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ANALYTIC REPORT ON THE CONSULTATION DRAFT CONSTITUTION OF THE SOMALI REPUBLIC

With support from the
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International Development Law Organization (IDLO)

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EXECUTIVE SUMMARY

This Report provides an analysis of the 2010 Consultation Draft Constitution of the Somali Republic, which was produced by the Independent Federal Constitution Commission, in light of two earlier documents: the country's first Constitution, adopted at independence in 1960, and the 2004 Transitional Charter, which is currently in operation. It also takes into account the Principles announced at the two Somali National Consultative Constitutional Conferences, held in Puntland in December 2011 and February 2012. We find that the Consultation Draft is a significant improvement over prior constitutions in Somalia's history and that it provides more detail on certain crucial sections.

This Report, which updates and supersedes the Analytic Report submitted in February 2012, presents a number of suggestions for improvement of the Draft. We identify certain rights (e.g., freedom of the press and the right to stand for election) omitted in the Draft, which might be advisable to include. In light of our understanding that the system of government will be parliamentary (as in earlier Somali constitutions), we note that the President has relatively strong veto power for a ceremonial office.

The division of authority between the Federal Government and those of the Regional States in the Consultation Draft is complex. It is suggested that some simplification can be achieved by reducing the number of categories of concurrent jurisdiction. The Report also recommends that the mechanism for resolving disputes as to whether particular legislation affects the interests of states be clarified.

Additionally, the Report recommends further specification of the mandates of the electoral and civil service commissions. The Draft might also provide more detail on the making of international obligations.

Our overall review suggests that the Consultation Draft is a sound basis for Somalia to proceed in the drafting process.

INTRODUCTION

1. This Report provides an analysis of the 2010 Consultation Draft Constitution of the Somali Republic, produced by the Independent Federal Constitution Commission (IFCC), in light of two earlier documents: the country's first Constitution, adopted at independence in 1960; and the 2004 Transitional Charter, which is currently in operation. We also take into account the two Somali National Consultative Constitutional Conferences, held in Garowe, Puntland in December 2011 and February 2012. These produced the Garowe I and Garowe II Principles. Constitutional reform is central to Somalia's reconstruction and development, and it is our hope that this Report can inform the current constitution-making effort in Somalia.

2. The Garowe I Principles announced in December 2011 anticipate a final Draft of the new Constitution by April 20, 2012. The Draft will be provisionally adopted by a 1000-member National Constituent Assembly, formed under the so-called "4.5 principle" of clan representation, and will then be subject to a Constitutional Implementation Review Process and National Referendum, as circumstances permit. Upon adoption of the Draft, the Garowe I Principles mandated presidential and parliamentary elections and a restoration of normal political operations for the country. The Garowe II Principles took the decision to utilize a parliamentary rather than a presidential system, and provide further detail on the formation of the National Constituent Assembly and the new Federal Parliament.

3. This Report has been prepared by a group of scholars of comparative constitutional law. The team carefully examined the 1960 Constitution, the 2004 Transitional Charter, and the 2010 Consultation Draft provision by provision. It sought to identify continuities and discontinuities between the Consultation Draft and the earlier documents. The team then analyzed the various Chapters of the Consultation Draft in light of comparative practice and international norms. It also took into account the Garowe I and Garowe II Principles, where relevant to the Consultation Draft.

4. In our view, the Consultation Draft provides a sound basis for continuation of the drafting process. The Consultation Draft has been prepared with apparent care and provides for a workable government system that comports with international norms. The suggestions that follow do not constitute a negative assessment on our part. Our suggestions are technical; they are oriented toward improving the Draft, enabling it to better realize its goals. Specific recommendations are indicated by the use of underlining and are summarized at the end of the Report.

I. GENERAL PRINCIPLES

A. Citizenship

5. The 1960 Constitution does not regulate citizenship directly, but leaves the rules to be decided by ordinary law (Art. 2). The 2004 Transitional Charter includes slightly more extensive regulation of citizenship, providing for birth citizenship (which extends to those of Somali origin born in the country, as well as those born of Somali fathers). It also calls on Parliament to regulate citizenship by statute.

6. The Consultation Draft contemplates a rather generous *jus soli* approach to citizenship in Art. 11.2, which states that all those born on Somali soil (whether of Somali origin or not) have unconditional rights to Somali citizenship. This approach seems appropriate, given a national environment in which national unity is a priority. However, unless the drafters mean the *jus soli* clause in Art. 11.1 to apply to all individuals born in Somalia, the drafters may wish to stipulate some of the standard exceptions to birthright citizenship. For example, the drafters might exclude from citizenship those born of (a) temporary visitors, on business or pleasure; (b) those visiting on student visas; (c) those who are members of the diplomatic corps of another country; and (d) those in transit (of airspace, waters, or land). Some constitutions assume that *jus soli* laws will be interpreted to include these qualifications, but such an interpretation is not at all ensured (consider the United States, for example, in which a *jus soli* clause similar to that of the Draft is interpreted broadly).

7. An alternative would be to modify Art. 11.1 to read, "A person of Somali origin born inside the Federal Somali Republic is a Somali citizen by birth". This addition would be consistent with the language of the Transitional Charter and would avoid the problem of granting citizenship to children born of tourists, diplomats, and those in transit. It might, however, lead to problems if certain tribal groups are considered to be of non-Somali origin.

8. With the exception of this point, the Consultation Draft is a significant improvement on the prior rules. It provides much more detail and allows those of Somali fathers or mothers to claim birthright citizenship (Art. 11.2). Policies for renouncement (Art. 10.3), marriage (Art. 10.4), naturalization (Art. 12), and revocation (Art. 13) are now included in the document. There are additional policies for birth citizenship (Art. 11) and enumeration of Parliament's powers to legislate on citizenship (Art 14).

B. Language

9. There are basically two approaches to the provision of language rights in official settings (e.g., schools or court proceedings). In one approach, the state does not proclaim an official language per se, but assumes a dominant language and makes accommodations when necessary for those who need help (the United States and

France are examples of this type). Another approach is to provide for one or more official languages and mandate that instruction or information be provided universally in that (or those) languages (e.g., Canada and the European Union). In this approach, the languages designated as official are treated equally, and citizens should expect that public documents will be written in each language and that public officials will provide services in each of the languages. South Africa has a distinct approach in which 11 languages are designated as official, and governments at every level must use at least two of them.

10. The 1960 Constitution did not specify an official language, but the 2004 and 2010 documents provide for Somali and Arabic as official languages. The 2004 Transitional Charter refers to the "second languages" of Government, which are English and Italian.

11. In the Consultation Draft, minority linguistic groups have the right to use their own languages (Art. 36) and to be free from discrimination (Art. 17). Furthermore, the Draft includes some progressive provisions on the right to use one's own language in the criminal justice process. Government officials must inform those who are arrested or detained of the basis of their detention in a language they understand (Art. 40.3) and one has the right to an interpreter at trial (Art. 40.6.f). These provisions seem sound and are consistent with international human rights provisions.

C. Land and Property

12. There was no separate chapter on land in the 1960 Constitution, but the Transitional Charter introduced regulation of natural resources and called on the government to develop a land policy. This document recognized land as a "primary resource" and allowed for extensive regulation of land according to goals of equity, efficiency, productivity, and sustainability. The government is also given broad power regarding national land policy and the land framework and must ensure activities which protect ownership and use interests in land (Art. 66).

13. The disruptions in recent Somali history are likely to make property rights and land allocation a particularly important set of issues in the future. It is thus appropriate that the Consultation Draft devotes all of Chapter 5 to these topics. This Chapter is linked to the property rights clause, Art. 31, which is itself fairly standard. Chapter 5 contemplates a comprehensive regulatory scheme to be developed by the Federal Government in consultation with others, and to be implemented in light of the allocation of powers among levels of government. Art. 49 contains an explicit scheme for property restoration, excepted from the property rights clause. This will undoubtedly also implicate the right to housing in the case of occupants of others' property.

D. The Role of Islam

14. Somalia's constitutions have always been guided by the country's Islamic culture. The 1960 Constitution mentioned Islamic principles in a number of places, stating that Islam was the state religion (Art. 1.3), the basis of personal law for Muslims (Art. 30), part of the compulsory education for Muslims (Art. 35.6), and the main source of legislation (Art. 50). Laws had to conform to the general principles of Islam (Art. 98.1) or could be struck down. The Presidency was restricted to Muslim citizens, as is the case in some other predominately Muslim countries. In the original version, the 1960 Constitution forbad non-Islamic religions from engaging in missionary activity (Art. 29), though this provision was apparently removed in 1963.

15. The 2004 Transitional Charter retains the central position of Islam as the official religion and "basic source" of legislation (Art. 8) and requires the compulsory teaching of Islam in schools. It does not limit the compulsory teaching of Islam to Muslims or to public schools (Art. 24.10).

16. Like the 1960 Constitution, the Consultation Draft states that laws must comply with Shariah (Art. 2.3). This will presumably be policed by the Constitutional Court, whose members must be qualified in both law and Shariah (Art. 117.3). Also like the 1960 Constitution, the Draft returns to the restriction on propagation of non-Islamic religions (Arts. 2.2 and 22.2). Consideration should be given to review of this ban, as it appears to contradict the core principle of freedom of religion under Art. 22.1. At a minimum, repetition of the ban may be unnecessary; either Art. 2.2 or 22.2 could be eliminated. Likewise, the constitutional prohibition on Muslims renouncing Islam that appears in Art. 22.2 is more conventionally left to religious regulation or ordinary law rather than being embodied in the Constitution. Very little is added by putting this into the constitutional text in terms of securing compliance, and we know of no other constitution in a predominately Muslim country with such a provision. Indeed, some constitutions (e.g., Finland) explicitly provide for freedom to change religions. This Report is not recommending the Finnish approach for Somalia, but does recommend that drafters consider following the pattern among other predominately Muslim countries by leaving the constitution silent on renunciation of religion. In terms of education, the 2010 Draft limits compulsory Islamic education to state schools, and this is an improvement over the 2004 Transitional Charter. The Constitution explicitly finds that female genital mutilation is contrary to Shariah and is thus prohibited (Art. 20.4), as is abortion except in instances of "necessity" (Art.20.5).

17. Art. 47.1 states: "In Islam, justice requires a balance of rights and duties." This statement does not itself have legal significance, and could be removed. If it is retained, consideration should be given to removing the term "In Islam" in Art. 47.1. While Somalis are overwhelmingly Muslim, there are a small number of non-Muslims in the country, and they are also subjects of the Constitution and bearers of duties. The Draft may be read to imply that *only* Muslims must balance rights and duties.

II. RIGHTS AND DUTIES

18. The 1960 Constitution includes what were, at that time, a fairly standard set of rights and a limited set of duties, mainly to obey laws and pay taxes. By their terms, these applied only to citizens. The equality clause (Art. 3) prohibited discrimination, and included as protected classes race, national origin, birth, language, religion, sex, economic or social status, or opinions (Art. 3). These categories were somewhat narrowed in 2004, when national origin, economic or social status, and opinion were removed as protected classes, while political affiliation was added (Art. 15.1). The 2004 Transitional Charter added some rights (e.g. personal security in 16.2) but did not mention others (freedom of religion).

19. The list of human rights in the Consultation Draft is elaborate, comprehensive, and fairly standard. It provides that rights not only have so-called "vertical" application to protect individuals against the state, but also "horizontal" application, in that the state has a duty to protect individuals from private abuses of their rights (Art. 15). Art. 43 provides a structure for evaluating laws that purport to limit the fundamental rights, setting up a kind of balancing test that would be applied, presumably, by the constitutional court. Limitations on rights must be both reasonable and justified and examine whether the purposes of government limitation could be achieved in a less restrictive manner. This is a standard way to approach rights limitations in modern constitutional orders. In addition, courts that are called on to interpret fundamental rights may consider Shariah and international law and are also allowed to consider comparative jurisprudence, though they are not required to follow such decisions (Art. 45).

20. The equality clause (Art. 17) provides for protection from discrimination on a number of grounds. The equality mandate is considerably expanded relative to the earlier constitutions. Color, clan, ethnic or social origin, culture, dialect, disability, opinions (political or otherwise), occupation, and property have been added as protected classes (Art. 17). Discrimination is defined so as to make intent irrelevant (Art. 17). Notably, and in contrast with earlier constitutions, Art. 17.4 allows the state to take protected attributes into account in remedial affirmative action schemes designed to overcome past discrimination. All Articles are fairly consistent with the most recent international practice.

21. The Consultation Draft includes both the traditional civil and political rights, including elaborate protections for criminal defendants, as well as economic and social rights, such as those to health, housing, and social assistance (Art. 32). The state is to adopt policies for the progressive fulfillment of the rights "as far as resources permit." This is an important limitation in Somalia. Notably, the state has a duty to protect social and economic rights from interference by others. This could lead to, for example, a constitutional claim arising if a landlord seeks to evict a tenant for non-payment of rent.

22. Children and the elderly are subject to special protection, in keeping with the earlier Somali documents. Art. 34 provides an extensive set of protections for children. The elderly are subject to a duty of care on the part of their adult children (Art. 33.4).

23. The Consultation Draft includes some rights that are new in the Somali context, such as the clear statement that the right to healthy environment is both individual (Art. 30) and collective, in that it includes a right against unsustainable exploitation of the country's natural resources. This could give wide standing to individuals to challenge development projects in court and provides an environment-protective scheme. Other progressive and newly included rights are those related to administrative action, including access to state information (Art. 37) and just and procedurally fair administrative action (Art. 38). The latter right originates in the South African constitutional experience and has been adopted in a number of other countries. Other new rights include those to express artistic creativity and academic freedom (Art. 23.2), the right to receive ideas (Art. 23.2), and the right to choose one's profession (Art. 28).

24. Missing, however, as compared with the 2004 Transitional Charter, is the right to stand for election (Art 21.6 of the 2004 Transitional Charter). Art. 27 might be modified to reflect this explicitly by adding "and to stand for elections" at the end of the clause. It is also notable that there are no explicit intellectual property rights (e.g., patent or copyright) in the 2010 document. Nor is there a mention in Art. 35 of higher education, which is found in many other constitutions and was mentioned in the earlier Somali documents.

25. Of particular importance is the lack of explicit mention of freedom of the press. This had been present in Art. 20 of the 2004 Transitional Charter. While Art. 23 guarantees freedom of expression, this is a guarantee to persons and not to the media as an entity. Consideration should be given to adding explicit protection of freedom of the press to the list of constitutional rights.

26. The list of duties of citizens in Art. 47 is reasonable and discrete. It has the advantage over other constitutions in this regard, in that the duties are quite capable of being achieved, and achievement can be measured. Citizens have a duty to engage in useful work, pay taxes, and defend the Republic. Other duties, such as to foster national unity in harmony with others (Art. 47.d) and to promote accountability and the rule of law (Art.47.e), are a bit more vague and hence less capable of acquiring clear meaning. Consideration could be given to the removal or clarification of these other duties.

III. THE POLITICAL SYSTEM

27. The design of the political system is an issue at the heart of the constitution-making process and will be of special relevance to Somalia. The Consultation Draft provides options rather than imposing a single solution. The Garowe II Principles announce the decision to utilize a parliamentary system. Therefore the Consultation Draft must be revised to reflect this decision, and all references to the presidential option should be removed.

28. The 1960 Constitution established a parliamentary system featuring a Prime Minister along with an indirectly elected President. Many of the provisions in the "parliamentary option" in the Consultation Draft are drawn from that system. This system was retained in 2004. We suggest that tradition is of less importance than function for Somalia going forward. Hence, we take a fresh look at the 2010 Draft from a comparative perspective, seeking to identify potential problems, notwithstanding the structure of prior Somali constitutions.

A. Political Parties

29. Decisions about the legality of parties can be among the most contentious that arise in new democracies. Art. 52 contemplates a number of restrictions on the formation of political parties. Drafters should consider adding language about the decision-making process in such cases. Who, exactly, will be charged with making such judgments? The Electoral Commission? The courts? Consideration should be given to explicitly assigning decisions on the legality of parties either to the Electoral Commission or Constitutional Court.

30. Art. 52.3 specifically proscribes any political parties that are based on "clan identity". In practice, such requirements can prove materially difficult and politically challenging to adjudicate. Experience in other African countries suggests that clans and tribes can become the *de facto* basis of politics, even when they are explicitly separated from party affiliation. Depending upon the distribution of ethnic groups in Somalia, the drafters may wish to consider language that requires that parties enjoy support across some number of geographic jurisdictions – a condition that would require parties to enjoy a broader constituency in a way that might be more easily evaluated.

