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THE LEGAL SYSTEM OF THE SOMALI DEMOCRATIC REPUBLIC

By

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PREFACE

Somalia, comprising today the former Italian-administered Trust Territory of Somalia, and the erstwhile British Somaliland Protectorate, became an independent sovereign republic in 1960.

The Republic functioned under a parliamentary system of government for nine years until, on October 21, 1969, the civilian administration was ousted in a bloodless revolution successfully staged by Somalia's armed forces.

Somalia's legal system is of special interest to students of comparative law. Unlike most countries in Africa, the Republic has inherited two distinct legal systems: one founded upon the Italian system, and the other basically Anglo-Saxon, both of which coexist with Shariat (Islamic) law and customary law.

Since independence, the Republic, under a unitary form of government, has been confronted with the challenge of evolving its own legal system, distilled from the essential principles and characteristics that give the diversity of existing systems their respective merits.

The process of creating a new legal system, adapted to the needs and demands of a changing society, although it has entailed considerable research and protracted effort, has been one of absorbing interest.

This work has been so planned as to give the reader a perspective that sketches the historical events that enabled the colonial powers, Britain and Italy, to superimpose their influence on the Islamic nomads in the Horn of Africa. It records the development of the

legal systems that were the legacy of these powers to Somalia. This, together with the background information on the country and its people, constitutes Part I of this book.

Parts II and III present a detailed examination of the legal systems introduced into Italian Somalia and the British Somaliland Protectorate before independence. Particular emphasis is given to the main sources of law in the Colonial Era, embracing the law of metropolitan origin, local enactments, Shariat law, and customary law, and the judicial systems established during that period.

Somalia's legal system since independence is treated in greater detail in the subsequent three parts of this book. Constitutional law, outlining the functions and powers of the various organs of the State, the sources of law, and the judicial system of the Republic, before and after the revolution, occupy Parts IV and V. Part VI is devoted to the methodology adopted for the integration of laws in the Republic, with an analysis of the most important branches of law, especially those relating to the economic development of the country.

Since members of the legal profession exert no small influence on the legal system in operation, mention is made of the laws on legal education and the legal profession as a whole.

The statements of the law refer to the position as it was on December 31, 1970.

This study is not intended as a critical commentary, but depicts factually the development of the legal system. It is largely based on my experience, gained as a United Nations expert assigned to Somalia for about a decade. I have had the privilege of serving the Republic in various capacities: as a member of the

consultative commission responsible for preparing integrated legislation (October 1960 to February 1970); as a judge, and later as Vice-President of the Supreme Court (February 1962 to July 1967), and as legal adviser to the Prime Minister and later to the President of the Supreme Revolutionary Council (August 1967 to May 1971). This exceptionally long assignment was due to the keen interest evinced by the United Nations in the unique experiment in legal integration that is being carried out in Somalia and to the confidence and trust reposed in me both by the United Nations and by the successive governments of the country, for which I am deeply grateful.

I would like to express my indebtedness to the Somali Ministry of Justice, Religion, and Labour, for permitting me to use material from my earlier book, *The Development of the Constitution of the Somali Republic*.

I am grateful, too, to the the editors of the *Journal of the International Commission of Jurists*, Geneva, and the *Journal on African Law Journal*, London, for allowing me to draw upon any articles which appeared in those publications.

My sincere thanks are due to Mr. Anthony R. Peters, adviser on mass communications to the Somali Ministry of Information and National Guidance; to Miss Rosavittoria Tedaro and Mr. Bruno Carini, United Nations interpreters-translators attached to the Somali Institute of Public Administration, for valuable assistance; and to Messrs. Mohamed Sheriff, R. H. Dutt, and K. Kannan, for typing the manuscript.

I should point out that the views in this book are mine alone and do not in any way reflect the views of either the United Nations or the Somali Government.

HAJI N. A. NOOR MUHAMMAD

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A. Early History

The Horn of Africa has a hoary past. Archeological evidence shows that the Horn was inhabited in prehistoric times. The earliest culture found has been assigned to the beginning of the last pluvial age, roughly 100,000 years ago. Several successive stone-age cultures have been found in this area.[2] The northern part of the Horn of Africa was probably part of the area known to the Pharaonic Egyptians as the "Land of Punt." Records reveal that the ancient Egyptians frequented the Somali coast in search of frankincense, myrrh, gum, and precious woods.

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1. *See* I. LEWIS, THE MODERN HISTORY OF SOMALILAND (Windfield and Nicholson, London 1965); S. TOUVAL, SOMALI NATIONALISM (Harvard Univ. Press, Cambridge, Mass. 1963); J. DRYSDALE, THE SOMALI DISPUTE (Pall Mall Press, London 1964); SOMALI GOVERNMENT, THE SOMALI PENINSULA—A NEW LIGHT ON IMPERIAL MOTIVES (1962); E. Bayne, *Somalia*, FOUR WAYS OF POLICIES Ch. III (Amer. Univ. Field Staff, Inc., N.Y. 1965); E. PANKHURST, EX-ITALIAN SOMALILAND (Watts & Co., London 1951); R. HESS, ITALIAN COLONIALISM IN SOMALIA (Univ. of Chicago Press, Chicago 1966); COLONIAL OFFICE, SOMALILAND PROTECTORATE 1956-1957 (H. M. Stationery Office 1959); A. HAMILTON, SOMALILAND (Hutchinson & Co., London 1911).

2. *See also* J. CLARK, PREHISTORIC CULTURES OF THE HORN OF AFRICA (Cambridge Univ. Press, Cambridge 1964).

B. Muslim Sultanates

Beginning about the middle of the Eighth Century, Arabs initiated migrations to the Horn of Africa and early in the Tenth Century founded settlements along the coast where Zeila, Mogadiscio, and Brava are now located. Arab colonization resulted in the establishment of Muslim Sultanates at Zeila and Mogadiscio. The Sultanate of Zeila, which was established in the Thirteenth Century, lasted until the Sixteenth Century. After the disintegration of the Sultanate, Zeila and the other regions became dependencies of Yemen and thus nominally a part of the Ottoman Caliphate. The Sultanate of Mogadiscio was very prosperous in the Fourteenth Century, and continued to be independent until the Sixteenth Century. In the Seventeenth Century this area came under the suzerainty of the Sultan of Muscat. When the State of Muscat was divided into Ottoman and Zanzibar, at the beginning of the Nineteenth Century, Mogadiscio came under the Sultan of Zanzibar. Though the coastal areas were thus under Ottoman or Zanzibar suzerainty, the interior was independent.

C. Imperial Partition

By the middle of the Nineteenth Century the Horn of Africa became a theatre of competition between Britain, France, and Italy.

Concern for the security of trade and communications with India induced the British to take an interest in the Somali coast. Following the establishment of the Protectorate over Aden in 1839, the British concluded treaties with the Sultan of Tajura and the Governor of Zeila, under which the latter undertook not to enter into any treaty obligations with other European nations without notifying the British authorities in Aden.

With the opening of the Suez Canal in 1869, the

Somali coast acquired considerable strategic importance. Under the nominal suzerainty of Turkey, Egypt's ruler Khedive Ismail sent forces to occupy portions of the coast as far south as Kismayu. Egyptian ports were established in the ports of Zeila and Berbera and other places along the coast. After an occupation of less than a decade, the Egyptian government withdrew from the Somali coast, mainly because of the Mahdist revolt in the Sudan.

Soon after, the British occupied Zeila. During the latter half of 1884 Britain entered into a series of treaties of protection with the Somali tribes. On July 20, 1889, the British proclaimed a protectorate on the Somaliland coast.

The French had long been interested in the area farther west along the coast, as they needed their own coaling station to support their communication with their Far East possessions. In 1862, they obtained the cession of Obbia, situated on the northern shore of the Gulf of Tajura, which later became the center of French commercial activities. Between 1884 and 1885 the French concluded treaties with the Sultans of Tajura and Gobad and the Ise Somalis, and acquired the areas that are now known as French Somaliland. Trade activities and the seat of the Government were subsequently shifted to Djibouti.

About 1860 the Italians became interested in the Somali coast mainly for reasons of commerce. It was then under the suzerainty of the Sultan of Zanzibar. A mission headed by Captain Antonio Cecchi concluded a commercial treaty with Zanzibar and established a consulate there in 1885. But Italy's attempts at acquiring sections of the mainland coast did not succeed. In 1889, under an agreement between Italy and the British East Africa Company, to which the Sultan of Zanzibar also gave his assent, the Italians acquired

control over the towns of Brava, Merca, Mogadiscio, and Warsheikh. Italy declared a protectorate over the coast lying between the aforesaid towns and in the same year signed treaties with the Sultan of Obbia and with the Sultan of Mijertein establishing protectorates over their domains. Thus the Somali coast from Bender Ziada, on the Gulf of Aden in the North, to Kismayu, on the Indian Ocean in the South, came under Italian influence. The administration of the territory was entrusted first to the Filonardi Company from 1892 to 1896 and then to the Commercial Company of Benadir from 1896 to 1905. However, in view of the deteriorating security conditions, the Italian Government took over direct administration on May 1, 1905, and in April 1908 Benadir in the South and the protectorates in the North were unified to form Italian Somalia. Partly through the difficulties of terrain and communications, and partly through the hostility of the local people and the activities of Sayyid Mohamed Ibn Abdulla Hassan, Italy was not able to exercise effective control over the whole territory. By 1914 she succeeded in extending effective administration to all parts of the territory, which was pacified only after the death in 1920 of Sayyid Mohamed Ibn Abdulla Hassan.

D. Ethiopia and the Somalis

The scramble for Africa coincided with the consolidation and extension of central authority in Ethiopia under Emperor Menelik II. In 1887 Menelik conquered Harar and subjugated the turbulent Galla people. After these victories Menelik turned his attention toward his Somali neighbours. Ras Makonnen, Menelik's able general, led the Ethiopian drive not only against the Ise, Gadabursi, and Habar Awal clans but also to the east and southeast amongst the Somalis of

the Haud and Ogaden. In 1891 Ras Makonnen took Imi on the Shebeli and continued to press toward the Indian Ocean, thus enlarging the Ethiopian sphere of influence. In the North, and over most of their western periphery, the Somali clans were experiencing Ethiopian pressure. In 1896, the Ethiopian forces heavily defeated the Italians at the famous battle of Adowa, thereby decisively eliminating Italy's claim to a protectorate and emerging as a sovereign power. With the increasing Ethiopian pressure, matters were moving toward a climax by the beginning of 1897.

Emperor Menelik advanced claims for a reconstitution of the ancient frontiers of Ethiopia and pressed for the inclusion of the British Somaliland Protectorate within his empire. The British Government sent the Rodd Mission to negotiate with the Emperor. In a treaty concluded in 1897 between the Rodd Mission and Menelik, it was provided that the frontiers should be decided by negotiations between Rodd and Ras Makonnen. Under the compromises reached between Rodd and Ras Makonnen, Britain abandoned her claim to some 67,000 square miles of land in the Haud and retained Hargeisa and part of the hinterland within her protectorate.

Farther to the south, following the Italian debacle at Adowa, Italy negotiated a boundary settlement with Ethiopia in 1908. The Italian sphere was thus defined vaguely as lying within an area up to 180 miles from the coast and running from the boundary of the British protectorate to the Juba River, north of Bardera.

The French also discussed boundary questions with Ethiopia. The Lagarde Mission, which was sent to Menelik, agreed to reduce the extent of the *Côte des Somalis* to the satisfaction of the Emperor in return for commercial guarantees. These included an agreement on the construction of the proposed railway from Djibouti to the Ethiopian hinterland, the effect of

which was to make French Somaliland the official outlet for Ethiopia's trade.

Thus Britain, Italy, and France adjusted their Somali possessions to dimensions acceptable to Ethiopia. However, Ethiopia's expansion into the Somali-inhabited territories of Haud and Ogaden brought into the open the traditional antagonism between Ethiopians and Somalis.

E. Dervish Fight for Freedom

Even though the imperial powers had come to an agreement among themselves regarding their possessions in the Horn of Africa, they soon found themselves involved in a relentless struggle with a tough and gifted Somali religious leader and nationalist, Sayyid Mohamed Ibn Abdulla Hassan. His valiant attempts, which lasted for two decades, to free his country from the domination of Britain, Italy, and Ethiopia are known as the Dervish fight for freedom.[3]

Sayyid Mohamed Ibn Abdulla Hassan belonged to the Salihiya sect, a reformist and puritanical movement. Under its banner he launched a campaign to rid his country of "infidel" domination. In 1899, he and his followers occupied Burao which was in the center of British Somaliland. There he proclaimed himself the Mahdi and called upon all Somalis to join him in the holy war against the infidels. Between 1901 and 1904 the British, with active Ethiopian support and Italian cooperation, sent four expeditions against Sayyid Mohamed. The results of these operations were inconclusive. On March 5, 1905, Sayyid Mohamed and the Italian authorities entered into an agreement at Illig under which Sayyid Mohamed was assigned a wedge of territory between the lands of the northern Mijertein Sultanate and the Sultanate of Obbia to the south. His authority to govern his followers was recognized. The British also gave their assent to the above agreement.

3. For further description, *see* I. LEWIS, *supra* note 1, at 63-91; D. JARDINE, THE MAD MULLAH OF SOMALILAND (London 1923); MCNEILL, IN PURSUIT OF THE MAD MULLAH (London 1902).

By 1908, however, Sayyid Mohamed was preparing to resume hostilities, and this prompted the British to withdraw from the interior. Emboldened by his success against the Somali tribes in Burao, Sayyid Mohamed threatened to attack the coastal towns. Consequently, measures were taken by the British to strengthen their military, and they gradually proceeded to occupy certain strategic locations in the interior. Intermittent fighting between the British and Sayyid Mohamed continued throughout the period of World War I. At the end of the war, the British launched another offensive against Sayyid Mohamed. The operations were successful and Sayyid Mohamed's forces were beaten and dispersed. He himself fled with a small group of his followers into Ethiopian territory. He died toward the end of 1920 near Imi in the Arussi country. With him ended the twenty-one-year rebellion which Britain, assisted by Italy and Ethiopia, had been unable to quell.

The death of Sayyid Mohamed signalled the decline of his movement and by 1927 the Italians succeeded in imposing their administration upon the tribesmen in the north of their area. The Horn of Africa remained relatively quiet.

But in December 1935 there was a confrontation between the Ethiopian troops and Italian-supported Somali forces at Walwal and the latter forced their opponents to withdraw. This incident set in motion a series of events that culminated in the invasion and conquest of Ethiopia by Italy in 1936. When the Italians had completed their conquest and created their Italian East African Empire, they brought under the

administrative control of Mogadiscio all the Somali-inhabited areas in Ethiopia adjoining the boundaries of the British protectorate and Italian Somalia.

F. British Military Administration

During World War II, following the declaration of war by Italy upon the Allies, Italian forces invaded the British Somaliland from the northwest and occupied the territory in August 1940. But on March 16, 1941, a British and Somali force stormed Berbera from the sea and moved on to link up with other British forces, including contingents from east and southern Africa which had come up from the south. The Horn of Africa was soon under British military control and, with the exception of the Somalis under French rule, the Somali people came for the first time under one administration.

When the Emperor of Ethiopia was restored to his throne, he agreed that for the time being, in the interest of the prosecution of war, certain areas within the prewar frontiers of Ethiopia, including the Ogaden province and the Haud, should remain temporarily under the control of the British. Part of the Haud was restored to Ethiopia in 1944 and in 1948 the British also withdrew from the Ogaden province. Eventually, under the terms of a formal agreement signed in London on November 29, 1954, all remaining territory under temporary administration by Britain was handed back to Ethiopia. It was, however, provided in the agreement that the "British-protected" Somalis should continue to enjoy their seasonal grazing rights in the areas handed back.[4]

4. The handing over of the Haud and Ogaden to Ethiopia was done without the consent of the Somalis and caused great resentment amongst them. *See* S. TOUVAL, *supra* note 1, at Ch. 13.

G. Trusteeship for Somalia

Under the terms of the Peace Treaty of 1947, Italy renounced her rights and title to her territorial possessions in Africa, including Somalia. As the Four Powers could not reach agreement on the question of Italy's former possessions, the whole issue was referred to the United Nations for settlement. On November 21, 1949, the General Assembly recommended that Italian Somalia be placed under international trusteeship for ten years with Italy as the administering power, stipulating that, at the end of the ten-year period, the territory should become an independent state.[5] On April 1, 1950, in accordance with the U.N. Resolution, former Italian Somalia, excluding Ogaden, was placed under United Nations trusteeship and administered on behalf of the United Nations by Italy. The status of British Somaliland remained unchanged.

The ten-year period of trusteeship over Somalia was due to expire on December 2, 1960. But at the request of the Somali Government, supported by the Administering Authority, the General Assembly of the United Nations advanced the date of independence to July 1, 1960.[6]

The British Government also agreed in principle to grant independence to the Somaliland Protectorate to coincide with the independence of the Italian Trust Territory.

H. Independence and Union

British Somaliland became the independent State of Somaliland on June 26, 1960, and the Trust Territory of Somalia achieved independence on July 1, 1960.

5. General Assembly Resolution 289 (IV) of Nov. 21, 1949.

6. General Assembly Resolution 1418 (XIV) of Dec. 5, 1959.

On July 1, 1960, the legislatures of the two newly independent states met at Mogadiscio in joint session and proclaimed the establishment of the Somali Republic.

I. Revolution of October 21, 1969

The Republic was under civilian rule for nearly nine years, and on October 21, 1969, the nation's armed forces took over power in a bloodless revolution. The name of the state was changed to "Somali Democratic Republic."

CHAPTER 2

THE LAND

A. Location and Area

The Somali Democratic Republic occupies the Horn of Africa, a long and narrow strip of land hugging the northeast corner of the continent. It lies between French Somaliland, Ethiopia, and Kenya on one side, and the Gulf of Aden and the Indian Ocean on the other. It has an area of 637,650 sq. km. (246,201 sq. miles), about the same as Afghanistan, Turkey, France, or Chile.

B. Geographic Factors and Climate

The Northern Regions (the former British Somaliland Protectorate) are somewhat mountainous with plateaus reaching between 3,000 and 7,000 feet. In the Southern Regions (the former Trust Territory of Somalia), in the Mijertein, there is an extremely dry dissected plateau that reaches a maximum height of 8,250 feet. South and west of this area, extending to the Shebeli River, lies a plateau reaching a maximum elevation of 2,250 feet. The region between the Juba and Shebeli Rivers is low agricultural land, and the area that extends southwest of the Juba River to the Kenya border is low pasture land.

The Republic has only two rivers, the Juba and the Shebeli. They both rise in the Ethiopian highlands and flow towards the Indian Ocean. The Juba has a

maximum flow of 36,000 cusecs during the dry season; the Shebeli has a maximum flow of 6,000 cusecs during the rainy season but dries up at its lower reaches between January and March. They provide water for irrigation but are not navigable. The Juba meanders its way into the sea near Kismayu in the extreme south of the Republic, while the Shebeli does not normally reach the sea, losing itself in marshes and sand dunes, approximately 200 km. south of Mogadiscio.

The Republic has a tropical climate and there is little seasonal change in temperature. The temperature ranges from about 76° to 88° F., with a mean annual range of about 10°. In the plateau region the climate is cooler, while in the southwest it is warmer. The periodic winds, *i.e.*, the southwest monsoon (June to September) and the northeast monsoon (December to March), influence temperature and rainfall.

There are two rainy seasons in the year, the *Gu* period (April to June-July) which is the more important, and the *Der* period (September to November-December). Along the lower reaches of the two rivers and the coastal strip, the *Hagai* rains fall intermittently from July to August-September. Average rainfall is estimated at eleven inches, but it is irregular and droughts are not infrequent, particularly in the Northern Regions.

C. Natural Resources

About half of the land surface of the Republic is only suitable for livestock raising, while ten percent is arable. The rest of the country, which consists largely of arid desert, is of no significant use for agriculture.

The area actually occupied is a little over a million hectares, of which about 650,000 hectares are under crop. The area under controlled irrigation by the

waters of the two rivers is about 15,000 hectares, of which bananas account for 11,000 to 12,000 hectares, and sugar cane for 1,300 hectares, while in the rest citrus fruit, papaya, and vegetables are grown. The area irrigated by river floods is much larger, estimated at 60,000 to 80,000 hectares, and is utilised for growing maize and sorghum crops.

The soil along the Shebeli River is deficient in organic matter and plant nutrients. It also has an inadequate water-holding capacity and tends to be saline, due to the alkaline river water. On the other hand, the Juba River water and soil are better in all these respects, and the possibilities of further development of irrigation agriculture in that region are positively greater.

Forests cover about nine million hectares; that is about fourteen percent of the total area. These consist mainly of shrubs and thorn trees. Real forests with high trees are found only along the two rivers. The Republic's main forestry products for export are charcoal, incense, myrrh, and gum arabic, while large quantities of fuel wood are used domestically. Charcoal is the most important of the forestry exports from the Southern Regions.[1] Incense, myrrh, and gum arabic are produced in the drought-stricken and otherwise extremely poor province of Mijertein and the Northern Regions.

The Republic has a long coastline of 3,000 km. along the Indian Ocean and the Gulf of Aden, and this places the country in a favourable position with respect to fishery resources.

Geological surveys have revealed the existence of some minerals in the Republic. The main deposits are uranium ore in the Alio Ghelle area, iron ore in the

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1. Export of charcoal has been prohibited by decree of the Supreme Revolutionary Council No. 6 of Oct. 26, 1969.

Bur Hakaba area in the Upper Juba Region, roughly estimated at 300 million tons (iron content 43 percent), and gypsum, estimated at 50 million tons, found within nine miles from the port of Berbera. Other minerals such as manganese, feldspar, meerschaum, and columbite are also reported to exist.

An exclusive prospecting licence covering an area of about 8,256 sq. km. in the Alio Ghelle area for an initial period of five years was granted in December 1968 to Somiren, a subsidiary of the Italian ENI Company. (*Ente Nationale Idrocarburi*, meaning National Hydrocarbons Corp.). Somiren has undertaken to prospect for minerals in an area of 45,000 sq. km. in the Northern Regions. Western Nuclear, Inc. (United States) and the German Uranium Company of Somalia (West Germany) have also been granted licenses covering adjacent but smaller areas near Alio Ghelle.

In 1952 the Sinclair Oil Company obtained a concession for oil exploration. Having drilled thirteen bore holes in widely separated areas, it gave up the concession in 1968. A West German group took over this concession. Other oil prospecting companies include an American concern, Hammar Petroleum Company, and France's E.R.A.P. (Agency for Petroleum Research Activities).

D. Economy [2]

The Somali economy may be divided into three

2. *See* M. KARP, THE ECONOMICS OF TRUSTEESHIP IN SOMALI (Boston University African Research Studies No. 2 1960); A. A. CASTAGNO, JR., SOMALIA (International Conciliation, Carnegie Endowment for International Peace 1959); I. LEWIS, A PASTORAL DEMOCRACY (Oxford Univ. Press, N.Y. 1961); C. LEGUM & J. DRYSDALE, AFRICAN CONTEMPORARY RECORD, ANNUAL SURVEY AND DOCUMENTS 1968-69, at 204-06 (Africa Research Ltd., London 1969); 2 INTERNATIONAL MONETARY FUND, *Somalia*, in SURVEYS OF AFRICAN ECONOMICS (Wash., D.C. 1969).

sectors: pastoral economy, indigenous agriculture, and market (plantation) economy.

In the Somali Democratic Republic about two-thirds of the people are nomads, who depend solely on the breeding of livestock for their livelihood. For the nomads, livestock offers the best means of survival. Even in drought conditions, they continue to exist on milk and occasionally on meat. They avoid difficult conditions and famine by moving with their families and livestock in search of water and grazing. In addition to subsistence, livestock has several social uses, such as the payment of *yarad* (bridewealth) at wedding times, and for compensation for damages for moral or physical injury to persons, including homicide or damage to property. Other social significance of livestock is enhancement of prestige and security. Nomads, therefore, usually endeavor to own as many head of livestock as possible. Besides providing subsistence to the people, livestock also brings in about half of the country's export earnings.

Indigenous agriculture takes two principal forms: purely rain-fed dry-land farming and dry-land farming supplemented by irrigation from the flood waters of the rivers. Agriculture is produced for direct consumption and to a limited degree for commercialization. The agricultural crops raised include durra, beans, gourds, grapefruit, sesame, and groundnut. But the production of these crops fluctuates, as the rainfall varies considerably from year to year.

The market economy of the Republic revolves around the activities of plantations, which are concentrated in the interriver area in the Southern Regions.

Bananas are by far the most important crop of the country. Banana cultivation was introduced by Italian farmers in 1920 and export started in 1930. Italy first exempted Somali bananas from import duty

in 1930. In the following year, all private imports of bananas from other sources were prohibited and in 1935 the banana monopoly called Azienda Monopolio Banano (AMB) was established. The AMB became the sole powerful authority in regulating banana imports into Italy. The Italian banana planters in Somali set up two organizations: the Società Azionaria Concessionari Agricoli di Genale (SACA) and the Società Agricoltori Giuba (SAG). The former organization dealt with banana production on the Shebeli River, while the latter concerned itself with banana production along the Juba River.

Formerly in Italy, Somali bananas were exempt from the then-imposed 40 percent import duty. In recent years this duty was lowered to 25 percent if the bananas came from countries associated with the European Common Market or 31.2 percent otherwise.

The Italian Government dissolved the AMB in January 1964, but the agreement between the two Governments continued to operate till the end of 1966. Starting from 1967, the two producer associations, SACA and SAG, entered into contracts with Italian importers to sell annually 100,000 tons of bananas at a fixed f.o.b. price.

In 1968, the two producer associations decided to jointly market their output, and accordingly set up a single marketing agency. This agency, Somalbanana, then became responsible for the marketing of all bananas offered for export in the Republic. Marketing in Italy was undertaken by the Società Mercantile Oltremare (SMO), a joint venture between Somalbanana and a foreign company. The share capital of the former was raised from banana producers belonging to both producer associations. Financial participation by producers was on a voluntary basis and participants were entitled to share in the profits in proportion to

their respective shares of the quantities of product ultimately exported and sold. Nonparticipants were paid a fixed f.o.b. price and were entitled to utilize all the technical and related facilities of Somalbanana.

Recently, under Law No. 45 of August 13, 1970, the National Banana Board has been established for promoting the production and marketing of bananas. It has taken over the responsibilities of SACA, SAG, and Somalbanana.

The banana is one of the major export items of the Republic, earning on an average of Sh.So. 7 million [3] a month.

Cotton was cultivated on a commercial basis before the 1929 world depression, which made the Italian growers turn to other crops. Cotton production stayed at a low level until it rose under the impact of the Korean War boom. This was followed by a steep decline and eventual abandonment. After independence, however, impetus was given to cotton cultivation as part of the development plan, which envisaged the promotion of the textile industry in the Republic.

Sugar cane was cultivated exclusively by the Società Agricola Italo-Somala (SAIS), a company founded in 1920 by the Duke of Abruzzi, a pioneer of tropical agriculture. In 1963 the Somali Government, with the help of the Italian Government, created Società Nazionale per l'Agricoltura e l'Industria (SNAI) and purchased half of the capital of SAIS. Efforts were made to expand the area under sugar cane cultivation and to increase production. SNAI was nationalized under Law No. 26 of May 7, 1970.

There are no large-scale industries in the Republic comparable to those founded in some other African countries. The existing industries were established

3. The rate of exchange of a U.S. dollar is 7.14 Somali Shillings (Sh.So.).

mainly to serve the internal market and, to a lesser extent, to provide for the processing and packaging of agricultural exports.

The largest industry is the SNAI sugar factory. The second largest enterprise is a cotton-textile factory, Somaltex. This was established as a joint stock company, the capital being provided partly by the Somali Government and partly by German investors. The new industrial units are the Meat Factory at Kismayu, which is exporting meat products abroad, the Milk Factory at Mogadiscio, and the Fish Factory at Las Koreh. These three projects are Russian aided. Private industry is almost wholly on a local craft basis.

Before independence, the participation of Somalis in the country's economic development was negligible. Over the centuries most of the people had not been able to rise above the subsistence level. There were neither any sizable savings that could be channelled to investment, nor was there a group of competent enterpreneurs who could undertake investment ventures.

Soon after independence, the State took the responsibility of framing development plans which were designed for the all-round development of the country. The First Five-Year Plan, 1963-67,[4] was inaugurated in July 1963. It envisaged an expenditure of Sh.So. 1,400 million, covering all aspects of the Nation's life. It gave high priority to the development of transport, agriculture, and industry; these together were to absorb 70 percent of the total plan budget. Transport and communications would receive nearly a third of the total, industry and tourism over a sixth, and agriculture nearly a quarter. Out of Sh.So. 1,400 million required to implement the plan, Sh.So. 677 million were

4. SOMALI REPUBLIC, FIRST FIVE-YEAR PLAN 1963-67 (Planning & Coordination Comm. for Economic & Social Development, July 1963).

made available in the form of foreign grants and loans, and it was hoped that the balance amount would be forthcoming from further grants and long-term, low-interest loans.

However, the results of the plan did not come up to expectations. There were certain limitations inherent in the plan. Lack of reliable statistical data in the initial framing of the plan itself, the uncertainty of the time element involved in the preparation of detailed estimates of the projects envisaged, the problems of reorganization and strengthening of the administrative machinery on which the efficient implementation of the plan ultimately depended, and above all the paucity of financial resources, were impeding factors.

The shortcomings of the First Five-Year Plan forced the Government to reconsider and review the whole planning situation. Instead of another ambitious five-year plan, a Short-Term Development Plan for 1968-70 [5] was prepared. This, according to the Government, offered the best possibility of being successfully implemented within a reasonable time and thus of facilitating a real and measurable increase in the country's capacity for more extensive development. In May 1970 the Government started the preparation of a new development plan to cover the period 1971-1973.

Taking an overall picture of the development of the Republic since independence, it is recognized that its general economic performance has been fairly satisfactory. Even though the general pattern of subsistence economy has not changed and the economic problems inherited at the time of independence continue

5. SOMALI REPUBLIC, SHORT-TERM DEVELOPMENT PROGRAMME 1968-70 (Planning Commission, Mogadiscio 1968). The programme envisages a total outlay of Sh.So. 705 million, of which Sh.So. 400 million represents expenditure on projects carried over from the previous Plan.

to persist, there has been steady progress in overcoming the basic economic weaknesses.

E. Transportation

The development of transport facilities in the Republic at the time of independence was inadequate. The Italians constructed the port of Mogadiscio and some roads leading to the Ethiopian border during the war against Ethiopia in the 1930's. The British constructed roads during World War II, linking the port of Berbera to Hargeisa and Burao. But the state of these roads and ports in 1960 was very poor.

The Somali Government gave the highest priority to the development of the transport sector. The construction of two new roads was completed in 1964 and 1965. One was the Afgoi-Shalambot road (68 km.), which was financed by the Common Market, and the other was the Gelib-Kismayu road (115 km.), which was financed by West German credit. These roads have improved overland transport of exports to the exit points. The road between Mogadiscio and Fer Fer has been resurfaced. Work on an International Development Association (IDA) financed road between Afgoi and Baidoa (218 km.) has been commenced. At present the Republic has 12,000 km. of roads, of which 600 km. are constructed on an artificial foundation with an asphalted surface, 5,400 km. are unsurfaced, leaving an additional 6,000 km. of tracks.

The bulk of the foreign imports into the Republic is carried by sea. The volume of this trade has expanded rapidly in recent years. Shipping services for foreign as well as coastal trade are inadequate and costly. In order to encourage shipping, a law establishing a national shipping company with State participation was enacted in January 1968, but the company has not started functioning.

There are three main ports (Mogadiscio, Merca, and Kismayu) in the Southern Regions and one (Berbera) in the Northern Regions. Mogadiscio and Kismayu handle the bulk of the import and export trade of the Southern Regions, while Merca is used mainly for the export of bananas. Berbera handles the bulk of the import and export trade of the Northern Regions. The Short-Term Development Plan provides for the development of the Mogadiscio Port. The International Development Association (IDA) is assisting with the financing of consultants' services to carry out the final engineering requirements for the proposed harbour, based on a preliminary design for a two-berth port and a protective breakwater. At Kismayu Port, the basic deep-water docking and other facilities have been completed with U.S. technical and financial aid, and work on complementary facilities is in progress. Construction of a deep-water port at Berbera, with Russian aid, has also been completed.

Since the Republic covers a vast area, there is no effective alternative to air transport for connecting the widely scattered centers. There are at present some twenty airstrips throughout the country. But only four of these, at Mogadiscio, Kismayu, Hargeisa, and Berbera, are all-weather airports equipped with navigational control facilities. The Mogadiscio airport has been extended to handle jet aircraft, and a new terminal building has been completed. The runway of the airport at Hargeisa has also been rebuilt. Somali Airlines [6] has scheduled services to the major towns in the country and also to Aden, Djibouti, Nairobi, and Dar-Es-Salaam.

F. Foreign Aid

The Somali Democratic Republic has been re-

6. *Infra* Pt. VI, Ch. 8, C.

markably successful in getting foreign aid from diverse sources, such as Italy, the USSR, the USA, the European Economic Community (EEC), China, and West Germany, and from the United Nations and the Specialized Agencies.

According to a study made by the Office of the United Nations Development Programme in Mogadiscio, the total external aid to the Republic since independence up to the middle of 1966 was $320 million, giving an annual average of $53 million or $21 per capita. This covers all aid, including technical assistance, famine relief, and budget support. Of the total amount of $320 million, $186 million (58 percent) was in the form of grants and the remaining $134 million (42 percent) was in the form of loans.[7]

Italy provided the largest share, amounting to $90 million, which included budget support, technical assistance, and loans for financing projects. Out of this amount, $65 million of Italian aid was in the form of grants and $25 million in loans.

The USSR provided $59 million, the next biggest contribution, of which $52 million was loans and $7 million grants. The important Russian-financed projects are the State farms, the Mogadiscio Milk Factory, the Kismayu Meat Factory, the Las Koreh Fish Factory, the Berbera port, and a mechanical workshop.

The United States provided the third biggest contribution, amounting to $47 million, of which $41 million was grants and $6 million loans. The important U.S.-financed projects were Kismayu Port, soil and agriculture services, and public safety.

Communist China, West Germany, the United Nations with the Specialized Agencies, and the EEC,

7. Foreign aid received between 1960 and 1969 was about $388 million, with grants and long-term loans amounting to 62 and 38 percent of the total, respectively.

were the other prominent aid providers, each contributing $20-27 million.

The broad conclusion is that the Somali Democratic Republic has not lacked foreign aid—rather she may have strained her absorptive capacity.

There has not been any lack with respect to technical assistance, either. The Somali Democratic Republic has been provided with technical experts under bilateral and multilateral agreements. The United Nations alone has had about ninety experts in the Republic. There have also been a large number of technicians from the USSR, the USA, West Germany, Italy, India, and other countries. These technical experts have helped to fill the gap in senior technical and administrative manpower.

CHAPTER 3

THE PEOPLE AND THEIR CULTURE [1]

A. Population

Since no comprehensive census of the population of the country has ever been taken, reliable information is not available about numbers, age, and sex distribution or birth and death rates. The population is officially estimated by the Ministry of Interior at about five million. On the other hand, according to a United Nations estimate in 1970, the population is about 2.8 million, which is consistent with the earlier estimate made in the Manpower Survey.[2]

Following independence there was an ever increasing flow of persons from the rural areas to towns in search of employment. Recent findings suggest that the major reasons for the urban influx, particularly in Mogadiscio were: large construction projects in 1963 and 1964 which needed and attracted unskilled labour from rural areas; the 1964-65 drought, which compelled many to migrate to the urban center in quest of food and water; the lack of employment opportunities in the rural areas; the rigours of subsistence agriculture and animal husbandry; the relative attrac-

1. *See* I. LEWIS, PEOPLES OF THE HORN OF AFRICA (International African Institute, London 1955); I. LEWIS, *supra* Pt. I, Ch. 2, note 2; I. LEWIS, *supra* Pt. I, Ch. 1, note 1.

2. S. B. L. NIGAM, THE MANPOWER SITUATION IN SOMALIA 8, (Ministry of Health and Labour, Mogadiscio 1965).

tiveness of urban life with its better educational, medical and cultural facilities, and higher job expectations. At present, approximately nineteen percent of the population live in towns of more than 5,000 persons.

Unemployment is marked in urban areas, notably in Mogadiscio, where the migration from rural areas has been reinforced by the influx from Aden, Djibouti, the Ogaden and the Northern Frontier District of Kenya.

A highly tentative estimate made in 1963 suggests that about 54 percent of the males and 21 percent of the females were in the labour force, with an overall rate of 38 percent. The labour force in the working age group 15-59 was, however, only 35 percent of the total population.

An estimated 85 percent of the labour force in 1963 was engaged in stock-raising, agriculture, forestry, and fishing; three percent in industry; and twelve percent in the tertiary sector.

B. Ethnic Groups

The people, unlike those in many other countries in Africa, are homogeneous in race, language, culture, and religion. Ethnically and culturally, they belong to the Hamitic group.

According to traditional groupings, there are four main Somali clan-families: Dir, Isaq, Hawiye, and Darod. Each of these clan-families traces its descent from a common ancestor from whom it takes its collective name.

The Dir clans (Ise and Gadabursi) are mainly found in the western part of the Northern Regions of the Republic, with a small nucleus being found in the Southern Regions in the Merca District and between Brava and the Juba River. The Isaq are concentrated in the center of the Northern Regions of the Repub-

lic. The Darod, who number about one and a half million and form the largest among the Somali clan-families, live in the Mijertein region, Haud, and Ogaden, and extend into the northeastern region of Kenya (formerly known as the Northern Frontier District). The Hawiye, whose strength is about half a million, live in Mudugh, Hiran, and part of Benadir Regions.

Besides the above Somali clan-families, there are the subtribes and Somalized Bantus. Subtribes, whose total population is a little more than half a million, are concentrated in the fertile region between the two rivers. There are about 80,000 Somalized Bantus, who trace their origin to earlier Bantu and Swahili-speaking groups. They are scattered in cultivating villages along the Shebeli and Juba Rivers and in pockets between them.

In addition, there are immigrant communities, the most important among them being the Arabs who number about 42,000 in the Republic. Many of these families have been established for centuries, their ancestors having come from Yemen and Hadramut; others are more recent immigrants. They are traders living in coastal towns with a few dispersed groups in the interior. The Indian and Pakistani population number approximately 1,200, most of them being traders who are concentrated in the Southern Regions of the Republic. There are also a few permanent Italian settlers in the Southern Regions who are mainly farmers and estate-owners.

C. Social Organization

(1) MARRIAGE [3] AND THE FAMILY

The family based on marriage is the fundamental element of society in the Somali Democratic Re-

3. *See infra* Pt. II, Ch. 4, C.

public. The common age for the first marriage for a boy is when he reaches eighteen to twenty-five years and when a girl is fifteen to twenty years old. In most cases the parents and kinsmen exercise considerable influence in the choice of a bride, since marriages are often arranged with a view to forging advantageous social links between groups. With the spread of modern education, many marriages reflect some degree of personal preference on the part of the partners.

Prior to marriage, a girl's virginity is safeguarded by infibulation, which is usually done when the girl attains the age of ten. In some cases it is done even earlier.

When both parties agree to the match, there is an engagement ceremony during which the boy's parents give *gabbati* (betrothal gift paid in money or livestock) to the girl's parents.

The betrothal gift is followed by a reciprocal transfer of wealth between the girl's and man's families and their lineages. The gifts given to the girl's family are known as *yarad* (bridewealth) and those returned to the boy's family are known as *dibaad* (dowry). The dowry consists of sheep and goats and a few burden-camels, as well as all the equipment and furnishings necessary to enable the couple to set up house and become an independent stock-herding unit.

According to Shariat Law, marriage is a civil contract, based on offer and acceptance and the agreement to pay *mahar* (dower), a separate gift given by the husband to his bride often ranging from fifteen to twenty pounds in value. The Sheik or *Weddad* (man of religion) who conducts the wedding obtains the formal consent of the parties to the union, pronounces them man and wife and blesses them with a few verses from the Koran.

The Somalis are polygamous, and in some cases

advantage is taken of the Islamic principle which, in exceptional cases, allows a man to have four wives at any one time. In practice, the majority of men have only one wife, although it is not uncommon for wealthy elderly men to go in for more than one wife. Divorces are common, being more easily obtained by men than by women.

Somali women, like their menfolk, are equally independent and they make their influence felt in the family. More and more women are going in for higher education, and many of them are finding avenues of employment in Government service as teachers, nurses, and secretaries. Somali women today lend charm and grace to social life and, supported by efforts towards improvement of their position in society, they become increasingly able to hold their own with their menfolk.

(2) DETRIBALIZATION OF SOMALI SOCIETY

In the traditional pastoral society, the Somalis were bound together by ties of patrilinial kinship. Somalis owed loyalty to their *dia*-paying [4] groups, subclans, clans, and clan-families. Before the establishment of centralized administration, Somalis depended upon the protection they received as members of *dia*-paying groups. This protection included both life and property.

The *dia*-paying group was closely knit by two cardinal ties: *tol* (kinship) and *herr* (agreement). First, the members of the group, numbering from a few hundred to a few thousand, traced their descent through the agnatic line to a common male ancestor. Secondly, *herr* principally related to collective defence and security. As a contractual alliance, it bound together people of the same *herr* in relation to internal delicts and defined their collective responsibility in

4. *Dia* means blood money.

external relations with other groups. In particular it stipulated that they should in concert pay and receive compensation with respect to action committed by or against their group alliances. Within the same clan, members of one *dia*-paying group might join together to oppose another in order to protect their interests. Various sections of a clan might unite against another clan in similar circumstances. Kindred clans within a clan-family, might also join together against another clan-family. Amongst these diverse loyalties, the most vital and the most-often mobilized was the loyalty to the *dia*-paying group.

However, tribal loyalties very often engendered nepotism and corruption, which tended to corrode social life as well as the body politic. The Supreme Revolutionary Council considered it necessary to rid Somali society of these deleterious influences and therefore pledged itself to liquidate tribalism in every form. For the purpose of implementing this pledge, Law No. 67 of November 1, 1970 was enacted, which has revolutionized the whole social structure in the Somali Democratic Republic.

Under the aforesaid law, all associations of a tribal nature or whose purpose is to further tribal interests are prohibited. The law abolishes tribal titles such as Sultan, Bogar, Garad, Ogas, Malag, Iman, Islan, etc., and prohibits the receipt and collection of contributions of a tribal nature. Tribal rights with respect to land and water resources as well as tribal responsibility for the payment of *dia* and of compensation for physical or moral injury are abolished. The changes brought about in customary law with respect to these matters will be dealt with in greater detail later.[5]

Thus, under this law the age-long tribal structure,

5. *Infra* Pt. V, Ch. 2, F.

which largely depended upon extended kinship, has been abolished and the basis is laid for the growth of a modern and progressive society.

D. Language

The Somali language has been classified as Cushitic and is akin to Afar, the language spoken by the Danakils in French Somaliland, and the Galla languages.

There are numerous dialects. Linguistically they may be classified into three divisions: first, the dialects spoken by the Somali nomads; second, the dialects spoken by the inhabitants of the coastal towns in the Southern Regions of the Republic; and third, the dialects spoken by the inhabitants of Benadir. Even though the dialects differ markedly in pronunciation and in vocabulary, Somalis speaking different dialects understand one another and there is thus no language barrier among them.

The Somali language is only a spoken language and various attempts have been made to adopt an alphabet. Three alternative alphabets have been considered: Latin, Arabic, and a specially devised alphabet called Osmaniya (after its inventor Yusuf Osman Kenadid). But the attempts to finalize a script had to be suspended in view of the political controveries they aroused.

Even though the Somali language does not have a script, it retains its distinct characteristics as a separate and extremely vigorous language. It possesses an unusually rich oral literature and its poetry plays a very important role in Somali culture.

Besides the Somali language, Arabic, Italian, and English are being used in the Republic as official languages. Arabic is known by religious teachers and by a majority of the educated Somalis, and is widely used

as a scholarly written language. Newspapers are being published in the three languages.

E. Religion

Islam is the state religion. However, every person has the right to freedom of conscience and freely to profess his own religion and worship.

The Somalis are devout Muslims and follow the Shafie school. They are strict in the observance of the five "pillars" of their faith—the profession of belief in God and the Prophet Muhammad, the daily prayers, fasting, almsgiving, and pilgrimage.

The declared religious practices of the Somalis have been considerably influenced by Sufism (Muslim mysticism). The most important Sufi Orders *(Tariqa)* in the Somali Democratic Republic are the Qadiriyah, Ahmadiyah, Salihiya, and Rifaiyah. The Qadiriyah is the oldest Dervish Order of Islam. It was founded by Abdul Qadir-al-Jailani (1077-1166), who died in Baghdad. He is renowned throughout the Muslim world for his piety and his services to the cause of Islam. The strongholds of this order in the Somali Democratic Republic are Mogadiscio and Brava, from where the order has spread widely, owing its reputation for teaching orthodox Islam. The other orders owe their origin to the teaching and example of Sayyid Ahmed Ibn Idris al-Fasi (1760-1832), to whose celebrated school at Mecca their founders belonged.

Jamaá, the smaller bodies of believers and followers of a particular *Tariqa* are scattered throughout the country, each with its own Sheikh, and centered around the mosque or tomb of the founder of that particular branch *(Jamaá)* of the orders. *Tariqa* means "path" in the sense of the way to be followed in the quest for righteousness and the way to God. Those who

have travelled furthest on the path, through virtue and the practice of devotion, are nearest to God.

Islam has become one of the mainsprings of Somali culture. To nomads and cultivators alike, the profession of the faith has the force almost of an initiation rite into their society. Islam adds depth and coherence to those common elements of traditional culture which, over and above their clan divisions, unite Somalis and provide the basis for their strong national consciousness.

F. Education

The literacy rate in the Republic is very poor. Contributing factors include the inadequacy of the existing facilities for education, the lack of an adequate number of trained teachers, and the high cost of education. Since the population is sparsely spread over a very large area, many of the schools, particularly from the intermediate stage onwards, have to be boarding schools; and as Somali qualified teachers are not available in sufficient numbers, a large proportion of the teaching staff of the schools consists of expatriate teachers who have to be paid at a much higher rate than Somali teachers, thus accounting for the high cost.

The Republic inherited two diverse systems of education, the system prevalent in the Southern Regions which draws its inspiration from the Italian system of education, and that in the Northern Regions, developed from the British system. In the former, the pre-University course consisted of twelve years, including five years for the primary, three years for the intermediate, and four years for the secondary. In the latter system it was three, four, and four years, respectively. The textbooks as well as the medium of instruction were different. Besides the above two systems, there is a third one based on the old Somali system of Koranic education, which is in Arabic.

Since independence, the Ministry of Education has taken major steps in the unification of education. These are the establishment of twelve years of pre-University education (including four years each for primary, intermediate, and secondary education) and the unification of the curricula, medium of instruction, teacher training programmes and textbooks, and reading material based on the Somali environment.

There are two kinds of schools: Government schools and private schools. It was only after independence that private schools were started on a large scale, the most important of which are the Italian Catholic Mission schools, the United Arab Republic (UAR) schools, the Mennonite Mission schools, the Sudan Interior Mission schools, and the Somali private schools. Even though detailed statistics of the private schools are not available, it has been estimated that they accommodate about twenty percent of the school-going children in the country. The Ministry of Education has recently established a section in charge of private education that controls such schools by supervising the syllabus prescribed for each level of education and ensuring that they act according to the laws and regulations governing education in the Republic.

In 1968-1969, total enrolment in primary schools was 24,697 (out of which 4,747 were girls); in intermediate schools 10,609 (out of which 2,195 were girls); and in secondary schools and teacher training schools 2,957 (out of which 351 were girls). Thus the overall enrolment of students was 38,263 (of which 68 percent in primary schools, 25 percent in intermediate schools, and seven percent in secondary schools), which is about one percent of the total population.

In the primary schools at present the language of

instruction for all the grades is Arabic. The subjects taught include religion, Arabic, English, mother tongue (Somali history), social and natural environment, and physical education.

The intake of primary schools is from Koranic schools that give pre-primary education, which is basically religious. The Ministry of Education is doing its best to reorganize Koranic education and so far some assistance has been usually given to the Koranic teachers by the Ministry and by local administrations.

In the intermediate schools at present the language of instruction is English and the curricula has been unified.

There are at present the following public secondary schools: Sheikh Secondary School, Amoud Secondary School, Hargeisa Boys' Secondary School, Hargeisa Girls' Secondary School, Burao Secondary School, Benadir Secondary School at Mogadisco, National Secondary School at Mogadiscio, Scuola Media Superiore Hamar Geb Geb, Mogadiscio, Scuola Superiore Hamar Geb Geb.

Besides the above secondary schools, there are the following post-intermediate technical schools: Ragioneria (Accountancy) and Geometri (Land Surveying), Mogadiscio, offering a four-year course; Burao Technical Institute, offering a three-year course; Technical Institute, Hargeisa, offering a three-year course; Clerical Training Center (Commercial Institute), Hargeisa, offering a two-year course; and Scuola Industriale, Mogadiscio, offering a four-year course.

In 1967 a School for Animal Health Assistants was established at Mogadiscio with the help of the FAO/UN Special Fund to train medium-level veterinarians.

There is a National Teacher Training Center at Afgoi (NTEC) established by USAID. Under a contract between USAID and Eastern Michigan University, a body of advisers has been attached to NTEC since the Center began. The Center has accommodation for 200 students. In addition to training teachers, the Center is also working on unification of education and production of textbooks and other teaching material for educational programmes.

Until NTEC was established, there was only one institution for higher education in the Republic, *viz.*, the University Institute, which was providing a two-year course in law and economics. The medium of instruction was Italian. After these two years, the students had to go to Italy to complete their university education.

In the absence of a university or a degree-granting college in the Republic, all higher education had to be pursued abroad. Through the assistance provided by friendly countries and international agencies, a large number of Somali students have been going abroad for further studies on scholarships and fellowships. The number of Somali students studying abroad at the end of 1966 was 1,461, of whom 1,176 were studying for university degrees. They have been following courses in about 62 different fields of study, including medicine, law, agronomy, horticulture, economics, commerce, civil engineering, and teaching.

For the purpose of promoting higher education, a National University was established in 1969.[6] It has at present only one faculty, law and economics, providing a four-year course leading to a degree.

Efforts to improve both the quality and availability of education and training come primarily from the government. However, the government receives generous assistance from friendly countries and organizations for the construction of school buildings and

6. *Infra* Pt. VI, Ch. 11, B.

for the purchase of equipment and materials for schools. Construction of school buildings and classrooms is also done under self-help schemes. Countries such as the UAR, the U.S.A., Italy, Russia, and India provide teachers. International organizations, including UNESCO and UNICEF, also extend considerable help.

G. Housing, Health, and Sanitation

Corresponding to the dichotomy between nomadism and sedentary cultivation, there are two types of traditional huts. One, the easily transported collapsible hut called *gurgi* or *agal*, may be packed on a nomad's camel; the other is a fixed cylindrical hut of the riverine agriculturists, called *matleh*. Huts of members of the same extended family are grouped together within a common thorn-shrub enclosure *(zariba)* forming a temporary village often designated as *rer*.

The villages and towns are widely scattered. They vary in size, ranging from small settlements to larger towns such as Mogadiscio and Hargeisa. The population of each village and town varies with the fluctuation in the seasons.

The nomads who form a transitory element in towns live for the most part in huts erected on the periphery of the urban centers. The more permanent townsmen live mainly in mud-and-wattle houses called *arish*, and now to some extent in masonry dwellings.

As in the case of most developing countries in the world, the rate of urbanization is very rapid in the Republic, resulting in an increasing housing shortage in urban areas. The growing demand for housing and the tax exemption granted by the government to income from house rent for ten years have brought about a very rapid rate of increase in housing construction.

With a view to encouraging low-cost housing, the government has established a National Housing Agency,[7] which has, with the assistance of the United Nations, completed a pilot project of low-cost housing.

Water supply in the rural areas and in the main towns in the Republic is not adequate. The rural population obtains water from rivers, ponds, and wells. Mogadiscio, Hargeisa, and Kismayu have their own water supply systems. The government has established the National Water Agency [8] for providing better water facilities in Mogadiscio and Kismayu, with the project being financed by a loan from the USAID.

The diet of the pastoral nomads consists of milk, often sour, ghee, bush fruit when available, and meat, especially for feasts and entertaining guests; the diet of the agricultural pastoralists consists of milk, durra or beans, meat, fruit, tea, and sugar; and the diet of the sedentary cultivators consists of local bread *(mofa)*, durra, maize, beans or rice, sugar, vegetable oil or butter, milk, tea or coffee, and bananas, dates, and mangoes, where these are available.

The most widespread diseases in the country are malaria and tuberculosis. The incidence of these diseases is very high and calls for the adoption of special measures to combat them.

Considerable progress has been made in malaria eradication and tuberculosis control projects. The former, commenced in 1962, co-ordinates the development of the national malaria service and the rural health services as a prelude to mounting a countrywide eradication programme. The latter, initiated in 1960, operates a center in Mogadiscio and will be extended to other parts of the country. A combined mass campaign for tuberculosis and smallpox vaccination was inaugurated in the North and it was also planned to extend

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7. Law No. 6 of Jan. 25, 1968.
8. *Infra* Pt. VI, Ch. 7, C.

it on a nation-wide scale during the period covered by the Short-Term Development Plan.

The health sector in the Republic is at a low level of development. Until recently, the medical facilities were concentrated in a few urban centers, emphasis being mainly on curative services with not much attention paid to preventive measures.

In 1964 there were 25 hospitals, 32 infirmaries, and 182 dispensaries, with a total number of 4,330 beds. A few new health institutions have been established in recent years. The European Economic Community constructed a modern 600-bed hospital in Mogadiscio in 1965. A TB hospital was established by the government in 1966 at Belet Wein. Two hospitals with 50 beds each were set up at Wajit and Sheikh with the assistance of the USSR. A maternity section was added to the Group Hospital and a model ward with twenty beds was also built at Hargeisa to be used largely as a training ward for the Hargeisa School of Nursing. Twenty new dispensaries—five in the North and fifteen in the South—were also established. Three maternity and child health centers were opened in the North and a basic health center with modern equipment was also inaugurated in Mogadiscio. Further expansion of medical facilities is underway.

The present situation of the medical services in the Republic is as follows: There are three general hospitals: the EEC Hospital and the De Martino Hospital in Mogadiscio, and the Group Hospital in Hargeisa; eight regional hospitals; three TB hospitals; one mental hospital in Berbera; Forlanini Hospital in Mogadiscio for TB and mental care; eight district hospitals with 30 to 140 beds each; 24 infirmaries with ten to twenty beds each, and about 150 dispensaries. There are also two private missionary hospitals, one run by the Mennonite Mission and another run by the Sudan Interior Mission.

In view of the dearth of professional medical personnel, a large number of scholarships was allocated for medical studies. At the end of 1967 about 180 students were studying for degree courses in medicine, dentistry, etc., and 24 in pharmacy. The Health Training Institute in Mogadiscio, operated with the assistance of WHO/UNICEF, had by 1967 trained about 300 persons of various specialities: health superintendents, public health nurses, sanitarians, and x-ray and pharmacy technicians. The Hargeisa School of Nursing is also training professional nurses to meet international standards.

PART TWO
DEVELOPMENT OF THE LEGAL SYSTEM IN ITALIAN SOMALIA

CHAPTER I

GENERAL INTRODUCTION

The legal system of a country consists of the body of law applicable as well as the legislative, executive, and administrative institutions that emanate the law, and the judiciary that administers it. While dealing with the development of the legal systems in Italian Somalia and the British Somaliland Protectorate, it is necessary to deal both with the law and the institutions established during the colonial period.

Although the former Trust Territory of Somalia and the former British Somaliland Protectorate gained legislative autonomy in the late 1950's and emerged as a unitary Republic in 1960 after attaining independence, much of the Republic's present law dates back from the Colonial Era. Neither autonomy nor independence served to wipe out the law that Italy and Britain respectively imposed on their colonies. On the contrary, legislative provisions were enacted to continue the received law.

Among the legislation governing the received law, mention may be made of three provisions. First, when Italian Somalia was brought under Trusteeship Administration, Article 4 para. (3) of Decree No. 1357 of December 9, 1952,[1] issued by the President of the Republic of Italy specifically provided for the application of Italian laws in the Trust Territory. Secondly, when the British Somaliland Protectorate attained independence, Article 42 para. (1) of the Constitution approved by the Somaliland Order-in-Council, 1960,[2] also provided for the continuance of the application of

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1. [1952] Gaz. Uff. 293, [1953] Bulletino Ufficiale, 1.

2. SOMALI REPUBLIC—NORTHERN REGIONS, ANNUAL VOLUME OF LAWS 58-102 (1960). This Order in Council was made on June 23, 1960.

certain Indian enactments and the laws of England that were in force. Thirdly, Article 3 para. (1) of the Act of Union,[3] enacted soon after the coming into being of the Republic, specifically provided:

> [T]he Laws in force in Somaliland and Somalia at the time of the establishment of the Union shall remain in full force and effect in the respective jurisdictions subject to the provisions of the Constitution, this law, or any future law.

Any study of law in the independent Somali Democratic Republic must, therefore, begin with an examination of the colonial law. Not only is much of this early law in force today, but it also provides an indispensable background to an understanding of the new State's efforts to develop a modern legal system.

The law of the colonial period may be divided into three groups: the law of metropolitan origin, local enactments, and indigenous law.

The law of metropolitan origin. In respect to Italian Somalia, this consisted of the laws and regulations in force in Italy, (or modified versions thereof), which were made applicable to the colony. In respect to the British Somaliland Protectorate, this consisted of certain Indian enactments, English common law, the doctrines of equity, and the statutes of general application which were made applicable in the Protectorate.

Local enactments included the legislative enactments of institutions and authorities established by the Italians in Italian Somalia, and by the British in the British Somaliland Protectorate.

Indigenous law consisted of Shariat law and customary law applicable to the indigenous populations in Italian Somalia and in the British Somaliland Protec-

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3. Law No. 5 of Jan. 31, 1961. It was retroactive effective July 1, 1960.

torate. Shariat law and customary law existed long before the advent of the colonial powers and are not a product of the Colonial Era. However, the colonial powers did legislate as to the application of Shariat law and customary law.

During the colonial period, Italy and Britain respectively established two different judicial systems, which continued in force until 1962 when the Republic established its own system. A study of the earlier systems will be useful to understand the new system adopted by the country.

The development of the legal system in Italian Somalia is covered in this Part, while Part III deals with the development of the legal system in the British Somaliland Protectorate.

CHAPTER 2

LAW OF METROPOLITAN ORIGIN

A. Constitutional Development in Italy
B. Metropolitan Organs That Exercised Legislative Power
C. Sources of Metropolitan Law
D. Principle of Special Legislation
E. Scope of the Reception Statutes
F. Promulgation and Publication of Legislation
G. Sources for Research

A. Constitutional Development in Italy [1]

In order to understand the law of metropolitan origin, which is the first source of law in Italian Somalia, it will be useful to describe briefly the constitutional development in Italy and indicate the main constitutional organs that were concerned with metropolitan law.

(1) Unification of Italy

Before 1861, Italy was a conglomeration of petty states. The Kingdom of Italy was formed in 1861 as a result of a series of political revolutions dating from Napoleon's campaigns of 1795 and 1797, and all parts of Italy were gradually annexed to the Kingdom of Sardinia. In 1866, as a result of the Austro-Prussian war, Mantua and Venice were added, and in 1870 the

1. *See* R. Albrecht-Carrie, Italy from Napoleon to Mussolini (Columbia Univ. Press, N.Y. 1950); D. Mach Smith, Italy: A Modern History (Univ. Mich. Press, Ann Arbor 1959); J. Sprigge, The Development of Modern Italy (Yale Univ. Press, New Haven, Conn. 1944); H. Hearder and D. Waley, A Short History of Italy (Cambridge Univ. Press, Cambridge 1963); M. Carlyle, Modern Italy (Frederick Praeger, N.Y. 1965); P. Calamandrei, A. Levi, *et al.*, Commentario Sistematico alla Costituzione Italiana (1950); J. Perillo, The Italian Legal System: An Introduction (Stanford Univ. Press, Stanford, Cal. 1965).

Papal States, thus bringing about the unification of most of Italy.

The Constitution or *Statuto Fondamentale* issued in 1848 by Carlo Alberto, King of Sardinia and Piedmont, was extended to the territories that were included in the Kingdom of Italy. The Statute of 1848 provided for a Parliament consisting of two chambers and a Council of Ministers led by the head of the government. The title of King of Italy was conferred on Vittoria Emmanuele II and his successors by a law of March 17, 1861. In 1871 the capital of the kingdom was transferred to Rome.

(2) Fascist Rule, 1922-1943

After World War I, Italy's domestic conditions deteriorated steadily, and the post war struggles between Marxist, reform, clerical, liberal (conservative), and nationalist groups disrupted state action and provided the opportunity for a fascist *coup* headed by Mussolini.

During Mussolini's regime, the Statute of 1848 was modified by a number of laws. Special mention may be made of three laws. First, a law of December 24, 1925 required the consent of the Government, in effect of Mussolini himself, for the placing of any matter on the agenda of either of the legislative chambers. Secondly, the Italian Charter of Labour of April 21, 1927, defined the organization of the corporative state. Thirdly, the law of March 21, 1930, provided for the organization of a National Council of Corporations. Furthermore, under the Statute of 1848, the ministers had been declared responsible; but it was not specified to whom they were responsible. In practice, they had been held to be individually responsible to Parliament. By a law of 1925, Mussolini specifically declared that they were individually responsible to the King and to the head of the government, that was to say, Mussolini himself.

(3) ITALIAN REPUBLIC

After the downfall of fascism, a referendum was held on June 2, 1946, and the Italian people voted in favour of the establishment of a republican form of government. A new constitution,[2] which replaced the Statute of 1848, was approved by the constituent Assembly on December 22, 1947, and became effective on January 1, 1948.

The main constitutional organs of the Italian Republic are the President of the Republic, the Parliament, the Council of Ministers, the Constitutional Court, the administrative courts, and the civil and criminal courts.

The President of the Republic is elected for a seven-year term by a joint session of Parliament and by electors appointed by Regional Councils. He is the chief of state and represents the national unity. Parliament consists of the Chamber of Deputies and the Senate.

The executive power is vested in the Government (or the Cabinet), consisting of the President of the Council of Ministers and the Ministers appointed by the President of the Republic. The Government is responsible to Parliament.

The Constitutional Court exercises judicial review of legislative action. The administrative courts, the most important of which is the *Consiglio di Stato*, exercise judicial review of administrative action. The ordinary courts which exercise civil and criminal jurisdiction are the *giudici conciliatori*, *pretori*, tribunals, courts of appeal, and *Corte di Cassazione*, often called the Supreme Court, which is the highest of the ordinary courts.[3]

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2. For test of the Constitution, *see* 2 A. PEASLEE, CONSTITUTIONS OF NATIONS 482-505 (Martinus Nijhoff, the Hague 1956).

