

Somaliland Forum Constitution Committee
Working paper: Analysis of and comments on the Proposed Changes to the 1997
Somaliland Interim Constitution
September 1999

In August 1999, the Somaliland Government published considerable proposed amendments to the 1997 Interim Constitution. As Chairman of the Somaliland Forum Constitution Committee, I prepared the following line by line analysis of the proposed changes, which then informed the Forum's formal response to the changes, which was submitted in an open letter to the Government and the Parliament. In the event, many of the proposed changes were not carried through as the House of Representatives' Committee reinstated most of the original provisions and the final version of the amended Constitution was shorter, but very similar to the 1997 Interim Constitution.

The Analysis (prepared in September 1999)

To understand the extent of proposed changes and their significance, I have listed below each article of the current (1997 Interim) constitution (numbered 1 to 156) and set against each article the proposed change, if any, and, where applicable, the corresponding new articles in the Government's draft. To facilitate our deliberations, I have added my own comments.

Preamble
Preamble
No change

Art.1 The State of the Republic of Somaliland
Art.1
No change

Art.2 The Territory of Somaliland
Art.2
No change

Art.3 The Capital
Art.3
No change

Art.4 Citizenship
Art.4
No change

Art.5 Religion
Art.5
No change

Art.6 The Language
Art. 6
No change

Art.7 The Flag
Art.7
No change

Art.8 The Emblem
Art.8
Slight Changes in the design of the emblem and, in particular, the removal of some of the inscriptions on the breast of the falcon
No major changes.

Art.9 The National Anthem
Art.9

No Change

Art.10 Equality of Citizens

Art.10

Minor addition to s.3 relating to the equal rights of non-citizens which are now qualified as not including the “political rights” (xuquuqda siyaasiga) which are reserved for citizens.

It is usual for countries to reserve the rights to vote and to stand for election for political office to citizens and this is permissible, for example, under Article 25 of the International Covenant on Civil and Political Rights 1966. The phrase “political rights” has, however, a wider meaning than voting/election or public office rights, and for the sake of clarity, if this amendment is only aimed at those well established reserved rights, then it is preferable to identify them specifically. It is a general principle that any derogation from fundamental human rights ought to be construed narrowly.

Art.11 The Political System

Art.11

Section 2 which limited the number of political parties to 3 has been deleted.

The new s.2 which replaces s.3 now simply says that “Political parties and their structure shall be determined by a law”. The bar on political parties which are based on regions or clans has been deleted.

These changes are very welcome, as a limit on the number of political parties was indeed contrary to the Constitution's expressed statement in s.1 of this article that there shall be a democratic and multi-party political system. The deletion of the ban on parties which are either based on “regions” appears to be sensible, as well, as it would have been unworkable during transitional period from representation based on persons nominated by the various communities (beelaha) to those elected through political parties. Whilst the lessons of the unbridled multi-party system in the first 9 years of the ill-fated union with Somalia have to be learnt, it is hoped that arbitrary restriction on political parties will not re-appear in the newly drafted Electoral Bill.

Art. 12 Foreign Relations

-

Deleted

This article set out the Republic's adherence to international law and norms, including the UN Charter and the Universal Declaration of Human Rights, as well as other concepts as peaceful settlement of disputes, respect for territorial integrity of others etc. It also, in my view, correctly accepts the international norm of state succession in respect of the treaties and agreements entered into by previous governments (with some reservations, which perhaps might be better worded to include a commitment to settle by agreement., questions relating to state succession). These are all the minimum standards expected of any state which is aiming to claim its well deserved place in international arena, as for example, is shown in the EC Guidelines on the Recognition of New State in Eastern Europe and in the Soviet Union (December 1991). It is not clear therefore why this declaratory article has been deleted. Similar provisions can be found in, for example, the Ethiopian Constitution (art.86) and the Sudanese Constitution (art.17) and art.13 of the Eritrean constitution .

Art. 13 to 33 Various “directive principles” relating to the government's aims in respect of the economy, natural resources, land, education, health etc.

-

Deleted

These 21 articles state what is often described as “directive principles” and are aimed at providing a non-enforceable, but constitutional general guidance to the government, as set out in art.58. They are, in effect, a “wish list”, but the fact that they are noted in the Constitution underlines their importance to the nation, and indeed, some of them, such as education, health, and the care of the disabled and the handicapped, are increasingly seen as “rights” (albeit, ones that can not be always met) ranking with civil and political rights. For example, the Ethiopian Constitution considers some of these as “economic, social and cultural rights” (art.41) and the rights of labour (art.42). The Eritrean Constitution includes a short Chapter on “national objectives and directive principles”. Again, it is not clear why it was thought appropriate to remove all these directive principles. If there is a concern that these principles might be misconstrued as importing immediate legal

obligations on the Government which clearly it cannot meet, in the present circumstances, then this should be addressed separately as part of a grassroots dissemination of the provisions of the Constitution, and in particular, prior to the referendum next year.

Art. 34 – 52 (Chapter 3) The rights of the individual, fundamental freedoms

Art.12

All the 18 articles relating to human rights and freedoms have been replaced by one article, which lists all the main rights and adds that they will all be in accordance with the laws of the land.

