

The Constitution of Somalia on Paper and the Constitutional reality

Dr Antonios Kouroutakis*

Introduction:

Somalia in 2012 adopted a new constitution and it became another African country with a new constitutional order such as Egypt, South Sudan, Libya and Tunisia. The recent Constitution like a palimpsest, embodies the constitutional acquis, and the lessons learned from past constitutional experiences. At the same time, it encapsulates the hopes for a stable and prosperous constitutional status quo in Somalia. While the Governments are enriched with a new constitutional cloak, the ideals for democracy, reconciliation and peace will not be materialized with an automatic pilot. It has been acknowledged numerous times that constitutional documents are not panacea solving all problems.

With this caveat, it is important to take into consideration the constitutional reality in Somalia. Since 2012, the state building with its institutions is still in the making. The second legislative chamber is still absent from the mechanism of separation of powers. In addition, the building of the federal states is still ongoing distorting the balance within the vertical separation of powers. Moreover, elections do not take place due to security concerns evaporating the fuel of the political process and a fortiori the provision of referenda in the amendment process was proven an excessive expectation.

It seems that the drafters of the constitution were aware of the mismatch between the constitution on paper and the political reality, and therefore they included provisions for the thorough review of the constitution before the end of the first parliamentary session. On the other hand, a constitutional document less sophisticated but closer to the existing political situation, with an asymmetric federal system, a unicameral legislative body, a temporary indirect system of elections and an amendment process without referenda possibly could have turned the focus of the legislative time and of political capital on more pressing issues like the case of Somaliland, and the terrorism threat from Al Shabaab ensuring the integrity and security of Somalia.

That said, the structure of the article is the following: first I discuss the drafting process of the constitution and the upstream and downstream constraints of the process. Second, I examine the basic components of the constitution of the Federal Republic of Somalia. The analysis includes the fundamental principles and the architecture of the constitution, the system of separation of powers, the relationship between the two executive heads, the federal structure of the country and the amendment procedure. In addition, the analysis is focused more on the political reality vis a vis the constitutional framework highlighting the progress that was already made, the deadlocks and the necessary steps for further normalization of the constitutional order.

A. The Drafting of the New Constitution; a long process

This new constitution was adopted with the aim of terminating a long period of tension, turmoil, and transition by establishing stable political institutions and introducing efficient governance. It seems that the process of the constitutional making was one of the most complicated and the longest. It started in 2000 and it lasted for 12 years, it included numerous national and international actors. In national level, the role of each transitional government was central, but it was also complimented by the presence of local authorities such as the Presidents of “Puntland” and “Galmudug”, and representatives of Ahlu Sunnah Wal Jama’a. In the international level, neighbours countries, the so-called ‘frontline states’ of Kenya, Ethiopia, and Djibouti were highly involved along with the international community.

The constitutional history of Somalia that will be presented briefly below shows that one of the most pressing problems was the failure of each newly formed government to follow through with the reconciliation efforts to produce a government of national unity.¹

Having said that, Somalia became an independent country in 1960 after a long period of colonialization from UK and Italy. In 1960 the first Constitution was adopted forming the

* Antonios Kouroutakis is an Assistant Professor at IE University, Law School. akouroutakis@faculty.ie.edu

¹ Antonios Kouroutakis, *The Provisional Constitution of the Federal Republic of Somalia: Process, Architecture and Perspectives*, (2014) 4 Cambridge Journal of International and Comparative Law 1195, 1200.

Democratic Republic of Somalia,² but instead of signaling a period of constitutional tranquillity, it marked a long period of tension and insecurity. The constitutional order was overthrown with the association of the President Abdirashid Ali Shermarke and the immediate military coup d'état. The country was ruled by the Supreme Revolutionary Council under the commands of the Major General Mohamed Siad Barre. In 1976 the Supreme Revolutionary Council was transformed into a political party, the Somali Revolutionary Socialist Party and in 1979 it introduced a socialist regime and a new constitution, the Constitution of the Somali Democratic Republic.³ The socialist regime lasted until the beginning of 1991, until the outbreak of the civil war.