3. On the organization and jurisdiction of the courts, *see* CAPPELLETTI AND PERILLO, CIVIL PROCEDURE IN ITALY Ch. 3-4 (1965). On Italian administrative law, *see* GALCOTTI, THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND ITALY (1954).

B. Metropolitan Organs That Exercised Legislative Power [4]

(1) IN GENERAL

Having described the constitutional development in Italy and indicated the main constitutional organs concerned with metropolitan law, we may now examine how the said organs exercised the legislative powers with respect to Italian Somalia.

(2) MERCATELLI REGULATIONS

After the failure of the two Chartered Companies, the Filonardi Company and the Benadir Company, the Italian Government assumed direct administration of the territory. The first legislative measure issued by Italy to control the administrative organization of Italian Somalia was the regulations governing the structure of Italian Somalia approved on February 24, 1905, by the Minister of Foreign Affairs, Hon. Tittoni. They were issued in the colony by Royal Commissioner L. Mercatelli by Decree No. 1 of May 1, 1905, and remained in force until Law No. 161 of April 5, 1908, was enacted. It should be noted that the Mercatelli Regulations were approved only by the Minister of Foreign Affairs and were not authorized by law. The said regulations, therefore, represented a bold act in so far as they provided for the performance of various functions of the State in the colony by organs that did not have such faculty.

(3) LAW NO. 161 OF APRIL 5, 1908

The Italian Parliament did not find it necessary

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4. *See* M. COMBA, LA POTESTA' LEGISLATIVA NEI RIGUARDI DELLE COLONIE 50-58 (Fratelli Bocca Editori, Torino 1930).

to intervene until April 5, 1908, when it issued the basic law [5] governing the organization in the colony.

Law No. 161 of April 5, 1908, united all the areas of Southern Somalia into a single administration under the name "Somalia Italiana," and established the political and legislative organization of the colony, thus intervening for the first time in the latter's internal affairs by providing the basis for the organization of the judiciary (Arts. 12-16), of the military (Arts. 17-19), and of financial matters (Arts. 20-21).

(4) TRUSTEESHIP ADMINISTRATION, 1951-1960

At the end of World War II, the status of Italian Somalia changed to that of a United Nations Trust Territory. Article 4 of Decree No. 2357 of December 2, 1952,[6] was issued by the President of the Republic of Italy soon after the trusteeship administration came into being. It provided that the legislative power in the territory "shall be exercised by the Administrator in conformity with Articles 4 and 5 of the Declaration of the Constitutional Principles of the Trusteeship Agreement." Thus during the period of trusteeship administration, the metropolitan organs ceased to exercise legislative power with respect to the Trust Territory of Somalia. Legislative power was first exercised by the Administrator and was later gradually transferred to the legislative body established in the territory.

C. Sources of Metropolitan Law

Italian law, unlike English law, is essentially statutory in nature. Decided cases *(giurisprudenza)* are not formally recognized as a source of Italian law,

5. [1908] Gaz Uff. 102, 2 LAWS AND DECREES OF THE ITALIAN KINGDOM 141-225, 1094-99 (1908).

6. [1952] Gaz. Uff. 293, OFFICIAL BULLETIN OF THE TRUST TERRITORY 1 (Jan. 1953).

even though they may have persuasive effect and are often consulted by lawyers and judges in the interpretation of statutes. Legislation is then the fundamental source of Italian law. Consequently, legislation constituted the body of metropolitan law received in Italian colonial Africa.

The Italian legislation took various forms, including Royal Decree *(Regio Decreto)*, law *(Legge)*, legislative decree *(Decreto Legislativo)*, decree-law *(Decreto-Legge)*, and regulations *(Regolamento)*, depending on the source from which it emanated. A law was an act of Parliament promulgated by the King while Italy remained a Kingdom and since the coming into force of the Constitution of Italy of 1948, it has meant an act of Parliament promulgated by the President of the Republic. Under Article 76 of the Constitution of Italy, the legislative power may be delegated to the Government for a limited time and for a definite object. When promulgated in proper form, these legislative decrees *(decreti legislativo)* have the force of law *(legge)*. In extraordinary cases of necessity and urgency, Article 77 of the Constitution of Italy empowers the Government to issue decree-laws *(decreti legge)*. Such decree-laws will become void *ab initio* unless converted into law by Parliament within sixty days. The above three forms constitute primary legislation. Regulations *(regolamento)* are issued by Government authorities and can be termed subsidiary legislation.

Much of the Italian law is to be found in codes. In 1865 and in the following years the King of Italy promulgated new codes for the Kingdom of Italy: the Civil Code, Code of Commerce, and Code of Procedure. Following the movement for reform, a Penal Code [7]

7. C. PEN., approved by Royal Decree No. 1398 of Oct. 19, 1930, and in force since July 1, 1931.

and Code of Criminal Procedure [8] were adopted in 1931; a new Civil Procedure Code [9] was adopted in 1940, and a new Civil Code [10] and a new Navigation Code [11] were adopted in 1942. These five codes are still in force in Italy.

It should be noted that there is a bulk of uncodified legislation in force; some are in the form of codes themselves, which expand and supplement the provisions of the code relating to specific subjects. The examples of the special legislation are the Law on Bank Checks and Bank Drafts,[12] and the Law on Bills of Exchange and Promissory Notes.[13]

D. The Principle of Special Legislation [14]

It should be noted that the legislation in force in Italy did not automatically apply to Italian Colonies. Generally speaking, a royal decree or a law of Parliament could apply in a colony only if specifically so provided in such decree or law itself or in a subsequent decree or law. As a result of this rule, the body of laws in force in the colonies was distinct from that of metropolitan Italy. Even where a decree or law of Italy had been declared applicable to a colony, subsequent amendments to that decree or law could not affect the colony unless such amendments themselves were also declared applicable. And if legislation by its

8. C. PRO. PEN., approved by Royal Decree No. 1399 of Oct. 19, 1930, and in force since July 1, 1931.

9. C. PRO. CIV., approved by Royal Decree No. 1443 of Oct. 28, 1940, and in force since April 21, 1942.

10. C. CIV., approved by Royal Decree No. 262 of March 16, 1942, and in force since April 21, 1942.

11. C. NAV., approved by Royal Decree No. 327 of March 31, 1940, and in force since April 30, 1942.

12. Royal Decree No. 1736 of Dec. 21, 1933.

13. Royal Decree No. 1669 of Dec. 14, 1933.

14. *See* M. COMBA, *supra* note 4 at 166-67.

terms applied simply to a colony such as Eritrea or Italian Somalia, it was in force only in the territory specified.

Even during the period of the private management of the colony, the temporary Regulations of May 14, 1895, provided that the laws in force in the Kingdom should apply with respect to controversies between Europeans. Similarly, Governor's Ordinance of December 26, 1903, contained a provision that in penal matters the Penal Code and the Penal Procedure in force for the Royal Army should be observed. The legality of this provision is questionable. However, it is noteworthy that from the very beginning of the establishment of the colony, it was considered necessary to issue provisions determining the application of the metropolitan legislation in Somalia.

Similarly, the Mercatelli Regulations provided that it was necessary to promulgate the King's laws and regulations with the modifications necessitated by local conditions and with the exception of personal and family laws governing the status of Italians. It also declared the applicability of Italian laws to Europeans if there were no impediment to such application in the measures regularly promulgated in the colony. The legality of these regulations, as noted earlier, was controversial. But the regulations reflect the principle that in the legislation governing the organization of Somalia it was necessary to specially provide for the application of the laws of the Kingdom to the colony, thus indicating that the legislators were conscious of the principle of special legislation for the colony.

Furthermore, Article 4, letter (e) of the basic law (Law No. 161 of April 5, 1908) specifically gave the King's Government the power to extend to the colony the codes, laws, and regulations of the Kingdom, with suitable modifications necessitated by local conditions, with the exception of laws governing personal

and family status of Italians. The principle that metropolitan legislation could not apply in the colony unless it were extended was thus clearly established.

The said principle was also indirectly confirmed by Article 3 of the Organization of the Judiciary in Italian Somalia, approved by Royal Decree No. 708 of July 7, 1910, according to which, unless and until special provisions for the colony were enacted, the codes, laws, and regulations of the Kingdom should apply to Italian citizens and foreigners in so far as the local conditions permitted. Furthermore, Article 3 of the subsequent Organization of the Judiciary approved by Royal Decree No. 937 of June 8, 1911,[15] and partly amended by Royal Decree No. 3036 of December 20, 1923, repeated the contents of Article 4 of the previous organization providing that the civil and penal cases in which Italians and foreigners were parties should be decided in conformity with Italian laws, insofar as local conditions permitted.

It should, however, be noted that there were exceptions to the principle of special legislation. Laws of a constitutional nature and laws relating to metropolitan institutions, such as the *Corte di Cassazione* in Rome, whose jurisdiction extended to Italian Somalia were considered to be in force in the colony. When institutions that took over the functions of the metropolitan institutions were established in the colony, the metropolitan laws relating to them ceased to have effect.

E. The Scope of the Reception Statutes

As noted earlier, following the assumption of direct administration of Italian Somalia, Italy enacted Law No. 161 of April 5, 1908, which was the main reception statute governing the application of metropolitan law in the colony.

15. [1911] Gaz. Uff. 24; 4 LAWS AND DECREES OF THE ITALIAN KINGDOM 780-1162, 3513-38 (1911); 10 BOLLETTINO UFFICIALE DELLA SOMALIA ITALIANA (Sept. 30, 1911).

First, Article 4 of the above law gave the King's Government the power to extend to the colony the code, laws, and regulations of the Kingdom with the modifications necessitated by local conditions and to promulgate new legislative measures on matters other than those relating to personal and family status of Italians.

Secondly, the above provisions enabled the King's Government to issue decrees governing the organization of the Administration, the Judiciary, and the Military.

Thirdly, the above provisions also empowered the King's Government to issue decrees governing some special matters, *viz.*, the ascertainment of land available to the State, the alienation and concession of immovable property, and the diminution of exchange for public purposes with limitation on imports for a specific period.

Article 3 of Royal Decree No. 937 of June 8, 1911, which governed the Organization of the Judiciary and the application of metropolitan law in Italian Somalia, provided that the codes, laws, and regulations of the Kingdom should apply to Italian citizens and foreigners in the colony in so far as local conditions permitted.

Since neither the metropolitan Government nor the Governor of the colony promulgated any legislative measures governing civil, commercial, and penal matters, the Italian Codes applied with respect to Italians and foreigners. Special decrees were issued only with respect to the organization of the Administration, the Judiciary, and the Military and concerning matters such as concessions of land.[16] With respect to these matters, the metropolitan law did not apply.

16. Royal Decree No. 820 of June 8, 1911, [1911] Gaz. Uff. 191. Royal Decree No. 820 of June 8, 1911, was amended by

Although Law No. 161 of April 5, 1908, and Royal Decree No. 937 of June 8, 1911, were repealed, the metropolitan law, which they introduced, continued to be in force in Italian Somalia until specifically repealed or amended.

F. Promulgation and Publication of Legislation

One of the basic principles of the colonial legislative system was that a law or decree that had been made for, or declared applicable to, a colony, could not go into effect unless that law or decree were promulgated in Italy by the King or in the colony by the regional Governor. Once promulgated, legislation was then required to be published in the Metropolitan Official Bulletin or in the local Official Bulletin, as the case might be.

G. Sources for Research

The basic research tools for a scholar of law of Italian Somalia are the various Official Bulletins. Insofar as the official sources are concerned, the best collection of metropolitan Official Bulletins is available in the *Istituto Italiano per l'Africa*, in Rome. The collection includes the library of the former Colonial Ministry and that of the former *Istituto Coloniale*. The Garesa Museum in Mogadiscio also contains copies of the metropolitan and local Official Bulletins. As yet no consolidated lists of volumes have been published.

Among the unofficial sources for the legislation in question, the most important is *Manuale di Legislazione della Somalia Italiana* published in 1913 in three volumes by Carlo Rossetti and printed by Tipografia della Unione Editrici, Rome.

Royal Decree No. 430 of April 21, 1912, [1912] Gaz. Uff. 118, and by Royal Decree No. 226 of Jan. 1929, [1929] Gaz. Uff. 59.

CHAPTER 3

LOCAL ENACTMENTS

A. In General

The enactments of local authorities and institutions are a second source of law in Italian Somalia.

Before describing the forms of local enactments, it might be useful to briefly consider the constitutional development in Italian Somalia.

B. Constitutional Development in Italian Somalia

(1) INTRODUCTION

The basis of the administrative system in Italian Somalia was first laid by the Italian Chartered Companies. The companies were agencies with paragovernmental functions and were in fact semiofficial overseas extensions of the metropolitan government. The companies' agents performed the same functions as the Residents and Governors after 1905. The early colonial government was but a continuation of the chartered company's government. The Tittoni Government, which provided for direct administration of the colony, merely followed existing directions. The colonial policy of the Fascist Government for *la Grande Somalia* differed little from that of pre-Fascist days.

(2) PRE-TRUSTEESHIP PERIOD

(a) Scope of Governor's Authority under the Mercatelli Regulations

The Mercatelli Regulations gave considerable powers to the Governor of the colony in the executive

and legislative fields. First, the Governor was vested with all the powers that the King's Ministers could delegate. Thus he had the power to regulate by decree the administration of justice, public security services, customs duties, ports, post and telegraph, social security, public works, domain land, etc.

Secondly, the Governor was also conferred with powers to exercise the various administrative activities and some legislative activities. The legislative organs of the metropolis did not have any means of interfering in the affairs of Somalia. Somalia found itself directly dependent on the executive power in Italy and it appeared as if the colony were removed from the purview of the State power. It should be noted that under the Mercatelli Regulations the Governor of Italian Somalia was endowed with certain autonomy and liberty of action which was in contrast with the limited powers conferred by various laws on the Governors of the colony of Eritrea.

(b) Scope of Governor's Authority under Law No. 161 of April 5, 1908.

Under Law No. 161 of April 5, 1908, also, the Governor of the colony was vested with large executive and legislative powers.

In the executive field, the Governor was given power with respect to services, public security, hygiene, hunting, and fishing. He had also the power to vary, within certain limits, customs duties and taxes, to order the suspension or the application of penalty, to condone fines due to the treasury, which constituted a modification of the norms dictated by the Government, or a suspension or condoning of an irregular sentence of the judicial authorities. The Governor, as representative of the Central Government, also exercised the powers which the King's Ministers could delegate.

The legislative power of the Governor was derived from two distinct sources: the power directly conferred on him by the basic law; and the power that might be delegated to him by the King's Government. There was a subdelegation of the powers that were conferred by Parliament on the Italian Government, and which the Italian Government delegated to the Governor.

The ample powers conferred on the Governor, including the power derived from delegation and subdelegation, permitted a complete decentralization of functions between the metropolis and the colony, and offered the possibility of an autonomy centered in the Governor, the supreme local organ.

(c) Scope of Governor's Authority under the Fascist Rule

During the Fascist rule, the administrative system was not much different from the early colonial government. It was, after the fashion of Italian Fascism, bureaucratic and highly centralised, and the Governor exercised ample executive and legislative powers as was the case in the early colonial period.

(3) TRUSTEESHIP PERIOD [1]

During the Trusteeship Administration between 1950 and 1960, Italy's new position in the former Colony of Somalia was carefully defined in the United Nations Trusteeship Agreement,[2] which was approved by the United Nations General Assembly on December 2, 1950. Under the agreement, Italy assumed responsi-

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1. *See* A. CASTAGNO, JR., *supra* Pt. I, Ch. 2, note 2; P. CONTINI, THE SOMALI REPUBLIC: AN EXPERIMENT IN LEGAL INTEGRATION 1-4 (Frank Case & Co. Ltd., London 1969).

2. TRUSTEESHIP AGREEMENT FOR THE TERRITORY OF SOMALILAND UNDER ITALIAN ADMINISTRATION (Sales No. 1951 A.1, United Nations, N.Y. 1951).

bility for the Territory, and the Italian Trusteeship Administration (A.F.I.S.) was required to "foster the development of free political institutions and to promote the development of the inhabitants of the territory towards independence." The agreement also contained as an annex a Declaration of Constitutional Principles guaranteeing the rights of the inhabitants and the full implementation of the administration's obligations.

To make the assurance doubly certain from the Somali point of view, a special United Nations Advisory Council was established in Mogadiscio to provide direct liaison with the administrative and its wards. This body, which consisted of representatives of Colombia, Egypt, and the Philippines, was available to make recommendations and reports on the progress of development in all spheres and to provide tangible evidence of United Nations' responsibility and concern. The effect of the presence of the United Nations was also further strengthened by the provision of regular visiting missions which, like the Advisory Council, reported to the Trusteeship Council of the United Nations.

The constitutional development achieved in Somalia during the trusteeship period may be traced under the following heads: Executive, Territorial and Local Administration, Legislature, and Judiciary. The Judiciary will be dealt with in a separate chapter.

(a) The Executive

Under the Trusteeship Administration in Somalia, the administering authority (Italy) was represented by an administrator, who was the chief executive officer of the territory.[3]

3. Declaration of Constitutional Principles, Annex to the Trusteeship Agreement, art. 3.

The Administrator was bound to seek the advice of an administration committee composed of himself, the Secretary-General of the Administration and between seven and nine heads of the government departments on all matters concerning the plans for political, economic and social development, the budget, and the closing of accounts.[4]

The Trusteeship Agreement enjoined the administering authority to give the inhabitants of the territory a progressively increasing participation in the various organs of the government.[5]

Somali participation in the governance of the Territory began in 1954, when Somali officials were invited to participate in the work of the administration committee as observers. However, in 1956 legislative measures were introduced to enable Somalis to take a more active part in the administration. Under Law No. 1 of May 7, 1956, the first Somali Government, consisting of a Prime Minister and five Ministers, all appointed by the Administrator, was established to "ensure the internal administration of the territory within the limits set by the Trusteeship Agreement." The Prime Minister directed the general policy of the Government and was responsible to the Administrator therefor. The Government was not responsible to the Legislative Assembly, but was bound to submit its programme to it for approval.[6] Each Minister had an Italian counsellor, appointed by the Administrator, who attended the Council of Ministers without the right to vote.[7] The office of Counsellors to Ministers was, however, abolished in November 1956 following a recommendation of the Trusteeship Council.

4. Ordinance No. 47 of July 22, 1950.

5. Trusteeship Agreement, art. 3.

6. Decree No. 78 of May 18, 1956, defined the functions and powers of the Ministers and Departments.

7. Decree No. 79 of May 18, 1956.

A major development in the executive field before independence was the formation of the second Somali Government in 1959, which consisted of the Prime Minister and nine Ministers.[8]

During the Trusteeship Administration, the Administrator retained certain reserved powers pertaining mainly to defence and foreign affairs.[9]

(b) Territorial and Local Administration

During the period before 1955, for purposes of administration, the territory was divided into six Regional Commissariats (later Regions), which in turn were subdivided into thirty Residencies (later Districts). These divisions were under the authority of the Regional Commissioners (later Provincial Commissioners, and since 1959 Regional Governors) and Residents (later District Commissioners), respectively, all of whom were appointed by, and responsible to, the Administrator.

In order to widen participation of Somalis in the local administration, the Trust Administration established two types of local government bodies: District Councils in the rural areas and Municipal Councils in the towns and villages.

District Councils [10] were composed of chiefs and notables, elected in the tribal assemblies *(shirs)* and local political party representatives. They were presided over by District Commissioners. The functions of the District Councils were purely advisory. The councils aided the District Commissioners, the repre-

8. Ministries included: Interior; Justice; Finance; Industry and Commerce; Public Works and Communications; Agriculture and Animal Husbandry; Public Education, Health, and Veterinary Services; Labour; and General Services.

9. Declaration of Constitutional Principles, Annex to the Trusteeship Agreement, art. 4.

10. Ordinance No. 5 of May 30, 1955.

sentatives of the Central Government in the Districts, in the administration of the areas under their jurisdiction. They were concerned with matters involving customary law and with settlement of disputes over grazing and water rights. District Commissioners were required to seek the advice of the Councils on social, cultural, and economic programmes that affected the District. The Trust Administration hoped to utilize the Councils as the main instrument for the civic education of the nomads and it expected to grant the Councils financial, executive, and legislative powers. But the Councils failed to develop into effective organs of modern local government, mainly because the people in the interior move from place to place in search of pasture. The Councils remained consultative bodies.

In contrast to District Councils, the Municipal Councils of the towns and villages showed a large measure of adaptability to the requirements of modern local government. In 1954 elective Municipal Councils were established, and in 1956 a comprehensive law on Municipal Administrations was enacted.[11] Under this law the Municipal Councils, whose number increased to 48, were transformed into largely autonomous bodies dealing with complex matters such as census, registry, public services, and town planning. Each Municipal Council had an elected Mayor, *Giunta*,[12] and Council. The rapid progress of Municipal Councils was assisted by the Administration's policy of attaching as Secretaries to the Councils officials with training in municipal administration. Control over the Municipal Council was exercised by the Regional Governors and the Minister of Interior. All matters dealing with personnel, public service, rates and taxes, finance, prop-

11. Law on Municipal Administration, Law No. 9 of Sept. 30, 1956.

12. Committee of the Council.

erty, and town planning were subject to the approval of the Regional Governor. The Minister of Interior had the right to remove Mayors and to dissolve the Municipal Councils "for reasons of public order." These rather extensive limitations on the Municipal Councils were criticized by the Advisory Council as being "so wide as to constitute a threat to the independence of the municipalities." [13]

(c) The Legislature

The Declaration of Constitutional Principles annexed to the Trusteeship Agreement provided "for the gradual development of institutions designed to ensure the establishment of full self-government and independence." [14] However the declaration added that, pending the establishment of an elective legislature, the legislative authority should normally be exercised by the Administrator, after consultation with the Territorial Council.[15]

Pursuant to the above provisions, the Territorial Council was established in 1950 [16] and inaugurated on January 29, 1951. The Council consisted of 51 members of whom 21 were regional representatives, eighteen represented political parties, eight economic groups, and one cultural groups. In addition, there was one representative each of the Italian, Arab, Indian, and Pakistani communities. The members were nominated by the Administrator and served a one-year

13. UNITED NATIONS, REPORT ON THE U.N. ADVISORY COUNCIL para. 105(ii) (U.N. Document T/1311, April 22, 1957). Under the law on Local Administration and Local Council Elections dated Aug. 14, 1963, the cases in which Local Councils may be dissolved are specifically mentioned. *See infra* Pt. IV, Ch. 8.

14. Preamble.

15. Art. 4.

16. Ordinance No. 1449 of Nov. 30, 1950, amended by Ordinance No. 18 of Oct. 20, 1951, and Ordinance No. 22 of July 21, 1952.

term. Although this body, which contained representatives of both traditional and modern interests, including political bodies, was in composition similar to the Somaliland Protectorate's Advisory Council, it was more truly an embryonic legislature.

The General Assembly of the United Nations in its Resolution 755 (VIII) of December 9, 1953, and the Trusteeship Council at its fourteenth session recommended that wider powers be granted to the Territorial Council in order to make it an actual legislative body in conformity with the principles of the Trusteeship Agreement, and that its members should be elected by the people on the basis of universal suffrage. The administering authority implemented these recommendations in 1955 and 1956. The Territorial Council was transformed in 1955 into an elective body [17] and in 1956 it was replaced by the Legislative Assembly which was granted a large measure of legislative powers.[18]

The first elections to the Legislative Assembly were held on February 29, 1956. The urban population voted by means of direct, male, and secret suffrage. Among the rural population primary and secondary elections took place: tribal Councils *(shirs)* elected their electoral representatives, who in turn voted for the members of the Council. Of the 72 seats, sixty were allocated to Somalis and ten to separately elected representatives of ethnic minorities. The new Assembly was much more representative in composition than the old Territorial Council.

The new Legislative Assembly, which was inaugurated on April 20, 1956, was given full statutory powers in domestic affairs, although the Administrator retained the right of absolute veto. The power to sub-

17. Ordinance No. 6 of March 31, 1955.

18. Ordinances Nos. 1 and 2 of Jan. 5, 1956.

mit draft legislation was vested in the Administrator, the Government, and the members of the Assembly. At the beginning, prior authorization of the Administrator was required for submission of legislation. The bills adopted by the Assembly were subject to the approval of the Administrator, who could request the Assembly to propose amendments. The Administrator had the right to issue decree-laws in cases of urgent necessity, but these had to be submitted to the Assembly as soon as possible for conversion into law. In addition, the Legislative Assembly could delegate to the Administrator the power to issue, in particular matters and for a limited time, decrees having the force of law. The Administrator could dissolve the Assembly and call for new elections to be held within 120 days if it were unable to discharge its functions or if it performed its functions in such a manner as to endanger the normal conduct of the legislative process.

The next major step in the development of the Legislative Assembly was the introduction of universal adult franchise for elections to the Legislative Assembly.[19] Under the new system, Somali citizens of both sexes who were over eighteen years of age were entitled to vote. Those over 25 years of age who could read and write in Arabic or Italian [20] had the right to be elected. The list system [21] was adopted for the elections; and the term of office of the Legislative Assembly was five years. The Legislative Assembly elected under the new elections law was inaugurated on May 26, 1959.

C. Forms of Local Enactments

The legislation issued by the Governor during the

19. Law No. 36 of Dec. 12, 1958.
20. Somali is not a written language.
21. List system is explained in Pt. IV, Ch. 4.

pre-Trusteeship period was in the form of ordinances. During the early part of the Trusteeship Administration, the Administrator retained the power to issue ordinances. However with the establishment of the Legislative Assembly, local enactments, following the Italian pattern, took the form of laws, decree-laws, and legislative decrees. As noted earlier, laws were approved by the National Assembly and promulgated by the Administrator, while decree-laws and legislative decrees were issued by the Administrator.

The Administrator had the power to issue subsidiary legislation. The Regional Governors and Municipal Councils were also empowered by certain laws to issue subsidiary legislation. The subsidiary legislation issued by the Administrator was in the form of decrees and those issued by the other organs were in the form of ordinances. Irrespective of the source from which it emanated, subsidiary legislation was required to be in conformity with the law under which it was issued.

D. Sources for Research

The ordinances issued by the Governor during the early colonial period, the ordinances and decrees issued by the Administrator, and the laws, decree-laws, and legislative decrees emanated by the Administrator during the Trusteeship Administration were published in the local Official Bulletin. A collection of Official Bulletins is kept in the Garesa Museum in Mogadiscio.

CHAPTER 4

INDIGENOUS LAW

A. Introduction
B. Persons to Whom Indigenous Law Applied
C. Matters Governed by Indigenous Law
D. Exceptions to the Application of Indigenous Law
E. Conflict of Laws
F. Sources for Research

A. Introduction

The third source of law in Italian Somalia was indigenous law, consisting of Shariat law and customary law *(testur)*.

The Somalis have developed a system of customary law that is closely related to their social organization. When Islam spread among them, Islam not only put its gloss on their social organization, but considerably influenced customary law.

While undertaking paragovernmental administration in the colony, the Filonardi Company established a judicial system based on the traditional role of the Kadis and on indigenous law. The Benadir Company continued this practice. When Italy directly took over the administration of the colony, it followed the policy of not tampering with the indigenous law and institutions, with the result that Shariat Law and much of the Somali customary law survived the colonial period in pure form.

The basic Law No. 161 of April 5, 1908, specifically provided that the laws and local customs of the natives should be maintained and that colonial subjects and persons assimilated with them should be judged in conformity with Shariat Law and customary law, and Royal Decree No. 937 of June 8, 1911, approving the Organization of the Judiciary, also provided for the application of Shariat Law and customary law

and established the Kadi's Court and Tribunal of Kadis to administer them.

During the Trusteeship Administration, the application of Shariat Law and customary law was governed by Article 35 of the Law on the Organization of the Judiciary of 1956,[1] which provided that causes in which Muslims were exclusively interested should be decided according to Shariat Law and customary law, subject to the exceptions established by law, and that the parties might prove by any method of proof the existence of any custom which they required the court to apply, and the court might also *ex officio* take sufficient measures to ascertain the existence of such custom.

B. Persons to Whom Indigenous Law Applied

The application of indigenous law in Italian Somalia involved two basic questions: to whom did it apply, and the specific matters governed by Shariat Law and customary law.

(1) PRE-TRUSTEESHIP PERIOD

Law No. 161 of April 5, 1908, clearly laid down the categories of persons to whom indigenous law applied. Article 13 of the law provided:

> Colonial subjects and persons assimilated with them shall be judged in conformity with Muslim law (Shariat law) and indigenous customary law *(testur)*, *i.e.*, in accordance with various religious prescriptions and various local customs, subject to Article 4, letter (b). (Unofficial translation)

The term "colonial subjects and persons assimilated to them" included the Somalis, non-Somali Africans, and Asia Muslims who were resident in the colony. Under the above provision, indigenous law was applied with

1. Ordinance No. 5 of Feb. 2, 1956.

respect to all colonial subjects irrespective of ethnic origin.

(2) THE TRUSTEESHIP PERIOD

Article 35 para. (1) of the Law on the Organization of the Judiciary of 1956, restricted the persons to whom Shariat law and customary law applied. It provided:

> Cases in which non-Muslims are interested shall be decided in conformity with the laws in force in the Territory; and cases in which Muslims are exclusively interested shall be decided according to Muslim laws (Shariat law) and customary law, subject to the exceptions established by law. (Unofficial translation)

Under this provision, indigenous law was applied in respect of Muslims only, irrespective of ethnic origin.

C. Matters Governed by Indigenous Law

(1) IN GENERAL

Under Article 22 of the Law on the Organization of the Judiciary approved by Royal Decree No. 937 of June 8, 1911, Italian penal law was made applicable to colonial subjects and persons assimilated with them. Under Article 3 of the said law, Shariat law and customary law were subject to the exceptions established by law, made applicable in cases in which colonial subjects and persons assimilated with them were exclusively interested. From the above two provisions, it follows that indigenous law governed matters of private law, unless there was a statutory provision to the contrary. This continued to be the case throughout the colonial era.

(2) MATTERS GOVERNED BY SHARIAT LAW

The matters governed by Shariat law are very difficult to determine. In the British Somaliland Protectorate Shariat law was applied in all matters regarding marriage, divorce, family relationship, *wakf*, gift, succession, and wills. However in Italian Somalia no such matters were specified for the application of Shariat law.

As noted earlier, under Article 3 of the Law on the Organization of the Judiciary approved by Royal Decree No. 937 of June 8, 1911, Shariat law was made applicable in cases where the parties were exclusively colonial subjects and persons assimilated with them. However, Article 2 of the Law on the Organization of the Judiciary of 1956 introduced a complicated system under which Kadis were given exclusive jurisdiction in matters of personal status, family law and succession, and any other controversy between Muslims, except where the plaintiff chose to submit to the jurisdiction of the Regional Judge. This article also provided that the Regional Judge who applied the Italian law had exclusive jurisdiction over controversies that were based on written documents or controversies where the juridical relationship had arisen or was governed by formalities different from those of Shariat law or customary law. The above system in some respects extended the application of Shariat law, and in other respects restricted it by allowing a Muslim to opt out of the application of Shariat law by creating juridical relationships under written documents or other formalities not contemplated by Shariat law.

(3) MATTERS GOVERNED BY CUSTOMARY LAW

Customary law governs many aspects of Somali life such as land tenure, marriage, custody of children, intestate succession, and civil wrongs. In some of these fields, there has been an interaction of Shariat law and customary law. Customary law relating to these matters is described below.

(a) Land Tenure [2]

(i) Pasture Land

According to customary law, pasture land is not owned by specific groups but is open to all Somalis for grazing without distinction of clan or lineage. Cultivable land in contrast, whether actually under cultivation or land which has reverted to bush *(bariod)*, is held by specific clan groups, and in some cases divided out amongst clan sections. Artificially created waterponds *(war)* and wells *('el)* are generally similarly assigned to specific clans, clan segments, and individuals, title being acquired by the act of expending physical effort in their construction and maintenance. However, especially with deep wells (and theoretically of course with wells built by the Government) right of access to water is usually freely granted to alien groups—although when water is scarce such right may be granted in return for some payment in cash or kind. The existence of stretches of arable land, of farming communities, and of other permanent trading settlements, and of wells and other man-made sources of water—as well as the nature of relations, whether hostile or friendly—to some extent modified the operation of the principle of universal free access to pasture. Yet the fact remains that the most strongly nomadic groups range over hundreds of miles in their annual movements in search of good grazing—the only limit to maximum extension being the fear of isolation from one's kin and clan in the event of friction and strife with rival groups.

(ii) Arable Land

Cultivation definitely prescribes ownership of specific tracts of territory. All those clans that practise stable cultivation have quite precise areas of influence. During the period of Italian colonial rule many of these areas were marked out with clearly defined boundaries in an effort to reduce competition and friction between rival groups. Each clan has, thus, from the point of view of cultivation, a distinct territory over which it exercises corporate jurisdiction. This does not of course exclude the possibility of wider territorial alliances. However, the typical situation remains that each clan is *generally* a separate or primary land-holding unit. On this basis, the clan exercises rights over its arable land as a sort of corporation in which all members are in effect shareholders and which is run by its chiefs and elders. Clan members have right to land cultivation by virtue of their membership in the group, which is normally acquired by birth. In some cases, the arable land is internally divided into separate portions amongst the clan segments—at least at some levels of clan segmentation.

Thus, the traditional position is that arable land is held by clans and clan segments as corporate entities, individuals having rights to land for cultivation only in their capacity as active members of their group —a position normally acquired by birth. Such lands could not traditionally be disposed of outside the groups, by whatever method, except with the consent of the elders of the group as a whole. This stipulation did not mean that land transactions did not occur—but they occurred only on this basis.

(iii) Land Law

During the Italian colonial rule, land was governed by the Land Law for the Colony of Eritrea approved by Royal Decree No. 269 of February 7, 1916,[3]

2. *See* I. Lewis, Report on Land Tenure Conditions in the U.N. Special Fund FAO Agricultural and Water Survey Project Area in the South of the Somali Republic (Mimeographed Sept. 10, 1964).

3. *See* 2 RACCOLTA DEI PRINCIPALI ORDINAMENTI LEGISLA-

which was extended to Italian Somalia by Royal Decree No. 380 of March 17, 1938.

This law specifically recognized the indigenous system of land tenure and also introduced complicated Italian legal concepts.

Land is divided into several categories. First, there is *demanio, i.e.*, the state-owned land, and secondly, private land. State-owned land falls into one of two subcategories: *demanio pubblico, i.e.*, public domain land, and *demanio disponibile, i.e.*, alienable state-owned land. The former, consisting of land impressed with a public use such as seashores, waterways, roads, and caravan routes, cannot be alienated, nor can individuals obtain private right in them by prescription. All state-owned land not specified by statute as being with *demanio pubblico* was within the *demanio disponibile* and could be made the subject of grants or concessions to private individuals.

While the law did not hold that as a result of colonization all land within the colony was to be deemed as state-owned, the Italians did issue legislation [4] which declared that lands in Italian Somalia that were

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TIVI DELLE COLONIE ITALIANE 296-340 (a cura dell'Avv. Adolfo Parpagliolo, Istituto Poligrafico dello Stato, Annesso 1932).

As no comprehensive law on land has been enacted since independence, the provisions of the law governing land mentioned above substantially continues to be in force in the Southern Regions of the Republic. In the British Somaliland Protectorate, most of the land is regarded as common land which belongs to no individual person. Certain small areas have been appropriated by the Government under the Townships Ordinance (LAWS OF SOMALILAND, Ch. 84, 1950) and Expropriation of Land Ordinance (LAWS OF SOMALILAND, Ch. 81, 1950) to be public land for the building of towns and other public purposes. Public land in towns is leased to individuals for 99 years. In rural areas, land is governed by customary law, which is similar to the customary law applicable in Italian Somalia.

4. Royal Decree No. 695 of June 8, 1911. *See Id.* at 367-68.

not subject to any valid title of any Italian or foreigner and which were not in actual and effective cultivation or utilization of a permanent nature by any indigenous person or group were alienable state-owned lands.

(iv) Land Book

During the Trusteeship Administration, a Land Book for Italian Somalia [5] was established under Ordinance No. 7 of March 18, 1955. Rights over land in rural and urban areas derived either under law or custom were entered in the Land Book after due ascertainment of such rights. Under the Ordinance, a Land Office was established in every region with the Regional Judge as the Head of the Office. Sections of the office were established in other centers of particular importance. Petitions for entry of rights over land in the Land Book had to be filed before the Land Officer. The decisions of the Land Office were subject to appeal to the Judge of Somalia and then to the Court of Justice.

(v) Commercialism in Land Transactions

Following the example of the Italian concessionary companies working the banana plantations in the interriver areas, a growing number of wealthy entrepreneurs bought considerable land holdings for the commercial production of bananas, maize, and other crops such as sesame, groundnuts, and cotton. Such large holdings were obtained by negotiations with the local clan elders and the persons actually working the land, if it were already under cultivation. These transactions were recorded in written documents prepared by the local Kadis or by notaries.

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5. In the British Somaliland Protectorate, grant or transfer of land or any interest therein or lease of land for a period of more than one year must be registered in the Local District Office, under the Registration of Documents Ordinance, 1912. (3 LAWS OF SOMALILAND, Ch. 82, 1950).

(b) Marriage

The Somalis follow the principles of Shariat Law concerning the contract of marriage, the rights of the spouses, and the dissolution of marriage, but adhere to their own indigenous customs with regard to marriage gifts and payments and the circumstances under which they may be reclaimed.

Under Shariat Law, the crucial marriage transaction is the *mahar* (dower). Besides *mahar*, there are other payments and presents commonly made with respect to marriage: *gabbati* (betrothal gift paid in money or livestock to the girl's parents), *yarad* (bride-wealth), and *dibaad* (dowry), which have been referred to earlier.[6] If the girl refuses marriage after her father has betrothed her and received *gabbati*, this may be reclaimed through the court. If, however, she runs away from her husband soon after marriage and refuses to return, the repayment of part of the *yarad* is considered a gentlemanly act, but cannot normally be enforced in court. If the wife dies soon after marriage, it is usual to replace her by her younger sister without further *yarad*, while if the latter refuses to comply with this arrangement part of the *yarad* must be returned. If the husband dies and the wife is taken over by his brother, a small amount of extra *yarad* only is sometimes payable.

(c) Custody of Children

In the matter of custody of children, customary law is also different from Shariat law. According to customary law, the divorced mother may only keep her infant children until weaning, or some two years old—and then only if she is not going too far away. This is said to be partly due to the poverty of the people and the difficulty involved in the payment and

6. *See supra* Pt. I, Ch. 3, C.

receipt of maintenance, and partly to the fact that a divorced wife usually returns to her own tribe, which might mean a protracted separation of the child from the father and his tribe. Sometimes it is agreed between the parties that the mother may keep them longer than this, and in such circumstances she is normally not entitled to claim money for their support. In all cases, moreover, it seems that the child is taken by the father's tribe at the end of this period of custody, with no option to the child.

The above principles of customary law are contrary to Shafie law, according to which the mother, unless she remarries outside the prohibited degrees (or disqualifies herself by her manner of life, etc.) is entitled to the custody of her children up to the age of disviction (seven years of age), after which the choice between father and mother lies with the children themselves. During the period of custody the mother may never, without the father's consent, take them further from his locality than would enable him to visit them and return in a single day, while the father (or, if he were dead, their other guardian) may take them at any age if he is emigrating in order to settle elsewhere.

(d) Intestate Succession

In matters of intestate succession, the old Somali customs also ran counter to Shariat law in that women were totally excluded. However, lately mothers and widows have usually been given their proper shares. But daughters frequently got nothing except where a daughter was the only heir, when she was apparently allowed to keep her father's property unless and until she married outside the *dia*-paying group—whereupon she left at least the camels behind; and these were normally all that really mattered. The aggregate children's share was divided among the sons only—especially in the case of camels, which represented a tribes-

man's primary wealth. The daughters, of course, were supported by their brothers until marriage. Where cases came to court, the judges followed the strict rules of Shariat law.

(e) Civil Wrongs

(i) Classification of Civil Wrongs

Civil wrongs under Somali customary law could be classified into three categories: *dil* (homicide), *qoon* (wounding), and *dalliil* (insult). The corresponding compensations to be paid were known as *dia*, *qoomal*, and *haal*.

a. *Dil* and *Dia*

Customary law relating to homicide and the related compensation was influenced by Shariat law.

According to the Shariat law applicable to the Shafie school, homicide is of three categories: premeditated, involuntary, or voluntary. Only premeditated homicide involves penalty under the law of talion. All premeditated crimes are punishable under the law of talion and subsidiarily by the price of blood, and according to one jurist of the Shafie school, either by the one or by the other. The price of blood for premeditated homicide can be recovered only from the criminal. On the other hand, involuntary and voluntary homicide involve payment of the price of blood which will be recovered from the *aakila* (agnates on the collateral line).[7] Thus under Shariat law, *dia*, or blood money, is a penal punishment.

However, Shariat law relating to *dia* as applied among the Somalis was modified in certain respects by customary law.

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7. MAHUDDIN ABU ZACHARIAH GAHYA ABU SHERIF NAWAWI, MINHAJ ET TALIBIN 410-11 (transl. into English from French of L. W. C. Van den Berg, E. C. Howard, Thacker & Co., London 1914), a manual of Muhammadan Law according to the School of Shafie.

First, when Islam spread among the Hamitic tribes, the law of talion, which is a principle of Shariat law, was never introduced, for there was no supreme authority to enforce it. Only the looser and less severe methods of compensation continued. With the establishment of Italian power in this part of the Horn of Africa, the colonial authorities took over the administration of criminal law, and the Italian Penal Code was made applicable. Under the above code, homicide became an offence against the State; and the clan of the victim continued to exercise the right to claim civil damages, apparently as compensation for the loss of one of its members. Thus *dia*, which is a penal punishment under Shariat law, was considered civil damages under customary law.

Secondly, Somali customary law did not make any distinction between premeditated and accidental homicide as regards the collective responsibility of the *dia*-paying group for the payment of compensation.

Thirdly, in cases of homicide where a sentence of death or imprisonment for life or imprisonment for more than ten years was imposed on the offender, no *dia* was allowed under customary law.

Fourthly, in cases of homicide where the criminal was acquitted or the State decided that there was insufficient evidence to prosecute under the Penal Code, the case could be heard again, or for the first time, as a civil suit under customary law.

Fifthly, where a lesser sentence than imprisonment for ten years was imposed, a portion of the usual *dia* termed *jiffo* (*i.e.*, thirty-three and one-third camels representing one-third of the *dia*) was allowed to the immediate relatives of the deceased.

Sixthly, under Somali customary law not only the *aakilas* but the *dia*-paying group were jointly liable for the *dia*.

Dia for the homicide of a man was one hundred camels, and half of that for a woman. These rates were based on the Shariat law and were the flat rates for individuals, irrespective of age, wealth, or position. Particular *dia*-paying groups might enter into special *herr* [8] for higher or lower rates.

b. *Qoon* and *Qoomal*

In the classification of wounds and the compensation to be awarded for each type of wound, Somali customary law generally adopted the principles of Shariat law.

Minhaj et Talibin divides the wounds on the head and face into ten kinds. They are: *harisa,* if only the skin has been cut or scraped; *damia,* if blood has flowed; *badia,* if the flesh has been injured; *mutalahima,* if the flesh has been penetrated; *simhak,* if the membrane between the flesh and the bone is injured; *mudiha,* if the bone has been uncovered; *hashima,* if the bone itself has been injured; *munakkila,* if the bone is broken, so that the fragments are separated; *mamuma,* if the membrane of the brain has been injured; *damigha,* if the brain is injured.[9]

Minhaj further provides:

> As regards wounds on the head or face, the indemnities due for causing such wounds to a free Moslem are as follows: for a *mudiha,* five camels; for a *hashima,* which is also a *mudiha,* ten camels; for a *munakkila,* fifteen camels; for a *mamuma,* a third of the price of blood prescribed for homicide; . . . . Wounds on the head and face, classified as less serious than a *mudiha,* necessitate an indemnity fixed according to the gravity in due proportion to a *mudiha.*[10]

8. *Herr* means customary law or special agreement. Here it is used in the latter meaning.

9. *Supra* note 7 at 403.

10. *Id.* at 414-15.

Minhaj also prescribes that:

> A woman or a hermaphrodite is worth half a man, whether in a case of homicide or in a case of wounding.[11]

c. *Dalliil* and *Haal*

The case for compensation as apology *(haal)* for wounded pride might have arisen as a result of any of the following acts: first, if a man were struck in public on the face by another with a sandal or whip, the act is considered particularly offensive, and the victim could claim *haal.* Secondly, rape or illicit intercourse with an unbetrothed girl was an insult to the honour of the family represented by its head. Thirdly, in a similar case if the girl were engaged, then it was her fiance who was wronged. Fourthly, failure to marry a girl after betrothal was considered to be an insult to the father of the betrothed girl on the part of the fiance. Fifthly, if a man married a girl betrothed to another, it was an insult to the man to whom the girl was first proposed. The above examples are only illustrative and not exhaustive.

The normal rate of compensation for all these improprieties was a pony (value: five camels) whose possession gave prestige to its owner. Later, cash payment as compensation for insults was also applied.

(ii) Who Could Claim Compensation

Having discussed the various kinds of civil wrongs, we come to the question as to who could claim compensation under Somali customary law.

In case of homicide, *dia* was claimed by the next of kin; and in the case of other compensations, by the party injured.

However, it was a fundamental principle of So-

11. *Id.* at 414.

mali customary law that no man received or paid compensation individually.

Compensation, when paid or received, was divided within the clan according to two alternative principles:

(1) *Qoro-leh* (penis-possessors) or *qoro-tirris* (penis count), *i.e.*, all males paying or receiving equally, old or young, rich and poor alike.

(2) *Qabno* (wealth in stock), each *jilib* or *rer* paying or receiving proportionately to its wealth.

Usually the full *dia* was divided into two portions. The larger *(mag deer)*, "the geater blood wit," was paid and received by all the members of the group as a whole, while the smaller *(jiffo)* was paid and received by the immediate kin. The immediate kin were usually the male agnates descended from a common ancestor of the third or fourth ascending generation.

(iii) Who Paid Compensation

Reference has already been made to the fundamental principle of the Somail customary law that no man received or paid compensation individually.

In the case of *dia*, the *dia*-paying group was responsible for its payment; and in cases in which *dia* was claimed, the group was represented by its *akil* or recognized elders. The principles relating to the raising of the compensation also governed its distribution among the victim's group.

As regards compensation other than *dia*, if there were a *herr* among a group to pay such compensation together, then the group would pay. On the other hand, where there were no such *herr*, the rule was that the amount was due from the defendant's own nearest relatives, *i.e.*, his father and his brothers or, if he had no father or brothers alive, from his paternal uncles

and their sons, *i.e.*, his first cousins and so on progressing through his more distant relatives.

(iv) Customary Mode of Settling Disputes

The customary mode of settling disputes regarding *dia* and other compensation was by arbitration.

After a quarrel, offers of a settlement or demands for compensation were made by the use of an embassy, whose members were, if possible, "in-laws" of both sides or, failing them, old men not closely related to either party.

The exchange of peace terms was followed by a general peace meeting of both groups concerned. Compensation for wounding commenced with a payment of sheep called variously the *budegeyo* (tail cutting) or the *shashaffo* (fat) as maintenance for the injured until they were fit enough to have their wounds assessed in value. The examination of the stock offered in payment was done by a locally appointed board of elders called a *bash gudi* or *panch*.

Where a dispute arose between members of the same *dia*-paying group, it was generally taken before an open council of the elders concerned. This *shir* acting as a court *(guddi)* decided guilt and awarded judgment. Appeal from its decision might be taken to a neutral panel of arbitrators consisting of unrelated elders who were known for their skill in mediation and judgment. Whether the elders of a group themselves decided the issue or whether they allowed mediation by arbitrators, the decision taken would be enforced by them, provided they accepted it.

In cases where parties of different *dia*-paying groups had a dispute, they presented their dispute to a panel of arbitrators. These arbitrators had no direct means of enforcing their decisions. The acceptance of the decision of arbitrators by the disputants of rival *dia*-paying groups would depend upon whether their

kinsmen wished to reach a peaceful settlement, either through fear of war or pressure from the Administration. If they considered that the arbitrators' decision was a reasonable one, they would see that it was accepted, even by bringing pressure upon the parties concerned.

In cases where serious clashes occurred between clans, administrative authorities often intervened and tried to bring about settlement.

As stated earlier, the panel of arbitrators in itself had no direct means of requiring the litigants to accept its decision. However, courts enforced such decisions.

D. Exceptions to the Application of Indigenous Law

The Law on the Organization of the Judiciary, approved by Royal Decree No. 937 of June 8, 1911, which authorized the application of Shariat law and customary law, specifically provided that the said laws administered by the Kadis should be compatible with the fundamental principles of Italian law. Similarly, the Law on the Organization of the Judiciary of 1956, promulgated during the Trusteeship Administration, also provided that customary law should not be contrary to general principles of Italian law. It should be noted that on this ground the indigenous law was constantly overruled in matters such as slavery.

E. Conflict of Laws

In Italian Somalia, indigenous law could be administered in so far as it was not incompatible with the fundamental principles of Italian law. Hence if there were a conflict between the two, the latter prevailed. Furthermore, whenever there was variance between the rules of indigenous law and the provisions of any enactment with reference to the same subject matter, the provisions of the enactment prevailed. This seemed reasonable as a working formula where the enactment was designed to modify or abolish rules of indigenous law that were deemed incompatible with the general principles of Italian law.

Since the Somalis themselves belonged to one ethnic group and followed the Shafie School of Islam, the same Shariat Law and customary law were applicable to all of them. Therefore there was no internal conflict in the application of indigenous law.

F. Sources for Research

According to the classical doctrine of Islamic jurisprudence, Shariat Law is based exclusively on divine revelation, and is derived from four main sources: the Koran, as the *ipsissima verba* of Allah, the Almighty; the *Sunna*, or practices of the Prophet (as established by the *Hadies* or traditions of what he said, or allowed to be done), as also inspired in content, if not in form; the *Ijma*, or consensus of the jurists, as yet another manifestation of the divine will; and *Kiyas*, or the analogical deductions of the jurists from these primary sources, as an earnest attempt to work out the implications of the divine revelation in the form of a legal system.

Since the Somalis follow the Shafie School of Islam, courts usually relied on Minhaj et Talibin, the Manual of Jurisprudence of the Shafie School [12] for the exposition of the Shariat Law governing them.

Customary law is essentially unwritten and no systematic attempt was made to record it. However, a most important record of customary law in Italian

12. *Id.*

Somalia [13] was made by M. Colucci in his book *Diritto Consuetudinario della Somalia Italiana Meridionale* published in 1924 in Florence.

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13. Customary law in Italian Somaliland and that in the British Somaliland Protectorate are the same. For a summary of the customary law applicable in the British Somaliland Protectorate, *see* J. ANDERSON, ISLAMIC LAW IN AFRICA 40-57 (H.M. Stationery Office, London 1954); Haji N. A. Noor Muhammad, *Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic*, 8-3 J. AFR. L. 157-177 (1967); *Wright, The Interaction of Law and Custom in British Somaliland and their Relation with Social Life*, 1943 J. OF THE E. AFR. NATURAL HIST. SOC. 62. *See also* I. LEWIS, *supra* PT. I, Ch. 2, note 2, and I. LEWIS, *supra* Pt. I, Ch. 3, note 1.

CHAPTER 5

JUDICIAL SYSTEM IN ITALIAN SOMALIA

A. Pre-Trusteeship Period
B. Trusteeship Period

A. Pre-Trusteeship Period

During the period of the two companies, it was the Italian policy not to tamper with the indigenous judicial institutions. Elements of the Italian judicial system were, however, grafted onto the traditional Islamic and Somali systems. The result of this policy was a dual system of courts, one having jurisdiction over colonial subjects and persons assimilated with them and the other having jurisdiction over Italians and foreigners.

When Italy took over the direct administration of Italian Somalia, the Law on the Organization of the Judiciary approved by Royal Decree No. 937 of June 8, 1911, embodied the dual system which originated during company rule. The judicial system thus established continued from 1911 to 1941 without substantial modifications.

The aforesaid Law on the Organization of the Judiciary established the following system of courts:

(1) CIVIL AND CRIMINAL COURTS [1]

(a) The Kadis had jurisdiction:

(i) in civil and commercial matters, over all disputes between colonial subjects and persons assimilated with them;

(ii) in penal matters, over offences committed by colonial subjects and persons assimilated with them, punishable with imprisonment for a crime

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1. Royal Decree No. 937 of June 8, 1911, arts. 16-34.

not exceeding three months or with imprisonment for a contravention not exceeding one year or fine for a contravention not exceeding Lire 1,000 or both. The Residents also exercised jurisdiction over offences committed by colonial subjects and persons assimilated with them within the limits established for the Kadis. Where one of the parties was a non-Muslim, the case could, on the request of the party concerned, be tried by the Resident.

(b) The Tribunal of Kadis decided on appeals against judgments in civil, commercial, and penal matters passed by the Kadis. It was composed of a Kadi higher in grade and two other Kadis or notables excluding the Kadi who delivered the judgment appealed against.

(c) The Governor had jurisdiction to hear appeals against the decisions of the Tribunal of Kadis.

(d) The Resident had jurisdiction:

(i) in civil and commercial matters, over all disputes between Italian citizens and foreigners, where the value of the subject matter did not exceed Lire 5,000. His decisions were not subject to appeal where the value of the subject matter did not exceed Lire 500.

(ii) in penal matters, over all offences committed by Italian citizens and foreigners punishable with imprisonment for a crime not exceeding three months, or with imprisonment for a contravention not exceeding one year, or fine for a contravention not exceeding Lire 1,000, or both.

(e) The Judge of Somalia had:

(i) original jurisdiction in civil and commercial matters, between Italian citizens and foreigners, where the value of the subject matter exceeded Lire 5,000;

(ii) appellate jurisdiction in civil and commercial matters over appeals against the decisions of the Residents where the value of the subject matter exceeded Lire 500;

(iii) original jurisdiction in penal matters which were not within the jurisdiction of the Residents and of the Assize Court.

(f) The Assize Court was composed of the Judge of Somalia, who presided, and four assessors. It had jurisdiction over crimes, by whomsoever committed, for which the law prescribed a more severe punishment than a minimum imprisonment for a period of five years and a maximum imprisonment for a period of ten years. The President and the Assessors jointly decided on questions of fact, and the President alone decided on questions of law and the application of punishment.

(g) The Court of Appeal in Rome had jurisdiction over appeals against decisions of the Judge of Somalia given in the exercise of his original jurisdiction in civil, commercial, and penal matters.

(h) The *Corte di Cassazione* (Supreme Court) in Rome had jurisdiction over appeals against the decisions of the Assize Court in penal matters.

(2) MILITARY COURT

A Military Court [2] was also established, which had jurisdiction over offences committed by members of the military forces. The Court consisted of a president and five judges. It was required that the President should be superior in grade and older in age than the offender.

(3) TRIBUNALE DELL'INDIGENATO

In addition to the courts mentioned above, a po-

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2. *Id.*, arts. 62-72.
3. *Id.*, arts. 76-91.

litico-military *Tribunale dell'Indigenato* [3] was also established in each of the regions of the colony. The *Indigenato* was a new institution in Italian colonial law. In its broad outlines and summary powers, it closely resembled the French *Indigénat*, which flourished from 1887 to 1912 and which might have served as a model for the Italians.

The *Indigenato*, which consisted of the Regional Commissioner, the local Resident, and the Commander of the local *presidio* (military command), was empowered to try colonial subjects and persons assimilated with them on the following charges:

(a) commission of crimes against the Italian State or the Colonial Government or their representatives;
(b) endangering the security of the colony by raids;
(c) smuggling of arms and ammunition;
(d) commission of crimes against the Armed Forces and Government transports and caravans;
(e) commission of crimes against officials on duty;
(f) spreading false and alarming news affecting public security;
(g) refusal to accept legal currency;
(h) refusal to cooperate in supplying labour or requisitions for the public welfare;
(i) refusal to furnish correct information to the authorities;
(j) failure to observe government decrees, laws, and ordinances.

It was given broad discretionary powers.

The *Indigenato* enforced its decisions through confiscation of goods or through collective punishment. In extreme cases, offenders were deported to Eritrea.

Appeal against the decisions of the *Indigenato* lay to the Governor and to the *Corte di Cassazione* in Rome.

B. Trusteeship Period

The Declaration of Constitutional Principles required the administering authority to "establish a judicial system" and "ensure the absolute independence of the judiciary." The administering authority had also to "ensure that representatives of the indigenous population be progressively entrusted with judicial functions." [4]

Under the system existing at the beginning of the Trusteeship Administration, certain judicial functions were carried out by the Residents, the Regional Commissioners, and the Administrator. This was in contradiction to the principle of separation of the executive and judicial powers stipulated in the Trusteeship Agreement. The Advisory Council and the Trusteeship Council repeatedly expressed concern about this state of affairs and urged the administering authority to entrust judicial functions to judges and to increase the participation of Somalis in the administration of justice.

Subsequently, under the Law on the Organization of the Judiciary of 1956 [5] an attempt was made to bring about the separation of the judiciary and executive functions. The Law contained provisions concerning judicial power in civil and penal matters, the jurisdiction of tribunals, and the procedure before them.

The law provided for the following system of courts: [6]

(1) The Kadi. He had its seat in the principal

4. Declaration of Constitutional Principles, art. 7.
5. Ordinance No. 5 of Feb. 2, 1956.
6. *Id.*, arts. 1-15.

town of each district and his jurisdiction included:

(a) in civil matters, all disputes between Muslims, without limitation regarding either the nature or the value of the subject matter of the suit;

(b) in penal matters, all offences committed by Muslims to the detriment of Muslims, punishable by imprisonment not exceeding one year, as well as certain less serious offences.

(2) The Tribunal of Kadis. It had its seat in every regional capital and decided on appeals against judgments passed by the Kadis in the first instance. It was composed of three Kadis in civil matters, and of the Regional Judge and two Kadis in penal matters.

(3) The Regional Judge. He had his seat in the capital of the Region. He was competent in all matters not falling within the competence of the Kadis.

(4) The Judge of Appeal. He had his seat in Mogadiscio and was competent for the whole territory.

(5) The Assize Court. It had its seat in Mogadiscio and was competent for the whole territory. It was composed of the Regional Judge (President) and six assessors [7] and had jurisdiction in serious criminal cases and in certain matters determined by the nature of the offences.

(6) The Appeal Court of Assize. It had its seat in Mogadiscio and was composed of the Judge of Appeal (President) and six assessors. It had jurisdiction to hear appeals against judgments of the Assize Court.

(7) The Court of Justice. It had its seat in Mogadiscio and had jurisdiction over the whole territory. It had appellate powers, both civil and criminal, and the power to revise judgments of the lower courts. In addition, the Court of Justice had powers in administrative matters to hear appeals filed against final decisions of the Public Administration on grounds of lack of jurisdiction, excess of power, or violation of the law concerning the legal interests of individuals and communities. It also had power to rule on decisions taken by the Administrator in specific matters.

The Court of Justice was composed of the President, the Magistrate of Accounts, two judges, and two Kadis, and was divided into three Sections: Ordinary, Shariatic, and Special Accounts.

In order to safeguard the independence of the judiciary, a Higher Judicial Council was established consisting of the President of the Court of Justice, the Judge of Appeal, and the Attorney General. It was entrusted with supervision and protection of the rights of the judges. No person who permanently discharged judicial functions could be dismissed, transferred, or assigned to other functions without his own consent, or, failing this, without the advice of the Higher Judicial Council.

7. Assessors were appointed annually by decree of the Administrator on the proposal of the President of the Court of Justice. They were chosen from among persons resident in the Territory who could read and write. For each case, eight assessors were taken by lot, six of whom sat as assessors and two were substitute assessors. The Judge of Appeal and the six assessors constituted a bench.

The Law on the Organization of the Judiciary of 1956 thus brought about radical changes and innovations in the judicial system in Somalia. First, a new and independent judicial organ, the Court of Justice, was created for Somalia. This court discharged the functions which in Italy were performed by the *Corte di Cassazione, the Consiglio di Stato* (Council of State), and the *Corte dei Conti* (Court of Accounts). Secondly, a Shariatic Section in the Court of Justice could, under the Judiciary Law, give final verdicts in appeals in Shariatic matters. Thirdly, the power to deal with appeals, which previously belonged to the Administrator, was replaced by an ordinary system of appeal in the courts with a clear separation of the Executive and the Judiciary. The Court of Justice cumulated the functions of a Supreme Court, a Shariat Court, and an Administrative Tribunal.

The main defect of the law lay in the fact that the Regional Judges had too large an area under their jurisdiction and they were not in a position to ensure prompt administration of justice.

To remedy the above defect, Law No. 9 of February 19, 1958, was promulgated establishing a district judge in each of the thirty Districts of Somalia. The district judges had jurisdiction over criminal cases punishable with imprisonment up to three years and over other specified crimes. The law provided that the district judges should be Somali citizens selected on the basis of qualifications and competitive examinations. While the jurisdiction of the Kadis was limited to matters concerning Muslims, the district judges were empowered to decide cases involving any person regardless of nationality or religion.

Law No. 14 of May 27, 1958, in amending the Law on the Organization of the Judiciary of 1956 provided that all assessors *(Assessori)* of the Court of Assize

and the Assize Appellate Court should be Somali citizens appointed yearly by the Minister of Justice. This measure constituted an important step toward the full transfer of the judicial power to the Somalis.

Further, an important amendment was made to the Judiciary Law which restricted the jurisdiction of the Kadis to civil matters only, including marriages, divorce, civil cases, and notarial acts. This amendment came into force on June 8, 1958.

By Law No. 10 of February 20, 1958, a Military Tribunal was established in Mogadiscio, consisting of the Regional Judge of Mogadiscio and two military assessors drawn by lot for each case from a roster of officers appointed by the President of the Court of Justice. The Military Tribunal had competence in penal military matters. Formerly, the Italian Military Tribunal in Rome had jurisdiction in some cases affecting the territory. The formation of the Military Tribunal in Modagiscio completed the transfer to local courts of the jurisdiction over all cases pertaining to the territory.

With the establishment of District Judges, the judicial system of Somalia comprised: 48 Kadis, six Kadis' Tribunals, thirty District Judges, six Regional Judges, one Judge of Appeal, one Court of Assize, one Appeal Court of Assize, and one Court of Justice.

By the end of 1959, seven Somali District Judges were appointed, while in twenty-two Districts the judicial functions were exercised by District Commissioners. The District Judge in Mogadiscio was an Italian. Of the six seats of Regional Judges, three were carried by Italian Judges, while the other three seats were vacant. The Judge of Appeal and the members of the Court of Justice, with the exception of two Kadis, were all Italians.

PART THREE

DEVELOPMENT OF THE LEGAL SYSTEM IN BRITISH SOMALILAND PROTECTORATE

CHAPTER I

LAW OF METROPOLITAN ORIGIN

A. Sources of Metropolitan Law
B. The Scope of the Reception Statutes
C. Publication of Legislation
D. Sources for Research

A. Sources of Metropolitan Law

Law of metropolitan origin constituted the first source of law in the British Somaliland Protectorate. It consisted of case-law and statutory law.