This an extra-ordinary and unwieldy proposal and is far inferior to the existing 18 articles in the current constitution which set out clearly all the main internationally accepted rights and freedoms. More importantly, there is an explicit duty on the Government under art.52 to guarantee (to all citizens) these rights and freedoms and it is stated that the law shall determine the punishment for infringement of these rights. A constitution is the right document to declare these fundamental rights and the single article proposed is woefully inadequate. It also does not meet the Republic's obligations under international law in that it seeks to place these rights under the current (and future) laws of the land, rather than the internationally accepted norms which are currently endorsed explicitly in the Republic's constitution under art.12. Also the Republic accepts the Universal Declaration of Human Rights (see art.12 and the recent 1997 pronouncements of the President in his meeting with Amnesty International) and, again, because of art.12(1) and the general principles of state succession can be said to have inherited from the last "Somalian" government the half hearted accession of that government (on 24/04/91) to the International Covenant on Civil and Political Rights. Under art.2(2) of the Covenant, states are required to "take the necessary steps in accordance with their constitutional processes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised " in the Covenant. Furthermore , no derogation from some of the rights (such as the right to life, art.6, the right not to be subjected to torture , art.7, or to slavery, art 8 etc) is allowed, so any state laws which go contrary to these rights, even in times of public emergency, will not be considered valid under international law. At a time when we are seeking to gain our legitimate place in the international arena, these specific amendments are a retrograde step. It is worth pointing out , as well, that the EC Guidelines on Recognition of the New States in E. Europe also emphasise respect for the rule of law, democracy and human rights, and we are not going to advance our cause by cutting back on the expressed rights and freedoms of our citizens.

The importance of clear constitutional guarantees on human rights has been underlined not only by our recent struggles against oppression, but also by the Borama Conference of the Somaliland Communities (1993) where it was emphasised in article 8 of our National Charter (Axdi Qarameed). Also in the Hargiesa Conference (1996/97), the Constitutional Commission were enjoined, among other things, to give regard to veneration of individual life through the entrenchment of fundamental rights and freedoms.

A quick survey of the constitutions of neighbouring African countries shows that none of them leave fundamental human rights to one clause and the trend is to have lengthy articles covering all aspects. The Ethiopian Constitution has no less than 31 articles (art.14 to 44) covering all human and democratic rights; the Eritrean Constitution, 16 articles (art.14 to 29); the Sudanese, 15 articles (art.20 to 34); and the Ugandan Kenyan Constitution, an impressive 39 articles including the establishment of a Human Rights Commission. (art.20 – 58). The "Somalian" Constitution of 1960 included 16 articles on rights and freedoms (art 16 – 30) and Siyad Barre's 15 (art 20 – 34) !!!!

Art.53 The duties of citizens

Art.13

No change

Art.54 Punishment for non fulfilment of citizens' duties

-

Deleted

This is welcome as there should not be a general law for punishing "bad citizenship" and specific laws already cover unlawful or illegal acts such as non-payment of taxes etc. Modern Constitutions do not, on the whole, sanction criminal laws for non observance of civic duties as these are likely to go counter to modern concepts of human rights.

Art.55 Crimes against human rights

Art.14

No change

Art.56 Extradition and asylum

Art.15

S.3 which forbade extradition of Somaliland citizens to foreign countries has been deleted and replaced by an additional sentence to s.1 which forbids extradition of any muslim person to a non-muslim (country).

Basing extradition on the respective religions of the individual concerned and the requesting party, rather than on the usual considerations of nationality or bilateral or multi-lateral treaties between states is highly questionable. Also the new section leaves open the possibility of Somaliland citizens being extradited to muslim countries.

Art.57 The rights of women

Art.16

No change

Art.58 relating to directive principles

-

Deleted

Art.58 is linked to the directive principles which are found in art.13 to art.33. The latter, as can be seen above have also been deleted.

Art.59 Sovereign powers

Art.17

No change

Art.60 The Parliament

Art.18

S.2 which bans the transfer of legislative powers to anyone outside Parliament has been deleted.

Also s.5 which set out the most important objectives of Parliament's duties including protection of the peace, security and sovereignty of the Republic etc has been deleted.

If s.2 of art.60 is construed as meaning that all legislative powers reposes in Parliament save as Parliament itself delegates the Executive and others to pass subordinate legislation, than there is nothing wrong with this concept as it simply reinforces the supremacy of Parliament in the legislative field. Clearly both the Executive and local government do have power delegated to them by Parliament (under specific laws) to pass subordinate legislation (Xeer Hoosaad). This section, therefore, was ambiguous and could do with clarity, but this does not mean that it should be totally removed as there should not be any doubt as to Parliament's supremacy in making laws. A good example of a clause that covers this adequately is, for example found in art.79(2) of the Ugandan Constitution which translated to our situation will read that "Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in the Republic of Somaliand except under express authority conferred by a law passed Parliament". It is important for the checks and balances in the Constitution that the Executive does not encroach into this fundamental power of Parliament without having an express authority to do so under the Constitution or under an Act of Parliament. Laws often allow central and local governments to issue some regulations, rules or by-laws as central and local governments cannot function properly without having these delegated power, within strict procedures, (under in specific Acts of Parliament) to issue some subsidiary legislation (xeer hoosaad), but there should be no room for laws passed by Executive "decree" without parliamentary prior delegated approval and subsequent oversight.

It is not clear why s.5 was deleted, but the deletion, on the face of it, does not reduce the power of Parliament who are still free to pursue those objectives which are implicit in the other provisions of the constitution.

Art.61 Joint sessions

Art.18(4)

No change

Art.62 General Provisions

Art.19

No change

Art.63 and 64 Number, election and eligibility

Art.20

The number of the House members and their eligibility for election will now be set in the Elections Law

It is not unusual to leave the actual number of the members of Parliament to be set in a law, other than the Constitution. The current constitution sets 82 as the number of the membership of the House of Representative.