In 2000 the Transitional National Charter, a temporary constitution with a three years life span⁴ was adopted after the Somali National Peace Conference, the so called Arta Process.⁵ However, this attempt was not marked by success, as the Transitional National Government failed to produce national unity and opposition was formed, backed by Ethiopia and decentralised Somali authorities under the umbrella of the Somali Reconciliation and Rehabilitation Council (*SRRC*), led by Puntland President Abdulahi Yusuf.⁶

In 2002, a new initiative was undertaken with the aim to bring the Transitional National Government and the rival coalition to a political settlement. After a series of discussions and negotiations a new constitutional document was drafted, the Transitional Federal Charter of 2004,⁷ which introduced a federal paradigm,⁸ and explicitly prescribed the process for the drafting of a new constitution.⁹

² The Constitution of the Democratic Republic of Somalia see <http://somalitalk.com/dastuur/1960.html> [accessed 14 November 2017]

³ The Constitution of the Somali Democratic Republic see <http://www.worldstatesmen.org/Somalia-Constitution1979.pdf> [accessed 14 November 2017]

⁴ For the utility of sunset clauses in constitutional documents, see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (Routledge 2017).

⁵ For more details on the Arta Process, see A P Kasaija, 'The UN-led Djibouti Peace Process for Somalia 2008–2009: Results and Problems' (2010) 28 *J of Contemporary African Studies* 261, 264

⁶ K Menkhaus, 'The Crisis in Somalia: Tragedy in Five Acts' (2007) 106 *African Affairs* 357, 359

⁷ <http://www.ilo.org/dyn/travail/docs/2177/Transitional%20Federal%20charter-feb%202004-English.pdf> [accessed 14 November 2017]

⁸ Transitional Federal Charter for the Somali Republic, Art 11(1).

⁹ Transitional Federal Charter for the Somali Republic, Art 11(3b).

Likewise, this process failed once again to produce a path to the constitutionalization of the legal order¹⁰ and in 2008 in Djibouti a new initiative took place which was an African Union-sponsored conference, but had a very wide support of the international community, including the United Nations, the African Union, the European Union, and the United States. The new accord which was reached between the Transitional Federal Government (TFG) and the Alliance for the Re-liberation of Somalia (ARS), the so called Djibouti Accord, paved the way for the cessation of all armed conflict across the country, it included an 11 point agreement,¹¹ and most importantly ex post facto signaled the foundation of the new constitution drafting process.

The acceleration of the constitutional drafting process took place with the Kampala Accord of 2011 that aimed to end the transitional phase, which was an agreement between the President of the Transitional Federal Government of Somalia and the Speaker of the Transitional Federal Government of Somalia.¹²

But, by the end of 2011, as the UN Report of the Secretary General affirms, fundamental constitutional issues were unresolved such as the borders of the country, the role of sharia, the nature of the State (federal or unitary) and the system of Government (presidential or parliamentary).¹³

Eventually, two national constitutional conferences in Garowe, the former in December 2011 and the latter in February 2012, under the auspices of the Special Representative of the Secretary General for Somalia were a landmark during which the constitution-making process was defined in detail. The first national constitutional conference will set the

¹⁰ For more details see Antonios Kouroutakis, *The Provisional Constitution of the Federal Republic of Somalia: Process, Architecture and Perspectives*, (2014) 4 *Cambridge Journal of International and Comparative Law* 1195, 1198.

¹¹ Decisions of the High Level Committee Djibouti Agreement, 25 November 2008, <<http://www.ucdp.uu.se/gpdatabase/peace/SOM%2020081126.pdf>> [accessed 14 November 2017] para 5;

¹² Kampala Accord, June 9, 2011 [https://unpos.unmissions.org/sites/default/files/old_dnn/110609%20-%20Kampala%20Accord%20\(signed\).pdf](https://unpos.unmissions.org/sites/default/files/old_dnn/110609%20-%20Kampala%20Accord%20(signed).pdf) [accessed 14 November 2017].