(1) Case Law

The British Somaliland Protectorate had from the very inception of its organization of justice inherited the English common-law doctrines concerning the authority of judicial precedents as sources of law. In spite of the existence of such partial codifications as the British and Indian enactments made applicable in the Protectorate, the legal system of the Protectorate remained essentially a common-law system. Within its framework was a hierarchy of courts administering civil and criminal law ranging from the District Court at the base of the judicial pyramid to the Privy Council at the apex. The network of appeals from the lowest to the highest courts essentially implied a system of precedent according to which the decisions of the Privy Council were binding on all subordinate courts. Decisions of the superior courts of England concerning common law and statutes of general application were also binding on the courts in the Protectorate if they were "established decisions," *i.e.*, if they were not subsequently controverted.

(2) Statutory Law

The introduction or reception of statutory law of

metropolitan origin in the Protectorate took place in two steps: first, by general reception statutes, which introduced a large body of metropolitan legislation, and secondly, by the introduction of individual items of legislation. The general reception statutes and individual items of legislation were in the form of Orders-in-Council issued under the Foreign Jurisdiction Acts.

Among the general reception statutes, the following will be discussed: the Principal Order-in-Council, 1929-1955 and the Somaliland Order-in-Council, 1960.

B. The Scope of the Reception Statutes

(1) THE PRINCIPAL ORDER-IN-COUNCIL, 1929-1955 [1]

This Order-in-Council consolidated the previous Somaliland Orders-in-Council beginning with the Somaliland Order-in-Council, 1899, and made further provision for administration in the Protectorate.

It provided,

(a) that His Majesty's criminal and civil jurisdiction in the Protectorate should so far as circumstances permitted, be exercised on the principles of, and in conformity with, the enactments, procedure, and practice applied by courts in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Bombay, and so far as such enactments, procedure, and practice were inapplicable, be exercised under and in accordance with the Common and Statute Law of England;

(b) that the enactments described in the First Schedule to the Foreign Jurisdiction Act, 1890, should apply to the Protectorate, subject to certain modifications; [2]

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1. ANNUAL VOLUME OF LAWS OF SOMALILAND (1955); 2 STATUTORY RULES AND ORDERS 2464 (H.M. Stationery Office, London 1955).

2. The British Acts made applicable to the Protectorate were the following: Admiralty Offences (Colonial) Act, 1849; Evidence Act, 1851 (§§ 7 and 11); Foreign Tribunals Evidence Act, 1856; British Law Ascertainment Act, 1859; Admiralty Offences (Colonial) Act, 1860; Foreign Law Ascertainment Act, 1861; The Merchant Shipping Act (§ 11), 1867; The Conveyancing (Scotland) Act, 1874; The Fugitive Offenders Act, 1881; The Evidence by Commission Act, 1885.

These acts ceased to apply on June 26, 1960, when Somaliland became independent.

(c) that the Indian Acts [3] applied should continue to be applicable to the Protectorate.[4]

The metropolitan law thus made applicable may be divided into two groups:

(a) British and Indian Acts specifically made applicable in the Protectorate; and

(b) Common and Statute Law of England.

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3. The Indian Acts applied in the Protectorate were the following: The Indian Penal Code (Act XLV of 1860); The Indian Succession Act (Act X of 1865); The Indian Post Office Act (Act VI of 1898); The Indian Divorce Act (Act IV of 1869); except so much as relates to divorce and nullity of marriage; The Bombay Civil Courts Act, 1869 (Act XIV of 1869) except certain sections; The Indian Evidence Act, 1872 (Act I of 1872); The Indian Contract Act, 1872 (Act IX of 1872); The Indian Oaths Act, 1873 (Act X of 1873); The Indian Majority Act (Act IX of 1875); The Indian Limitation Act, 1908 (Act IX of 1908); The Transfer of Property Act, 1882 (Act IV of 1882); The Code of Civil Procedure (Act V of 1908); The Provincial Small Cause Courts Act, 1887 (Act IX of 1887); The Indian Railways Act, 1890 (Act IX of 1890); The Prevention of Cruelty to Animals Act (Act XI of 1890); The Land Acquisition Act, 1894 (Act I of 1894).

Under Ordinance No. 4 of 1925, which was revalidated by Order-in-Council, 1953, if amending or substituting Act was passed in India before Sept. 1, 1923, such amendments and substitutions would apply in the Protectorate and not those made after the said date unless they were applied by ordinance.

Except the Penal Code, Post Office Act, The Bombay Civil Courts Act, and The Provincial Small Cause Courts Act, all the other Indian acts continue to be in force.

4. Principal Order-in-Council, 1929-1955, §§ 16, 17.

(2) THE SOMALILAND ORDER-IN-COUNCIL, 1960 [5]

After the Principal Order-in-Council referred to above, the important law issued governing the reception of metropolitan law was the Order-in-Council that was made on June 23, 1960, on the eve of the independence of Somaliland. It contained as its annex the Constitution of Somaliland.

Article 42 of the Constitution provided that the criminal and civil jurisdiction of the Courts of Somaliland should, so far as circumstances permitted, be exercised in conformity with the enactments set out in the Second Schedule; [6] and so far as the same did not extend or apply, be exercised in conformity with the substance of common law, the doctrines of equity, and the statutes of general application in England on March 16, 1900, and with the powers vested in and according to the procedure and practice observed by the Courts of Justice and Justices of the Peace in England.

The application of the law, and the powers, procedure, and practice referred to in Article 42 of the Constitution were subject to two exceptions:

(a) they would not apply if they were modified, amended or replaced by any law specifically made for Somaliland;

(b) they should be applied only so far as the circumstances of Somaliland and its inhabitants permitted and subject to such qualifications as local circumstances rendered necessary.

As regards the application of common law and statute law of England, there were—and there still are—certain problems [7] regarding interpretation.

5. SOMALI REPUBLIC, NORTHERN REGIONS ANNUAL VOLUME OF LAWS 58-102 (1960).

6. The enactments mentioned are the Applied Indian Acts referred to in *supra* note 3.

7. Common law and statute law of England are still applicable in the Northern Regions; *see infra* Pt. IV, Ch. 11, F. The said problems are not peculiar to this country only. For a discussion of the problems relating to Uganda, *see* H. MORRIS & J. READ, UGANDA, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 240-44 (Stephens & Sons, London 1966).

One problem related to the interpretation of the term "statute of general application." No definition was attempted of what was a statute of general application within the meaning of Article 42 of the Constitution. Consequently, there was no certainty as to the applicability of any particular statute until the matter was decided by a competent court.

Another problem was with respect to the interpretation of the proviso that the common law and statutes of general application were to be in force only so far as the circumstances in the Protectorate and its inhabitants permitted, and subject to such qualifications as local circumstances rendered necessary. Before a court applied a particular English law, it had to consider, first, whether circumstances of Somaliland permitted the application of the said law. In deciding on the suitability of the said law, a court had to decide whether it had to look to circumstances prevailing in Somaliland at the time of the court's decision or those prevailing at the time of the general reception of English law. Logically, it should relate to the circumstances that were relevant at the time of the reception. Where a particular English law had been received in Somaliland, the court had to consider, secondly, whether the local circumstances in this particular case rendered the application of the English law necessary. Obviously, this gave the courts very wide discretionary powers.

C. Publication of Legislation

The Orders-in-Council applicable to the British Somaliland Protectorate were published in England and in the Gazette of the Protectorate.

D. Sources for Research

The basic research tools with respect to the Orders-in-Council are the annual volumes of the law reports containing the public general statutes published by the Council of Law Reporting, London.

A compilation of the Orders-in-Council, which were in force in the Protectorate on January 1, 1950, is found in Volume III of the *Laws of the Somaliland Protectorate*, Waterlow & Sons, London (1950). Subsequently relevant Orders-in-Council were published in the annual volumes of *Laws of the Somaliland Protectorate* from 1950 to 1960.

CHAPTER 2

LOCAL ENACTMENTS

A. In General

The enactments of local authorities and institutions established by Britain are a second source of law in the British Somaliland Protectorate.

Before describing the forms of local enactments, it might be useful to indicate in brief the constitutional development in the Protectorate.

B. Constitutional Development in the Protectorate

(1) INTRODUCTION

In the Trust Territory of Somalia a time-limit of ten years had been stipulated for the development of the territory towards self-government and independence, thus calling for urgent reforms. However, in the British Somaliland Protectorate no date had been fixed for independence, and constitutional progress was made at a much more leisurely pace. This was in consonance with the general view prevalent in Great Britain that development would be all the more effective if it were brought about progressively. However, during the last days of colonial rule in the Protectorate, Great Britain had to rush through radical reforms in order to satisfy the rising aspirations of the people.

(2) SCOPE OF GOVERNOR'S AUTHORITY UNDER THE PRINCIPAL ORDER-IN-COUNCIL

In the early years of the British Somaliland Pro-

tectorate, the supreme executive and legislative powers were vested in the Governor. Under the Principal Order-in-Council, the Governor was authorized to execute all things that belonged to his office according to the tenor of any Orders-in-Council relating to the Protectorate.[1]

The Principal Order-in-Council also empowered the Governor to make ordinances [2] for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons in the Protectorate.

In the making of any ordinances, the Governor was required to conform to and observe all rules, regulations, and directions in that behalf contained in any Instructions under His Majesty's Sign Manual and Signet. He was to observe any general or special instructions of the Secretary of State with respect to the previous submission to the Secretary of State of draft ordinances, to the making of ordinances for particular purposes, to the amendment of ordinances or draft ordinances, and to other matters in relation thereto.

The Governor was also required to respect existing native laws and customs except insofar as the same might be opposed to justice and morality.

The Governor had to sign every ordinance made by him and, at the first available opportunity, was required to transmit the authenticated copy thereof to the Secretary of State. His Majesty might disallow any ordinance, wholly or in part, and upon such disallowance being publicly notified, the provisions so disallowed ceased to have effect.

The Governor might by ordinance apply to the Protectorate any Act or law of the United Kingdom

1. Principal Order-in-Council, 1929-1956, § 7(2).
2. *Id.* at § 15.

or of any legislature of India or of any colony, subject to any exceptions and modifications. He might by ordinance also repeal or amend with respect to the Protectorate any amendments, acts, laws, or ordinances that were made applicable or had been brought into operation in the Protectorate by or under any of the provisions of any Order-in-Council. An ordinance varying or affecting any Order-in-Council relating to the Protectorate could not come into force unless it had been previously approved by the Secretary of State, and such approval had to be recited therein.

(3) CONSTITUTIONAL DEVELOPMENT

The constitutional development in the British Somaliland Protectorate may be reviewed under the following heads: Executive, Territorial and Local Administration, and Legislature.

(a) The Executive

In the development of the Executive, mention should be made of three Orders-in-Council.

First, the Somaliland (Constitution) Order-in-Council, 1953,[3] established an Executive Council consisting of three *ex officio* members (the Chief Secretary, the Attorney General, the Financial Secretary) and a few official and unofficial members [4] and provided for consultation by the Governor with the Council.[5]

Secondly, further reforms with respect to the Executive were brought about by the Somaliland (Constitution) Order-in-Council, 1960.[6] Under the Order-

3. SOMALILAND PROTECTORATE ANNUAL VOLUME OF LAWS 9-29 (1960).
4. *Id.* at § 3.
5. *Id.*
6. SOMALILAND PROTECTORATE ANNUAL VOLUME OF LAWS 1-55 (1960).

in-Council the Executive Council consisted of the Governor as President, the three *ex officio* members referred to above, and four other members who were members of the Legislative Council designated as Ministers.[7] The Governor could charge the members of the Executive Council with departmental responsibility. The Governor consulted with the Executive Council in the formation of policy and in the exercise of all powers conferred upon him, but he was not obliged to consult it in the exercise of any power that was in his discretion or with respect to which he was charged with special responsibility, *viz.*, external affairs, defence, and the Protectorate Police.[8]

Thirdly, on the eve of the independence of the Protectorate, the Somaliland Order-in-Council, 1960,[9] was passed. It vested the executive authority in a Council of Ministers consisting of a Prime Minister and three other ministers collectively responsible to the Legislative Assembly.[10] The authority vested in the Council of Ministers extended to external relations.[11] The unofficial members of the Executive Council became the first members of the Council of Ministers and the Leader of Government Business in the Legislative Council became the first Prime Minister.[12]

(b) Territorial and Local Administration

For purposes of administration, the Protectorate was divided into six districts, each of which was under a District Commissioner, who was assisted in some districts by an Assistant District Commissioner. Dis-

7. Somaliland (Constitution) Order-in-Council, 1960, § 4.
8. *Id.* at §§ 5, 6.
9. *Supra* note 6, at 58-102.
10. Somaliland Order-in-Council, 1960, Annex. CONSTITUTION OF SOMALILAND § 3.
11. *Id.* at § 4.
12. *Id.* at § 5.

trict Commissioners acted on the instructions of the Governor.

The link between the District Commissioner and the people was the *Akil* (Chief). He held a traditional status with his tribe and was paid by the Government to explain and implement policy and to maintain order. Upon powers conferred on him by the Local Authorities Ordinance, 1950, the Governor appointed certain *Akils* to be Local Authorities [13] with the duty of maintaining order and the power to make certain orders relating to local administration.

In addition to the Local Authorities, Advisory Councils were formed in 1951 at the district level, consisting of representative Somalis. These councils discussed matters of local interest such as the conservation of natural resources.

In the towns there were at first Representative Councils which were advisory. Later Local Government Councils were established.[14] The Council consisted of a chairman, a vice-chairman, and the number of members prescribed in its warrant, and they were elected or appointed in accordance with the terms of the warrant.[15] Each council had an executive officer [16] and other staff. The council collected local revenue, principally in the form of *Zariba* dues,[17] and provided public services in return.

(c) The Legislature

The earliest measures taken by the British authorities towards self-government consisted in the appointment in 1947 of an Advisory Council on a clan basis, its

13. Local authorities still continue to function.
14. Local Government Councils Ordinance, 1953.
15. *Id.* at § 10.
16. *Id.* at § 20.
17. Market fees levied on animals, ghee, gum, myrrh, and grains. *See* 3 LAWS OF SOMALILAND Ch. 61 at 589-592 (1950).

main purpose being "to stimulate the interest of the people themselves in the administration of the country and in the collection and expenditure of public funds." [18]
It usually met twice yearly to discuss a widening range of issues.

While dealing with the development of the legislature in the Somaliland Protectorate, mention should be made of four Orders-in-Council.

First, the Somaliland (Constitution) Order-in-Council, 1955,[19] besides establishing the Executive Council referred to earlier, created for the first time a Legislative Council consisting of the three *ex officio* Executive Council members, not more than five official members and not more than six unofficial members appointed for a period of three years.[20] It provided that the Council should meet at least once every year.[21] Under the Order-in-Council, it was lawful for the Governor to make laws for the peace, order, and good government of the Protectorate with the advice and consent of the Legislative Council.[22] Any member could introduce any bill or propose any motion for debate. The Council had no power to proceed with any bill or motion without the recommendation or consent of the Governor,[23] and no bill passed by the Council could become law without the assent of the Governor.[24]

Secondly, the Somaliland (Constitution) Order-in-Council, 1959,[25] enlarged the membership of the Legislative Council to include, besides the Governor who was the President and the three *ex officio* members, not more than fourteen official members, thirteen elected members, and not more than three nominated members.[26]

18. REPORT ON SOMALILAND PROTECTORATE 32 (1948).
19. SOMALILAND PROTECTORATE ANNUAL VOLUME OF *Laws* Supp. 1, at 30-33 (1956).
20. *Id.* at §§ 16-21.
21. *Id.* at § 39(2).
22. *Id.* at § 29.
23. *Id.* at § 32.
24. *Id.* at §§ 36(1) & (2).
25. SOMALILAND PROTECTORATE ANNUAL VOLUME OF LAWS 1-17 (1959).

Elections for the thirteen members were held in March 1959 by secret ballot in a small number of urban constituencies and by acclamation in the rural constituencies. The suffrage was restricted to men.

Thirdly, the Somaliland (Constitution No. 2) Order-in-Council, 1959,[27] provided for a Legislative Council consisting of 33 elected members and three *ex officio* members, presided over by a Speaker who was nominated by the Governor. Elections under the Constitution were held on February 7, 1960.

Fourthly, on the eve of the independence of the Protectorate, as a final step towards complete self-government, the Somaliland Order-in-Council, 1960, was enacted, under which the persons who immediately before that Order had been elected members of the Legislative Council became members of the Legislative Assembly and were deemed to have been elected thereto under the new Constitution.[28]

C. Forms of Local Enactments

All laws passed by the Governor were styled ordinances and subsidiary legislation issued by him took the form of Government Notices. When the Legislature was established, the legislation enacted by it came to be known as laws. Subsidiary legislation issued by the Council of Ministers continued to be in the form of Government Notices.

26. Somaliland (Constitution) Order-in-Council, 1959, § 4.
27. *Supra* note 25, at 47-59.
28. *Supra* note 10, at § 18.

D. Sources for Research

The Principal Order-In-Council required that the ordinances and notices made by the Governor should be published in the Gazette issued in the Protectorate. An official compilation of laws, which were in force in the British Somaliland Protectorate on January 1, 1950, is available in three volumes. From 1950 to 1960, annual volumes of *Laws of the Somaliland Protectorate* were also published containing the ordinances and Government Notices issued by the Protectorate Government. A comprehensive analytical index to the laws of the Northern Regions in force as on August 15, 1960, prepared by Mr. Iqbal Singh and published by the Government is a very valuable guide for research relating to legislation covering the period.

CHAPTER 3

INDIGENOUS LAW

A. Introduction

Indigenous law consisting of Shariat law and customary law was the third source of law in the British Somaliland Protectorate.

Although the establishment of the Protectorate resulted in the importation of foreign law and the enactment of local ordinances based on English legal principles, it did not entail the supercession of the indigenous law.

The continuance of indigenous law was guaranteed by the Principal Order-in-Council. Section 12 of this Order-in-Council provided that in all cases, civil and criminal, to which natives were parties, every court "shall be guided by native law, so far as it is applicable and is not repugnant to justice and morality, or inconsistent with any Order-in-Council or ordinance." Similarly, in making ordinances, the Governor was required "to respect existing native laws and customs except so far as the same may be opposed to justice or morality." [1]

The Principal Order-in-Council referred only to "native laws and customs," and did not specifically mention Shariat law. However, as noted earlier, the Principal Order-in-Council provided, *inter alia*, that His Majesty's civil jurisdiction in the Protectorate

1. Principal Order-in-Council, 1929-1955, § 15(iii).

should, so far as circumstances admitted, be exercised in conformity with the enactments of the Governor of Bombay in Council. Under Section 26 of the Bombay Regulation 4 of 1827, the Bombay Courts were to apply, in the absence of specific enactments, both the "usage of the country" and the "law of the defendant," which has always been interpreted as including Islamic personal law according to its variations. It would, therefore, follow that the Principal Order-in-Council provided authority for the application of Shariat law to the indigenous inhabitants either as their "native law and custom," since it had become in fact such by adoption and assimilation, or as the "law of the defendant." [2]

For practical purposes, however, the application of Shariat law in the Protectorate was principally based on the Kadis' Courts Ordinance, 1937,[3] and later on the Subordinate Courts Ordinance, 1944,[4] which repealed the Kadis' Courts Ordinance.

Article 43 of the Constitution of Somaliland annexed to the Order-in-Council, 1959, also made specific provision for indigenous law. It provided that:

> In all cases, civil and criminal, to which only Somalis are parties, every Court shall—
> a) be guided by Somali customary law (including Somali customary law which is based upon Islamic law) so far as it is applicable and is not repugnant to justice, equity, and good conscience or is inconsistent with any written law in force in Somaliland or any regulation or rule made thereunder; . . .

B. Persons to Whom Indigenous Law Applied

The application of indigenous law in the British

2. J. ANDERSON, *supra* Pt. II, Ch. 4, note 13, at 2, 40-41.
3. Ordinance No. 17 of 1937.
4. Ordinance No. 4 of 1944, 1 LAWS OF SOMALILAND Ch. 4 (1950).

Somaliland Protectorate should be examined with reference to two basic questions: to whom did it apply; and the specific matters governed by Shariat law and customary law.

Under the Principal Order-in-Council, in all cases, civil and criminal, to which natives were parties, every court was to be guided by indigenous law. The definition of "native" applicable to this Order-in-Council is similar to that adopted in Italian Somalia under Law No. 161 of April 5, 1908, for it included any indigenous inhabitant of Africa or Arabia.

The Subordinate Courts Ordinance, 1944, also defined the term "native" as including any member of the Somali race, any person known as a Zeilawi, and any person of Sudanese or Arab origin born or domiciled in the Protectorate.

However, Article 43 of the Constitution of Somaliland annexed to the Order-in-Council, 1960 restricted the application of Somali customary law (including Somali customary law that is based upon Shariat law) to Somalis only. With respect to other Muslims permanently resident in the Protectorate, Shariat law applied in personal and family matters.

C. Matters Governed by Indigenous Law

(1) MATTERS GOVERNED BY SHARIAT LAW

In the British Somaliland Protectorate, the Kadis' Courts Ordinance, 1937, for the first time clearly defined the scope of the application of Shariat law. It restricted it to marriage, including divorce and maintenance, guardianship of minors and family relationship, *wakf*, gift, succession, and will. The position continued unchanged under the Subordinate Courts Ordinance, 1944, and under the Somaliland Order-in-Council, 1960.

(2) MATTERS GOVERNED BY CUSTOMARY LAW

As regards the scope of application of customary law, there was not much difference between the British Somaliland Protectorate and Italian Somalia.[5]

D. Exceptions to the Application of Indigenous Law

As a general rule, it can be stated that indigenous law governed the natives unless legislation specifically provided otherwise. There were, however, certain exceptions to this rule.

Although the Principal Order-in-Council, and the Subordinate Courts Ordinance, 1944, directed the enforcement of native laws and customs, they also provided that such laws and customs were to be applied only insofar as they were not "repugnant to justice, equity, and good conscience." It should be noted that this phrase was not precisely defined and the courts resolved such questions in an *ad hoc* manner.

E. Conflict of Laws

The Principal Order-in-Council, the Subordinate Courts Ordinance, 1944, and the Somaliland Order-in-Council, 1960, all provided that native laws and customs should not be inconsistent with any written law in force in the Protectorate. In case there was a conflict between the indigenous law and the written law, the latter prevailed.

As mentioned with respect to Italian Somalia, the Somalis belong to one ethnic group and follow the Shafie School of Islam, and the same Shariat law and customary law were applicable to them. Hence, there was no internal conflict in the application of indigenous law.

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5. *See supra* Pt. II, Ch. 5.

F. Sources for Research

The sources for legal research on indigenous law, which were mentioned earlier in relation to Italian Somalia, apply also with respect to the British Somaliland Protectorate.

CHAPTER 4

JUDICIAL SYSTEM IN THE BRITISH SOMALILAND PROTECTORATE

A. Pre-1950 Judicial System
B. Reorganization after 1950

A. Pre-1950 Judicial System

In the British Somaliland Protectorate, as early as 1926, a Criminal Procedure on the lines of the Indian Criminal Procedure was introduced by the Criminal Procedure Ordinance,[1] which was subsequently amended on various occasions.

The above ordinance established the following system of courts:

The Protectorate Court: It could try any offence under the Penal Code [2] and pass any sentence authorized by law.[3] It had revisionary power over any criminal proceedings in any subordinate court.[4]

District Courts of the first class: They could try offences for which the punishment prescribed was imprisonment for a term not exceeding four years and fine not exceeding Rs. 3,000 [5] and whipping. The District Officer or the Assistant District Officer in charge of a District was a Magistrate with power to hold District Courts of the first class within such district.

District Courts of the second class: They could try offences for which the punishment prescribed was imprisonment not exceeding six months and fine not exceeding Rs. 750.[6] Assistant District Officers not in charge of a district were Magistrates with power to hold District Courts of the second class within the district to which they were posted.[7]

1. LAWS OF SOMALILAND Ch. 35 (1950).
2. *Id.* § 11.
3. *Id.* § 13.
4. *Id.* art. 316.
5. Indian Rupee was legal tender in the Protectorate under the Coinage Ordinance, 1937.

Any person convicted by a District Court of the first or second class could appeal to the Protectorate Court.[8]

Besides the above courts, there were the *Akils* Courts and the Kadis Courts. The *Akils* Courts were established under the *Akils* Court Ordinance of May 25, 1921. The *Akils* Courts were allowed, on receipt of written authority from a District Court, to enquire into and decide any question of native law and custom. The *Akils* Courts, consisting of a bench of three and full court of five members, were courts of first instance on matters relating to minor wounds and insults and acted as advisory councils to the District Courts.

The Kadis Courts were established under the Kadis Courts Ordinance of July 21, 1937. They had jurisdiction to decide any question regarding marriage, including divorce and maintenance, guardianship of minors and family relationship, *wakf*, gift, succession, or wills. The District Court and the Protectorate Court had power to revise any decision of the Kadis Court on a question of fact or on account of any irregularity not connected with the interpretation of Shariat law. Appeals against any decision or order of a Kadis Court on a question involving an interpretation of Shariat law were heard by two Kadis appointed for the purpose by the Protectorate Court. The Kadis Courts also had power to assess wound compensation according to Shariat law in cases that were referred to them by other courts.

6. *Supra* note 1, at § 14.
7. *Id.* § 7.
8. *Id.* § 316.

The Subordinate Courts Ordinance of July 1, 1944,[9] abolished the *Akils* Courts and established in their place the Subordinate Courts. It reorganized the Kadis Courts also.

The Subordinate Courts had jurisdiction over natives in civil and criminal matters as laid down in the warrant establishing the courts. This jurisdiction did not exceed Rs. 1,500 in civil matters. These courts had power to try minor criminal offences with power to impose a sentence of imprisonment or fine not exceeding Rs. 500. Appeals from decisions of these courts lay to a first class Magistrate, in civil matters to the Subordinate Courts of Civil Appeal, and in criminal matters to the Protectorate Court.

The Subordinate Courts Ordinance also established Kadis Courts [10] which administered Shariat law and had jurisdiction only in matters affecting the family life of the Somalis such as marriage, divorce, guardianship of minors and family relationship, *wakf*, gift, succession, and wills. It had no criminal jurisdiction. Appeals lay to the court of the Chief Kadi.

B. Reorganization after 1950

In 1950, the judicial system was partly reorganized in the Protectorate. The Somaliland Order-in-Council, 1950, provided for the constitution of a High Court in place of the then-existing Protectorate Court.

The jurisdiction of the High Court was criminal and civil in an original, appellate, and revisionary capacity. In its original criminal jurisdiction, the court dealt with the more serious cases committed for trial by the District Courts.[11] Its appellate jurisdiction in

9. *Supra* note 1, at Ch. 4.

10. *Id.* § 10(2).

11. In serious cases, such as murder, the preliminary enquiry was conducted by the District Court. If the court was satisfied that there was a *prima facie* case, then it committed the case to the High Court for trial.

both criminal and civil matters extended to all cases in which an appeal lay from the District Courts. It exercised revisionary jurisdiction in criminal and civil cases at its own discretion, but effective September 1, 1952, it had no jurisdiction in civil matters heard in Subordinate Courts established under the Subordinate Courts Ordinance. All criminal trials before the High Court were conducted with the aid of assessors.[12]

An appeal against the decision of the High Court in its civil and criminal jurisdiction to the Court of Appeal for Eastern Africa was provided by the Appeal to the Court of Appeal Ordinance No. 24 of 1950 as amended by Ordinance No. 14 of 1957.

East African (Appeal to Privy Council) Order-in-Council, 1951, provided for appeals to the Privy Council from decisions of the Court of Appeal.

The Order-in-Council, 1960, which came into force on the attainment of independence of Somaliland, abolished appeals to the Court of Appeal for Eastern Africa and to the Privy Council.

By the end of 1959, the Judiciary of Somaliland consisted of a Chief Justice, one Senior Magistrate, one Resident Magistrate, and one Magistrate (nonprofessional), the last named being a Somali, and also one Chief Kadi, twelve Kadis, and seventeen Subordinate Court Judges.

12. "When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally and shall record such opinion. The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors." (Criminal Procedure Ordinance No. 4 of 1956, §§ 236(1) & (2); 1 LAWS OF SOMALILAND Ch. 6 (1950).

PART FOUR

CONSTITUTIONAL LAW, SOURCES OF LAW, AND THE JUDICIAL SYSTEM OF THE REPUBLIC PRIOR TO THE REVOLUTION

CHAPTER I

PREPARATION OF THE CONSTITUTION AND UNION

A. In General

Having described the development of the legal system in Italian Somalia and in the British Somaliland Protectorate, an attempt will be made in the following chapters to outline the evolution of the legal system of the Somali Democratic Republic. The constitutional law, the sources of law, and the judicial system both prior to, and after, the Revolution will be discussed in Parts IV and V respectively, and the integration of laws effected since independence will be dealt with in Part VI.

Before dealing with the constitutional law, it may be pertinent to make a brief mention about the preparation of the Constitution and the Union of the former Trust Territory of Somalia and Independent Somaliland.

B. Preparation of the Constitution [1]

In the Trust Territory of Somalia, along with the progress made towards full self-government and independence, initial steps towards the preparation of the Constitution were also taken. By Decree No. 140 of

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1. For a fuller description, *see* G. COSTANZO, PROBLEMI COSTITUZIONALI DELLA SOMALIA NELLA PREPARAZIONE ALL'INDIPENDENZA 1957-60 (Giuffre' Editore, Milano 1962).

September 6, 1957, a Political Committee was appointed for the purpose of conducting preparatory studies for a Somali Constitution, with the President of the Legislative Assembly as chairman and the Prime Minister as vice-chairman. A Technical Committee was also appointed for the purpose of assisting the Political Committee in its work. The Political Committee did not meet and was later replaced by a Drafting Political Committee of the Constituent Assembly.[2] The Technical Committee prepared a Constitution of Somalia and presented its draft to the Political Committee in November 1958.[3]

The constitutional studies and suggestions prepared by the Technical Committee covered 141 articles divided into four parts: General Principles of the State; Fundamental Rights and Duties of Man; Organization of the State; and Constitutional Guarantees. In accordance with the recommendations contained in the United Nations General Assembly Resolution 89A (IV) Section B, the studies were based on the Universal Declaration of Human Rights and the Declaration of Constitutional Principles annexed to the Trusteeship Agreement.[4]

Law No. 6 of January 8, 1960, conferred on the Legislative Assembly the full powers of a Constituent Assembly for the purpose of drafting and approving the Constitution of Somalia. The Legislative Assembly

2. Report of the United Nations Advisory Council for the Trust Territory of Somaliland under Italian Administration, T/1516, April 14, 1960.

3. The Technical Committee was composed of nine Italian members and an expert on constitutional matters appointed by the Advisory Council. In the course of its work, the Committee co-opted twelve additional members which included nine Somalis, two Italians, and another expert appointed by the Advisory Council. *See Id.*

4. *See supra* Pt. II, Ch. 3, note 2.

met as the Constituent Assembly for the first time on March 17, 1960. A Drafting Political Committee was appointed on March 22, 1960, and was entrusted with the preparation of a draft constitution. The Drafting Political Committee consisted of: (1) thirty deputies drawn proportionally from the parliamentary groups and elected by each group, each being represented by at least two members; (2) two representatives of each of the political parties: the Somali Youth League, the Independent Constitutional Party, the Great Somalia League, the Somalia National Union, the Liberal Somali Youth Party, and the National African Union; (3) two citizen experts in religious matters, appointed by the Ministry of Justice; (4) two businessmen appointed by the Ministry of Industry and Commerce; (5) one representative each from the Somali General Students Organization and the Somali University Students Association; (6) one representative each from the two Trade Union Federations; and (7) the Minister for the Constitution.[5] The task of preparing the draft constitution was entrusted to the Minister for the Constitution. The Political Committee began its work on March 29, 1960, and finished it on May 9, 1960.

The Constituent Assembly began consideration of the draft constitution on May 16, 1960. It had 42 sittings in 31 days. The Constitution was approved on June 21, 1960, ahead of the time fixed for the independence of the Trust Territory.

The Constitution thus prepared was essentially a democratic instrument based on Western models, and especially on the model of the Constitution of Italy. It represented the culmination of the efforts to evolve a modern political structure for a traditionally democratic society.

5. *Supra* note 2, Annex 1, at 2.

C. The Union

The possibility of territorial union in the Horn of Africa had been widely discussed since the inception of Somali nationalism in the 1940's.

When Somalia attained a new status as a United Nations Trust Territory with its independence being assured, the goal of national unification received increased attention. All the major political parties, such as the Somali Youth League (S.Y.L.), Great Somalia League (G.S.L.), and Hizbia Dastur-Mustaqie Somali (H.D.M.S.), not only supported the Somalia independence but advocated a greater Somali state. In order to further its pan-Somali objectives, the S.Y.L., the party holding a majority of the Legislative Assembly seats and Government positions, maintained branches in the Somaliland Protectorate. Unification was also part of the Government's official programme. But while declaring themselves dedicated to the goal of independence, Government leaders always emphasized that it should be accomplished peacefully. The Government's official position on unification was stated by the then Prime Minister in his address to the Legislative Assembly in July 1959 when he declared that:

> All means must be employed within the framework of legality and the pursuit of peace—in order to obtain the union of all Somali territories, and their unification under the same flag. This constitutes for us not only a right, but a duty which one cannot neglect, because it is impossible to distinguish between Somali and Somali.[6]

In the Somaliland Protectorate there was also increasing demand both for independence and for unification of the Somali people. The political parties in the Protectorate, such as the Somali National League (S.N.L.), the National United Front (N.U.F.), and the United Somali Party (U.S.P.), all supported unification. In February 1959, the British Government declared:

> Her Majesty's Government is aware of the desire expressed by many Somalis of the Protectorate that there should be closer association between this territory and Somalia. If, therefore, when Somalia has become independent, the Legislative Council of the Protectorate formally resolves that negotiations with the Government of Somalia be instituted to determine the terms and conditions on which a closer association of the two territories may be achieved, Her Majesty's Government in the United Kingdom would be ready to transmit this resolution to the Government of Somalia and enquire whether that Government would be willing to enter into negotiation. If so, Her Majesty's Government would arrange for negotiations of a suitable nature to take place.[7]

The Somali nationalists were in a majority in the Legislative Council, which was elected on the basis of universal adult male suffrage on February 17, 1960. They adopted a motion in the Legislative Council on April 6, 1960, calling for independence and union with the Trust Territory of Somalia as soon as Somalia became independent on July 1, 1960. A constitutional conference was convened in London in May 1960, which agreed on a date for independence and the arrangements to accompany it.[8]

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6. GOUVERNMENT ITALIEN À L'ASSEMBLEE GÈNÈRALE DES NATIONS UNIES SUR L'ADMINISTRATION DE TUTELLE DE LA SOMALIE, MINISTÈRE DES AFFAIRES ETRANGÈRES, RAPPORT SUR LA SOMALIE 167 (1959).

7. Policy statement issued by the Secretary of State for the Colonies, Alex Lennox-Boyd, at Hargeisa, Feb. 9, 1959. For text *see* 5-4 COMMONWEALTH SURVEY 178-79 (London, Feb. 17, 1959).

8. 5-16 COMMONWEALTH SURVEY 702-03 (Aug. 4, 1959); 6-8 COMMONWEALTH SURVEY 271-73 (March 15, 1960); 6-9 COM-

When the British Government agreed in principle to grant independence to the Somaliland Protectorate on or about July 1, 1960, the Somali leaders began negotiations for unification. A conference was held in Mogadiscio in the middle of April 1960. The conference agreed that after the two territories attained independence, they would be united "under one flag, one President, one Parliament, and one Government." It was also agreed that the central governmental institutions of the new Republic would be a Presidency, a Council of Ministers, and a Legislative Assembly; that the Constitution of Somalia would serve as the basis for the Constitution of the new Republic; and that the administrative, judicial, and economic systems of the two territories would function separately until provision was made for their integration. It was envisaged that each territory, upon becoming independent and prior to the unification, would conclude a separate agreement with the respective administrating power regarding the transfer of authority, and regarding economic aid and other arrangements.[9]

The British Somaliland Protectorate became independent on June 26, 1960, and the Trust Territory of Somalia on July 1, 1960.[10] On July 1, 1960, the legislatures of the two newly independent states met at Mogadiscio in joint session and proclaimed the establishment of the Somali Republic. On the same day, the President of the Legislative Assembly of Somalia,

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MONWEALTH SURVEY 402-04 (April 26, 1960); BRITISH COLONIAL OFFICE, REPORT OF THE SOMALILAND PROTECTORATE CONSTITUTIONAL CONFERENCE 1044 (H.M. Stationery Office, London 1960).

9. For the communique issued at Mogadiscio on April 16, 1960, *see* THE TIMES, April 18, 1960 (London).

10. The date originally fixed for the independence of the Trust Territory of Somalia was Dec. 2, 1960. The date was advanced by the General Assembly Resolution 14118 (XIV) of Dec. 5, 1959.

Hon. Aden Abdulla Osman, who was elected as the provisional President of the Somali Republic, promulgated the Constitution, which was originally prepared for Somalia; and effective that date, the Constitution provisionally came into force throughout the Republic.

D. Act of Union, 1961

While there was no doubt that full and lawful union had been effected by the will of the peoples of Somaliland and Somalia through their duly elected representatives, some doubts were expressed concerning the legal effects of the instruments relating to the union. The Act of Union of Somalia and the Union of Somaliland and Somalia Law[11] were both drafted in the form of bilateral agreements, but neither of them was signed by the representatives of Somaliland and Somalia. The Somalia Act of Union was approved "in principle" but not enacted into law. On July 1, 1960, a decree-law was issued to deal with some of the legal effects of the union. However, in the absence of conversion into law in accordance with Article 63 of the Constitution, this decree-law never came into force. In order to resolve the uncertainties as to the precise legal effects of the union, the Act of Union Law No. 5 of January 31, 1961, was enacted by the National Assembly.

The Act of Union, *inter alia*, provided that:

> . . . the Legislative Assemblies of Somaliland and Somalia shall together comprise the first National Assembly of the Somali Republic; . . . the laws in Somaliland and Somalia at the time of the establishment of the union shall remain in full force and effect in the respective jurisdictions subject to the provisions of the Constitution, this law or any future law; . . . subject to the provisions of Ar-

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11. Law No. 1 of 1960.

> ticle 94 of the Constitution concerning the jurisdiction of the Supreme Court and any future law, the courts as presently constituted in Somaliland and Somalia shall continue to exercise the respective jurisdiction conferred upon them by law; . . . save as otherwise provided in the Constitution, this law or any future law, all public bodies, both central and local, shall continue to exist and shall retain all their duties, functions and powers.

Thus the doubts entertained regarding the union were set at rest by the Act of Union of 1961 and the union emerged stronger with the integration of laws and the different legal systems prevailing in both parts of the Republic.

E. Referendum

While concluding this chapter, it should be noted that under Article III of the Transitional and Final Provisions of the Constitution, it was required that, within one year from its coming into force, the Constitution should be submitted to a popular referendum. The Constitution was approved by popular referendum [12] on June 20, 1961, by an overwhelming majority of 90.6 percent of those who voted.[13]

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12. For fuller description of the referendum conducted in the Republic, *see* REPUBBLICA SOMALA, MINISTERO DELL'INTERNO, REFERENDUM COSTITUZIONALE DEL 20 GIUGNO 1961 (Feat, Torino 1963).

13. Results proclaimed by the Supreme Court were as follows: total votes cast 1,948,348; votes for the Constitution 1,756,216; votes against the Constitution 183,000; invalid votes 9,132.

CHAPTER 2

GENERAL CHARACTERISTICS OF THE CONSTITUTION [1]

A. Islamic State
B. Representative Democratic Republic
C. Written Constitution
D. Parliamentary System of Government
E. Fundamental Human Rights
F. Rigid Constitution
G. Supremacy of the Law

Before dealing with the functions and powers of the four principal organs of the State established by the Constitution, *viz.*, the President of the Republic, the National Assembly, the Government, and the Judiciary, it may be useful to indicate the general characteristics of the Constitution.

A. Islamic State

The Constitution established an Islamic State. It provided that Islam "shall be the State religion" [2] and that the doctrine of Islam be the main source of the laws in the Republic.[3]

B. Representative Democratic Republic

The Constitution established a representative

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1. For text of the Constitution, *see* OFFICIAL BULLETIN No. 1 of July 1, 1960; 1 A. PEASLEE, CONSTITUTIONS OF NATIONS: AFRICA 773-803 (The Hague 1965). For commentary of the Constitution, *see* M. D'ANTONIO, LA COSTITUZIONE SOMALA: PRECEDENTI STORICI E DOCUMENTI COSTITUZIONALI (Presidenza del Consiglio dei Ministri, Servizio Informazioni, Roma 1962); R. ANGELONI, DIRITTO COSTITUZIONALE SOMALO (A. Giuffre' Editore, Milano 1964); M. STRAMACCI, LE COSTITUZIONI DEGLI STATI AFRICANI Ch. 27 (A. Giuffre' Editore, Milano 1963).

2. CONSTITUTION, art. 1(3).

3. *Id.* art. 98(1).

democratic Republic.[4] "The sovereignty belongs to the people consisting of all citizens,"[5] and "the sovereignty of the people is exercised indirectly through representatives elected periodically by universal adult suffrage." Its Head of State was to be the President of the Republic, who was to be elected for a term by the National Assembly.

C. Written Constitution

The Republic had a written constitution, and this had important juridical implications.

A written constitution means limited Government. The Somali Constitution divided the sovereign powers amongst the three organs of the State—the National Assembly, the Government, and the Judiciary—and defined the powers of each of these organs. No organ could therefore act beyond its own powers or usurp those assigned to another under the Constitution.

Where a written constitution exists, it forms the organic or fundamental law of special sanctity. The validity of the laws enacted by the National Assembly were to be tested in relation to the fundamental law. Under the Somali Constitution, if any law enacted by the National Assembly were contrary to or inconsistent with the provisions of the Constitution, it would be unconstitutional and therefore null and void. The National Assembly, under the Somali Constitution, could not therefore be said to be a sovereign legislature in the sense in which the Parliament in England is sovereign. In England, Parliament is supreme and "can do everything that is not naturally impossible" (Blackstone) and the courts cannot nullify an Act of Parliament on any ground whatsoever.[6]

4. *Id.* art. 1(1).
5. *Id.* art. 1(2).
6. For amending powers under the Somali Constitution, *see infra.*

In a written constitution, the judiciary is called "the guardian of the Constitution." While the powers of all the organs of the State are drawn from and limited by the constitution, power must necessarily be reposed in some authority to guard that the limits imposed by the constitution are not violated by any one of these organs. In the Constitution of the United States, judicial review of acts of Congress is not provided for in explicit terms. However, judicial review of acts of Congress was made constitutional law, and thereby the cornerstone of American constitutionalism, by the decision of the Supreme Court of Chief Justice Marshall in the celebrated case of *Marbury v. Madison.*[7] In the Somali Constitution, there were express provisions to the effect that laws and provisions having the force of law should conform to the Constitution and that the question of their constitutionality would be decided by the Supreme Court constituted as the Constitutional Court.[8]

D. Parliamentary System of Government

The Somali Constitution envisaged a parliamentary system of government. Most of the democracies in the modern world can be divided into two categories: the presidential system and the parliamentary system. In the presidential system such as in the United States, the President is the real head of the executive, and is elected by the people for a fixed term. He has Ministers (Secretaries), but they are appointed by him as his counsellors and are responsible to him and not to the legislature. Following the principle of separation of powers, the position of the President is made to coordinate with that of the Congress and the

7. 1 Cranch 137 (1803).
8. Judicial review of legislative action is dealt with in Pt. IV, Ch. 13.

Judiciary. These three organs of the State enjoy equal status.

On the other hand, in the parliamentary system such as in England, Her Majesty the Queen is a mere titular Head, and the executive power is wielded by the Cabinet headed by the Prime Minister, who is responsible to the legislature. While in modern Africa there is a striking movement toward the Presidential system in the sense of vesting the executive power, real and formal, in a monocephalous executive,[9] the Somali Constitution adopted a parliamentary system with the President of the Republic as the Head of the State and the Prime Minister as the Head of the Government. The President of the Republic was elected by the National Assembly. The President appointed the Prime Minister, and appointed the Ministers on the advice of the Prime Minister. The Government, consisting of the Prime Minister and the Ministers, had to obtain the confidence of the National Assembly within thirty days of its formation. The Government continued in office so long as it had the confidence of the President of the Republic and of the National Assembly.

E. Fundamental Human Rights

Fundamental human rights[10] were written and entrenched in the Somali Constitution. The rights guaranteed by the Constitution included not only civil and political rights, but also social, economic, educational, and cultural rights.

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9. *See* Juergensmeyer, *African Presidentium—A Comparison*, 8-3 AFR. L. J. 157-177 (1964).

10. *See* HAJI N. A. NOOR MUHAMMAD, THE DEVELOPMENT OF THE CONSTITUTION OF THE SOMALI REPUBLIC 44-74 (Gov't. of the Somali Republic, Ministry of Grace and Justice, Mogadiscio April 1969).

The Constitution divided the fundamental rights into four categories: fundamental rights of the citizen; fundamental rights of man; social rights; and judicial guarantees.

The fundamental rights of the citizen included: the right to vote (art. 8), the right of access to public office (art. 9), the right to petition (art. 10), the right of residence (art. 11), the right of political association (art. 12), the right to form trade unions (art. 13), and the right to economic initiative (art. 14).

The fundamental rights of man included: the right to life and personal integrity (art. 16), the right to personal liberty (art. 17), the right to extradition and political asylum (art. 19), limits to personal service and personal levy (art. 20), freedom of domicile (art. 21), freedom of correspondence (art. 22), social equality (art. 23), right to property (art. 24), freedom of assembly (art. 25), freedom of association (art. 26), the right to strike (art. 27), freedom of opinion (art. 28), freedom of religion (art. 29), and the right to personal status (art. 30).

Social rights included: protection of the family (art. 31), the provision of welfare agencies (art. 32), protection of public health (art. 33), safeguarding of public morals (art. 34), the provision of public education (art. 35), protection of labour (art. 36), provision of social security and social welfare (art. 37).

Judicial guarantees included: right to institute judicial proceedings (art. 38), protection against acts of public administration (art. 39), civil responsibility of the State for the acts of its officials and employees (art. 40), right to defence in legal proceedings (art. 41), right to free legal aid (art. 41).

It was further provided in article 7 that the laws of the Republic should comply insofar as possible with the principles of the Universal Human Rights adopted

by the General Assembly of the United Nations on December 10, 1948.

F. Rigid Constitution

The Somali Constitution was rigid in the sense that it could not, as in England, be amended by ordinary legislation. Amendments or additions to the provisions of the Constitution could be decided by the National Assembly by two successive ballots held at an interval of not less than three months, approval requiring an absolute majority in the first ballot and a two-thirds majority in the second ballot.[11] Furthermore, it was provided that the Constitution should not be amended for the pupose of modifying the republican and democratic form of Government or for restricting the fundamental rights and freedoms of the citizens and of man guaranteed by the Constitution.[12]

G. Supremacy of the Law

The Somali Constitution also provided that the organization of the State and the relationships between the State and the persons, public and private, should be governed by law,[13] and thereby established the supremacy of the law.

The Constitution thus laid the foundations of the Rule of Law in the Republic.[14]

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11. CONSTITUTION art. 104(1).
12. *Id.* art. 104(2).
13. *Id.* art. 5(1).
14. *See* Haji N. A. Noor Muhammad, *The Rule of Law in the Somali Republic*, V-2 J. OF INTERNATIONAL COMM. OF JURISTS 275-302 (Winter 1964).

CHAPTER 3

THE PRESIDENT OF THE REPUBLIC [1]

A. In General

The Republic, as noted earlier, had adopted a parliamentary system, with the President of the Republic as the Head of the State and the Prime Minister as the Head of the Government. The President, like Her Majesty the Queen of England, stood apart from, and also above, all the other organs of the State and represented the unity of the Nation.[2]

(1) QUALIFICATIONS

A candidate for the office of President of the Republic had to be a Muslim citizen,[3] whose father and mother were both original citizens. He could not be less than 45 years of age and must have had the right to vote. He could not have been married to, nor could he marry, during his tenure of office as President, any woman who was not an original citizen. During his term of office, the President could not exercise any other public function except the right to vote, nor could he engage in any professional, commercial, industrial, or financial activity.[4]

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1. In Italy, the President of the Republic is elected for seven years by Parliament in joint session of its members. *See* CONSTITUTION OF THE ITALIAN REPUBLIC, 1948 art. 83.
2. CONSTITUTION, art. 70(1).
3. There are several other states (*e.g.*, Afghanistan, Argentina, Iran, Norway, Pakistan, Sweden, etc.) whose Head is required by the constitution of that state to be the follower of a particular religion.
4. CONSTITUTION, art. 71.

(2) ELECTION

The President was elected by the National Assembly by secret ballot by a two-thirds majority in the first and second ballots, and by an absolute majority in subsequent ballots.[5]

The President of the National Assembly fixed the date for the election of the new President, with the election to take place within thirty days prior to the expiration of the term of office of the President in office. Should the National Assembly be dissolved or should its term expire within less than three months, the election of the President was to take place within thirty days following the first meeting of the new Assembly. During that period, the President in office continued to hold office.[6]

(3) TERM OF OFFICE

The term of office of the President was six years from the date of his taking the oath. Any modification of the term of office of the President would not apply to the President in office. It was further provided that no person could be elected President consecutively for more than two terms.[7]

Under the Constitution, no Vice-President was provided for. In case of death, resignation, or permanent disability of the President, the National Assembly was to meet within thirty days to elect a new President. Until the election of the new President, the President of the National Assembly was to temporarily exercise the functions of the President of the Republic. It was the duty of the President of the National Assembly to also temporarily exercise the functions of the President in all cases of absence or temporary disability of the President and in cases where the powers of the President in office were suspended for purposes of impeachment for high treason or attempt against the constitutional order.[8]

5. *Id.* art. 70(2).
6. *Id.* art. 72.
7. *Id.* art. 71(1).

B. Functions

The President was not the head of any of the three traditional powers of the State (*viz.*, Legislature, Executive, or Judiciary), but represented, as mentioned earlier, the unity of the Nation. He was in constant contact with the other constitutional organs of the Republic and participated in all major constitutional activities in the legislative, executive, and judicial fields.[9]

(1) LEGISLATIVE POWERS

The President of the Republic had to perform important functions in the legislative field.

The intervention of the President was indispensable in the formation of the National Assembly. The President fixed the date of the election to the National Assembly: the election had to take place during the last thirty days of the tenure of office of the legislalature.[10] The President might also request the President of the National Assembly to convene the Assembly in extraordinary session.

The President had also the power to dissolve the National Assembly before the end of the term whenever it could not discharge its functions or discharged them in a manner prejudicial to the normal exercise of legislative activity.[11] However, in the same decree dissolving the Assembly, the President was to fix the date of the new elections and the elections were to take

8. *Id.* art. 74.
9. *Id.* art. 75.
10. *Id.* art. 52(2).
11. *Id.* art. 53(1).

place within sixty days of the dissolution.[12] The outgoing Assembly was to retain its powers until the proclamation of the electoral results of the new Assembly.[13]

One condition prescribed for the issuance of a decree dissolving the National Assembly was that the President of the Republic must hear the opinion of the President of the National Assembly.[14] Obviously the President was also to consult the Prime Minister, as the decree was required to be countersigned by the latter.[15]

Another restriction on the power of the President in this regard was that the National Assembly could not be dissolved during the first year in office of the Assembly, as it was difficult during such a short period to judge how the Assembly was discharging its functions. The Assembly could not be dissolved during the last year in office of the President of the Republic.[16]

The President also participated, though not directly, in the legislative functions of the National Assembly. The President exercised salutary control over legislation in two ways: first, the President authorized the presentation to the National Assembly of draft legislation originating with the Government.[17] Secondly, the President promulgated laws approved by the Assembly. Even though the President assumed responsibility neither for the presentation of draft legislation nor for its approval, he had the discretion to suspend the promulgation and transmit, stating the reasons therefor, a message to the National Assembly

12. *Id.* art. 53(2).
13. *Id.* art. 53(4).
14. *Id.* art. 53(1).
15. *Id.* art. 76(2).
16. *Id.* art. 53(3).
17. *Id.* art. 75(a).

requesting it to reconsider the draft law.[18] By this method, any questions relating to the constitutionality of draft laws or questions relating to their merits could be controlled by the President, thus avoiding any eventual complications. Where the President exercised his veto, the legislation in question could become law only when it was approved again by the National Assembly by a two-thirds majority, in which case the President was to promulgate the legislation within thirty days of the approval.[19]

(2) EXECUTIVE POWERS

The most important function that the President had to perform in the executive field was the appointment of the Prime Minister. The initiative regarding the formation of the Government and the choice of the Prime Minister rested with the President. In England there is a convention that the majority party leader should be called upon to form the cabinet. In the Somali Republic, there was no such convention,[20] nor was there any constitutional provision to that effect.

The Prime Minister was appointed and dismissed by the President.[21] The Presidential decree appointing the Prime Minister was to be countersigned by the in-

18. *Id.* art. 61(3). In 1965, the National Assembly approved a law restricting retail licenses only to Somalis. The President returned the law to the National Assembly for reconsideration on the ground that the proposed law would have adverse reactions abroad, and that if retaliatory measures were taken by other countries, Somalis were likely to suffer most as there are more Somalis abroad than foreigners within the Republic.
19. *Id.* art. 61(4).
20. In 1964, the S.Y.L. Party, which had a majority in the National Assembly, elected Hon. Abdirashid Ali Shermarke as its leader. The President of the Republic, however, called upon Hon. Abdirizak Haji Hussein, a member of that party, to form the Government.
21. CONSTITUTION, art. 78(3).

coming Prime Minister.[22] The Presidential decree dismissing the Prime Minister was to be countersigned by the succeeding Prime Minister.[23] The Presidential decree nominating or dismissing the Prime Minister took effect immediately and automatically without being subject to any approval or ratification.

The confidence of the President of the Republic was required not only for the formation of the Government, but also for its continuance. However, under the constitutional set-up, an extra-parliamentary Government would have been very exceptional, since the National Assembly had the power to express its confidence in the new Government within thirty days of its formation.[24]

All acts of the Government which were in the shape of legal measures had to be taken with the concurrence of the President of the Republic. Such acts included:

(i) the issuing of legislative decrees [25] and decree-laws.[26] All such measures, which had the force of law, had to be proposed by the Prime Minister or the Minister concerned and approved by the Council of Ministers;

(ii) the issuing of decrees of amnesty and indult. The National Assembly might delegate to the President of the Republic the power to grant amnesty and

22. *Id.* arts. 78 and 76; Law on the Organization of the Government, Law No. 14 of June 3, 1962, art. 2. This law was amended by Decree-law No. 1 of Feb. 7, 1965, converted into law by Law No. 4 of June 1, 1965; Law No. 10 of Aug. 11, 1966; Decree-law No. 4 of Sept. 24, 1967, converted into law by Law No. 24 of Dec. 11, 1967; Decree-law No. 8 of May 24, 1969, converted into law by Law No. 16 of June 24, 1969.

23. *Id.*

24. CONSTITUTION, art. 82(1).

25. *Id.* art. 62.

26. *Id.* art. 67.

indult.[27] Decrees granting amnesty and indult were to be countersigned by the Minister of Justice and Religious Affairs;

(iii) the issuing of regulations governing the organization of the Presidency of the Council of Ministers, the Ministries, and subordinate offices; [28]

(iv) the issuing of regulations on proposals approved by the Council of Ministers. The power to issue regulations might be given by law to other organs of the State and public bodies; [29]

(v) the appointing of high officials and Commanders of the Armed Forces as specified by law, on the proposal of the competent Minister approved by the Council of Ministers; [30]

(vi) the issuing of varied administrative measures such as measures contemplated in the Law on the Organization of the Government,[31] the Citizenship Law,[32] the Public Order Law,[33] etc.

(vii) the conferring of the State honours.[34]

It should be emphasized that the President of the Republic was not responsible for any act performed in the exercise of his functions except for crimes of high treason or attempts against the constitutional order.[35]

(3) JUDICIAL POWERS

The President issued decrees relating to the appointment, promotion, transfer, disciplinary measures,

27. *Id.* art. 64.

28. *Id.* art. 81(2).

29. *Id.* art. 85.

30. *Id.* art. 87.

31. Law No. 14 of June 3, 1962.

32. Law No. 28 of Dec. 22, 1962.

33. Law No. 21 of Aug. 26, 1963.

34. CONSTITUTION, art. 75.

35. *Id.* art. 76(1).

and termination of service of the members of the Judiciary. However, this was only a formality, as such measures were taken by the Minister of Justice and Religious Affairs on the recommendation of the Higher Judicial Council presided over by the President of the Supreme Court.[36]

The President also appointed two members to the Supreme Court constituted as the Constitutional Court for a period of three years on the proposal of the Council of Ministers.[37]

He had the power to grant pardon and commute sentences.[38] This power was exercised on the advice of the Attorney General in order to modify the rigours of justice administered by courts.

(4) DIPLOMATIC POWER

The President accredited and received diplomatic agents [39] and ratified treaties [40] to which the Somali Republic was a party, subject to the prior authorization of the National Assembly.[41]

(5) POWER TO DECLARE WAR

The President had the power to declare a state of war [42] with the prior approval of the National Assembly [43] exclusively for the purpose of defending the State,[44] and to this end could issue appropriate orders to the Armed Forces, of which he was the Commander-in-Chief.[45]

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36. Law on the Organization of the Judiciary (Legislative Decree No. 3 of June 12, 1962). *See infra* Pt. IV, Ch. 12.
37. CONSTITUTION, art. 99.
38. *Id.* art. 75(c).
39. *Id.* art. 75(d).
40. *Id.* art. 67.
41. *Id.*
42. *Id.* art. 75(c).
43. *Id.* art. 68.
44. *Id.* arts. 6(1) & (2).
45. *Id.* art. 75(f).

C. Responsibility of the President

In order to safeguard the prestige of the President of the Republic and to place him above the responsibilities deriving from functions that were specifically assigned to other constitutional organs, the Constitution provided:

> 1. The President of the Republic shall not be responsible for acts performed in the exercise of his functions . . .
> 2. The responsibility for acts of the President shall rest with the Prime Minister and the competent Minister who subscribed to them.[46]

The "irresponsibility" of the President of the Republic as laid down by the above provisions extended to all consequences arising out of the functional measures (civil, penal, administrative, constitutional) signed by him. The signature of the Prime Minister or the Minister concerned, which was made an indispensable prerequisite for the legal validity of such measures, would indicate the Ministers who were responsible for them.

However, in a democratic and republican regime based on the supremacy of the law,[47] the principle of "irresponsibility" of the Head of the State had its limitations and did not in every case place him in a position of absolute immunity. First of all, his "irresponsibility" was purely functional and therefore did not extend to acts of public and private life in which the President did not act in his capacity as Head of the State, but acted as a private individual.

Secondly, the "irresponsibility" of the President —also in functional matters—did not extend to serious crimes against the personality of the State such as high treason or attempt to subvert the constitutional

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46. *Id.* art. 76(1).
47. *Id.* art. 5.

order. If such a crime occurred, the President was to be impeached by a decision of the National Assembly taken by secret ballot and approved by a two-thirds majority.[48] As already mentioned, after such a decision he was to be immediately suspended from office and temporarily replaced by the President of the National Assembly.[49] He was to be tried by the Supreme Court constituted as the High Court of Justice, which included six additional members drawn by lot from a special list.[50]

The juridical nature of the offences of high treason and attempt against the constitutional order was the subject of much discussion.[51] It was maintained by some jurists that, in view of the political nature of the charge brought against the President, the content of it and the punishment therefor should at each time be decided by the Court even apart from any specific provision. Others argued that such a view would constitute an implicit violation of the fundamental rights of the individual in penal matters, and particularly of the principle that penal laws should not be retroactive and that, if the above principle were to be made applicable to citizens and aliens alike, it should necessarily apply also to the First Citizen of the Republic. This controversy was resolved by the Somali Penal Code, which defined the crimes and specified the punishment.

Article 184 of the Penal Code defined high treason as the willful commission of acts designed to subject the territory or part of the territory of the State to the sovereignty of a foreign State, or to prejudice its independence, or to disrupt the unity of the State, and pre-

48. *Id.* art. 76(3).
49. *Id.* art. 74(2).
50. *Id.* arts. 76 & 102. *See infra* Pt. IV, Ch. 15.
51. *See* R. ANGELONI, *supra* Pt. IV, Ch. 2, note 1, at 103.

scribed the death penalty for the crime. Article 217 [52] defined an attempt against the constitutional order as an attempt to modify the order established by the Constitution by illegal means, *i.e.*, by means not contemplated by the Constitution, and provided the punishment of life imprisonment.

It is, therefore, obvious that only when acts of this precisely defined nature were committed, the National Assembly could impeach, and the Supreme Court, constituted as the High Court, try the President of the Republic.

To sum up, the powers vested in the President of the Republic under the Somali Constitution did not fall within the exclusive field of competence of the Legislature, the Executive, or the Judiciary, but represented a synthesis of the sovereignty of the State. The President as the Head of the State played a vital role in the body politic by coordinating, and by resolving conflicts arising out of, the activities of the three traditional powers, thus facilitating the smooth working of the constitutional machinery.

52. Article 217 of the Penal Code has been amended by Law No. 2 of Jan. 10, 1970. Under the provisions as amended, whoever commits an act for the purpose of changing the order established by revolution, or the revolutionary form of government not authorized by the Revoluntionary laws shall be punishable with imprisonment for life.

CHAPTER 4

THE NATIONAL ASSEMBLY [1]

A. In General
B. President, Vice-Presidents, and Other Officers of the National Assembly
C. Functions of the National Assembly
D. Standing Board and Standing Committees
E. Privileges of Deputies

A. In General

The legislative power was vested in the National Assembly.[2]

(1) UNICAMERAL LEGISLATURE

The Constitution provided for a unicameral legislature for obvious reasons. First, the State was declared to be a unitary Republic,[3] and there was, unlike in federal states, no necessity for a second chamber to give representation to the constituent states. Secondly, the relative simplicity in enacting legislation in a unicameral legislature as against the complex procedure adopted in bicameral legislatures was another reason for adopting the former system. Thirdly, the difficulties and expenses involved in establishing a second chamber was a further reason for not incorporating a bicameral system.

1. In Italy, Parliament is composed of the Chamber of Deputies and the Senate of the Republic (ITALIAN CONSTITUTION, art. 55). The Chamber of Deputies is elected for five years by universal and direct suffrage on the basis of one deputy for eighty thousand inhabitants (*see* arts. 56 & 60). The Senate of the Republic is elected for six years on a regional basis. To each region is assigned one senator for every two hundred thousand inhabitants in each of the nineteen regions into which Italy is divided. However, no region except that of Val d'Aosta, which has only one senator, shall have less than six senators (arts. 57, 60, & 131).

2. CONSTITUTION, art. 49.

3. *Id.* art. 1(1).

(2) COMPOSITION

The National Assembly of the Republic consisted of: 123 deputies elected by universal, free, direct, and secret franchise; [4] and deputies by right, *viz.*, persons who had held the office of President of the Republic. They were deputies for life.