31. Art. 52.6 suggests, generally, that legislation be enacted such that parties declare contributions from "certain sources" over "certain amounts". The language on "certain sources" could be considered vague and potentially discriminatory. The drafters may wish to consider specifying what sorts of sources would require disclosure. For example, foreign sources? Or perhaps all sources should be declared?

32. One possible approach is to streamline Art. 52 to only include to Sub-Arts. 1-3. Sub-Arts. 4-6, as well as Arts. 53 and 54, could be combined into an Article dedicated to the establishment of the Electoral Commission and its functions. The Electoral Commission composition and appointment is defined in Chapter 11, together with all other National Commissions and Independent Agencies. The drafters may wish to consider an article in this chapter establishing the Electoral Commission with the mission of regulating all aspects of elections, including political parties. Such an article could also define the Commission's powers. Some of the decisions in the Garowe II Principles can inform this section.

B. The Parliamentary System

B.1. The Presidency

33. The first option described in the Consultation Draft is the parliamentary system, which has now been selected as the choice going forward. This system includes a President whose powers are explicitly "formal" (Art. 94.1) and who is elected by the two legislative houses sitting together. The President is elected for a six-year term (Art. 98); the House of the People is elected for a five-year term (Art. 81.1), whereas the term of the House of the Regional States is to be determined (Art. 81.2). There is a separate schedule for the presidential election, where the process of candidate nomination, quorum for the election, and the decision rule are presented. There are two issues regarding the presidency on which we comment. First, there is no particular reason for making the term of office of the President longer than that of the legislature. Ideally, every President would be elected by a new legislature, but given that the legislative term in a parliamentary system is not fixed, the drafters cannot guarantee that this will be the case, as a new legislature may be formed in the middle of the presidential term. We do not believe this is an argument for making terms of different length, especially if it is only a difference of one year.

34. Second, the drafters sought to design a ceremonial presidency. Thus, according to Art. 94.1, "most presidential powers are formal or are exercised acting on request of the Prime Minister, the Council of Ministers or some other official or body." Art. 99.1 states that the President serves as Commander in Chief of the Armed Forces, but that this is "a ceremonial office that carries no power of command." The Main Report of the Independent Federal Constitution Commission states that the power of the President is "ceremonial" (p. 51).

35. Legislating a ceremonial power is not an easy task, and one can reasonably expect that the line between what is and is not ceremonial will be subject to debate in the course of any country's life. Systems in which the power of the head of state is entirely ceremonial, such as that of England, have evolved over centuries of political interaction among the Crown, the government and the Parliament, in which it gradually became apparent that the best course of action for the Crown was to nominate a government that represented a majority in Parliament. Among other

parliamentary systems, there is a fair degree of variation regarding the powers of the head of state, and the degree of effective power depends not only on what the Constitution says, but also on political and personal factors.

36. The Consultation Draft is not completely consistent in regards to the ceremonial nature of the presidency under the parliamentary system, as it grants the President relatively strong veto power (Art. 88). Art. 88.2 allows the President to return legislation to Parliament on the grounds of lack of procedural propriety; Parliament, in turn, can override the presidential decision by passing the draft law for a second time. More importantly, Art. 88.3 allows the President to return a draft law to Parliament "on the ground that it is unwise in terms of its substance"; Parliament can override the President's veto, but only with a 2/3 majority of each house. (In this regard, the denominator is unclear: is it 2/3 of those present or all members?). Even if only reactive, the power to require that a super-majority approve a piece of legislation is considerable and is certain to make the President more than simply a ceremonial figure.

37. The grounds for the President returning a draft law to Parliament on lack of "procedural propriety" would benefit from greater clarity. What does "procedural propriety" mean? The Constitution specifies some basic procedures for draft laws: quorum for parliamentary sessions (Art. 85), decision mechanism (Art. 86), and legislative initiative (Art. 87). If the President thinks any of these procedures were violated, then the matter should be referred to the Constitutional Court. Sending the draft law to Parliament, which might very well re-approve it (possibly with the same procedural impropriety), will not make it any more constitutional. If the President objects to other procedures, he/she will be stepping outside of his/her bounds. For instance, the President might object to the approval of a law by closed rather than open vote, or to the way a committee discharged the draft law. However, according to Art. 84, the Parliament should provide for its own rules and procedures. Thus, the President would have no grounds to object to those procedures. We believe that the provisions in Art. 88.2 are ambiguous. We recommend removing the President's veto power.

38. Similarly, Art. 99.1 invites conflict over interpretation of what constitutes a ceremonial power. The drafters may wish to consider if it is really necessary to designate the Head of State as the Commander in Chief of the Armed Forces. If the drafters' goal is to remove the President's authority in the appointment of commanders of the Armed Forces, then the drafters may wish to explicitly place the authority in the hands of the Head of Government (the Prime Minister) (Art. 167). The legislation that will be passed to implement the constitutional provisions dealing with the Armed Forces and the Police (Art. 170) can define the length of the terms of the commanders and the conditions for their removal from office. This may prevent excessive political considerations in their appointment by the Prime Minister. However, if the drafters are concerned with the fact that the Prime Minister reflects a temporary majority and should therefore not be in charge of appointing the

commanders of the Armed Forces, then placing the authority to appoint these commanders with the President is important.

39. We suggest that further thought be given to the issue of the formality of the President's power. The actions of the President are constrained in specific areas. For example, the drafters, following a trend of many recent constitutions, seek to constrain the role of the President in appointing the Prime Minister, by identifying *ex ante* who must be chosen as the Prime Minister (Art. 105: the President must appoint the person who heads the largest party in the House of the People). But if the drafters' goal is to constrain every aspect of the President's behavior, it may be better to simply abolish the office entirely.

40. Art. 94.2 requires rotation of the Office of the President "between different groups in society." Although the intention of the clause is well-taken, we suggest that the fact that it is left abstract may be the source of controversy in the future over which groups are entitled to be considered for the rotation, when a rotation has effectively taken place, etc. We recognize, however, that the political context of the drafting process may require that the drafters adopt a vague principle.

41. Art. 96.1 regulates the "Election of the President and Deputy-President", but is not clear as to whether the legislative houses must develop rules of procedure for the presidential election, or whether it should follow Schedule 3. The drafters may wish to consider limited redrafting to clarify the relation between the rules and Schedule 3.

42. Art. 96.2 provides for a Deputy President. Given the desire to have a purely ceremonial presidency, the Deputy President will have very little to do in the normal course of business. In the event that the President dies or is incapacitated, a new President can be elected by the parliament quickly. Consideration might be given to eliminating the office of the Deputy President. This is particularly true if the President's veto power is removed. To be sure, some parliamentary systems, such as that of India, do have a deputy head of state. But many others, including Italy, do not.

43. Art. 99 lists Powers of the President. Even if constrained by the stipulations in Art. 105, Art. 107 and Art. 108, appointment and dismissal of the Prime Minister and government Ministers is one of the powers of the President, and we recommend should be added to the list here.

44. Art. 97 stipulates that if the President faces trial by the Constitutional Court, he/she is to be suspended if a motion of impeachment successfully passes in the House of the People. It ends with the provision that the Constitutional Court conducts the trial of the President. But what happens if the President is convicted? More importantly, what happens if the President is acquitted? Neither option is stated in the Article. We recommend that the drafters should be clear in the text of the Article, and not just the title, that impeachment results in removal. The drafters might use the text from Article 98 in the presidential option here.

B.2. The Government

45. Art. 105, on Appointment of the Prime Minister (PM), states that the President must appoint as PM the head of the largest party in the House of the People. If no party has a majority, the President must appoint the person who leads a coalition of parties that add to a majority of legislative seats. These alternatives may be in conflict. Assume a Parliament with three parties, A, B and C, holding 40%, 30% and 30% of the seats, respectively. According to the first part of the Article, the President must appoint as PM the leader of party A. But since this is a case in which no party has alone a majority of seats, according to the second part of the Article, the President must appoint the leader of party B (or C) if these parties form a coalition. We observe that this gives the President discretion which may not have been intended by the drafters. We recommend that ambiguity about who will be appointed as PM, and hence the government formateur, should be removed. If the first part of the Article is meant to apply when there is a majority party, then the drafters may wish to consider changing the language to read, for instance, that "the President shall appoint as Prime Minister the person who leads the party with more than 50% of the seats in the House of the People." The second clause (to appoint the person who commands the support of a majority coalition) might be changed to read, for instance, that, "If no party has more than 50% of the seats, the President shall appoint as Prime Minister the head of the largest party."

46. We also suggest that drafters of Art. 105 consider starting with "Following legislative elections,…" There are two other instances in which the President will have to appoint a PM, neither of which follows legislative elections. First, the President will appoint a PM after the Parliament passes a vote of no confidence in the government. As written now (Art. 110), the successful vote of no confidence will bring with it the name of the new PM. We observe that the Article, however, is silent as to whether the President shall formally appoint the individual proposed by those moving the no confidence vote as the PM, or whether the new PM will have to present his/her government and its program to the Parliament, as a PM appointed after an election would.[1] Second, the President will have to appoint a new PM if the incumbent resigns for reasons unrelated to a vote of no confidence or if he/she dies. The Consultation

[1] The 1949 German Constitution was the first to introduce the "constructive" vote of no confidence, similar to the one designed in Art. 110. That Constitution, however, does not require that the government be subject to a vote of investiture. The 1978 Spanish Constitution, in turn, adopts both a "constructive" vote of no confidence and a vote of investiture for the government. Its provisions are the following: if the government is removed because it lost a vote of confidence (that is, a vote initiated by the government requesting Parliament to express its confidence in it), the new PM is chosen according to the same procedures that are adopted to choose the head of government following legislative elections; if the a motion of no confidence is approved, the Constitution explicitly states that the candidate included in the motion is understood to have the confidence of Parliament.

Draft does not specify what is to be done when these circumstances arise.[2] We recommend that the drafters clarify the appointment process for these other instances.

47. The label of Art. 106 should be changed. In fact, it is about a vote of investiture, as will be described below. In it, the PM is required to present the government and its program to Parliament within 30 days of its appointment. Although the language of the Article is somewhat ambiguous, this is how we understand the intended process:

    i. Within 30 days of his/her appointment by the President, the PM and the government program are presented for a vote in Parliament.

    ii. The Constitution does not stipulate what kind of vote is required for approval. This omission allows two interpretations. First, since it is implicit that the government must have the confidence of a majority, and that decision making in Parliament is by a majority of those present and voting (Art. 86), one can assume that this is what is required to invest the government. Alternatively, Art. 110.4 stipulates that the quorum for a vote of no confidence is 70% of members of the House of the People, and that it is passed with the approval of more than 50% of the *members* of the House of the People. Since the vote of investiture and the vote of no confidence can be seen as functionally equivalent, one might think that both should be subject to the same majorities. This discrepancy should be clarified.

    iii. If the first vote fails, within 30 days the PM may submit a list of Ministers that is whole or in part different from the one that was rejected in the first vote.

    iv. If the second vote also fails, within 30 days the PM may again submit a new list for approval.

    v. If the third vote also fails, within 7 days Parliament may submit the name of an alternative PM.

    vi. If Parliament does not submit an alternative name, the President must dissolve the Parliament, and new elections are held.

48. We identify two relatively minor considerations regarding this process for consideration by the drafters. First, it extends for quite a long period of time. 30 days may not be required between each of the votes. Second, it should be stated explicitly that the President must appoint as PM the person who emerges as the result of the fourth step of the process, that is, the person who was proposed by Parliament as an alternative to the PM who had been appointed by the President. As

[2] Note that the Consultation Draft does not leave it clear either whether the whole government should resign in case of death or resignation of the PM. For reference, Art. 101 of the Spanish 1978 Constitution resolves these issues with a simple formulation: "1. The Government shall resign after the holding of general elections, in the cases of the loss of confidence by Parliament as stipulated in the Constitution, or because of the resignation or death of its President. 2. But the outgoing Government shall continue in its functions until the new Government takes office."

currently drafted, that person is never appointed before the vote of investiture or after he/she emerges successfully from it.

49. The heading of Art. 106 is imprecise. It should be labeled "Vote of Investiture". This is what it regulates. The phrase "vote of confidence" invokes a provision that the Consultation Draft does not contain, but is found in other parliamentary systems: namely, the authorization for the government to engage the Parliament's confidence after it has been in office. This is an important provision, explicitly introduced in the 1958 French Constitution and now adopted in many constitutions that are based on the principle of assembly confidence. There is a relatively large literature in law and political science dealing with the vote of confidence. We could say much more about the merits and demerits of including a vote of confidence provision, but for now we simply call attention to the fact that it is widely regarded as an important instrument to allow the government to administer its majority and successfully pass legislation quashing the legislative majority.

50. Art. 108 concerns the Appointment of Ministers. We wonder what the drafters' rationale is for limiting the size of the Council to 23. There may be fewer government ministries, or there may be more. Of course, there can be ministers without portfolio, as well.

51. The requirement in Art. 108 that members of the Council of Ministers not be members of the Parliament (or that they resign their seats if they become a Minister) tends to be associated with presidential forms of government, which aim at guaranteeing the separation of executive and legislative powers. In our view there is not a strong rationale for requiring that Ministers be chosen from outside of Parliament in a parliamentary system. The logic of such systems is that the government and legislature can act in harmony; forcing the most popular and competent leaders of the parliamentary majority party to resign their seats will lead to less congruence between the two branches. We further note that the Garowe II Principles state that the "Council of Ministers shall be drawn from within and outside parliament." Our recommendation is that <u>Article 108 should be amended to allow Ministers to retain their parliamentary seats.</u>

52. If we are incorrect that the Garowe II Principles have resolved this issue, and the drafters choose to retain the separation of government and parliament, we note that the Constitution leaves unspecified the mechanism to replace members of Parliament who resign to serve in the government. In countries where the electoral system is based on single-member districts, a by-election is often required, and this might lead to an opposition victory, which could in some cases disrupt the political balance. We understand that the Garowe II Principles have decided on a system of proportional representation, and so assume that there will be a mechanism to identify replacements (e.g, the person next in the party list). In some countries, members of Parliament who will serve in the government do not permanently resign their seats; they simply take a leave from Parliament while serving in the government, with a

replacement taking their seat for the duration of their tenure in government. If the separation of government and parliament is maintained, the drafters should consider specifying the mechanism for replacing legislators who want to serve in the government, or recognize that it is to be defined by law. If the prohibition of members of Parliament from serving as Ministers is retained, the Constitution must clarify if this is extended to the PM. Must he/she come from within Parliament? May he/she come from within Parliament? If not, the individual who is designated as PM will have to resign from his/her legislative seat before being confirmed in office by the vote of investiture. We suggest that requiring resignation may deter some of the most qualified people from wanting to join the government, leading to less connection between the PM and the parliamentary majority. The Constitution requires that the PM be the head of the largest party in the House of the People. It is likely that this person will, him or herself, have a seat in Parliament.

53. Art. 110 regulates the vote of no confidence, which can be brought by any 20 members of the House of the People. Other provisions in the Constitution requiring a specific number of members include the requirement of ten members for bill introduction (Art. 87.3) and referral of draft bills to the Constitutional Court (Art. 88.4). But other parts of the Constitution use percentages of members rather than numbers. See Art. 82.4, which states that 20% of members can ask for a special session. If the House of the People is to have 225 members, as contemplated by the Garowe II Principles, this would mean 45 members could ask for a special session. The drafters should consider using either percentages or numbers, but not both.

54. With regard to Art. 111, Caretaker Government, the current formulation only predicts the need for a caretaker government for the period between the date of a legislative election and the formation of the next government. However, there are other circumstances under which the need for a caretaker government may arise. For instance, depending on how the issue of the investiture of a PM who is selected in the course of a vote of no confidence is resolved (whether a formal vote of investiture is necessary or not), there may be a period with no formal government; depending on how the succession of a PM who resigns or who dies in office is resolved, there may be need for a period in which there will be no formal government. Thus, the drafters may wish to adopt a more general formulation, which would seek to cover all these possibilities (see footnote 2 for the formulation found in the 1978 Spanish Constitution).