Art.65 Term of office

Art.21

No change

Art.66 Seat of Parliament

Art.22

No change

Art.67 Convening

Art.23

No change

Art.68 Sittings

Art.24

No change

Art.69 Sessions

Art.25

No change in sections 1 –3, but s.4 relating to the President's Address to the nation at the beginning of each session of the Parliament is to be confined to "the general policy of the government and general situation of the country" rather than the current provision which obliges him to cover "the programmes of the government, and the political, economic, financial and security" state of the nation.

This appears to be a narrowing of the subjects to be covered at the President's address at opening of Parliament.

Art.70 Pay and Remuneration

Art.26

No change

Art.71 Prohibition of holding other office

Art.27

No change

Art.72 Privileges

Art.28

Minor change in 76(6) consequent upon the proposed abolition of the House of Representatives' Standing Committee (see below)

Art.73 Loss of membership

Art.29

No change

Art.74 Filling of vacancies

Art.30

No change

Art.75 Secretary and advisers

Art.31

S.75(3) changed slightly so that the appointment of the staff of Secretariat of the House is carried out with the consent of the Speaker (rather than, as is the case now, that of the Civil Service Commission.).

Art.76 Introduction of bills

Art.32

No change

Art.77

Art.33

No change

Art.78 Powers and duties

Art.34

Reduced from 7 sections to 4:

78(1)- No change – 34(1)

78(2)- The House has power to debate, comment on, refer back with reasons or approve the programme of the Government. The phrase “refer back with reasons” has been removed. The rest is in 34(2)

78(3)- Deleted. This section gives the House power to “ratify governmental agreements and treaties including political, economic and security agreements or those agreements involving financial commitments which have not been covered in the Budget, or which will involve the promulgation or amendment of a law”.

78(4)- Deleted. Art.78(4) gives the House power to forward to the Government advice and recommendations on general policy and leadership.

78(5)- No change – 34(3).

78(6)- No major change – 34(4) - Parliament’s power to call the Government and its agencies “to question them about the fulfilment of their duties” has been changed to “to question them about their functions.” Art 34(3) also now includes the Committees of the House.

78(7)- Deleted. Art. 78(7) explicitly gives the House Committees to summon ministers or the heads of public agencies for questioning. It is partly covered by art.34(3) which gives Parliament and its committees to summon the Government or the agencies.

These amendments do reduce the powers of the House. It will no longer be able to refer back the programmes of the Government and, whilst it can summon the Government and public agencies for questioning, the removal of explicit references to Ministers in this article, could mean that the choice of who the Government sends to Parliament from any department or public agency is now left to the discretion of the Government. These proposals will effect the House’s ability to carry out the kind of wide reaching debates on the Government’s programme, which it has done recently in its last session.

Also the House’s power to ratify agreements and treaties – a traditional function of Parliaments- is proposed to be removed. The new art 18(4)(t) leaves to joint sittings of the two Houses to discuss proposals to ratify international or regional treaties, but there are other agreements (e.g bilateral agreements between Somaliland and a specific other country or, for that matter, between the Government and external corporations) which do not fall within the new art.18 and would not therefore benefit from parliamentary oversight. Agreements which might incur expenditure outwith the Budget also need parliamentary approval.

Art.79

-

Deleted. This article explained some of legislative powers of the House, and stated that these included the imposition of taxes, savings schemes, printing of currency, issue of loans etc.

The deletion of this article does not mean that the House loses any of these functions as they are described as coming under the “legislative powers” of the House, and so long as Parliament passes clear finance bills which govern these issues, the effect of this change may not be that significant. However, as we are still going through transitional and difficult period, the Hargeisa Conference, in including this declaratory article, might have had in mind the serious consequences of unregulated printing of money or other financial imprudence and the proposed changes will have to be justified beyond peradventure.

Art.80 The Budget

Art.35

80(1)- now to be changed to simply “the House of Representatives shall approve the budget” (35(1)) whilst before it was the House has the power to debate, amend and approve by resolution” the budget.

80(2)- No change - 34(2).

80(3)– the word “all” has been removed in connection with the House’s power to approve all expenditure outside the Budget (34(3)).

80(4) to (7)- No change – 34(4) to 34(7)..

Most Constitutions give parliaments the right to approve a budget, which also carries the implication that they may reject it or amend it.. Unless these proposed changes are meant to confine the power of the House to either reject or approve the budget in toto, there is no need for the changes. On the other hand, if that is what is meant, then it is a diminution of the powers of the House. Parliaments jealously guard their overview of government budgets – for example, in the UK, the House of Commons not only votes the totals of expenditure requested by Ministers in “Estimates”, but specifies how that money is to be spent.

If there is concern about the House of Representatives proposing expenditure in areas which have not been proposed by the Government, then there could be a specific provision to address that issue.

Parliament needs to have strict oversight of the budget and the provision that all proposed expenditure outwith the budget has to be brought to its attention is an important element of the checks and balances in a democratic state. .

Art.81 Dissolution of Parliament

-

Deleted.

This is a very welcome amendment. The circumstances in which the President may dissolve the House now are, in any case extremely limited, and, in a Presidential system, like ours, which does not depend on governments and parties which may need to seek fresh mandates from the public, this limited power of dissolution appears to be redundant.