¹³ Report of the Secretary-General on the political, security and humanitarian situation in Somalia [S/2011/759] of 9 December 2011.

principles on the finalization and adoption of the new constitution and the end of the transition the so-called Garowe Principles.¹⁴

During the second national constitutional conference in Garowe in February 2012, the deadline for the whole process was extended until August 2012, instead of April 2012.¹⁵ In addition, some unresolved issues were agreed. In particular, the nature of federal structure of Somalia, including the status of the capital city was defined. Second, consensus was reached on both the structure of the federal executive and the related elements of electoral system design. Finally the principles were articulated related to the constitutional adoption process by the National Constituent Assembly, including the selection process of its members and the new federal parliament and the design of the Upper House of Parliament representing the administrative regions.¹⁶

As a matter of fact, the Garowe Process set the upstream and downstream constrains for the national constituent (constitutional) assembly that would be in charge of the drafting of the new constitution.¹⁷ In particular, the composition of the constitutional assembly was defined. The formula 4.5 regarding the representation of the 5 clans within the assembly was reaffirmed¹⁸ and a maximum number of 1000 delegates was set of which 30 per cent was supposed to be women.¹⁹ Further, the review of the new constitution in order to comply with the existing subnational constitutions.²⁰ In addition, the ratification process was agreed and

¹⁴ First Somali National Consultative Constitutional Conference, 21-23 December 2011, Garowe, Puntland, Somalia

<https://reliefweb.int/sites/reliefweb.int/files/resources/GAROWE%20CONSTITUTIONAL%20CONFERENCE%202021-23%20DEC11.pdf> [accessed 14 November 2017]

¹⁵ Second Somali National Consultative Constitutional Conference, 15-17 February 2012, Garowe, Puntland, Somalia https://reliefweb.int/sites/reliefweb.int/files/resources/PDF_97.pdf. [accessed 14 November 2017]

¹⁶ Second Somali National Consultative Constitutional Conference, 15-17 February 2012, Garowe, Puntland, Somalia https://reliefweb.int/sites/reliefweb.int/files/resources/PDF_97.pdf [accessed 14 November 2017]

¹⁷ About the upstream and downstream constrains see Jon Elster, Forces and Mechanisms in the Constitution-Making Process, (1995) 45 Duke Law Journal 346.

¹⁸ The formula 4.5 was first used in the Arta Conference and assigns equal representation for what it considers the four “major clans” Darod, Dir, Hawiyya, Digil and Mirifle and assigns half of the share for fifth clan, the Isaaq.

¹⁹ First Somali National Consultative Constitutional Conference, 21-23 December 2011, Garowe, Puntland, Somalia [b] [c] [d]

<https://reliefweb.int/sites/reliefweb.int/files/resources/GAROWE%20CONSTITUTIONAL%20CONFERENCE%202021-23%20DEC11.pdf> [accessed 14 November 2017]

²⁰ First Somali National Consultative Constitutional Conference, 21-23 December 2011, Garowe, Puntland, Somalia. [e]

there was a provision for a national referendum given that the circumstances permitted.²¹ Furthermore, the structure of the federal parliament was set, its bicameral form and its four-year term.²² Finally, apart from the federal form of the statehood,²³ it was decided that the new constitution shall adopt the parliamentary system and the electoral system for both the upper and the lower house.²⁴

What was a major reason for the difficulty to reach an agreement and implement that was the fact that during the past years of insecurity and tension, along with the central government, others such as the clans became stakeholders in the share of powers and they demanded that they will have a say in the constitution making process and that their power is recognized within the new constitutional order. Further, as I have mentioned elsewhere:²⁵

“since the breakdown of Somalia in the 1990's, every peace effort succeeded in fostering the institutional prerequisites of a legitimate government winding down the centrifugal forces. In particular, the transition from the Transitional National Government to the Transitional Federal Government introduced the federal character of the constitution so as to ameliorate the power sharing between different actors, while, as will be seen below, references of the Provisional Constitution to the Shari'ah, which did not exist in the Transitional Federal Chapter, reflect an influence of the Alliance for the Re-liberation of Somalia, and represented an innovation heralding the religious sentiment of Somali civil society.”