C. The Federal Parliament

55. Chapter 8 of the Consultation Draft describes the Federal Parliament. In contrast with earlier constitutions, the Consultation Draft features a bicameral body with a House of the People and a House of Regional States. As a minor, drafting issue, some subsections of the Consultation Draft use the word "legislature" rather than "parliament". Others say "parliament." Similarly, the Upper House is sometimes referred to as the House of the Regional States and sometimes simply as the House

of Regional States. In each case, we recommend that one or the other should be chosen for consistency.

56. Art. 76 concerns the membership of House of Regional States. The Garowe II Principles contemplate a maximum of 54 members. We are unsure if this is to be the maximum in the final Constitution, but if so, Art. 76 must be harmonized with it. The Garowe II Principles also require the Constitution to provide more detail on the Upper House.

57. Art. 80 regulates the Speaker and Deputy Speaker of Parliament. The Speaker (but not the Deputy Speaker) is to be a non-partisan, neutral officer. This might be reconsidered. One may conceive of this office as an agent of the majority in Parliament; indeed, the Speaker is likely to be the political leader of the largest party, if he/she is to be able to win the election. No doubt there is concern that the Speaker act in a non-partisan manner. But requiring the resignation from party office will not, on its own, ensure that. In any case, like all other members, the Speaker is under a duty to act in accordance with the best interests of the nation (Art. 79).

58. The Consultation Draft does not define the term of the House of Regional States, instead stating that it is to be a permanent body (Art 81). Did the drafters intend the Draft to mean that the members sit for life? Or simply that the House of Regional States will be a permanent feature of the Constitution? The drafters may wish to consider changing the word "permanent" to another term. There may be an interest in having uniform national terms for these representatives. In practice, the terms of the members of the House of Regional States may be related to the terms of office of those who appoint them, the Regional State legislatures and executive.

59. Art. 84 requires that the Rules of Procedure to be adopted by each House provide for the participation of the people in parliamentary procedures. We are unsure of what is contemplated here. Typically parliamentary procedures are internal to the functioning of Parliament.

60. The main objective of Art. 87 is to give stronger power to the House of the People over the House of the Regional States. The latter has equal footing with the former only in draft laws "affecting all or some of the regional states, as such, or the system of federal government." Consideration should be given to the definition of laws that affect all or some of the Regional States, as such, or the system of Federal Government. Given that it is reasonable to expect that disputes over qualification of specific draft laws may emerge, the drafters may wish to introduce mechanisms for resolving such disputes. It is not clear that Art. 68.3, providing for Constitutional Court resolution of interstate conflicts, is sufficient to cover these disputes, because that provision refers to disputes among states, not governments (see ¶78 below). Alternatives include providing a schedule that lists the topics that fall within this category, assignment of disputes on this topic to the Constitutional Court, or the establishment of a parliamentary commission composed of members of both Houses

charged with the task of deciding when a draft law initiated by the House of the Regional States falls within its purview.

61. We suggest that the wording of Art. 87.9 could improved. It seems to mean that "Draft laws that are exclusively federal in nature will be sent to the House of the Regional States after passage in the House of the People. If the House of Regional States does not pass it, or introduces amendments, the House of the People retains the power to send the draft to the President for assent, or may abandon the draft law". The Article seems to also contemplate a joint consultation of the two Houses. The drafters may wish to consider that such consultation could be achieved with a joint committee.

62. Art. 88.4 does not make any distinctions between the parliamentary and presidential options regarding initiation of review of legislation for constitutionality. Now that the parliamentary option has been chosen by the drafters, it should be recognized that giving the President the power to initiate constitutional review is a powerful tool. This can serve as a check against unconstitutional action. It may, however, be unnecessary, given that very small parliamentary minorities (10 out of 225 members) can also initiate review.

63. Art. 89.5, providing for remuneration for committee chairs, could be an inducement for corruption considering the potential power of committee chairs. Presumably all members of Parliament are remunerated, and it may be that committee chairs should have additional remuneration, but the drafters may wish to consider that it is unusual to specifically constitutionalize remuneration for committee chairs.

IV. FEDERALISM AND DEVOLUTION

64. With respect to other topics, the comparison with the 1960 Constitution and the 2004 Transitional Charter concerning federalism and devolution is relatively simple, given that nearly all the provisions contained in the Consultation Draft find few equivalents in these two previous documents. Indeed, after several references to the Federal Government in Arts. 48, 49 and 50, Art. 55 of the Consultation Draft clearly defines Somalia as a "Federal Republic". The 1960 Constitution defined the country as the "Somali Republic", and had a vague requirement of administrative decentralization "whenever possible" (Art. 86). The Transitional Charter was actually the "Transitional *Federal* Charter of the Somali Republic" (emphasis added).

65. As a general matter, the territorial organization of states and the allocation of powers across levels of government has become increasingly complicated in recent years. Sub-state institutional structures differ quite significantly from country to country, and in recent years, the forms of decentralization and devolution have become quite variegated, with many possible classifications. One classic distinction is between unitary and decentralised states. The difference between unitary and decentralized states is that in a unitary state, legislative power is exercised solely by

the central government. This does not imply that in unitary states there is no form of local government, but it does imply that there are no sub-state bodies that can legislate. Within the category of decentralized states, there is a further distinction between federal and regional states. According to one definition, federal states are those in which residual lawmaking authority lies with the sub-state units, while in regional states, residual lawmaking authority lies with the center.

66. The 1960 Constitution clearly envisaged a unitary Somali state, stating that "the legislative power shall be vested in the National Assembly" (Art. 49). On the other hand, both the 2004 Transitional Charter and the Consultation Draft provide for a decentralized system of government, although the 2004 Transitional Charter contained a provision similar to the 1960 Constitution, which stated that the "Legislative powers of the Transitional Federal Government of Somalia shall be vested in Parliament".

67. This section considers several features of the Federal Structure of the Consultation Draft, i.e., (a) extent of the legislative power exercised by the Regional States; (b) existence of a separate branch of the judiciary at Regional State level; (c) presence of a second chamber of Parliament that represents the Regional States; (d) presence of provisions concerning financial and fiscal autonomy; (e) existence of Regional State constitutions; and (f) the status of the Capital City.

A. Allocation of Legislative Power

68. Some constitutions, including those of many federalisms, contain an explicit provision or clause listing the subject-matters on which the central government can legislate, leaving the so-called "residual" subject-matters (i.e., the ones that are not listed in the Constitution) to the sub-state entities. In other systems (sometimes called "regional" systems), the Constitution contains a list of the subject-matters over which the sub-state entities can exercise legislative power, leaving the central government with competence over all the other subject-matters. Some constitutions (such as those of Italy or Germany) also contain a list of so-called "concurrent subject-matters," i.e., subject-matters over which both the central government and the sub-state entities can exercise legislative power.

69. Because it established a unitary state, the 1960 Constitution contained no internal allocation of legislative power. The 2004 Transitional Charter included Schedule 1, according to which eleven matters (from foreign affairs to collecting import/export and indirect taxes) were under the "authority" of the Transitional Federal Government, and Schedule 2, according to which twenty-four matters (from Education to General Public Health) came under the "authority" of the State Governments. The Transitional Charter did not contain any indications as to whether the Transitional Federal Government or the State Governments had "authority" over the subject-matters not mentioned in the two schedules (i.e., the "residual clause").

70. Allocating legislative power between the two different levels of government is difficult and, in many cases, can be controversial. The Consultation Draft opts for a rather unique allocation of powers that is carried out in five different ways (see Art. 60)

    1) Subject-matters contained in an Exclusive Federal List (Art. 60.4)
    2) Subject-matters contained in an Exclusive Regional State List (Art. 60.5)
    3) Subject-matters contained in a Federal Concurrent List (Art. 60.6)
    4) Subject-matters contained in a Regional State Concurrent List (Art. 60.7)
    5) The "residual clause" is in favour of the Federal Government, given that the latter can legislate on any topic (subject-matter) that is not mentioned in Schedule 2 (Art. 60.8)

71. From a comparative perspective, the framework of Art. 60 is complex and includes some internal tensions. In our view, there is some risk that it could lead to an excessive number of jurisdictional disputes between the Federal Government and those of the Regional States. In particular, the presence of the Federal Concurrent List (Art. 60.6) and the Regional State Concurrent List (Art. 60.7) may lead to conflicts. This could overburden the new Constitutional Court with politically sensitive disputes, at a time when it will need to develop its capacity.

72. It is not unusual to have a list of "concurrent" subject-matters for which the Federal Government approves a framework or skeleton law defining the guiding principles that should be followed in legislating, while leaving it to the sub-state entities to legislate in more detail within the boundaries of the framework law. The Consultation Draft does not seem to follow this approach. Instead, it has two different lists of concurrent subject matters, with different default rules about what law to apply in the case of a conflict. This framework of allocation of powers finds no equivalent in comparative constitutional law. The drafters might consider simplifying the allocation of subject-matters over which the Federal Government and the Regional States may exercise legislative power. One possibility would be to include:

    1) A list of exclusive legislative powers of the Federal Government similar to the one contained in Schedule 1 of the 2004 Transitional Charter (i.e., that contains subject-matters such as foreign policy and defence and security).
    2) A list of concurrent subject-matters over which the Federal Government can determine the guiding principles through framework or skeleton laws and the Regional States can legislate in detail.[3]
    3) Depending on how far the drafters wish to go with the federalizing process, the residual clause (i.e., all the subject-matters not listed in the Constitution) should be in favour of the Regional States (this would be the option if the

[3] This procedure is already provided for in the Consultation Draft with regard to local government and administration – see Art. 59).

drafters wanted a strongly devolved federal system), or there should be a third list of subject-matters over which the Regional States have exclusive legislative power with the residual clause in favour of the Federal Government (this would be the option if the drafters preferred a weaker form of federal system).

73. After Art. 60 provides the various categories of jurisdiction, Art. 61 goes on to state that "In the spirit of cooperation, a Regional State that wishes to enact law on any topic under either the Federal Concurrent List or the Regional State Concurrent List of powers should consult with the Federal Government" (Art. 61.1), and "A federal law shall be passed to establish a procedure by which a Regional State may assume responsibility to make law on any topic under the Regional State Concurrent List. Such a process shall involve an assessment of the capacity of the Regional State to take responsibility for the enactment and administration of law on the topic" (Art. 61.2).

74. There is some tension between Art. 60.7, which provides that Regional State law prevails with respect to the federal law with regard to topics that come under the Regional State Concurrent List, and Art. 61.2, which requires the passage of a federal law to set up a procedure for Regional States to legislate on the same topics. Art. 61.2 implies that federal law is the source of authority for the Regional State to exercise legislative power that is granted to it in Art. 60.7. This is confirmed in that Art. 61.2 involves "an assessment of the capacity of the Regional State to take responsibility for the enactment and administration of law on the topic." In addition, Art. 61.2 only mentions the "procedure by which a Regional State may assume responsibility to make a law on any topic under the Regional State Concurrent List", remaining silent with regard to the procedure to be followed when a Regional State legislates on a topic contained in the Federal Concurrent List. <u>The drafters could clarify many of these issues by changing Art. 61.2 to cover the Federal Concurrent List rather than the Regional State Concurrent List.</u>

75. Art. 62 allows for mutual delegation of powers from one government to the other. This is common under both Federal Constitutions and those with regional autonomy. For example, the South African. Spanish and Italian Constitutions foresee the possibility of negotiations between the Autonomous Communities/Regions and the Central Government to transfer powers from the latter to the former. When combined with the possibility of a particular Regional State government assuming responsibility for some law making under Art. 61.2, the Consultation Draft allows the possibility of so-called regional asymmetry that exists in countries such as Spain, Italy and, with all its constitutional peculiarities, in the United Kingdom. This approach can facilitate tailored policies for specific areas of the country, but in some systems has led to problems with respect to the concept of indivisibility of the territory (as foreseen in Art. 7.2 of the Consultation Draft). Examples of such problems in other countries include the longstanding controversy between Catalonia and the Spanish Government with regard to the Catalans' Statute of Autonomy and the decision of the Scottish Government (supported by Scottish National Party

majority) to hold a referendum on independence in 2014. The demand for continuous devolution, in other words, can lead to pressures for independence.

B. Allocation of Judicial Power

76. In federal systems, the sub-state entities often have a separate court system and their own substantive and procedural law, be it civil or criminal. The Consultation Draft seems to contemplate a regional system rather than a federal system in this regard, given that Art. 64.1 clearly states that "There is one unified judicial system for the Republic [...]". However, as is the case in many other African countries, Art. 64.2 goes to state that "Despite clause (1) local traditional dispute resolution mechanisms may continue to apply law that is not inconsistent with the Shariah and the constitution", thereby implying that there is a (quasi-)legal system at the local level that runs in parallel to federal and Regional State law. Together, these provisions imply that regional states will *not* have their own judiciaries.

77. There are other elements that more clearly demonstrate the federal character of the Consultation Draft by providing for input from the Regional States into the composition of the judiciary. Art. 127 of the Consultation Draft provides that each Regional State nominates a member of the Independent Judicial Service Council, a body that plays a role in the appointment of members of the judiciary. The House of Regional States has to approve the person proposed by the Judicial Service Council as Attorney General. Twenty-five members of the House of the Regional States and the government of any Regional State have standing to bring a case before the Constitutional Court (Art. 118). Furthermore, the House of the Regional States approves the names of judges to the Constitutional Court proposed by the Judicial Service Council. Together, these provisions ensure appropriate Regional State participation in the appointment of judges and in the judicial process.

78. Art. 68 provides for mechanisms for resolving disputes among governments. They are primarily to be resolved through negotiation and mediation, and this approach is consistent with that adopted by other countries, including South Africa. By agreement the governments can establish special committees or boards to resolve disputes. Art. 68.3 provides that "if the states concerned cannot resolve a dispute by mediation or negotiation, the Constitutional Court shall decide the dispute". Because this Article uses the word "states" it is not clear whether the Constitutional Court can hear disputes that arise between a Regional State and the Federal Government. <u>The word "states" should be replaced with "governments".</u>

C. Representation in the Upper House

79. In federal systems, the second chamber represents the sub-state entities, but the manner of representation varies across systems. For example, the United States

adopts equal representation for each state.[4] Other federal systems, such as Germany and Austria, have "weighted" representation according to the size and population. The Consultation Draft uses the former approach. Art. 76 declares that "The House of the Regional States consists of a delegation of 10 members from each Regional State [...]". These members are to include the head of the Regional State government or a person representing him, and nine members nominated by the Regional State legislature.

80. Art. 88.4 gives the possibility for one or more delegations in the House of the Regional States "to refer a draft law that has been passed by Parliament to the Constitutional Court for ruling on the substance of the draft law or of the procedure used to adopt it". This will allow a single Regional State delegation to potentially use constitutional review as an instrument of constitutional obstruction, which may or may not be desirable.

81. The voting rules concerning the House of the Regional States are not fully specified in the Consultation Draft. For many decisions, acts are approved in the Upper House on the basis of a collective vote of the delegation of each Regional State (see Arts. 66.2, 82.4, 87.4, 88.4, 157.1, 171.8). On the other hand, under the parliamentary system, when electing the President of the Republic the "Member of the House of the Regional States must cast votes as individuals and not delegations" (see Schedule 3). While details on voting procedures should be left to the standing orders (rules and regulations) of the House of the Regional States, we believe that the drafters might consider providing greater clarity on the role played by the single members, on one hand, and the delegations of the Regional States, on the other. This is consistent with the requirements of the Garowe II Principles.

D. Fiscal Federalism

82. The financial arrangements between the Federal Government and the sub-state entities are of critical importance. On one hand, if the sub-state entities are deprived of financial resources, their autonomy is severely constrained. If the sub-state entities do have financial resources made available, many subsidiary questions arise. For example, which level has to pay for the exercise of specific functions by the sub-state entities? Which level disposes of which sources of income? Are there any transfers or grants from the Federal Government level to the sub-state entities? Is there a control of sub-state government borrowing?

83. Unlike the 1960 Constitution and the Transitional Charter of 2004, which did not contain any provisions concerning so-called fiscal federalism or devolution, the

[4] In other words, all the states have identical representation regardless of their size and population. In fact, there are fifty states, and each one has two senators elected directly by the people. This means that Wyoming and California are on an equal footing in terms of representation in the US Senate, even though the population of California is roughly 70 times larger than that of Wyoming.

Consultation Draft provides extensive detail on fiscal powers and financial resources of the Somali Regional States. The powers of the various levels of government to raise revenues are set out in Schedule 2. This Schedule will require close coordination with the ultimate allocation of powers based on current Art. 60.