(3) ELECTION

The right to vote in political elections was granted to citizens who had completed eighteen years of age at the time elections were held. The only restrictions were that they should not have been declared to be of unsound mind by judicial authorities or interdicted from holding public office or deprived of electoral rights as a consequence of penal conviction. Persons who were serving sentences of imprisonment were also not entitled to vote.[5]

Every citizen who had the right to vote, who in the year of the elections had completed at least twenty-five years of age, and who could prove that he could read and write was eligible to be elected as a deputy.[6]

Employees of the State or other public bodies and members of the Armed Forces or paramilitary organizations of any rank and grade were ineligible to be elected as deputies. However, such grounds of ineligibility would not apply if the person concerned had presented his resignation at least 180 days before the date of voting.[7]

The deputies were elected under the list system of proportional representation.

4. *Id.* art. 51(2).

5. Political and Local Council Elections Law, art. 4.

6. *Id.* art. 5.

7. *Id.* art. 6.

The number of deputies to be elected in each district was established in Schedule A attached to the Political and Local Council Elections Law.[8] Each regularly constituted political party could present a list of candidates in each electoral district. The number of candidates contained in each list could not be less than twice nor more than thrice the number of deputies to be elected in each district.[9] Each list of candidates was to be signed by not less than 500 voters of the same electoral district.[10] The presentation of each list was to be accompanied by the receipt of a security deposit of Sh.So.5,000. The security deposit was to be returned where the list obtained at least the votes necessary for the election of one deputy; otherwise the security deposit would be forfeited and credited to the revenue of the State.[11] The number of seats assigned to each list of candidates was proportional to the votes obtained by the list in the electoral district and was calculated on the basis of the quotient and the highest remainder, provided that the lists that did not reach the quotient were excluded also from the calculation of remainders. Where no list reached the quotient, the seats were assigned to the list that obtained the highest number of votes.[12] Where only one list reached the electoral quotient, all the seats [13] were assigned to such list. Where only one list was presented in an electoral district, no vote was taken and as many candidates as the number of deputies to be elected in such electoral district were proclaimed elected in the order in which they were indicated in the list.[14]

8. *Id.* art. 3.
9. *Id.* art. 9.
10. *Id.* art. 12(1).
11. *Id.* art. 13.
12. *Id.* art. 9.
13. Decree-law No. 8 of Oct. 28, 1968, converted into law by Law No. 32 of Dec. 2, 1968.
14. Political and Local Council Elections Law, art. 9.

Where a deputy ceased to exercise his functions, his seat would be declared vacant by the National Assembly and the vacancy would be filled by the candidate immediately following the last candidate elected in the same list of the electoral district, under the proclamation made by the President of the National Assembly.[15] Under this system, there was, therefore, no necessity for holding by-elections.

The Supreme Court had jurisdiction over petitions challenging the qualifications of deputies. Petitions stating the grounds therefor could be filed by any citizen who was a voter, within thirty days of the proclamation of the electoral results or of the occurrence of the cause of incompatibility or ineligibility. The Supreme Court had to give a decision within ninety days from the date of expiration of the time limit fixed for the filing of petitions.

(4) TERM OF OFFICE

Each legislature was elected for a period of five years starting from the proclamation of the electoral results. Any modification of this term of office did not affect the duration of the legislature during which such decision was taken.[16] The date of the elections to the new Assembly was fixed by the President of the Republic and was to take place during the last thirty days of the legislature in session. The new Assembly was to meet for the first time within thirty days of the proclamation of the electoral results.

The Assembly might, however, be dissolved before the end of its term of office by the President of the Republic, whenever it could not discharge its functions or if it discharged them in a manner prejudicial to the normal exercise of legislative activity.[17]

15. CONSTITUTION, art. 59(4); Political and Local Council Elections Law, art. 63.
16. CONSTITUTION, art. 52(1).
17. For further discussion, *see* Pt. IV, Ch. 3, B.

(5) SESSIONS OF THE NATIONAL ASSEMBLY

The Assembly was to hold two annual sessions commencing in the months of April and October, respectively. The Assembly might be convened in extraordinary session by its President, or on the request of the President of the Republic, or of the Government, or of one-fourth of the deputies.

The meetings of the Assembly were to be public. Only in exceptional cases the Assembly might decide to meet in closed session, on the motion of its President, or at the request of the President of the Republic, or of the Government, or of not less than thirty deputies.[18]

B. President, Vice-Presidents, and Other Officers of the National Assembly

(1) OFFICE OF THE PRESIDENCY

At the commencement of each legislative term, the National Assembly elected by secret ballot a President, three Vice-Presidents, a Questor, two Vice-Questors, and two Secretaries who jointly constituted the Office of the Presidency.[19]

(2) THE PRESIDENT OF THE NATIONAL ASSEMBLY

The President of the National Assembly was elected by a vote of the absolute majority of the deputies. Should the first three ballots fail to yield an absolute majority of votes, a further ballot was to be taken and the deputy who had gained the largest number of votes would be declared elected.[20]

The President enforced the observance of the Standing Rules, maintained order, and ensured the

18. CONSTITUTION, art. 55(3).
19. *Id.* art. 55(1); Standing Rules of the National Assembly, art. 2.
20. Standing Rules of the National Assembly, art. 2.

proper course of business in the Assembly. He granted leave to speak, directed and moderated the debates, put the questions, determined the order of votings, announced the results thereof, and supervised the performance of the duties assigned to the Questors, Vice-Questors, and Secretaries. He summoned the chairman of the standing committees and the leaders of the parliamentary groups for the purpose of examining the order of business of the Assembly and informed in due time the Government so that the latter would be in a position to arrange for one of its representatives to attend the debate.[21]

While the Assembly was in session, the President received draft laws, reports, and all other parliamentary documents, and informed the Assembly about such receipt on the first day it was reconvened.[22]

(3) THE VICE-PRESIDENTS

The Vice-Presidents alternatively substituted for the President whenever the latter was absent or otherwise prevented from performing the duties of the chair.[23]

(4) OTHER OFFICERS

The Questors and Vice-Questors were in charge of the ceremonial, police, and internal services of the Assembly.[24]

The Secretaries, who were assisted by the officers assigned to the office of the Presidency, were responsible for delivering notices of convocation of the Assembly. They recorded the sequence of deputies desiring to speak, read proposals and documents, recorded resolutions, called the roll, kept record of individual

21. *Id.* art. 4.
22. *Id.*
23. *Id.* art. 5.
24. *Id.* art. 7.

votes when required, ensured that the reports of proceedings were published within the time prescribed by the President, and that speeches were not altered or modified. They verified the texts of laws and resolutions approved by the Assembly and affixed their signatures thereon, and contributed to the proper conduct of business as directed by the President.[25]

Upon the President's proposal, the office of the Presidency appointed a Secretary General of the Assembly who was responsible to the President for the proper functioning of the Assembly. The duties and responsibilities of the Secretary General were defined by the Presidency.[26]

C. Functions of the National Assembly

Among the most important of the functions of the National Assembly were: a) law-making; b) control over finance; c) establishment of other constitutional organs; d) authorization of the ratification of International Treaties; e) authorization of the declaration of a state of war; f) delegation of the power to grant amnesty and indult; g) power to order investigation and to put interpellations.

(1) LAWMAKING

(a) Laws

Every deputy, the Government, or at least 10,000 voters had the right to present draft laws to the National Assembly. The exercise of popular initiative was governed by law and could not pertain to matters of taxation.[27]

Prior to the discussion in the National Assembly,

25. *Id.* art. 6.
26. *Id.* art. 78.
27. CONSTITUTION, arts.60(1) & (2).

every draft law was examined by a standing committee of the National Assembly.[28]

Draft laws presented by the Government or private members were required to lie over 24 hours after they had been distributed to the deputies and before they were debated in the House, unless the Assembly directed otherwise for reasons of urgency.[29]

The general debate was the first step in the consideration of a draft law. The Minister or the deputy presenting the draft law might move that the debate proceed to individual parts or titles of the draft law; should they fail to do so, ten deputies might put forward a request to that effect. Upon hearing two deputies speaking respectively for and against the request, the Assembly was to decide. When the consideration of a draft law was by articles, each article as well as any amendment proposed to that article was to be voted upon. Whenever a draft law consisted only of a single article, both general and detailed discussion should be proceeded with at the same time.[30]

After approving the formative criteria of a draft law, the Assembly might also refer the final drafting of the articles of such law to the competent standing committee, while retaining its right to finally approve the draft law.[31]

The Assembly next voted on draft laws article by article, and in the end it voted on draft laws as a whole by secret ballot.[32]

(i) Promulgation and Publication

Every law approved by the Assembly was to be promulgated by the President of the Republic within

28. *Id.* art. 60(3). *See infra* § D.
29. Standing Rules of the National Assembly, art. 53.
30. *Id.* art. 55.
31. *Id.* art. 56.
32. CONSTITUTION, art. 60(4).

sixty days of its approval. Where the Assembly declared, by an absolute majority of its members, that there was an urgent need, a law was to be promulgated within the time limit fixed by the Assembly, provided that such time limit be not less than five days. Every law approved by the Assembly and promulgated by the President of the Republic was to be published in the Official Bulletin and was to come into force on the fifteenth day following its publication, unless the law provided otherwise.[33]

(ii) Veto and Message by the President of the Republic

Within the period fixed for promulgation, the President of the Republic might transmit to the Assembly a message stating the grounds therefor, requesting that the law be reconsidered.[34]

Where the Assembly approved such law again by a two-thirds majority, it was obligatory on the part of the President of the Republic to promulgate it within thirty days of the approval.[35]

(b) Legislative Decrees

The National Assembly might delegate to the Government the power to issue, on specified subjects or matters and within a fixed time limit, provisions having the force of law. In delegating authority, the Assembly might establish the policy and issue directives. Provisions made under a delegated power were to be issued by decree of the President of the Republic on the proposal of the Council of Ministers.[36]

(c) Decree-laws

In cases of urgent necessity, the Government

33. *Id.* art. 61.
34. *Id.* art. 61(3).
35. *Id.* art. 61(4).
36. *Id.* art. 62.

might issue temporary provisions having the force of law. Such provisions were to be issued by decree of the President of the Republic on proposals approved by the Council of Ministers and, within five days from the date of their publication, were to be presented to the National Assembly for conversion into law. If in session, the Assembly was to decide on their conversion into law within thirty days of the date of presentation; if not in session, it was to decide within thirty days of its first subsequent meeting. Provisions that were not converted into law would cease to have effect *ab initio;* the Assembly might, however, decide that such effect would cease on a different date and might regulate the legal consequences arising from the nonconversion of such provisions.[37]

(d) Regulations

Regulations were issued by decree of the President of the Republic on proposals approved by the Council of Ministers. The National Assembly might, however, by law give the power to issue regulations on specific matters to other organs of the State and to public bodies.[38]

(2) FINANCIAL FUNCTIONS

(a) Budget

The Assembly approved each year the budget to be presented by the Government at least two months before the end of the financial year. The law approving the budget might not establish new taxes and new expenditures.[39]

Provisional application of the budget might be authorized by law for periods not exceeding three months *in toto.*[40]

37. *Id.* art. 63.
38. *Id.* art. 85.
39. *Id.* arts. 66(1) & (2).
40. *Id.* art. 66(3).

(b) Taxation

The imposition, modification, and abolition of taxes could be effected only by law.[41]

(c) Expenditure

Laws involving new or larger State expenditure were to specify the means for meeting such expenditure. In the case of an expenditure to continue for more than one year, the means to meet it might be limited to the budget for the current year.[42]

(d) Annual Accounts

Within the first six months of each financial year, the Government was to present to the Assembly, for approval, the Annual Accounts relating to the previous financial year.[43]

(3) POWERS REGARDING THE ESTABLISHMENT OF OTHER CONSTITUTIONAL ORGANS

Besides the above functions, the National Assembly had an important part to play in the establishment of other constitutional organs of the State.

The most important function in this regard was the election of the President of the Republic. As noted earlier, the President was elected by secret ballot by the National Assembly, by a two-thirds majority in the first and second ballots, or by an absolute majority in subsequent ballots.[44]

Secondly, even though the Prime Minister was appointed by the President of the Republic, the Government had to obtain the confidence of the National Assembly within thirty days of its formation. Subsequently the Government might also ask the Assembly to express its confidence at any time. The Assembly was to express its confidence or no-confidence by means of a motion approved by a simple majority. Where a motion of no-confidence was proposed, which could be done at any time by at least ten deputies, it was required that it should be carried by an absolute majority in open vote.[45]

41. *Id.* art. 65(1).
42. *Id.* arts. 65(2) & (3).
43. *Id.* art. 66(4).
44. *Id.* art. 70(2).

With respect to the Judiciary, the Assembly was to elect two additional members to the Supreme Court constituted as the Constitutional Court,[46] twelve citizens to the Supreme Court constituted as the High Court of Justice [47] (and out of these twelve, six would sit as additional members of the Court), and three members to the Higher Judicial Council, which was the highest body having control over the members of the Judiciary.

(4) AUTHORIZATION FOR RATIFICATION OF INTERNATIONAL TREATIES

The Assembly had the power to authorize by law the ratification of political, military, and commercial international treaties or of treaties that involved a modification of the law or financial commitments not included in the budget.[48]

(5) AUTHORIZATION FOR DECLARATION OF A STATE OF WAR

The National Assembly had also the power to authorize the declaration of a state of war and to confer on the Government the necessary powers.[49]

(6) POWER TO GRANT AMNESTY AND INDULT

The power of granting amnesty and indult could

45. *Id.* art. 82.
46. *Id.* art. 99.
47. *Id.* art. 102.
48. *Id.* art. 67.
49. *Id.* art. 68.

be delegated to the President of the Republic by a law approved by the National Assembly by a two-thirds majority. Amnesty and indult could not be granted with respect to offences committed after the presentation of the draft law on the delegation of powers.[50]

(7) POWER TO ORDER INVESTIGATION

The Assembly could order investigations through committees consisting of deputies from all parliamentary groups, in order to investigate occurrences or situations of public interest. When it decided to order such an investigation, the Assembly was to establish, within the limits of the Constitution, the powers of the committee; it could also appoint experts to cooperate within the committees.[51]

(8) QUESTIONS, INTERROGATION, INTERPELLATION, AND MOTION

Every deputy had the right to put questions and to submit an interrogation or interpellation to the Government and to propose motions to the Assembly.[52]

A deputy desiring to submit an interrogation or interpellation had to do so in writing. It was to be read by the President in open Assembly within five days from the date of its submission; or, if the Assembly were not in session, within the second sitting held after it was convened.[53]

An interrogation was to consist of a simple question as to whether a fact were true, whether any information had reached the Government, or whether such information was correct, whether the Government intended to provide the Assembly with such documents as the deputy might require, or whether it had made

50. *Id.* art. 64.
51. *Id.* art. 69.
52. *Id.*
53. Standing Rules of the National Assembly, art. 71.

or was about to make decisions concerning given subject matters.[54]

An interpellation consisted of a written question as to the reasons for or purpose of the course of action chosen by the Government in matters concerning given aspects of its policies.[55]

The interrogation or interpellation, having been read by the President in the open Assembly, was to be forwarded to the competent Minister, who had to provide the originator of the interrogation or interpellation with a written reply within twenty days from the date of the submission.[56]

Should the originator of the interrogation or interpellation consider the written reply not to be satisfactory, he had the right to request the Minister concerned to clarify the problem before the Assembly.[57]

Should he be dissatisfied and intend to have a discussion on the explanations offered by the Government, he was to submit a motion. The President was to read the motion to the Assembly and, upon obtaining the Assembly's approval, fix a date for the discussion and inform the Minister concerned accordingly.

D. Standing Board and Standing Committees

Much of the business of the National Assembly was conducted in the Assembly, but important functions were also performed by the standing board and standing committees.

There were the following standing committees: the Committee on Interior; the Committee on Foreign Affairs and Information; the Committee on Justice; the Committee on Defence; the Committee on Finance;

54. *Id.*
55. *Id.*
56. CONSTITUTION, art. 69(1).
57. Standing Rules of the National Assembly, art. 72.

the Committee on Economic Affairs (Industry and Commerce, Public Works and Communications, Agriculture and Animal Husbandry); the Committee on Social Affairs (Health, Veterinary and Labour, Education).

The standing board and each standing committee consisted of eleven members who elected a chairman, a deputy chairman, and a secretary.

The standing board and the standing committees were appointed at the commencement of each legislative term and continued in office for the entire duration of the term.[58]

Within three days from the first sitting, the President had to convene the parliamentary groups for the purpose of appointing their delegates to the standing board and standing committees. Each group was to nominate its delegates to each committee at the ratio of one delegate for every eight deputies or fraction thereof. The President distributed the nominees among the individual Committees,[59] the composition of all of which had to be approved by the National Assembly.[60]

The standing board exercised the following functions: a) it was responsible for the investigation of the grounds of ineligibility for and incompatibility with the office of deputy; b) it considered requests for authorization to legally prosecute deputies; c) it had the right to propose amendments and additions to the standing rules of the Assembly as might be required; d) it had also the right to give opinions on questions relating to the interpretation of the standing rules of the Assembly as well as decisions on any conflicts of competence.[61]

58. *Id.* art. 11(bis).
59. *Id.* art. 12.
60. *Id.* art. 11(bis).
61. *Id.* arts. 8 & 9.

Draft laws were referred to the standing committees for consideration, on the basis of their competence.

Each committee appointed a rapporteur on each draft law for debate in the Assembly. Should disagreement arise during the committee phase, the dissenting parties were allowed to submit one or two minority reports and to appoint a rapporteur for each.[62]

The committees had the power to summon officials of the Public Administration and ask them for clarifications concerning the subject committed to them.[63]

The standing board and the standing committee also functioned during intervals between the sessions of the Assembly.[64]

E. Privileges of Deputies

To enable deputies of the National Assembly to fulfill their functions, individually and collectively as a House, they were, like the members of the Judiciary, given certain privileges and immunities not enjoyed by ordinary individuals and societies.

The Constitution provided that deputies should not be prosecuted for facts mentioned, opinions expressed, or votes cast in the exercise of their functions.[65]

Furthermore, it was provided that, without the authorization of the Assembly, no criminal proceedings could be instituted against a deputy, nor could a deputy be arrested or otherwise deprived of personal liberty, nor could his person or domicile be subjected to search, except in case of *flagrante delicto* for a crime in respect of which a warrant of arrest was

62. *Id.* art. 20.
63. *Id.* art. 19.
64. *Id.* art. 14.
65. CONSTITUTION, art. 58(3).

mandatory, nor could he be placed under arrest or detention in execution of a sentence, even where it had become final.[66]

In cases other than those involving criminal proceedings, an action might be taken against a deputy in accordance with law, without authorization of the Assembly.

It should be noted that the privilege of freedom of speech guaranteed to the deputies by the Constitution was similar to that enjoyed by the members of Parliament in England. However, in England, while the member need not fear arbitrary arrest by the Executive, he is no longer protected against arrest for indictable crimes or misdemeanours except when within the precincts of the House. But in the Republic, with respect to criminal proceedings, the deputies enjoyed much greater immunity than the members of Parliament in England.

66. *Id.* art. 58(4).

CHAPTER 5

THE GOVERNMENT

A. In General

(1) COMPOSITION

The executive power was vested in the Government, which consisted of the Prime Minister and the Ministers.[2] The Ministers might be assisted by Undersecretaries of State, who exercised the functions delegated to them by the Ministers [3] but did not form part of the Government.

(2) QUALIFICATIONS

The Constitution did not specify that the members of the Government and the Undersecretaries should be deputies. Article 80, paragraph 2, of the Constitution only provided that they should be citizens possessing the qualifications required for election as deputies. It would, therefore, follow that nondeputies could also be appointed as members of the Government and Undersecretaries. The functions of the Ministers and of Undersecretaries were incompatible with any other public function except the exercise of the right to vote and of the functions as deputy in the National Assembly. They were prohibited from engaging in professional, commercial, industrial, or financial ac-

1. In Italy, the Government consists of the President of the Council and of the Ministers, who together form the Council of Ministers. The President of the Republic appoints the President of the Council and, on the latters' proposal, the Ministers (*see* ITALIAN CONSTITUTION, art. 92).

2. CONSTITUTION, art. 77.

3. *Id.* art. 79.

tivities. They could not directly or indirectly obtain the lease of, or purchase, property belonging to the State or to public bodies, except for premises to be used as their personal residence. They were further prohibited from selling or leasing their property to the State or to public bodies or from participating in a personal capacity in State enterprises or in enterprises controlled by the State.[4]

(3) FORMATION

The initiative regarding the formation of the Government was entrusted exclusively to the President of the Republic, who, after consultation with the political leaders, appointed the Prime Minister. The Prime Minister assumed office immediately upon appointment. He then chose his Ministers,[5] who were in turn appointed by the President of the Republic. The appointments of the Prime Minister and Ministers were made by decree of the President of the Republic with the countersignature of the Prime Minister.[6] The countersignature of the Prime Minister with respect to his appointment did not imply that the proposal came from him; it only implied that he accepted the proposal made by the President of the Republic and assumed the constitutional responsibility therefor. On the other hand, the countersignature of the Prime Minister with respect to the appointment of the Ministers implied that the former had made the proposal. The choice of the Prime Minister was guided by political consideration, and there was, as mentioned earlier, no law or convention binding the President to call upon the leader of the majority party in the National Assembly to form the Government. The only constitutional restriction imposed on the formation of the Government was that, within thirty days from its formation, the Government should obtain the confidence of the National Assembly by a motion of confidence approved by a simple majority in open vote.[7]

4. *Id.* art. 80(2).
5. *Id.* art. 78.
6. *Id.* art. 76(2).

(4) DISSOLUTION OF THE GOVERNMENT

A government might be dissolved for any one of the following reasons:

First, the dissolution might occur as a result of the death of the Prime Minister.

Secondly, it might be caused by the voluntary resignation of the Prime Minister. Where the Prime Minister resigned, the whole Government had to resign, and the resignation took effect when it was presented to the President of the Republic. The President could not refuse to accept the resignation, but might request the Prime Minister to reconsider it.

Thirdly, where a no-confidence motion was approved by the National Assembly by an absolute majority in open vote, the Government was required to resign.[8] It should be noted that, unlike the practice in countries such as, for instance, England and India, where the Cabinet has to resign when a finance bill is defeated, the Government in the Somali Republic was not under law bound to resign when such a bill was defeated. The Government had to resign only when a no-confidence motion was approved by the National Assembly. However, the resigning Government was to continue in office for the purpose of carrying out routine duties until the appointment of a new Government.[9]

Fourthly, the President of the Republic might dismiss the Government. This was a discretionary power

7. *Id.* art. 82(2).
8. *Id.* arts 82(3) & (4).
9. *Id.* art. 82(5).

vested in the President, which enabled him to bring about an equilibrium in the administration and helped him to resolve constitutional conflicts. Dismissal of a Government would have been a very exceptional step, since it would have been difficult for the President of the Republic to dismiss a Government that had the confidence of the National Assembly. However, this power constituted the ultimate safeguard of democracy against autocratic regimes with respect to which the National Assembly might not have control.

Fifthly, when the National Assembly, on the motion of at least one fifth of the deputies approved by a two-thirds majority, decided to impeach the Prime Minister for offences committed in the exercise of his functions, he would be automatically suspended from exercising his functions,[10] and would be tried by the Supreme Court constituted as the High Court of Justice. In this case, the Government would stand dissolved when the automatic suspension referred to above occurred.

B. Functions of the Government

Before dealing with the individual functions of the component organs of the Government, mention may be made of the general functions of the Government.

It should be pointed out that "Government" and "executive power" are not synonymous terms here. The latter includes not only the Government but also the various branches of Public Administration. The Government, on the other hand, is the major organ of executive power, having under it the various Ministries and the complex organization of Public Administration.

10. *Id.* art. 84(4).

As mentioned earlier, important measures of the Government required the formality of a Presidential decree. However, constitutionally the initiative for Presidential decrees came from the Prime Minister or the Ministers concerned, who assumed the responsibility for such measures.

In relation to the National Assembly, the Government exercised important functions. It initiated draft legislation and prepared and issued legislative decrees as well as decree-laws in cases of urgent necessity. At the same time, the Government itself was subject to parliamentary control in that the Assembly had to approve the formation of the Government as well as the Government programme. It therefore followed that full agreement between the Government and the National Assembly on political matters was a *sine qua non* for the proper and effective functioning of the Government.

As regards the Judiciary, the fundamental principle embodied in the Constitution was the absolute independence of the Judiciary.[11] However, the Minister of Justice and Religious Affairs provided services to the Judiciary within the limits established in the budget and initiated administrative measures concerning the members of the Judiciary, which, after having heard the Higher Judicial Council, were issued by decree of the President of the Republic.

(1) THE PRIME MINISTER

The Prime Minister of the Republic was, like the Prime Minister of England, the keystone of the Government arch. Morley described the position of the British Prime Minister as follows:

> Although in Cabinet all its members stand on an equal footing, speak with equal voice, and on rare

11. *Id.* art. 93.

> occasions when the division is taken, are counted on the fraternal principle of one man—one vote, yet the head of the Cabinet is *primus inter pares* and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority.[12]

The above estimate was equally true of the Somali Prime Minister.

The Prime Minister was the head of the Government. He advised the appointment and dismissal of Ministers and Undersecretaries. He directed the general policy of the Government and was responsible therefor. He maintained the unity of the Government's policy by coordinating and promoting the activities of the Ministers. He convened and presided over the Council of Ministers and fixed the agenda for its meetings. He was directly in charge of the Presidency of the Council of Ministers,[13] which dealt with matters affecting the Government in general. He administered those acts relating to personnel employed by the State which were not expressly reserved by law to individual Ministers, and which provided for the execution of his decisions. The power of the Prime Minister was indeed great. Backed by a stable and substantial majority in the National Assembly and given the continued support of the President of the Republic, the range of his political action was practically unlimited.

(2) THE COUNCIL OF MINISTERS

The meeting of the Prime Minister and the Ministers constituted the Council of Ministers.[14] The Council of Ministers dealt with the following matters: major questions of policy or public order; approval of draft laws to be presented to the National Assembly

12. LIFE OF WALPOLE 157 (1913).
13. CONSTITUTION, art. 83(1); Law on the Organization of the Government, Law No. 14 of June 3, 1962, art. 3.
14. CONSTITUTION, art. 78(2).

and withdrawal of draft laws previously presented; approval of decree-laws, legislative decrees, and of those regulations that required the approval of the Council of Ministers under the Constitution or by law; proposals concerning international treaties and major questions of international policy; settlement of conflicts of jurisdiction between different Ministries; registration with reserve of administrative decrees under the Financial and Accounting Procedure of the State;[15] any other matter expressly reserved to the Council of Ministers by the Constitution, by law, or by regulations, or deemed by the Prime Minister to be of particular importance.[16]

The Council of Ministers was presided over by the Prime Minister and consisted exclusively of Ministers. The Undersecretaries were allowed to participate in the meetings of the Council of Ministers in an advisory capacity, without the right to vote. Officers and experts might also be called to participate in the meetings.[17]

The duties of the Secretary of the Council of Ministers were performed by an officer appointed by the President of the Republic on the proposal of the Prime Minister, having heard the Council of Ministers.[18]

(3) THE MINISTERS

The Ministers directed the affairs within the competence of their respective Ministries. They directly or through competent officers took measures connected with the functioning of the Ministry or Office of which they were in charge.[19] In their capacity as Ministers,

15. *See infra* Pt. IV, Ch. 10, A.
16. Law on the Organization of the Government, Law No. 14 of June 3, 1962, art. 5.
17. *Id.* art. 4(2).
18. *Id.* art. 4(3).
19. CONSTITUTION, art. 83(2); *supra* note 16, art. 3(2).

they had the power to incur expenditure within the limits laid down in the budget.[20]

The Law on the Organization of the Government [21] established the following Ministries: Foreign Affairs; Interior; Defence; Grace and Justice; Information; Education; Health and Labour; Planning and Coordination; Finance; Public Works; Communications and Transport; Industry and Commerce; Agriculture; Animal Husbandry & Veterinary Services; Mining; Rural Development and Self-Help Schemes.

The above law also contemplated the appointment of Ministers of State without portfolio who directed the affairs within the ambit of the functions delegated to them by the Prime Minister.[22]

(4) TEMPORARY SUBSTITUTION

In case of absence or incapacity of the Prime Minister, his functions were temporarily assumed by a Minister nominated by him.[23] In case of absence or incapacity of a Minister, his functions were temporarily assumed by the Prime Minister or by a Minister designated by the Prime Minister.

C. Responsibility of the Members of the Government

The responsibility of the members of the Government could be either personal or collective.

The Prime Minister was personally responsible: for the political action of the Government; for directing the general policy of the Government, as well as maintaining its unity by coordinating and promoting

20. Financial and Accounting Procedure of the State, art. 23.

21. *See infra* Pt. IV, Ch. 6.

22. There were in early 1969 two Ministers of State, one in charge of Somali Affairs and another in charge of Establishment and Personnel.

23. *Supra* note 16, art. 8.

the activities of the Ministers; for convening the Council of Ministers; for measures relating to the Presidency of the Council of Ministers. Ministers were personally responsible for directing the affairs within the competence of their respective Ministries.[24]

The collective responsibility of the Prime Minister and the Ministers pertained to acts and measures adopted by the Council of Ministers.[25]

The responsibility of the members of the Government were civil, administrative, or penal.

In penal matters, the Prime Minister and the Ministers were responsible for offences committed in the exercise of their functions. In respect of such offences, the members of the Government could be impeached on a decision of the National Assembly taken on the motion of at least one-fifth of its members and approved by secret ballot by a two-thirds majority. They were to be tried by the Supreme Court constituted as the High Court of Justice.[26] No criminal proceedings could be instituted against the Prime Minister or the Ministers except with the authorization of the National Assembly, approved in a secret ballot by a two-thirds majority.[27]

24. CONSTITUTION, art. 83.

25. *Id.* art. 83(3); *supra* note 16, art. 4.

26. CONSTITUTION, art. 84(2); *see infra* Pt. IV, Ch. 15.

27. *Id.* art. 84(3).

CHAPTER 6

CENTRAL AND TERRITORIAL ORGANIZATION

A. Central Organization
B. Territorial Organization

A. Central Organization [1]

The Central Administration of the Somali Republic was organized into the Presidency of the Council of Ministers and sixteen ministries that among them performed most of the administrative functions of the State.

In each ministry there was a Directorate General headed by a Director General, who—directly or through officers subordinate to him—provided for the execution of the business within the competence of the ministry.[2] The ministry was divided into several departments,[3] which might again be divided into sections, services, and offices.[4]

(1) Presidency of the Council of Ministers

The Presidency of the Council of Ministers was directly under the Prime Minister and contained a series of small offices and services that did not rate ministries to themselves, either on account of their small size or on account of the wide interministerial scope of their activities.

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1. Law on the Organization of the Government Law No. 14 of June 3, 1962, as amended. *See supra* Pt. IV, Ch. 3, note 22.
2. Central Organization of the Central Offices of the Administration, art. 3; D.P.R. No. 316 of Dec. 17, 1962.
3. *Id.* art. 4.
4. *Id.* art. 5.

The Presidency of the Council of Ministers consisted of the following offices:

(a) Office of the Prime Minister, handled the correspondence of the Prime Minister and provided the liaison between the Prime Minister and the officers of the State, members of the public, and representatives of other countries.

The functions of the Secretariat of the Council of Ministers were also provided by the Office of the Prime Minister. In that capacity, the Office of the Prime Minister received documents intended for the Council of Ministers, convened meetings of the Ministers, prepared the agenda of the meetings, provided for the drafting and the custody of the records of meetings, maintained a register of the decisions of the Council of Ministers, transmitted to the President of the Republic the acts requiring his signature, transmitted draft laws to the National Assembly, and forwarded to the Magistrate of Accounts administrative decrees for registration.

The Office of the Prime Minister was also in charge of the Cipher Office and Translation Service.

(b) Directorate General of Establishment and Personnel, was under a Minister of State, responsible to the Prime Minister. It dealt with matters relating to the Civil Service.[5]

(c) Directorate General of Government Transports, was under a Minister of State, responsible to the Prime Minister. It dealt with Government transports and the maintenance works relating thereto.[6]

(d) Directorate General of Somali Affairs, was under a Minister of State, responsible to the Prime

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5. D.P.R. No. 12 of March 20, 1965, as amended, art. 5.
6. Decree-law No. 4 of Feb. 24, 1969.

Minister. It dealt with matters relating to Somalis residing in territories bordering the Somali Republic.[7]

(e) Office of the General State Attorney. The General State Attorney had the duty to protect the rights and interests of the State and in particular the rights and interests of the Administration and public bodies throughout the Republic. He represented them in judicial proceedings. He was also in charge of the publication of the Official Bulletin. He had to tender legal advice on matters referred to him by the Administration and public bodies.[8]

(f) Institute of Public Administration.[9]

(g) Office of the Magistrate of Accounts.[10]

(h) Civil Service Commission.[11]

(i) Bureau for the Investigation of Corruption.[12]

(2) MINISTRY OF FOREIGN AFFAIRS

The Ministry was responsible for the carrying out and coordination of foreign policy, international relations, the drafting of treaties, international agreements and conventions, and the preparation for the signature of the President of the Republic of acts for the purpose of international representation.[13]

(3) MINISTRY OF INTERIOR

The organization of the territorial administration and internal security and public order came within the

7. *Supra* note 5, art. 7.

8. *Id.*, art. 8. *See infra* Pt. VI, Ch. 11, D.

9. *Supra* note 5, art. 9.

10. *Id.* art. 10. The functions of the Magistrate of Accounts are dealt with *infra* Pt. IV, Ch. 10, A.

11. *Id.* art. 11. The functions of the Civil Service Commission are described *infra* Pt. IV, Ch. 5, G.

12. Law No. 10 of Feb. 13, 1968.

13. *Supra* note 1, art. 11.

sphere of the Ministry of Interior. The central and local organization of the Police and the Illalo Corps[14] was also under this Ministry.[15]

(4) MINISTRY OF DEFENCE

The Somali Republic had a single united Ministry of Defence that administered the Army, Navy, and Air Force. This Ministry dealt with the administration of military personnel and with studies and projects related to national defence.[16]

(5) MINISTRY OF GRACE AND JUSTICE

This ministry was originally known as the Ministry of Grace and Justice. In 1966, it was renamed the Ministry of Justice and Religious Affairs and in 1969 it reverted to and was again called by the former designation of the Ministry of Grace and Justice. It consisted of three departments and one service. The Administrative Department exercised control over the finances and accounts of the Ministry. The Judiciary and Professional Affairs Department dealt with all administrative matters concerning the members of the Judiciary and the auxiliary personnel. The Legislative Department was entrusted with the function of drafting laws and regulations originating with the Government.[17] The Prison Service attached to the Ministry

14. Tribal Police attached to the District Commissioners for the purpose of preserving the peace, preventing crime, and apprehending offenders against the peace. *See* LAWS OF SOMALILAND Ch. 49 (1950).

15. Decree-Law No. 1 of Feb. 7, 1965, converted into law by Law No. 4 of June 1, 1965, art. 9.

16. *Supra* note 13, art. 13.

17. As the Legislative Department did not have qualified men, the function of the Department was exercised by the Consultative Commission for Legislation appointed by decree of the President of the Republic.

exercised control over the prison staff and prison activities.[18]

(6) MINISTRY OF INFORMATION

This ministry dealt with the dissemination of information relating to the activities of the Government, documentation on the political, economic, and social life of the Republic, tourist information, public entertainments, conventions, and relations with the press, radio, and all other means of communication.[19]

(7) MINISTRY OF EDUCATION

The main functions of the Ministry of Education covered organization of educational establishments of all types, basic education, scholastic assistance, scholarships, libraries, and museums. The Ministry exercised supervision over private educational institutions, boarding schools, and students' associations. It was also responsible for the promotion and improvement of literature, art, and science.[20]

(8) MINISTRY OF HEALTH AND LABOUR

This ministry originally included the Health, Labour, and Veterinary Departments. But in 1965, the Veterinary Department was transferred to the Ministry of Agriculture and Animal Husbandry.

The chief functions of the Ministry of Health and Labour covered:

(a) public health and hygiene, sanitary police, social assistance, preventive and social medicine, organization of hospitals, dispensaries, nursing homes, laboratories, sanitary assistance, and the supervision over sanitary services provided by local bodies or private persons;

18. *Supra* note 15, art. 7; D.P.R. No. 17 of March 20, 1965.
19. *Supra* note 1, art. 15.
20. *Id.* art. 18.

(b) the organization of labour in all its forms, protection of professional categories, regulation of labour relations, employment, assistance, and social security, and supervision over all agencies dealing with the protection and the moral, professional, and social improvement of the workers.[21]

(9) MINISTRY OF PLANNING AND COORDINATION

Under the Law on the Organization of the Government of 1962, the Directorate General of Planning was within the Presidency of the Council of Ministers, under the charge of a Minister of State. In view of the growing importance of planning *vis-a-vis* the development of the country, a separate Ministry of Planning and Coordination was created by Law No. 10 of August 1, 1966. This ministry dealt with planning and coordination and statistical services.[22]

(10) MINISTRY OF FINANCE

This ministry was entrusted with the preparation of the budget estimates, annual accounts of the State and variations of the budget. It controlled accounting services, currency, and banking, the enforcement of taxes and custom duties, and the administration of revenue. It also exercised supervision over local taxation and the General Stores.[23]

(11) MINISTRY OF PUBLIC WORKS

This ministry dealt with public works, plans and projects for public works, and roads. It also dealt with zoning, building and town planning, land tenure, and topographic and cartographic research.[24]

(12) MINISTRY OF COMMUNICATIONS AND TRANSPORT

This ministry was responsible for ports, airports,

21. *Supra* note 15, art. 12.
22. Law No. 10 of August 1, 1966, art. 1.
23. *Supra* note 15, art. 11.
24. *Id.* art. 13.

public water supplies, postal, telegraphic, radio-telegaphic, telephonic and radio-telephonic services, and land, sea, and air communications.[25]

(13) MINISTRY OF INDUSTRY AND COMMERCE

This ministry was concerned with the organization of industrial activities, handicrafts, trade, currency control, insurance agencies, consumer goods, fisheries, supervision over weights and measures, and tourism.[26]

(14) MINISTRY OF AGRICULTURE

This ministry was responsible for the organization of agriculture, agricultural economics, extension and training services, land colonization, land reclamation and improvement, agricultural research, plant protection, and locust control.[27]

(15) MINISTRY OF ANIMAL HUSBANDRY AND VETERINARY SERVICES

This ministry dealt with the organization of animal husbandry, veterinary services, veterinary police, supervision over veterinary services provided by local bodies or private persons, research and training in animal husbandry, range management, and development of holding grounds.[28]

(16) MINISTRY OF MINING

This ministry dealt with the development of min-

25. *Id.*, amended by Decree-law No. 4 of Feb. 24, 1969.

26. Law No. 14 of June 3, 1962, art. 20, as amended by Decree-law No. 4 of Sept. 24, 1967, converted into law by Law No. 24 of Dec. 11, 1967; art. 3 as amended by Decree-law No. 8 of May 24, 1969, art. 4.

27. *Supra* note 15, art. 14, as amended by Decree-law No. 4 of Sept. 24, 1967, converted into law by Law No. 24 of Dec. 11, 1967, art. 2.

28. *Id.*

eral resources including mining and geological survey.[29]

(17) MINISTRY OF RURAL DEVELOPMENT AND SELF-HELP SCHEMES

This ministry was concerned with community development and self-help schemes, forestry, research in forest resources, conserving and regulating the utilization of grazing areas excluding ranges, holding grounds, development and production of games, and control over hunting.[30]

B. Territorial Organization

So far as territorial organization was concerned, there was not much change and the old system continued.

For purposes of administration, the State was divided into regions [31] and districts.[32]

Each region was headed by a Regional Governor, who was under the Ministry of Interior. He represented the Government in the region. As a public order authority, the Regional Governor had special responsibility for maintaining law and order within the region. The Regional Command and the respective territorial and mobile units of the Police Force and of the Illalo Corps were, within the limits established by law, under his authority.[33] He might also be appointed the Supervisory Authority of the Local Administrations within the region.[34]

29. *Id.*

30. *Id.*

31. There are at present eight Regions.

32. There are at present 48 Districts.

33. Public Order Law, Law No. 21 of Aug. 26, 1963, art. 2(1).

34. *See infra* Pt. IV, Ch. 8.

Each district was headed by a District Commissioner, who was under the Regional Governor. Within the district, he exercised functions similar to those attributed to the Governor.

A district could be subdivided into sub-districts under Heads of Sub-districts.

CHAPTER 7

THE CIVIL SERVICE

A. In General

The Somali Republic inherited two systems of civil service, one in the Southern Regions [1] and another in the Northern Regions.[2] The Act of Union of 1961 provided that, pending integration, civil servants would continue to be governed by the respective laws in force.

The Civil Service Law enacted in 1963 [3] had two main purposes: to fulfill Article 88, paragraph 5, of the Constitution which provided that "the status of civil servants shall be established by Law"; and to establish a unified civil service for the whole Republic. Since the progress of a country depends in large measure upon the competence, efficiency, integrity, and devotion to duty of its civil service, the law provided uniform terms and conditions of service for all public officials throughout the country. It also guaranteed security of tenure and provided adequate safeguards for the protection of the rights of civil servants; in the first place, by the specific provisions of the law on such matters as appointment, promotion, disciplinary measures, and administrative and judicial guarantees; and

1. Civil Service Law approved by Decree No. 2479 of Dec. 22, 1955.
2. Colonial Regulations and General Orders.
3. Law No. 7 of March 15, 1963.

in the second place, by broadening the powers of the Civil Service Commission established under the Constitution, so as to prevent abuse or arbitrary treatment.

However, in order to effect decentralisation of powers and to improve the efficiency of the administration, another Civil Service Law was enacted in 1969.[4]

Under this Law, the Civil Service was divided into the following categories:

Division A—Administrative and Professional, Grades 1 to 8;

Division B—Executive and Senior Technical, Grades 1 to 4;

Division C—Clerical and Technical, Grades 1 to 4;

Division D—Junior Technical and Unclassified, Grades 1 to 4.[5]

B. Appointment

In conformity with the basic constitutional principle that every citizen was equally eligible for public office,[6] the civil service was open only to persons possessing the necessary requirements.[7] The qualifications for admission to the civil service were ascertained through open competitive examinations, thus ensuring that the best candidates were selected. On the other hand, a mere evaluation of the educational qualifica-

4. Law No. 14 of March 11, 1969. This law has been superseded by Law No. 27 of April 1, 1970. *See infra* Pt. V. Ch. 1, B.

5. *Id.* art. 4 and Schedule A. The Civil Service Establishment Commission was appointed to make recommendations regarding the fixing of the establishment of each Ministry and the placing of the persons in service. *See* Civil Service Law, art. 67 and D.P.R. No. 59321 of Sept. 5, 1966, as amended.

6. CONSTITUTION, art. 9.

7. Civil Service Law, art. 17.

tions of a candidate might not be sufficient from a moral and professional standpoint. Accordingly, the final appointment of an official was subject to the successful completion of an adequate probationary period, during which he performed the duties pertaining to the initial grade. The fairness of the decision regarding an official's suitability was ensured by the intervention of the Civil Service Commission.[8]

C. Promotion

An official might be considered for promotion if he had served three years in a grade within the division in which he was placed. Promotion to posts in Divisions A and B was made by the Council of Ministers on the recommendation of the Civil Service Commission. Promotion to posts in Divisions C and D was made by the Director General of Establishment and Personnel Divisions on the recommendation of a Ministerial Promotion Board consisting of three officials of the Ministry or Unit concerned.[9]

D. Termination

The appointment of an official might be terminated for any of the following reasons: acceptance of an official's resignation;[10] where an official who, after medical examination by a Government Medical Board, was found to be medically unfit to continue in service;[11] abolition of post;[12] reaching the retirement age. The retirement age was sixty years in the case of male officials and fifty-five years in the case of female

8. *Id.* art. 14(4).

9. *Id.* arts 43, 44, 45. For definition of the term, Unit, *see infra* note 22.

10. *Id.* art. 59.

11. *Id.* art. 60.

12. *Id.* art. 61.

officials. In exceptional circumstances, an official might be permitted to retire at the age of fifty years; [13] where the Council of Ministers, on the recommendation of the competent Minister, considered that an official should be required to retire in the public interest; [14] as a result of disciplinary action imposed by the Disciplinary Board; [15] as a result of conviction, which had become final on a criminal charge for abuse of official position for unlawful gain, peculation, theft, fraud, cheating, misappropriation, or any offence which would debar an official from holding public office, notwithstanding any amnesty that might have been granted.[16]

E. Disciplinary Measures

Article 534, of the Civil Service Law prescribed the following disciplinary measures: censure in writing; fine not exceeding the amount of seven days' pay; stoppage of pay for a period not exceeding thirty days, which period should not be counted towards pension; suspension from duty with loss of pay for a period not exceeding three months, which period should not be counted towards pension; retardation of promotion or increment; reduction of pay not exceeding one third and for a period not exceeding six months; demotion; dismissal.[17]

The first three penalties referred to in the preceding paragraph might be imposed, depending on the seriousness of the offences, for: gross negligence or unsatisfactory service; willful disobedience; failure to comply with Articles 28 and 29 of the Civil Service

13. *Id.* art. 62.
14. *Id.* art. 63.
15. *Id.* art. 64(1)(a).
16. *Id.* art. 64(1)(b).
17. *Id.* art. 53(1).

Law dealing respectively with the duties of civil servants and with the prohibitions applicable to them; conduct causing interruption or disturbance of the work of the office; absence from duty without justification; tolerating abuses committed by subordinate officials.[18]

The remaining penalties referred to might be imposed, depending upon the seriousness of the offence, for: gross abuse of authority; violation of official duties causing serious damage to the State, to public agencies, or local administrations, or to private persons; wrongful use or misappropriation of funds administered by, or entrusted to, an official; demanding or accepting any gratification in return for acts performed or to be performed in the course of official duty; acts of gross insubordination; violation of official secrets; abuse of official position for personal gain.[19]

Where there were aggravating circumstances or in case of repetition of offences, or where there were extenuating circumstancs, the penalties to be imposed might vary from a greater or to a lesser extent than those provided for the particular offence.[20]

(1) DISCIPLINARY BOARDS

Without prejudice to any civil or criminal proceedings to which he might have rendered himself liable, an official who ceased to fulfill or violated any of the provisions of the Civil Service Law or Regulations was dealt with: by a ministerial disciplinary board; or by a central disciplinary board; or summarily.[21]

18. *Id.* art. 53(2).
19. *Id.* art. 53(3).
20. *Id.* art. 53(4).
21. *Id.* art. 54.

(a) Ministerial Disciplinary Board

As and when required, a ministerial disciplinary board might be established and convened by the Director General or other official in executive control of a Unit,[22] the Head of a Somali Diplomatic Mission abroad, or by the Regional Governor for the trial of officials subordinate to them for offences under Article 53 of the Civil Service Law.[23]

The board consisted of three members, including the chairman, who was the Director General or other official in executive control of a Unit, the Head of a Somali Diplomatic Mission abroad, or the Regional Governor, as the case might be, or an official holding a position in Division A, Grade 5, or above, delegated by any of them. The other two members were to be officials in a grade not lower than that of the offending official, and in no case below Division C, Grade 1.

The board had the power to try offences committed by officials other than those in Division A, Grade 1 to 5 who were triable by a central disciplinary board and to impose the penalties set out in paragraph (1) of Article 53, provided that a sentence imposing certain penalties as set out in sub-paragraph (b), (g), and (h) [24] did not take effect unless they were confirmed by the Head of the Unit.[25]

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22. The term "Unit" was defined in Article 1 of the Civil Service Law. It meant a Ministry, Department, or any other section of the public service which was so designated by the Director General of Establishment and Personnel Divisions.

23. *See supra* notes 16 and 17.

24. *See supra* note 16.

25. The term "Head of the Unit" was defined in Article 1 of the Civil Service Law to mean: (a) the Prime Minister in the case of the Presidency of the Council of Ministers; (b) the Minister in the case of the Ministry concerned; and (c) in other cases, the official in executive control of the Unit concerned.

(b) Central Disciplinary Board

The Prime Minister might, by decree, establish and convene a central disciplinary board for the trial of officials in Division A, Grade 1 to 5, for offences under Article 53 of the Civil Service Law.

The board consisted of five members, including the Chairman, who were designated by the Prime Minister. One of the members was a person with knowledge of and experience in the administration of law. The other four members were representatives of Ministries other than the Ministry of the offending official. None of the members were to be of a lower grade than offending official.

The board had the power to impose penalties set out in paragraph (1) of Article 53 [26] of the Civil Service Law. The decisions of the board were subject to the confirmation by the Council of Ministers.[27]

(c) Summary Power

The Head of Unit with respect to officials of his Unit, the Head of a Somali Diplomatic Mission abroad with respect to all officials of the Mission, and the Regional Governor with respect to officials whose duty stations were within his Region, had the power to deal in a summary manner with offences under Article 53 of the Civil Service Law and might impose the following penalties: censure in writing; fine not exceeding the amount of seven days' pay.

The Head of Unit, the Head of a Somali Diplomatic Mission abroad, and the Regional Governor might, subject to such limitations as they thought fit, delegated in writing their power of imposing summary punishment to any official under them in Division A, Grade 5 or above, provided: that officials holding posts

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26. *See supra* note 16.

27. Civil Service Law, art. 52.

in Division A, Grade 6 to 8, Division B, Grade 1 and 2, and Division C, Grade 1, should not be dealt with summarily by any person other than the Head of Unit, the Head of a Somali Diplomatic Mission abroad, or Regional Governor, as the case might be; and that officials holding posts in Division A, Grade 5 or above, could not be dealt with summarily.[28]

F. Administrative and Judicial Guarantees

The members of the Civil Service had adequate administrative and judicial guarantees.

Any official who was aggrieved by any decision relating to his terms and conditions of service, which was considered by him to be inconsistent with the provisions of the Civil Service Law or Regulations, might appeal to the Civil Service Commission directly or through his Head of Unit within thirty days after the decision.[29]

The members of the Civil Service also had the right to file petitions before the Supreme Court against final decisions of the Government that were contrary to law with respect to their terms and conditions of service.[30]

G. Civil Service Commission

The Civil Service Commission was one of the organs contemplated in the Constitution.[31] Its composition and powers were laid down by Law No. 9 of February 15, 1961, and they were subsequently modified by the Civil Service Law of 1969.[32]

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28. *Id.* art. 54.
29. *Id.* art. 12.
30. CONSTITUTION, art. 5(2); Law on the Organization of the Judiciary, art. 5(3)(b). *See infra* Pt. IV, Ch. 14.
31. CONSTITUTION, art. 89.
32. *See supra* note 4.

The Commission consisted of a chairman and four members appointed for a term of four years by decree of the President of the Republic, on the proposal of the Prime Minister, having heard the Council of Ministers.[33]

It was an advisory body whose duties were: to make recommendations to the Council of Ministers on matters relating to the appointment and promotion of officials in Divisions A and B; to advise the Council of Ministers on any matter concerning the civil service on which their advice was sought;[34] and to hear appeals filed by officials aggrieved by any decision relating to their terms and conditions of service, which was considered by them to be inconsistent with the Civil Service Law or Regulations.[35]

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33. *Id.* art. 5.
34. *Id.* art. 11.
35. *See supra* note 29.

CHAPTER 8

LOCAL GOVERNMENT

A. In General

The Constitution provided that "whenever possible, administrative functions shall be decentralized and performed by the local organs of the State and by public bodies." [1] One of the laws enacted to implement the above provision was the Local Administration and Local Council Elections Law.[2]

At the time of independence, there were, as noted earlier, two systems of local government. The main differences between the two systems were: first, the Law on Municipal Administration of the Trust Territory of Somalia provided for urban local government only, while the Local Government Councils Ordinance of the Somaliland Protectorate provided for rural local government also. Secondly, the Law on Municipal Administration itself laid down in detail the rules governing the composition, powers, and responsibilities of the different grades of local government authorities, while the Local Government Councils Ordinance provided that these matters should be laid down in detail in the warrant appointing the authority. Thirdly, the Law on Municipal Administration placed executive re-

1. CONSTITUTION, art. 86.
2. Law No. 19 of Aug. 14, 1963, as amended by Law No. 15 of July 13, 1965.

sponsibility in the hands of the Mayor and *Giunta*,[3] while the Local Government Councils Ordinance laid emphasis on the responsibility of the Council acting through its executive officer with provision for delegation of certain of its powers to committees.

The new law on the Local Administration and Local Council Elections unified local governments in both parts of the Republic.

The main principles incorporated in the law are explained under subsequent sections of this Chapter.

B. Classification of Local Administrations

The whole territory of the Republic was divided into units, each of which was under the jurisdiction of a Local Administration, which was an autonomous body with juridical personality.[4] Thus the distinction previously existing in the Southern Regions between rural and urban areas was abolished. The Local Administrations were, however, divided into four classes:

Class A—Local Administration of Mogadiscio;
Class B—Local Administrations whose offices were located in Regional Headquarters;
Class C—Local Administrations whose offices were located in District Headquarters;
Class D—Other Local Administrations.[5]

C. Functions of Local Administrations

The law gave Local Councils very important responsibilities, the exercise of which would lead to effective local self-government. On the other hand, in view of the existing discrepancies in the size and importance of different local administrations, a distinc-

3. A Committee of the Council.
4. Local Administration and Local Council Elections Law, arts. 1(1) & (2). There are at present 64 Local Administrations.
5. *Id.* art. 3.

tion was made in the law between mandatory and optional functions. While all Local Councils were required to execute the mandatory functions, the optional functions were to be carried out only if a Local Council felt it was in a position to do so, subject to approval by the Supervisory Authority.

(1) MANDATORY FUNCTIONS

The following were mandatory functions:

(a) Cooperation with the competent authorities of the Central Government in the maintenance of law and order and the promotion of good government;

(b) Safeguarding and promoting public health and hygiene;

(c) Control of pests;

(d) Establishment, regulation, and control of markets and, subject to the provisions of any other law, control of the sale of goods and livestock outside such markets;

(e) Regulation of the construction, alteration, and demolition of buildings;

(f) Abatement of nuisances;

(g) Prevention or relief of famine.[6]

(2) OPTIONAL FUNCTIONS

The optional functions included:

(a) Establishment and operation of Koranic and primary schools;

(b) Provision, maintenance, and operation of water supplies and of public utility services such as electricity and transport;

(c) Maintenance and repairs of streets, squares, and public places and the provision of street lighting;

(d) Prevention, extinguishment, and control of fires;

6. *Id.* art. 8.

(e) Development and improvement of agriculture, land conservation, animal husbandry, forestry, and fisheries;

(f) Registration of the population and maintenance of registers of births and deaths;

(g) Maintenance of registers of voters;

(h) Town planning and provision and administration of public housing in urban areas and social welfare services, etc.[7]

As mentioned earlier, the Local Administrations might perform one or more of the optional functions, subject to the approval of the Supervisory Authority.

D. Financial Autonomy

The law sought to provide financial autonomy to Local Administrations. To this end, Local Administrations were empowered to levy and collect a variety of rates, taxes, and fees, the proceeds of which would enable them to provide the services for which they were responsible.[8]

E. Local Government Services

The functioning of a Local Administration is predicated upon the efficiency of the staff. For this reason the law provided that the Executive Secretary and, where such post was established, the Deputy Executive Secretary and the Heads of Service were to be officials of the Civil Service and were to be appointed from amongst the officials of the Ministry of Interior, and established a special category of "Local Government Services" as part of the Civil Service. The law also strengthened the power of the Executive Secretary and made him responsible for the proper execution of policies of the Council.

7. *Id.* art. 9.
8. *Id.* art. 30.

F. Organs of Local Administrations

The Local Administrations functioned through the following organs:

(1) The Local Council, which was elected on the basis of the list system of proportional representation for a period of five years by universal adult franchise.[9] It had the power to formulate policies, provide the necessary services and make adequate financial provision designed to ensure the efficient fulfilment of its duties and functions.[10]

(2) The Chairman, who was elected by the Council from among its members for a period of five years.[11] He represented the Local Administration, convened and presided over meetings of the Council and directed the activities of the Local Administration.[12]

(3) Finance and Staff Committees. Each Council appointed a Finance Committee to deal with the finances of the Local Administration, and a Staff Committee to deal with matters relating to the staff of the Local Administration.[13]

G. Supervisory Authority

The Minister of Interior was the Supervisory Authority of Local Councils. He might, however, by decree appoint as Supervisory Authority of any Council the Regional Governor or District Commissioner territorially competent.[14]

Where a Council could not perform its functions, or persistently made default in performing the duties

9. Political and Local Council Elections Law, Law No. 13 of June 6, 1968, art. 2.
10. *Supra* note 4, art. 7.
11. *Supra* note 9.
12. *Supra* note 4, art. 12.
13. *Id.* art. 14.
14. *Id.* art. 6.

imposed on it by law, or exceeded or abused its powers, the Minister of Interior, having heard the Council of Ministers, might by decree dissolve the Council and appoint a Special Commissioner.[15] Where a Council was dissolved, a new Council was to be elected not later than six months from the date of the dissolution. Any Councillor might, in accordance with law, file a petition before the Supreme Court challenging the legality of the dissolution.[16]

15. *See* Ahmed Mudde Hussen v. The Minister of Interior, *infra* Pt. IV, Ch. 14.
16. *Supra* note 4, art. 44.

CHAPTER 9

PUBLIC BODIES

A. In General
B. Classification of Public Bodies
C. Organs of Public Bodies
D. Control over Public Bodies
E. Appointment of Special Administrator and Liquidator

A. In General

The Constitution contemplated that decentralization was to be effected not only through the local organs of the State but also through public bodies.[1]

Modern executive business is not confined to the execution of laws, but extends to the economic, social, and cultural development of the country as a whole. Since the functions relating to developmental activities entail specialized knowledge and management skills, the State found it expedient to pursue these aims through bodies set up by law.

B. Classification of Public Bodies

The public bodies functioning in the Republic prior to the Revolution might be classified into three categories:

1. Public bodies established to promote the economic development of the country. This category included the financial and banking institutions such as the Somali National Bank and the Somali Development Bank; agricultural, industrial, and commercial bodies, such as the National Pool of Motor Vehicles and Tractors (O.N.A.T.), the National Agency for Foreign Trade (E.N.C.E.), the Port Authority of Somalia, the Agricultural Development Agency, the Livestock Development Agency, the Somali Tourist Agency (E.T.A.S.), the National Housing Agency, and the Mogadiscio Water Agency.

2. Public bodies established for social purposes, such as the Social Security Fund for Somalia (C.A.S.S.), and the National Aid and Welfare Agency (E.N.A.B.).

3. Public bodies established for cultural purposes. This category included chiefly the National University of Somalia, the National Theatre Agency, and the National News Agency (S.O.N.N.A.).[2]

1. CONSTITUTION, art. 86.

C. Organs of Public Bodies

The public bodies were autonomous and had juridical personality. They had the following organs: the Board of Directors, which was the policy-making body; the President, who represented the public body; the Managing Director, who was the executive head of the public body; the Board of Auditors; the control organ consisting of some Ministers and resided over by the competent minister.

The Law on the Organization of the Government prescribed that appointment and termination of service of Presidents and Managers of public bodies were to be made by the President of the Republic, on the proposal of the competent minister, and approved by the Council of Ministers.[3] Article 2 of the Law on the Control over the Management of Public Bodies,[4] laid down that the salary, including any allowances or other emoluments due to the managers of public bodies, were to be governed by special provisions issued by presidential decrees.

2. *See* 1-10 AFR. L. J. 14-15 (1966).

3. Law on the Organization of Government, as amended, art. 7.

4. Decree-law No. 5 of Aug. 16, 1966, converted into law by Law No. 19 of Dec. 10, 1966.

D. Control over Public Bodies

The Law on the Control over the Management of Public Bodies also established the manner of control over such bodies by the Magistrate of Accounts and provided for appointing special enquiry committees.[5]

Under the above law, it was the duty of the Magistrate of Accounts to provide for the inspection and control over the management of public bodies. The results of any such inspection or control were to be reported by the Magistrate of Accounts to the competent minister for necessary action.

Apart from the public bodies referred to above, the Magistrate of Accounts, in his capacity as control organ of the State, also participated in the control over the management of other agencies:

1. where the whole capital of the agency or a part thereof was directly or indirectly paid by the State or by another national or foreign public body, provided that, in case of partial payment, the amount paid was over Sh.So. 50,000;

2. where in cases other than those provided for in (1.) above, the State or another national or foreign public body had granted subsidies or contributions in cash or in kind, or had lent money to the agency in amounts exceeding Sh.So. 50,000. In these cases, the control was exercised within the financial year in which the subsidies or contributions were paid.

The results of the control so exercised was sent by the Magistrate of Accounts to the competent minister or ministers, the Prime Minister, and the Minister of Finance. The results of the control were also included in the annual report of the Magistrate of Accounts.

Furthermore, the Prime Minister might, with the

5. *Id.* arts. 4 & 5.

concurrence of the competent minister or ministers, appoint a special enquiry committee for the purpose of enquiring into the management of one or more public bodies. The results of the enquiries were to be presented together with a written report and any documents relating thereto to the Prime Minister, the minister or ministers concerned, and the Magistrate of Accounts for necessary action.[6]

E. Appointment of Special Administrator and Liquidator

The Law on the Control over the Management of Public Bodies also provided that, where it was considered absolutely necessary, the management of a public body might, by presidential decree, be temporarily entrusted to a special administrator or a public body might be liquidated and an official liquidator might be appointed. Where a public body was liquidated, the residual capital was to accrue to the State or another public body.[7]

6. *Id.* art. 1.
7. *Id.* arts. 7 & 8.

CHAPTER 10

AUXILIARY BODIES

A. Magistrate of Accounts
B. National Economic and Labour Council

The Constitution contemplated two auxiliary bodies: the Magistrate of Accounts and the National Economic and Labour Council.

A. Magistrate of Accounts

Under most constitutions there is an Auditor General. Likewise, the Somali Constitution contemplated a Magistrate of Accounts whose main functions were similar to those of an Auditor General.[1]

One of the functions attributed to the Magistrate of Accounts was the exercise of prior control over the legality of Government acts involving financial obligations.