Art.82 Enactment and promulgation

Art.36

The time limit of 21 days for the President to publish new laws in the Official Journal will be removed, and he can now do that “as soon as possible”.

This may be a practical problem currently, but laws passed by Parliament ought not to be delayed unduly before they are published.

Art.83 General provisions

Art.37

Minor change. Under the article, the House of Elders has a special responsibility for “passing” (dejinta) laws relating to religion, culture and security. The word “passing” is to be changed to “initiating” (curinta).

This change aptly acknowledges the fact that both Houses scrutinise most legislation proposed by the other and removes the ambiguity that legislation in these special areas might wrongly be seen as being the sole responsibility of the House of Elders (see Art.100(2)).

Art.84 Election and term of office

Art.38

83(1) Minor change (38(1)). The procedures for election of the members of the House of Elders shall now be set out in the Elections Law.

83(2) No change (38(2)).

It makes sense to cover all parliamentary elections in one Act.

Art.85 Eligibility

Art.38(1)

Art.85 which set out the conditions for eligibility for election to House of Elders (i.e. 45 years or over, good knowledge of religions or an elder well versed in the culture) is to be repealed and will be covered by the Elections Law.

- ditto -

Art.86 The number of members

Art.39

Art. 86(1) which set out the number of the members as 82 will be amended to a total number of 60(?). The standing committee of the House which consists of 25 member is to be reduced to 15 members (39(1))

Art.86(2) which gives honorary membership of the House to 5 persons nominated by the President and to past Speakers of the Houses and Presidents/Vice-Presidents is be deleted.

In a small country, like ours, this proposed reduction of the total membership of the House and the removal of honorary membership can be seen as a useful step in reducing the cost and weight of governmental bodies.

In contrast to the abolition of the standing committee of the House of Representatives, the Elders' Standing Committee has been retained, albeit with a reduced membership of 15. The Government has recently justified this on the basis that the elders have as special role in dealing with peace and security and would need a standing committee that can be sent to deal with any exigencies during the Parliamentary recess. Whilst this may the case, Standing Committees have a wider role in monitoring Governmental activities, specially in relation to emergency matters, and the proposed retention of only the Elders' Standing Committee lessens Parliament's duty to oversee the work of the Executive.

Art.87 Secretary and advisers

Art.40

No change

Art.88 Inaugural sitting

Art.41

No change

Art.89 Rules of the House

Art.42

No change

Art. 90 Powers and duties

Art.43

90(1) "initiation" substituted for "passing" which the same change as in Art.83 above.

90(2) to 90(5) – No change

90(6) the word "bills" inserted to correct an oversight in the text which now refers to "mashruuc" (i.e literally project) rather than the correct phrase "mashruuc-xeer" which means bills or draft legislation.

These minor changes are improvements on the current text. There is a contrast, however, between how nothing has been changed in this article which relates the powers of the House of Elders, as compared to Art.78 which deals with the powers of the House of Representatives (see above).

Art.91 Pay and remuneration

Art.44

No change

Art.92 Privileges

Art.45

No change

Art.93 Resignation

Art.46

Minor change – adds the House may reject such resignations.

Art.94 Loss of membership

Art.47

No change

Art.95 Dissolution

-

Deleted.

The power of the President to dissolve the House of Elders is to be removed in the same way as the deletion of art.81 which related to House of Representatives – see above. This means that both Houses can not be recalled until the expiry of their full terms after elections are held in accordance with the new Elections Law.

Art.96 Prohibition

Art.48

No change

Art.97 Sittings and sessions

Art.49

No change

Art.98 Vacant seats

Art.50

98(1)- No change

98(2)- Vacancies to be filled in accordance with the Elections Law.

Art.99 Legislation procedures

Art.51

99(1) to 99(5)- No change

99(6) last sentence referring to the House which forwarded the Bill issuing it as law if the President fails to sign it or refer it back is to be deleted.

The procedure for legislation remains unchanged and the minor amendment is sensible as the section already says that the Bill will become law if the President fails to sign it within the allotted three weeks or fails to refer the Bill back to the House. The procedure for the issue or promulgation of bills is set in art.100 (the new art.52) and so, in the circumstances described in 99(6), the President will have to issue the law in the Official Gazette.

Art.100

Art.51

100(1) to 100(2)- No change

100(3)-The President shall now publish bills passed by both Houses and approved by him the law in the Official Journal as soon as possible, rather than the current time limit of 21 days.

100(4)- No change

100(5)- On return of a Bill to the House of Representatives by the House of Elders who have rejected, as a matter of principle, by two thirds majority, the Representatives, if not satisfied with the rejection, may approve it again. The section currently says that if this second approval is passed by a majority of less than two thirds, the Bill will fall. This is to be amended to read that the Bill will pass if approved again by the House (presumably on a simple majority).

The major change here is that the Representatives can reassert their wishes on Bills rejected by the Elders by a simple majority, and not, as currently, by a qualified two thirds majority. This amendment will strengthen the Representatives' hand, and does re-emphasise their pre-eminence in the legislation field. "Turf wars" between two Houses in a bicameral system can be constitutionally difficult, and this will bring to an end speedily any major differences in opinion on Bills between the two House.

Art.101 The Seat of the House

Art. 53

No change

Art.102 Accusations against members

Art.54

102(1)- The second (un-numbered) paragraph which states that members of both Houses can not be brought to court, nor imprisoned until they are stripped of their immunity is to be deleted.