84. Art. 63.2 states that "The Federal Government may spend money for any lawful purpose, whether within its legislative power or not". If interpreted in a certain way, this might be considered an "override clause" that would allow the Federal Government to legislate beyond the boundaries established by the Constitution. The drafters may wish to give consideration to removing this provision.

85. Chapter 14 of the Constitutional Draft is an unusually detailed section of a Constitution devoted to public finance. With regard to the funding of various levels of territorial government, Chapter 14 provides for a system than on the whole would appear to be an acceptable balance between tax-raising powers at local and regional levels and revenue transferred to the Regional States and the local governments by the Federal Government.

86. Art. 145 combines the need for fiscal autonomy with efficiency in fighting tax evasion. Art. 145 establishes that the Federal Government may authorize Regional State governments or local governments to collect taxes and that the "Federal Government revenue collected by a Regional State or local government should be allocated, in whole or in part, as far as reasonably possible, to that government in such a way as to offer an incentive to that government to collect the revenue efficiently". In light of the domestic economic difficulties of Somalia, this provision is an admirable effort to incentivize the levels of government in the country to collect taxes.

87. As is the case in many federal and regional systems of government, the Consultation Draft also foresees so-called Federal Government equalization grants that can be used in order to endeavour to maintain the same level of services in all the Regional States (Art. 147). This is consistent with the Garowe II Principles, which include the "principle of equalization and equity among states". This language ought to be explicitly included in Art. 148. With regard to the funding of local government, the Consultation Draft provides for a "bidirectional system" that can be found in other federal and regional systems of government, according to which revenue may be distributed to the local authorities either by the Federal Government through the Regional State Governments or by the latter directly.

88. The Consultation Draft establishes that "Regional States may borrow money only with a guarantee from the Federal Government" (Art. 149.) Although this rule undoubtedly represents a federal limit on the Regional State, we believe it is appropriate given the experience of debt-spending at sub-state level in many federal and regional systems around the world.

E. Regional State Constitutions

89. Being unitary in nature, the 1960 Constitution makes no mention of sub-state constitutions, while they are referred to only once in Schedule II of the 2004 Transitional Charter concerning the powers of the State Governments. In fact, the functions of the latter included developing "state constitutions, their state flag and their state emblem" as part of their function within their territory (emphasis added).

90. Chapter 14 of the Consultation Draft devoted to the Regional States assumes that there will be Constitutions.[5] In particular, according to Art. 140, the form of government of the Regional States "is a matter for the constitutions of the Regional States adopted in accordance with this Chapter". This would appear to imply that some Regional States may have a parliamentary system, some a "presidential"-type system and some even a mixed system. Although this variety is not unheard of in comparative experience,[6] we believe that the drafters may wish to consider that the Regional States should all have the same form government identical to that adopted at Federal Government level in order to facilitate relations both horizontally (among Regional States) and vertically (with the Federal Government).

91. Art. 141 clearly underlines the hierarchy that exists between the Federal Constitution and Regional State constitutions, given that the latter must be in pursuance of the former. Referral to the Constitutional Court of the Regional State Constitution to verify its conformity with the Federal Constitution is an appropriate mechanism in this regard (Art. 142.3).

F. Capital City

92. Art. 67 concerns the national capital and presents three different options. The Garowe II Principles suggest that none of these will be decided at the constitutional stage. Instead, the status of Mogadishu will be decided by the new parliament through the enactment of primary legislation. This means that Art. 67 can be simplified to state that Mogadishu will be the Capital of the Republic and that its status will be determined by law. The immediate consequences for representation in the new parliament are unclear.

[5] As a minor drafting issue, we suggest this Chapter be combined with Chapter 7 - Federal Structure of the Republic. In fact, it is not clear to us why the latter and the Regional States have been put into two non-consecutive sections of the Constitution.

[6] For example, after constitutional amendments in 1999 and 2001, Italy now foresees the possibility for the Regions to adopt their own form of government, although this has not yet occurred in practice.

V. COURTS

A. Constitutional Review

93. A major trend in modern government is to have a court with the power to review legislation and administrative actions for conformity with the Constitution. A major institutional choice for the drafters is whether to give this power to the regular Supreme Court or to a designated Constitutional Court. Somalia, like many newly independent nations in Africa, adopted the former system in 1960, providing for Supreme Court jurisdiction in Arts. 98-99 of the Constitution. Any litigant in a judicial proceeding could challenge the constitutionality of a law before the Supreme Court. In addition, the Attorney General could raise the issue of constitutionality, as could ordinary courts acting on their own authority. In all cases, the petition would be sent to the Supreme Court, which would then form itself as the Constitutional Court to hear the issue. The Constitutional Court contained four additional members who served three-year terms. Two were appointed by the President acting on a proposal from the cabinet, and two were elected by the National Assembly.

94. The Transitional Charter, in Art. 4.2, allows any person to bring an action in the Supreme Court for a declaration that a law or administrative action is unconstitutional. The 2010 Consultative Draft, however, provides much more detail. It has a five-member constitutional court with extensive powers. Besides the ability to resolve disputes among regional governments (Art. 69.3) and with the center (Art. 117.4.d), the Court has what is known as *ex ante* review power (Art. 88.4). This means that the Court can hear disputes over the constitutionality of draft laws before promulgation on request of the President, Council of Ministers, a state delegation to the upper house, or a minority group in the lower house. This is a power that is found in the French Constitution. The Somali Constitutional Court will also have *ex post* review power at the request of individuals, courts independent commissions, and various government actors (Art. 117-119).

95. The chapters on the structure of government provide, in both presidential and parliamentary alternatives, that if impeachment charges are moved and approved in the House of the People, the President is tried before the Constitutional Court. Art. 117, which establishes and defines the powers of the Constitutional Court, does not mention the power to decide on the President's trial. We recommend that the drafters should include the power to decide on impeachment trials in Art. 117.

B. The Court System and the Judicial Process

96. The 1960 Constitution established a Supreme Court and left other courts to be determined by law. The 1960 Constitution also allowed for popular participation in trials according to law, though we do not know if these provisions were ever brought into effect. In addition, when the Supreme Court sat as the High Court for purposes

of presidential impeachment, it was to include six citizens from a special list. So we recognize that there was an element of popular participation here as well. The 2004 Transitional Charter set up a Supreme Court as well as a Court of Appeal below it, with other courts to be defined by law. As in other areas, however, regulation was quite minimal.

97. The Consultation draft provides more detail. The apex of the ordinary court system is a Supreme Court, which shall include nine judges, with the Chief being elected from that number. A Court of Appeal is mentioned, as is a unified system of first instance courts (Art. 116). It was wise for the drafters to have clearly stated that the Chief Justice of the Constitutional Court is the head of the Judiciary (Art. 117.1), so as to avoid conflict with the Chief Justice of the Supreme Court over that role.

98. A consistent feature of Somalia's Constitutions has been a prohibition on special courts outside the judicial power, but the Consultation Draft allows a military court system to be established (Art. 121.2).

C. Judicial Appointments, Discipline, and Removal

99. The 1960 Constitution leaves appointment to ordinary law, and gives the Higher Judicial Council a consultative role in discipline. Removal is left to law. The Transitional Charter provides more detail, stating that removal is only available for misbehavior (Art. 55). It provides a special mechanism for removal involving Parliament.

100. In the Consultation Draft, the provisions on judicial appointment and removal follow the modern trend of including a judicial council, so as to insulate appointments and removal from pure political interference. Art. 124 requires that nominees to the judiciary be nominated by the Judicial Service Council. Judges of the Supreme and Constitutional Courts are approved by the House of Regional States, while the others are appointed by the President. In either case, it appears that the President has no discretion in the matter. He/She "shall" appoint the persons.

101. The provisions on discipline and removal require initial reference to the Judicial Service Council, again in accordance with international trends. There is a body called the "Inspectorate of the Judiciary", to be defined by law, as per Art. 125.6, and this apparently is involved in lower level disciplinary cases. Perhaps this body has a history in Somalia, but if not, the drafters may wish to state whether it is a body within the judiciary or not.

102. For more serious cases, the Judicial Service Council is to appoint an Independent Commission (Art. 125) made up of three judges or four judges. This Commission has the power to dismiss the judge. We observe that there is a slight discrepancy in language between Art. 125.3, which refers to "serious cases", and Art. 125.4, which refers to "grave misconduct". We recommend that the drafters consider using the grave misconduct formulation in Art. 125.3 for consistency.

103. The Judicial Service Council itself reflects appointments from a number of institutions, including the Chief Judges of the Supreme and Constitutional Courts, the Attorney General, and the Chair of the Human Rights Commission serving *ex officio*. The Chairman of the Council must resign other positions if elected Chair, and so this effectively bars the *ex officio* members from being elected Chair. This selection of language helps ensure that the Judicial Service Council is not dominated by the courts or government.

VI. INDEPENDENT INSTITUTIONS

104. A major trend in constitutional development is the creation of independent institutions to monitor government action and ensure accountability. The 1960 Constitution had established an independent Magistrate of Accounts with a role in audit. The Transitional Charter, however, had an entire Chapter on National Commissions that mentioned 12 specific Commissions(including the Independent Federal Constitution Commission).

105. The Consultation Draft has several such institutions and a separate chapter on their composition and independence. These include the Human Rights Commission (Art. 46), with the power to promote knowledge, set standards, monitor and investigate; the Electoral Commission; and the Judicial Service Council. Some of these bodies are described in more detail than others. The Civil Service Commission is mentioned only in this section, presumably because it is already established. But its role is undefined in the Constitution. We recommend that the Civil Service Commission be mentioned in Art. 139 as having a role in the appointment, discipline and removal of civil servants, if indeed this is the role that is contemplated by the drafters.

106. Art. 129.4 states that funding for each Commission shall be by a separate vote in the national budget. The drafters might wish to clarify if their intention is that each Commission shall have its own separate line item in the budget. It would be unusual to have a budget process involving votes on individual institutions. This could make a budget bill extremely difficult to pass. Instead, the drafters may wish to consider that there should be a single up or down vote on the budget, and this is what Art. 152 on the budget seems to imply.

107. The appointment of Commissioners is covered in Art. 131. The initial proposal is to come from the "relevant" Minister. Independent Commissions are designed to be outside the ordinary government hierarchy, and, indeed, to play somewhat of a supervisory role, so it seems unusual to have a particular Minister in charge. Furthermore, bodies such as the Human Rights Commission will by nature cover many different Ministries. It is not clear to the reader which of several Ministries would be the "relevant" one. A solution the drafters may wish to consider is simply to say that the Council of Ministers nominates the candidates. The Council can work out its own method politically.

108. The Chapter applies to the Attorney General and Auditor General. The Attorney General is extensively regulated elsewhere in the Constitution, and so only Arts. 129, 132, 133, and 135 would really apply from this Chapter. Nevertheless, there is no problem in principle with mentioning it in this Chapter, as it is important to reiterate the independence of the office.

VII. PUBLIC FINANCE

109. In contrast with the previous Constitutions, public finance is extensively regulated in the Consultation Draft in Chapter 14, with a special focus on the allocation of funds among the Federal Government and the states. Art. 148 contemplates a federal law on the equitable allocation of revenue. Art. 147 focus on the transfer of revenue from national government to states, and Art. 151 suggests that there will be an annual allocation of revenue act. Presumably this act would also be regulated by the general law contemplated in Art. 148? We are not entirely clear and would suggest clarification be considered by the drafters.

110. Art. 153 contemplates using the last year's budget in the event there is no passage of a new one. It limits expenditures on the basis of the previous year's budget to four months. What occurs if a new budget cannot be passed is unclear to the reader. If it is imagined that no expenditures are subsequently possible, this will shape the content of budget negotiations, and so the drafters may wish to state this explicitly.

VIII. PEACE AND SECURITY

111. Somalia's earlier Constitutions did not contain as much detail as the 2010 Consultation Draft with regards to matters of national security and civil-military relations. All of the Constitutions prohibit militias (1960, Art. 26.3; 2004, Art. 71; 2010, Art. 163.2.).

112. The 1960 Constitution provided that the President has the power to declare war after authorization from the National Assembly (Art. 75), and the National Assembly had authority to also confer on the government the "necessary powers" (Art. 68). It specified that the President is the Commander in Chief of the Armed Forces (Art. 75.f), and in that capacity can appoint, based on ministerial proposal, the "high officials and commanders of the military forces specified by law". The 1960 Constitution refers to Military Forces and Armed Forces at different points without clarifying whether they are different. There are no specific provisions about civilian oversight of the Armed Forces, dismissal of Commanders of the Armed Forces or the duties of the Armed Forces.

113. The 2004 Transitional Charter is silent on the authorization for declaration of war, but matters not covered within the Charter are incorporated from the 1960

Constitution (Art. 71.2), and hence, presumably, the President still has at the current moment the power to declare war, subject to National Assembly approval. The Charter continues to recognize the President as the Commander in Chief of the Armed Forces and incorporates the right to appoint members of the Armed Forces, which are now defined as consisting of the Army and Police (Art. 65.1), and imposed a duty on the Armed Forces to faithfully abide and "preserve" the Charter and other laws of the land (Art. 65).

114. The Consultation Draft is clearly an improvement over these earlier constitutions in its level of detail and scope of matters covered. It also attempts to make clear that the Armed Forces are subservient to the civilian government. With regard to the Declaration of War and Peace: The parliamentary option recognizes that the President still has the power to declare war, but he/she can only do so if requested by the Council of Ministers, and they in turn must have the approval of Parliament "and to declare peace" (Art. 99.4). In the interests of clarity, the drafters may wish to consider that this provision should specify "both Houses of Parliament" as is the case with the analogous clause in the presidential option (Art. 101.5). The way the language in the clause is structured it is also not clear to the reader whether declaring peace also requires parliamentary approval – we recommend that this should be clarified.

115. In general, it should be noted that few modern constitutions provide for a declaration of peace in any case. Declaring peace may have been relevant under the international law of armed conflict before the adoption of the United Nations Charter, but formal declarations of war (and thus peace) are of less significance in the modern era. This may be implicitly recognized in the Consultation Draft, which states that the President can use the Armed Forces for "defense of the republic, in fulfillment of an international obligation, or in cooperation with the police", acting on the advice of the Prime Minister, and approved by the House of the People (Art. 167.2). We observe that this clause creates a potential loophole around seeking the approval of both Houses of Parliament contained in the war declaration clause. According to this clause, the President can effectively use the Armed Forces to engage in war (as long as he does not officially declare war), provided he has sought approval only from the House of the People. If this is a concern to the drafters, consideration might be given to modifying the wording "approved by the House of the People" to "approved by both Houses of parliament" as is the case with the declaration of war clause (Art. 99). Any foreign military venture that the President then wishes to commit Somalia forces to, whether for defense or other purposes, will thus require the President to seek approval of both Houses of Parliament.

116. As per the earlier Constitutions, the President serves as the Commander in Chief of the Armed Forces (Art. 99.1) but the parliamentary option states that the role is purely ceremonial (Art. 99.1) and explicitly points out that it carries no power of command, without clarifying who in fact command rests with. We suggest removal of the language stating that the role is purely ceremonial, as it is likely that in times of war, a centralized command structure will be necessary. If the goal of the drafters is

to empower the Prime Minister as Commander in Chief, then we recommend that this should be explicitly stated. Otherwise, we recommend that the "purely ceremonial" language should be discarded.

117. The President appoints, on the request of the Prime Minister, the heads of the "armed forces" and intelligence services (Art. 167). We wonder whether this should read "armed forces" or "security services", as later on, "security services" is the all-inclusive term used, defined as comprising the "armed forces, any intelligence services and the federal police service" (Art. 162.1).

118. As Art. 167 refers to Armed Forces and intelligence services only, it is not clear to the reader whether it is deliberately intended to exclude from the President's power appointments in the federal police service and regional state police, or whether this is an oversight. We observe confusion between the use of the word "security services" and "armed forces" in other clauses of the Consultation Draft (see below), and it would be important for the drafters to clarify whether this is intentional or an error which could be corrected.

119. There is also no detail setting out who has the power to dismiss the heads of the security services/Armed Forces. Presumably, this would be with the party appointing them in the first place. Perhaps this should be clarified by the drafters.