All acts of the Government and of other organs of the Public Administration involving financial obligations of any kind required the prior registration by the Magistrate of Accounts.[2] However, acts having legislative force or of a political nature and acts done in the exercise of the constitutional prerogative of the Head of the State were exempt from such registration.[3]

For purposes of registration, the original and copies of documents relating to every act subject to registration had to be transmitted to the Magistrate of Accounts. Where the Magistrate of Accounts was satisfied of the legality of the act, he would register

1. CONSTITUTION, art. 90.
2. Financial and Accounting Procedure of the State, Legislative Decree No. 2 of Dec. 24, 1961, art. 32.
3. *Id.* art. 33.

it and return the original without delay; otherwise he might withhold or refuse registration and transmit his observations in writing to the originating office.[4]

Where registration was withheld, denied or omitted, the Council of Ministers might, stating the reasons therefor, request registration with reserve, in which case the Magistrate of Accounts had to register it. However, in cases of registration with reserve, the Magistrate was required to transmit to the President of the National Assembly copies of the relevant documents together with his observations. The law imposed two restrictions with respect to registration with reserve: where a commitment or a payment voucher exceeded the amount provided in the subhead in the budget or was chargeable to a different subhead; and where the appointment, recruitment, or promotion of an officer in the civil service was not within the limits of the approved establishment.[5]

A controversy relating to the denial of registration with reserve was within the exclusive jurisdiction of the Supreme Court.[6]

The second function attributed to the Magistrate of Accounts was the audit of the annual accounts submitted to him by the Ministry of Finance.[7] The Magistrate of Accounts was to send a report on his audit to the Minister of Finance, who would forward the annual accounts and the report to the National Assembly for approval.[8]

The Magistrate of Accounts along with the Accountant General had control over the accounts.[9] The Accountant General, having verified the accounts,

4. *Id.* art. 35.
5. *Id.* art. 36.
6. *Id.*
7. *Id.* art. 26.
8. *Id.* art. 27.
9. *Id.* art. 28.

transmitted them to the Magistrate of Accounts together with his written observations. The Magistrate of Accounts audited the accounts. Where he was satisfied that the accounts were proper, he approved them; otherwise after raising such queries as might be necessary, he might, according to law, institute proceedings before the Supreme Court to determine the accounting responsibility of the official concerned. Where the Magistrate of Accounts had failed to give or had delayed approval, the official concerned might also file a petition before the Supreme Court to obtain approval.[10]

The Magistrate of Accounts also, as mentioned earlier, participated in the control over the financial management of agencies to which the State made a regular contribution, and of agencies to which the State made a substantial contribution as an extraordinary measure.[11] The Constitution prescribed that the Magistrate of Accounts was to report the results of his audit to the National Assembly.[12]

B. National Economic and Labour Council

The second auxiliary body mentioned in the Constitution was the National Economic and Labour Council. The Constitution provided that it was to be composed of experts and representatives of categories of producers of national wealth in proportion to their numerical strength and economic importance and that it was to be an advisory body to the National Assembly and to the Government with respect to matters and functions assigned to it by law.[13] The law contemplated by the Constitution was not enacted.

10. *Id.* art. 40.
11. *Supra* note 1, art. 90(2).
12. *Id.* art. 90(3). *See supra* Pt. IV, Ch. 10.
13. *Id.* art. 91.

CHAPTER 11

SOURCES OF LAW

A. In General

The Republic's sources of law after independence, but prior to the revolution, included the Constitution, legislation, international law and international treaties, case law to a limited extent, English common law and doctrines of equity, and indigenous law.

B. The Constitution

The Constitution was considered the Republic's basic law to which all other legislation should conform.[1]

C. Legislation

(1) FORMS OF LEGISLATION

The National Assembly had broad if not unlimited powers to legislate in the interest of the people.[2]

The forms of law in the Republic, as prescribed by the Constitution, followed the Italian pattern. Thus there were no ordinances, statutes, acts, or orders, but laws, legislative decrees, decree-laws, and regulations.

The authorities competent to issue, and the condi-

1. *See supra* Pt. IV, Ch. 3.
2. The limitations on the power of the National Assembly have been dealt with in Pt. IV, Ch. 2.

tions relating to, each type of legislation have been mentioned earlier while dealing with the National Assembly.[3]

Besides the above types of legislation, mention should also be made of two special types of legislation, *viz.*, ordinances and internal rules.

Ordinances were issued by the Minister of Interior and the Regional Governors during a state of emergency under the Public Order Law.[4] Such ordinances could provisionally provide for:

(a) such restrictions on the freedom of movement, association, propaganda, and strike as might be necessary to prevent disturbance of public order, public calamity, or danger of disorders;

(b) the arrest and the search of persons, or premises of persons, suspected of a crime or activities contrary to public order and security;

(c) the requisition of property or services, and timely compensation where such requisition was necessary, to prevent public calamity, or succour a population in distress, or ensure the essential public services;

(d) the suspension or revocation of authorizations or licenses to keep or carry arms or weapons normally used for offensive purposes;

(e) conferring upon civil and military authorities powers that were different from those ordinarily vested in them.

Internal rules were issued by local administrations and public bodies. Such rules were valid only with respect to the local administration or public body for which they were issued and were subject to the laws and regulations.

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3. *See supra* Pt. IV, Ch. 4.
4. Law No. 21 of Aug. 26, 1963, art. 71.

(2) PUBLICATION OF LEGISLATION

Legislation in its various forms was, as mentioned earlier, published in the Official Bulletin.

D. International Law and International Treaties

The Constitution provided that the generally accepted rules of international law and international treaties duly concluded by the Republic and published in the manner prescribed for legislative acts were to have the force of law.[5] It gave the President the power to ratify international treaties.[6] However, the ratification of political, military, and commercial treaties and treaties that involved a modification of the law or financial commitments not included in the budget required the prior authorization by law by the National Assembly.[7]

The question whether or not the principle of implied ratification could be applied with respect to an international treaty was considered by the Supreme Court in *Mohamed Abdi Mohamoud v. DLCO (Hargeisa)*.[8] In the above case, the appellant, who was an employee of the Desert Locust Control Organization (DLCO), claimed enhanced housing allowance from DLCO and the respondent raised the plea of immunity from legal process on the basis of the DLCO Convention to which the Somali Republic was a party. The Regional Court rejected the plea and gave judgment in favour of the appellant.

On appeal, the Court of Appeal noted that, even though the Somali Republic was a party to the DLCO

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5. CONSTITUTION, art. 6.
6. *Id.* art. 75(e).
7. *Id.* art. 67.
8. Supreme Court Civil Appeal No. 117 of 1967. *See* Judgment of the Full Bench dated April 18, 1968, delivered by Mohamoud Sheik Ahmen, Vice President.

Convention, the Convention was not ratified in accordance with the provisions of the Constitution. However, the Court observed that the National Assembly had approved in the Annual Budget a contribution due to DLCO from the Republic and that the provision of the said contribution in the Budget Law could be considered as implied ratification of the Convention. It held that DLCO had the status of the Specialized Agencies of the United Nations and, as such, was immune from legal process.

A full bench of the Supreme Court however, observed that the Court of Appeal had erred in holding that ratification of the DLCO Convention was effected by the National Assembly when it approved in the Annual Budget the contribution due under the Convention from the Somali Republic to DLCO. It said that the authority competent to effect ratification was not the National Assembly, which could only authorize it by law, but the President of the Republic, and that there was no evidence to show that the President of the Republic had ratified the Convention. The Court dismissed the plea of implied ratification and held that, since the DLCO Convention was not duly ratified, DLCO was not entitled to immunity from legal process.

E. Case Law

Case law had limited application in the Republic prior to the revolution. As noted earlier, the Supreme Court constituted as the Constitutional Court had the power to declare a law or provision having the force of law unconstitutional if the said law or provision conflicted with the provisions of the Constitution, and such decisions of the Constitutional Court were binding on all other courts.[9]

9. Law on the Organization of the Judiciary approved by Legislative Decree No. 3 of June 12, 1962, Annex 1, art. 4.

So far as the decisions of the Supreme Court were concerned, they were not binding on the Court, but they had only a persuasive effect. No prohibition existed against reference to judicial precedents during the course of litigation. Advocates supported their arguments by reference to relevant case law, not as having binding effect, but as evidence that the point at issue had been considered by the same court. The Supreme Court could always overrule its own prior decisions. But it is equally certain that it would not do so without weighty reason. The reason that might cause the Supreme Court to overrule one of its decisions might arise from a conflict of views within the Court or from its re-evaluation of the policy bases of previously uniform decisions.

The attitude of the lower courts towards decisions of the Supreme Court was different in the Northern and Southern Regions of the Republic. The Northern Regions, which formerly constituted the British Somaliland Protectorate, continued to follow, even after independence, the English common law doctrine concerning the authority of judicial precedents. In the Southern Regions, the lower courts followed the Italian system and did not consider that the decisions of the Supreme Court were binding on them. However, they usually followed the precedents established by the Supreme Court, even though such precedents could not be cited as the basis for the decision.

F. English Common Law and Doctrines of Equity

It will be recalled that Article 42 of the Constitution annexed to the Somaliland Order-in-Council, 1960, directed the courts to apply English common law and doctrines of equity in deciding matters not governed by legislation. As new legislation enacted since independence did not cover all fields of law, English

common law and doctrine of equity were applied in a few cases in the Northern Regions.

G. Indigenous Law

Indigenous law, consisting of Shariat law and customary law, was as important a source of law after independence as it was during the colonial era.

(1) SHARIAT LAW [10]

As noted earlier, at the time of independence considerable difference existed in the scope of application of Shariat law in the Northern and Southern Regions of the Republic.[11]

Article 30, paragraph (2) of the Constitution provided that "the personal status of Muslims is governed by the general principles of Islamic Shariat." There is, therefore, no dispute that Shariat law was to apply to Muslims with respect to personal matters. However, in view of the differences in the then-existing laws of the Northern and Southern Regions, the question that the framers of the Law on the Organization of the Judiciary had to decide was to what extent Shariat law should apply with respect to other matters.

Two conflicting views were expressed regarding the matter. On the one hand, the conservatives were of the opinion that, since the Republic was an Islamic State, there should be no limitation at all regarding the application of Shariat law. On the other hand, the

10. P. CONTINI, *supra* Pt. II, Ch. 3, note 1, at 35-37. P. Contini, *Integration of Legal Systems in the Somali Republic*, 16-4 INTERNATIONAL AND COMPARATIVE L. Q. 1098-99 (1967); E. Cotron, *Legal Problems Arising out of the Formation of the Somali Republic*, 12 INTERNATIONAL AND COMPARATIVE L. G. 1021 (1963).

11. With respect to the application of Shariat law in Italian Somalia, *see* Pt. II, Ch. 5, *supra;* and in the British Somaliland Protectorate, *see* Pt. III, Ch. 4, *supra*.

radicals thought that Shariat law should apply only with respect to personal status and everyone should have the choice of law in other matters. A number of proposals were made, based on the two opposing views mentioned above.

However, after considerable discussion, a compromise solution was adopted which found expression in Article 9 of the Law on the Organization of the Judiciary [12] which provided as follows:

> *Article 9: Applicable Law.* Subject to the provisions of the Constitution and this Law, the Courts shall apply: a) the Shariat law or customary law in civil controversies where the cause of action has arisen under the said law; b) statutory law in other matters.

The effect of this provision in the Northern Regions was to extend the application of Shariat law beyond the personal matters, with respect to which it was applied before. So far as the Southern Regions are concerned, this provision afforded the parties a freedom of choice to enter into transactions under Shariat law or civil law. Thus, under this provision, the courts had to apply Shariat law in all civil matters if the dispute had arisen under that law.

(2) CUSTOMARY LAW [13]

Article 9 of the Law on the Organization of the Judiciary, besides governing the application of Shariat law, also provided for courts to apply customary law in civil matters where the cause of action had arisen under the said law.

Even though the scope of the application of customary law appeared to be similar to that which pre-

12. Legislative Decree No. 3 of June 12, 1962.

13. P. CONTINI, *supra* Pt. II, Ch. 3, note 1, at 66-77. Haji N. A. Noor Muhammad, *supra* Pt. II, Ch. 4, note 13, at 109-118.

vailed during the colonial era, Article 98, paragraph (1) of the Constitution provided that:

> Laws and provisions having the force of law shall conform to the Constitution and to the general principles of Islam.

The above provision cast a duty on the courts to examine the rules of customary law in the light of the provisions of the Constitution and the general principles of Islam.

Thus the courts had to scrutinize the rules of customary law on the basis of the following tests:

(a) whether the rules of customary law were in conformity with the general principles of Islam;

(b) whether they were in conformity with the provisions of the Constitution.

Those rules of customary law that did not survive this scrutiny were discarded while the others emerged strengthened.

We will now refer to some leading decisions of the Supreme Court wherein the Court applied the above tests in the scrutiny of the rules of customary law.

In *Hassan Hussein and Isman Farah v. Sulub Aw Abdi* [14] the Supreme Court had to examine the question whether the principle of customary law involved was in conformity with the general principles of Islam.

In the above case, a girl by the name of Amina was engaged against her will by her brother to the first appellant, and she eloped with the respondent and married him. The man to whom the girl had been engaged claimed *haal, i.e.*, compensation against the respondent. The claim was based on a rule of customary

14. Supreme Court Civil Appeal No. 5 of 1962; judgment dated Jan. 30, 1963, by Haji N. A. Noor Muhammad, Vice President; 1964 J. OF AFR. L. 141.

law providing that in those circumstances *haal* was payable, regardless of whether the girl had given her consent to the engagement.

The Supreme Court rejected the claim on the following grounds:

> In view of the cardinal principle of Islamic Law that the legal status of grown-up females is as complete as that of a male, courts are not prepared to concede the right of even the father to give his adult virgin daughter in marriage without the latter's consent. . . . Even Minhaj Et Talibin states that an agnatic brother can give his adult virgin sister in marriage, provided she does not oppose the choice. There cannot be therefore valid proposal where she is opposed to the choice. The appellant's claim to *haal* arises only if there was a valid betrothal, and if Amina married the respondent during the subsistence of a valid betrothal. The claim of the appellant for *haal* cannot therefore be maintained.

As regards the application by the Supreme Court of the second test, *viz.*, whether the rules of customary law were in conformity with the provisions of the Constitution, mention may be made of two cases. First, in *Hussein Hersi and Ahmed Adan v. Yusuf Deria Ali* [15] the Supreme Court had to examine the customary right to claim *dia* in light of the provision of the Constitution which stated that:

> Penal liability shall be personal. Any collective punishment shall be forbidden.

In that case, *dia* was claimed with respect to the death of a girl in a traffic accident. One of the contentions raised by the appellants was that the payment

15. Supreme Court Civil Appeal No. 2 of 1964; judgment dated May 16, 1964, by Haji N. A. Noor Muhammad, Vice President. *See* text of the judgment in 9-3 J. OF AFR. L. 170 (1965).

of *dia* was contrary to Article 43, paragraph (1), of the Constitution quoted above.

The questions that the Supreme Court had to consider were: whether the collective responsibility for the payment of *dia* was penal; and whether the collective responsibility of the *dia*-paying group for the payment of *dia* fell within the prohibition of collective punishment contained in Article 43, paragraph (1), of the Constitution.

As regards the first question, the Supreme Court observed that, even though *dia* was a penal punishment under Shariat law, under Somali customary law it was considered only as a civil liability.

As regards the second question, whether the payment of *dia* fell within the prohibition of collective punishment, the Supreme Court held that the constitutional prohibition applied only to the collective punishment imposed on villages and communities in whose area certain crimes were committed. As the collective responsibility for the payment of *dia* was not a collective punishment, such a responsibility was not abolished by the Constitution.

In the above case, the appellants also urged that the collective responsibility of the *dia*-paying group regarding the payment of *dia* was against the public policy of the State "of transforming the Somali society from the present largely tribal structure into a detribalized, closely knit national State."

The Supreme Court referred to the proceedings of the Constituent Assembly, which indicated that a specific proposal for the abolition of the civil responsibility for *dia* was moved in the Constituent Assembly but was defeated. The Court also drew attention to the Public Order Law which was adopted on August 26, 1963, providing for sequestration of properties of "groups of persons" from whom compensation was due with respect to offences against the life of persons.

The Court therefore concluded:

> Thus the Constituent Assembly which adopted the Constitution and the National Assembly both appear to approve the collective responsibility of the tribe regarding the payment of *dia*. In the face of such approval and in view of the long-standing nature of this custom, the Supreme Court cannot hold that the collective responsibility is against the public policy of the State. If it is satisfied that the collective responsibility of the tribe in respect of the payment of *dia* is against the public policy of State, it is for the National Assembly to pass a law putting an end to this responsibility.

Regarding the question whether *dia* was applicable to motor-car accidents, the Supreme Court held that "under Somali customary law, there was no distinction between deliberate and accidental homicide and *dia* was applicable in both types of homicide. The Court went on to say:

> When it is generally accepted that, under Somali customary law, a person must pay the *dia* of the person he kills, it does not matter whether the homicide is caused by the person directly or through the vehicle that he drives negligently. The principle of *dia* is that the offender has caused the death of another and thereby caused a loss to the latter's tribe, and it is his duty under Somali customary law to compensate the latter's tribe for the said loss. To deny compensation in motor-car accident cases would be contrary to the fundamental principle enunciated above.

As regards the contention of the appellants that *dia* should not be applicable to traffic accidents occurring in towns, the Supreme Court ruled:

> If we accept the principle of collective responsibility of the tribe for the payment of *dia* or other compensation, there is no reason why a distinction should be made whether the act was committed within a town or in the bush or whether

the act was committed by a person living in an urbanized area or a rural area.

The second case relating to the subject is *Akil Gulaid Jama v. Abdullahi Ali*.[16] In this case, the Supreme Court was called upon to decide whether a member of the *dia*-paying group had the right to opt out of the group. The Court also discussed the effect of the emergence of a modern state on a tribal organization.

In this case, a taxi driven by one Dahir Ahmed Nagan ran over Yusuf Boni, who died immediately as a result of the injuries sustained in the accident. The nephew of the deceased, Abdullahi Ali, filed a civil suit for compensation against the driver of the vehicle as well as his *dia*-paying group represented by Akil Gulaid Jama. One of the contentions of Akil Gulaid Jama was that driver Dahir Ahmed had left the *dia*-paying group before the incident and therefore the *dia*-paying group was not liable to pay *dia* in this case. The Regional Court, Hargeisa, and the Court of Appeal, Hargeisa, held that according to Somali-customary law no one can leave his *dia*-paying group.

The Supreme Court observed that tribal ties, which in the Somali *herr*, were created chiefly for purposes of collective defence, should, in view of their historical origin, be interpreted in accordance with a historical criterion, *i.e.*, in relation to the evolution of customs and law in the Somali society.

Even according to customs in the past, these relationships were acquired by birth and were maintained by consent: in other words they were formed *jure sanguinis*, but could be severed by decision of the whole group (expulsion of a member from the tribe), or of part of the group ("recession" and joining of

16. Supreme Court Civil Appeal No. 24 of 1964 (Full Bench). Judgment by Aldo Peronaci, President.

another group) or by an individual (leaving the tribe). The fact that this last event had, in the past, occurred ony very rarely did not at all affect the consensual nature of the maintenance of tribal ties.

The Court further observed that the consensual nature of tribal ties had been emphasized by the Somali Constitution. The Constitution in fact clearly showed its intention to depart from tribal customs without expressly abolishing them and to confer on the State alone not only sovereignty but also the protection of the rights of the citizens and of the rights of man in general which had formerly been conferred on the tribe. It followed that the tribe, whatever interpretation was given of its past nature and structure, had lost its original character of an "organic entity" *(ente originario)*. It retained a certain degree of sovereignty as it had at its origin, but survived only within the limits established by the Constitution, *i.e.*, as a free association which, although created and kept in existence by the *herr*, was based only on the free will of those who wished to remain its members and who were therefore free to renounce their membership in it.

As is the case in all free associations, tribal ties were, therefore, based on the "voluntary element" (which the Romans called *affectio societatis*), *i.e.*, the will of the individuals to maintain membership of the tribe. This will—if one made a comparison with the other free associations, created by their founders and not kept in existence, like this one, by *herr*—presented only one characteristic feature, namely that owing to the historical origin of the institution. The will was not necessarily expressed by an explicit act of adhesion, but was presumed to exist *jure sanguinis* in all those who were born in the group, by the simple fact of their existing inside the group. However, this assumption always gave way before an act of free "recession" expressed explicitly or *per facia concluden-*

tia, i.e., with acts that excluded on the part of a person the will to maintain membership in the group.

It followed, in the first place, that the explicit declaration of the intention to terminate the relationship of association (in whatever manner it was made, since no specific procedure was required) brought it to an end at once, *ipso jure*. It also followed that, while the fact of being absent from the group did not *per se* terminate the relationship, such relationship would be brought to an end *ipso facto* if the absence were accompanied by the will to terminate it.

A contrary view would, in fact, be in conflict with Article 26, paragraph (2) of the Constitution which laid down that the constant intention to maintain membership *(affectio societatis)* was necessary. The Court, therefore, concluded that a man could leave his tribe at any time. It also held that, from the correct formulation of this principle given above, it was evident that the relationship continued to produce its binding effects with respect to events that occurred before the recession; but once it was terminated, it no longer produced any effect with respect to events occurring after the recession.

H. Sources for Research

(1) LEGISLATION

Soon after independence an Official Bulletin was instituted for the publication of laws and decrees of the State. Law No. 15 of May 23, 1961, provided that the Official Bulletin would be under the Department of Administrative Affairs of the Ministry of Grace and Justice, which would have the custody of the original laws and decrees. However, under the Law on the Organization of the Government,[17] the publication of

17. Law No. 14 of June 3, 1962.

the Official Bulletin and the Repertory and the Archives of Laws and Decrees were transferred to the Presidency of the Council of Ministers. They were under the direct control of the General State Attorney.

Laws, legislative decrees, decree-laws, and regulations appear in the Official Bulletin under their number, date, and subject (*e.g.*, Law No. 14 of 11 March, 1969—Civil Service Law; D.P.R. No. 184 of 28 March, 1964—Civil Service Regulations). There is no index in the individual issues or in the bound volumes for each year. However, the Office of the Official Bulletin occasionally issues an annual index in Italian. This index, though a useful reference document, serves only a limited objective since it is organized chronologically and not analytically. The Somali Institute of Public Administration issued in November 1967 an analytical index of Somali Legislation for the period 1960-1966, both in English and Italian, which is indeed very useful. Because of the lack of an up-to-date comprehensive index, one has to wade through the volumes of the Official Bulletin in order to find out whether a law has been amended or modified, either expressly or by implication.

A collection of all the original laws and decrees is available in the Official Bulletin Office. This collection is not open to the public. However, all the volumes of the Official Bulletin are found in the libraries of the following institutions in Mogadiscio: the National University of Somalia, the United Nations Development Programme, the Somali Institute of Public Administration and the Police Academy, which are open to the public.

(2) CASE LAW

There is at present no organized law reporting in the Republic. However, two volumes of the Judgments of the Supreme Court, covering the Regions of Har-

geisa and Burao, were published in mimeographed form. The first volume covered the period 1960-1963, and the second 1964-1965. Some of the judgments of the Supreme Court were published in the *African Law Journal*, London. The judgments of the Supreme Court dealing with Commercial Law delivered in 1966 and 1967 have been included in the *African Law Reports—Commercial Series*, 1966 Vol. I (1968) and 1967 Vol. I (1969), respectively, published by Oceana Publications Inc., Dobbs Ferry, N.Y. U.S.A. It is understood that future issues of the *African Law Reports* will continue to cover the judgments of the Supreme Court of the Republic. Frank Cass and Company, London, is publishing an annual survey of African law for the years 1967 and 1968, edited by Neville Rubin and E. Cotran, School of Oriental and African Studies, University of London, wherein the author has contributed a chapter on the Somali Republic dealing mainly with the decisions of the Supreme Court during the period.

CHAPTER 12

JUDICIAL SYSTEM

A. In General

Under the Constitution, the judicial power in the Republic was vested in the Judiciary,[1] with the Supreme Court as the highest judicial organ.[2] The Judiciary was independent of the executive and legislative powers.[3] The Constitution also provided that the organization of the Supreme Court and the other judicial organs should be established by law.[4] The Constitution established the unity of the Judiciary, and to achieve that end it prescribed that no extraordinary or special courts should be established. However, there might be established, as part of the ordinary courts, specialized sections with the participation, where necessary, of citizens who were experts from outside the Judiciary. It was also provided that in time of war military tribunals were to be established by law; and in time of peace they should have jurisdiction only with respect to military offences committed by members of the Armed Forces.[5]

As referred to earlier, the Republic had inherited two systems of courts. In the Southern Regions of the Republic the organization of courts was based on the Italian system; and in the Northern Regions on

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1. CONSTITUTION, art. 92.
2. *Id.* art. 94.
3. *Id.* art. 93.
4. *Id.* art. 94(2).
5. *Id.* art. 95(1), (2), (3).

the Anglo-Saxon system. The Act of Union (Law No. 5 of January 31, 1961) provided for the continuation of the then-existing systems, until unification was effected. The National Assembly, by Law No. 5 of January 30, 1962, delegated to the Government the power to prepare, among others, a law on the organization of the judiciary on the binding advice of a special commission presided over by the Minister of Grace and Justice and consisting of eleven members of the National Assembly, the members of the Consultative Commission for Integration, and other experts. The new law on the organization of the judiciary was approved by Legislative Decree No. 3 of June 12, 1962, and the new organization came into effect in the Northern Regions on September 1, 1962, and in the Southern Regions on October 1, 1963.

In addition to integrating the courts existing in the Southern and Northern Regions of the Republic and establishing a new system, the main question that had to be tackled was whether or not to have two systems of courts—Shariatic courts, and civil and criminal courts.

There were advantages and disadvantages in having separate Shariatic courts. One advantage might have been that, if the Shariatic courts were separate, there would be some judges with specialized knowledge in that branch and the provision of such a system would be acceptable to the conservative group among the Muslims.

On the other hand, it usually happens that Kadis have specialized knowledge only in Shariat law and they do not generally know any other language except Arabic. This could conceivably have hampered the growth of the Shariat law. Shariat law is not static, but dynamic. It may be recalled that the sources of Shariat law are: the Koran; *Hadies*, that is, the precepts of the Prophet; *Ijma*, that is, consensus of learned men; and *Kiyas*, that is, analogy. In a developing society, conditions may arise for interpreting Shariat law that may not be specific on a particular matter, and the judge is called upon to draw on analogy or give an opinion *(fatwa)*. The judge who is well versed in Shariatic and civil law will be in a better position to rely on the latter two sources of Shariat law than a Kadi, who knows only Shariat law and Arabic. In view of this great advantage, it was decided to have only one system of courts.[6]

B. The Court System

The following courts were established under the new system: the Supreme Court; the Courts of Appeal; the Regional Courts; and the District Courts.

The functions and powers of the above courts are indicated in brief below.

(1) SUPREME COURT

The Supreme Court had its seat in Mogadiscio. It consisted of the President, the Vice-President, and four other Judges. The most important duty of the Supreme Court was to ensure respect for the law and also to ensure the uniform application of the law.[7]

As the highest judicial organ, it had jurisdiction over the whole territory of the Republic in civil, criminal, administrative, and accounting matters. Under Article 59 of the Constitution, it had jurisdiction over petitions challenging the qualifications of deputies elected to the National Assembly. Article 94 of the

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6. *See* HAJI N. A. NOOR MUHAMMAD, *supra* Pt. IV, Ch. 2, note 10, at Ch. XVII; P. CONTINI, *supra* Pt. II, Ch. 3, note 1, at 38-40; Haji N. A. Norr Muhammad, *supra* Pt. IV, Ch. 2, note 14.

7. Law on the Organization of the Judiciary, art. 5.

Constitution further provided for the Supreme Court to exercise jurisdiction in any other matter specified by the Constitution and by law.

Article 66 of the Criminal Procedure Code [8] vested the Supreme Court with the power to issue a writ of *Habeas Corpus* ordering any person held in arbitrary detention or in cases other than those provided by law to be set at liberty forthwith.

Cases before the Supreme Court were to be heard by a Division Bench of three judges. Such bench had jurisdiction over: appeals against judgments given by any Court in its appellate jurisdiction or against judgments given by any Court from which appeals lay directly to the Supreme Court; petitions against the final decisions of the Public Administration; petitions relating to the rendering of accounts by officials handling public funds; petitions for revision of judgments in criminal cases.

A Full Bench of the Supreme Court, consisting of five Judges, had jurisdiction over: controversies relating to conflict of jurisdiction or competence among judicial organs; any other matter considered by the President to be of particular importance, even though such matter were within the jurisdiction of the Division Bench.[9] A Full Bench had also jurisdiction over petitions challenging the qualifications of deputies to the National Assembly, in accordance with Article 59 of the Constitution.

Appeals to the Supreme Court in civil and criminal matters lay only on the following questions of law: lack of jurisdiction or incompetence of the lower court; violation or erroneous application of legal provisions; nullity of the judgments or the proceedings; omission,

8. Criminal Procedure Code approved by Legislative Decree No. 1 of June 1, 1963.

9. *Supra* note 7.

insufficiency, or contradiction in the grounds on which the judgment was based, relating to a material point raised by either party or by the Court on its own motion.

In case the Supreme Court annulled a judgment appealed against, the Court might remand the case for retrial to the judicial organ which issued the measures or, where no additional evidence was required, it might decide the case finally.[10]

In administrative matters, petitions to the Supreme Court lay against final administrative decisions on questions of law, and, where expressly provided by law, on questions of fact also.[11] In view of the importance of judicial review of administrative action this is dealt with in detail later.[12]

Petitions to the Supreme Court in accounting matters were to be filed by the Magistrate of Accounts in cases where the accounts submitted by any official or agent of the Public Administration who handled funds or property of the State or who was entrusted with the collection or payment on behalf of the State were not proper. Where the Magistrate of Accounts had failed to give or delayed approval of the accounts submitted, the officer or agent concerned could also file a petition before the Supreme Court to obtain approval.[13] The Magistrate of Accounts acted as prosecutor in proceedings before the Supreme Court in accounting matters.[14]

As regards the qualifications of deputies, petitions could be filed before the Supreme Court by any citizen who was a voter, challenging the qualification of

10. *Id.* art. 10(2).

11. *Id.* art. 10(4).

12. *See infra* Pt. IV, Ch. 14.

13. Financial and Accounting Procedure of the State, art. 40.

14. *Supra* note 7, art. 10(5).

any deputy elected, within thirty days of the proclamation of the electoral results, or of the occurrence of the cause of incompatibility or ineligibility. In *Scek Ali Mohamed Hassan v. Nur Mohamed Hussen*,[15] the petitioner challenged that the deputy concerned could not read and write and that he did not therefore fulfill Article 3, paragraph (1), of the Political Elections Law (Law No. 4 of January 22, 1964). The Supreme Court, after verifying that the deputy could read and write, rejected the petition.

(2) COURTS OF APPEAL

The Court of Appeal had its seat in each Regional Headquarters and had jurisdiction over the whole territory of the Region.[16]

The Court of Appeal had two Sections: [17] the General Appellate Section and the Assize Appellate Section. Cases in the General Appellate Section were heard by a single judge. This Section heard appeals against judgments of the District Court and the General Section of the Regional Court. The Assize Appellate Section consisted of the President of the Court of Appeal, a judge of the Court, and three assessors.[18] It

15. See Judgment of the Full Bench of the Supreme Court dated June 25, 1964.

16. There are at present two full Courts of Appeal: one at Mogadiscio and the other at Hargeisa. In all the other Regional Headquarters Civil General Appellate Sections of the Court of Appeal have been established.

17. Under the Law on the Organization of the Judiciary, there was a Military Penal Appellate Section in Courts of Appeal of Mogadiscio and Hargeisa, consisting of the President of the Court and four Military Assessors. This section was competent to hear appeals from the Military Penal Sections of the Regional Courts of Mogadiscio and Hargeisa, respectively. The Law on the Organization of Military Courts (Legislative Decree No. 2 of March 31, 1964) abolished the aforesaid Military Penal Appellate Sections.

18. Assessors of the Assize Section of the Regional Court and of the Assize Appellate Section of the Court of Appeal are drawn from lists prepared and reviewed every year by decree of the Minister of Justice and Religious Affairs. The list of assessors, subdivided by regions, consists of citizens of full age, resident in the Republic, of good conduct, and holding at least an intermediate school diploma. Not less than three days before the beginning of the proceedings the President of the Court must draw by lot in open court the assessors who participate in the proceeding. In addition to the assessors, the substitute assessors must also be chosen. In the Regional Court and the Court of Appeal the assessors participate in the decision on questions of fact. The judges decide on questions of law and impose the punishment. *See supra* note 7, arts. 12 & 26.

heard appeals against judgments of the Assize Section of the Regional Court.

The Law on the Organization of the Judiciary provided for the establishment by law of Tax Appellate Sections in the Court of Appeal having appellate jurisdiction in tax matters.[19]

The power was also vested in the Court of Appeal to issue the writ of *Habeas Corpus* within the limits of its own territorial jurisdiction, ordering that any person held in arbitrary detention or in cases other than those provided by law were to be set at liberty.[20]

(3) REGIONAL COURTS

The Regional Court had its seat in each Regional Headquarters and had jurisdiction over the whole territory of the Region.

The Regional Court had two sections: [21] the General Section and the Assize Section. Cases in the General Section were heard by a single judge. The General Section had jurisdiction in civil matters over controversies that were not within the jurisdiction of the District Court, and in criminal matters with respect to crimes not within the jurisdiction of the District

19. *Supra* note 7, art. 4(6).

20. Criminal Procedure Code, art. 66.

21. *Supra* note 7, art. 3.

Court and the Assize Section. The Assize Section consisted of the President of the Regional Court and of two assessors.[22] It had jurisdiction with respect to crimes which were punishable with death, imprisonment for life, or imprisonment for not less than ten years.

The General Section and the Assize Section could hold sessions outside their normal seat, within the territorial limits of the Court, at such places as might be necessary for the convenient and speedy administration of justice.

There were also to be established, by law, Tax Sections in the Regional Courts, having jurisdiction in the first instance over matters relating to taxation.

(4) DISTRICT COURTS

The District Court had its seat in each District Headquarters and had jurisdiction over the whole territory of the District.

The District Court had two sections: the Civil Section and the Criminal Section. In each section, cases were heard by a single judge. The Civil Section had jurisdiction over all controversies where the cause of action had arisen under Shariat law or customary law, and any other civil controversy where the value of the subject matter did not exceed Sh.So. 3,000, provided that, on the application of the judge or of either party, the President of the Court of Appeal could order the transfer of the case to the General Section of the Regional Court. The Criminal Section had jurisdiction with respect to offences punishable under the Penal Code with imprisonment for a period not exceeding three years, or fine not exceeding Sh.So. 3,000, or both.

Separate Civil Sections of the District Court were to be constituted outside its normal seat within the

22. *Supra* note 18.

territorial limits of the districts by decree of the Minister of Justice and Religious Affairs, having heard the Higher Judicial Council.

C. Other Judicial Organs

The Constitution provided that the constitutionality of laws and provisions having the force of law were to be decided by the Supreme Court constituted as the Constitutional Court [23] and that the President of the Republic and the members of the Government were to be tried before the Supreme Court constituted as the High Court of Justice.[24] The composition, functions, and powers of these Courts are dealt with later.

The Constitution and the Law on the Organization of the Judiciary contemplated two other judicial organs: the Office of the Attorney General and the Higher Judicial Council.

(1) OFFICE OF THE ATTORNEY GENERAL

The Office of the Attorney General had its seat in Mogadiscio and consisted of the Attorney General *(Procuratore Generale)* and four Deputies.

It was the duty of the Office of the Attorney General to ensure respect for the law and to protect the rights of the State, public organs, and incapacitated persons. To this end, the Attorney General was to:

> (i) either directly or through his Deputies or through Police Officers or Inspectors authorized by Law, investigate, institute, and conduct criminal proceedings;
> (ii) whenever he considers that public interest is involved, shall institute and conduct or intervene in civil proceedings;
> (iii) shall, as provided by law, prefer appeals in civil and criminal matters. The investigation and suppression of crimes are carried out by the Po-

23. *Supra* note 1, arts. 98, 99, & 100.
24. *Id.*, arts. 101 & 102.

lice under the direction of the Office of the Attorney General. The Office of the Attorney General also exercises overall supervision over prisons and other penal institutions, as provided in the Prisons Law.[25]

(2) HIGHER JUDICIAL COUNCIL

In order to ensure the independence of the Judiciary, the Higher Judicial Council was contemplated in the Constitution.[26] The Higher Judicial Council had its seat in Mogadiscio and consisted of the President of the Supreme Court, who was the Chairman, the Attorney General, the members of the Supreme Court, and three members who were to be deputies or practicing attorneys, elected by the National Assembly for a period of three years. The most senior Registrar of the Supreme Court was the Secretary of the Council.[27]

It was the duty of the Higher Judicial Council to ensure the independence of the judiciary and to exercise supervision, through the President of the Supreme Court, over the functioning of the Courts, as well as over the members of the judiciary and auxiliary personnel. The Council also:

(a) exercised supervision over competitive examinations and grading with respect to members of the Judiciary, with the assistance, if necessary, of University Professors of law;

(b) advised the Minister of Justice and Religious Affairs regarding administrative measures concerning members of the Judiciary, the recommendations of the Council being binding with respect to appointments, transfers, promotions, and termination of appointments;[28]

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25. *Supra* note 7, art. 8.
26. *Supra* note 1, art. 96(5).
27. *Supra* note 7, art. 27.
28. *Id.* art. 28(2). Under Article 5 of Law No. 14 of Aug. 15, 1966, with respect to the appointment of the President and Vice President of the Supreme Court, the attorney, the judges of the Supreme Court and the Presidents of the Courts of Appeal, the opinion of the Higher Judicial Council was not binding.

(c) conducted disciplinary proceedings against members of the Judiciary and auxiliary personnel on its own initiative or at the request of the Minister of Justice and Religious Affairs, and made binding recommendations regarding the penalties to be imposed; and

(d) exercised any other function attributed to it by law.

The Council also had the power to make recommendations to the Minister of Justice and Religious Affairs on any matter concerning the organization and administration of justice and could, at the request of the Minister, give opinions on laws and regulations pertaining to the administration of justice. The Council had the power to request from the Public Administration such information as might be deemed necessary in the performance of its functions.[29]

D. Independence of the Judiciary

The Constitution and the Law on the Organization of the Judiciary provided considerable safeguards guaranteeing the independence of the judiciary.

First, Article 96 of the Constitution laid down that, in the exercise of their judicial functions, the members of the judiciary should be subject only to law.

Secondly, the law guaranteed permanency of tenure to the members of the judiciary. The retirement age of the judges of the Supreme Court, the Presidents of the Courts of Appeal, and the Attorney General was 65 years, and the retirement age of the other judges was 60 years.[30]

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29. *Supra* note 7, art. 23.
30. *Id.* art. 23.

Thirdly, the members of the judiciary could not be deprived of their judicial functions except as a disciplinary measure.[31]

Fourthly, they could not be transferred or assigned to other functions except as a disciplinary measure or for urgent exigencies of the service.[32]

Fifthly, they could not be arrested or be subject to any restriction on their personal liberty without prior authorization of the Minister of Justice and Religious Affairs in conformity with the advice of the Higher Judicial Council, except in *flagrante delicto* for which arrest was mandatory, or in execution of a criminal judgment.[33]

Sixthly, no civil action lay against any member of the judiciary for acts performed in the exercise of their functions, unless the civil liability arose from the commission of a crime.[34]

Seventhly, no administrative measure concerning the members of the judiciary, especially regarding their appointment, transfer, promotion, and termination of service, could be issued by the Government without the favourable recommendation of the Higher Judicial Council.

The aforesaid provisions, no doubt, constituted adequate safeguards for ensuring the independence of the judiciary.

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31. *Id.* art. 24(1).
32. *Id.* art. 24(2).
33. *Id.* art. 24(3).
34. *Id.* art. 24(5).

CHAPTER 13

JUDICIAL REVIEW OF LEGISLATIVE ACTION

A. In General

The Constitution of the Somali Republic contemplated judicial review of legislative action [1] as well as judicial review of administrative action.

Article 98, paragraph (1), of the Constitution provided: "Laws and provisions having the force of law shall conform to the Constitution and to the general principles of Islam;" and Article 99, paragraph (1), provided that "a question of constitutionality shall be decided by the Supreme Court constituted as the Constitutional Court."

B. Exercise of Judicial Review

In countries such as the United States and India, the power of judicial review of legislative action is vested in the Supreme Court. However, the Constitution of the Somali Republic, following the Constitution of Italy,[2] vested this power in the Supreme Court constituted as the Constitutional Court.

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1. *See* HAJI N. A. NOOR MUHAMMAD, *supra* Pt. IV, Ch. 2, note 10, at Ch. 13; Haji N. A. Noor Muhammad, *supra* Pt. IV, Ch. 12, notes 6, at 283-286.

2. In Italy, the Constitutional Court consists of fifteen judges who serve for twelve years. One-third are appointed by the President of the Republic, one-third by Parliament in ordinary session of the two chambers, and one-third by the

According to the Constitution, the Constitutional Court consisted of the members of the Supreme Court with two additional members appointed for three years by the President of the Republic on the proposal of the Council of Ministers and two additional members elected for the same period by an absolute majority of the National Assembly.[3] The additional members were to be chosen from among persons who were eligible for election as deputies and who in addition possessed a diploma from the University Institute of Mogadiscio or its equivalent. As a transitional measure, they might be chosen from among persons who were learned in the law, but did not possess the aforesaid diploma. Additional members could not, during their membership, exercise any legislative or administrative function and could not practise before courts. For the purposes of the exercise of their functions, the additional members were to have the same status and were entitled to the same conditions of service as Senior Judges.[4]

C. Petition for Judicial Review

The question of the constitutionality of a law or a provision having the force of law could be raised at any time in any judicial proceeding in a court of first instance, or in a first Appellate Court by the Office of the Attorney General, or by any party in the proceeding by means of a petition stating the grounds, addressed to the judge by whom the principal case was being heard. The question could also be raised by the judge on his own motion.

Supreme Magistracy, ordinary and administrative. The Court elects the President from among its members. See ITALIAN CONSTITUTION, art. 135.

3. CONSTITUTION, art. 99.

4. Annex I to Law on the Organization of the Judiciary, art. 3.

D. Procedure

The judge before whom a petition for judicial review was filed might reject the petition and proceed with the original case if he considered the petition to be manifestly unfounded or to have no bearing on the principal case. On the other hand, where he considered the petition not manifestly unfounded, or had some bearing on the principal case, or where he raised the question of constitutionality on his own motion, he could refer the case to the Supreme Court constituted as the Constitutional Court and suspend judgment in the principal case, pending the decision of that court. The order of the judge referring the case to the Constitutional Court was to specify the laws or provisions having the force of law which he considered to be unconstitutional and the provisions of the Constitution which he considered to be offended by such law.[5] Where a petition was presented while the case was pending before the Supreme Court, the Supreme Court, where it found the petition not manifestly unfounded, was to suspend judgment and refer the question to the Constitutional Court.[6] A copy of the order of the judge or court referring the case to the Constitutional Court was to be transmitted to the President of the Republic, the President of the National Assembly, and the Prime Minister.[7]

In proceedings before the Constitutional Court, the provisions governing the procedure in appeals to the Supreme Court in administrative matters applied insofar as they were applicable. The State Attorney, representing the Government, and the Attorney General in pursuance of his duty to ensure that the provisions of the Constitution were safeguarded were enti-

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5. CONSTITUTION, art. 98(2) & (3); *Id.* art. 4.

6. *Supra* note 3, art. 98(4).

7. *Supra* note 4, art. 4(3).

tled to be heard in the case, together with the parties to the case.[8]

If the Constitutional Court found that the law or provision having the force of law impugned was constitutional, it declared accordingly by a final judgment. On the other hand, if the Court found that the law or provision having the force of law was in whole or in part unconstitutional, it could by a final judgment declare the said law or provision unconstitutional. Where, as a consequence of such judgment, any other law or provision having the force of law was found unconstitutional, such law or provision was also declared unconstitutional by the Court.[9]

Certified copies of the judgments of the Constitutional Court were sent by the President of the Court to the President of the Republic, the President of the National Assembly, and the Prime Minister. The judgment was deposited with the Registrar of the Court for the perusal of the parties concerned. Judgments declaring a law unconstitutional were published in the Official Bulletin of the Republic by the competent administrative authorities within ten days from the date of the communication of the judgment to the Prime Minister.[10]

Laws and provisions having the force of law declared unconstitutional ceased to be in force on the day of the publication of the judgment declaring their unconstitutionality.[11] The decisions of the Constitutional Court were binding on all other courts.[12]

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8. *Id.* art. 5.
9. *Id.* arts. 6(1) & (2).
10. *Id.* art. 6(3).
11. *Id.* art. 6(4).
12. *Id.* art. 4(2)(b).

E. Competency of the Supreme Court to Exercise Judicial Review

The Constitutional Court was never formally constituted. However, the constitutionality of certain provisions of law were raised before the Supreme Court in three cases: *Somali National Congress v. the State,*[13] *Ahmed Mudde Hussen and others v. the Minister of Interior* [14] *and Ahmed Said Mohamed et al v. the Prime Minister.*[15]

In *Somali National Congress v. the State,* the constitutionality of four provisions of the Local Administration and Local Council Elections Law (Law No. 19 of August 14, 1963) were challenged before the Supreme Court. The appellant contended that: (a) the provision stating that no vote could be taken when only one list was presented in an electoral district (Article 7(3) of the Annex to the Law); (b) the provisions requiring that each list of candidates must be signed by a certain number of voters (Article 10(1) of the Annex); (c) the powers attributed to the Chairman of the Local Council concerning the presentation of the lists when he himself was a candidate in another list and therefore an interested party (Article 10 of the Annex); and (d) the obligation to make a security deposit (Article 11(1) of the Annex) were contrary to the principle relating to the right to vote embodied in Article 8 of the Constitution, which was as follows:

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13. Somali National Congress v. the State; *see* judgment of the Supreme Court delivered on Nov. 5, 1963 by Guiseppe Papale, President.
14. *Supra* Pt. IV, Ch. 8, note 15; *see* judgment of the Supreme Court delivered on March 7, 1964, by Guiseppe Papale, President.
15. Ahmed Said Mohamed v. the Prime Minister; *see* judgment of the Supreme Court delivered on Dec. 16, 1965, by Aldo Peronaci, President.

1. Every citizen who possesses the qualifications required by law shall have the right to vote.
2. The vote shall be personal, equal, free, and secret.

It was the appellant's case that the impugned provisions of the Annex to the Local Administration and Local Council Elections Law rendered the constitutional principle establishing the right to vote nugatory and hence unconstitutional.

Since the Constitutional Court was not established, the question that the Full Bench of the Supreme Court had to consider was whether it could exercise jurisdiction on constitutional matters before the Constitutional Court was constituted. Neither in the Constitution nor in the Law on the Organization of the Judiciary was there any specific provision authorizing a provisional solution of the problem. The Supreme Court, in its judgment of November 5, 1963, while upholding the constitutionality of the impugned provisions, held that, pending the constitution of the Constitutional Court, "the ordinary court can exercise jurisdiction on constitutional matters subject to the condition that its judgment will have only a limited effect, and not a general one as would be the case if the judgments were of the Supreme Court constituted as the Constitutional Court."

In the second case, *Ahmed Mudde Hussen and others v. the Minister of Interior*,[16] a petition was filed to annul the decree issued on January 2, 1964, by the Minister of Interior dissolving the Local Council of Mogadiscio. The State Attorney raised the question of the constitutionality of Article 44, paragraph (3), of the Local Administration and Local Council Elections Law, attributing to the Supreme Court alone, without

16. This case is discussed in detail in *infra* Pt. IV, Ch. 14, B.

any right of appeal, the power to hear petitions challenging the legality of the dissolution of a Local Council. He contended that, while Article 97, paragraph (3), of the Constitution provided for appeals against judicial decisions, under Article 44, paragraph (3), of the Local Administration and Local Council Elections Law, no appeal was provided against the decision of the Supreme Court, and that therefore Article 44, paragraph (3), of the Local Administration and Local Council Elections Law violated Article 97, paragraph (3), of the Constitution. He further requested that the hearing of the petition be suspended pending the formation of the Constitutional Court. The Supreme Court, relying on the proceedings of the Constituent Assembly relating to the matter, stated that the framers of the Constitution did not intend to provide for an appeal in this matter as well as against decisions of the Supreme Court constituted as the Constitutional Court and as the High Court of Justice. The Supreme Court, following its previous decision in *Somali National Congress v. the State*, held that it could decide on the question of the constitutionality raised in this case, and that such decision would have only limited effect.

In *Ahmed Said Mohamed et al. v. the Prime Minister*, the petitioners prayed for the annulment of Presidential Decree No. 36612 of April 26, 1965, issued under Article 35 of the Civil Service Law (Law No. 7 of March 15, 1962), terminating the services of the petitioners on the ground of redundancy. Besides other objections, the State Attorney raised the point that Article 5, paragraph (3) of the Law on the Organization of the Judiciary providing that petitions against the final decision of the Public Administration should be to the Supreme Court with no right of appeal against the decision of the Supreme Court was incompatible with Article 97, paragraph (3), of the

Constitution, which provided that "all judicial decisions and all measures concerning personal liberty . . . shall be subject to appeal in accordance with law." The State Attorney urged that the case be referred to the Supreme Court constituted as the Constitutional Court in order to decide whether or not Article 5, paragraph (3), of the Law on the Organization of the Judiciary was unconstitutional in view of the specific provisions of Article 97, paragraph (3), of the Constitution.

The Full Bench of the Supreme Court reviewed the two previous decisions on the subject, in which the Supreme Court held that in the absence of an actually functioning Constitutional Court the Supreme Court was automatically competent to decide the question involved in a particular case. In the instant case, the Supreme Court observed that it could not accept the ruling in the above cases because, although the Constitutional Court had actually not yet been constituted, that did not mean that the provisions contained in Article 99 of the Constitution and in Article 5 of the Annex to the Law on the Organization of the Judiciary ceased to be valid. According to these provisions, only the new and high organ, *viz.*, the Constitutional Court, had jurisdiction over questions relating to the constitutionality of laws and the above provisions implicitly denied any such jurisdiction to the Supreme Court. The Court further stressed that the intention of the legislature expressed in the Constitution and the law was that the ordinary judicial authorities, as regards questions of constitutionality, were not competent to decide on the merits of such matters, but could only determine whether or not such questions were manifestly unfounded. The Court ruled that the objection raised by the State Attorney regarding the constitutionality of Article 5, paragraph 3(b), of the Law on the Organization of the Judiciary was not manifestly

unfounded, and therefore referred the matter to the Constitutional Court. According to the above ruling, the Supreme Court was not competent to exercise judicial review even with limited effect, as was held in its two previous rulings.

CHAPTER 14

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION [1]

A. In General

The Somali Constitution provided that "administrative acts contrary to law . . . may be invalidated on the initiative of the interested parties in accordance with the provisions of the Constitution." [2] The Somali Constitution thus contemplated judicial review of administrative action.

Judicial review of administrative action in the Republic was much wider in scope than, for instance, in England. In England, acts that are described as ministerial and acts where the administration may act in a summary manner without notice and hearing are not amenable to judicial review. In Somalia, under the constitutional provision mentioned above, no such exception could be made, as all acts of the administration contrary to law were made subject to judicial review. Thus in the Republic there was a universal submission of administrative action to judicial review as is the case under the Italian system.

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1. *See* HAJI N. A. NOOR MUHAMMED, *supra* Pt. IV, Ch. 2, note 10, at Ch. 19; Haji N. A. Noor Muhammed, *Judicial Review of Administrative Action in the Somali Republic*, 1-10 AFR. L. J. 9-20 (1966); R. ANGELONI & M. RUGIU, PRINCIPI DI DIRITTO AMMINISTRATIVO SOMALO (A. Guiffre' Editore, Milano 1965). *See infra* Pt. VI, Ch. 2.

2. CONSTITUTION, art. 5(2).

B. Exercise of Judicial Review

Before independence, in the Trust Territory of Somalia under Italian Administration, judicial review of administrative action was exercised by the Court of Justice, which was the highest judicial organ. Article 11 of the Law on the Organization of the Judiciary, approved by Ordinance No. 5 of February 2, 1956, provided as follows:

> Petitions against final acts of the Public Administration shall lie, in the legitimate interest of persons or public bodies, on grounds of lack of jurisdiction, excess of power, or violation of the law. If the petition is admitted on other grounds, expressly contemplated by the law, the Court shall annul the administrative decision, without prejudice to any further action which the administrative authority may see fit to take. (Unofficial translation.)

In the Constituent Assembly of the Trust Territory of Somalia, one of the questions discussed was whether the power of judicial review of administrative action should be entrusted to the Supreme Court or to a *Consiglio di Stato*, following the Italian system.[3]

The draft constitution prepared by the Technical Committee and the draft constitution submitted by the Minister for Constitutional Affairs conferred this power on the Supreme Court. But the Political Committee of the Constituent Assembly added a new article giving this power to a *Consiglio di Stato*. The new article read as follows:

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3. The *Consiglio di Stato* in Italy is the highest administrative organ. It consists of a President, twelve Presidents of Sections, 67 Counsellors, seven First Referendaries, and six Referendaries. The *Consiglio di Stato* is divided into six sections: three perform the advisory function as to matters of all the government departments; the other three exercise judicial control over administrative acts.

> *Article 89:* The *Consiglio di Stato* is an organ to give advice on juridical and administrative matters and an organ to protect justice in the Administration.

Under the above article, the *Consiglio di Stato* would have had two functions: it was to be an advisory body and an organ having competence in administrative justice. This new provision met with much opposition in the Constituent Assembly.

The Minister for Constitutional Affairs was against the creation of the *Consiglio di Stato*. He said first that from the constitutional point of view the establishment of the *Consiglio di Stato* to have administrative powers (that is, to render advice in matters relating to administration) and jurisdictional powers (that is, having jurisdiction over administrative actions for the protection of legitimate interests) did not conform to the principle of the separation of powers provided in the general principles of the draft constitution; secondly, that the establishment of the *Consiglio di Stato*, which would divide the judicial organs in general and administrative organs in particular, was contrary to the principle of the unity of jurisdiction, as provided in the draft constitution; thirdly, that the proposed *Consiglio di Stato* did not come within the system of ordinary courts, nor was it protected by the guarantee applicable to the ordinary courts such as the irremovability and independence of its members, as assured by the Higher Judicial Council.

On the other hand, the proposed *Consiglio di Stato* would depend upon the central organs of the Public Administration. Thus, the guarantees of impartiality and justice that the *Consiglio di Stato* offered were inferior to those offered by the Supreme Court. The citizens who filed actions against the Public Administration would therefore have greater guarantees of justice if the competence were conferred on the ordinary courts than would be the case if it were conferred on the *Consiglio di Stato*. Fourthly, the Minister pointed out that, from the functional point of view, the *Consiglio di Stato* was superfluous in the judicial organization of Somalia, for the reason that the administrative advisory function was already attributed to the Office of the State Attorney *(Avvocato Erariale)* and administrative justice was being exercised under the then-existing law by the Court of Justice. He added that he did not see the usefulness of a new organ to advise the Government, and that this advisory body could not in a decisive manner affect the decisions of the Government.

Fifthly, the Minister urged that the establishment of the *Consiglio di Stato* might also create conflicts of jurisdiction with the ordinary courts. Sixthly, the Minister was of the opinion that the amount of work to be done in Somalia did not justify such an organ. The Minister summed up by saying that the *Consiglio di Stato* would raise many problems and that the advantages it might bring would be out of proportion to the difficulties it might produce from the constitutional, political, legal, and administrative point of view.[4] The Constituent Assembly was not in favour of the creation of the *Consiglio di Stato*, and conferred the jurisdiction over administrative matters on the Supreme Court. Article 94(1) of the Constitution provided:

> 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 or in any other matter specified by the Constitution and by law. (Italics added)

While the legal system in the Republic maintained

4. V-35 CONSTITUENT ASSEMBLY PROCEEDINGS, 5 (June 14, 1960).

the distinction between ordinary law and administrative law, as is the case in the Italian system, unlike the latter we find a confluence of the ordinary and administrative jurisdictions in the Supreme Court, the highest judicial organ of the State.[5]

C. Who Could File an Administrative Petition

The Constitution in Article 5, paragraph (2), provided, as noted earlier, that "administrative acts . . . may be invalidated on the initiative of the interested parties." In other words, the petitioner in an administrative matter had to be a person who, being damaged by an administrative act, had an interest in annulling such act.

In order to understand the meaning of "interest," it is necessary to bear in mind the distinction between *right (diritto)* and *interest (interesse)*, which is peculiar to the Italian as well as the Somali legal system.

Prof. Zanobini has explained the distinction as follows:

> The *right (diritto seggettivo)* can be defined as "an interest recognized by law as pertaining exclusively to the holder and as such protected in a direct and immediate manner," whereas the *legitimate interest (interesse legittimo)* is defined as an individual interest closely connected with a public interest and protected by law only through the legal protection of the latter.[6]

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5. It should be mentioned, as noted earlier, that in Ahmed Said Mohamed v. the Prime Minister the question was raised whether or not the vesting of the power of judicial review of administrative action in the Supreme Court without the right of appeal under art. 5(3) of the Law on the Organization of the Judiciary is contrary to art. 97(3) of the Constitution providing that "all judicial decisions . . . shall be subject to appeal in accordance with law." The Supreme Court has referred the question to the Constitutional Court. *See supra* Pt. IV, Ch. 13.

6. 1 G. ZANOBINI, CORSO DI DIRITTO AMMINISTRATIVO 151 (9th ed.).

According to the above definition, every right is an interest, but not every interest is a right. In the realm of private law and in matters relating to rights of liberty, a person can be recognized as the exclusive holder of a particular interest, and the law clearly purports to protect that interest by itself, *i.e.*, in a direct and immediate manner. Such interests are called rights.

> In the field of public law, on the other hand, this exclusive character of the interest of the subject seldom occurs (apart from the matters relating to rights of liberty), since private interests appear to be closely connected with those of the public, so they cannot be given the exclusive and direct protection which is characteristic of the *diritto seggettivo*. Law is concerned here mainly with the general interests of the community, and private interests in these cases receive only an indirect protection through the legal protection of the larger interest of which they are only a component part.[7]

In the latter case public authorities, while acting within their powers, cannot be said to have infringed any right of the citizen. They may act in an inexpedient or an unwise manner that does not provide for the public those advantages which the citizen can reasonably expect. In such cases the citizen suffers only a violation of his *legitimate interest*. Generally speaking, all activities within the scope of the discretionary evaluation of the public authorities do not cause a violation of the rights, but merely of the legitimate interests of the citizens.

The Supreme Court of the Somali Republic discussed in detail the concept of *interest* in the administrative petitions filed before it challenging the elec-

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7. S. GALEOTTI, THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND IN ITALY 14-15 (1954).

toral results in some electoral districts during the political elections held on March 30, 1964.[8]

The Court distinguished between the *protected* interest *(interesse protetto)*, *i.e.*, material interest *(interesse materiale)*, and interest to file a petition *(interesse al ricorso)*, *i.e.*, *formal interest (interesse formale)*. The material interest is an interest that is protected indirectly by law, whereas the formal interest arises from the damage caused to a material interest, and the formal interest moves the holder of the material interest to file an action requesting the cessation of such damage.

The material interest may be: purely of economic value, *e.g.*, damage caused to property; or of economic and moral value, *e.g.*, that resulting from a disciplinary action that may affect the career and honour of a civil servant; or purely of a moral value, *e.g.*, such as the loss of an honorary office or title.

One of the essential conditions of material interest is that it must be direct. This condition excludes the possibility of filing a petition for the protection of general or collective interest, except in the cases where petitions of a general character are specifically allowed by law, *i.e.*, where any citizen is given the right to file such a petition (*cf.* Article 59 of the Constitution).[9] Direct interest therefore means *individual* or *personal* interest.

A condition common to both material and formal

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8. *See* judgment of the Supreme Court delivered on July 2, 1964, by Haji N. A. Noor Muhammad, J. The facts of the case will be discussed *infra*.

9. CONSTITUTION, art. 59:

1. The Supreme Court shall have jurisdiction over petitions challenging the qualification of deputies.
2. Petitions stating the grounds thereof may be filed by any citizen who is a voter within thirty days of the proclamation of the electoral results or of the occurrence of the cause of incompatibility or ineligibility.

interest is that the interest must be real. Under this condition a petition can be used neither for the protection of future or eventual interest, nor for the protection against damages to real interests, which have not yet materialized. In other words, the condition that the interest must be real requires not only that the petitioner must be the holder of the interest at the time of filing the petition, but also that the interest should have been already damaged as a result of the administrative act that is complained against.

Thus under the Somali law the persons who could file administrative petitions are those who had a *direct* and *real interest* in annulling the administrative act impugned.

In the election petitions [10] filed during the political elections of 1964, the Supreme Court was called upon to decide whether the petitioners were competent to file the petitions. Among the election petitions, (a) some were filed by the defeated candidates; (b) some by the Local Branch of the S.N.M. Party, Hargeisa, and (c) some by the President of the S.D.U. Party for the electoral district of Odwein. The Supreme Court, applying the tests that in order to file an administrative petition the petitioner must have a direct and real interest in the annulment of the decision impugned, held that in group (a) petitions the petitioners' being defeated candidates had a direct and real interest in filing the petitions. With respect to group (b) and group (c) petitions, the Supreme Court declared that they were inadmissible on the ground that ". . . the Local Branch of a Party and the President of a Party have no direct or real interest in the matter. Nor can it be maintained that they have *ex lege* the right to represent the interested parties in such proceedings. . . ."

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10. *See supra* note 8.

D. Against Whom Such Petitions Could Be Filed

The various central administrative organs, Local Administrations, and public bodies that existed in the State have already been referred to.[11]

Article 5, paragraph 3(b), of the Law on the Organization of the Judiciary, 1962, provides that the Supreme Court shall have jurisdiction over "petitions against final decisions of the Public Administration."

Administrative acts could be broadly divided into two categories: acts that were *not final,* and *final* acts. The first category included acts against which an appeal through the proper channel was allowed to the authority that was hierarchically superior to the authority issuing the act. In the category of administrative acts that were not final, the interested party who was aggrieved by such act could appeal to the hierarchically superior authority and unless the decision of the said authority was notified to him or unless the time limit prescribed by law for the said authority to give a decision expired, the interested party had no right to file an administrative petition before the Supreme Court. Whether the hierarchically superior authority gave a decision or failed to give a decision within the prescribed time limit, such authority was a necessary party to the proceedings.

It is in view of the above principles that Article 68, paragraph 1, of the Rules of Procedure of the Court of Justice,[12] applicable to the Supreme Court, provided that within the time-limit established by law "the petition shall be notified to the administrative authority which passed the administrative measure impugned and to the persons to whom the measure refers, if any."

11. *See supra* Pt. II, Ch. 5; Pt. IV, Ch. 5; Pt. IV, Ch. 8; and Pt. IV, Ch. 9.

12. Rules of Procedure of the Court of Justice, approved by Administrative Decree No. 29 of Feb. 24, 1956.

The authority which issued the final act was made a necessary party in order to enable it to defend its act and the connected administrative interest.

In some of the political election petitions filed before the Supreme Court, which were referred to earlier, the Minister of Interior, who was responsible for conducting the elections, was made a party and the Chairman of the Electoral Central Office, who was empowered to proclaim and publish the final results of the elections [13] and against whose decision the petitions were filed, was not made a party. It was contended by the counterpetitioners that in view of the fact that the Chairman of the Electoral Central Office had made the final decision, he should have been made the counterpetitioner and that, since he was not made a party, the petitions were inadmissible. The question that the Supreme Court had to decide was whether or not the Chairman of the Electoral Central Office was a necessary party, or in other words whether his decisions were final acts.