<https://reliefweb.int/sites/reliefweb.int/files/resources/GAROWE%20CONSTITUTIONAL%20CONFERENCE%202021-23%20DEC11.pdf> [accessed 14 November 2017]

²¹ First Somali National Consultative Constitutional Conference, 21-23 December 2011, Garowe, Puntland, Somalia [b] and [h] <https://reliefweb.int/sites/reliefweb.int/files/resources/GAROWE%20CONSTITUTIONAL%20CONFERENCE%202021-23%20DEC11.pdf> [accessed 14 November 2017]

²² First Somali National Consultative Constitutional Conference, 21-23 December 2011, Garowe, Puntland, Somalia [2] <https://reliefweb.int/sites/reliefweb.int/files/resources/GAROWE%20CONSTITUTIONAL%20CONFERENCE%202021-23%20DEC11.pdf> [accessed 14 November 2017]

²³ Second Somali National Consultative Constitutional Conference, 15-17 February 2012, Garowe, Puntland, Somalia [1] https://reliefweb.int/sites/reliefweb.int/files/resources/PDF_97.pdf [accessed 14 November 2017]

²⁴ Second Somali National Consultative Constitutional Conference, 15-17 February 2012, Garowe, Puntland, Somalia [2] https://reliefweb.int/sites/reliefweb.int/files/resources/PDF_97.pdf [accessed 14 November 2017]

²⁵ Antonios Kouroutakis, The Provisional Constitution of the Federal Republic of Somalia: Process, Architecture and Perspectives, (2014) 4 Cambridge Journal of International and Comparative Law 1195, 1199

B. The Architecture of the Somali Constitution

The new constitution was voted on August 1st 2012 and it came into force immediately²⁶ as the circumstances did not permit the approval by a referendum. Of the 645 members of the national constituent assembly present, 621 backed the document, 13 voted against and 11 abstained.²⁷

The Constitution is comprised of 15 chapters and 143 articles. Chapter 1 regulates the fundamentals of the constitutional order such as the relationship between state and religion, the supremacy of the constitution, the official language, the flag and national symbols. Chapter 2 with 32 articles encompasses the Bill of Rights, Chapter 3 is dedicated to the natural resources and the environment. Chapter 4 regulates the representation of the people, while Chapters 5 and 12 flesh out the principle of federalism, Chapters 6 to 9 embody the separation of powers and Chapter 10 introduces the Independent Commissions. Chapter 11 regulates the civil service, Chapter 13 the public finance, Chapter 14 is dedicated to peace and security and regulates the state of emergency, while the procedure for amending the Constitution is prescribed in Chapter 15 under the Title 1.

Like most of the constitutions of muslim populated countries, the Constitutions of Somalia recognizes a special status to Shari'ah²⁸ and it explicitly states that “no law can be enacted that is not compliant with the general principles and objectives of Shari'ah.”²⁹ Given the supremacy of the new constitution³⁰ a “constitutional dualism” emerges where the rules of the constitutional law prevail in politics while the law of Shari'ah prevails in the regulation of private life.

Without doubt, it is a very long constitutional document, and this signals the stress of the constitutional drafters to foresee and regulate every eventuality. Having said that, the paradox is that two essential characteristics for a stable government—the nature of a country's party

²⁶ Provisional Constitution of the Federal Republic of Somalia, Art 138.