102(2)- No change

The remaining provisions still imply that members of Parliament enjoy immunities which can be side-stepped if the member is caught in flagrante delicto for an offence attracting at least 3 years imprisonment. But it is not clear why it is proposed to delete the paragraph clearly setting out the general immunities of the members of Parliament against court indictment or detention before a vote to remove their immunities can be taken. All constitutions give members of parliament immunities from arrest, and specially, from suit in relation to acts and speeches undertaken as a parliamentarian. Instead of reducing the current immunities and privileges of members of parliament, there is a good case for improving them and making it clear that no member may be arrested or prosecuted for opinions expressed or statements made by him at any meeting of the House or its committees or in connection with his duties as member of parliament. Examples of such clauses can be seen in art.58 of the "Somalian" Constitution, art.38 of the Eriterian Constitution or art54 and 63 of the Ethiopian Constitution.

Art.103 The President

Art.55

No change

Art.104

Art.56

Minor change – the Executive consists of the President, the Vice President and “the Council of Ministers which the President forms” . The words in parenthesis have been substituted for the current article version which refers to “ministers and deputy ministers”.

This is a sensible minor amendment which introduces into this article “the Council of Ministers” in line with the current provision in art.115(2).

Art.105

Art57

No change

Art.106 Eligibility for Election

Art.58

106(1)- the phrase “notwithstanding residence as refugee in another country” is to be deleted.

106(2)- the phrase “and must abide by Islamic principles” is to be deleted.

106(3)-106(6) - No change

106(7)- This relates to the spouse of the Presidential candidate. It is not clear whether this has been deleted as the draft text repeats section 6???????

106(8)- 106(9)- No change.

Art.107 Election procedure

Art.59

107(1) – 107(4)- No change

107(5)- In the event of security conditions making it impossible to hold elections of President/Vice-President, the House of Elders shall extend the term of office. This is to be changed to “parliament in a joint sitting” (i.e both Houses).

This is a welcome change as it allows the House of Representatives to have a voice in these unusual circumstances.

Art.108

Art.60

Minor change. The president/Vice-President shall now be sworn at a ceremony attended by the speakers of Parliament and the members of the Supreme Court (and not just the Chair of the Supreme Court).

Art.109 Prohibitions

Art.61

No change

Art.110 Termination of office

Art.62

No change

Art.111 Salary and Emoluments

Art.63

No change

Art.112 Term of office

Art.64

No change

Art.113 Vacancy

Art.65

No change

Art.114 Filling of vacancy

Art.66

114(1)- The current provision of the Vice-President taking over as President for the rest of the term of the President who resigns or dies etc. is to be changed. This will now be confined to circumstances when the vacancy arise in the last two years of the incumbent President's term of office. If, however, the vacancy arises during the first three years of the term, then the Vice-President shall become Acting President and a President shall be elected within six months.

114(2)- No change other than the substitution of the word "shraxad" (nominating) for the current word "magacaabid" (naming or appointing) in connection with the President's power to nominate, for approval by the two Houses, a nominee Vice –President in the event of a vacancy in that office.

In the US presidential system where a vice-president is elected at the same time as the President, the Vice-President assumes the office of President on its vacancy for the rest of the presidential term (Art.II, section 1). In contrast, in the Sudan, where the elected president appoints two vice-presidents, the first vice-president assumes office until an election can be arranged (art.42). There are similar arrangement in Uganda with the elected president appointing a vice-president who then acts as a caretaker, in the event of a vacancy, unless the vacancy occurs during the last year of the president's term of office (art.109). The current system under art.114 of the Somaliland Constitution follows the US example, but the proposed amendment qualifies it so that if the vacancy arises during the first three years of the term of office of the incumbent President, then the vice-president simply acts as a caretaker president until the elections are held.

Art.115 Powers of the president

Art67

No change.

115(13) – states "Other powers set out in the Constitution or any other laws". It will be changed to "Other powers set out in the laws of the land".

No change.

Art.116 Powers of the Vice-President

Art.68

116(1) –116(2) – No change.

116(3)- changed in line with the changes to art.114 so that the vice-president will now assume the office of president when it becomes vacant as set out above.

See notes relating to the changes on art.114.

Art.117 Other powers

Art.69

117(1) – no change in the first paragraph which gives the President power to issue emergency decrees when the House of Representatives is not in session or cannot reach a resolution urgently and there are compelling circumstances which endanger the security of the country and law and order.

But, currently, these emergency decrees must be approved by the Standing Committees of the two Houses within seven days; or if the Committees reject the decrees, the latter shall be presented to a joint sitting of the two Houses within 45 days, who shall approve by a simple majority.

The proposed change is that the decrees shall now be presented straight to the first sitting of Parliament who shall approve by a simple majority. Emergency decrees may be applicable to a region or to some regions, or they could have general or national effect.

117(2)- Deleted. This states that emergency decrees shall have the same effect as laws passed by Parliament, and shall come into force when signed by the President.

117(3)- Deleted. This states that emergency decrees shall be reviewed once every six months by the two Houses whose resolutions will be passed by a simple majority.

These changes reduce drastically the Parliament's oversight of presidential exercise of emergency powers. This amendment follows, in part, the proposed removal of the House of Representative's Standing Committee, which with that of the House of elders, was charged with reviewing within a week any presidential emergency decrees. Although we are still going through difficult times, and emergency matters affecting law and order can arise frequently, Article 117 is a necessary measure in a democratic society where law by presidential decree should be very strictly controlled and monitored. It is also important that once Parliament approves of the decree as being necessary, then there is a mechanism for its regular review so that "emergency legislation" does not continue to apply even when the need for it has passed.