After reviewing Articles 51 and 53 of the Political Elections Law, the Supreme Court held:

> The above provisions make it clear that no hierarchical appeal to the Minister or to any other administrative authority is provided against the decisions of the Chairman of the Electoral Central Office: the decisions of the Chairman are therefore final. It follows that the Chairman of the Electoral Central Office who made the decisions should have been made a party, and not the Minister of Interior, as was wrongly done by the petitioners in groups a) and b) petitions.[14]

13. Political Elections Law (Law No. 4 of Jan. 22, 1964) art. 51.

14. *See supra* note 7.

The Supreme Court held the above petitions inadmissible on this ground also.

In another case, *Scek Haji Abubacar Abdillahi v. the Presidency of the Council of Ministers*,[15] the petitioner, who was appointed as First Kadi of the former Court of Justice during the Italian Trusteeship Administration, filed an administrative petition against the Presidency of the Council of Ministers for annulling the presidential decree terminating his services, alleging that his name was not included in the establishment, but that he was put *a disposizione* of the Department of Personnel. The State Attorney contended that the petitioner was not put *a disposizione*, but his services were terminated for having reached the retirement age. The State Attorney further raised the point that, since the decree in question was issued by the President of the Republic on the proposal of the Minister of Grace and Justice, having heard the Higher Judicial Council and the Council of Ministers, the administrative action should have been brought against the Minister of Grace and Justice and not the Presidency of the Council of Ministers.

The Supreme Court upheld the legal position taken by the State Attorney. The Court observed that the basic principle is that the petition should be filed against the administrative authority that issued the measure impugned, and that in this case the administrative authority was the Minister of Grace and Justice. Even though measures were issued in the form of a presidential decree, the responsibility for acts of the President of the Republic rested with the Prime Minister or with the competent Ministers who subscribed to them.[16] The above responsibility was confirmed by

15. *See* judgment of the Supreme Court dated April 22, 1965, in Administrative Petition No. 7 of 1965.

16. *Supra* note 9, art. 76(2).

Article 83, paragraph 2, of the Constitution, which laid down that "the Ministers shall direct the affairs within the competence of their respective Ministries and shall be individually responsible therefor." The Court further added that not all employees of the State were under the Presidency of the Council of Ministers because, so far as the members of the Judiciary were concerned, they had an independent status, as guaranteed by the Constitution. The Supreme Court therefore held that the petition was inadmissible.

E. Methods by Which Such Proceedings Could Be Instituted

In the Somali system, following the Italian system, the methods available by way of administrative remedies were: the annulment of an administrative decision; or the annulment plus a decision replacing the one that was annulled.

Administrative petitions lay on questions of law and, where expressly provided by law, on questions of fact also.[17]

Article 11 of the Rules of Procedure of the Supreme Court enacted under the previous Law on the Organization of the Judiciary, 1956, which was quoted earlier, defined the questions of law that might form the grounds for filing administrative petitions. They were: lack of jurisdiction *(incompetenza)*; excess of power *(eccesso di potere)*; violation of the law *(violazione di legge)*. Since no law had been passed governing the rules of procedure of the Supreme Court regarding administrative matters, the above three grounds were considered as constituting questions of law under Article 33, paragraph 4, of the Law on the Organization of the Judiciary, 1962.[18]

17. Law on the Organization of the Judiciary, art. 10(4).

18. *Id.* art.33(4) provides that: "the procedure in force in

The time limit for filing administrative petitions was thirty days from the date of the notification of the decision appealed against; [19] and where no decision had been communicated within sixty days by the Public Administration on a petition submitted through the proper channel or on a formal request for a decision, the appeal was to be filed within thirty days from the expiry of the said period of sixty days.

An administrative petition was to be filed before the Registrar of the Supreme Court and contained a summary statement of the facts and grounds of law on which it was based, as well as the relief sought. Where the said requirements were not complied with, the petition could not be admitted.[20]

Within thirty days from the date of the notification referred to above, the original of the petition, a certified copy of the decision appealed against and documentary evidence, if any, was to be filed with the Registrar of the Supreme Court. The administrative authority concerned and the parties to whom the appeal had been notified might file objections and supporting documents at any time after the filing of the administrative petition and up to twenty days prior to the date of the hearing.[21]

Filing of an administrative petition would not operate as a stay. However, the Supreme Court, at the request of the petitioner or of the other parties concerned, might, after deliberation *in camera*, order a stay of execution in cases where execution would cause irreparable damage.[22]

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the Supreme Court shall continue to apply insofar as it is compatible with the provisions of the Constitution and this law."

19. *Supra* note 17, art. 11(4).
20. *Id.*
21. *Supra* note 10, art. 68.
22. *Id.* art. 69.

After the hearing, if the Court considered that the petition was not admissible, it could give a preliminary decision without examining the merits of the case. Where the petition was allowed for lack of jurisdiction, the Court annulled the decision of the Public Administration and the competent authority was required to conform to the directions given by the Court.[23]

In case the Public Administration failed to comply with the directives of the Supreme Court contained in its judgment within the time limit fixed by the Court, the Supreme Court was empowered to take the necessary action to carry out its judgment.[24]

F. Question of Limitation as Applicable to Such Proceedings

In *Abdullah Aboker v. the Minister of State* [25] the Supreme Court explained the concepts of the law of limitation as applicable to administrative cases.

In the above case, a man belonging to H.T. (Haber Tolgallo) was killed by another belonging to Abdulla Aboker. There was a *Shir* (tribal meeting) and Saad Musa subsections, including Abdulla Aboker, agreed to pay H.T., within thirty days from November 15, 1964, one hundred camels by way of *dia* (blood money). The compensation referred to was not paid within the time limit agreed upon, and a dispute also arose as to whether the compensation should be paid in cash or in kind. It was alleged that there was a likelihood of

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23. *Id.* art. 72.
24. *Supra* note 17.
25. Supreme Court Administrative Petition No. 14 of 1966, Order dated May 18, 1967, by Haji N. A. Noor Muhammad, Ag. President. The ruling in the above case was followed in Elders of Gudabarsi (Haibjirreh) v. the Minister of Interior, Supreme Court Administrative Petition No. 28 of 1967.

the breach of the peace with respect to the payment of *dia* and the Regional Governor of Hargeisa ordered on February 11, 1965, the sequestration of 157 camels belonging to Abdulla Aboker under Article 69 of the Public Order Law.

The petitioners filed a petition before the Regional Court of Hargeisa challenging the legality of the sequestration order by the Regional Governor. The Regional Court upheld the order. The Court of Appeal of Hargeisa also upheld the order on appeal. The Supreme Court, on the other hand, held that the Regional Court had no jurisdiction to enquire into the legality of the sequestration order passed by the public order authorities and therefore annulled the orders of the lower courts.

The Supreme Court observed that as regards time limits, the Somali law, following the Italian Law, made a distinction between *decadenza* (lapsing of power) and *prescrizione estintiva* (extinctive prescription of a right). Where, according to a law, a power could be exercised only within a certain period of time—usually not very long—and where such time limit had elapsed without the power having been exercised, there was *decadenza*. The failure to exercise the power resulted in the lapse of the right to exercise such power. For example, in administrative matters the interested party was given thirty days' time to exercise his power to file an administrative petition and, in case this time limit expired, the party concerned could not exercise this power as the right to exercise it had lapsed. The important thing to note is that *decadenza* was the consequence of the expiry of the time limit irrespective of the cause of the failure of the party concerned to exercise the power during the said period. The intention of the Legislature in this regard appears to have been to extinguish the right to exercise a power which

had not been availed of in cases where prompt action was called for in the public interest.

Prescrizione estintiva also related to time limit, but it was based on the ground that the nonexercise of the right was due to *inerzia* amounting to *indifferenza* (lack of interest) on the part of the holder of the right. However, this concept took into account certain specified circumstances that would exclude such *inerzia* or *indifferenza*. For example, under Italian law *prescrizione estintiva* was suspended for military personnel in time of war and for minors who had no legal representatives. Furthermore, *prescrizione estintiva* might have been interrupted by the holder of a right by means of legal acts which showed his will not to remain indifferent. On the other hand, *decadenza* could neither be suspended nor interrupted. Once the prescribed time limit expired, the right to exercise the power automatically lapsed.

The Court said that the concept of *decadenza* had been imported into the Somali Law by Article 11(4) of the Law on the Organization of the Judiciary, 1962, with respect to administrative matters. Under the above provisions, if an administrative petition were not filed within the prescribed time limit, there was *decadenza* and the right of the interested party to exercise his power of filing an administrative petition would lapse on the expiry of the prescribed time limit.

The Supreme Court observed that in the instant case, the impugned sequestration order was passed by the Regional Governor of Hargeisa on February 11, 1965; the hierarchical appeal to the Minister of Interior was filed on May 21, 1966; and the administrative petition before the Supreme Court was filed on August 16, 1966. Thus, in this case the hierarchical appeal was filed after the lapse of one year, three months and eleven days instead of thirty days; and

the administrative petition before the Supreme Court was filed after the lapse of two months and two days, which is within the period of ninety days allowed by law.

Since the hierarchical appeal to the Minister of Interior was not filed within the prescribed time limit, the Supreme Court declared that the administrative petition was inadmissible.

As regards the first objection of the petitioner that the question of limitation could not be raised *ex-officio* by the Court, the Supreme Court noted that the objection was based on Article 2938 of the Italian Civil Code, an English translation of which reads as follows:

> 2938. The judge may not raise *ex-officio* the prescription which has not been raised by the party.

The Supreme Court observed that the above provision applied to civil law and not to administrative law. It added that in administrative law cases, as soon as a petition was filed, it was the duty of the Court to verify: whether the petition had been filed in time; and whether the formalities as laid down by law had been complied with. Where the above requirements were not fulfilled, the Court had to declare the petition inadmissible. There was, thus, a duty cast on the Supreme Court to verify each and every petition in order to find out whether they were filed in time and whether the other requirements were complied with. The Court, therefore, held that the objection of the petitioners was untenable.

Secondly, as regards the argument of the petitioners that the period of time spent in *bona fide* carrying on judicial proceedings in courts having no jurisdiction regarding the matter should be excluded from the calculation of the time limit for filing the administrative petition, the Court pointed out that under

Article 11(3) of the Law on the Organization of the Judiciary, 1962, even in civil and criminal matters the Supreme Court might grant to a private party an extension of the time limits for filing the appeals only in cases where the Court was satisfied that the party had not been able to comply with the time limits for reasons beyond his control, and not for a *bona fide* mistake. However, in administrative matters, under Article 11(4) of the said law, the Supreme Court was not given the power to grant extension of the time limit even on this ground. The right to exercise the power of filing hierarchical appeals and administrative petitions had to be strictly complied with and no extension of the time limit was to be allowed; and, as mentioned earlier, if the remedies were not availed of within the specified time limit, the right to resort to such remedies would lapse.

Furthermore, the Court pointed out that the petitioners were challenging before the Regional Court and Court of Appeal the sequestration order of the Regional Governor issued under Article 69 of the Public Order Law. Article 9 of the same law specified the authorities competent to hear the hierarchical appeal and to hear the administrative petition and the time limits during which such remedies could be availed of. The petitioners had obviously taken their case before the Regional Court and the Court of Appeal contrary to clearly expressed provisions of law, *viz.*, of Article 9 of the Public Order Law. The Court, therefore, concluded that in the instant case there could be no *bona fide* mistake as claimed by the petitioners. It added that, even if there were such a *bona fide* mistake, it would not apply in administrative cases.

We will at this stage refer to two leading cases relating to administrative law decided by the Supreme Court.

In *Haji Mohamed Hussen and others*,[26] the Chairman of the Electoral Central Office set aside the elections held in the whole district of Merca on the ground that there had been an ascertained alteration of the results of the voting in the Electoral Section Office No. 13. The evidence taken by oath by the Attorney General clearly indicated that the total number of persons who voted in Section No. 13 was 395 (and not 695 as shown in the records of that Electoral Office), that the valid votes were 375 (and not 675), and that the valid votes obtained by the various parties were as follows: S.D.U. 4; S.Y.L. 62 (and not 362, as shown in the records); S.N.C. 294; P.R.S. 1; S.A.N.U. 4; M.D.M.S. 10; and that the 300 additional votes that were not lawfully cast were assigned by the Section Office to the S.Y.L. Party. The Chairman of the Electoral Central Office considered that the above evidence was fully reliable as it was made by persons who had, in view of their specific function, no interest whatsoever in the matter other than the ascertainment of the truth. The above evidence was confirmed by other witnesses.

The above evidence clearly indicated the additional number of votes that were not lawfully cast and the party to which they were assigned as well as the votes that were valid in that section and their distribution among the lists of candidates. The petitioners contended that under the Political Elections Law the Chairman of the Electoral Central Office had no power to set aside the election. In setting aside the decision of the Chairman, the Supreme Court held that, "the Chairman of the Electoral Central Office had no other power under law except to correct the results of the counting by subtracting the 300 invalid votes assigned

26. *See* judgment of the Supreme Court dated July 4, 1964, delivered by Guiseppe Papalo, Acting President.

to the S.Y.L. Party, and to allot the seats to the appropriate Parties," and that, "the Chairman is not vested under law with the power to set aside the election," and that, "the setting aside of the electoral operations in the whole district would, in effect, render invalid 20,031 votes, the validity of which had not been questioned." The Court observed that, "in view of the lack of jurisdiction on the part of the Chairman of the Electoral Central Office to set aside an election, the Supreme Court must annul the decision of the Chairman of the Electoral Central Office." The Court directed the Chairman to correct the number of valid votes assigned to the S.Y.L. list by subtracting 300 votes and to allot, on the basis of the valid votes, one seat to the list of the S.D.U. Party and one seat to the list of the S.N.C. Party. The Court further directed the Chairman to carry out the above measures within two days from the date of the publication of the judgment. The Chairman carried out the directives of the Supreme Court within the prescribed time limit.

Another interesting case in administrative law arose in *Ahmed Mudde Hussen and others v. the Minister of Interior*.[27] The election of the Local Council of Mogadiscio took place on November 26, 1963, and the newly elected Council met for the first time on January 2, 1964, and elected by lot Ahmed Mudde Hussen as its chairman. The same day, the Minister of Interior, in the exercise of the powers vested in him under Article 44, paragraph 1, of the Local Administration and Local Council Elections Law, issued a decree dissolving the Local Council and appointing a Special Commissioner. Later, a fresh election to the Local Council was also ordered. The decree dissolving the Local Council stated that the previous Municipal Council,

27. *See* judgment of the Supreme Court delivered on March 7, 1964; *see also supra* Pt. IV. Ch. 12, note 6 at 286-88.

of which Ahmed Mudde Hussen was the Mayor, was dissolved on August 18, 1962, by the Minister of Interior on the grounds that there were allegations of grave administrative deficiencies and irregularities. Since the new Council had again elected Ahmed Mudde Hussen as the Mayor, there was no guarantee that the Council with Ahmed Musse Hussen as the Mayor would function any better.

Article 44, paragraph 1, of the Local Administration and Local Council Elections Law provided that, where a Council could not perform its functions or persistently made default in performing the duties imposed on it by law, or exceeded or abused its powers, the Minister of Interior might by decree dissolve the Council.

The main question on merit that the Supreme Court had to consider was whether the power vested in the Minister under Article 44, paragraph 1, of the Local Administration and Local Council Elections Law was properly exercised by the Minister. The State Attorney contended that the first condition for dissolution of the Council laid down in the law, *viz.*, inability to perform its functions, was generic and not subject to any specific limitation, as it was based on a broad power of discretion on the part of the Public Administration, and that the Public Administration was not bound to give any reason. The Court said that even though the Public Administration had discretion in the exercise of the power vested in it by Article 44, paragraph 1, such discretion had to be exercised within legal limits. In other words, whether or not to issue such a decree was within the discretion of the Public Administration, but once the Public Administration decided to issue such a decree, the grounds stated for the dissolution had to be legally tenable.

Secondly, the Supreme Court held that the expression "where a Council cannot perform its functions" could not be interpreted in any other way than impossibility to perform its duties imposed by law. This impossibility, the Court said, had to be evaluated *a posteriori*, that is, after taking into account how the Local Council performed its functions and not on the basis of a probability. In the instant case, the Court said that the grounds stated in the impugned decree were based on an *a priori* judgment of how the Council would perform its functions. It would appear that the Public Administration thought that a previous Council with Ahmed Mudde Hussen as its Mayor did not perform its functions properly and that the new Council with the same person as the Mayor would do likewise.

Under the circumstances, the Supreme Court came to the conclusion that the law was not properly applied by the Public Administration. The Supreme Court annulled the impugned decree. Following the judgment of the Supreme Court, the Minister of Interior reinstated the dissolved Local Council. This case indicated not only the effectiveness of the remedy provided against the administrative action, but also the readiness on the part of the Executive to comply with the judgment of the Supreme Court.

CHAPTER 15

THE SUPREME COURT CONSTITUTED AS THE HIGH COURT OF JUSTICE

A. Competent Organ To Try the President of the Republic and the Members of Government for Offences Committed

The Supreme Court constituted as the High Court of Justice had jurisdiction over proceedings against the President of the Republic and the members of the Government. As noted earlier, the President of the Republic was criminally liable for crimes of high treason and attempts against the constitutional order.[1] The Prime Minister and the Ministers were criminally liable for offences committed in the exercise of their functions.[2]

The High Court of Justice consisted of all members of the Supreme Court and six additional members drawn by lot from a special list of twelve citizens elected by the National Assembly at the beginning of its first session from among persons who were not members of the Assembly.[3] The additional members were chosen from among persons who were eligible for election as deputies.[4] They could not, during their membership, exercise any legislative or administrative functions and could not practise before courts. For the

1. *See supra* Pt. IV, Ch. 3.
2. *See supra* Pt. IV, Ch. 5.
3. CONSTITUTION, art. 102.
4. Law on the Organization of the Judiciary, Annex I, art. 9(1).

purpose of the exercising of their judicial functions, they had the same status and were entitled to the same conditions of service as Senior Judges.[5]

B. Who Could Initiate Proceedings

The President of the Republic and the members of the Government could be impeached by a decision of the National Assembly taken on a motion of at least one-fifth of its members and approved by secret ballot by a two-thirds majority.[6]

C. Procedure

The articles of impeachment as approved by the National Assembly were to specify the offences alleged to have been committed by the accused persons and their accomplices; and the High Court of Justice was to take cognizance of these offences, unless it decided to proceed separately against the accomplices. The articles of impeachment were to contain a summary description of the evidence supporting the charge.[7]

The articles of impeachment were to be communicated by the President of the National Assembly to the President of the Supreme Court within two days from the date of the approval.[8]

On the receipt of the articles of impeachment, the President of the Supreme Court was to cause them to be notified to the accused persons immediately and was to fix a time within which the accused might appoint a defence counsel and submit any written defence. Within the same time limit he was to draw by lot, at a preliminary public hearing, the additional mem-

5. *Id.* art. 9(2).
6. *Supra* note 3, art. 76(3).
7. *Supra* note 4, art. 10.
8. *Id.* art. 11(1).

bers of the court and then issue a writ directing the accused to appear before it. If the accused did not appoint a counsel, the Court could, by the writ directing the accused to appear or by a subsequent order, appoint a counsel to act on their behalf.[9]

Proceedings before the High Court of Justice were governed, in so far as applicable, by the provisions governing Assize proceedings.

The functions normally exercised in judicial proceedings by the Office of the Attorney General were, in proceedings before the High Court of Justice, exercised by one or three prosecuting commissioners appointed by the National Assembly from among its members or from outside for the purpose.[10] In the course of the proceedings, the High Court of Justice might, on the application of a party, or on its own motion, impose, revoke, or modify preventive measures against the accused.[11] The High Court of Justice could delegate to one or more of its members the power to carry out any investigation necessary for the purpose of the proceedings.[12]

Where it appeared that there was no, or insufficient, evidence to support the charge, or the acts alleged did not constitute an offence, or the accused was not responsible for the acts found, or there existed circumstances that eliminated the culpability of the acts, the High Court of Justice could acquit the accused. Where the charge was found to be true, the Court could convict the accused and impose the punishment prescribed by law and take any other constitutional or administrative measure, as it might deem appropriate.

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9. *Id.* arts. 11(2) & (3).
10. *Supra* note 3, art. 101(2).
11. *Supra* note 4, art. 12(3).
12. *Id.* art. 13.

A certified copy of all judgments of the High Court of Justice, were to be sent by the President of the Court to the President of the National Assembly. Judgments were also to be deposited with the Registrar of the Court for the perusal of the parties concerned and were to be published by the competent administrative authority in the Official Bulletin of the Republic within ten days from the date of deposit.[13]

The execution of the judgments of the High Court of Justice were to be carried out by the Attorney General.[14]

The High Court of Justice might revise its own judgments of conviction subject to the provisions of the law in force in so far as they were applicable.[15]

Civil action arising from the facts ascertained in the course of the proceedings were to be instituted separately after the conclusion of the criminal proceedings.

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13. *Id.* art. 14.
14. *Id.* art. 15.
15. *Id.* art. 16.

PART FIVE
CONSTITUTIONAL LAW, SOURCES OF LAW, AND THE JUDICIAL SYSTEM AFTER THE REVOLUTION

CHAPTER I

CONSTITUTIONAL LAW

A. Introduction
B. Functions and Powers of the Organs of the State

A. Introduction

After nine years of civilian government, the Armed Forces took over power in the Republic at 03.00 hours on October 21, 1969, in a bloodless revolution.

In a press conference held in Mogadiscio on October 26, 1969, the President of the Supreme Revolutionary Council stated:

> We, jointly as the Armed Forces, here in Somalia, have taken or assumed power after having seen the danger that was threatening our independence and existence. We took power with the aim to normalize, to restore true democracy which was being threatened, to carry on all possible developments which would lead to progress and the prosperity of our people and to hand over power again to a civilian government at an appropriate time and after that we will return to our barracks.[1]

In the First Charter, issued on the date of the revolution, the Supreme Revolutionary Council declared its internal and foreign policy.[2]

The First Charter declared that the internal policy in the State would be:

> 1) To constitute a society based on labour and the principle of social justice, taking into account the particular environment and the conditions of the Somali people;
> 2) To prepare and orient the economic, social, and

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1. MINISTRY OF INFORMATION AND NATIONAL GUIDANCE, SOMALI DEMOCRATIC REPUBLIC, NEW ERA 12 (Feb., 1970).

2. 1 OFFICIAL BULLETIN 2-3 (Oct. 21, 1969). For English text of the First Charter, *see Id.* at 3.

cultural development in order to reach a rapid progress of the country;
3) To eliminate illiteracy and to develop the cultural heritage of the Somali people;
4) To constitute, as a matter of priority, the basic conditions for the development of a script for the Somali language;
5) To liquidate corruption, anarchy, tribalism, and every other form of immoral conduct in State activities;
6) To abolish the political parties; and
7) To conduct, at the appropriate time, free, and impartial elections.

The First Charter further stated that the foreign policy of the State would be:

1) To lend support to international solidarity and national liberation movements;
2) To oppose and fight all forms of colonialism and neocolonialism;
3) To fight for the unity of the Somali nation;
4) To recognize fully the principle of peaceful coexistence for all peoples;
5) To continue and preserve the policy of positive neutrality; and
6) To respect and recognize all legal international commitments undertaken by the Somali Republic.

Under the First Charter of the Revolution and Law No. 1 of the same date,[3] the Supreme Revolutionary Council assumed the legislative, executive, and judiciary functions in the State. It dissolved the National Assembly, deposed the Government, and abolished the Higher Judicial Council. Those provisions of the Constitution that were contrary to, or inconsistent with, the spirit of the revolution were suspended by the First Charter, and the Constitution itself was later repealed by Decree No. 38 of February 24, 1970. The name of the State was also changed to Somali Democratic Republic.

3. *Id.* at 4-5.

The functions and powers of the organs established after the revolution and the modifications of the functions and powers of other organs brought about after the revolution are dealt with below.

B. Functions and Powers of the Organs of the State

(1) IN GENERAL

As noted earlier, under the First Charter of the Revolution, the Supreme Revolutionary Council assumed the legislative, executive, and judicial powers in the Republic. Law No. 1 of October 21, 1969, which amplified the provisions of the First Charter, specifically provided that the functions of the President of the Republic, the National Assembly, the Council of Ministers, individual Ministers, the Higher Judicial Council, the Constitutional Court, and the High Court of Justice would vest in the Supreme Revolutionary Council and that such powers were to be exercised in the manner established by the existing laws until otherwise provided by the Supreme Revolutionary Council.[4] As yet no fundamental law establishing the functions and powers of the various organs of the State has been issued.

The significant changes made after the revolution in the organisational setup of the State were the following:

First, the Supreme Revolutionary Council was established and its functions were defined in broad outline.

Secondly, after the revolution, the Supreme Revolutionary Council appointed a "government of technicians" and handed to it the functions pertaining to Government.

4. Law No. 1 of Oct. 21, 1969, art. 1.

Thirdly, changes were brought about in the civil service, local administrations, and public bodies with a view to giving the Government an effective control over them.

Fourthly, in the judicial field, even though the Supreme Revolutionary Council at first suspended the Supreme Court and declared that the judgments of the Courts of Appeal were final, it restored the functions of the Supreme Court [5] with effect from December 1, 1969.

On the other hand, it abolished the Constitutional Court and the High Court of Justice,[6] and established a special court called the National Security Court. Juvenile Courts and Reformatories [7] were also established to deal effectively with juvenile delinquency. The Supreme Revolutionary Council retained the functions of the Higher Judicial Council.

(2) THE SUPREME REVOLUTIONARY COUNCIL

The Supreme Revolutionary Council consists of 25 Army and Police Officers.

The President of the Supreme Revolutionary Council was elected by the Members of the Council in secret ballot by a two-thirds majority on the first ballot and by an absolute majority on the second ballot.[8] He is the Head of the State, Head of the Government, and Commandant-in-Chief of the Armed Forces.

The Supreme Revolutionary Council exercises legislative and some executive functions. It has taken over the functions of the former National Assembly. Such functions include the approval of the annual budget, annual accounts of the State, and legislation. The

5. Decree No. 1 of Dec. 9, 1969.
6. Decree No. 12 of Oct. 25, 1969.
7. The composition and functions of the National Security Court and Juvenile Courts are dealt with in Pt. V, Ch. 3.
8. FIRST CHARTER OF THE REVOLUTION OF OCT. 21, 1970.

Council also lays down the general policy of the State. Its approval is required for appointing high officials of the State.

(3) THE GOVERNMENT

The Government consists of the President of the Supreme Revolutionary Council, the Vice-President, and the Secretaries of State. The meeting of the aforesaid constitutes the Council of Secretaries, which is presided over by the President of the Supreme Revolutionary Council.

The Secretaries of State are appointed and dismissed by decree of the President of the Supreme Revolutionary Council, subject to the approval of the Supreme Revolutionary Council.

The Council of Secretaries mainly deals with the following matters:

(i) major questions of policy and public order;
(ii) approval of draft laws to be presented to the Supreme Revolutionary Council;
(iii) proposals concerning international treaties and major questions of international policy; and
(iv) approval of the Annual Budget and Annual Accounts of the State for submission to the Supreme Revolutionary Council.

It has also the right to make proposals for the appointment of high officials.

(4) CENTRAL AND TERRITORIAL ORGANIZATION

(a) Central Organization

The Central Administration of the Republic is organized into the Presidency of the Supreme Revolutionary Council and fifteen ministries.

The Presidency of the Supreme Revolutionary Council includes the Secretariat of the Supreme Revolutionary Council and the Secretariat of the Council

of Secretaries and deals with matters formerly dealt with by the Presidency of the Council of Ministers.

The ministries established are the following: Justice, Religious Affairs and Labour; Foreign Affairs; Interior; Defence; Information and National Guidance; Education; Health; Planning; Finance; Public Works; Rural Development and Livestock; Communications and Transport; Industry and Commerce; Agriculture; and Mineral Resources.

The functions of the various ministries and the internal organization remain as they were before the revolution.

(b) Territorial Organization

Along with the territorial organization existing before the revolution, Regional and District Revolutionary Councils were appointed throughout the Republic.[9] These councils consist of Army and Police officers and are competent to decide on problems of the Region or District concerned. The posts of Regional Governors and District Commissioners are held by Army and Police officers. The District Commissioners are called Development and District Affairs Officers.[10]

(5) THE CIVIL SERVICE

With a view to improving the efficiency of the Civil Service, a new Civil Service Law was issued by the Supreme Revolutionary Council. The new law retains the main provisions of the previous law regarding the divisions of the Civil Service into Divisions A, B, C, and D, as well as appointment, promotion, termination, and disciplinary measures. However, the Civil Service Commission established under the previous law was abolished.

A new law governing pensions and gratuities for

9. Law No. 1 of Oct 25, 1969.
10. Law No. 39 of July 24, 1970.

the civil servants was also enacted by the Supreme Revolutionary Council.[11] According to this law, officials in Divisions A and B who have continuously held a permanent office in the civil service for twenty years or more are entitled to pension at the rate of 1/800 of their basic salary for each completed month of service, provided that the pension shall not exceed 50 percent of their basic salary. Officials in Divisions A and B who have not served for twenty years but for ten years or more, and officials in Divisions C and D who have held a permanent post for ten years or more are entitled to a gratuity at the rate of one month's basic salary for every completed year of service. Pensions and gratuities are on a contributory basis. Officials in Divisions A and B contribute to the Pension Fund at the rate of five percent of their monthly basic salary and the Government contributes three percent, while officials in Divisions C and D contribute to the gratuities fund at the rate of two and one-half percent of their monthly basic salary and the Government contributes an equal amount. Provisions have also been made for giving gratuities for service-incurred death, injury, and illness.

(6) LOCAL ADMINISTRATIONS

By Decree No. 4 of October 25, 1969, all the local councils were dissolved and Extraordinary Commissioners were appointed for all Local Administrations. The Extraordinary Commissioners exercise the functions of the Chairman and of the Local Councils.[12]

(7) PUBLIC BODIES

A general law [13] governing public bodies was enacted with a view to streamlining their administration.

11. Law No. 27 of April 1, 1970.
12. Law No. 5 of December 31, 1969.
13. Law No. 16 of April 1, 1970.

Prior to the new law, each public body had a president, a managing director, a board of directors, and a board of auditors. It was considered, first, that the above setup was top-heavy, involving considerable expenditure, not generally commensurate with the benefit derived. Secondly, the above system also involved waste of talents in that two top officials, *viz.*, a president and a managing director, were assigned to each public body. Thirdly, the management of certain public bodies is such that it does not require a board of directors to assist in laying down policies. Finally, most of the members appointed to the board of auditors were not qualified for the job. For the above reasons, the new law abolished the posts of presidents and the boards of auditors in all public bodies. It also laid down two types of organization for public bodies, one with a general manager and a board of directors and another with a manager only. Under the new law, auditing is to be done by a separate unit, to be established for the purpose in the Office of the Magistrate of Accounts.

The law gives power to the President of the Supreme Revolutionary Council to establish a Special Enquiry Committee for the purpose of enquiring into the management of any public body.

The law also provides for the appointment of a Special Administrator and an Official Liquidator.

CHAPTER 2

SOURCES OF LAW

A. In General
B. Legislation
C. International Treaties
D. Case Law
E. English Common Law and Doctrines of Equity
F. Indigenous Law

A. In General

As noted earlier, the Constitution was repealed. Hence the Republic's sources of law since the revolution include legislation, international treaties, case law to a limited extent, general principles of common law and equity, and indigenous law.

B. Legislation

The Supreme Revolutionary Council has unlimited powers to legislate in the interest of the people.

(1) FORMS OF LEGISLATION

The forms of legislation follow the Italian pattern and mainly consist of laws, legislative decrees, and regulations. Since the Supreme Revolutionary Council is in constant session, there does not appear to be any necessity for decree-laws.

(a) Laws

The President of the Supreme Revolutionary Council, the members of the Supreme Revolutionary Council, and the Government have the right to present draft laws to the Supreme Revolutionary Council. Laws approved by the Supreme Revolutionary Council are promulgated by the President of the Supreme Revolutionary Council and published in the Official Bulletin.

(b) Legislative Decrees

As noted earlier, the Government had the power to issue measures having the force of law in specified matters and within a limited period of time, where such power was delegated by the National Assembly. Since the revolution, the Supreme Revolutionary Council may by law give similar power to the Government. Such measures are issued in the form of legislative decrees by the President of the Supreme Revolutionary Council.

(c) Regulations

Regulations are issued by decree of the President of the Supreme Revolutionary Council.[1] The Supreme Revolutionary Council may by law give the power to issue regulations to the other organs of the State and to public bodies.

(d) Ordinances

As before, ordinances under the Public Order Law may be issued by the Secretary of State for Interior and by the Regional Governors with respect to matters already referred to while dealing with the sources of law prior to the revolution.

(e) Internal Rules

Internal rules can be issued by local administrations and public bodies subject to the limitations mentioned earlier.

(2) PUBLICATION OF LEGISLATION

By a decree dated October 21, 1969, the Supreme Revolutionary Council established an Official Bulletin for the publication of legislative and administrative acts and other measures of the Somali Democratic Republic. The decree provides that where no specific date

1. Law No. 47 of Aug. 18, 1970, governing the issue of regulations.

is mentioned in the act or measure concerned, such act or measure shall come into force on the fifteenth day following the date of its publication.

C. International Treaties

Prior to the revolution, under Article 6 of the Constitution, the generally accepted rules of international law and international treaties duly concluded by the Republic and published in the Official Bulletin had the force of law in the Republic. It may be recalled that no fundamental law has been issued so far. There is therefore no legal basis at present for stating that the principles embodied in Article 6 of the Constitution still hold good. However, the procedure prescribed by Article 67 of the Constitution, which has been referred to earlier,[2] is still being adhered to with respect to the ratification of international treaties.[3]

D. Case Law

Case law has had only limited application in the Republic since the revolution. Since the Supreme Court constituted as the Constitutional Court was abolished, reference for purposes of the application of case law need be made only to the practice in the Supreme Court and the lower courts.

The practice of the Supreme Court in this regard may be illustrated by reference to a recent decision in *Haji Ali. Warsama Weis v. Ibrabim Gamcoli.*[4] In the

2. *See supra* Pt. IV, Ch. 12.

3. See law authorizing the ratification of Treaty on the Non-Proliforation of Nuclear Weapons (Law No. 22 of March 3, 1970) and Decree of the President of the Supreme Revolutionary Council No. 87 of March 3, 1970, ratifying the aforesaid treaty.

4. Supreme Court Civil Appeal No. 120 of 1969. *See* judgment dated May 24, 1970.

above case, the question for decision was whether Order 41 Rule 27 of the Indian Civil Procedure providing that, whenever an appellate court admits additional evidence, it should record its reasons for doing so is discretionary or mandatory. While declaring that the provision is not mandatory, the Supreme Court followed a previous decision on the said Court in *Aden Ali Mattan v. Jama Deria* [5] and observed,

> In the instant litigation, this Court has no option but to follow the case law on this matter.

In the same case, while declaring that, where the object of a contract is illegal or where the consideration is illegal, the whole transaction is tainted with illegality and no right of action exists even indirectly with respect to anything arising out of the transaction, the Supreme Court again relied on its previous decision in *Abdillahi Jama Mohamed v. Farah Hussein Jama.*[6]

As regards the practice in the lower courts, there appears to be no change to what has been stated earlier in Chapter 11 of Part Four.

E. English Common Law and Doctrines of Equity.

As mentioned earlier,[7] Article 42 of the Constitution annexed to the Somaliland Order-in-Council 1960, directed the courts to apply English common law and doctrines of equity in deciding matters not governed by legislation. Since new legislation does not cover all

5. Supreme Court Civil Appeal No. 3 of 1965. *See* judgment dated June 2, 1965, by Haji N. A. Noor Muhammad, Vice-President; SOMALI REPUBLIC, SOMALI LAW REPORTS, HARGEISA AND BURAO REGIONS, 1964-1965 at 90 (March 1967).

6. Supreme Court Civil Appeal No. 28 of 1964. *See* judgment dated Aug. 31, 1964, by Haji N. A. Noor Muhammad, J.; SOMALI REPUBLIC *Id.* at 49.

7. *See supra* Pt. IV. Ch. 12.

fields of law, English common law and doctrines of equity are still applicable in the Northern Regions.

F. Indigeneous Law

(1) SHARIAT LAW

The application of Shariat law is governed by Article 9 of the Law on the Organization of the Judiciary, 1962,[8] and continues unchanged.

(2) CUSTOMARY LAW

After the revolution, considerable changes were effected with respect to customary law.

As noted earlier, Law No. 67 of November 1, 1970 was enacted with a view to liquidate tribalism in every form.[9] This law brought about many changes in the field of customary law, the most important of which are the following:

(a) Land and Water

The law abolishes tribal rights with respect to land and water resources, and provides that land and water resources that do not belong to any public body or other juridical person or private individual shall belong to the State. The claiming of any grazing right or right over land or water on tribal ground is made punishable.

(b) Civil Wrongs

Another important change brought about by Law No. 67 is with respect to the payment of *dia* and other forms of compensation. The law puts an end to the tribal responsibility for such payments and makes such payment the responsibility of the offender; where he is dead, the compensation may be realized from his property, if any. Likewise, compensation for death or

8. *Id.*

9. *See supra* Pt. I, Ch. 3, F.

physical or moral injury may be received only by the injured party or by his close relatives, *viz.*, his father, mother, spouse, and children. The other relatives, who would otherwise be entitled to receive compensation, are excluded. Collecting and receiving contributions towards the payment of *dia* and other compensations are also prohibited.

Thus, under Law No. 67 of November 1, 1970, the scope of customary law has been considerably reduced.

CHAPTER 3

JUDICIAL SYSTEM

A. In General

It will be recalled that, prior to the Revolution, the judicial system in the Republic consisted of the Supreme Court, Courts of Appeal, Regional Courts, and District Courts. The Constitution also contemplated the establishment of the Constitutional Court and High Court of Justice. After the revolution, considerable changes were brought about in the judicial system. First, the Constitutional Court and the High Court of Justice were abolished. Secondly, even though the Supreme Court, the Courts of Appeal, the Regional Courts, and the District Courts were retained, some of their jurisdiction was taken over by the newly established National Security Court and its Regional and District Sections.[1] Thirdly, Juvenile Courts were established after the revolution.[2] In this chapter, the composition, functions, and powers of the National Security Court and the Juvenile Courts alone are dealt with.

B. National Security Court

(1) COMPOSITION

The National Security Court with its seat in Mogadiscio was established with a view to safeguarding the aims and objectives of the revolution.

The Court consists of a President, a Vice-Presi-

1. Law No. 3 of Jan. 10, 1970, as amended by Law No. 7 of Jan. 21, 1970.
2. Law No. 13 of March 8, 1970.

dent, and two judges. The President and the Vice-President must be appointed from among members of the Armed Forces, and the other members may be appointed from among the members of the Armed Forces or the Judiciary; and if they are appointed from among the members of the Judiciary, they must possess degrees in law. Cases are heard by a bench consisting of three members of the Court, presided over by the President or the Vice-President.

(2) JURISDICTION

The National Security Court has competence over the whole territory of the Republic. It has jurisdiction [3] over serious offences affecting the security of the State. They may be divided into the following groups:

(i) Offences under the Somali Penal Code. They include crimes against the Personality of the State, crimes against Public Order, crimes by public officers against the Public Administration, and contraventions relating to public order and public tranquillity;

(ii) offences under the Law governing the power to detain, Law No. 1 of January 10, 1970;

(iii) offences under the Public Order Law, Law No. 21 of August 26, 1963.

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3. The National Security Court has, under Article 6 of Law No. 3 of Jan. 10, 1970, jurisdiction over the following offences: (i) crimes against the Personality of the State (Somali Penal Code, Book II, Pt. 1, art. 186-239); (ii) crimes against public order (Somali Penal Code, Book II, Pt. V, art. 320-328); (iii) crimes by public officers against the public administration (Somali Penal Code, Book II, Pt. II, art. 241-256; (iv) contraventions relating to public order and public tranquillity (Somali Penal Code, Book III, Pt. I, arts. 505, 514, 516, 530, 534, 539, & 540); (v) offences under the Law Governing Power to Detain, Law No. 1 of Jan. 10, 1970; (vi) offences under the Public Order Law, Law No. 21 of Aug. 26, 1963; (vii) any other offence that the Supreme Revolutionary Council may by decree declare to be against the security of the State.

The Court has also jurisdiction over criminal charges against members of the Government. No such charges may be investigated, or proceeded with, without the prior authorization of the Supreme Revolutionary Council.[4]

(3) REGIONAL AND DISTRICT SECTIONS OF THE NATIONAL SECURITY COURT

Regional and District Sections of the National Security Court may be established as and when considered necessary by the Supreme Revolutionary Council, and such sections have jurisdiction over the Regions or Districts concerned.

The Regional Sections consist of the President of the Regional Revolutionary Council or an officer delegated by him, who presides, and the President of the Regional Court, and an officer of the Armed Forces designated by the Regional Revolutionary Council. The Regional Section has jurisdiction over offences coming within the competence of the National Security Court, other than those triable by the District Section.[5]

The District Section consists of the President of the District Revolutionary Council or an officer delegated by him, who presides, and the President of the District Court, and an officer of the Armed Forces designated by the District Revolutionary Council. It has jurisdiction over offences coming within the competence of the National Security Court that are punishable with imprisonment not exceeding three years or fine not exceeding Sh.So. 3,000 or both.[6]

(4) PROCEDURE

The Prosecutor of the National Security Court has powers to arrest and detain persons and seize prop-

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4. *Id.* art. 8.
5. *Id.* art. 1 & 3.
6. *Id.*

erties.[7] He may by measures that are not appealable transfer to the National Security Court any case falling within the jurisdiction of the Regional or District Sections of the National Security Court, in view of the importance of the case or of the accused or of the particular circumstances in which the offence was committed. He also has the power to transfer any case that is within the competence of the National Security Court to an ordinary court having jurisdiction over similar cases, if in his opinion and because of surrounding circumstances or the nonseriousness of the case, he considers that the case may be heard in the ordinary court.[8]

Cases before the National Security Court are conducted by the Prosecutor of the National Security Court or his representative. The Attorney General may also appear in such cases either alone or jointly with the Prosecutor.[9]

The accused may be represented by a Somali defence counsel in any proceedings before the National Security Court. Where he is charged with an offence punishable with death, imprisonment for life, or imprisonment for more than twenty years, and if he does not have his own counsel, the Court must appoint a defence counsel at the expense of the State.[10]

The decisions of the National Security Court and those of the Regional and District Sections are final. However, pardon of the whole or part of the sentence may be granted by the Supreme Revolutionary Council on application made by the person convicted or his descendant, ascendant, or spouse.[11]

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7. *Id.* arts. 2(3) & (4).
8. Law No. 8 of Jan. 26, 1970, art. 14.
9. *Id.* art. 15.
10. *Id.* art. 3.
11. Law No. 7 of Jan. 21, 1970, art. 4.

The Supreme Revolutionary Council may also annul the decisions of the National Security Court and its Sections and may remand the case to the same court or to another section for retrial.[12]

The National Security Court is given the power to make its own rules of procedure, which must be issued by the Supreme Revolutionary Council.[13]

The law establishing the National Security Court has retroactive effect from October 21, 1969.[14]

C. Juvenile Courts

Under Law No. 13 of March 8, 1970, the President of the Regional Court that is territorially competent has been appointed as the Juvenile Court in that Region. The Juvenile Court has exclusive jurisdiction to hear and determine cases relating to children and young persons [15] accused of any offence except murder. Where a child or a young person is convicted of an offence other than murder, the Court may commit him to a reformatory until he attains the age of eighteen years or for any shorter period.

The law provides that no child may be sentenced to imprisonment. It also provides that a young person may be sentenced to imprisonment only when the Court considers that none of the other methods in which the case may be dealt with is suitable. Where a young person is sentenced to imprisonment, he shall not, so far as circumstances permit, be allowed to associate with

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12. *Id.*
13. Law No. 3 of Jan. 10, 1970, art. 5.
14. *Supra* note 11, art. 4.
15. The term "child" is defined as a person under the age of fourteen years; and the term "young person" is defined as a person who has attained the age of fourteen years and not the age of eighteen years. See Law No. 13 of March 8, 1970, art. 3(1).

adult prisoners. Any person aggrieved by the decision of a Juvenile Court may, within seven days, appeal to the competent Court of Appeal, whose decision is final.

PART SIX
INTEGRATION OF LAWS SINCE INDEPENDENCE

CHAPTER 1

METHODOLOGY [1]

A. In General
B. Drafting of Legislation
C. Language Problem
D. Integration of Legislation Effected So Far

A. In General

Having discussed the constitutional law, the sources of law, and the judicial system of the Republic both prior to and after the revolution, we will now attempt to indicate the methodology adopted for the integration of laws and give an analysis of the major laws so far integrated.

B. Drafting of Legislation

Since the integration of the laws and institutions is a delicate and complicated matter, the Government considered it necessary to appoint a competent commission to assist in it. A Consultative Commission for Integration was therefore appointed in 1960, which was reconstituted in 1964 as the Consultative Commission for Legislation.[2]

The Consultative Commission consisted of judges and lawyers who were trained in the Italian, Anglo-Saxon, and Shariat legal systems. Its main functions

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1. *See* P. Contini, *supra* Pt. IV, Ch. 2, note 10.

2. The Consultative Commission for Integration was established by Decree of the President of the Republic No. 19 of Oct. 11, 1960. The Commission was reconstituted as the Consultative Commission for Legislation by Decree of the President of the Republic No. 271 of Oct. 29, 1964. After the Revolution it was again reconstituted by Decrees of the Secretary of State for Justice, Religious Affairs & Labour No. 47 of March 8, 1970, and No. 152 of June 30, 1970. The author was a member of the Commission from Oct. 1960 until Feb. 1970.

were to prepare draft laws, regulations, and other legislative measures originating with the Government; the Commission examined, at the request of the Government, draft legislation originating from other sources for the purpose of reviewing it from a technical-legal point of view and coordinating it with the existing legislation. It carried out such other research and studies as might be necessary in the performance of its functions.

During the last ten years, most of the unified legislation was drafted by the Consultative Commission. However, in the preparation of certain laws, other procedures were also adopted. For instance, under Law No. 5 of January 30, 1962, the Government was delegated the power to issue a Penal Code, a Criminal Procedure Code, a Traffic Code, and a Law on the Organization of the Judiciary on the binding advice of a Special Commission presided over by the Minister of Justice and consisting of eleven Deputies (members of the National Assembly) and nine legal experts.[3] In the preparation of laws such as the Foreign Economic Transactions Law and the Somali National Bank Law, *ad hoc* commissions were appointed including experts from the International Monetary Fund. Other individual experts who were competent in certain fields were in some cases entrusted with the duty of drafting other particular laws.

From the beginning, it was realized that the draftsmen should not prepare ideal laws unrelated to the conditions prevailing in the country. While preparing legislation, the Consultative Commission always sought the advice and collaboration of representatives of the ministries concerned.

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3. *See infra* Pt. VI, Ch. 3, note 5.

C. Language Problem

One of the most difficult problems in drafting legislation is language. Since Italian, English, and Arabic are the official languages, draft legislation had to be submitted in the three languages. However, in view of the nonavailability of competent translators who could translate Italian or English texts into Arabic, the Consultative Commission prepared draft laws only in Italian or English. All legislation was usually published in the Official Bulletin in both languages.

Since the concepts in the Italian, Anglo-Saxon, and Shariat legal systems are not similar, translation of legislation from Italian into English and vice versa, and from Italian and English into Arabic presented considerable difficulty. In order to avoid, as far as possible, ambiguities and imperfections, translations from the original texts were usually revised by lawyers.

D. Integration of Legislation Effected So Far

Following the union of the two territories, all legislation and institutions had to be integrated. The major areas in which laws were needed as early as possible were the structure of the State and the economic life of the country.

For unifying the structure of the State, laws governing the legislative, executive, and judicial branches of the State were enacted. In the field of criminal law, the integration process was completed by the new Penal Code, Criminal Procedure Code, Military Penal Code, and Military Procedure Code. The Public Order Law was also issued which defined the powers of the police and other authorities and provided for the protection of public order and security.

In the economic sphere, a unified currency, nego-

tiable instruments, and banking system were established and a uniform regulation of foreign trade and foreign exchange transactions was instituted. Laws governing economic initiative and cooperatives were also enacted. Among other integrated laws, mention should be made of the Civil Aviation Law, the Maritime Code, and the Labour Code.

In the fiscal area a unified text of laws on direct taxation was promulgated and customs duties and other central and local taxes were also unified.

There are some vital aspects of the economy, which have not yet been integrated, such as contracts, companies, copyright, patents, and trademarks. Draft laws on these subjects prepared by the Consultative Commission for Legislation are under study by the ministries concerned.

So far there has been the least amount of codification in the area governed by Shariat law. However, with respect to matters covered by customary law, laws have already been enacted governing the use of water as well as those abolishing tribal rights over land and water resources and tribal responsibility for the payment of compensation for civil wrongs. A draft law on land tenure is under active consideration of the Government.

CHAPTER 2

CITIZENSHIP [1]

A. In General

Before the enactment of a uniform law on citizenship, two different laws were in force in the Southern and Northern Regions of the Republic.[2] In the South, during the period of the Trusteeship Administration, Law No. 2 of December 1, 1957, was passed governing the subject and was repealed by another law four months before independence. In the North also, the Nationality and Citizenship Ordinance, 1960, was enacted on the eve of the independence of Somaliland. A unification of the laws on the subject was effected in 1962 by a new law that contains provisions regarding acquisition and loss of citizenship.[3]

As regards acquisition of citizenship, the law makes a distinction between acquisition by law *(ope legis)* and acquisition by grant. In the first case, citizenship is acquired immediately and automatically by all those who fulfill the conditions laid down in the law; in the second case, it is granted to individuals

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1. P. CONTINI, *supra* Pt. II, Ch. 3, note 1, at 49-54; HAJI N. A. NOOR MUHAMMAD, Pt. IV, Ch. 2, note 10, at 39-43.

2. In the Southern Regions, the applicable law was Law No. 9 of Jan. 12, 1960; in the Northern Regions, Ordinance No. 15 of June 25, 1960.

3. Law No. 28 of Dec. 22, 1962.

by act of the President of the Supreme Revolutionary Council on the proposal of the Secretary of State for Interior.

B. Acquisition of Citizenship by Operation of Law

In laying down the provisions for the acquisition of citizenship, the Somali Citizenship Law has given preference to the principle of *jus sanguinis* [4] (*i.e.*, being the child of a father who is a citizen), instead of the principle of *jus soli (i.e.*, having been born in the territory of the State). The acquisition of citizenship by law is thus based on the principle of nationality. Any person living beyond the boundaries of the Republic but belonging by origin, language, or tradition to the Somali Nation may acquire Somali citizenship by simply establishing his residence in the territory of the Republic and formally declaring to renounce any foreign citizenship or status as subject of a foreign country.[5]

C. Acquisition of Citizenship by Grant

The general conditions required for the granting of citizenship are residence in the territory of the Republic for a period of seven years, good civil and moral conduct, and a declaration that the person concerned is willing to renounce any status as citizen or subject of a foreign country.[6] The period of residence required is reduced by two years in the case of a person who is the child of a Somali mother even though she may not be a citizen.[7] Prior to the granting of Somali citizenship, a person must renounce his foreign citizen-

4. *Id.* art. 2.
5. *Id.*
6. *Id.* art. 4.
7. *Id.* art. 5.

ship or status as subject of a foreign country before the President of the District Court of the District where he resides, or, if he resides abroad, before a Consulate of the Republic.[8] The granting of citizenship is made by decree of the President of the Supreme Revolutionary Council, on the proposal of the Secretary of State for Interior, having heard a Special Commission.[9] In order for the status of Somali citizenship to become effective, the person concerned must, after the issuance of the decree granting citizenship, take an oath of allegiance that he will be loyal to the Republic and comply with its laws. This oath is administered before the President of the District Court territorially competent.[10]

D. Honorary Citizenship

The grant of honorary citizenship is, both substantially and formally, of a completely exceptional nature. Honorary citizenship is granted by the President of the Supreme Revolutionary Council, having heard the Council of Secretaries, to persons who have rendered exceptional service to the Somali Republic. It does not include the enjoyment of political rights or the obligation to render military service and does

8. *Id.* art. 6.
9. *Id.* art. 5. The Special Commission consists of: (a) the Head of the First Department of the Ministry of Interior as Chairman; (b) an officer designated by the Secretary of State for Foreign Affairs; (c) a representative of industries and a representative of commerce designated by the Secretary of State for Industry and Commerce; (d) an agriculturist designated by the Secretary of State for Agriculture; (e) four qualified citizens designated by the Secretary of State for Interior.
10. *Id.* art. 8. As of March 15, 1969, 2340 persons have been granted citizenship. They include 1842 Arabs, 69 Ethiopians, 88 Pakistanis, 19 Italians, two Greeks, one Persian, four Indians, one Turk, one Syrian, nine stateless persons.

not extend to members of the family of the person to whom it is granted. Honorary Somali citizenship does not affect the other citizenship of the person to whom it is granted.[11]

E. Loss of Citizenship

The loss of citizenship is substantially regulated in the same manner as the acquisition of citizenship.

A person who has acquired Somali citizenship by law or by grant may renounce it, and such renunciation may either be express or implied. Somali citizenship is renounced by any person who:

(a) having established his residence abroad voluntarily acquires foreign citizenship or the status as subject of a foreign country;
(b) having established his residence abroad and having acquired, for reasons beyond his will, foreign citizenship or the status as subject of a foreign country, declares to renounce Somali citizenship.
(c) being abroad and having accepted employment from a foreign Government or voluntarily serving in the armed forces of a foreign country, continues to retain his post, notwithstanding the notice from the Somali Government to leave the employment or the service.[12]

A person who has acquired Somali citizenship by grant may be deprived of it for unworthiness as a consequence of his being sentenced to imprisonment for a term of not less than five years for a crime against the personality of the Somali State or having acquired citizenship by means of fraud. Deprivation

11. Citizenship Law, Law No. 28 of Dec. 22, 1962, art. 9.
12. *Id.* art. 10.

of citizenship acquired by grant does not extend to the wife and minor children of the person concerned.[13]

F. Recovery of Citizenship

The recovery of citizenship by a person who has lost it is regulated in the same manner as the granting of citizenship and is subject to the condition that the person concerned has established his residence in the territory of the Republic for a period of at least three years.[14]

G. Married Women and Minor Children

Special provisions are laid down in the law to regulate the acquisition, loss, and recovery of citizenship by married women and minor children.

In furtherance of the fundamental principle that the family is based on marriage,[15] a married woman follows her husband's citizenship except where, according to the national law of the country, her husband's citizenship may not be extended to her or where the husband becomes stateless. However, the recovery of Somali citizenship by a woman who has lost it as a result of her marriage with an alien is greatly facilitated where the marriage is dissolved. For this purpose, it is sufficient for the woman to establish her residence in the territory of the Republic and renounce any foreign citizenship or status as subject of a foreign country.[16]

Minor children follow their father's citizenship. However, when they become of age, they have a right to opt for a different citizenship.[17]

13. *Id.* art. 11.
14. *Id.* art. 12.
15. CONSTITUTION, art. 31(1).
16. *Supra* note 11, art. 13.
17. *Id.* art. 14.

As one of the aims of the State is to protect motherhood and childhood,[18] it has been deemed proper to consider a Somali citizen any minor who is the child of unknown parents and was born in the territory of the Republic, provided that he has not acquired a foreign citizenship or the status as subject of a foreign country.[19]

H. Citizenship Previously Acquired

Particularly significant is the provision that expressly recognises the status of Somali citizenship acquired under previous legislation, before the entry into force of the Citizenship Law.[20]

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18. *Supra* note 15, art. 31(5).
19. *Supra* note 11, art. 15.
20. *Id.* art. 18.

CHAPTER 3

CRIMINAL LAW

A. Introduction

Before the integration of criminal law, the Italian Penal Code [1] and the Italian Criminal Procedure Code [2] applied in the Southern Regions, and the Indian Penal Code [3] and the Criminal Procedure Ordinance [4] applied in the Northern Regions. With a view to integrating criminal law, the National Assembly delegated to the Government the power to enact *inter alia* a Penal Code and a Criminal Procedure Code, on the binding recommendations of a Special Commission. This commission was presided over by the Minister of Justice and consisted of eleven Deputies and nine experts, including members of the Consultative Commission for Integration.[5]

When the Special Commission began preparatory work on the new Codes, the Minister of Justice gave a general direction that the Penal Code should be based

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1. Penal Code approved by Royal Decree No. 1398 of Oct. 19, 1930.
2. Criminal Procedure Code approved by Royal Decree No. 399 of Oct. 19, 1930.
3. Indian Penal Code, Act 45 of 1860, as modified by the Indian Penal Code (Modification) Ordinance No. 40, 1935, 1 LAWS OF SOMALILAND Ch. 8 (1950).
4. Criminal Procedure Ordinance No. 4 of 1926, 1 LAWS OF SOMALILAND Ch. 61 (1950).
5. Law No. 5 of Jan. 30, 1962. *See supra* Pt. VI, Ch. 1. The author was a member of the Special Commission.

on the Italian Penal Code and the Procedure Code on the Criminal Procedure Ordinance of the Northern Regions. Obviously, this direction was based on the experience gained during the period of British Military Administration of the South, when such a combination of criminal law resulted in the speedy and efficient administration of justice.

The new Penal Code was approved by Legislative Decree No. 5 of December 16, 1962, and came into force on April 2, 1964. The new Criminal Procedure was approved by Legislative Decree No. 1 of June 1, 1963, and came into force on August 1, 1965.[6]

The Somali Penal Code was virtually a replica of the Italian Code of 1930, with the omission of certain articles and the modification of some others. On the other hand, the Criminal Procedure Code, though mainly based on the Criminal Procedure Ordinance of the Northern Regions, contemplated certain departures from the Indian system and included some concepts that were adopted from the Italian system.

Since the Somali Penal Code is different from those applied under the Anglo-Saxon system, its basic principles are dealt with in detail. As regards the Criminal Procedure Code, only the salient features are mentioned.

B. The Penal Code

The Somali Penal Code is divided into three books. Book I deals with general principles, Book II with crimes, and Book III with contraventions.

(1) GENERAL PRINCIPLES

(a) In General

The Somali Penal Code embodies the cardinal

6. *See* Decree-law No. 5 of March 30, 1965, converted into law by Law No. 10 of June 1, 1965, which fixed the date of the coming into force of the Criminal Procedure Code.

principles enshrined in the Universal Declaration of Human Rights for the protection of individual liberty.

First, it provides that no one shall be punished for an act that is not expressly made an offence by law, nor with a punishment that is not prescribed therefor.[7]

Secondly, it provides that the incriminating penal rule shall not be retroactive.[8] The principle that law shall not be retroactive relates only to the incriminating penal rules, but not to the discriminating rules or those that are more favourable to the offender.

Thirdly, it embodies the principle *nulla poena sine lege*. Liability to punishment and the nature and extent of the penalty are determined by the penal law in force when the offence was committed. If, however, at the date when the sentence is passed, a less severe law is operative than that which was in force when the act was committed, the latter shall be applied. Similarly, the conviction and sentence shall terminate if the law making the act punishable is repealed. The less severe law does not operate retroactively in the case of exceptional or temporary laws.[9]

(b) Where and by Whom Must an Offence Be Committed in Order to Make Somali Penal Law Applicable

(i) For offences committed by Somali citizens, the "personality principle" applies, *i.e.*, Somali penal law is applicable to an accused having Somali citizenship wherever the offence charged is committed. Article 8 of the Penal Code, however, provides that an offence, if committed in a foreign country, is punishable in the Republic only if it is also punishable under the law of the country where it was committed.

7. Penal Code, art. 1.
8. *Id.* art. 2(1).
9. *Id.* art. 2.

(ii) For offences committed in the territory of the Republic, the "territorial principle" is applicable, *i.e.*, foreigners who commit offences within the territory of the Republic are subject to Somali penal law.

(iii) For offences committed by non-Somali citizens abroad, Somali penal law applies only in exceptional cases.[10]

(c) Elements Constituting an Offence

According to the Somali Penal Code, an offence is a combination of two separate elements, *viz.*, material or objective element and psychological or subjective element. Thus, a criminal act under Somali law is the objectively unlawful and subjectively guilty perpetration of an act or acts.

A material or objective element consists of an act or omission which has a causal relationship with an event that is harmful or dangerous.[11] There must be a causal connection between the act and the forbidden result. This "causation theory," *i.e.*, the question whether a particular result is due to the action of the person concerned, is of particular importance in the case of homicide and physical injury. A "cause" is any factor the absence of which would have prevented the unlawful result. In the case of crimes of omission, a "cause" is the omission of any act which, if performed, would have prevented the fulfillment of the unlawful aim. Thus, offences of commission require a punishable act, and offences of omission a punishable failure to act.

A psychological or subjective element [12] consists of criminal intent *(dolo)*, or preterintention *(preterintenzione)*, or negligence *(culpa)*.

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10. *Id.* arts. 7 & 8.
11. *Id.* art. 20.
12. *Id.* arts. 23 & 24.

A crime is with criminal intent where the harmful or dangerous event, which is the result of the act or omission, is foreseen or desired as a consequence of his act or omission and where the law makes the crime dependent upon such event.

A crime is preterintentional or beyond the intent, where the harmful or dangerous event arising from the act or omission is more serious than the one desired by the offender.

A crime is with *culpa* or against the intent, where the event, even if foreseen, is not desired by the offender and occurs as a consequence of negligence, lack of skill or nonobservance of laws, regulations, orders, or instructions.

As regards contraventions, the psychological or subjective element consists in acting knowingly and willfully, irrespective of whether it be done with criminal intent, preterintentionally, or with *culpa*.

(d) Circumstances of the Offence

According to the Somali Penal Code, the objective gravity of an offence may be modified by the circumstances of the offence, which may be aggravating or extenuating.[13]

The circumstances of the offence are divided into "ordinary" and "special" on the basis of whether they are provided for in the law generally for all types of offences or for individual offences.

Another distinction is also drawn between "objective" and "subjective" circumstances. Objective circumstances relate to the nature, kind, means, object, time, place, and any factor relating to the act, the gravity of the injury or the danger or personal conditions or qualities of the injured party. Subjective circumstances relate to the extent of the criminal intent, or

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13. *Id.* arts. 39 & 40.

the degree of *culpa*, or the personal conditions and qualities of the offender, or the relationship between the offender and the injured party.

In view of their accessory nature, aggravating and extenuating circumstances will be taken into account, even though they are not known to the offender or mistakenly believed by him to be nonexistent. However, in the case of mistake as to the party injured, the aggravating circumstances with respect to the condition or qualities of the party injured or the relationship between the latter and the offender will not be taken into account against the offender. On the other hand, the circumstances concerning the age or other conditions or physical or mental qualities of the party injured will be taken into account.

(e) Circumstances Excluding Punishment

If in relation to a punishable act the subjective and obejective elements of an offence exist, the offender is guilty and liable to punishment unless there are special circumstances that exclude punishment. Such circumstances may be termed justifications.

The justifications mentioned in the Somali Penal Code are the following:

(i) Consent of the injured party. The consent must be given by the owner of the right, the infringement of which constitutes the object of the offence.

