (Article 3(3)). Article 49(1) of the PFC states: “[I]n the Federal Republic of Somalia, the State is composed of two levels of government: (a) The Federal Government Level; [and] (b) The Federal Member States Level, which is comprised of the Federal Member State government, and the local governments.” These different tiers of governments are guided and governed by the PFC, which says: “*After the Shari’ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all sections of government*” (Article 4(1)). This means that the Federal Government and the Federal Member States must adhere and depend on the national constitution when making policies and reaching political decisions. It also means that the Federal Government and the

Federal Member States must not draft or make laws, enter into agreements or make decisions that are contrary to the constitution of the nation.

The distribution of powers between the Federal Government and the Federal Member States is very clear in the PFC. In 2012, when Somali leaders met and negotiated what powers to delegate to the Somali Federal Government, it was agreed to give to the Federal Government four constitutional powers only. These powers are: Foreign Affairs; Monetary; Citizenship and Immigration; and Defense (see Article 55). The rest of the constitutional powers are residual powers exclusively under the jurisdiction of the Federal Member States. These four powers are the only powers that the Federal Government can exercise legally.

The PFC gives the rest of the powers to the Federal Member States, one of them being Puntland State of Somalia. Article 208 of the PFC states that:

“[U]ntil such time that all the Federal Member States of Somalia are established and the adopted Federal Member State Constitutions are harmonized with the Somali Federal Constitution, the Federal Member States existing prior to the provisional adoption of this Provisional Constitution by a National Constituent Assembly shall retain and exercise [all] powers endowed by their own State Constitution.”

Firstly and foremost, this article recognizes the Puntland Government as an existing Federal Member State as it was established in 1998. It also allows the Puntland Government to exercise all the powers within its own constitution, until such time

that its constitution, and those of the other member states and that of the Federal Republic of Somalia Government are harmonized.

The PFC also accepts Puntland's status as an "Independent State" with the exception of the above-stated four powers transferred to the Federal Government, until such time that all constitutions are harmonized and the finalized Federal Constitution is ratified in a national referendum. The article also further restrains the Federal Government to assume or exercise any other powers that are proscribed within the constitution of Puntland. This also means that Somalia's federalism political system is "Dual Federalism" where the Federal Member States retain unique powers, while allowing the Federal Government to exercises very limited powers that are expressed in Article 55 of the PFC.

To make sure that neither the Federal Member States nor the Somali Federal Government exercise powers outside of their constitutional powers, the SPFC states: "[E]very government shall respect and protect the limits of its powers and the powers of other governments" which are endowed in their different constitutions. It further states that: "[A]ll levels of governments must comply with the national Constitution, without any government assuming more powers than the Constitution allocates" (see Article 52(2)(4)).

When one reads the above articles of the PFC, it is clear that the Federal Government has broken all of them when it signed agreements with Soma Oil and Gas and Spectrum ASA. It has exercised powers that the constitution did not grant to it. Therefore, any agreements on natural resources, particularly oil and gas, entered

into by the Somali Federal Government in 2013 and 2015 are illegal, and therefore null and void. As a result, these companies are operating illegally, and the data they have collected or currently collecting is stolen data from the Somali people. Therefore, we strongly urge the Soma Oil and Gas and Spectrum ASA not to sell the collected data until there is a legal agreement in place between them and the Somali people. Similarly, we urge that the international oil companies to not pay for this stolen data. We urge Spectrum ASA and BGP Inc., to immediately stop the seismic operation they are currently conducting in the Indian Ocean sector of Somalia, as their operation is contrary to the PFC. Similarly we are asking the international oil companies that are underwriting these operations to stop funding these operations. Finally, we are urging these companies to immediately cease their operations.

To show the reader the extent of the illegality of the agreements reached with of Soma Oil and Gas, and Spectrum ASA, one needs to look closely at Article 45 of the PFC that governs Somalia's natural resource sector. The article states: *"[T]he allocation of the natural resources of the Federal Republic of Somalia shall be negotiated by, and agreed upon, by the Federal Government and the [future] Federal Member States in accordance with this Constitution."* To date this has not happened. No final agreement has been reached between the Federal Government and the Federal Member States on question of natural resources.