120. Unlike the earlier constitutions, the Consultation Draft makes it clear that it intends to subject the Armed Forces to non-military control (Art. 163.1). The Armed Forces are to be subject to non-military over sight, including by a parliamentary committee (Art. 167.4), and a member of the Council of Ministers will be responsible for matters of defense (Art 167.3). We wonder whether such civilian oversight should be restricted to only the Armed Forces and not the all-inclusive "security services". Although it is provided that federal legislation shall provide for the "involvement of civilians in the oversight of the federal police" (Art. 163.2.f), it is not clear why the intelligence services, or the Police are initially escaping civilian oversight.

121. The "armed forces or security services" (again, security services by definition include armed forces, so this mention of both words is not necessary) are to respect the rule of law, democratic institutions and fundamental rights (Art. 164.1.b.) and may not obey a manifestly unlawful order (Art. 166).

122. The Consultation Draft states that the Armed Forces are committed to "uphold the constitution" (Art. 164.1.c). Similar language was utilized in the 2004 Transitional Charter which charged the Armed Forces with abiding and preserving the Charter (Art. 65). We recommend that the drafters considering replacing the word "uphold" with "respect and abide by" so as to ensure that the Armed Forces have no enforcement powers to take action against people alleged to have breached the constitution, except under court order.

123. Unlike the earlier Constitutions, the Consultation Draft attempts to set out the duties of the security services. The Armed Forces are to guarantee the sovereignty and independence of the country and defend its territorial integrity (Art. 162.2),

while the role of the Federal Police is to protect the lives and property of the citizens (Art 162.3). We observer that there is no mention of the intelligence services and their responsibilities. The drafters may wish to give consideration to adding a clause to the effect that the intelligence services serve under the control and direction of the government.

IX. STATE OF EMERGENCY

124. The 1960 Constitution and the 2004 Transitional Charter contained no provisions concerning a state of emergency. The Consultation Draft is, therefore, a significant improvement in that it establishes and regulates the state of emergency in Art. 169. The inclusion of clear provisions governing a limited state of emergency is important, especially since different parts of Somalia have had states of emergencies declared on a number of occasions. These provisions largely conform to international standards elaborated in the Paris Minimum Standards of Human Rights Norms in a State of Emergency.

125. Under the Consultation Draft, the President may declare a state of emergency (parliamentary option – Art. 99) affecting the whole or part of the country which may not be more extensive than necessary in light of the situation (Art 169.2). These clauses cross-reference another clause, which declares that the President, acting on the request of the Council of Ministers, may declare a "necessary state of emergency" (Art 169.3). It is not clear to the reader what the use of the word "necessary" intends to add – it is understood that a state of emergency should only be declared when necessary (Art. 169.1), and so the drafters may wish to consider removing it from this clause.

126. Emergency rule may be declared only if it is "necessary" to deal with a "serious situation arising from war, invasion, insurrection, disorder, a natural disaster or some other grave public emergency" (Art. 169.1). Although the grounds for emergency seem reasonable, we identify an ambiguity in the phrase "other grave public emergency" and in the term "disorder". These phrases might usefully be replaced with the phrase "public emergency which threatens the life of the nation" from the Paris Standards, which is further defined there as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed". The interpretation of this phrase would then benefit from insight gained through the experience of other countries.

127. The "House of the People" has the power to approve or extend a state of emergency for renewable periods of no more than three months (Art. 169.4). If "Parliament" does not approve a state of emergency, the state of emergency ceases (Art 169.4). There is an inconsistency: Art. 169.3 and the first part of Art. 169.4

refer to the "House of the People" being able to debate and approve a state of emergency, and then, in Art. 169.4, reference is made to "Parliament" as the entity being able to approve or extend a state of emergency. We recommend that the clauses consistently either refer to Parliament throughout or the House of People throughout.

128. In terms of rights, the Consultation Draft states that the powers granted shall "not include powers to violate the rights under this constitution, unless this violation is absolutely necessary for the purposes of dealing with the emergency situation" (Art. 169.6). It is not clear to the reader what rights are being referred to and whether and when a violation becomes "absolutely necessary". If it is all the rights under the Constitution, then we recommend to the drafters that it should be stated explicitly – for example, the drafters may wish to consider replacing the words "violate the rights" with "violate any rights".

129. One possible approach that has been adopted in other countries is to divide the set of constitutional rights into two types of rights. The first set would comprise constitutional rights that cannot be violated and are thus non-derogable, whether in a state of emergency or not. As per the Paris Standards, this would include some of the rights specified in the Consultation Draft: these would be dignity (Art. 16), discrimination (Art. 17), life (Art. 18), slavery (Art. 19), liberty (Art. 20), religion (Art. 22), access to courts (Art. 39), and fair trial (Art. 40). No absolute necessity or justification could be used to derogate from these rights. The second set would contain the remaining constitutional rights; absolute necessity in a state of emergency may justify encroaching on those, provided the term itself is clarified further.

130. The validity of a declaration and the procedures involved in making the declaration may be challenged in court (Art. 169.7). But the Consultation Draft does not stipulate which court has jurisdiction. Consideration should be given by the drafters to explicitly assign this explicitly to the Constitutional Court so that cases could go directly there.

X. INTERNATIONAL LAW

131. National constitutions relate to international law in two ways: They regulate the process of making international obligations, and they define the status of international law in the domestic legal order. The 1960 Constitution provides that "generally accepted rules of international law" and international treaties duly concluded by the Republic and published in manner prescribed for legislative acts have the force of domestic law (Art 6.1). The Republic repudiates war as a means of settling international disputes (Art. 6.2). The 1948 United Nations Universal Declaration of Human Rights is also mentioned, in that laws must be compatible with it.

132. The 2004 Transitional Charter requires the Republic to uphold the "rules of international law and all international treaties applicable to the Somali Republic", which seems close, if not identical, to the "force of law" given in the 1960 Constitution (Art. 69.1). It also requires the Government to uphold "all bilateral agreements" concluded by the Republic (Art. 69.2). The document also allows, subject to legislative Acts of Parliament, international laws to be enforced, if they are accepted and adopted (Art. 69.1). Both documents, in other words, seem to adopt what is known as a "dualist" theory of international law, in which both customary international law and treaty obligations are enforceable only after a formal act integrating them into the domestic order. Interestingly, in 2004, the repudiation of war is no longer present. The 2004 Transitional Charter does not explicitly refer to the 1948 UN Universal Declaration, but it does state that the Republic "shall recognize and enforce all international human rights conventions and treaties to which the Republic is a party" (Art. 14.1).

133. The Consultation Draft, in contrast, has less discussion of international law. Rules of international law are not mentioned. In the section of "International Obligations", the document only states that "treaty obligations in effect on the date that the Constitution comes into force remain in effect" (Art. 177). We observe that there is no discussion of how future international obligations are to be produced. The drafters may wish to consider adding explicit provisions explaining how treaties are entered into and discussing whether or not there is any role for either House of Parliament.

XI. AMENDMENT

134. The 1960 Constitution contained amendment provisions that allowed Parliament to consider amendments proposed by a fifth of its members, the government, or 10,000 voters (Art. 104). Passage required two separate votes: The first requiring an absolute majority of deputies and the second requiring a 2/3 majority (though the denominator for the second vote is not mentioned as between all deputies or merely those present and voting.). In keeping with the approach adopted by some constitutions, certain provisions were identified as unamendable, in particular those "modifying the republican and democratic form of government or for restricting the fundamental rights and freedoms…" (Art. 105). In contrast, the 2004 Transitional Charter allowed for any part of the Charter to be amended (Art. 70.1) as long as the proposal was made by at least 1/3rd of the members of Parliament and passed by no less than 2/3 of all members (Art. 70.2.)

135. We observe that the provisions governing amendment of the Constitution are notably more precise in the 2010 Consultation Draft. It provides that an amendment can be proposed by a member of the federal legislature, by the federal or state government, or put forward through a petition signed by at least 20,000 citizens (Art. 171.3). A motion to amend the Constitution may be introduced into either of the two Houses of Parliament (Art. 171.4).

136. All provisions of the Consultation Draft are amenable save for the "Founding Principles contained in Chapter 1" (Art. 171.1.a) and the fundamental rights and freedoms contained in Chapter 3 (Art. 171.1.b). There is some ambiguity here. With regard to the first exclusion, it is Art. 1, rather than Chapter 1, of the Consultation Draft that refers to "founding principles"; the rest of Chapter 1 refers to other provisions, including but not limited to, religion (Art. 2), official languages (Art. 5) and capital city (Art. 8). It is thus not clear whether the intention is to make all these provisions non-amendable (in which case "Founding Principles" should be replaced with "Articles"), or whether the intention is only to limit non-amendability to Art. 1 (in which case "Chapter 1" should be replaced with "Article 1"). It is surely conceivable, for example, that for whatever reason, at some point in the country's future, the capital city may be changed. We recommend that the drafters consider clarifying the restrictions on amendments in regards to which founding principles are protected.

137. We observe that the non-amendability of fundamental rights also creates some ambiguity. These rights cannot be amended under the constitutional framework for amendment, but they *can* be limited by law (Art. 43.1). It seems counterintuitive to the reader to prohibit amendment of the rights but also allow derogation from these rights through legislative processes that may have the same effect and be easier to implement. Furthermore, it might be desirable for the drafters to *add* a fundamental freedom to the list or make it stronger, and so it should be clearly understood that the rights and freedoms could not be reduced, but might be enhanced. We recommend that the drafters consider limiting the restrictions on amendment so as to allow enhancement, but not removal, of rights.

138. No amendment may be proposed within the first seven years after the coming into force of the Constitution, except for those that may be necessary to ensure the participation of Puntland or Somaliland (Art. 172). We assume the drafters wish to ensure that the people have some opportunity to live under the Constitution before deciding to amend it; such provisions are unusual but not unheard of in national constitutions.

139. When a "majority" of the all members of the House in which the amendment was submitted have accepted the proposed amendment for first reading, a joint committee comprising members of both Houses will be established (Art. 171.5) to review the amendment. The joint committee is to inform the people of the proposal and ensure that there is adequate opportunity for public debate (Art. 171.6), and the public "shall…. Have the opportunity to present their comments and suggestions…" (Art. 171.6). The joint committee will submit its report within two months of its appointment (Art. 171.7).

140. Final approval requires the approval of 2/3rd of the members of the House of the People and 2/3rd of the delegations to the House of the Regional States. Note that all amendments need to satisfy this high threshold before they can be passed. We would recommend that the drafters consider a lower threshold of, say, 3/5 in each house, but this is only because some evidence shows some level of flexibility in the

updating of a Constitution, by formal means, may promote constitutional stability and endurance in some contexts.[7]

TYPOGRAPHICAL ERRORS AND MINOR ISSUES IN THE CONSULTATION DRAFT

Article 21: "trades unions" should be "trade unions"

Article 70: states refers to regional states, and could say so explicitly

Article 82.3: should be changed from "dated" to date

Cross reference in Art. 99.2 should refer to 88.3, not 87.9

Art. 126.1: the second reference should be to the Judicial Service Council, not "Services"

Art. 136: the numbering of sub-articles is out of sequence

Art. 136.4: commissions should be plural

Art. 157: should Finance Commission be capitalized?

Art. 157.3: there is a missing word: "…commission shall be **to** recommend…"

Art. 169.3: "no feasible" should be "not feasible"

[7] See Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009).

SUMMARY OF RECOMMENDATIONS

1.) Birthright citizenship for persons born in the country might be limited to persons of Somali origin rather than all persons, or subject to stated exceptions. (¶¶ 6-7)

2.) Consideration should be given to removing the ban on propagation of non-Islamic religions as it is in some tension with the core principle of freedom of religion under Article 22.1. At a minimum, either Art. 2.2 or 22.2 can be eliminated. (¶16)

3.) The constitutional prohibition on Muslims renouncing Islam that appears in Art. 22.2 might be reconsidered to conform to the practice in other predominately Muslim states. (¶16)

4.) If it is retained, consideration should be given to removing the term "In Islam" in Art. 47.1. (¶17)

5.) Art. 27 might be modified to grant adult citizens the right to stand for elections as a form of political participation. (¶24)

6.) Consideration should be given to adding explicit protection of freedom of the press to the list of constitutional rights. (¶25)

7.) Decisions on the legality of political parties should be explicitly assigned either to the Electoral Commission or Constitutional Court. (¶29)

8.) The ban on clan-based political parties might be more easily achieved by requiring that parties enjoy support across some number of geographic jurisdictions. (¶30)

9.) The powers of the Electoral Commission should be laid out in more detail and might include the power to decide on questions of qualifications of presidential and other candidates. (¶32)

10.) The presidential veto power should be reduced or eliminated. (¶¶36-37)

11.) The office of the Deputy President might be eliminated. (¶42)

12.) Appointment and dismissal of the Prime Minister should be added to the list of presidential powers. (¶43)

13.) The impeachment trial in the parliamentary option should clearly lead to removal of the President. This could be done by copying provisions from the presidential option in Art. 98. (¶44)

14.) Provisions about who will be appointed as PM in the absence of a party with 50% of the vote should be clarified. (¶45)

15.) Art. 105 should include the words "Following legislative elections,…" We recommend clarifying the appointment process for other instances of presidential appointment. (¶46)

16.) Minor changes should be made to the vote of investiture. The drafters may consider adding a vote of confidence. (¶¶47-49)

17.) Ministers might be allowed to retain parliamentary seats. (¶¶50-52)

18.) The draft sometimes refers to Parliament and other times to the legislature. The House of Regional States is sometimes called the House of *the* Regional States. One or the other should be chosen for consistency. (¶55)

19.) The "permanent" status of the House of Regional States might be replaced with another term. (¶58)

20.) Art. 87.9 should be slightly redrafted. (¶61)

21.) The drafters might consider simplifying the allocation of subject matters over which the Federal Government and the Regional States may exercise legislative power. (¶72)

22.) If the current scheme is maintained, the drafters should change Art. 61.2 to cover the Federal Concurrent List rather than the Regional State Concurrent List. (¶74)

23.) A clear mechanism should be introduced to decide questions over whether legislation affects interests of states or not. The Constitutional Court is one possibility. Replacing the word "states" in Art. 68 with "governments" would likely resolve this. (¶78)

24.) Consideration might be given to removing the phrase in Art. 63.2 that reads "whether within its legislative power or not". (¶84)

25.) Consideration might be given to requiring a uniform form of government in the Regional States identical to that adopted that at the Federal level. (¶90)

26.) Art. 117 should include in the list of Constitutional Court powers that of hearing impeachment cases against the president. (¶95)

27.) Judicial discipline in serious cases should be clarified. (¶102)

28.) The role of the Civil Service Commission should be elaborated in Art. 139. (¶105)

29.) The word "vote" should be changed to "item" in Art. 129. (¶106)

30.) Independent Commissioners should be nominated by the Council of Ministers rather than "relevant" ministers, because the latter term is unclear. (¶107)

31.) Approval of the declaration of war in the parliamentary option might require involvement of "both houses of Parliament", as is the case with the analogous clause in the presidential option. (¶ 114)

32.) The Prime Minister might be given a role in the exercise of presidential commander in chief powers. (¶116)

33.) The use of the term security services should be made consistent. (¶¶117-120)

34.) The power of dismissing the heads of the security services should be assigned. (¶119)

35.) Consideration should be given to adding a clause to the effect that the intelligence services serve under the control and direction of the government. (¶123)

36.) The provisions on emergency should refer consistently either to Parliament or the House of People throughout. (¶127)

37.) The drafters should add explicit provisions explaining how treaties are entered into. (¶133)

38.) The restriction on unamendable provisions should be clarified. (¶¶136-137)

39.) The amendment threshold might be made more flexible. (¶140)

APPENDIX: ANALYTIC TABLE COMPARING SOMALIA'S CONSTITUTIONS

Key:

Y = Yes

N = No or not mentioned in the constitution

(Article numbers in parentheses)

I. Legislative/Executive Relations & Government Structure

Issue	**1960 Constitution**	**2004 Transitional Charter**	**2010 Presidential Option**	**2010 Parliamentary Option**
Regulation of Political Parties		No explicit registration requirement; arguably, political parties must have a national character, because 21.2 defines "political programs interpreting clearly their national political agenda" (21.2)	Registration required (52.1)	
Prohibition of all tribal and military parties	Y (12.2)	Y (21.4)	Y (52.3)	