²⁷ Somali leaders back new constitution, BBC <http://www.bbc.com/news/world-africa-19075685> [accessed 14 November 2017].

²⁸ Provisional Constitution of the Federal Republic of Somalia, Art 2 (2).

²⁹ Provisional Constitution of the Federal Republic of Somalia, Art 2 (3).

³⁰ See Provisional Constitution of the Federal Republic of Somalia, Art 4.

system, and the majority-building capacity of a country's electoral system—are not regulated as both subject to special legislation adopted by the House of the People.

In addition, the constitutional drafting economy is not advanced given that among several provisions, some topics are regulated more than once. Suffice to mention here that it is mentioned three times in the text of the constitution that the Council of Ministers has exclusive competence on the annual budget.³¹

The Provisional Constitution of the Federal Republic of Somalia is the supreme law of Federal Republic of Somalia which is clearly stated in article 4³². At the same time, article 2 paragraph 3 states that “No law can be enacted that is not compliant with the general principles and objectives of Shari’ah.”³³ This provision expressly clarifies the hierarchical role of Shari’ah creating in reality a constitutional dualism. On the one hand on public law matters, the constitution is the supreme law of the land, while in private law matters, shari’ah is the ultimate rule.

Furthermore, unlike the previous two constitutions of 1960 and 1971, the new constitution is not introduced by a preamble. Without doubt, preambles have no regulatory force, but they have a symbolic value as they set out the values of the civil society and to epitomize the nexus between the text of the Constitution and the people.

i. On Federalism

The Provisional Constitution followed the previous pattern of the Transitional Federal Chapter and declared Somalia as a federal state ³⁴ The Constitution creates a two-level government and distinguishes two types of competences.

Article 54 contains an exhaustive list of competences to be exclusively exercised by the Federal Government: Foreign Affairs, National Defence, Citizenship and Immigration, and

³¹ Somali prime minister voted out of office by lawmakers, Reuters, December 6, 2014

Provisional Constitution of the Federal Republic of Somalia, Arts 69(1)(b), 79(1)(b) and 79(1)(c), and 80(1)(b).

³² Provisional Constitution, Art 4.

³³ Provisional Constitution, Art 2 (3).

³⁴ Provisional Constitution, Arts 3(3) and 48.

Monetary Policy.³⁵ However, in article 50, the Constitution recognises shared competences between the Federal Government and member states based on the principle of subsidiarity.³⁶ In addition, Article 50, which is open textured, sets the principles of federalism in Somalia such as of mutual cooperation and support between the government of the Federal Member States, and between the governments of the Federal Member States and the Federal Government and of fair distribution of resources.³⁷

Accordingly, within the separation of powers federalism is enshrined in the configuration of a bicameral legislature, with the upper house representing the interests of the member states and safeguarding the federal system.³⁸ In addition, federalism is enshrined in the amendment process as the Federal Members State governments have the power to initiate an amendment procedure.³⁹

In reality, when the constitution was finalized, the state building of the federal states was not completed, (with the exception of Puntland.)⁴⁰ Thus the constitutional drafters have included a specific provision in reality sunseting the function of the federal house (the upper) until the rest of the federal states are built.⁴¹ Currently, almost 5 years since the activation of the new constitution the state building of all federal states is not complete. In theory federalism seems to correspond to the diversity of the Somali society as, before the decolonisation, Somalia was divided into several regions and a decentralised system of governance aims to be closer to the people. However, the opinion has been expressed that Somalia is a

³⁵ Provisional Constitution, Art 54.

³⁶ Provisional Constitution, Art 50.

³⁷ Provisional Constitution, Art 50.

³⁸ Provisional Constitution, Art 61(3).

³⁹ Provisional Constitution, Art 132 (3).