Even the "Somalian" Constitution enjoined the President to submit any emergency decrees to the National Assembly within 5 days, and the assembly have to decide within 30 days to "convert" the decree into law. More importantly, if the conversion was not done, the decree shall cease to have effect ab initio (i.e as if it never existed).

Art.118 Protocol

Art.70

118(1) and 118(3)- No change

118(2)- It is proposed that the speakers of both House (and not just the House of Elders Speaker) will now have joint second place in protocol after the President and the Vice-President.

This minor change is welcome as it recognises the importance of the House of Representatives.

Art.119 The Council of Ministers

Art.71

119(1)- states that "The Council of Ministers shall assist the President in the fulfilment of his duties and shall resolve collectively the general policies, planning and programmes of the government". The amendment reads after the word duties as follows: "*and shall advise him collectively on the general policies of the government*".

119(2)- No change

119(3)- The reference to the Vice-President is deleted.

119(4)- the phrase "government" (xukumadda) has been substituted for "nation" (Qaranka) in relation to ministers not holding any other job.

119(5)a – the condition for eligibility for appointment as a minister/deputy minister which are the same as those for members of Parliament will now be set in the Elections Law.

119(5)b- This clause barring members of Parliament from being nominated as ministers/deputy ministers is to be removed

119(6)- Ministers can be responsible for one or more ministries. This is to be changed to read that a minister may be responsible for only one ministry, but may be temporarily put in charge of another ministry whose minister may be absent.

119(7)- a new addition allowing the Vice-President to attend meetings, when necessary.

119(8)- No change.

The change seems to underline the "presidential" nature of our Constitution, and makes it clear that whilst the Council of Ministers have a collective responsibility, it is still within the confines of advising the President who is the head of the Executive. The amendment simply clarifies this position. Ministers are appointed (subject to confirmation by the House of Representatives) and may be dismissed by the President, and this amendment aims to clarify that role.

The major change in this article is the proposal to allow members of parliament to be nominated as ministers/deputy ministers. The preamble to the Constitution and the National Charter (art.9) are both very clear about the separation of powers in our "presidential" and bicameral system of government. It is therefore essential that members of legislative ought not to be eligible to serve in the Executive, and vice versa. After there is

nothing stopping a member of parliament or a minister from resigning and then seeking new careers. Indeed Article 9(2) of the Charter explicitly stated that if a member of the two Houses was appointed as minister, he will immediately lose his seat in the House. If this long established principle is to be changed, and Parliamentarians will be allowed to become ministers, then the fundamental principle of separation of powers in our constitution ought to be revised.

Art.120 Continuation of office

Art.72

No change

Art.121 Accusations and impeachment

Art.73

121(1)- First paragraph – No change in the offences for which the President/Vice-President might be impeached, which are described as “high treason and contravention of the Constitution”.

Second paragraph and sections 2 and 4:

If the President/Vice-President is accused of committing the above offences, then the charges shall be forwarded by the attorney General to the Houses of Parliament which shall consider them and, on a majority of two thirds of their total membership, shall strip him of the privileges of his office, if there is a prima facie case for him to answer. Alternatively, under section 2, the charges may be proffered by at least one third of the total membership of the two Houses and shall be passed on to the two speakers who shall call a joint sitting of the two Houses. A simple majority of this sitting may approve of the charges. In both cases, the charges shall then be heard by the High Court of Justice which consists of the Chairman of the Supreme Court, four justices of the supreme Court and four members elected from amongst the members of the two Houses.

Similar procedures apply to Ministers and Deputy Ministers, accused of the same offences, but in their case, the Attorney General shall pass the information to the President, who, if satisfied with the details, shall remove their privileges of office and then the substantive case will then be heard by the High Court of Justice. If, however, the President is not satisfied with the information received, he shall submit it to the House of Representatives, which will reach a decision by a simple majority.

New Procedures:

The charges against the President/Vice-President shall now be proffered by at least one third of the members of the House of Representatives who shall forward them to the speaker of the House. The House may then approve of the charges by a simple majority. The House shall then choose no more than 10 of its members who shall prosecute the charges in front of the House of Elders, which shall be presided by the Chairman of the Supreme Court. The President/Vice-President shall be represented by Counsel and the House of Elders may approve of the charge by a two thirds majority of its total membership.

As for ministers/deputy ministers the current procedures shall continue to apply, save for the fact that, if the president is not satisfied with the information laid before him by the Attorney General, he need not pass the matter on to the House of the Representatives and he shall have the power to order the attorney General to withdraw the charges.

The main changes in the “impeachment process” is the proposed introduction of the US system, whereby the charges are passed by the House of Representatives and the “trial” is conducted in front of the other House, rather than in front of a special court. In the light of the recent case of President Clinton, I suppose this is not surprising. Part of the arguments for having one body undertaking the trial, while the other makes the initial decision to charge, and then to act as prosecutor, in effect, is to separate the role of “prosecution and jury”. But, in many constitutions, the decision to remove a President for abuse of office or misconduct is left to a qualified majority of the Parliament but the methods of investigating and adjudicating on the charges are different. The current Somaliland procedures for the trial to be conducted by a “High Court of Justice” are similar to those in art.76(3) of the “Somalian” Constitution where the Supreme Court sat as a reconstituted High Court of Justice. Despite the existence of a bicameral parliament, a similar provision is found in the French Constitution (arts.67 & 68).