Electoral Commission to monitor party behavior	N	Y (Duties unspecified) (68.3.l)	Y (53, 54, Chapter 11)	Y (53, 54, Chapter 11)
Bicameral or Unicameral legislature	Y (Unicameral) (49)	Y (Unicameral) (28.2)	Y (Bicameral) (72)	
Powers unique to each chamber of legislature	N	N	Y (73, 74)	
Islam	Islam as the main source of laws of the state (50)	Shariah as the basic source for laws of the state (8.2)	No law in conflict with Islam can be enacted (2.3)	
Formation of Parliament	N	Some level of "sub sub-clans" on membership in Parliament (30.a)	House of the People: direct election (75) House of the Regional States: State executive chooses one of ten representatives, state leg. the other nine (76)	
Party-neutral Speaker of each house	N	N	Y (80.3)	
Ability of President to call special session of Parliament	Y (54.2)	Y (34.2)	Y (82.4)	Y (President acting at request of Council of Ministers) (82.4)
Dissolution of Parliament by executive	Y (By the President, but not during first year of sessions nor during last year in office) (53)	N (Strict limitation on term of Transitional Federal Parliament) (32)	N	Y (Only when unable to approve Council of Ministers and program of government) (83, 106.3)
Public sessions of Parliament	Y (55.3)	N	Y (Unless Speaker deems otherwise) (84.2)	

Quorum requirements	Absolute majority (55.4)	Absolute majority (34.3)	Lower house requires 1/3 members; upper house has 1/3 members covering at least 1/3 of states(85)	
Immunity from prosecution of members of Parliament	Y (Exceptions as approved by Assembly or in *flagrante delicto*) (58.4)	Y (Except in cases of *flagrante delicto*) (35.2)	Y (Total immunity within premises of Parliament; no arrest or charge without approval of Attorney General) (92)	
Simple majority legislation passage	Y (55.5)	N(Heightened majority requirements for veto override, so simple majority may be assumed, but it isn't mentioned)	Y (House of the People - majority of those present and voting House of the States - majority of those present and voting, in which each state delegation casts only one vote)(86)	
Exclusive executive proposal of expenditure and tax bills	N (Tax law excluded from popular initiative) (60.2)	N	Y (87.5)	
Executive veto	Y (2/3 vote required to override) (61.3)	Y (2/3 vote required to override) (61.3, 36.3)	Y (If for procedural reasons, override by simple majority) (88.2); (if for substantive reasons, override by 2/3 vote) (88.3)	Y (As in Presidential Option; but President acts at behest of government/ Prime Minister (88.2; 88.3)
Delegation of legislative power to government	Y (on specific matters for a limited period) (62)	N	N	
Executive decree power	Y (Temporary; Assembly decides	Y (President signs decrees approved by	N	

	whether to make law within 30 days if in session, within 30 days after start of session if not) (63, 85)	Council of Ministers) (44.4.b)		
Review of legislation for constitutionality	Y (Supreme Court acting as Constitutional Court on petition from Attorney General or from party in a judicial proceeding) (98-99)	Y (Supreme Court on petition from any person)(4.2)	Y (Constitutional Court, with both *ex ante* review power (88.4) and *ex post* (117)	
Investigatory power and power to interpellate ministers	Y (69)	Y (53.5)	Y (Including subpoena power) (90, 91)	
Independent Leader of the Opposition	N	N	Y (93)	
Approval of Government budget by legislature	Y (Approving law cannot establish new provisions) (66)	Y (33.d)	Y (73)	
President elected by Parliament	Y (Elected by Assembly) (70)	Y (41.1)	N	Y (96)

Presidential terms	6 years, no more than two consecutive terms, but non-consecutive terms allowed (71.1; 72)	5 years, without limit on re-election, but also allows for indefinite tenure until provisions of Charter provide for new election) (43.1)	Two 5-year terms (100)	A single six-year term (98)
President as commander-in-chief of armed forces	Y (75.f)	Y (39.1.b)	Y (101.2)	Ceremonial power only (99.1)
Presidential power to assent to or veto legislation	Y (61.3)	Y ((Sch. II)	Y (101.3)	N (At behest of Prime Minister or gov't) (88.2, 88.3, 99.2)
Presidential power to declare war	N (Only upon authorization by Assembly) (68)	N	Y (101.5)	N (Only upon request of Council of Ministers with approval of Parliament) (99.4)
Immunity from prosecution of President	Y (76.1)	N	N (Serious criminal offenses allow impeachment)	N
Impeachment proceedings against President	Y (Impeachable by Assembly for high treason or attempts against the constitutional order) (76.3)	Y (Impeachable for violation of the Transitional Charter) (43)	Y (Impeachable jointly by House of the People and House of the Regional States for serious breach of Constitution, serious abuse of office, or serious criminal offenses; tried before	Y (Impeachable by House of the People for gross violation of Constitution or high treason; tried before Constitutional Court) (97)

			Constitutional Court) (98)	
Ministerial responsibility for acts of President to which they ascribe	Y (76.2)	N	N	N
Prime Minister from largest party in first chamber	N (Appointed and dismissed by President) (78.3)	N (Appointed by President) (46.2)	N	Y (105)
Council of ministers and program of government approved by first (only) chamber (vote of investiture)	Y (82)	Y (44.2)	N	Y (106)
Vote of no confidence provisions	Y (82)	Y (53.7)	N	Y (110)
Vote of confidence provisions (Government engages confidence of Parliament)	Y (82.1)	N	N	N
Direct election of President	N (Elected by National Assembly)	N (Elected by Parliament)	Y (Vote details in) (96.1) (96.2)	N (Sch. 3)
Explicit allowance for independent candidates for president	N	N	Y (97.1, 97.3)	Y (Unlikely, based on procedure) (Sch3)
Removal of head of government procedures	Y (78.3, 82, 84)	Y (51.1)	N	Y (110)

(other than impeachment)				
Independence of judicial branch	Y (93)	Y (55.1)	Y (114)	Y (114)
Head of gov't standing to bring case before Constitutional Court	N	N	Y (President) (118.1.a)	Y (Prime Minister) (118.1.b)
Limitations on judicial removal	Y (Left to law) (96)	Y (55.2)	Y (125)	Y (125)
Provisions for selection of members of independent committees	N	Y (68)	Y (Proposal by Council of Ministers, Approval by House of People) (131)	Y (Proposal by Council of Ministers, Approval by House of People) (131)
Head of gov't appoints heads of armed forces and intelligence services	Y (high officials and commanders of military forces appointed by President on proposal of competent Minister) (87)	N	Y (President) (167.1)	Y (President at behest of Prime Minister) (167.1)
Use of armed forces requiring joint approval by head of gov't and House of the People	N	N	Y (167.2)	Y (167.2)
State of emergency requiring joint approval by head of gov't and	N	N	Y (169.3)	Y (169.3)

House of the People				

II. Federalism and Devolution

Issue	1960 Constitution	2004 Transitional Charter	2010 Consultation Draft
Articulation of principles of federalism based in efficiency	N (Administrative Decentralization whenever possible) (86)	N	Y (power distributed to, and revenue raised at, most efficient level of government) (56)
Annual conference of executives of regional governments to better facilitate cooperation	N	N	Y (Water resources, agriculture, health, and education) (57)
Federal government provenance of local government framework and guiding principles	N	Y (Weak definition and three levels of local administration) (11.2, SchI.4)	Y (59)
Explicit allocation of regional authority	N	N	Y (60)
Procedure for exercise of Regional Concurrent powers by federal law	N	N	Y (61)
Delegation of powers procedure	N (Administrative Decentralization whenever possible) (86)	N	Y (62)

Allowance for local/traditional dispute resolution mechanisms	N	N	Y (64.2, 123)
Allowance for federal takeover of failing regions	N	N	Y (66)
Mediation & negotiation of regional disputes followed by arbitration by Constitutional Court	N	N	Y (68, 117.4.d)
State Boundaries Dispute Commission	N	Y (Demarcation Commission) (68.3.h)	Y (69)
New state creation	N	N	Y (70)
One chamber dedicated to representation of regional interests	N	N	Y (74, 76, 79.3)
Separate procedure for legislation that does/doesn't affect regional interests	N	N	Y (87.7, 87.9)
Regional input into Judicial Service Council	N	N	Y (127.1.f)
Establishment of regional legislature by regional constitution	N	N	Y (140)
Principles for regional constitutions	N	N	Y (must be compatible with national Constitution, ensure

			protection of minorities) (141)
Constitution adoption and amendment procedure for states	N	N	Y (Democratic, reviewed by Constitutional Court) (142, 143)
Restrictions on, and principles governing federal revenue distribution to states	N	N	Y (147, 148, 151, 157.3)
Restrictions on state borrowing	N	N	Y (Federal approval) (149)
Transparent public contracts	N	N	Y (156)
Federal legislation of state budget presentation and timetables	N	N	Y (161)
Informal state input into national constitutional amendment	N	N	Y (171.9)
Exclusive regional powers	N	Y (Detailed list of functions) (Sch. II)	Y (General list of locally-pertinent areas) (Sch. 2.1)
Concurrent Federal and state powers	N		Y (powers that would ideally be regional but regions lack power to enforce) (Sch. 2.2)
Exclusive Federal powers	N	Y (Detailed list of functions) (Sch. I)	Y (largely national-level concerns) (Sch. 2.3)

Regional taxation powers	N (Administrative decentralization whenever possible) (86)	N	Y (local efficiency balanced with need for national uniformity) (Sch. 2.4)

III. Rights

Issue	**1960 Constitution**	**2004 Transitional Charter**	**2010 Consultation Draft**
Equality	Equal rights and duties before law (3)	Equal before law; equality includes full and equal enjoyment of rights and freedoms (15.1)	Everyone equal before law (17)
Human dignity	All equal in social dignity (23)	N	Human rights = manifestation of human dignity; dignity is a right; state power must not be used in way that disregards human dignity (16)

Discrimination	Without distinction of race, national origin, birth, language, religion, sex, economic or social status or opinion (3)	Without distinction of race, birth, language, religion, sex or political affiliation (15.1)	State cannot discriminate on grounds incl. but not limited to: race, color, clan, sex, ethnic or social origin, culture, dialect/language, birth, religion, , opinion, occupation and property, ; *BUT* measures intended to achieve full equality for people/groups previously discriminated against are permitted (17.4)
Life	Right to life and personal integrity; death penalty only for most serious crimes against human life or personality of state (16.1)	Everyone has right to life; no one shall be deprived of life (16)	All have right to life (18)
Slavery	Subjection to any form of slavery or servitude punishable as crime (17)	No one should be deprived of his personal liberty, personal freedom (16.2) Forced labor for people under 18 shall not be allowed (26.d)	A person cannot for any purpose subject another person to slavery, servitude, trafficking for any purpose or forced labor (19)
Liberty	Every person shall have right to personal liberty (17)	No person to be deprived of personal liberty (16.2)	Right to personal liberty (20.1)
Security	N	No person to be deprived of personal security (16.2)	Right to personal security: freedom from unlawful arrest, violence, forms of torture and

			freedom from any cruel, inhuman, or degrading treatment or punishment (20.2)
Physical integrity	N	Any physical or moral violence or action against person subject to restriction of personal liberty shall be punishable as crime and hence is prohibited (16.4)	Physical integrity is inviolable – cannot be subjected to medical or scientific experiments without consent of person or consent of near relative with support of expert doctor (20.3)
Female genital mutilation	N	N	Prohibited (20.4)
Abortion	N	N	Abortion prohibited except in cases of necessity (20.5)
Association	Every person has right to freely form associations without authorization; no person can be compelled to join an association or continue to belong to it; secret associations or those having organization of a military character shall be prohibited (26)	Right to organize, form, take part in political, labor, professional or social entities in conformity with law, without prior gov't authorization; Right to associate with other persons and in particular to establish any social organization in accordance with law; no person can be compelled to join/continue to belong to association of any kind (cannot establish secret associations or military	Freedom of association – incudes right to form/belong to organizations, including trades unions, includes freedom not to associate (21)

		defense or paramilitary organizations) (14.2.b)	
Religion/Belief	Every person has right to freedom of conscience and freely to profess his own religion and to worship it; subject to limits prescribed by law for purpose of safeguarding morals, public health or order; no religion other than Islam can be spread or propagandized (17, as amended in 1963)	N	Free to practice his/her religion; BUT no Muslim can renounce Islam, no religion other than Islam can be propagated (22)
Expression	Every person has right to freely express his own opinion in any manner, subject to limitations which may be prescribed by law for purpose of safeguarding morals and public security; expressions of opinion may not be subject to prior authorization or censorship (28)	Right to freely express his/ her own opinion in any manner (subject to any limitation which may be prescribed by law for purpose of safeguarding morals and public security) (20.2) Right to freely express opinion orally, written form or any other manner without censorship (19.1.c)	Right to express: opinions, impart info and ideas Right to seek and receive ideas (23.1-2)
Creativity/ academic freedom	N	N	Right to express artistic creativity; to academic freedom; freedom of scientific

			research (23.3)
Inviolability of home	Every person has right to inviolability of domicile; no inspection, search or seizure shall be carried out in domicile or other place reserved for personal use except when apprehended flagrante delicto or pursuant to act of competent judicial authority or in cases prescribed by law, or in cases of urgent necessity defined by law under provisional measures, and with reasons communicated to the person; in other cases prescribed by law for judicial purposes; inspections for public health, safety or fiscal purposes shall not be carried out except in cases/manner prescribed by law (21)	No person shall be subjected to inspection, personal search of his/her house or property without permission of competent judicial authority related to health and tax. In every case, self respect and moral dignity of person concerned must be preserved (16.3)	Right to inviolability of that person's home; protects home from unlawful search (24)
Privacy	Every person has right to freedom and secrecy of written correspondence and any other means of communication; limitations only in special cases (same as those for domicile) (22)	Shall be no interference of personal communication (14.4)	Right to privacy; right protects property from interference, invasion, unlawful search or seizure; protects every person, their conversations and other communications from interference or invasion (24)

Assembly	Every person has right to assembly in peaceful manner for peaceful purpose; law may provide that previous notice of public meeting be given to authorities; meetings can be forbidden only for reasons of public health, safety, morality, order or security (25)	Right to assemble freely (22)	Right to gather together peacefully with others, and to demonstrate and protest peacefully without need to seek prior authorization (25)
Petition	Every citizen has right to address written petitions to president of republic, the national assembly and the government; every petition which is not manifestly unfounded shall be examined (10)	N	Title is: freedom of assembly, demonstration protest and petition BUT freedom to petition not specifically mentioned within text under that heading
Movement	Every citizen has right to reside and travel freely in any part of territory of state and shall not be subjected to deportation (11.1)	Right to reside, work and travel freely in any part of country (14.2)	Right to freedom of movement, to choose residence (26.1)
Movement beyond borders	Every citizen has right to leave territory of state and return thereto (11.2)	N	Right to enter and remain in country, freedom to leave country; right to passport (26)
Political Parties	Every citizen has right to associate in political parties without previous authorization	Right to associate with political parties, political programs interpreting clearly	Art. 27 Right to form political parties;

	for purpose of cooperating democratically and peacefully in shaping of national policy; political parties which are secret, have organization of military character or tribal denomination shall be prohibited (12)	their national political agenda; political parties shall be open for all citizens and guided by principles of democracy; Political party of military character or tribal nature shall be prohibited; political forces shall have right to form alliances (21)	right to take part in activities of political parties
Vote	Every citizen who possesses qualifications required by law shall have right to vote (8.1)	Right to vote upon turning 18; all citizens possessing qualifications required by law have right to vote (14.2.c, 21.6)	Right to vote in free and fair elections for adult citizens (27)
Stand for Election	Every citizen who possesses qualifications required by law shall be equally eligible for public office (8.2)	All citizens possessing qualifications required by law have right to be elected to public office; every citizen shall have right to, subject to this Charter, contest for any vacant seat (21.6)	N
Trade/ occupation/ profession	N	N	Right to choose trade, occupation, profession freely (28)
Labor	State shall protect labor and encourage it in all its forms and applications; every worker shall have right to receive, without	Labor rights: no worker shall be discriminated against, each shall have right to salary and equal pay commensurate to work performed and other	Right to fair labor practices (29.1)

	discrimination, equal pay for work of equal value so as to ensure existence consistent with human dignity; each worker has right to weekly rest and annual leave with pay which he cannot be compelled to renounce; law establishes maximum working hours and minimum age; state shall protect physical and moral integrity of workers (35)	benefits as shall be stipulated by laws of country; shall not be compelled to forfeit right to weekly rest and annual leave with pay; law shall establish working hours; law shall establish minimum age and salary for workers (18)	
Trade union	Every citizen has right to form trade unions or join them for protection of his economic interest (13)	Right to assemble freely with other persons and in particular to form or belong to trade unions or other associations for the protection of his/her interests; workers for transitional Federal government have right to form trade unions (19)	Right to form/join trade union, to participate in activities of trade union (29.2)
Strike	Right to strike is recognized and may be exercised within limits set by law; any act tending to discriminate against or restrict free exercise of trade union rights shall be prohibited (27)	Freedom to strike; right to mobilize and participate in any meeting or demonstration (19)	Right to strike (29.3)