⁴⁰ Somaliland, another region of Somalia acts as a de facto state and does not participate in the new constitution, while the other federal units such as Jubaland have not completed the state building. For more info see Somalia's parliament should produce a constitution by and for the people, The Heritage Institute February 2017 page 7.

⁴¹ Provisional Constitution, Art 138 (2).The effect of provisions and Articles related to the Upper House of the Federal Parliament wherever cited in this Constitution, shall be postponed until such time when all Federal Member States are formed and their representatives sworn into office as members of the Upper House of the Federal Parliament. Pending the establishment of the Upper House of the Federal Parliament, the House of the People shall perform all duties and functions provided for the Upper House in this Constitution and function as a unicameral federal legislature, faithfully taking into account the founding principle of power sharing in a federal system as stipulated in Article 3 (3) of this Constitution and the interests of Somalia-s regions when taking its decisions.

homogenous country and therefore such provision was unnecessary.⁴² What is problematic in reality is that the constitution aims to set a symmetric federation while in reality the federal regions have not the same capacity and status.

ii. On the separation of powers

The system of governance is determined by the division of powers between the President, the bicameral Federal Parliament, the Federal Government, and the Constitutional Court.

The President who is elected only by the lower house given the inactivity of the upper house⁴³ is the head of the state⁴⁴ and his competence is enumerated in article 90. Among others, the President exercises legislative oversight legislative oversight, as presidential assent on bills makes them to laws;⁴⁵ is the head of the armed forces;⁴⁶ appoints the Prime Minister,⁴⁷ declares a state of emergency;⁴⁸ and pardons offenders and commutes sentences on the recommendation of the Judicial Service Commission.⁴⁹

The Prime Minister is the head of the Government.⁵⁰ According to Article 99, the Council of Ministers has wide powers and general competence. Nonetheless, the competences of the Prime Minister reflect his special status in the context of the Federal Government, namely his power to appoint the members of the Council of the Ministers⁵¹ or his power to dissolve it with his resignation.⁵² The Prime Minister and the Council of Ministers have effective control over the legislative agenda as the Constitution concentrates law-making powers in

⁴² A O Shuriye, 'The Inveterate Failures of the International Community on Somali Impasse' (2012) 12 Middle-East Journal of Scientific Research 927,934.

⁴³ Regarding the process see Antonios Kouroutakis, *The Provisional Constitution of the Federal Republic of Somalia: Process, Architecture and Perspectives*, (2014) 4 Cambridge Journal of International and Comparative Law 1195, 1201.

⁴⁴ Provisional Constitution, Art 87(1a).

⁴⁵ Art 90(f) and Art 85.

⁴⁶ Art 90(b).

⁴⁷ Art 90(d).

⁴⁸ Art 90(a).

⁴⁹ Art 90(p).

⁵⁰ Art 100a.

⁵¹ Art 97(3).

⁵² Art 97(4).

the Houses of the Federal Parliament, whereas the Council of Ministers may initiate draft legislation,⁵³ and it has exclusive competence on the annual budget.⁵⁴

As a counterweight, the Prime Minister and the Council of Ministers require a vote of confidence by the House of People with a simple majority of the total members.⁵⁵ Thus, the executive remains dependent on and accountable to the legislature.

Given the parliamentary nature of the system it is expected that the key player within the executive function would be the prime minister. But as the previous years have shown, the President has asked numerous times the prime minister to resign, triggering a vote of no confidence in Parliament. In addition, the President has also exercised wide discretion for the appointment of the new prime minister.⁵⁶ This is caused by two correlated factors. First popular elections have not taken place so far due to security concerns,⁵⁷ and second the political parties have not been formed until May 2017.⁵⁸ In particular the representatives were elected by a clan based system, and both the President and the Prime Minister were appointed by the Parliament. Thus both executive heads have an equal popular mandate and legitimacy, that allow the President to exercise his authority in a very substantive way than an regulatory and symbolic way, as it is expected in parliamentary systems.