It is proposed that the current system will be retained for charges against ministers/deputy ministers, but with the proviso that the President now effectively decides on his own whether a prima facie case is made, and can now order the Attorney General not to proceed with the matter. In view of the fact that the Ministers are part of the Executive, as well, and are closely working with the President, then the current procedure of the having the House of Representatives as the final arbiter appears to be sensible. Again this was the procedure adopted in art.84 of the "Somalian Constitution", although in that case, Parliament passed the initial motion and to impeach by a majority of one fifth and then the final decision by a two thirds majority.

Art.122

Art.74

No change

Art.123

Art.75

No change

Art.124 the structure of the judiciary

Art.76

124(1) It is proposed to add the Judicially Commission to the courts and the procuracy as the agencies of the judiciary.

124(2) No change

Art.125 The courts

Art.77

No change

Art.126 The supreme court

Art.78

No change

Art.127 The lower courts

Art.79

No change

Art.128 The Procuracy

Art.80

No change

Art.129 The armed forces courts

Art.81

No change

Art.130 Appointments

Art.82

130(1) The second paragraph about the Vice-Chairmanship of the court being determined on the basis of seniority is to be deleted.

130(2) The qualification of 20 years experience for appointment to the supreme Court is to be reduced to 5 years.

130(3) The President may remove the chair or any of the supreme court justices with the consent of the House of Representatives (and not the two standing committees of the Houses).

Not all courts have deputy presiding justices, and, presumably, for practical purposes, in the absence of the Chairman, one of the justices has to act as chairman, in his absence; but unless some ad hoc administrative arrangements are made by the Chairman, it will be cumbersome if this decision has to be made by President every time the Chairman is away. In view of the constitutional importance of the post of Chairman, it is preferable to have a clear rule as to who shall deputise for him.

The reduction to five years experience for eligibility to such a high office is difficult to understand, and will lead to a lowering of the standards.

*The appointment of justices of the supreme court has to be confirmed by the House, and it is sensible, therefore, that their removal is to be sanctioned by the House, as well. In any case, it is proposed that the House of Representative's standing committee will be abolished. It is, however, still a matter of serious concern that justices of the supreme court can be removed willy nilly by the President and the two Houses. This has happened recently when the Supreme Court Chairman was removed by the President. The independence of the judiciary from the other two branches of government is guaranteed by the constitution under art.122 (and the new art.74). But security of tenure is one of the cornerstones of judicial independence and, (senior) judges are normally appointed (where they are not elected) to secure positions and are only removed either for mental or physical incapacity or misbehaviour, and subject to a retirement age. Provisions setting out such security of tenure are usually found in most Commonwealth Constitutions and go back to the British Act of Settlement 1701 which set out that judge's commissions were to be made *quamdiu se bene gesserint* (so long as they behave themselves), "but upon the address of both Houses of Parliament it shall be lawful to remove them" i.e, they could only be removed for misbehaviour. An example of a modern Constitutional provision in Africa is s.98 of the Constitution of Zambia, which sets out a retirement age for Supreme Court and High Court judges of 65 years and notes that he or she may only be removed from office by the President, after a tribunal investigation, only "for inability to perform the functions of the office, whether arising from infirmity of body or mind, incompetence or misbehaviour". Even the "Somalian" Constitution included a clause (96(3)) which made it clear that judges "shall not be removed or transferred except in the cases specified by law".*

The Supreme Court is also the Constitutional Court and will have to make important decisions relating to the constitutionality of government action, and, in due course may also have to adjudicate on electoral matters. Security of tenure confirmed in the constitution will cement the independence of the court.

Art.131 The Judicial Commission

Art.83

131(1) to (4) Currently, under this article, the Commission is chaired by the Chairman of the Supreme Court and consists of the two senior justices of the Supreme Court, the Attorney General, the Director General of the Justice Ministry, the Chairman of the Civil Service Commission and 4 members of the public selected by the two Houses (on two year terms) to provide a lay element. The quorum is 7 members, the deputising chair is the most senior of the justices, and the secretary of the Commission is the Chief Registrar of the Supreme Court. It is proposed (and, according to recent reports, this has already been implemented!!!) that the Commission will be chaired by the Minister of Justice and that there will be no Supreme Court justices as members. The rest of the membership remains the same. The quorum will be more than half of the members and the Commission will choose, from among its members, a secretary

The chairing of this important Commission by a Minister goes counter to the expressed principle of separation of powers. It is also highly unusual that this Commission which is responsible for the appointment and removal of judges does will no longer include any justices of the supreme court, or for that matter, any other judge - this is all the more strange, in the light of the retention of the membership of the Attorney General.

Art.132

Art.84

132(1) is to be amended to read that the Judicial Commission shall be responsible for "the advice" on the appointment, removal etc of judges (other than Supreme Court Justices) . Currently the article gives the responsibilities, without any qualification, to the Commission.

132(2) & 132(3) – No change

This amendment now means that the Commission only advises and the final decision have to be made by someone, who is not mentioned in this article. Does this mean that the President will now be assuming this responsibility? If that is the case, then this should be made clear.

Art.133 The relationship between the JC and the Justice Ministry

Art.85

No change

Currently, this article is important because it re-emphasises the independence of the Judicial Commission from the Ministry, which as an arm of the Executive branch of government. In

view of the fact that the Justice Minister is proposed to chair the Judicial Commission, one wonders why this article has not been consequently amended or deleted.

Art.134 –140 The Ulema Council

-

All these articles relating to the responsibilities, membership, term of office, appointment and salaries of the Ulema Council are to be deleted.