The above article also presents other fundamental legal issues. The first and most important is that the Federal Government of today does not have any power over Somalia's natural resources nor does Somalia's Federal Parliament have the

power to legislate such powers. One wonders, therefore, how the Federal Government entered into agreements with Soma Oil and Gas and Spectrum ASA when it has no constitutional legal powers to do so? Conversely, one wonders how such companies enter agreements with an authority that does not have constitutional rights. No wonder such companies are having difficulty with the legality of their agreements and at least one of the foreign companies is currently under investigation for corruption by British authorities.

PUNTLAND CONSTITUTION

Currently, both the Puntland Government and the Federal Government of Somalia have been entering into agreements in the oil and gas sector, but we note that only Puntland has the legal authority to do so. In 2014, the Puntland Government signed an agreement with ION to conduct offshore Multi-client Seismic. We have used the PFC and our own Constitution as the guiding documents. These two documents allow us to enter agreements with any national or international oil companies (IOC) that are interested in oil and gas or mineral exploration and extraction.

Article 7 of the Puntland State Constitution states:

- 1. Puntland consists of the regions of Bari, Nugaal, Sool, Ayn, Karkaar, Mudug, Haylan, and Sanag.*
- 2. The territorial sovereignty of Puntland is supreme and may not be ceded or violated.*
- 3. Puntland shall welcome and negotiate with any region or district willing to join Puntland State.*

4. *The Puntland territory comprises the airspace, the soil and the subsoil, the territorial waters, its contiguous zone and the exclusive economic zone at sea up to a distance of 200 nautical miles from the mean low water mark, with the continental shelf.*

Article 4 (1)(2)(3) also states that:

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.*
2. *The powers that Puntland State shall cede to the Federal Government of Somalia and those that will be preserved shall be determined through negotiation between the Federal Government of Somalia and Puntland State and shall be set out in the Federal Constitution of Somalia and the Puntland State Constitution.*
3. *Pending the completion of the Federal Constitution, ratified by Puntland, and approved by popular referendum, Puntland State shall have the status of an independent state.*

Article 54 also states that:

1. *Puntland natural resources belong to the people of Puntland and shall be benefitted from only in accordance with the law.*
2. *Puntland State is responsible for the protection of and benefit from the natural resources of Puntland.*

3. *Puntland State shall make agreements with national or foreign companies and give them the right to benefit from natural resources.*

In these articles, the Puntland Constitution clearly states that the Puntland Government is responsible for its own territory, including up to 200 nautical miles into the economic exclusive zone (EEZ) of the sea. Article 54 stipulates that all the natural resources within the territory of Puntland belong to its people and the Puntland Government manages it. Therefore, until all the Federal Member States are established, power sharing is negotiated and agreed, and the various state Constitutions are harmonized with the PFC, Puntland retains all constitutional and legal rights over its natural resources. Both the Somali Provisional Federal Constitution and Puntland Constitution support this position.

CONCLUSION

Today, Somalia is aiming to recover from the 25-year legacy of armed conflict, state collapse and despair. Establishing the Federal Government of Somalia was a concerted effort between the Somali people and the international community. However, this effort did not lead Somalia in the expected direction; rather, the Federal Government began to blatantly abuse its constitutional powers and violate agreements with Federal Member States, especially Puntland which pre-dates the Federal Government.

There is no question that Somalia's federal system is still incomplete. Therefore, since the PFC is not yet finalized, it remains to undergo a process of negotiation and agreement between the Federal Government and the Federal

Member States that clearly defines exclusive, concurrent and residual powers in the Somali Federal Constitution (once finalized). Additionally, the constitution's federal structure recognizes that the Federal Member States have the authority to negotiate power and position, and agree which power(s) they wish to delegate to the Federal Government. Therefore, the Federal Government itself cannot exercise powers that were not delegated to it by the Federal Member States.

As Somalia's federal structure is still incomplete, it makes matters worse when international oil companies are involved in a sector where the Federal Government oversteps its authority. The country's federation needs to be completed through negotiation and agreement between the Federal Government and the Federal Member States. Until such time, as stated by the PFC, Puntland State maintains the 'status of an independent state' and, empowered by constitutional and legal backing, shall continue to explore different avenues for developing its natural resources pending the finalization of the Somali Federal Constitution.