Having said that, the lack of elections and political parties has de facto transformed the constitutional system from a parliamentary system to a two-headed government resembling more the semi presidential system.

⁵³ Art 80(1).

⁵⁴ Arts 69(1)(b), 79(1)(b) and 79(1)(c), and 80(1)(b).

⁵⁵ Art 69(1)(d).

⁵⁶ <http://www.reuters.com/article/us-somalia-politics/somali-prime-minister-voted-out-of-office-by-lawmakers-idUSKBN0JKOAO20141206> [accessed 14 November 2017].

⁵⁷ The peace in Somalia is a quest due to the widespread attacks by Al Shabaab. The international society in line with the political actors in Somalia show a strong commitment to eliminate the terrorist threats and to restore the normality. See for instance the recent UN Security Council Resolution 2372/2017 30 August 2017 http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2372.pdf [accessed 14 November 2017].

⁵⁸ The registration of political parties was implemented in May 2017. See Somalia's National Independent Electoral Commission have set up the office of registrar of political parties, 23 May 2017 <https://unsom.unmissions.org/somalia%E2%80%99s-national-independent-electoral-commission-sets-office-registrar-political-parties> [accessed 14 November 2017].

iii. On the amendment process

Another critical aspect is the amendment process. The amendment procedure is prescribed in Chapter 15. Interestingly two procedures exist; the former regulates the amendment procedure during the first term of the federal parliament (until 2016)⁵⁹ and the latter regulates the amendment procedures after the expiry of the first term of the federal parliament.⁶⁰

It seems that the drafters of the constitution have in mind that some constitutional configurations and policy options might not be workable in practice and thus intentionally delegated that task to the lawmakers of the first parliament to resolve. Without doubt, it is already noted that the deferral to future lawmakers decision-making on certain constitutional issues is not always a negative development. On the contrary, it is a useful mechanism to limit decision cost and error cost during the constitution-making process.⁶¹

Thus during the first parliamentary session, two bodies were formed: the Oversight Committee and the Independent Provisional Constitution Review and Implementation Commission according to article 133.⁶² A number of proposals were suggested, such as the abolition of the upper house, and the abolition of the office of the Prime Minister.⁶³ However, none of the aforementioned key political issues were eventually amended by the end of the first parliamentary session.⁶⁴ Only two provisions were amended, on technical matters such as the transition between the parliaments after elections and the move of the referendum to the upcoming tenth parliament.

⁵⁹ Provisional Constitution of the Federal Republic of Somalia, Art 133, 134, 136.

⁶⁰ Provisional Constitution of the Federal Republic of Somalia, Art 132.

⁶¹ Antonios Kouroutakis, *The Provisional Constitution of the Federal Republic of Somalia: Process, Architecture and Perspectives*, (2014) 4 *Cambridge Journal of International and Comparative Law* 1195, 1205. See also on the mechanisms to postpone and delegate to future lawmakers constitutional issues, see R Dixon & T Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *IJ Con L* 636.

⁶² Provisional Constitution of the Federal Republic of Somalia, Art 133(1).

⁶³ See Jan Amilcar Schmidt, *The Somali Constitutional Review Process. Taking Stock at <http://www.constitutionnet.org/news/somali-constitutional-review-process-taking-stock>* [accessed 14 November 2017].

⁶⁴ The main reasons why the amendment procedure during the first parliamentary sessions was not that deep is twofold. First the special bodies were formed with a delay, quite close to the expiration of the parliamentary session and second there is no consensus on the direction on key political issues. See Somalia's parliament should produce a constitution by and for the people, *The Heritage Institute* February 2017 page 5.