Collective bargaining	Trade unions being juridical persons may negotiate collective labor contracts binding on their members (13)	N	Trade union/employer's organization or employer has right to engage in collective bargaining (29.4)
Environment	N	N	Right to environment that is not harmful to wellbeing, to have the environment protected from pollution (30)
Natural resources	Law may control exploitation of economic resources of the territory of the state (14)	N	Right to have natural resources of nation protected from unsustainable exploitation (30)
Property	Right to own property shall be guaranteed by law which shall define modes of acquisition and limits to enjoyment thereof for purpose of ensuring social function (24)	Right to own private property shall be guaranteed by law, which shall define its contents and limits (27.3)	Right to own/use/dispose of property (31.1)
State appropriation of property	Only for reasons of public interest; in manner prescribed by law; in exchange for equitable and timely compensation (24)	Personal property can be expropriated for public interest in exchange for equitable and timely compensation; property shall be returned to owner or his/her heirs in accordance with law (27.4)	State can only compulsorily acquire property if: it is in public interest, parties have agreed or court has decided on just compensation; compensation should be prompt; exception – restoration of property contemplated in art. 49 (31.2)

Economic	Every citizen shall have right to economic initiative within framework of laws (14)	Economic system shall be based on free enterprise (27)	N
Copyrights	N	Copyrights pertaining to arts, science, technology shall be protected and law shall regulate contents/limits of its exercise (27)	N
Women	Law shall ensure that women work only under suitable conditions (36)	Government shall guarantee public social welfare by creating positive environment for women to participate effectively in economic social and political life of society (26.i)	N
Health	State shall protect public health and promote free medical assistance for indigent persons (33)	Responsibility of government to protect and provide public health, safe motherhood, childcare and control communicable diseases; law shall regulate establishment of private health centers and clinics (26)	Right to health (32.2)
Social security	State shall promote social security and assistance by law; state shall guarantee to civil and military employees the right to pension; shall guarantee in accordance with	Government to guarantee to its employees the right to pension, assistance in case of accident, illness, or incapacity to work. Law shall guarantee pension for private sector	Right to social security, incl. social assistance (32.3)

	law assistance in case of accident, illness, or incapacity for work (38)	employees (18.5 closest)	
Social Welfare	State shall promote and encourage creation of welfare institutions for physically handicapped persons and abandoned children (32)	Government to guarantee welfare of persons with disabilities, orphans, widows, heroes who defended country, and the elderly (26)	Right to adequate standard of living, incl. adequate food, water, housing (32)
Family	Family based on marriage, as the fundamental element of society, shall be protected by the state (31)	Family shall be recognized as the basic unit of the society whereas religion; state shall protect and encourage marriage (25)	State shall protect the family based on marriage as the fundamental element of society (33)
Elderly	Children of full age obligated to support parents when parents are unable to support themselves (31.4)	Children of full age obligated to support parents when parents are unable to support themselves (25.4)	Adults have a duty to support their parents, if the parents are unable to care for themselves (33)
Children's right to care	Parents shall provide for support, education and instruction of children, as required by law; law shall provide for fulfillment of these obligations in case of death of parents and whenever parents do not perform them; state shall recognize protection of children of unknown parents as its duty (31.2-3)	Parents shall support their children, education and welfare, as required by law (25.3)	Right to care, incl. education and instruction, from parents or care from others if not in family environment; applies as well to street children, children of unknown parents (whose rights the state has a special duty to fulfill and protect). Children specifically defined as under 18 years old. (33.3)

Children – name / nationality	N	Obligation of parents/guardian to register child upon birth (26)	Right to name and nationality from birth (34.1)
Treatment of Children	N	N	Right to be protected from mistreatment, neglect, abuse, or degradation (34.2)
Child labor	Law shall ensure that minors work only under suitable conditions (36)	Government shall guarantee that forced labor or military service for children under 18 cannot be permitted (26)	No child may perform work or provide services not suitable for the child's age or which creates a risk to their health/development (34.3)
Detention of Children	N	Children under 18 shall not be imprisoned in same prison and/or custody as those for adults in accordance with law (26)	Children may be detained only a last resort, for shortest tim possible, separately from adul except immediate family, appropriate conditions; fami must be informed asap (34.4)
Children -Legal assistance	N	N	Right of child to legal assistance in any legal proceeding affecting child at state's expense if substantial injustice may otherwise result (34.5)
Children – armed conflict	N	Government shall guarantee that military service for children under 18 cannot be permitted (26)	Right to be protected from armed conflict; children may not be used in armed conflict (34.6)

Importance of Child's interest	N	N	Child's interests of paramount importance in any matter concerning child (34.7)
Education	State shall encourage education, as being a fundamental interest of the community and provide for creation of state schools open to all; freedom of teaching guaranteed by law (35) Teaching of Islam compulsory for pupils of Islamic faith in primary and secondary state schools and in schools having parity of status; teaching of holy Koran shall be fundamental element in primary and secondary state schools for Muslims (35)	Basic right for all Somali citizens (24.1) Teaching of Islam compulsory for pupils in all public and private schools (16.5)	Right to education, incl. right to pursue it without interference from state or other persons; implies duty of state to protect the right from interference; state to develop and implement developmental programs for the progressive fulfillment of right to education (35.1-3, 35.5)
Free Education	Primary education in public schools shall be free (35)	Right to free primary and secondary education (16.5)	Right of children to free/compulsory primary education (including both Islamic and general); right of everyone to basic education (35.4)
Higher Education	Institutes of higher education shall have their own autonomous organization within limits prescribed by law	Government shall promote higher education and the establishment of technical institutes as well as	N

	(35.7)	technology and research institutions (24)	
Educational institutions	Organizations and individuals have right to establish, in accordance with law and without financial support from state, schools and educational institutions; private schools may have parity of status with state schools and institutions under conditions laid out by law (35)	Private schools, institutes and universities may be established according to law and in line with educational program and academic curriculum of country (24.5)	Right to establish and maintain independent educational institutions at their own expense, provided these institutions must satisfy reasonable standards prescribed by state (35.6)
Language and Culture	N	N	Right to use language and participate in cultural life of that person's choice (incl. cultural or linguistic minority) (36)
Access to Information	N	N	Right of access to info held by state, info held by another person that is required for exercise or protection of any right; Parliament to enact law to give effect to this right, but even in absence of such law authorities shall be as open as possible with providing info (37)
Press	N	Freedom of press and independent media in	N

		accordance with law (20)	
Administrative Actions	Judicial protection against acts of public administration shall be allowed in all cases, in manner/with effects prescribed by law (39) Whoever suffers damages from acts or omissions in violation of his rights by officials or employees of state or public bodies in performance of their duties has right to obtain compensation from state or public bodies concerned; liability of officials to be governed by law (40)	Penal, civil, and administrative liabilities of officials and employees of the government shall be governed by law (17)	Right to administrative action that is lawful, reasonable, and procedurally fair (38)
Access to courts	Every person has right to institute legal proceedings under conditions of full equality before lawfully constituted court (38)	Right to institute legal proceedings in competent court (17)	Right to fair/public hearing within reasonable time by impartial court or other tribunal to determine any question of civil rights and obligations or any criminal charge (39)
Self incrimination	N	N	Person cannot be compelled to incriminate themselves (40.1)

Speedy trial	N	Any arrested for suspicion or restricted from personal liberty shall have access to competent judicial authority within 48 hours and confirmed by it within time prescribed by law (16.6)	Everyone who is arrested has right to be brought before court as soon as reasonably possible but no later than 48 hrs. after arrest (40.2)
Grounds for arrest	No one can be liable to any form of detention or other restriction of personal liberty except when apprehended in flagrante delicto or pursuant to act of competent judge stating the grounds thereof, in the cases and in manner prescribed by law; In case of detention or other restriction the reasons for the measure shall be communicated to the person concerned without delay (17)	No one can liable to any form of detention or other restrictions of personal liberty except when apprehended flagrante delicto or pursuant to any act of the competent judicial authority (16.5) Shall be informed as soon as reasonably practicable in a language he/she understands and in detail of the nature of offense with which he/she is charged (17)	Everyone who is arrested has right to be informed promptly of arrest or detention in language which person understands (40.3)
Legal representation (when arrested and at trial)	State shall guarantee under conditions and in manner prescribed by law; free legal aid to the poor (41)	Government shall guarantee free legal services for individual citizens who cannot afford them; every person detained, imprisoned, or restricted shall be permitted right to defend him/herself (17.2)	Everyone who is arrested or detained has right to choose/consult with practitioner; right to be represented by lawyer incl. in right to fair trial (40.4, 40.6.)

Fair trial	N	Not specifically mentioned	Everyone who is tried for alleged criminal offense is entitled to fair trial (40.5)
Personal penal liability	Penal liability shall be personal; any kind of collective punishment shall be forbidden (43)	N	Cannot be convicted for act committed solely by another person (40.6.g)
Presumption of innocence	Every person shall be presumed innocent until conviction has become final (43)	Every person charged with criminal offense shall be presumed innocent until proven guilty in competent court of law (17.2.a)	Fair trial includes right to be presumed innocent until proven guilty (40.6.a)
Forced confession	N	N	Fair trial includes right not to be convicted on basis of forced confession (40.6.b)
Presence at trial	N	Right to defend self in court in person (17.3)	Fair trial includes right to be present at trial (40.6.d)
Challenging evidence	N	N	Fair trial includes right to challenge evidence presented (40.6.e)
Defense	Right of defense allowed at every stage of legal proceedings (41)	Right to defend him/herself; every person charged with criminal offense shall be given adequate time and facilities for preparation of his/her defense at any stage of legal proceeding (17)	N

Interpreter at trial	N	N	Fair trial includes right to interpreter if accused person does not understand language used in court (40.6.f)
Ex Post Facto enforcement	No person can be convicted for an act which was not punishable as an offense under law in force at the time when it was committed, nor may heavier punishment be imposed than the one applicable at that time (42)	N	Fair trial includes right to not be convicted of crime for committing act that was not offense at time committed unless it is a crime against humanity under international law (40.6.g)
Extradition	Extradition may be granted only in the cases/manner prescribed by law, subject to prior international convention; no person may be subjected to extradition for political offenses (19)	Extradition granted only against person accused of committing crime in his or another country only if extradition treaty exists between Somalia and country requesting it (23)	Extradition can be granted only in cases and manner prescribed by law subject to prior international treaty or convention (41)
Refugees/ Asylum	Any alien persecuted in his own country for political offenses shall have right to asylum in the territory of the state in the cases and under conditions provided by law (19.3)	May grant asylum to person and close relatives who flee his/another country on grounds of political, religious, or cultural persecution unless person seeking refuge has committed crime against humanity (23)	Right of person who has sought refuge in Somalia to not be returned or taken to another country if person has well-founded fear of persecution in that other country (42)

Limiting rights	N	N	Rights set out in this chapter may be limited by law, provided that law is not targeted at particular individuals or groups; limitation must be demonstrably reasonable and justified according to values underlying constitution, taking into account all relevant factors (including nature/importance of right, importance of purpose of limitation, whether limitation is suitable to purpose, whether purpose could be achieved while being less restrictive of rights); possible restriction of fundamental rights during state of emergency is dealt with in Chapter 15 (43)
Remedies for violations	Any physical or moral violence against a person subject to restriction of personal liberty shall be punishable as a crime (18)	N	Law shall provide adequate procedures for redress for violations of human rights; redress must be available in readily accessible courts; any person or organization can go to court to protect rights of others unable to do so for themselves (44)

Interpreting rights	N	N	When interpreting rights shall take approach that seeks to achieve purposes of rights/values underlying them; consider Shariah and international law and decisions of courts in other countries; recognition of rights in this chapter does not deny existence of any other rights that are recognized or conferred by Shariah or by customary law or legislation to extent that they are consistent with Shariah and constitution (45)
Misc. interesting provisions	Art. 34 State shall safeguard public morality in the manner prescribed by law (34) Every person shall have right to a personal status in accordance with his respective laws/customs; personal status of Muslims governed by principles of Shariah (30) No personal service or property levy may be imposed save in accordance with law	Government shall safeguard public morality of society; shall endeavor to promote social welfare and development of rural population (26.g) Any NGO with objective of either human rights or environmental protection shall be registered and allowed to operate in the Somali republic in accordance with international treaties and laws of the country (22)	N

	(20)	Government shall encourage, support, and provide full guarantee to foreign investment in the country as specified by law (27)	

IV. Courts and Legal Proceedings

Issue	1960 Constitution	2004 Transitional Charter	2010 Consultation Draft
Right to Institute Legal Proceedings	Every person shall have the right to institute legal proceedings, under conditions of full equality, before a lawfully constituted court (38)	Every person shall have right to institute legal proceedings in a competent court (17)	Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court or other tribunal to determine: 1. Any question of civil rights and obligations; or 2. Any criminal charge (39)
Protection Against Acts of the Public Administration	Judicial protection against acts of the public administration shall be allowed in all cases, in the manner and with the effects prescribed by law (39)		
Civil Liability of the State for the Acts of its Officials and Employees	Civil Liability of the State for the Acts of its Officials and Employees: 1. Whoever suffers damages from acts or omissions in violation of his rights by	The penal, civil and administrative liabilities of officials and employees of the Government shall be governed by law (17)	

	officials or employees of the State or of public bodies in the performance of their duties, shall have the right to obtain compensation from the State or the public bodies concerned 2. The penal, civil and administrative liability of officials and employees for the acts or omissions referred to in the preceding paragraph shall be governed by law (40)		
Right of Defense	1. The right of defense shall be allowed at every stage of the legal proceedings 2. The State shall guarantee, under the conditions and in the manner prescribed by law, free aid to the poor (41)	1. Every person who is charged with a criminal offence: a) Shall be presumed to be innocent until he/she is proven guilty in a competent court of law b) Shall be informed as soon as reasonably practicable, in a language that he/she understands and in detail, of the nature of the offence with which he/she is charged c) Shall be given adequate time and facilities for the preparation of his/her defense at any stage of the legal proceedings	1. Everyone who is arrested or detained has the right to choose, and to consult with, a legal practitioner 2. Everyone who is tried for an alleged criminal offence is entitled to a fair trial 3. A fair trial includes: a) the right to be presumed innocent until proven guilty b) The right not to be convicted on the basis of a forced confession c) The right to be represented by a lawyer chosen by the accused person

		2. Every person detained, imprisoned or restricted shall be permitted the right to defend himself/herself in a court in person or communicate with his/her relatives, lawyer of his/her own choice whenever he/she requires 3. The Government shall guarantee free legal services for individual citizens who cannot afford them (17)	d) The right to be present at their trial e) The right to challenge the evidence presented f) The right to an interpreter if the accused person does not understand the language being used in the court (40)
Non-retroactive Nature of Penal Law	No person may be convicted for an act which was not punishable as an offence under the law in force at the time when it was committed; nor may a heavier punishment be imposed than the one applicable at the time (42)		1. Everyone who is tried for an alleged criminal offence is entitled to a fair trial 2. A fair trial includes: A person may not 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 (40)
Penal Liability	1. Penal liability shall be personal. Any kind of collective punishment shall be forbidden 2. The accused shall be	Every person who is charged with a criminal offence: Shall be presumed to be innocent until he/she is	1. Everyone who is tried for an alleged criminal offence is entitled to a fair trial 2. A fair trial includes:

	presumed innocent until the conviction has become final (43)	proven guilty in a competent court of law (17)	a) The right to be presumed innocent until proven guilty b)Criminal liability is a personal matter and not person may be convicted of a criminal offence for an act committed solely by another person (40)
Social Purpose of Punishment	Punishments restrictive of personal liberty shall not consist of treatment contrary to feeling of humanity or obstruct the rehabilitation of the convicted (44)		
Enforcement of Punishments	Supervision over the enforcement of punishment and security measures shall be exercised by the competent court in accordance with law (45)		
Redress of Judicial Errors	The conditions and the procedure for the redress of judicial errors shall be prescribed by law (46)		
The Judiciary			
Judicial Authority	The judicial power shall be vested in the judiciary (92)	1. The judicial power of the Somali Republic shall vest in the courts 2. The judicial power shall	Judicial authority is vested in the courts (113)

		encompass jurisdiction over Civil, Criminal, Administrative and Commercial matters and any other matter specified by this Charter or any other laws of the land (54)	
Independence of Judiciary	The Judiciary shall be independent of the executive and legislative powers (93)	1. The Judiciary shall be independent of the legislative and executive branches of Government and in the exercise of their judicial function; the members of the judiciary shall be subject only to the law 2. A Judge shall be removed from office only for inability to perform the function of his/her office (whether arising from infirmity of body or mind or from any other cause) or for misbehavior, and shall not be removed except in accordance to this Clause 3. A Judge shall be removed from office by the President if the question of his/her removal has been referred to a Tribunal appointed by the Parliament and the Tribunal has recommended to the Parliament that the Judge ought to be removed from office for inability as aforesaid or misbehavior	1. The Judiciary shall exercise its judicial function independently of the legislative and executive branches of government. Judges are subject only to the law 2. No civil or criminal proceedings shall be instituted against a judge in respect of any act performed in the course of judicial functions 3. The home or person of a judge may not be searched without the authorization of the Judicial Service Council (114)