(ii) Exercise of a right or performance of a duty imposed by law or by a lawful order of a public officer.

(iii) Private defence of his own or another person's right against the actual danger of an unlawful injury. In this case, the defence must be proportionate to the injury.

(iv) State of necessity of saving himself or others from actual danger or serious bodily injury where such danger could not otherwise be avoided.

(f) Circumstances Excluding Liability

While the circumstances mentioned above exempt the offender from punishment, there are certain others that render him free of liability. The term "liability" in the language of penal law is the personal responsibility of the offender for his unlawful act. Capacity to act in a guilty manner presupposes a minimum degree of mental and moral maturity. Where this is lacking, there is no capacity for guilt. Responsibility can be affected by age, mental derangement, or intoxication.

According to the Somali Penal Code, any one under fourteen years of age who commits an offence is not responsible within the meaning of the law.[14] In the case of an offence committed by a juvenile (between fourteen and eighteen years of age) the offender is responsible, if he has the capacity of understanding and of volition, but the punishment will be reduced.[15]

Liability is also excluded in the case of total mental deficiency and total drunkenness, or total intoxication from narcotic drugs arising from accident or *force majeure* and not due to *culpa*, or chronic intoxication from alcohol or narcotic drugs, or deaf and dumb condition, provided that these subjective conditions preclude capacity of understanding and of volition.[16]

In *Jama Kaireh Abdi v. The State*,[17] the Supreme Court, while dealing with the question of the nature of proof required to substantiate the defence of insanity, observed that under the Anglo-Saxon law, the legal test applied to ascertain insanity is found in the M'Naughten Rule. According to the said Rule, "to es-

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14. *Id.* art. 59.
15. *Id.* art. 60.
16. *Id.* arts. 50, 53, 56-58.
17. Supreme Court Criminal Appeal No. 4 of 1965. *See* judgment dated June 22, 1965, by Haji N. A. Noor Muhammad, Vice-President; Somali Republic *supra* Pt. V, Ch. 2, note 5, at 210-217.

tablish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." The Court held that the M'Naughten Rule does not apply to the Somali Penal Code, and that here the test to be applied is whether at the time of the commission of the offence the accused by reason of infirmity was in such a state of mind as to preclude the capacity of understanding and of volition.

In the case of partial mental deficiency and non-culpable drunkenness or intoxication, or chronic intoxication from alcohol or narcotic drugs, or deaf and dumb condition, the liability will be reduced, where the aforesaid subjective conditions are such as to largely diminish, but not exclude, the capacity of understanding or volition.

Voluntary or culpable drunkenness from alcohol and intoxication from narcotic drugs do not exclude or lessen liability. The punishment is increased if the incapacity is voluntarily produced for the purpose of committing the offence or of providing himself an excuse.

(g) Attempted Crime

In contrast to a completed offence, in which all the subjective and objective elements are present and which is always punishable, an attempt is punishable only if the intent to commit a crime has been implemented by acts that constitute a beginning of the crime while the crime itself remains inchoate. Where the line is to be drawn between preparation for an offence, which is not punishable, and a punishable attempt, is a subject of controversy.

Two theories have been advanced in this regard.

One is the "objective" theory, according to which the natural opinion of an impartial bystander is considered decisive. For instance, if a man about to commit a burglary has merely carried a ladder to the site selected, he has performed an act of preparation, whilst once he has set foot on the ladder an attempt has been made. The other is the "subjective" theory, according to which the "natural" view is that of the actor himself, so that the acts that he himself looks on as the beginning of his intended offence already constitute an attempt. Thus the removal of a watchdog would constitute an attempt at burglary. The framers of the Italian Penal Code preferred the "objective" theory, obviously on the ground that the act by which an offence is actually begun supplies a genuinely objective criterion.

Thus, under the Somali Penal Code, a crime will be considered attempted where the act or omission on the part of the offender unequivocally directed towards causing the event has not been entirely completed or where the event has not resulted.[18]

The Penal Code, however, declares an offender not liable to punishment if he voluntarily desists from the attempt, unless the acts performed by him before desisting themselves constitute an offence. The word "voluntarily" denotes that he was not prevented from continuing by circumstances outside the control of his own will.

The case of abandonment of a completed attempt (repentance) is treated differently. In case the offender, after completing the act, voluntarily prevents the event, he shall be liable to the punishment prescribed in respect of the attempted crime reduced by one-third to one-half.[19]

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18. Penal Code, art. 17.
19. *Id.* art. 18.

With respect to impossible attempts, also, the Somali Penal Code has adopted the objective theory and provides that an attempt shall not be punishable where, owing to the unsuitability of the act or the non-existence of the object thereof, the event is impossible.[20]

The Somali Penal Code provides severe punishments for attempts at grave crimes. These include attempts against the integrity, independence or unity of the Somali State,[21] the order established by the revolution,[22] the organs established by the revolution,[23] the Heads or Representatives of Foreign States,[24] and attempts endangering public safety.[25]

The following punishments [26] are prescribed for attempted crimes:

(i) imprisonment from twenty to thirty years, where the law prescribes the punishment of death with respect to the crime;
(ii) imprisonment for not less than twenty years, where the law prescribes the punishment of imprisonment for life;
(iii) in all other cases, the punishment prescribed for the crime shall be reduced by one-third to two-thirds.

(h) Parties to an Offence

The Somali Penal Code does not expressly state who is to be looked upon as the principal, the actual offender. By implication, Article 72 reveals that the principal offender is the person who commits a punishable act, *i.e.*, who implements by his own guilt and unlawful act the subjective and objective constituents of an offence. He need not carry out every stage of the offence himself; just as he is the principal when he makes use of technical instruments to carry out his purpose, so he remains the principal when he employs to the same end the services of an innocent agent, who is not liable or not punishable on account of the personal condition or capacity to commit an offence.

20. *Id.* art. 19.
21. *Id.* art. 184.
22. *Id.* art. 217, as amended.
23. *Id.* art. 218, as amended.
24. *Id.* art. 227.
25. *Id.* art. 332.
26. *Id.* art. 125.

The Code provides as a general rule that, where more than one person participates in the same offence, each of them is liable to the punishment prescribed.[27] However, where the offence committed is different from that which was intended by any one of those who participated in it, that person will also be liable if the event is the consequence of his act or omission; and where the offence committed is more serious than that intended, the punishment will be reduced with regard to the person who desired the lesser offence.[28]

As regards agreement to commit an offence between two or more persons or instigation to commit an offence, such agreement or instigation is not punishable if the offence is not committed.[29]

(i) Concurrence of Offences

By a single act or omission, a person may violate various provisions of the law or commit more than one breach of the same provision of law. According to the Somali Penal Code, he will be punished for the various offences provided for by law. In such a case, the punishments are to be added together, subject to the maximum limits fixed by law.[30]

A person may commit more than one act or omis-

27. *Id.* art. 71.
28. *Id.* art. 77.
29. *Id.* art. 76.
30. *Id.* art. 44.

sion with the same criminal intent at the same time or at different times, and such acts and omissions may constitute a breach of the same provision of law, of the same or of different gravity. In such a case, the offence is called a "continuing offence," and the offender will be liable to the punishment imposed with respect to the most serious of the breaches committed increased up to threefold.[31]

The above provisions (*viz.*, Articles 44 and 45) will not apply when the law considers as constituent elements or as aggravating circumstances of a single offence acts which by themselves would constitute an offence. In this case, the offence is known as a "complex offence." [32]

(j) Punishment

(i) Aim of Punishment

Punishment is the penalty inflicted on a person for the commission of a guilty act. According to the "absolute theory," the aim of punishment is retribution; the "relative theories" state that the aim of punishment is preventive — the prevention of future crimes. And prevention may be divided into "general prevention," *i.e.*, the aim of punishment inflicted on offenders is to deter the public in general from committing the particular crime, and "special prevention" meaning that a particular offender who has not been deterred by general preventive measures is to be prevented from committing such crimes in the future. Without totally discarding the aforesaid traditional aims of punishment, the Somali Penal Code aims at rehabilitating the offenders, thereby ensuring wherever possible their readjustment to society.

The Somali Penal Code distinguishes between principal punishments and accessory penalties.

31. *Id.* art. 45.
32. *Id.* art. 46.

(ii) Principal Punishments

The principal punishments [33] are the following:

a. The death penalty. It is carried out by shooting inside a penitentiary. It is imposed only for the most serious crimes, *viz.*, crimes against the personality of the State, and crimes against human life.[34]

b. Imprisonment for life, entailing permanent interdiction from holding any public office.

c. Imprisonment for a crime, extending from five days to twenty-four years and entailing compulsory labour. If imprisonment is for a term of more than five years, it also entails permanent interdiction from holding public office; if it is for a term of more than three years, it entails temporary interdiction from public office for a period of five years.

d. Fine for a crime, consisting of payment to the State of a sum of not less than Sh.So. 10 and not more than Sh.So. 50,000.

e. Imprisonment for a contravention, extending from five days to three years and entailing compulsory labour.

f. Fine for a contravention, consisting of payment of a sum of money of not less than Sh.So. 2, and not more than Sh.So. 10,000.

(iii) Accessory Penalties [35]

33. *Id.* arts. 94-100.

34. The crimes against the Personality of the State for which the death sentence is imposed include treason—art. 184; bearing arms against the State—art. 185(1); serious sabotage of military works—art. 196(2); serious military espionage—art. 200(2); promotion of armed insurrection against the State—art. 221(1); devastation, pillage, and slaughter for political purposes—art. 222; and civil war—art. 223.

The crimes against human life for which the death sentence is imposed include carnage—art. 329; causing epidemics—art. 334; pollution of water and food—art. 335; and murder—art. 434.

35. *Supra* note 18, arts. 101-108.

Accessory penalties automatically apply by operation of law when a principal punishment is imposed on conviction. These are:

a. Interdiction from public offices, which may be permanent or temporary. A permanent interdiction will deprive the convicted person of the right to vote, the right to be elected, and every other political right; the right to public office, academic positions, titles, and decorations; and stipends, pensions, and allowances borne by the State or other public bodies. A temporary interdiction will deprive the convicted person of the capacity to acquire, exercise, or enjoy, during the period of interdiction, the aforesaid rights and privileges. The duration of temporary interdiction shall be not less than one year and not more than five years.

b. Interdiction from profession or trade. It will deprive a person of the capacity to exercise, for a period of not less than fifteen days and not more than two years, a profession or trade in respect of which a special permission or license is required.

c. Legal interdiction. A person sentenced to imprisonment for life or to death will be under legal interdiction. A person sentenced to imprisonment for a crime for a term of not less than five years will be under legal interdiction for the duration of the punishment. For the purposes of disposing of and administering property and acting as agent in connection with legal interdiction, the provisions of civil law regarding interdiction will apply.

(iv) Application of Punishment [36]

Following the Italian system, the Somali Penal Code in most cases prescribes the maximum and minimum punishment for an offence and leaves the application of punishment in individual cases to the discre-

36. *Id.* arts. 109-110.

tion of the judge. The judge must, while imposing punishment, take into account the following factors:

a. The gravity of the offence, as inferred from the nature of the offence and the way it was committed, the extent of the injury or danger caused to the injured party, as well as the intensity of the criminal intent or the degree of *culpa;*

b. The offender's criminal capacity, as inferred from the motives of the offence, the character of the offender, the criminal record of the offender, and the general conduct and life of the offender prior to the offence, the conduct at the time of, and subsequent to, the offence, and the individual, as well as the domestic and social conditions of the offender.

By combining both the objective and subjective criteria, the law requires that before imposing punishment a judge must have a clear view not only of the extent of the offence but also of the personality of the offender.

The judge must in all cases state the grounds justifying the use of the discretionary power in imposing punishment.

The Code also prescribes enhanced punishment for recidivists and habitual and professional offenders.[37]

(k) Security Measures

The Somali Penal Code leaves the adoption of security measures with respect to offenders who are deemed to be a danger to society to the discretion of judicial authorities. Such measures may normally be ordered by the judge in the judgment convicting or acquitting the persons concerned. They may also be imposed by a subsequent order: (i) in the case of a conviction, during the execution of a punishment, or dur-

37. *Id.* arts. 61-70 & 124.

ing a period in which a convicted person voluntarily evades the execution of the punishment; and (ii) in the case of acquittal, where it is presumed that the person is a danger to society and a period equal to the minimum term of the appropriate security measures has not elapsed.[38]

For purposes of penal law, a person will be deemed to be a danger to society where, even though he may not be liable nor punishable for an offence, he has committed any act that the law regards as an offence and where it is probable that he will commit other acts that are made offences by law.[39]

Provision is also made for the review of cases of persons adjudged as a danger to society. Such review must be done by the judge when the minimum period prescribed by law for each security measure expires. If it appears that the person is still a danger to society, the judge may fix a time for a further review. The judge has, however, the power to review the case at any time if there is reason to believe that the danger has ceased.[40]

The Code provides for two kinds of personal security measures: [41] (i) measures of a detentive character involving commitment to a hospital or nursing home in the case of a convicted person who requires physical or mental treatment, commitment to a lunatic asylum in the case of a person who has been acquitted on account of mental infirmity, and commitment to a reformatory in the case of a minor; and (ii) measures of a nondetentive character, involving police surveillance, in the case of a person who is a danger to society and expulsion from the State in the case of an alien.

38. *Id.* art. 165.
39. *Id.* art. 164.
40. *Id.* art. 168.
41. *Id.* arts. 172-181.

The only security measure with respect to property is confiscation. On conviction, the judge may order the confiscation of material objects that were used or intended to be used in the commission of the offence, or which represent the proceeds or the profits thereof. Confiscation shall also be ordered of material objects whose manufacture, use, possession, custody or alienation constitutes an offence even where no conviction was pronounced.[42]

(l) Extinction of Offence and Punishment

The Somali Penal Code makes a distinction between measures that extinguish an offence and measures that extinguish the punishment.

(i) Extinction of Offence

Among the measures that extinguish an offence, special mention should be made of amnesty and judicial pardon.

Amnesty is a general pardon granted by a special law. It extinguishes the offence, and where a sentence has been passed, causes the execution of the punishment and the accessory penalties to cease. Where there is a concurrence of offences, amnesty will apply to the particular offences with respect to which it is granted. An amnesty may be made subject to conditions or obligations. It will not apply to recidivists or to habitual or professional offenders unless the decree provides otherwise.[43]

Judicial pardon may be granted by a judge to a person under eighteen years or over seventy years of age who has committed an offence punishable with imprisonment for a maximum term of not more than three years or a pecuniary punishment or both, if he considers that the offender will not commit any fur-

42. *Id.* arts. 182 & 183.
43. *Id.* art. 144.

ther offence. Judicial pardon will extinguish the offence. Judicial pardon may not be granted more than once.[44]

(ii) Extinction of Punishment

The measures that extinguish punishment include indult and pardon, conditional suspended sentence, and rehabilitation.

Indult or pardon, which is granted by the Head of the State, constitutes condonation, wholly or in part, of the punishment imposed, or commutation of the punishment to another kind of punishment fixed by law. It shall not extinguish the accessory penalties, except where the decree provides otherwise, or the other penal consequences of the conviction.[45]

(m) Conditional Suspended Sentence

A special form of pardon is the conditional suspended sentence, which consists of conditional postponement of the execution of a sentence. It may be ordered only in cases where the punishment imposed is imprisonment for a period not exceeding six months or a pecuniary punishment, or both, and the pecuniary punishment is convertible into imprisonment for the same period, and where the Judge has reason to believe that the offender will maintain a good conduct in the future. The suspension of punishment is subject to the following conditions:

(i) that the offender does not, within five years from the sentence, commit a crime or contravention of the same nature as the one for which he was convicted; and

(ii) that the offender, within the time prescribed by the judge, fulfills any civil obligation to make restitution or pay compensation to the party injured.[46]

44. *Id.* art. 147.
45. *Id.* art. 149.
46. *Id.* art. 150.

(n) Rehabilitation

Rehabilitation extinguishes the accessory penalty and every other penal consequence of the conviction. It shall be granted where five years have elapsed from the day on which the principal punishment was executed or was in any other way extinguished and the convicted person has given real and continuous proof of good conduct. The period will be ten years in the case of recidivists and habitual and professional offenders. An order of rehabilitation will be revoked *ipso jure*, where the rehabilitated person commits within five years a crime with criminal intent or preterintentionally, which is punishable with imprisonment for a term of not less than three year or any other serious punishment.[47]

(o) Civil Sanctions [48]

Every offence entails the obligation to make restitution in accordance with civil law. Where an offence results in damage to property or any other damage, there is an obligation on the part of the offender and of the person who, in accordance with civil law, is responsible for his act, to pay compensation. Persons convicted of one and the same offence are jointly and severally liable to make restitution or pay compensation. The extinction of the offence or punishment will not extinguish the civil obligations arising from the offence.

(2) SPECIFIC OFFENCES

(a) Classification of Offences

The Somali Penal Code classifies offences into two categories, *viz.*, crimes and contraventions. The distinction between the two categories is based, first, on the subjective element constituting the offence. In the

47. *Id.* arts. 152-154.
48. *Id.* arts. 158-160.

case of a crime, a person will be answerable for his act or omission done with criminal intent, or preter-intentionally, or with *culpa*, while in the case of a contravention, he will be answerable if he has done the act or omission knowingly and wilfully, irrespective of whether it was done with criminal intent, preterintentionally, or with *culpa*.[49] Secondly, the distinction between the two categories is also based on the nature of punishment respectively prescribed for them in the Code.[50]

The subclassification of crimes and contraventions is based on the nature of the "interest" that is injured or threatened by the "criminal" act.

The interests protected may be divided into two major categories, *viz.*, social interests and individual interests.

Book II, dealing with crimes, protects certain social interests and individual interests. The social interests protected include:

(i) those relating to the Personality of the State (Part I), the Public Administration (Part II), and the Administration of Justice (Part III) ;

(ii) those relating to society as a whole, such as public order (Part V), public safety (Part VI), good faith in the public (Part VII), and national economy (Part VIII) ;

(iii) those relating to a number of moral values of society, which the law considers as deserving special protection, such as religious feelings and reverence for the dead (Part IV), morals and decency (Part IX), health of the human race (Part X), and family status (Part XI).

The individual interests protected in Book II include:

49. *Id.* art. 23.
50. *Id.* art. 15.

(i) those relating to persons with respect to the right to life, safety of individuals, honour, individual liberty, human personality, right to work, privacy of home, and secrecy (Part XII) ;

(ii) those relating to property, covering crimes against property by violence and fraud (Part XIII).

Book III, dealing with contraventions, protects directly certain interests of a social nature and thereby indirectly affords protection to certain individual interests.

The contraventions are divided into the following categories:

(i) those relating to public order and public tranquility (Part I) ;

(ii) those relating to public safety (Part II) ;

(iii) those relating to the prevention of certain classes of offences (Part III) ;

(iv) those relating to morals and decency (Part IV) ;

(v) those relating to public health (Part V).

Within the scope of the present survey, it is not possible to refer to all the offences under Books II and III, still less to discuss them in detail. Broad subdivisions of the offences are indicated below and special mention is made of the innovations introduced in the Somali Penal Code, which distinguish it from the Italian Penal Code.

(b) Crimes Against the Personality of the Somali State (Book II, Part I)

Crimes against the personality of the Somali State are divided into crimes against the Somali State as an international person (Chapter 1) and crimes against the internal order of the Somali State (Chapter 2). Other crimes included in Part I are crimes against the political right of Somali citizens (Chapter 3) and

crimes against foreign states, their heads and representatives (Chapter 4).

In Part I, certain innovations have been introduced relating to four important crimes. First, the crime of high treason is defined in the Code. It consists of the commission of an act directed to subject the territory of the State or a part thereof to the sovereignty of a foreign State, or to diminish the independence or to dissolve the unity of the State, and the death penalty is prescribed for the crime.[51]

Secondly, the crime of attempts against the order established by the Constitution is also defined. It consists of the commission of an act for the purpose of changing the Constitution or the form of Government by means not authorized by the Constitution, and the penalty of imprisonment for life is prescribed for the crime.[52]

The above two are the only political crimes for which the President of the Republic had penal responsibility pursuant to Article 76 of the Constitution.

After the revolution, Article 217 of the Penal Code was amended to provide that any attempt against the order established by the revolution is a crime.[53]

Thirdly, the crime of attempts against the constitutional organs is defined. It consists in attempts to kill the President of the Republic, the President of the National Assembly, the Prime Minister, or the President of the Supreme Court when the Supreme Court was constituted as the Constitutional Court or the High Court of Justice, and the crime is punishable with imprisonment for life. Attempts to impair the safety or personal liberty of the persons mentioned above is punishable with imprisonment from five to

51. *Id.* art. 184.
52. *Id.* art. 217.
53. Law No. 2 of Jan. 10, 1970, art. 1.

fifteen years. Any act directed to prevent wholly or in part the President of the Republic, the National Assembly, the Government and the Constitutional Court, or the High Court of Justice from exercising the functions conferred on them by the Constitution or by law is punishable with imprisonment for not less than ten years.[54]

After the revolution, Article 218 of the Penal Code was amended to protect the organs established by the Revolution, *viz.*, the President, the Vice President, and the members of the Supreme Revolutionary Council, the President of the Supreme Court, the Secretaries of State, the President and members of the National Security Court, and the Prosecutor of the National Security Court and his deputies.[55]

Fourthly, the Somali Penal Code declares it a crime to organize or participate in subversive and antinational associations. A subversive association is defined as an association whose object is to establish by force the dictatorship of one social class over others, or to suppress by force the economic or social order of the State, or to suppress by force one social class, or to subvert by force the economic or social order of the State, or to suppress by force any political or legal institution.[56] An antinational association is defined as an association that aims at pursuing or that pursues activities directed against the national unity.[57]

(c) Crimes Against the Public Administration and Against the Administration of Justice

Crimes against the Public Administration are divided into two categories: (i) crimes committed by public officers (Part II, Chapter 1); (ii) crimes com-

54. *Supra* note 7, art. 218.
55. *Supra* note 53, art. 2.
56. *Supra* note 7, art. 213.
57. *Id.* art. 214.

mitted by private individuals (Part II, Chapter 2). With respect to the above offences, no substantial changes from the Italian law have been made, except for the reduction of punishment for minor offences.

Crimes against the administration of justice are divided into the three categories: (i) crimes against the course of justice; [58] (ii) crimes against the authority of judicial decisions; [59] and (iii) arbitrary protection of private rights.[60] With respect to these offences also, no substantial changes have been made.

(d) Crimes Against Religious Feelings and Reverence for the Dead

Part IV covers crimes against religious feelings and reverence for the dead. Since Islam is the State religion, special provisions have been made in the Penal Code to protect the religious feelings of the Somali people. Crimes against religious feelings include the following crimes: (i) publicly bringing the religion of Islam into contempt or publicly insulting the religion of Islam by bringing into contempt persons professing it or places or objects dedicated to worship; [61] (ii) impeding or disturbing the exercise of functions, ceremonies, or religious practices of the Islamic faith.[62]

The legal protection given to the Islamic faith has also been extended to other religious groups, thus guaranteeing to them freedom of conscience, religious faith, and religious worship without any discrimination whatsoever.[63]

58. *Id.* Pt. III, Ch. 1.
59. *Id.* Pt. III, Ch. 2.
60. *Id.* Pt. III, Ch. 3.
61. *Id.* art. 313.
62. *Id.* art. 314.
63. *Id.* art. 315.

(e) Crimes Against the National Economy, Industry, and Commerce

Most important among the crimes against the national economy, industry, and commerce (Part VIII) are those relating to lockouts, strikes, unauthorized occupation of agricultural or industrial undertakings, and sabotage. Lockouts and strikes may be resorted to in the cases allowed by law; they are crimes only in the cases not allowed by law. Unauthorized occupation of agricultural or industrial undertakings and sabotage are crimes if such acts are done with the sole object of preventing or disturbing the normal course of work.

(f) Crimes Against Morals and Decency

Crimes against morals and decency are divided into: (i) crimes of sexual violence (Part IX, Chapter 1); (ii) crimes against modesty and sexual honour (Part IX, Chapter 2); and (iii) crimes against morals (Part IX, Chapter 3).

Carnal intercourse [64] and acts of lust [65] committed with violence on the person of the other sex and unnatural offences [66] committed on the person of the same or different sex with violence are crimes under the Somali Penal Code. In view of the fact that such offences are considered grave crimes under Shariat law, considerably enhanced punishments are prescribed for them. Homosexuality [67] also is made a crime.

Obscene acts committed in a public place or a place open to the public [68] and manufacturing, trading, and distributing of obscene publications [69] are also

64. *Id.* art. 398.
65. *Id.* art. 399.
66. *Id.* art. 408.
67. *Id.* art 409
68. *Id.* art. 402.
69. *Id.* art. 403.

made crimes. For purposes of penal law, acts and objects are deemed to be obscene where in the general opinion they are offences to modesty.[70]

Of considerable importance are the provisions in the Penal Code relating to prostitution. Under the Code anyone who practises prostitution in any form commits a crime and, where the act is committed by a married person, enhanced punishment is prescribed.[71] Incitement to lewd acts is also a crime, but it is less serious.[72] Instigation, aiding, and exploitation of prostitution [73] and compulsion to prostitution are also crimes. Security measures may be added to sentences for the above crimes.[74]

Crimes against public morals are mainly acts that openly violate the religious tenets of the Somali people regarding the supply and sale of alcoholic beverages [75] to, and consumption of alcoholic beverages by, Somali citizens and muslims of foreign nationality.[76]

Other crimes that come under the category of crimes against public morals are drunkenness of any person irrespective of his nationality or religious belief,[77] causing a state of drunkenness in other persons,[78] supply of alcoholic beverages to a person in a state of drunkenness, and unlawful manufacture of, or trade in, alcoholic beverages.

(g) Crimes Against the Family

Among the crimes against the family,[79] mention may be made of the following:

70. *Id.* art. 404.
71. *Id.* art. 405.
72. *Id.* art. 406.
73. *Id.* art. 407.
74. *Id.* art. 408.
75. *Id.* art. 410.
76. *Id.* art. 411.
77. *Id.* art. 412.
78. *Id.* art. 414.
79. *Id.* Pt. XI.

(i) Illegal marriage: Contracting marriages that are not allowed by the personal status of the persons concerned is made punishable.[80] This provision applies not only to illegal polygamy, which is prohibited by Islam, but also to bigamy in the case of persons professing other religions that prohibit bigamy.

(ii) Adultery. According to Shariat law, adultery is a serious crime and both the parties involved are punishable. The Penal Code embodies the above principle and provides that if a person who is bound by a legally valid marriage has carnal intercourse with a person other than his or her spouse, the person concerned and the accomplice will both be guilty of the crime of adultery. However, the crime can be prosecuted only on the complaint of the injured party.[81]

(iii) Incest: The Penal Code also provides that anyone who has carnal intercourse with a person with whom marriage is prohibited by reason of the offender's personal status will be guilty of the crime of incest.[82]

It should be noted that the aforesaid crimes are defined in such a way as to conform to the definition of such crimes under Shariat law.

(h) Crimes Against the Person

Crimes against the person are divided into: (i) crimes against the life and safety of individuals (Part XII, Chapter 1); (ii) crimes against honour (Part XII, Chapter 2); and (iii) crimes against individual liberty (Part XII, Chapter 3).

With respect to some of these offences, innovations have also been introduced, taking into consideration the principles of Shariat law.

As regards murder, the Penal Code provides that

80. *Id.* art. 425.
81. *Id.* art. 426.
82. *Id.* art. 427.

the crime is punishable with death.[83] However, the punishment will be reduced to imprisonment from ten to fifteen years where the death is caused by a parent and the victim was subject to his parental authority.[84] This exception is based on a principle of the Shafie School of Islam, according to which talion cannot be applied in cases of premeditated homicide of a descendant by an ascendant on the ground that the latter's social status is higher than that of the former.

Less severe punishment is also prescribed with respect to: (i) homicide and infanticide for reasons of honour;[85] (ii) death caused to a consenting person, provided the act has not been committed against a person under eighteen years of age, an insane person, or a person whose consent the offender has obtained by violence, threat, suggestion, or fraud;[86] (iii) homicide without the intention of causing death;[87] and (iv) death caused by negligence.[88]

The crimes of insult[89] and defamation[90] come within the category of crimes against honour. In view of the fact that most frequently insults and defamation are the causes for affrays and feuds among the Somali people, the Penal Code provides enhanced punishment in cases where the insult is directed against the nationality, ethnic, community, or family to which the injured party belongs or where the insult consists in the use of words or acts which, according to the

83. *Id.* art. 434.

84. *Id.* art. 442. Soon after independence, Law No. 6 of Feb. 10, 1962, was enacted to apply the aforesaid principle of Shariat law. This law was repealed by the Penal Code.

85. *Supra* note 7, arts. 444 & 435.

86. *Id.* art. 436.

87. *Id.* art. 441.

88. *Id.* art. 445.

89. *Id.* art. 451.

90. *Id.* art. 452.

social custom, tend to directly provoke the injured party.

C. Criminal Procedure Code

(1) IN GENERAL

Proceedings under the Criminal Procedure Code are essentially accusatory, with the prosecutor taking the leading role rather than inquisitorial, with the judge taking the leading role.

(2) PRE-TRIAL PROCEEDINGS

Criminal proceedings are in most cases conducted by the State on the basis of information, reports, or complaints and in a few specified cases on the complaint of the injured party.[91]

The Criminal Procedure Code prescribes rules concerning powers of arrest.[92] Normally a person may not be arrested without a proper warrant issued by the appropriate judicial authority. There are, however, certain exceptions to the above rule. The first exception is when a person is apprehended *in flagrante delicto*. The Criminal Procedure Code lays down the cases where arrest without warrant is mandatory and those in which it is discretionary. Under Article 35 of the Code, arrest without warrant is mandatory if a person is caught in the act of committing an offence, such as a crime against the Personality of the State or murder; and under Article 36, arrest without warrant is discretionary, if the offence is punishable with the maximum imprisonment for more than one year or with a heavier punishment. The second exception is provided in Article 38 of the Code. Under the above provision, a police officer may arrest a person without warrant in cases of urgent necessity, when there are

91. Criminal Procedure Code, arts. 17-22.

92. *Id.* arts. 28-45.

grounds to believe that the person concerned has committed an offence punishable with imprisonment for more than ten years or a heavier punishment and there is no time to get a warrant of arrest and if the person were not arrested, he would abscond.

In order to prevent any abuse in the exercise of this power, it is provided in Article 39 of the Code that a person so arrested must be brought, within 48 hours from the time of his arrest, before the competent court or the nearest judge, and the arresting officer must state the reason for the arrest. If the arrest is not confirmed by the judge within a period of five days from the day when it took place, it must be considered rescinded and the arrested person must be released.

(3) INVESTIGATION AND PROSECUTION BY THE ATTORNEY GENERAL

The Code also establishes the control of the Attorney General [93] over all investigations and prosecutions, which he may conduct through his deputies and police officers. On receiving a report of police investigation with respect to a criminal case, the Attorney General may frame a charge and present it before the competent court if he is satisfied that the evidence collected provides a *prima facie* case.[94] Otherwise he may close the case or order further investigation.

In criminal proceedings, two significant departures have been made from the system contemplated in the Indian Criminal Procedure Code. First, the new Code has abandoned the Indian system whereby the framing of a precise charge is deferred until the court has conducted a preliminary enquiry by hearing the prosecution evidence. Secondly, under the Indian system, the court frames the charge, while under the new Code, the charge is framed by the Attorney General.

93. The Attorney General and his deputies are members of the judiciary. *See supra* Pt. IV, Ch. 13.

94. *Supra* note 91, arts. 69 & 72.

(4) TRIAL [95]

When a trial commences, the judge reads and explains the charge to the accused in open court and asks him whether he wishes to raise objections, plead guilty, or plead not guilty. The accused may raise objections on a variety of grounds to the legal sufficiency of the charge. If such objections are upheld, the court will terminate the proceedings. To avoid unnecessary delays in the administration of justice, the court is given the power to convict the accused if he pleads guilty of an offence for which the law prescribes the maximum punishment of imprisonment for less than ten years or a lesser punishment. Where the accused is charged with a more serious offence, the court will proceed with the trial whether or not he pleads guilty. A plea of guilty may be withdrawn by the accused at any time during the course of the proceedings in a court of first instance, before judgment is given, and in such a case a plea of not guilty will be entered instead.

The trial procedure follows closely that of an English assize court. The Attorney General has the burden of proof of establishing that a crime was committed and the accused committed it. The accused is presumed innocent until he is finally convicted. The prosecution opens the case and presents witnesses who may be crossexamined by or for the accused. The case of the defence follows, and the accused may call witnesses and may himself give evidence or make an unsworn statement. The failure on the part of the accused to give evidence creates no presumption against him and generally may not be commented upon by the

95. *Id.* arts. 81-134.

prosecutor. A court may order, on its own motion, that evidence be produced which it considers proper and useful in order to ascertain the truth. After all the evidence has been produced, the Attorney General and the defence sum up their cases. When the hearing is closed, the members of the Court deliberate in chambers and then pronounce judgment in open court.

The Criminal Procedure Code contains rules of evidence which were taken, with a few changes, from the Indian Evidence Act of 1872.[96] The rules of evidence relate to matters such as the kinds of judicial proof, the competency and examination of witnesses, the admission and exclusion of evidence, privilege, burden of proof, and presumptions.

(5) APPEAL AND REVISION

The accused and the Attorney General may appeal against the decision of the trial court, first to the Court of Appeal, and later to the Supreme Court.[97] The appellate court may, if it reverses the decision appealed against, order a new trial. The Code also provides for revision by the Supreme Court of decisions that have become final on certain specified grounds.[98]

(6) WRIT OF HABEAS CORPUS

The Code has adopted the writ of *habeas corpus*,[99] a typically Anglo-Saxon instrument for the protection of the individual liberty. It should be noted that the writ was not known in former Italian Somalia. Under Article 66 of the Criminal Procedure Code, the

96. *Id.* Book III.

97. *Id.* arts. 208-236.

98. *Id.* arts. 237-244.

99. Law No. 12 of March 3, 1970, suspended for one year the application of the provisions relating to *Habeas Corpus* to offences falling within the competence of the National Security Court. Law No. 64 of Oct. 10, 1970, abolished the writ of *Habeas Corpus*.

Supreme Court and the Court of Appeal may order that any person held in arbitrary detention or in cases other than those provided by law be set at liberty.

Three important *habeas corpus* applications filed before the Supreme Court may be noted. First, in *Ahmed Sugulle and eight others v. the State*,[100] one Councillor in the Kismayu Local Council resigned and the President of the District Court of Kismayu issued a decree, under Article 62 of the Annex to the Local Administration and Local Council Elections Law, appointing in the above vacancy the person whose name appeared in the list of candidates immediately below the name of the last candidate elected. The Local Council discussed the legality of the above decree, and in the voting that followed nine Councillors voted against accepting the decree, six voted for, and two abstained. The newly appointed Councillor filed a petition before the President of the District Court of Kismayu. The President of the Court registered a criminal case against the nine Councillors who voted against accepting his decree and issued arrest warrants under Article 99 of the Criminal Procedure Code, and the Police arrested the Councillors. On an application filed by the nine Councillors, the Supreme Court observed that, under Article 95 of the Criminal Procedure Code, a warrant of arrest can be issued only in cases where a person fails to comply with an order given by a court, by a President of a court, or by a judge in accordance with the Criminal Procedure Code, and that the above Article cannot be applied in the case of noncompliance with an order issued under any other law. It also noted that the applicants were not charged with any offence that would justify the issuance of a warrant of arrest. The Court further observed that a district

100. Order of the Supreme Court dated Dec. 4, 1965, delivered by A. Peronaci, President.

judge has no power to initiate criminal action and, under Article 8(1) (a) of the Law on the Organization of the Judiciary, this power is given only to the office of the Attorney General. The Supreme Court therefore held that the warrant of arrest issued against the applicants was manifestly illegal, and directed that the applicants be released forthwith.

Secondly, in *Abdulkadir Del Abdulla v. the Commandant of the National Army* [101] one Hawa Del Abdulla filed an affidavit stating that her brother, Major Abdulkadir Del Abdulla, had been kept in detention in Army Camp, Mogadiscio, for about seven months without any charge being preferred against him in any competent court and that he was being detained in a manner other than that provided by law. The Supreme Court issued notice on the above application to the Commandant of the National Army, directing him to produce Major Abdulkadir in Court and to show cause why the prisoner should not be set at liberty. The Commandant submitted before the Supreme Court a report explaining the circumstances under which the Major was kept in custody. The report stated that the Major and two others, who were accused of having murdered a Soviet woman in Moscow, were arrested and detained in Moscow prison. They were later released and sent to the Republic at the request of the Somali Government, which had undertaken that the accused would be tried according to Somali law. The accused were then committed by the Government to the custody of the Army Command, pending the receipt of the records of the Soviet judicial authorities. Before the date fixed for the production of the Major in Court, the applicant withdrew the application, ap-

101. *Habeas Corpus* Application No. 1 of 1966. See Order of the Supreme Court dated June 19, 1966, delivered by Haji N. A. Noor Muhammad, Vice-President.

parently being satisfied that steps were being taken to initiate criminal proceedings against the accused.[102] The Court therefore passed an order dropping the proceedings.

Thirdly, in *Abdi Jama v. The State* [103] the applicant was arrested and detained by an Order of the Regional Governor under Article 71 of the Public Order Law.[104] The order was not notified to the Regional Court for confirmation, as required by Article 72 of the said Law.[105] However, the order was confirmed by the President of the National Security Court. It was contended on behalf of the applicant that the detention was illegal on the grounds that the order was neither notified to, nor confirmed by, the Regional Court and that the President of the National Security Court had no jurisdiction to confirm the detention order in question. The Supreme Court upheld the contentions of the applicant and declared that the continued detention of the applicant was illegal. It therefore ordered his release.

102. The accused were tried in the Regional Court at Mogadiscio for carnal violence under arts. 71 and 398 of the Penal Code. However, the accused were acquitted on the ground that the legal representative of the deceased had not made a complaint as required by art. 8 of the Penal Code read with art. 14(1) of the Criminal Procedure Code.

103. Supreme Court Criminal Case No. 67 of 1970 *(Habeas Corpus)* Full Bench Order dated March 26, 1970, delivered by Mohamoud Sheikh Ahmed, President.

104. Article 71 of the Public Order Law provides:

1. During the state of emergency, the Minister of Interior or the Governor territorially competent, with the authorization of the Minister of Interior, may by Ordinance provisionally provide for: . . . (b) the arrest, the search of person or premises of persons suspected of a crime or activities contrary to public order and security. . . .

105. Article 72 of the Public Order Law provides:

1. All measures concerning arrest or search of persons or premises taken during a state of emergency under an Ordinance referred to in Article 71, para 1(b) shall be promptly notified to the competent court for confirmation within thirty days from such notification. . . .

(7) ROLE OF ASSESSORS

In criminal proceedings a significant role has been given to assessors. In Italian Somalia, the assessors were part of the Bench like the "popular judges" in Italy and participated in decisions on questions of fact as well as on questions of law,[106] while in the British Somaliland Protectorate they assisted the Judge in an advisory capacity.[107] With a view to assigning a uniform role to assessors, it is provided in the Law on the Organization of the Judiciary that the assessors will form part of the Bench in the Assize Sections of the Regional Courts and in the Assize Appellate Sections of the Courts of Appeal, which deal with more serious crimes, and participate in the decision on questions of fact. The judges alone will decide on questions of law and impose the punishment.[108]

(8) RECOVERY OF CIVIL DAMAGES

The Code has adopted certain concepts from Italian law also. Special mention may be made of the provision in the Code relating to the injured party *(parte civile)*.[109] The Code, following the Italian system, provides that in the course of a criminal proceeding, the injured party may file a petition before the court for the recovery of damages for any civil liabilities arising from the accused. When the accused has been found guilty, the court must, in addition, decide upon the civil claim for damages brought by the injured party. Such a system is unknown to Anglo-Saxon law, where redress of private injury occasioned by the criminal act is available only in a separate civil proceeding.

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106. Ordinance No. 5 of Feb. 2, 1956, arts. 6 & 7.
107. Criminal Procedure Ordinance, §§ 236(1) & (2).
108. *See supra* Pt. IV, Ch. 12.
109. *Supra* note 91, arts. 14 & 130.

(9) REPRESENTATION BY COUNSEL IN CRIMINAL PROCEEDINGS

The accused may be defended by one or more defence counsels in any criminal proceeding. Where the accused is charged with an offence punishable with death, imprisonment for life, or imprisonment for more than twenty years, he must be represented by counsel; and if in such cases he does not have his own counsel and is poor, the court must at the expense of the State appoint a defence counsel.[110]

(10) TIME LIMITS FOR THE COMMENCEMENT OF CRIMINAL PROCEEDINGS [111]

Under the Code, criminal proceedings may be commenced at any time with respect to offences: (i) for which a warrant of arrest is mandatory; and (ii) for which the maximum punishment provided is imprisonment for not less than ten years or a heavier punishment.

In the other cases, no criminal proceedings may be commenced after the expiry of the following time limits: (i) six years, in the case of offences for which the maximum punishment is more than five years; (ii) four years, in the case of offences for which the maximum punishment is more than three years; (iii) two years, in the case of offences for which the maximum punishment is not more than three years; and (iv) six months, in the case of offences punishable with fine only.

D. Recognition of Foreign Penal Judgments

The Penal Code and the Criminal Procedure Code provide for the recognition of foreign penal judgments

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110. Law on the Organization of the Judiciary, art. 14; *supra* note 91, art. 15.
111. *Supra* note 91, art. 73.

and of civil provisions contained in such penal judgments.[112]

Requests for recognition of foreign judgments must be made before the President of the Court of Appeal within whose jurisdiction the Criminal Records Office is located.

The President of the Court of Appeal will not grant recognition to a foreign penal judgment if: (i) the convicted person was not summoned to appear at the trial or was not provided with a defence counsel in the cases in which, according to Somali law, a defence counsel is mandatory; (ii) the judgment has not become final in accordance with the law of the State in which it was pronounced; (iii) the judgment contains any provisions that are contrary to the general principles of the laws of the State.

E. Extradition

Under Article 11 of the Penal Code, extradition may be granted only in the cases and in the manner established by law and required by international convention. However, it is specifically provided that extradition will not be granted unless the act that gives rise to the demand for extradition is an offence under Somali law and the foreign law, and that no person may be subjected to extradition for political offences. It is further provided in the Criminal Procedure Code that an offer or grant of extradition must always be made subject to the condition that the person to be extradited shall not be tried for an offence, nor be subject to a punishment, other than those for which extradition was offered or granted. The Secretary of State for Justice may also make the offer or grant of ex-

112. *Supra* note 18, art. 10; *supra* note 91, arts. 282-286.

tradition subject to any other conditions which he may deem fit and proper.[113]

A request for extradition must be filed by the Secretary of State for Justice before the President of the Court of Appeal within whose jurisdiction the person to be extradited is found. Extradition may be granted only on the favourable order passed by the latter. Before deciding on such request, the Attorney General and the person to be extradited must be heard. Decisions of the President of the Court of Appeal regarding extradition may be appealed against to the Supreme Court by the person sought to be extradited or by the Attorney General.[114]

When it is necessary to extradite an accused or a convicted person from a foreign country, the President of the Court of Appeal within whose jurisdiction the criminal proceedings took place or such person was convicted, must make a request to the Secretary of State for Justice, giving notice thereof to the Attorney General. Requests for extradition may also be made by the Secretary of State for Justice on his own initiative, informing the competent Court of Appeal and the Attorney General.[115]

113. *Supra* note 91, art. 278.
114. *Id.* art. 279.
115. *Id.* art. 281.

CHAPTER 4

PUBLIC ORDER LAW

A. In General
B. Public Meetings
C. Associations
D. Activities Subject to Control
E. Arms
F. Security Measures for Keeping the Peace
G. Preventive Detention
H. State of Emergency and State of War

A. In General

Before integration, there were several ordinances in the Southern [1] and the Northern [2] Regions of the Republic governing public order and security. The Public Order Law unified the legislation in this field. The new law covers matters such as public meetings, associations, activities subject to control, arms, security measures for keeping the peace, preventive detention, state of emergency, and state of war.

Under the law, the following are Public Order Authorities: the Secretary of State for Interior, the Regional Governors, and the District Commissioners and Heads of Subdistricts.

The Secretary of State for Interior has control over the Central Command of the Police Force, while the other authorities have control over the Regional and District Commands of the Police Force respectively. The Public Order authorities may, in the performance of their functions, request the intervention of the Army and other military and paramilitary corps of the State.[3]

1. In the Southern Regions, the main ordinances were: *Ordine Pubblico*, Ordinance No. 1 of Feb. 20, 1954; and Ordinance No. 2 of Feb. 28, 1954.

2. In the Northern Regions, the main ordinances were: Public Order Ordinance, 2 LAWS OF SOMALILAND Ch. 78 (1950); Arms and Ammunition Ordinance, *Id.* Ch. 68; Explosives Ordinance, *Id.* Ch. 69; Cinematograph Ordinance, *Id.* Ch. 70; Emergency Powers Order-in-Council, 1939.

B. Public Meetings

According to the Public Order Law, a meeting will be considered public where, even though convened as a private meeting, it assumes the character of a meeting that is not private because of the locality in which it is held, or the number of persons, or its purpose or object. Meetings ordinarily held in their offices by associations will be deemed private meetings except where such meetings have the character of regional or national meetings or congresses.[4]

The promoters of a meeting to be held in a private place or in a place open to the public must give notice to the District Commissioner at least three days in advance.[5]

A public meeting may be dissolved only in the following cases: where the promoters fail to give prior notice; where the meeting is held in violation of a written order of the District Commissioner prohibiting or suspending a public meeting, or making it subject to special conditions as to time and place: the District Commissioner can issue such an order only for reasons of public health, safety, morality, order, or security; where, at a meeting held in a public place or a place open to the public, seditious manifestations occur or seditious shoutings are uttered that may in any manner disturb public order or security; where an offence is committed during the meeting.[6]

3. Law No. 21 of Aug. 26, 1963, art. 2.
4. *Id.* art. 13.
5. *Id.*
6. *Id.* art. 16.

The Public Order Law also prescribes the procedure for dissolving public meetings. Where it is necessary to dissolve a public meeting, the Public Order authority shall request the persons present in the meeting to disperse. If such request is not complied with, the said authority shall order the dissolution of the meeting by means of three distinct warnings expressed in the most effective manner. In case such warnings are not complied with, the meeting shall be dissolved by force and any person who refuses to obey may be arrested.[7]

C. Associations

Under the Public Order Law, the formation of political parties and associations was not subject to prior authorization.[8] However, the law required that associations of every kind, nature, and aim submit in writing to the Regional Governor territorially competent the deed establishing the association, the constitution, a list of office bearers of the association, the names of the promoters, and the location of the headquarters and local branches. The aforesaid information had to be communicated within a month from the date of the *de facto* formation of the association. Wherever the constitution was amended, or the office-bearers were changed, or the office of the headquarters or local branches were transferred from one place to another, notification thereof had to be given to the competent authority within the same time limit.[9]

7. *Id.* art. 17.

8. Under the First Charter of the Revolution of Oct. 21, 1969, political parties have been abolished. Law No. 43 of Aug. 10, 1970, has abolished all associations except those that are formed for agricultural, commercial, or industrial activities or those with respect to which the Supreme Revolutionary Council or Regional or District Revolutionary Council has given special permission.

9. *Id.* art. 59.

Under the Public Order Law, political parties and associations that were secret, or had an organization of a military character, or had a tribal denomination might be dissolved by order of the Supreme Court in a proceeding initiated by the Public Order authority for the purpose.[10] Other associations established or functioning contrary to law or carrying on activities contrary to public order or morals could have been dissolved by decree of the Secretary of State for Interior, having heard the Council of Secretaries. Appeals against the aforesaid decrees of the Secretary of State for Interior were to be filed before the Supreme Court.[11]

Associations whose activities cause serious disturbance to public order or constitute a serious offence to morals could be suspended by the Regional Governor territorially competent for a period not exceeding three months by a written order, stating the reasons therefor. Except in cases of urgent necessity, the Regional Governor, before issuing the order, had to notify the association concerned of the charges and hear the explanations, if any.[12]

D. Activities Subject to Control [13]

Certain economic and cultural activities that may affect morality, public health, order, or security are subject to administrative control. Theatrical performances and cinema shows require the prior authorization of special commissions, while sports competitions may be held in public places or places open to the public only with the prior authorization of district commissioners. Licensed premises such as hotels,

10. *Id.* art. 60.

11. *Id.* art. 62.

12. *Id.* art. 59.

13. *Id.* arts. 44-54.

boarding houses, restaurants, bars, and tea and coffee shops, as well as authorized games are subject to the supervision of the Public Order authorities.

E. Arms [14]

So far as arms are concerned, the Public Order Law adopted the definition of arms in conformity with Article 21 of the Somali Penal Code and provides for the control, collection, transportation, and sale of arms in general as well as for the keeping and carrying of arms subject to special licences.

F. Security Measures for Keeping the Peace

In the Criminal Procedure Ordinance applicable in the Northern Regions, there were provisions dealing with security measures for keeping the peace.[15] Similar provisions were included in the Public Order Law.

The measures relating to security for keeping the peace are of two types. The first is security for good behaviour, by means of which the danger of crimes or of serious disturbances of public order by socially dangerous persons is prevented by making such persons execute by order of a court a bond for their good conduct.[16] The second is preventive sequestration of property and animals. This measure is used to prevent acts of retaliation or vengeance following the commission or attempt of a crime against the life or safety of a person by guaranteeing compensation to the persons concerned by seizing the property or animals of persons who are presumably liable to pay such compensation.[17] Both security measures are of a preventive nature. While security for good behaviour prevents any future crime, preventive sequestration tends to eliminate the natural reaction of a person to retaliate against a crime committed by assuring him compensation for the crime.

14. *Id.* arts. 21-34.
15. Criminal Procedure Ordinance, §§ 88-107.
16. *Id.* arts. 66-68.
17. *Id.* art. 69.

G. Preventive Detention [18]

(1) INTRODUCTION

Preventive detention was provided for in the Public Order Law and in Law No. 1 of January 10, 1970.

Provisions relating to preventive detention are found, in some form or other, in most of the English-speaking countries such as Australia, Burma, Canada, Ceylon, India, Malaysia, New Zealand, Pakistan, Tanzania, and the United Kingdom. The main reason for retaining provisions relating to preventive detention is that the security of the State is not only threatened by war, but also by subversion, disorders, and national calamities; and everywhere it is recognized that preventive detention is a necessary evil and has come to stay.

(2) UNDER PUBLIC ORDER LAW

Under the Public Order Law, any person who is suspected of activities contrary to public order and security may, during a state of emergency, be detained without trial for a period not exceeding ninety days.[19] It is prescribed that such measures must be promptly notified to the competent Regional Court for confirmation within thirty days from such notification and that an appeal against the confirmation shall lie to the Supreme Court.[20]

18. *See* Haji N. A. Noor Muhammad, *supra* Pt. IV, Ch. 12, note 6, at 294-295.
19. Public Order Law, art. 71.
20. *Id.* art. 72.

As noted earlier, in *Abdi Jama v. the State*,[21] the Supreme Court ruled that the detention of the applicant was illegal on the grounds that the detention order had not been promptly notified to, nor confirmed by, the Regional Court as required by Article 72 of the Public Order Law.

(3) UNDER PREVENTIVE DETENTION LAW NO. 1 OF JANUARY 10, 1970

After the revolution, a new law governing preventive detention was enacted.[22] Under this law, whenever it is proved by evidence on oath to the satisfaction of the Regional or District Revolutionary Council that any person residing or being within the Region or District is conducting himself in such a manner as to be dangerous to the peace, order, or good government in the Republic, or is intriguing against the Supreme Revolutionary Council, or by word or action acts against the aims and spirit of the revolution, the Regional or District Revolutionary Council concerned or the National Security Service [23] may detain such person and report the matter to the Supreme Revolutionary Council stating the reasons therefor.[24] The Supreme Revolutionary Council may, for the reasons mentioned earlier, by decree, direct that such person be detained in such place or for such period as it may consider necessary or that he be removed from the limits of the district or region in which he ordinarily resides and detained in some other district or region.[25] No appeal lies against a detention decree. The Supreme Revolutionary Council may at any time revoke such decree.

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21. *See supra* Pt. V, Ch. 3, C(6).
22. Law No. 1 of Jan. 10, 1970.
23. The National Security Service was established by Law No. 14 of Feb. 15, 1970.
24. *Id.* arts. 1 & 2.
25. *Id.* art. 3.

H. State of Emergency and State of War

(1) STATE OF EMERGENCY

The Public Order Law deals with the state of emergency and the state of war.

A state of emergency may be proclaimed in cases of disturbance of public order, serious public calamity, or danger of war or disorders. In cases where such disturbance, calamity, or danger affects the whole territory of the State, the decree for the purpose must be issued by the Head of the State; in other cases, such decrees may be issued by the Secretary of State for Interior or by the Regional Governor. It was provided in Article 70 of the Public Order Law that the decree proclaiming the state of emergency must be forwarded on the same date to the National Assembly for confirmation. Since the revolution, such decrees are required to be forwarded to the Supreme Revolutionary Council for confirmation.

During the state of emergency, the Secretary of State for Interior or the Regional Governor, with the authorization of the Secretary of State for Interior, may by ordinance provisionally provide for: restrictions on the freedom of movement, propaganda, and strike; arrest, the search of persons or premises of persons suspected of a crime or activities contrary to public order and security;[26] requisition of property or services against equitable and timely compensation where such requisition is necessary to prevent public calamity, or succour a population in distress, or ensure the essential public services; the suspension or revocation of authorizations or licences to keep or carry arms or weapons normally used for offensive purposes.[27]

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26. For judicial protection against such measures *see supra* § G.
27. *Supra* note 19, art 71.

(2) STATE OF WAR

Article 74 of the Public Order Law provided for a state of war to be declared by the Head of the State subject to the prior approval of the National Assembly. Since the revolution, such measures are to be issued by the President of the Supreme Revolutionary Council, with the prior approval of the Supreme Revolutionary Council.

CHAPTER 5

LAW ON CREDIT INSTRUMENTS

A. In General

As noted earlier, in the field of mercantile law covering matters such as contracts, agency, partnership, sale of goods, negotiable instruments, patents and designs, trade marks, and bankruptcy, the Italian law applied in Italian Somalia and the Indian or English law applied in the British Somaliland Protectorate. After independence, an integrated law was issued only with respect to negotiable instruments, which are called credit instruments in the Republic.[1] With respect to other matters, the previous laws continue to be in force. The law on credit instruments has two annexes, Annex "A," dealing with bills of exchange and promissory notes, and Annex "B," dealing with checks and banker's drafts. The law follows closely the Italian law on the subject. The basic principles governing the subject are indicated below.

B. Credit Instruments

Credit instruments are of three kinds in point of form: bearer, order, or nominative, and they are transferable.

Bearer instruments may be converted into nominative instruments upon request. Similarly, nomina-

1. Legislative Decree No. 2 of Sept. 9, 1965.

tive instruments may be converted into bearer instruments upon request of the party whose name appears on the face of such instrument, except where such conversion has been expressly barred by the drawer.

Credit instruments issued in series may be consolidated into one multiple instrument by the drawer upon request of the holder, and multiple instruments may likewise be fragmented into minor amounts.

Credit instruments give the legitimate holder the right to get from the debtor, upon presenting the instrument, the performance provided therein. The debtor who carries out performance with respect to the holder of the instrument is discharged from the obligation even though the holder is not the owner of the instrument, provided that there is no intentional wrong or gross negligence on the part of the former. Anyone who acquires possession of a credit instrument in good faith is not subject to an action of replevin. A pledge, sequestration, pawn, or any other lien established in a credit instrument has no effect unless noted on the instrument itself.

A debtor may raise against the holder of a credit instrument defences such as those which are personal to such holder and those arising from forgery of his own signature, insufficient powers, or legal incapacity of representation at the time of issue, defects in form, and nonfulfillment of the conditions that are necessary for the plaintiff to exercise his right of action.

(1) INSTRUMENTS TO BEARER [2]

Instruments to bearer are transferable by delivery. The holder of an instrument to bearer is entitled to demand compliance mentioned therein upon presenting the instrument for payment.

2. *Id.* arts. 13-18.

(2) INSTRUMENTS TO ORDER [3]

The transfer of instruments to order is done by endorsement entered on the corresponding document and signed by the endorser. Conditions imposed in any endorsement will be considered ineffective, and partial endorsements are null and void. Endorsement constitutes a transfer of all rights inherent in the instrument. Acquisition of an order instrument by means other than endorsement has the effect of an assignment.

(3) NOMINATIVE INSTRUMENTS [4]

The holder of a nominative instrument is entitled to exercise the rights mentioned therein by reason of an entry in his favour recorded on the instrument and on the records of the issuing authority. Transfer of a nominative instrument is generally effected by entering the name of the purchaser on the instrument and on the records of the user. A nominative instrument may also be transferred on endorsement duly authenticated by a notary public or an exchange broker.

C. Bills of Exchange [5]

A bill of exchange is in the form of a signed and dated instrument in writing, whereby the drawer orders another person, the drawee, to pay a certain sum of money, at a fixed or determinable time, to or to the order of a specified person. It may be transferred by endorsement. Pending maturity, it may be presented to the drawee for acceptance. By accepting, the drawee undertakes to pay the bill of exchange at its maturity. Payment of a bill of exchange may be guaranteed by an *aval* as to the whole or part of its amount.

3. *Id.* arts. 19-30.
4. *Id.* arts. 31-37.
5. *Id.* Annex A, arts. 1-99.

A bill of exchange may be accepted or paid by a person who interferes for the honour of any debtor against whom a right of recourse exists.

In the event of nonacceptance, the holder can either wait until the bill matures or have recourse immediately to the drawer and the endorsers. In the latter case, he must first protest the bill for nonacceptance. In the former case, if the bill is not paid upon presentment, he must protest the bill for nonpayment before having recourse to the drawer and the endorsers. The protest must be drawn up by a notary public or by a law officer, and in areas where there is no notary public or law officer, by the Secretary of the Local Administration.

Actions regarding bills of exchange are of two kinds: "direct" or "by recourse." It is direct when it is against the accepting persons and their guarantors. It is "by recourse" when it is against any other party liable. The holder may exercise his right of recourse against the endorsers, the drawer, and other parties liable at maturity if the payment has not been made. He may exercise such right even before maturity: if there has been total or partial refusal to accept; or in the event of bankruptcy of the drawee, whether or not the latter has accepted the bill of exchange or in the event of a stoppage of payment on the part of the drawee, even when he has not been declared bankrupt by court or where execution has been levied against his goods without result; or in the event of the bankruptcy of the drawer of a nonacceptable bill.

All actions arising out of a bill of exchange against the acceptor are barred after three years from the date of maturity. Actions by the holder against the endorsers and against the drawer are barred after one year from the date of protest or from the date of maturity where there is a stipulation *retour sans frais.*

Actions by endorsers against each other and against the drawee are barred after six months from the date the endorser paid the bill or from the date when he himself was sued.

D. Promissory Notes [6]

A promissory note is an unconditional promise to pay a determinate sum of money. In general, promissory notes are governed by the rules relating to bills of exchange.

E. Checks [7]

A check is an instrument in writing whereby the drawer orders another person, who must be a banker, to pay a certain sum on demand to or to the order of a specified person or to the bearer. It is transferable by endorsement, which must be unconditional. Like the English check, it may be crossed with results similar to those in English law.

A check payable in the country in which it was issued must be presented for payment within eight days from the date of issue, and a check payable in a country other than that in which it was issued must be presented within a period of thirty days from the date of issue. If not paid on presentment, the check must be protested in the same way as the bill of exchange.

The drawee who pays an endorsable check is bound to verify the regularity of the series of endorsements but not the signature of the endorsers.

If a check is not paid on presentment, the holder may exercise his right of recourse against the endorsers, the drawer, and other parties liable within six months from the date of the expiry of the time limit fixed for presentment.

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6. *Id.* Annex A, arts. 100-105.
7. *Id.* Annex B, arts. 1-81.

F. Banker's Draft [8]

A banker's draft is an instrument of credit containing an unconditional promise to pay at sight a determinate sum of money to order issued by a credit institution and is payable at sight at an address indicated by the issuer. In general, a banker's draft is governed by the rules relating to bills of exchange. The holder of a banker's draft must present the instrument for payment within 30 days from the date of issue. His right of recourse against the issuer is barred after three years from the date of issue of the instrument.

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8. *Id.* Annex B, arts. 82-85.

CHAPTER 6

LAWS RELATING TO ECONOMIC DEVELOPMENT

A. In General

As noted earlier, soon after independence, the State assumed the responsibility of framing development plans for the all round development of the country.[1]

During the last decade, a remarkably comprehensive body of legislation has been built up. It provides the legal framework for the economic development of the country and for regulating the exploitation of its natural resources in the interest of national development.

The laws relating to economic development are dealt with in this chapter. Those regulating the exploitation of natural resources follow in the next chapter.

B. Legislation Relating to Planning

In order to advise the Government in the preparation of development plans, a Planning Committee for Economic and Social Development was established by Presidential Decree No. 261 of October 28, 1961. The committee was presided over by the Prime Minister and consisted of representatives of the ministries

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1. *See supra*, Pt. I, Ch. 2.

directly concerned with planning. The main functions of the committee included: preparing development plans; making recommendations with respect to the requirements, and ensuring the proper co-ordination and maximum utilization of foreign technical assistance, and other types of foreign aid; and supervising, revising, and appraising the implementation of development plans.

Since the revolution, the Planning Committee has not been reconstituted.

C. Laws Relating to Foreign Investment

Among the legislation enacted for the purpose of assisting the development of the economic life of the nation, the most notable is the Foreign Investment Law,[2] which was first enacted on the eve of independence of the former Trust Territory of Somalia and was applied only to the Southern Regions. It was extended to the whole of the Republic effective March 8, 1968.[3]

This law gives special protection to foreign assets invested in any sector of the national economy of the Republic. Any noncitizen who has invested, or intends to invest, such assets may obtain registration from the Committee on Foreign Investments presided over by the Secretary of State for Planning and Coordination, if the Committee is satisfied that the enterprise would further the economic development of, or benefit, the Republic. The Ministry of Finance is given the power to grant total or partial exemption from import or export duties, income tax, and municipal tax to any enterprise for a period up to five years. Machinery for new industry, farming, and mining exploration are exempt from import duties. Profits from investments recognized as productive (enterprises that engage in irrigation, improvement of land, establishment of factories, construction of aqueducts, and testing, analysing, and drilling activities in connection with oil and mineral exploration) may be transferred abroad freely up to a limit of fifteen percent a year of the capital invested; this transfer right is cumulative for a period of three years. Profits arising from other foreign investments may be transferred abroad up to a limit of ten percent a year of the capital invested, and the capital itself may be transferred abroad within three years, beginning seven years after the date of registration. Foreign personnel may also remit abroad up to 50 percent of emoluments. Enterprises approved under the law are exempt from appropriation, except in the public sector. In such case, equitable compensation is to be paid.