The Council's functions were to formulate declarations on issue of Sharia and to undertake research. In an Islamic country, such a body is needed, but it is questionable whether it should be set under the constitution.

Art.141 The structure of the country

Art.86

No change

The structure of the regions and the districts is now governed by the Local Government Law (Law No 80 of 1996), as amended.

Art.142 Administration of the regions & districts

Art.87

No change

Art.143 & 144 The regional & district councils

-

Deleted

This is covered in the Local Government Law.

Art.145 Special governmental bodies

Art.88

No change

Art.146 Appointment

Art.89

Art.146 states that the appointment of these special officers shall be proposed by the “Chair of the Council of Ministers” and approved by the House of Representatives. The word “president” is to be substituted for “Chair of the Council of Ministers”.

This is a sensible correction, as there is no constitutional post, which is termed “Chair of the Council of Ministers”. It is the President who chairs the meetings of the Council of Ministers under article 119(7).

Art.147 Administrative laws

Art.90

No change

Art.148 The principles of the armed forces

Art.91

148(1)-(2) No change

148(3)- Deleted. This section stated that the structure of the Army shall, as far as possible, reflect the Somaliland communities.

148(3) –(4) No change

Art.148(3) was probably aimed at ensuring that, the structure and composition of the armed forces took note of the fact that the various communities raised and supported units during the liberation struggle and that the process of their transformation into national armed forces required this special constitutional provision, so that all the communities were reassured of their stake and participation in the armed forces (and the Republic). The recent events in Lascaood and the Sool region suggest that, we are still in a transitional period and that the Hargeisa Conference's reasons for having this provision in the constitution may still be valid. Clearly, in making this proposal, the Government feels that we have gone beyond that transitional stage, and if that is the case, then the amendment is to be welcomed.

Art.149 Police & Corrections

Art.92
No change

Art.150 Government property
Art.93
No change

Art.151 Implementation of the constitution
Art.94

151(1)- No change

151(2)- No change – the phrase “Parliament” is substituted for “the two House”.

151(3)- Deleted, *as the election of the President at the Third Conference (Hargeisa) has already taken place in 1997.*

151(4)- Deleted – this relates to the number of members of the two Houses, which again was set at the Third Conference.

151(5)- No changes – now 94(3).

151(6)- No change – now 94(4).

151(7)- This currently reads that “all the laws which were current and which did not conflict with the Islamic Sharia shall remain in force until laws which are in accord with the Constitutions of the Republic of Somaliland are promulgated”. This is to be changed to refer to “all the laws which were in force before 21 October 1969”.

The only significant change is that relating to the type of laws which are can be in force in the Republic. The Constitution currently accepts all pre-1991 laws, which are still in force unless they are in conflict with Islamic Law. This was a pragmatic decision to avoid gaps in legislation arising immediately after the reclamation of our sovereignty. Unfortunately, this means that laws passed by the Siyad Barre could still be in force until they are repealed or are in conflict with the Somaliland Constitution (see art.155 below). The amendment is therefore very welcome, but the Government needs then replace quickly some of the consolidation laws (such as the Civil Law (Xeerka Madaniga), and the Civil Procedure Law (Xeerka Habka Madaniga, etc) which may have been amended or promulgated in the 1970s.

Art.152 Preparation for the referendum

Art.95

The last part of the article which proposes the formation of a Commission to oversee the holding of the referendum is to be deleted.

This provision was aimed at ensuring that that the Referendum Commission is seen as a Constitutional body which should be set up, and it is not clear why it is should be deleted. It is important that any such Commission is seen as independent of the government even though the constitution does not specifically say so.

Art.153 Amendments

Art.96

151(1)–(2) No change

151(3)- Deleted. This states that amendments or additions shall be debated by the two Houses within two months after the House of Representatives resolve by a majority vote that the amendment or addition is necessary.

151(4) – no change – 96(3)

151(5)- as 151(3) is to be deleted, then this section is amended to read simply that of the either of the two Houses does not approve of the proposed amendment/addition, it shall not be tabled again for a period of 12 months.

151(6)- Deleted. This set out that changes to the national flag, the national seal or the national anthem may be approved by a resolution of the House of Representatives.

The only change in this article is the removal of the House of Representative’s power to decide in the first instance by a simple majority vote whether any proposed amendment/addition is necessary. If they any proposal was rejected by them, then it could not be tabled again for a period of 12 months. With the removal of this power, the House of Representative shall have exactly the same power as the House of Elders in respect of constitutional amendments. This is a diminution of the legislative powers of the House of Representatives, which the Constitution, after all, describes as the “first body of the country’s legislative” (art.62).

Nonetheless, amendments will still have to be passed by a two thirds majority of the total membership of both Houses, and failing such a majority in either of the two House, the amendment will not be tabled again for another 12 months. The proposal removes the possibility of rejection of an amendment by the House of Representatives alone on a simple majority vote.

Again, the power of the House of Representatives to change the national symbols is to be removed.

Art.154 Limits

Art.97

No change

*This article makest invalid any proposals for changes of the constitution purporting to include a provision which is in conflict with the principles of Islamic Sharia, sovereignty of the country (territorial integrity), democratic principles and the multi-party political system and fundamental rights and personal freedoms. **This should be the starting point for assessing any proposed amendments.***

Art.155 Basis & supremacy of the constitution

Art.98

No change

Art.156 Oath

Art.99

No change

IBRAHIM JAMA Sep 1999