		4. Members of the judiciary shall not hold offices, perform services, or engage in activities incompatible with their functions (See 1960 Article 96(4)) 5. Administrative and disciplinary measures relating to members of the judiciary shall be adopted, as provided by law, by decree of the President of the Republic on the proposal of the minister of Justice and Religious affairs and in conformity to the decision of the Judicial Service Council. (See 1960 Article 96(5). 6. The Judiciary shall not be subject to the direction of any other organ or body 7. The Judiciary shall interpret and implement the law in accordance with the Charter and laws 8. Parliament shall make law setting the terms of the appointment, dismissal, discipline and terms of service of judges (55)	

		No criminal proceedings shall be instituted against a sitting judge, nor be interrogated as object of criminal investigation, or his person or domicile be searched nor shall be arrested unless caught in the commission of a crime, or without the authorization of the Judicial Service Council (58)	
The Court System		The court system shall consist of: 1. The Transitional Supreme Court 2. The Transitional Appeal Court 3. Other Courts established by Law (60)	There shall be one national system consisting of: 1. The Constitutional Court 2. The Supreme Court 3. The Appeal Court 4. A unified system of First Instance Courts (116)
The Supreme Court	1. The Supreme Court shall be the highest judicial organ of the Republic. It shall have jurisdiction over the whole territory of the State in civil, criminal, administrative, and accounting matters, and in any other matter specified by the Constitution and by law 2. The organization of the Supreme Court and of the other judicial organs shall be	1. There shall be a Supreme Court, which shall be the highest court in the Somali Republic and shall have unlimited original jurisdiction in the whole territory in Civil, Criminal, Commercial, and such other powers as may be conferred on it in this Charter or any other law 2. In addition to any other jurisdiction under this Charter	1. There shall be a Supreme Court comprising nine judges including a Chief Judge. 2. The Chief Judge of the Supreme Court shall be elected by the members from amongst their number; 3. Judges of the Supreme Court shall have appropriate qualification in Shariah and law;

	established by law (94)	or any other law, the Supreme Court shall have the power to hear and determine judgment on any dispute about the Transitional Federal Charter and other laws 3. One of the Judges of the Supreme Court shall be the President of the Court and such other Judges as may be prescribed by Law 4. The Judges of the Supreme Court shall have the security of Tenure while in office 5. Parliament shall make law regarding the structure and composition of the Supreme Court (61) The seat of the Supreme Court shall be in the capital of the Somali Republic (62)	4. The Supreme Court shall have jurisdiction over all issues except matters which are within the exclusive jurisdiction of the Constitutional Court (120)
Unity of the Judiciary	1. No extraordinary or special courts shall be established 2. There may only be established, as part of the ordinary courts, specialized sections for specific matters, with the participation, where necessary, of citizens who are experts, from outside the Judiciary	1. No extraordinary or special courts shall be established, except for military tribunals, which shall have jurisdiction only over military offences committed by members of the armed forces both during war and peacetime 2. The public, both civilian and military, shall directly	1. No court shall be established without conformity to principles of justice as stipulated by the constitution 2. Legislation may establish military courts which shall have jurisdiction only over military offences committed by members of the armed forces during war and peace time

	3. The jurisdiction of Military Tribunals in time of war shall be established by law. In time of peace, they shall have jurisdiction only in respect of military offences committed by members of the Armed Forces. 4. The people shall participate directly in assize proceedings, in the manner prescribed by law (95)	participate in Judiciary proceedings in conformity with those laws defining such participation (57)	(121)
Judicial Appointment and Tenure	1. In the exercise of their judicial function, the members of the judiciary shall be subject only to law 2. The rules concerning the legal status and the appointments of members of the judiciary shall be established by law 3. Members of the Judiciary shall not be removed or transferred except in the cases specified by law 4. Members of the Judiciary shall not hold offices, perform services or engage in activities incompatible with their functions 5. Administrative and	1. All the Judges shall be appointed by the President acting in accordance with the advice of the Judicial Service Council 2. The appointment of Judges shall be based on legal qualification and competence 3. A person shall not qualify to be appointed a Judge of the Supreme Court unless: a) He/she is, or has been, a Judge of the Appeal Court having unlimited jurisdiction in Civil, Commercial, and Criminal matters; or b) He/she is an advocate of the High Court of	1. In order to be appointed as a Judge, a person shall be of the highest integrity, as well as possessing the qualifications and experience appropriate to the particular judicial post(124) 2. The Judicial Service Council shall propose names of Judges of the Constitutional Court and the Supreme Court to the House of the Regional States. If the House of the Regional States approves the name of a person to be appointed as Judge, the President shall appoint that person (124) 3. Judges other than those of the Constitutional Court and the Supreme Court shall be

	disciplinary measures relating to members of the Judiciary shall be adopted, as provided by law, by decree of the President of the Republic, on the proposal of the Minister of Grace and Justice, having heard the Higher Judicial Council (96)	Somalia of not less than five (5) years standing 4. If the office of a Judge is vacant, or if a Judge for any reason is unable to discharge the functions of his/her office, or a judge retires at the attainment of sixty-five (65) years of age; a new judge shall be appointed on the proposal of the Judicial Service Council by the President (59) 5. A Judge shall be removed from office only for inability to perform the function of his/her office (whether arising from infirmity of body or mind or from any other cause) or for misbehavior, and shall not be removed except in accordance to this Clause 6. A Judge shall be removed from office by the President if the question of his/her removal has been referred to a Tribunal appointed by the Parliament and the Tribunal has recommended to the Parliament that the Judge ought to be removed from office for inability as aforesaid or misbehavior	nominated by the Judicial Service Council and the President shall appoint the person or persons nominated. (124) 4. The retirement age of a judge is 70 years (125) 5. No judge may be removed from office except for proven grave misconduct, or physical or mental incapacity. The law on judiciary shall have provisions on procedures related to removal of judges (125) 6. Complaints against a judge for misconduct, may be made to the Judicial Service Council which shall take appropriate action if it is satisfied that there are reasonable grounds for proceeding further. Appropriate action includes reference to the inspectorate of the judiciary, or in more serious cases, the appointment of an independent commission(125) 7. If the Judicial Service Council believes that there are reasonable grounds to believe that a judge is guilty of grave

		7. Members of the judiciary shall not hold offices, perform services, or engage in activities incompatible with their functions (See 1960 Article 96(4)) 8. Administrative and disciplinary measures relating to members of the judiciary shall be adopted, as provided by law, by decree of the President of the Republic on the proposal of the minister of Justice and Religious affairs and in conformity to the decision of the Judicial Service Council (55, see 1960 Article 96(5))	misconduct, it shall appoint an independent commission composed of three judges or former judges to investigate the conduct of the judge. The judge shall be dismissed if the commission concludes that grave misconduct has been established against the judge (125) 8. If the Judicial Service Council believes that there is reason to believe that a judge is incapable of performing the functions of the office because of physical or mental capacity, it shall appoint a commission to inquire into the health of the judge. The commission shall comprise relevant medical experts as well as at least one former judge. If the commission finds that the judge is unfit to continue in office, the Judicial Service Commission shall retire the judge with pension benefits (125) 9. The inspectorate of judiciary shall be established by law (125)
Judicial Procedure	1. Judicial proceedings shall be public; the court may decide, however, for reasons of	1. Judicial proceedings shall be open to the public, but the court may decide, for reasons	1. Judicial proceedings shall be open to the public, but the court may decide, in the

	morals, hygiene, or public order, that the proceedings be held in camera 2. No judicial decision shall be taken unless all the parties have had an opportunity of presenting their case 3. All judicial decisions and all measures concerning personal liberty shall state the grounds therefore, and shall be subject to appeal in accordance with law 4. The Police and Armed Forces shall be directly available to the judicial organs for the performance of acts pertaining to their functions (97)	of morals, hygiene, or public order, that the proceedings be held in camera 2. No judicial decision shall be taken unless all the parties have had the opportunity of presenting their case 3. All judicial decision and measures concerning personal liberty shall state the grounds thereof (56)	interests of national security, protection of witnesses, and in cases involving juveniles or concerning rape, that the proceedings be held in private 2. No judicial decision shall be made unless all parties had the opportunity or presenting their case 3. Reasons shall be given for all judicial decisions (115)
Constitutional Guarantees			
Constitutionality of Laws	1. Laws and provisions having the force of law shall conform to the Constitution and to the general principles of Islam 2. In the course of a judicial proceeding, the question of the constitutionality of a law or a provision having the force of law may be raised, as to the form or substance, by means	1. The Charter shall be interpreted in a manner: a) That promotes national reconciliation, unity and democratic values b) That promotes the value of good governance	1. In accordance with Chapter 10 of the Constitution, a court may invalidate any law, or administrative action, that is contrary to the constitution (3) 2. The following have standing to bring a case before the Constitutional Court a) The President

	of a petition of the party concerned or of the office of the Attorney General, or by the court on its own motion, where the decision depends, even though partially, on the application of the law or provision being challenged 3. Where a petition is presented by the party concerned or by the Office of the Attorney General while the case is pending before a court of first or second instance, the court, where it finds the petition not manifestly unfounded, shall suspend judgment and proceed according to Article 99 4. Where a petition is presented while the case is pending before the Supreme Court, the Supreme Court, where it finds the petition not manifestly unfounded, shall suspend judgment and proceed according to Article 99 5. The same procedure shall apply where the question of constitutionality is raised by a court of first or second instance, or by the Supreme Court, on their own motion	c) That advances human dignity, integrity, rights and fundamental freedoms and the Rule of Law 2. A person may bring an action in the Supreme Court for a declaration that any Law or action of the state is inconsistent with, or is in contravention of this charter 3. The Supreme Court shall determine all such applications on a priority basis (4)	b) The Prime Minister (in the parliamentary system) c)The Attorney General d) Any 25 members of either house of parliament e) The government of any regional state f) Any independent Commission g) Any individual affected by a law or action allegedly in contravention of the constitution 3. The above parties except for individuals may institute litigation seeking the advisory opinion of the Constitutional Court on a constitutional matter (118)

	(98)		
Constitutional Court	1. A question of constitutionality shall be decided by the Supreme Court constituted as the Constitutional Court, with the addition of two members appointed for a period of three years by the President of the Republic, on the proposal of the Council of Ministers and two members, elected for the same period by the National Assembly by an absolute majority 2. The qualification of the additional members shall be prescribed by law (99)		1. There shall be a Constitutional Court comprising at least five judges including the Chief Justice, who is the head of the judiciary, and the Deputy Chief Justice 2. The Chief Justice of the Constitutional Court shall be elected by the members from amongst their number 3. Members of the Constitutional Court shall have appropriate qualifications in law and Shariah and particular competence in constitutional law 4. The constitutional court shall have the following Powers: a) To scrutinize draft legislation upon request to determine compatibility with the constitution b) To make the final decision as to whether legislation, or decision of the executive are to be struck down for

			incompatibility with the constitution c) In the case of legislation held to be unconstitutional, the Court shall have discretion to determine whether the legislation is void retrospectively, from the moment of judgment or a date specified in the future to enable appropriate action pending invalidity. In the case of criminal legislation, if the effect of declaring the law invalid would be to benefit a person who has been convicted, the invalidity must be from the time of enactment d) The exclusive power to decide disputes between regional and central government and between regional governments; this power shall be exercised only after attempts pursued with reasonable diligence to resolve the dispute by mediation have been unsuccessful

			e) The exclusive power to ratify the result of national elections or referenda 5. The decision of the constitutional court in matters relating to the constitution shall be final (117)
Judgment	A decision of the Supreme Court declaring that a law or provision having the force of law is unconstitutional shall be communicated by the Court to the President of the Republic, the President of the National Assembly and the Prime Minister, and shall be published in the manner prescribed for the publication of laws (100)		
Other			
Judicial Service Council		1. There shall be a Judicial Service Council, which shall undertake and direct the General Policy and Administration of the Judiciary as prescribed by law 2. The Judicial Service Council shall comprise: a) President of the	1. There shall be a Judicial Service Council which shall be responsible for the administration, appointment, discipline, transfers, conduct, remuneration and pensions of the Judiciary as prescribed by law. Conditions of service of the Judiciary shall be set by the Judicial Services Council

		Supreme Court b) The Attorney General of the Republic c) Three judges elected from the Supreme Court d) Four lawyers selected from the private law practitioners by the Law Society of Somalia 3. Members of the Council shall enjoy similar privileges and immunity as that of the Judges 4. The Council shall be responsible for the appointment, transfers conduct, discipline and remuneration of Judges 5. The term of each council member shall be four years (63)	2. The Judicial Service Council shall be independent of the executive and the legislature 3. The Judicial Service Council shall submit its budget to the Ministry of Finance. It shall administer its budget in accordance with appropriate financial regulations (126) 1. The Judicial Service Council shall comprise: a) The Chief Judge of the Federal Supreme Court; b) The Chief Judge of the Constitutional Court; c) The Attorney General; d) Two people nominated by the Law Society for a four year term; e) The Chair of the Human Rights Commission; f) One person nominated by the legislature of each regional state; and g) A person nominated

			by the President for a four year term. 2. The Chairman shall be elected by the members of the Judicial Service Council from among the members of the Council. The Chairman shall hold this post for five years, renewable for only one further term. The Chairman of the council shall be relieved all other duties outside the duties of the council as soon [as] he is sworn for this role. A person elected as chair may serve the full term even if the person's remaining term of appointment to the Council is less than five years (127)
Office of Attorney General		1. The office of the Attorney General shall be a division of the judicial institution and shall comprise of: a) The Attorney General whose duty shall be to safeguard the implementation of the laws in the whole Republic. His duties, responsibilities and scope of duties shall be specified by law b) The Attorney General	1. The office of the Attorney General shall be a division of the judiciary 2. The Judicial Service Council shall propose names of suitability qualified persons as Attorney General to the House of the Regional States. If the House of the Regional States approves the name of the person, the President shall appoint that person 3. The Attorney General may be dismissed only on the same

		shall be appointed by the President on the recommendation of the Council of Ministers c) The Attorney General shall be the principal legal adviser to the Transitional Federal Government d) The State and Districts Attorney Generals whose powers are limited to specific regions and districts will be appointed as specified in sub section (b) 2. It shall be the responsibility of the Attorney General to promote and uphold the Rule of Law (64)	grounds and by the same procedure as a judge 4. The functions of the Attorney General include safeguarding the implementation of the law in the while Republic and upholding the rule of law 5. The Attorney General shall be responsible for Public Prosecutions (128)
Referral by other courts			Any court other than the Constitutional Court may refer matters which have come before them to the Constitutional Court for an opinion on a constitutional matter. A court shall do so if a party to a case before it requests, and the court is satisfied that resolution of the constitutional issues is central to the case (119)

Court of Appeal and First Instance Courts			The functions and organization of the Court of Appeal and First Instance Courts shall be defined by a Judicial Organization Law (122)
Customary Dispute Resolutions Mechanisms			The courts may recognize the decisions of customary dispute resolution mechanisms, subject to limitations set out by legislation as to the scope of this recognition (123)