In particular article 60 of the constitution that stated that “The term of office of the Federal Parliament is 4 years from the day of the announcement of the election results” was amended to, “the term of the office of Federal parliament ends from day that new parliament takes the oath.” Also, the article 136 paragraph two which states that “In a referendum held concerning the Provisional Constitution as amended, held before the end of the first term of the House of the People, the electorate of the Federal Republic of Somalia may adopt the new Constitution by a majority vote in favor of the final version of this Constitution” was amended to, “referendums concerning the provisional constitutions will be held after the upcoming tenth Somali parliament replaces the current parliament”.⁶⁵

Having said that, it is left to the ordinary constitution amendment process to amend further the constitution. According to the ordinary amendment process, four alternative procedures are set for the initiation of the process: first by the Federal Government, second, by a Federal Members State government, third by a member of the Federal Parliament and fourth by a popular initiative via a petition signed by at least 40,000 citizens.⁶⁶

The proposed amendment has to be proposed into either House of the Federal Parliament,⁶⁷ and then “if a majority of the members of the House in which its sponsors introduce a proposed constitutional amendment accept that amendment on first or a subsequent reading, the Speaker of the House of the People and the Speaker of the Upper House of the Federal Parliament of Somalia shall each appoint ten members of that Speaker’s House to a joint committee of the two Houses.”⁶⁸ Such Committee, which among others, reviews the proposal, and ensures the public engagement,⁶⁹ shall submit its report to each House of the Federal Parliament within two months after its appointment.⁷⁰

⁶⁵ See Somalia’s parliament should produce a constitution by and for the people, The Heritage Institute February 2017 page 5.

⁶⁶ Provisional Constitution of the Federal Republic of Somalia, Art 132 (3).

⁶⁷ Provisional Constitution of the Federal Republic of Somalia, Art 132 (4).

⁶⁸ Provisional Constitution of the Federal Republic of Somalia, Art 132 (5).

⁶⁹ Provisional Constitution of the Federal Republic of Somalia, Art 132 (6).

⁷⁰ Provisional Constitution of the Federal Republic of Somalia, Art 132 (7).

The approval of the proposed amendments requires a supermajority vote of 2/3 from both houses⁷¹ and it also sets a cool off period of three months at least after the report of the aforementioned committee.⁷²

However, two caveats exist. First, the first paragraph of article 132 introduces a number of eternal clauses about the first chapter of the constitution that regulate the founding principles of Somalia.⁷³ Second, any proposed amendments in terms of Article 132, on amending the amendment procedure and any proposed amendment in terms of Article 136 concerning the review of the final Constitution, it shall conduct a referendum on the revised Constitution as amended.⁷⁴

Apparently the already amendment of the article 136 that took place during the previous parliamentary session⁷⁵ contradicts the specific process set in article 132 paragraph 10.⁷⁶

Concluding remarks

Without doubt, the situation in Somalia has improved the last years given the longstanding constitutional and political crisis. The drafting process of the new constitution involved numerous parties; it was slow-paced, and complex. However, in 2012 a new constitution was finally adopted signaling a fresh start. The new constitution is a significant accomplishment, but more steps are necessary. A number of incomplete configurations, such as the state building of the member states, and the unclear power relationship between the head of the government and the head of the state might become sources for tension.

Furthermore, the lack of security threatens the stability of the whole country and it is necessary that the political capital must be focused on making the security a priority. This

⁷¹ Provisional Constitution of the Federal Republic of Somalia, Art 132 (8). “The Federal Parliament adopts a proposed amendment only after approving it on a final vote in the House of the People by at least two-thirds (2/3) of the existing members, and on a final vote in the Upper House of the Federal Parliament by at least two-thirds (2/3) of the existing members”

⁷² Provisional Constitution of the Federal Republic of Somalia, Art 132 (9).

⁷³ Provisional Constitution of the Federal Republic of Somalia, Art 132 (1).

⁷⁴ Provisional Constitution of the Federal Republic of Somalia, Art 132 (10).

⁷⁵ see text to footnote 58.

⁷⁶ about the discussion on unconstitutional constitutional amendments see Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017).

will allow the completion of the political system, with the emergence of the political parties and the materialization of elections.