Furthermore, the Republic has, by Law No. 11 of February 8, 1967, ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, sponsored by the International Bank for Reconstruction and Development. Law No. 11 provides that the awards of the Arbitral Tribunal will have the effect of a final judgment of the Supreme Court of the Republic.

D. Foreign Economic Transactions Law

Regarding foreign exchange and foreign trade, there existed until recently two different systems. The system in the Southern Regions was restrictive, preferential treatment given to a wide range of transactions with Italy. The system in the Northern Regions was similar to the systems in certain Sterling area territories and was fairly liberal. A new law has been enacted unifying the two systems and laying the

2. Law No. 10 of Feb. 18, 1960.

3. Decree-law No. 3 of March 3, 1968, converted with amendments into law by Law No. 17 of June 15, 1968.

framework for a liberalized trade and payments system.[4] Foreign economic transactions are, in general, free from any restrictions except those expressly stated by law, including the requirement of obtaining a licence from the Ministry of Industry and Commerce. A Licensing Committee has been established to decide on applications for licences for transactions in goods, services, and capital, and an advisory committee has also been set up to advise the Ministry of Industry and Commerce on financial policy questions relating to the regulation and control of foreign economic transactions.

An interesting case regarding the Foreign Economic Transactions Law arose in *Società Agraria Coltivatori Agricoli (S.A.C.A.) v. the Minister of Industry and Commerce and La Società Agricola Somala (S.A.S.)*.[5] The Minister of Industry and Commerce issued a decree granting to S.A.S. an exclusive licence for the export of bananas to the countries on the Persian Gulf for a period of three years. S.A.C.A. contended that the export of bananas was not made subject to licence under the Regulations [6] issued under the Foreign Economic Transactions Law and that the impugned decree granting to S.A.S. an exclusive li-

4. Decree-law No. 12 of Sept. 26, 1964, converted into law with modifications by Law No. 8 of Oct. 29, 1964.

5. Administrative Petition No. 2 of 1966. *See* judgment of the Full Bench of the Supreme Court dated April 30, 1966, delivered by A. Peronaci, President.

6. Schedule 4 to Regulations, D.P.R. No. 203 of Sept. 26, 1964, provided that the export of live animals, meat and meat preparations, ghee, cereals and cereal preparations, skins exceeding Sh.So. 200 in value, animal and vegetable oils and fat, firewood, iron, cast iron and steel scrap, nonprocessed ivory and horns of rhinos exceeding Sh.So. 200 in value shall be subject to license. D.P.R. No. 89 of March 23, 1965, which was issued after the administrative petition referred to above was filed, provided that the export of bananas to the countries of the Middle East shall be subject to license.

cence to export bananas was therefore illegal. The State Attorney, while justifying the action of the Minister, *inter alia*, stated that certain provisions of the Foreign Economic Transactions Law give the Ministry the power to apply these provisions with discretion according to the spirit of the law.

The Supreme Court observed first that the Foreign Economic Transactions Law does not grant full power to the Ministry and hence the Ministry should act within the law. It further observed that the said law provides that restrictions and prohibitions may be imposed in the national interest, and that the purposes for which they may be imposed are also specifically enumerated in the law. The impugned decree did not mention any of the purposes specified in the law and the decree did not, therefore, appear to have been issued in the national interest, but as an unconstitutional privilege, which not only prejudiced the interest of private individuals but was, in general, contrary to the right of Somali citizens to free economic initiative, which is subject only to restrictions imposed by law. The Court therefore held that the impugned decree was illegal.

E. Law on the Control over Economic Activities

Before the Law on the Control over Economic Activities [7] in the Southern Regions of the Republic, economic activities such as industrial, commercial, and artisan activities were subject to licence under Ordinance No. 17 of September 15, 1951. In the Northern Regions, economic activities such as trading in general, trading in charcoal or lime, fish curing, gum and damask plantations, and mining were subject to licence.[8]

7. Law No. 10 of Jan. 16, 1969.

8. *See Mines, Forests, Agriculture and Fisheries*, 2 LAWS OF SOMALILAND Pt. I, Title XVII (1950).

Under the Law on the Control over Economic Activities, major economic activities, such as imports and exports, wholesale trade in inflammable material, banks, insurance companies, land, sea and air transports, ship loading and unloading companies, and pharmaceutical products and other industries of national importance or those employing more than twenty persons, are subject to ministerial authorizations. Other economic activities such as domestic wholesale, trade, petrol pumps and service stations, pharmacies and service drug stores are subject to the authorization of the Regional Governors territorially competent, while economic activities of a minor nature are subject to authorization of the Chairmen of Local Councils.

F. Laws Relating to Banks

Banks play an important role in the economic development of the country. Among the laws relating to banks, mention may be made of the Banking Law, and the laws governing the Somali National Bank, the Somali Development Bank, and the National Commercial Bank.

(1) BANKING LAW OF AUGUST 14, 1963

On August 14, 1963, a Banking Law [9] was enacted, which laid down the procedure for establishing credit institutions and created the necessary organs to control their activities.

National credit institutions, which are not established by special law, must have the form of companies limited by shares. Both national credit institutions and branches of foreign credit institutions may be established or operated in the Republic only with the prior authorization of the Savings and Credit Committee,

9. Law No. 18 of Aug. 14, 1963.

on the basis of recommendation of the Somali National Bank.[10]

Two control organs, *viz.*, the Savings and Credit Committee and the Somali National Bank have been established by the Law. The Savings and Credit Committee, presided over by the Secretary of State for Finance and consisting of the Secretaries of State for Industry and Commerce, Agriculture and Public Works, and the President of the Somali National Bank, issues general directives regarding credit policy with a view to harmonising the requirements of national economic development and governmental activities with savings and domestic credit possibilities.[11] The Somali National Bank supervises the working of the credit institutions and sees to it that the latter observe the recommendations of the Savings and Credit Committee.[12]

Authorization to issue shares and bonds within the Republic, to contract loans or obtain financial participations from abroad, and authorization to place in the Republic foreign government securities as well as foreign bonds and shares of all kinds must be granted by decree of the Secretary of State for Finance in conformity with the recommendation of the Savings and Credit Committee, having heard the opinion of the Somali National Bank.[13]

(2) SOMALI NATIONAL BANK LAW

The Somali National Bank is the central bank of the Republic.[14] It replaced the *Cassa per la Circolazione*

10. *Id.* arts. 6 & 7.
11. *Id.* art. 17.
12. *Id.* art. 19.
13. *Id.* art. 22.
14. The Somali National Bank was established by Decree-law No. 3 of June 30, 1960, converted into law by Law No. 3 of Jan. 13, 1961. The aforesaid law was repealed and replaced by

Monetaria della Somalia (CCMS), which served as the currency issuing authority in the Southern Regions from 1950 to 1961, and the East African Currency Board which served as the currency issuing authority in the Northern Regions from 1947 to 1961.[15]

The main objectives of the bank are to foster monetary stability, maintain the internal and external value of the Somali Shilling, promote credit and exchange conditions conducive to the balanced growth of the economy of the Republic and, within the limits of its powers, assist in the implementation of the financial and economic policies of the State.

As the central bank, the Somali National Bank was empowered to issue a new currency called the Somali Shilling, supervise and control all credit institutions, and manage the gold and foreign exchange reserves of the Republic.[16]

Decree-law No. 6 of Oct. 19, 1968, converted into law by Law No. 27 of Nov. 26, 1968.

15. During the colonial period in Italian Somalia, several currencies circulated including Maria Taresa Thaler (a typical commodity money coined in silver) and Indian rupees, which were replaced on Dec. 8, 1910, by the Italian silver rupee. In 1925, the Italian silver rupee was replaced by the Italian Lira. (*See* Decree No. 1143 of June 18, 1925.) During the Trusteeship Administration, a currency called *Somalo*, having the same gold parity as the East African Shilling, was issued and CCMS was created in Rome to handle the currency. (*See* Ordinance No. 14 of May 16, 1950.) The Bank of Italy was given the management of CCMS both in Italy and in the Trust Territory.

In British Somaliland Protectorate, the Indian rupee was made legal tender in 1937. (*See* Coinage Ordinance, 1937.) On Oct. 1, 1951, the Indian rupee was replaced by the British East African Shilling issued by the East African Currency Board. (*See* Coinage and Currency Ordinance, 1951.)

In 1961, a new currency called "Somali Shilling" was established under Decree-law No. 2 of March 6, 1961, converted into law by Law No. 13 of March 23, 1961. The parity of the Somali Shilling is 0.124414 grams of fine gold.

16. Decree-law No. 6 of Oct. 19, 1968, art. 41.

The bank may extend to the Government, in the form of either direct advances or the purchase of securities issued or guaranteed by the State, not exceeding 35 percent of the average of ordinary revenues collected by the State during the preceding three years, and may extend to public bodies credit not exceeding one-seventh of such ordinary revenue collected by them.[17] The bank is also empowered to make advances to the Government in anticipation of the receipt of external funds, and such advances must not exceed 50 percent of all such funds for which satisfactory commitments exist.[18]

As the central bank, the Somali National Bank also exercises credit control over banks[19] and other specified financial institutions.[20]

(3) SOMALI DEVELOPMENT BANK LAW

The Somali Development Bank was first established in 1968 to provide long-term finance required for various phases of economic development.[21] It has since been reorganized by Law No. 25 of April 30, 1970. Prior to its establishment, long-term finance was provided by the Development Loan Section of *Credito Somalo*, which was established in 1959 with a capitalization of Sh.So. 1 million wholly subscribed by the Government from the proceeds of a fifteen-year U.S.A.I.D. loan of Sh.So. 14.3 million.[22]

The objectives of the Somali Development Bank

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17. *Id.* art. 42.

18. Decree-law No. 3 of June 30, 1960, art. 6.

19. *Supra* note 16, art. 20.

20. *Id.* arts. 34 & 35.

21. The Somali Development Bank was established by Decree-law No. 2 of Feb. 1968, converted with amendments into law by Law No. 15 of May 30, 1968. The aforesaid law was repealed and replaced by Law No. 25 of April 30, 1970.

22. *Credito Somalo*, a state-owned financial institution established by Ordinance No. 3 of Feb. 22, 1954.

are to promote, assist, and develop or modernise productive enterprises in the agricultural, industrial, mining, tourist, fisheries, and livestock sectors, and in general to take any other initiative aimed at the economic development of the country with particular reference to the private sector and within the framework of development programmes and priorities established by the State.[23]

The bank has an authorized capital of Sh.So. 100 million divided into 100,000 shares, of the value of Sh.So. 1000 each.[24] It will not start operations until one-fifth of the capital has been subscribed. No shareholder except the Somali Government may own more than one-fourth of the bank's subscribed equity capital.[25]

The bank has taken over the Development Loan Section of *Credito Somolo*. All financial transactions relating to the management of the said Section are kept separate from the bank's other financial transactions.[26]

(4) THE COMMERCIAL BANK LAWS

Before the Somali National Bank Law of 1968, the Somali National Bank and *Credito Somalo* were doing commercial banking. The Somali National Bank Law of 1968 provided for the abolition of *Credito Somalo* and for its absorption by the Somali National Bank. It also contemplated the establishment of a separate commercial bank. Two laws have since been enacted establishing two State commerical banks. One is called the Somali Savings and Credit Bank and encompasses the commercial banking business of the Somali National Bank and the former branch of Banque

23. Law No. 25 of Feb. 22, 1954.
24. *Id.* art. 7.
25. *Id.* art. 13.
26. *Id.* art. 27.

de Port Said, which was nationalized and made an agency of the Somali National Bank by Law No. 26 of May 7, 1970. Another, the Somali Commercial Bank, takes over the commercial banking business of the former branches of Banco di Roma, Banco di Napoli, and National and Grindlays Bank, which were also nationalized by the law mentioned above and constituted into agencies of the Somali National Bank.[27]

G. Law on Cooperative Societies

The cooperative movement is of particular significance in the economic development of the country. Cooperative societies were governed in the Southern Regions by Articles 2411 to 2545 of the Italian Civil Code; there was no separate law governing the subject in the Northern Regions. The Cooperative Societies Law of 1969, which has repealed the former law, makes comprehensive provision for the constitution and regulation of cooperative societies.[28]

The Law applies to the following types of cooperative societies: agricultural cooperatives organized for purposes such as land improvement, production, irrigation, storage, marketing, and supply of means of production; livestock cooperatives organized for purposes such as livestock improvement, pasture improvement, *uars*,[29] and well construction and maintenance, marketing, and supply of means of production; agricultural saving and credit cooperatives. All other categories of cooperatives not mentioned above are governed by this law, pending the enactment of specific legislation.

A cooperative must be established by a public

27. Laws Nos. 1 and 2 of Dec. 11, 1970. For nationlisation of banks, *see infra* note 42.
28. Law No. 12 of Jan. 1969.
29. Somali-type water reservoirs.

deed and registered in the Office of the Registrar of Cooperatives.[30] All newly established cooperatives will be classified as "precooperatives." A registered precooperative may be approved by the Cooperative Office if during the trial period of operation it has been run well according to cooperative principles and has implemented some schemes based on self-help. An approved cooperative may receive additional credit and assistance from the Government banks or from any other source in order to expand its activities.[31]

The law imposed certain restrictions regarding the formation of cooperatives, the shares, and the membership. First, according to the law, the village is the natural unit on which a cooperative must be based. However, a cooperative may cover one or more villages.[32] Secondly, the par value of a share must not be less than Sh.So. 100 and must not exceed Sh.So. 1000.[33] Thirdly, the number of members must be at least 25.[34] Fourthly, no member may subscribe more than ten percent of the share capital when the number of members does not exceed 50 and more than five percent when the number exceeds 50.[35]

In order to encourage cooperatives, the law provides certain fiscal privileges. Cooperatives are exempt: from registration fee and stamp duty with respect to deeds of establishment and registration; from taxes with respect to transfer by way of sale, mortgage, or lease of immovable and movable property; from income tax on profits.[36]

Even though the members of a cooperative are

30. Law No. 12 of Jan. 1969, art. 8.
31. *Id.* art. 9.
32. *Id.* art. 3.
33. *Id.* art. 11.
34. *Supra* note 32.
35. *Supra* note 33.
36. *Id.* art. 27.

jointly and severally liable for the debts of the cooperative, such liability must not in any case exceed five times the par value of their shares.[37] Furthermore, the law also provides that so long as a cooperative exists, the shares of a member may not be attached by any creditor of such member.[38]

A cooperative may be liquidated upon a decision of an extraordinary general meeting approved by a two-thirds majority of the registered members. The Secretary of State for Rural Development may, when it is considered absolutely essential, and after hearing the opinion of the Cooperative Office, order the liquidation of any cooperative and appoint an official liquidator.[39]

Control over the cooperatives is exercised by the Secretary of State for Rural Development, who may delegate his power to the Cooperative Office.[40]

The Cooperative Office, besides exercising supervision over the cooperatives, provides technical assistance to them with the collaboration of specialised technical services and undertakes the training of technical and administrative personnel in order to meet the needs of the future development of the cooperative movement.[41]

H. Law Relating to Nationalization

The Somali Government has, effective May 7, 1970, nationalized the following enterprises and institutions: the Mogadiscio Electricity Company (SRIS); the Jowkar Sugar Factory (SNAI); oil distributing companies including Shell and Agip; insurance com-

37. *Id.* art. 4.
38. *Id.* art. 18.
39. *Id.* art. 28.
40. *Id.* art. 30.
41. *Id.* art. 6.

panies; and the branches of Banco di Roma, Banco di Napoli, National and Grindlays Bank, and Banque de Port Said.[42]

The President of the Supreme Revolutionary Council has stated that compensation will be granted in a satisfactory manner to all those who are affected by nationalization.[43] In a statement to the press, the Secretary of State for Industry and Commerce said that the main reason for nationalizing the said enterprises and institutions was "purely economic coupled with dissatisfaction with their services." [44]

Public bodies have been established to take over electricity supply, oil distribution, and insurance [45] while the branches of the foreign banks have for the time being been made agencies of the Somali National Bank.

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42. Law No. 26 of May 7, 1970.

43. See DAWN (May 8, 1970 — a Government English weekly).

44. *Id.*

45. *Ente Nazionale dell'Energia Elettrica* has taken over electricity supply; *Società Petrol-Somala* has taken over oil distribution; *Società Assicuratrice Nazionale* has taken over insurance. *See supra* note 42, arts. 1 & 2.

CHAPTER 7

LAWS RELATING TO EXPLOITATION OF NATURAL RESOURCES

A. In General

A large area of integrated legislation is concerned with regulating the exploitation of resources such as land, water, livestock, wildlife, forests, and minerals.

B. Laws Relating to Land

(1) LAW RELATING TO STATE OWNERSHIP OF AGRICULTURAL LANDS

As noted earlier, laws governing land is different in both parts of the Republic. Pending the enactment of a comprehensive law on the subject, a special law was issued relating to State ownership of agricultural lands.[1]

This law declares that all agricultural lands that are owned by foreigners and which have not been sold or rented, and all lands that were granted as concessions to individuals or to foreign companies prior to independence and which have not been utilized by their real owners are property of the State. It also requires the Government to grant material assistance to Somali farmers especially in the form of exemption from taxes on agricultural development projects.

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1. Law No. 4 of Jan. 30, 1967.

(2) LAND REFORMS COMMISSION OF 1965

In order to advise the Government on land policy, a Land Reform Commission was appointed on May 9, 1965, which submitted its report in September 1965. The report dealt with agrarian development, including demarcation and clearance of land and settlement of nomads, and agrarian reforms including a land tenure system, tenancy rights, land ceilings, prevention of fragmentation of land, protection of the interests of workers and landless labourers, and land taxation.

(3) DRAFT LAND LAW OF 1966

On the basis of the recommendations of the Land Reforms Commission, the Government submitted a draft land law to the National Assembly in 1966. The draft law, following the Italian pattern, divided land into *demanio, i.e.*, the state-owned land and private land, and subdivided state-owned land into public domain and public patrimony.[2] It provided for the registration of immovable properties in a land book established for the purpose. It prescribed that entries in the land book were subject to the prior authorization of the Land Section established in the Regional Court of Mogadiscio, appeals against the decisions of which lay to the Land Section of the Court of Appeal of Mogadiscio and to the Supreme Court. Under the draft law, agricultural land belonging to public patrimony could be leased to private individuals. The draft law also enjoined Government to take measures for encouraging the settlement of nomads on such land. Maximum and minimum land ceilings were fixed by the draft law.

As regards township land, the draft law declared that land in townships that does not belong to private individuals or juridical persons under a valid title

2. *See also supra* Pt. II, Ch. 5.

should form part of public patrimony. It provided that any right acquired by virtue of any lease previously granted would lapse, unless it was made conformable to the provisions of the new law within a period of two years. It also laid down the rights and duties of lessees and established maximum and minimum ceilings.

The draft law was not, however, approved by the Assembly. The enactment of a new law on the subject is under the active consideration of the Government.

(4) AGRICULTURAL DEVELOPMENT CORPORATION LAW

As part of its efforts to promote the expansion and diversification of agricultural production, the Government established an Agricultural Development Agency (ADA) in February 1966, which was superseded by the Agricultural Development Corporation (ADC) in 1970.[3] ADC has wide powers to promote agricultural development and production. Its functions are to extend farm credit, to assist in the consolidation of small agricultural holdings into economic units, to help in the formation of agricultural cooperatives, and to establish facilities for implementing agricultural price stabilization policies.

C. Laws Relating to Water

(1) WATER LAW OF 1966

In August 1966, a uniform Water Law was enacted with a view to providing for the most equitable and economic distribution of available water supplies.[4]

Water may be public or private property. Article 1 of Financial and Accounting Procedure of the State defines State property in water as "natural lakes, rivers, and streams, including those underground." Ca-

3. Law No. 34 of June 26, 1970.
4. Law No. 13 of Aug. 1, 1966.

nals and artificial bodies of water, natural springs, wells, public watering places, aqueducts, and fountains that do not belong to any public body or other juridical or physical person also belong to the State.

The Water Law enables the State to exercise an effective control over the utilization of water in excess of a maximum quantity to be established by regulations. Permits are also required for exploration for water, drilling of water wells, and constructing new structures for the utilization and distribution of water. A Register of Water Users has been established in the Water Department in the Ministry of Public Works, and in the register the nature and extent of the water rights granted are indicated. The law also contemplates the creation of Water Users' Associations for the purpose of securing the most beneficial use of water.

The law has established the necessary administrative machinery for the implementation of water control. The National Water Committee, consisting of the Secretaries of State concerned with the utilization of water, is responsible for the formulation of a general policy for developing and distributing the country's water resources. The Water Department in the Ministry of Public Works and the Regional Water Committees are responsible for the utilization of water, exploration for water, and drilling of wells.

(2) NATIONAL WATER AGENCY LAW

For supplying water to Mogadiscio, the Mogadiscio Water Agency was established in 1967.[5] It is financed by a U.S.A.I.D. loan. The Agency has been converted into a National Water Agency, whose functions include the operation of the water supply in Kismayu.[6] It may also undertake the running of other public utility services as authorized by Government.

5. Law No. 2 of Dec. 11, 1967.

D. Laws Relating to Livestock

(1) VETERINARY CODE

A uniform Veterinary Code has been enacted which governs matters such as prevention of notifiable diseases of animals, and the export, import, and transport of animals and animal products.[7]

The Code casts a duty on owners of animals, veterinarians, and police officers to report if there is any outbreak of a notifiable animal disease. The Secretary of State for Livestock may by decree declare any area to be an area infected by notifiable disease, and restrictions may be imposed regarding the movement and segregation of animals in such areas. The Director of Livestock may order the slaughter of infected animals and the disposal of carcasses. The Director or any veterinary officer may enter any land, building, vehicle, ship, or aircraft to check whether any animal is infected with any notifiable disease. In view of the prevalence of notifiable diseases, the Government may prohibit the importation of any specified kind of animals. Preventive vaccination against infectious and contagious diseases of livestock is compulsory and free of charge.[8]

The Secretary of State for Livestock may by agreement with the Secretaries of State for Industry and Commerce, and Interior, establish, regulate, and control markets for animals and animal products exported from the Republic. No camels, cattle, sheep, or goats or any other animal may be exported from the

6. The law is in the process of publication.
7. Law No. 20 of June 27, 1967.
8. *Id.* arts. 6-18.

Republic unless they have been previously brought into a quarantine station or holding ground and detained there for a specified period for the purpose of vaccination or treatment. At the end of that period a veterinary officer will examine the animals and issue the necessary certificate if they are in good health and free from contagious diseases. Animals leaving a quarantine station or holding ground for export must remain under the supervision of the Port Veterinary Officer until they are exported.[9]

The Code also prescribes that all livestock meant for export must be taken to the holding grounds or quarantine stations only through certain authorized routes and must be subjected to inspection by veterinary officers at the check posts. Vehicles and ships carrying livestock must possess a special permit issued by the Secretary of State for Livestock, stating the maximum number of livestock that may be carried by the particular transport. There are special provisions in the Code for ensuring the welfare of animals during transport.[10]

The Code generally prohibits the export of female animals. However, the Secretary of State for Livestock may issue special permits for their export.[11]

(2) LIVESTOCK DEVELOPMENT AGENCY LAW

Recognizing the growing importance of livestock in the country's economy as well as its long-term prospects as a source of export earnings, the Government has established a Livestock Development Agency (LDA).[12] The Agency's functions cover all aspects of

9. *Id.* arts. 19-26.
10. *Id.* arts. 27-29.
11. *Id.* art. 30.
12. Decree-law No. 2 of Feb. 16, 1966, converted into law by Law No. 3 of March 21, 1966. This law was superseded by Law No. 34 of June 26, 1970.

the development of livestock production and marketing. It has set up holding grounds to facilitate the regular flow of graded and inspected cattle for the meat canning factory at Kismayu as well as quarantine stations for enforcing the application of international health standards with respect to these animals. The other important functions of LDA include the enforcement of quality control and the rationalization of marketing of livestock.

E. Law on Fauna (Hunting) and Forest Conservation

Wild life and forests are an important part of the resources of the Republic and uniform legislation was enacted in 1969 governing them.[13]

This law has established game reserves, controlled areas, and partial game reserves. It provides that no one may enter, or reside in, any game reserve nor hunt, kill or capture any animal in a controlled area or partial game reserve without a licence issued by the Secretary of State for Rural Development. The law also prescribes in schedules a large number of animals and birds that may not be hunted, captured, or killed. One may, however, kill or injure a dangerous animal in self-defence or if an animal is declared a dangerous animal. Various kinds of game licences are prescribed by the law and are issued subject to the payment of stipulated fees. Trophies such as ivory and rhinoceros horn must be produced before a licencing officer, who will issue a certificate of ownership to enable the owner to export them from the Republic.

The Government may declare any area as a forest

13. Law No. 15 of Jan. 25, 1969. This law repealed the Game Ordinance No. 18 of 1966, and 2 FOREST ORDINANCE LAWS OF SOMALILAND, 1950, Ch. 122, of the Northern Regions, and Ordinance No. 26 of Dec. 6, 1952, of the Southern Regions governing hunting.

reserve and impose restrictions. No one may occupy or utilize any land in such a reserve or collect any produce therefrom without a licence or other lawful authority. The Secretary of State for Rural Development may by decree declare as reserved any tree or class of tree in any unrestricted area and no one may cut, damage, or remove any such tree without licence or other lawful authority.

The Secretary of State for Rural Development may appoint honorary Game Rangers and Forest Officers.

He has also the power to declare any area as a grazing reserve for the purpose of controlling grazing in such area.

F. Law Relating to Fishing

Sea fishing is governed by the Maritime Code.[14] Sea fishing is divided into two classes: major and minor fishing activities. The former class relates to activities carried out exclusively by means of fixed plants, large nets for catching large size fish, and trawling on the high sea carried out with any mechanically propelled vessel. The latter covers other fishing activities including fishing for mother-of-pearl and other industrially exploitable shells. Major fishing activities in the territorial sea and permanent breeding of fish and other aquatic animals are subject to a concession issued by decree of the Secretary of State for Communications and Transport. Such decree is valid for a period of nine years but renewable for similar periods and subject to the payment of annual rent. Licences

14. Maritime Code, Legislative Decree No. 1 of Feb. 21, 1959, which was extended to the whole territory of the Republic with amendments by Decree-law No. 7 of Nov. 1, 1966, converted with amendments into law by Law No. 3 of Jan. 7, 1967. *See* arts. 66-72.

for minor fishing activities are issued by the Maritime Authority. They are valid for one year but renewable annually upon payment of the prescribed fees. Licences are not required for fishing by conventional means. Supervision of fishing and the enforcement of regulations relating thereto is done by the Maritime Authority.

G. Mining Code

Until 1970, mining was governed by colonial legislation.[15] A new Mining Code was approved by Law No. 77 of November 22, 1970, which unified the law on the subject in both parts of the Republic.

The Code deals with all minerals including petroleum, natural gas, and similar hydrocarbon substances.

Under the Code, the entire prospecting in, and control of, minerals is vested in the State, both upon the land and under the sea to a point where the sea is 200 meters in depth, the foreseeable limit of development at the present time.

The Code envisages the following stages of authorized operations for minerals, excluding mineral oil:

(i) prospecting permit to authorize a prospector to search for minerals and test the value of his discoveries;

(ii) an exclusive prospective licence granted initially for one year to the prospector over the area of his discovery to enable him to carry out unhampered more exclusive test work.

15. Mining Ordinance No. 13 of Aug. 15, 1951, applies in the Southern Regions. The following apply in the Northern Regions: Mining Ordinance No. 19 of 1953; Mineral Oil Mining Ordinance, 2 LAWS OF SOMALILAND Ch. 124 (1950); Control of Quarrying (No. 2) Ordinance No. 15 of 1951.

The Secretary of State for Mining may at his discretion renew the licence up to a total period of five years. The area for such licence is limited to eight square miles; however, a larger licence may be granted under special conditions as may be considered fit;

(iii) a mining permit essentially for the small scale miner, quarrying operations, and the like to be granted on an annual basis to permit regular extraction and sale of minerals from deposits worthy of small-scale commercial developments;

(iv) a mining lease, for more extensive mining operations of a longer term, likely to be undertaken by companies for periods of five to 21 years, and renewable if the mine has promise of longer life.

The stages of authorized operations contemplated in the Code for mineral oil (petroleum, natural gas, etc.) are the following:

(i) an oil exploration permit to allow initial exploration by geologists, aerial survey, etc., to locate areas favourable for closer examination and drilling;

(ii) an oil prospecting permit over an area not exceeding 500 square miles in which test drilling to locate oil is to be undertaken;

(iii) an oil mining lease, to authorize commercial extraction of oil upon discovery, limited in extent to 160 square miles.

In suitable cases, an area up to 500 square miles may be granted to cover a very large oil field.

The exploration permits and the prospecting permits for mineral oil are granted initially for a period of two years, but they may be extended at the discretion of the Government for three further terms of one

year each. The oil mining leases are granted for an initial term of 30 years and may be renewed up to a maximum of 60 years total duration.

The Code envisages a registry of all prospecting and mining rights to be maintained by the Director of Mining, the registry to be open to public inspection.

The Code safeguards the position of persons having lawful interest in the surface of the land which is the subject of prospecting or mining operations by providing for compensation and the deposit of sums as security against damage.

All minerals obtained in prospecting or mining are liable to prescribed royalties, and cannot be exported until such royalties have been paid or adequately secured. There is discretionary power to permit small quantities to be exported as commercial samples, scientific specimens, or for assay purposes.

Some provisions in the Code are of special legal interest. First, no legal proceedings whatsoever lie against the Director of Mines or any authorized officer on account of anything done in good faith in the execution of duty under the Code. Secondly, wide discretion is conferred on the Director of Mines to determine disputes involving prospectors and miners with respect to area, boundary, or beacon. Thirdly, only Regional Courts territorially competent are given original jurisdiction over controversies arising under the Code.

CHAPTER 8

LAWS RELATING TO COMMUNICATIONS

A. In General

There is no railroad in the Republic. Integrated legislation relating to communications enacted since independence govern land transport, civil aviation, maritime shipping, and post and telecommunications.

B. Laws Relating to Land Transport

The Law on the Control over Economic Activities governs land transport. Under this law, passenger bus and freight truck transport services with more than ten vehicles are subject to authorisation by the Secretary of State for Communications and Transport. Such services with ten or fewer vehicles are subject to authorisation by the Regional Governors. Authorisation for buses and trucks for town service, taxi cabs, cars for hire, and animal-driven vehicles is issued by the Local Administrations within whose limits they operate.[1]

C. Laws Relating to Civil Aviation

(1) Civil Aviation Law

A uniform Civil Aviation Law was enacted in 1965.[2] The law gives the Secretary of State for Communications and Transport the power to adopt the necessary measures to ensure the development of civil aviation and promote safety and efficiency in the use of civil aircraft, and to exercise the necessary control. The Secretary of State may establish and operate airports and provide and maintain in connection therewith roads, approaches, buildings, installations, and apparatuses and may, in agreement with the Secretary of State for Finance, establish landing and parking fees and charges for services rendered in the airports. He is authorised to provide for the registration of aircraft for civil aviation and the issuance of certificates of air worthiness, as well as licences and certificates to pilots and other civil aviation personnel. The power to grant concessions for the establishment and operation of civil airlines and to grant general or special authorisation to foreign civil aircraft to overfly or land in the territory of the Republic is vested in the Secretary of State.

The Secretary of State has the power to arrange for the investigation of civil aviation accidents occurring within the territory of the Republic or its air space and those occurring outside the national territory and air space in cases where aircraft registered in the Republic are involved. The Secretary of State is also required to take measures for implementing the Convention on International Civil Aviation of December 7, 1944, the Convention of the World Meteorological Organisation of October 11, 1947, and any other convention on the same or related subjects to which the Republic may become a party.

An advisory commission consisting of a Chairman and four members has been appointed to make investigation on petitions and claims relating to civil air navigation and related services and advise on matters relating to civil aviation and air navigation.

1. Law No. 10 of Jan. 16, 1969, arts. 3-5.
2. Decree-law No. 13 of Sept. 9, 1965, converted into law by Law No. 18 of Nov. 21, 1965.

(2) SOMALI AIRLINES

On the basis of a Convention dated July 15, 1963, between the Somali Government and Alitalia,[3] the the Somali Airlines was established with a share capital of Sh.So. 1 million divided into 2,000 shares of Sh.So. 500 each, the Somali Government having 50 percent of the shares, which was equivalent to the value of the three Douglas DC3 aircraft provided by the Government, while 50 percent of the shares belonged to Alitalia. By a subsequent Convention dated February 15, 1970,[4] the share capital was increased to Sh.So. 1,600,000 divided into 3,200 shares of Sh.So. 500 each, the Somali Government having 51 percent of the shares, and Alitalia having 49 percent of the shares.

The Somali Government has undertaken to give Somali Airlines the exclusive right of traffic in all internal lines and also in international routes in which aircraft flying the Somali flag can operate.

The administration of Somali Airlines is under the terms of the second Convention handed over to Somali citizens with effect from January 1, 1970.

D. Laws Relating to Maritime Shipping

(1) MARITIME CODE

Carriage of goods by sea in the Southern Regions of the Republic was governed by the Maritime Code approved by Legislative Decree No. 1 of February 21, 1959, and in the Northern Regions by the Carriage of Goods by Sea Ordinance, Ordinance No. 6 of 1926. The

3. The convention was approved by D.P.R. No. 294 of Nov. 6, 1963.

4. Convention dated Feb. 15, 1970, approved by Decree of the President of the Supreme Revolutionary Council, No. 37 dated Feb. 21, 1970.

Maritime Code referred to above was amended and extended in 1966 to the whole territory of the Republic.[5]

The Maritime Code defines the territorial sea. It provides:

> Subject to the generally accepted rules of international law, the portion of sea to the extent of twelve nautical miles within the continental and insular coasts shall be under the sovereignty of the State. The extent shall be measured from the coastal line along the land-water mark[6]

For purposes of maritime administration, the shares of the State territory are considered a single maritime circumscription including the Maritime Sections of Kismayu, Merca, Mogadiscio, Bossaso, Las Koreh, Mait, Berbera, and the Maritime branch offices of Brava, Adale, Obbia, Eil, Bender Beila, Hafun, Hordia, Bargal, Alula, Candala, Elayu, Heis, and Zeila.

The Maritime Authority in the Ministry of Communications and Transport deals with maritime matters. Under the law, the administrative duties of the Maritime Authority may be performed in foreign countries by registration agents [7] appointed from time to time by decree of the Secretary of State for Communications and Transport. Registration, documentation, or enrolment of vessels will be done if such vessels comply with international standards. Any sea-going vessel, wherever built, and owned by a citizen or a foreigner, is eligible for documentation.

The Maritime Code fixes the registration fees and annual tax payable by ships and contains detailed pro-

5. Decree-law No. 7 of Nov. 1, 1966, converted with amendments into law by Law No. 3 of Jan. 7, 1967.

6. *Id.* art. 3.

7. *Société Pour le Developement des Rellations Internationales* (S.O.D.E.R.I.), a firm in Paris, is the registration agent of the Republic, and registers ships flying the Somali flag.

visions relating to documentation of ships including their identification, transfer, preferred ship mortgages, and maritime liens.

The Code gives the Government the power to enter into international agreements for the reporting, marking, and removing of dangerous wrecks, derelicts, and other menaces to navigation in the Indian Ocean outside the coastal waters of the Republic.

The Code contains provisions governing manning requirements and crew complements.

(2) SOMALI PORT AUTHORITY

The Somali Port Authority was established in 1962 to administer all port areas.[8] It provides for the construction, modernization, and maintenance of port works and equipment and administers all normal maritime services.

E. Laws Relating to Post and Telecommunications

A uniform Postal Law was enacted in 1967.[9] Under the law, the Secretary of State for Communications and Transport is required to provide for conveyance of letter post items and postal parcels and the issue and payment of money orders and postal orders. The law ensures freedom of written correspondence and of any other means of communication. The Post and Telecommunications Department is given the exclusive right of conveying all letter post items from one place to another. The Secretary of State for Communications and Transport may, in consultation with the Secretary of State for Finance, establish internal and external tariffs. The external tariff must, however, conform to international conventions and agreements. The Secretary

8. Law No. 19 of June 14, 1962. This law was superseded by Law No. 70 of Nov. 22, 1970.
9. Law No. 21 of July 23, 1967.

of State for Communications and Transport may make regulations for matters such as registration and insurance of letter post items, money orders, postal orders, and postal parcels.

Uniform postal,[10] telephone [11] and external telegraph [12] tariffs have been issued.

The Republic has ratified the General Regulation of the Universal Postal Union,[13] the International Telecommunications Convention (Montreux 1965), and the International Telecommunications Telephone Regulations (Geneva Revision 1958), the Telegraph Regulations (Geneva Revision 1958), and the Radio Regulations (Geneva 1959).[14]

10. Postal Tariffs D.P.R. No. 276 of Aug. 30, 1965.
11. Telephone Tariff D.P.R. No. 58 of March 16, 1966.
12. External Telegraph Tariffs D.P.R. No. 49 of Feb. 22, 1968.
13. D.P.R. No. 44 of Feb. 22, 1968.
14. Decree of the Supreme Revolutionary Council, No. 43 of Jan. 24, 1970.

CHAPTER 9

LAWS RELATING TO TAXATION

A. In General
B. General Characteristics of the Tax System
C. Indirect Taxes
D. Direct Taxes
E. Tax Exemptions

A. In General

The Republic inherited at the time of its independence two different tax systems.

The tax system in Italian Somalia consisted mainly of customs duty,[1] income tax [2] and tax on dwellings.[3] A state monopoly was also established with respect to tobacco and matches.[4]

The tax system in the British Somaliland Protectorate, on the other hand, included customs duty,[5] business profits tax [6] and house tax.[7]

With a view to integrate the tax systems, a unified customs law [8] and a unified tariff [9] were issued,

1. Customs duty was levied under Italian customs law which was extended to the Colony. *See* Royal Decree No. 2049 of July 12, 1938, *Ordinamento Doqanale per l'Africa Orientale Italiana* and Ministerial Decree of March 15, 1939, *Norme che Roqolano le Importazioni e le Esportazioni Temporanee in Africa Orientale Italiana.*

2. Governor's Decree No. 1206 of Oct. 13, 1938, which was substituted by Law No. 15 of Nov. 16, 1956. An additional income tax was imposed by Legislative Decree No. 4 of May 5, 1960.

3. Law No. 16 of Nov. 26, 1957.

4. Ordinance No. 18 of July 30, 1955.

5. Customs Ordinance, 1937, which was substituted by Customs Ordinance No. 5 of 1952.

6. Business Profits Tax Ordinance No. 13 of 1955.

7. House Tax Ordinance No. 2 of 1952.

8. Legislative Decree No. 1 of March 31, 1961.

9. Decree-law No. 5 of April 11, 1963, converted into law by Law No. 7 of June 10, 1963. This was substituted by Legislative Decree No. 5 of Dec. 11, 1968.

and the latter established a single scale for storage charges, port dues, excise duty, and surcharge on sugar and alcohol. Preferential tariffs on foreign goods imported into the country were also abolished.[10] This step was taken in pursuance of the obligations imposed on the Republic by its association with the European Economic Community and by its accession to Bretton Woods institutions, in particular to the International Monetary Fund. The State monopoly on tobacco and matches, the Income Tax Law and the Additional Income Tax Law, which were applicable only in the Southern Regions were extended throughout the Republic.[11] The whole structure of direct taxation was streamlined by a law issued at the end of 1966.[12]

B. General Characteristics of the Tax System

As seen earlier, the economic structure of the country is characterised on the one hand by the subsistence economy typical of an agricultural and stock-raising population, essentially nomadic and widely spread all over the country, and on the other hand by market economy in the major urban centers. This peculiar feature of the national economy puts restraints on the activities of the State, particularly as regards its financial policy. The State can in fact raise revenue only on one part of the national economy, *viz.*, the market economy. In view of the economic background, indirect taxes on consumption account for a substantial part of the overall fiscal revenue. Besides, as the income of the population is also very low, the State has little money at its disposal.

Thus in the Somali Democratic Republic, the main

10. Decree-law No. 4 of March 18, 1962, converted into law by Law No. 9 of May 26, 1962.

11. Law No. 3 of Jan. 19, 1963.

12. Legislative Decree No. 5 of Nov. 5, 1966.

sources of revenue are: customs duties on import and export, constituting 60 percent of the State's revenue; excise duty on sugar, cigarettes, etc., giving about 21 percent; and income tax, contributing about seven percent.

The taxes payable to the State can be divided into the following categories: indirect taxes on consumption and business transactions and direct taxes.

C. Indirect Taxes

(1) INDIRECT TAXES ON CONSUMPTION

Indirect taxes on consumption include the customs duty, the administrative and statistical fees, the harbour tax, and the taxes on purchases and manufacturing.

Under the Customs Law, customs duty is payable by the owner of goods that enter or leave the territory of the State. Customs duty may be "ad valorem" or specific; in the latter case, the rate is calculated on the basis of the unit of measurement. The Customs Tariff [13] lists as many as 122 categories of goods on the import side and 27 on the export side, which are subject to customs duty.

Administrative and statistical fees are an additional tax at a rate of ten percent levied on the assessed value of imported goods subject to customs duty.

Harbour tax of 1.50 percent on the value of the goods is levied at the ports of Mogadiscio, Berbera, Bossaso, Kismayu, and Merca and of 0.30 percent is levied at the other ports.

Purchase tax is levied on a variety of urban goods, including passenger cars, fuel oil, wines and liquors, refrigerators and electrical household goods, jewelry, etc. This tax has varying rates ranging from fifteen

13. *Supra* note 9.

percent to 80 percent, the latter being chargeable on alcoholic drinks. The tax is virtually an import tax, the main purpose being to discourage imports.

Manufacturing taxes are taxes on the consumption of certain goods produced within the country, *viz.*, sugar and alcohol.

The State has the monopoly on tobacco and matches. It is the sole importer from whom the retail dealers buy. Prices fixed by the Government include a tax element of 150 to 235 percent and commission on wholesale and retail sales.

(2) INDIRECT TAXES ON BUSINESS TRANSACTIONS

Indirect taxes on business transactions include registration tax, succession tax, mortgage tax, stamp duty, circulation tax, and insurance tax.

Registration tax varies according to the subject matter of the deed concerned. Deeds of transfer of immovable property and of rights over immovable property require five percent registration tax, deeds of transfer of movable property two percent, tenders and contracts 1.50 percent, and lease contracts 0.50 percent.

Succession tax is levied on gratuitous transfer of property. The tax due on inheritance or gifts to relatives of the remotest degree is one percent, and those to persons other than relatives is two percent.

Mortgage tax is due at the rate of 0.50 percent with respect to registration, extension, cancellation, and recording in the mortgage register.

Stamp duty is of two types. It may be levied at a fixed rate of Sh.So. 5 or Sh.So. 3, depending on the nature of the document, and at a proportional rate of 0.50 percent on invoices, checks, etc.

The circulation tax is charged on motor vehicles circulating in the streets and public areas according to their horsepower rating, capacity in quintals, type,

and particular use. Proportional or fixed rates of the tax are levied with respect to each calendar year.

Before the revaluation, insurance tax was charged on the national and foreign insurance companies and their agents who were carrying on insurance activities in the Republic.[14] Unless otherwise stipulated, the insurance companies and their agents had the right to recover the amount of the tax from the persons insured with them. In the case of marine insurance, the rate of tax was two percent of the insurance premium, while the rate of tax on surface transport was four percent, and on fire insurance was nine percent.

D. Direct Taxes

Direct taxes[15] include income tax and tax on buildings. Income tax is levied on incomes of individuals and companies. Income up to Sh.So. 2,400 is exempt from income tax. The tax rate on salaried classes ranges from nine to 28 percent. Double taxation on both company profits and dividends is prohibited. There is an additional municipal tax on incomes.

E. Tax Exemptions

With a view to promoting economic development, certain tax exemptions have been provided by law.

New industries are exempt from income tax for a period of ten years. A 25 percent exemption on profits is also granted to industrial concerns, if the profits are reinvested in the same concern.

Import of equipment necessary for the first installation of industrial, agricultural, and mining enterprises is not subject to customs duty.[16]

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14. Insurance business was nationalised by Law No. 26 of May 7, 1970.
15. *Supra* note 12.
16. Law No. 26 of Nov. 10, 1961.

Furthermore, exemption from registration and mortgage taxes are granted to State-controlled companies for the promotion and development of this type of company.

CHAPTER 10

LABOUR LAW

A. In General
B. Labour Relations
C. Labour Welfare
D. Administering Authorities
E. Central Labour Commission
F. Administrative Jurisdiction of the Supreme Court

A. In General

Labour law, in its broad sense, is the law that affects working persons by virtue of their employment relationship. It may be divided into three branches, *viz.*: (i) labour relations dealing with the organization of labour and settlement of disputes arising out of the activities of organized labour; (ii) labour welfare dealing with the welfare of workers; and (iii) the branch dealing with the functions and powers of the authorities administering labour law.

Before a uniform labour law was adopted, the above matters were governed in the Southern Regions by the Labour Code of 1958.[1] There were many ordinances in the Northern Regions governing the subject.[2] The Labour Code of 1958 of the Southern Regions was extended throughout the Republic in 1964 and a revised Labour Code was issued in 1969.[3]

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1. Labour Code approved by Legislative Decree No. 25 of Nov. 15, 1958, was applicable.

2. In the Northern Regions, the following Ordinances were applicable: Contracts of Employment (Indigenous workers) Ordinance No. 6 of 1953; Employers Liability Ordinance, 2 LAWS OF SOMALILAND Ch. 106 (1950); Employment of Women, Young Persons and Children Ordinance, *Id.* Ch. 107; Minimum Wages Ordinance, *Id.* Ch. 109; Native Labour Ordinance, *Id.* Ch. 110; Trade Unions and Trade Disputes Ordinance, *Id.* Ch. 111; Workers Compensation Ordinance No. 7 of 1953.

3. The Labour Code of the Southern Regions, approved by Legislative Decree No. 25 of Nov. 15, 1958, was extended to the whole territory of the Republic by Law No. 2 of Jan. 9, 1964. The said Labour Code was repealed by the Labour Code approved by Legislative Decree No. 5 of Aug. 10, 1969.

The provisions of the Labour Code apply to all employers and workers, including those employed in the public service and public bodies insofar as any of their terms and conditions of service are not governed by any other law. They do not apply to Armed Forces, Police, or paramilitary forces of the State.[4]

The salient features of the Labour Code relating to the three branches of labour law mentioned earlier are dealt with below.

B. Labour Relations

(1) TRADE UNIONS, EMPLOYERS' ASSOCIATIONS, FEDERATIONS, AND CONFEDERATIONS [5]

The Labour Code contains detailed provisions regarding the organisation, functioning, and regulation of trade unions and employers' associations and their federations and confederations. It guarantees freedom of association and the right to join or withdraw from a union or association, and protects workers' and employers' associations from certain civil and criminal liabilities. The Code lays down a well-defined procedure for registration of trade unions and employers' associations.

An Office of the Registrar of Trade Unions and Employers' Associations was established, which ensures amongst other things that those organizations conduct their business in a lawful manner and ren-

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4. Labour Code approved by Legislative Decree No. 5 of Aug. 10, 1969, art. 2.

5. Id. Pt. II. Labour unions, employers' associations, and their federations and confederations have been abolished by the law abolishing associations. *See supra* Pt. VI, Ch. 4, note 8.

der their accounts properly and regularly. Those organizations are also required to keep themselves free from the influence of political parties and foreign bodies and are prohibited from accepting any financial aid from them. The Code lays down the rights and obligations of registered trade unions and registered employers' associations. In order to avoid outsiders' getting control over these unions and associations, the Code specifically provides that the office-bearers in these organizations must be persons who are actually working in the same occupation or trade or in related occupations or trades.

The Code lays down principles governing collective labour agreements and individual labour contracts. It stipulates the period of notice for the termination of contract of employment, annual gratuity, and death benefit.[6]

(2) RIGHT TO STRIKE, GO-SLOW AND LOCK-OUT [7]

The Code recognizes the right to strike, go-slow and lock-out; but such rights must be exercised within the limits laid down in the Code. First, such rights must not be exercised during a state of emergency. Secondly, such rights must be limited to the mere act of peaceful suspension of work; and any physical or moral coercion against persons or any violation of property rights are punishable. Thirdly, it is unlawful to exercise such rights unless seven days' notice is given after the conciliation or arbitration procedure is fully exhausted or the decision of the Court on the issues referred to it by any of the parties is given. In respect of essential services, the period of notice is increased to 15 days. Fourthly, it is unlawful to ex-

6. *Id.* Pt. III.

7. *Id.* Pt. X. The right to strike, go-slow, and lock-out has been temporarily suspended by Law No. 44 of Aug. 6, 1970.

ercise such rights during the pendency of conciliation, arbitration or court proceedings.

(3) SETTLEMENT OF LABOUR DISPUTES [8]

The Code lays down the terms and procedure for the settlement of individual and collective labor disputes by conciliation and arbitration through courts.

(a) Conciliation

An individual or collective labour dispute must be submitted by any of the parties to the competent District Labor Inspector for conciliation, and if it is not settled, the party concerned must refer the matter to the competent Regional Labour Inspector for a further attempt at conciliation. In case a collective labour dispute still remains unsettled, any of the parties may refer the matter to the Central Labour Inspector for conciliation. A collective labour dispute arising at the national level must be submitted by any of the parties to the Central Labour Inspector for conciliation and, where it is not settled, it must be referred to the Secretary of State for Labour.

(b) Arbitration by Court

Where the conciliation procedure referred to above has been fully exhausted and the dispute still remains unsettled, or where the dispute involves a question of law, any of the parties may refer the dispute to the competent Regional Court for arbitration. In the case of essential services, the Secretary of State for Labour has the right to refer a labour dispute to arbitration by court.

In order to avoid delay in the settlement of labour disputes, it is provided in the Code that a court to which a dispute has been referred for arbitration must decide it within ninety days and that the Supreme

8. *Id.* Pt. IX.

Court must decide any appeal filed against the award given by the Regional Court within thirty days.

C. Labour Welfare

Detailed provisions are included in the Code for ensuring labour welfare. The Code enjoins that in fixing remuneration, no discrimination may be made on account of age, sex, nationality, religion, or political or trade union activities. The Secretary of State for Labour is given the power to fix the minimum wage for any category of worker.[9]

The Code lays down conditions of work. It provides that the normal hours of work must not exceed eight hours a day or 48 hours a week. Special provisions are included regarding night work for women and young persons.

The Secretary of State for Labour may by decree prescribe the types of work prohibited for women, expectant and nursing mothers, children, and young persons. The Code provides for weekly rest, public holidays, and annual leave of fifteen days with pay.[10]

It is required by the Code that all factories, workshops, and other work places must be built, installed, equipped, and managed in such a way that the workers are properly protected against possible risks.[11]

Provisions are included in the Code to enable the labour authorities to effect strict supervision over the employment of labour. Any person who opens an industrial, commercial, or agricultural undertaking normally employing five or more persons must notify the competent District Labor Inspectorate about such opening.

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9. *Id.* Pt. V.
10. *Id.* Pt. VI.
11. *Id.* Pt. VII.

A work book is supplied to every worker by the District Labor Inspectorate free of charge. The work book will be in the custody of the employers and the worker is entitled to inspect it.

The Code also contains provisions regarding registration and placement of workers.

D. Administering Authorities [12]

The Labour Code contemplates the following administering authorities: (i) a Central Labour Authority, which is the Secretary of State for Labour; (ii) The Central Labour Inspector, who is the Director of the Labour Department; (iii) Regional Labour Inspectors; and (iv) District Labour Inspectors.

While it is the duty of all labour authorities to ensure compliance with the provisions of the Labour Code, special duties are assigned to each of the authorities. The Central Labour Authority assists on request in the drawing up of collective labour agreements and takes appropriate steps to settle by conciliation labour disputes at the national level or labour disputes of major importance. It directs the education and vocational training of workers and the placement of the unemployed, and is also responsible for all questions connected with employment relationship, conditions of work, employment of workers, manpower movements, and labour statistics. The Regional Labour Inspector and the District Inspector conciliate in labour disputes falling within their competence respectively, while the latter is also required to arrange for the placement of workers.

For purposes of inspection, the labour authorities may freely enter any work place without previous notice, interrogate any worker or employer, and re-

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12. *Id.* Pt. VIII.

quire the production of any relevant document. They may draw up reports of any breaches of the Code that they have observed. They may also request parties to a labour dispute to attend conciliation proceedings.

E. Central Labour Commission

A Central Labour Commission has also been established which is presided over by the Secretary of State for Labour and includes among its members the Directors-General of the Ministry of Labour, and of the Ministry of Planning and Coordination as well as two representatives each of the workers and the employers. The Commission may advise the Secretary of State for Labour on matters referred to it concerning the employment, conditions of service, and welfare of workers.[13]

F. Administrative Jurisdiction of the Supreme Court

The Labour Code gives the Supreme Court the exclusive administrative jurisdiction over appeals challenging the legality of the measures taken by the Secretary of State for Labour in labour matters.[14]

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13. *Id.* arts. 115 & 116.
14. *Id.* art. 142.

CHAPTER 11

LAWS RELATING TO LEGAL EDUCATION AND THE LEGAL PROFESSION

A. In General

There are several legal professions in the Republic. Even though most of the Judges, State Attorneys, Advocates, and Notaries Public have had a legal education and are called Jurists, they are members of distinct professions and only a minimal interchange of personnel occurs amongst them. Since legal education significantly affects the approach to law of the members of the various branches of the legal profession, it may be useful to indicate the facilities that are available in the Republic.

B. Law Relating to Legal Education

It was noted earlier that in the former Trust Territory of Somalia under Italian Administration, the University Institute of Mogadiscio was established in 1956 to provide higher education in law and economics for two years after secondary education. The legal subjects taught included private law, public law, Shariat law, civil law, commercial law, constitutional and comparative law, international law, criminal law, civil and criminal procedure and, labour law. After finishing their studies in the Institute, students went to Italian universities to complete their studies leading to degrees.

In the former British Somaliland Protectorate, no institution was established to impart higher education.

Since there were no facilities in the Republic for higher education leading to degrees, many students went to foreign countries. A study made in 1967 under the auspices of the Ministry of Planning and Coordination showed that 106 students were taking degrees in law and that three were undergoing training in law.

The following tables indicate the countries where the 106 students have been studying or undergoing training and their expected year of return:

Somali Students at Foreign Universities

East Germany	4
West Germany	1
Iraq	9
Italy	29
Morocco	2
Saudi Arabia	15
Sudan	4
United Arab Republic	7
United Kingdom	4
United States	2
USSR	28
Yugoslavia	1
Total	106

Expected Year of Return

1968	39
1969	17
1970	24
1971	11
1972	8
Not known	7
Total	106

With a view to providing degree courses in the Republic, a National University was established by Decree-law No. 10 of July 14, 1969) [1] and the University Institute was upgraded into a Faculty of Law and Economics offering courses in law and economics for a four-year period after completion of secondary school. The teaching staff is provided by the Padua University in Italy. The language of instruction is Italian and there is as yet no provision for teaching in English.

1. Decree-law No. 10 of July 14, 1969, was converted into law by Law No. 6 of Dec. 1, 1969.

The legal subjects taught in the Faculty in the first two years include: Introduction to Jurisprudence; Constitutional Law; Private Law; Shariat Law, Part I; Fiscal Laws; Administrative Law, Part I; Labour Law and Social Legislation; Penal Code, Part I; Criminal Procedure Code, Part I. The following subjects are taught in the third and fourth years: Comparative Law; Shariat Law, Part II; Civil Law; Penal Law, Part II; Criminal Procedure Code, Part II; Administrative Law, Part II; Commercial Law; Civil Procedure Code; Customary Law; International Law; International Organisations.

C. Law Relating to the Members of the Judiciary [2]

Judges are appointed after an open competitive examination. Selected candidates have to undergo practical training for one year. Candidates who are successful in the practical training are appointed as judges. Candidates with a *Takhasus* diploma [3] are eligible for appointment as assistant district judges, candidates with diplomas from the University Institute are eligible for appointment as district judges, and candidates with law degrees are eligible for appointment as district judges or assistant regional judges.

2. Law on the Organization of the Judiciary, 1962, arts. 15-25.

3. The *Takhasus* diploma is given by the Islamic Institute in Mogadiscio after a three-year course in Shariat Law. The medium of instruction is Arabic.

The posts of regional judges, senior judges, and first judges are filled by promotion. The President of the Supreme Court is appointed from among the first judges or from among senior judges who have served for at least four years as senior judges. However, under Law No. 14 of August 14, 1966, as an exceptional and temporary measure, a judge holding a university degree in law with five years' experience as a judge may be appointed as President of the Supreme Court; a judge with three years' experience may be appointed as Vice-President of the Supreme Court or as Attorney General, and judges with two years' experience may be appointed as first judges or Presidents of Courts of Appeal.

Although most of the members of the judiciary are career judges, the Law on the Organization of the Judiciary allows the direct appointment of eminent jurists, or university professors of law, or advocates with at least ten years' practice at the bar, as judges of the Supreme Court or as members of the Office of the Attorney General.

Foreign nationals may as a transitional measure be appointed as members of the Judiciary.[4] At present the judiciary includes two Sudanese judges and one Indian deputy attorney general.

D. Law Relating to the General State Counsel [5]

Apart from the judiciary (which includes the Office of the Attorney General, responsible for the investigation and prosecution of crimes), there is another legal office attached to the Government called

4. *Supra* note 2, art. 35.

5. Law on the Organization of the Government, art. 9; D.P.R. No. 13 of March 20, 1965, art. 8, as amended by D.P.R. No. 98 of June 29, 1967.

the Office of the General State Counsel.[6] It consists of the General State Attorney and two deputies.

The General State Attorney represents the State and provides legal advice to the State and to most of the state organs including local administrations and public bodies. He does not appear in criminal proceedings or in proceedings in which neither the State nor a state agency is a party. He has the custody of the Official Compilation of the Laws of the Republic and is in charge of the Official Bulletin. The Office of the General State Counsel enjoys considerable autonomy in its functioning.

E. Laws Relating to the Bar

There are at present eleven Advocates (Attorneys-at-Law) on the Ordinary Roll of the Supreme Court, 78 persons on the Special Roll, and four Advocates on the Roll of the Court of Appeal, Hargeisa. The Advocates can appear in all courts, while the persons on the Special Roll can appear in all courts except the Supreme Court in administrative cases. There is as yet no uniform law in the Republic governing legal practitioners and the Bar Council.

In the Southern Regions of the Republic, under Law No. 21 of June 27, 1958, legal practitioners are divided into three categories: Advocates, Solicitors, *(Procurators)*, and Shariatic Practitioners.

Persons with a degree in law from a recognized university or a diploma in Law and Economics from the University Institute of Mogadiscio, may, after serving as law apprentices for a period of at least two years, and after passing an examination conducted by the Bar Council, be enrolled as Advocates or Solicitors

6. The office of the General State Counsel was formerly known as *Avvocatura dello Stato*.

on the Ordinary Roll of Advocates and Solicitors kept in the Supreme Court.

Persons having a fair knowledge of Islamic law, as ascertained by a commission consisting of a judge as chairman and two Kadis as members appointed every year by the Secretary of State for Justice, are entered in the Special Roll of Shariatic Practitioners, which is kept in the Supreme Court and revised every year. The Shariatic practitioners whose names are entered in the said Roll may appear as counsel before the Civil Section of the District Courts, Regional Courts, and Courts of Appeal.

In particular cases, the President of the Supreme Court and the President of the Court of Appeal may, by a decree not subject to appeal, authorize the appearance of foreign Advocates, provided their names are entered in the Roll of their respective countries.

There is also a Bar Council composed of the President of the Supreme Court as Chairman, the Attorney General and one Advocate elected annually by the Advocates and Solicitors on the Roll of the Supreme Court.[7]

In the Northern Regions of the Republic, under the legal Practitioners Rules 1957, any of the following persons may apply to a judge of the Court of Appeal to be admitted to practise before the Court of Appeal, Regional Courts, and District Courts:

(1) Members of the Bar of England, Scotland, Northern Ireland, or the Republic of Ireland.

(2) Persons who have been admitted and are qualified to practise as advocates before:

(a) the Supreme Court of Canada, New Zealand, the Union of South Africa, Ceylon; or

7. Law on the Organization of the Judiciary approved by Ordinance No. 5 of Feb. 2, 1956, art. 95.

(b) the Federal High Court of Australia; or

(c) one of the High Courts of India or Pakistan; or

(d) before the Supreme Court or High Court within the jurisdiction of the Court of Appeal for Eastern Africa.

(3) Solicitors within the meaning of Section 3 or subsection (4) of Section 35 of the Colonial Solicitors Act 1900, admitted as Solicitors in England, Scotland, Northern Ireland, or the Republic of Ireland.

(4) Solicitors of the Supreme Court in England, Northern Ireland, or the Republic of Ireland, or Solicitors admitted to practise in Scotland.

Application to practise in the Northern Regions must be by petition to a judge of the Court of Appeal and must contain satisfactory proof of the qualifications of the applicant and such testimonials to character as the judge of the Court of Appeal may require. If the judge of the Court of Appeal is satisfied with the said qualifications and testimonials, he will by writing under his hand admit the applicant to practise. The Registrar of the Court of Appeal, upon production of an admission signed by a judge of the Court of Appeal and upon payment to him of the prescribed fee, will enter on the Roll the name of the person admitted. Every person admitted to practise is entitled to the title of "Advocate" and may continue to practise for so long as he takes out the annual certificate in accordance with the rules and is not struck off the roll.

A judge of the Court of Appeal may admit to practise on such terms (including the amount of fee payable) as he may think fit, temporarily, or for the purpose of any one case, any person who appears to him to be a fit and proper person to be admitted to practise.

F. Law Relating to Notaries Public [8]

Besides lawyers, there are in the Republic public officials known as notaries public appointed under Legislative Decree No. 1 of March 2, 1962.

The duties of the notaries public include drafting and authenticating important legal instruments such as wills, charters of companies, conveyances, and contracts, and drafting and presenting in court certain petitions in noncontentious matters. Frequently they are appointed by court order to take inventories, to draw up partition plans, to take custody of property attached, and to perform other duties in connection with litigations.

The keeping, filing, and indexing of notarial records are governed by law. Ordinarily, a notary must retain the original of any instrument that he prepares or that is filed with him. Upon demand he is required to give copies of instruments—except a will—that are in his official custody. A notarial copy usually has the same evidential value as an original.

A notarial act is conclusive evidence of three things: (a) that it was in fact so drafted and executed; (b) that the recitals and agreements expressed in the instrument are accurate reports of the parties' statements and agreements; and (c) that any fact that the instrument recites to have occurred in the presence

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8. In Italian Somalia, Notaries Public were first appointed under the Law on the Organization of the Judiciary approved by Royal Decree No. 937 of June 8, 1911, arts. 73-75. After independence, the aforesaid provisions were amended by Law No. 8 of Feb. 15, 1961.

In the British Somaliland Protectorate, registration of documents connected with immovable property was done (and is still being done) in the local District Office; and companies were registered in the Office of the Registrar of Companies.

A uniform law relating to the Notaries Public was enacted on March 2, 1962.

of the notary did occur, and any act the instrument recites to have been performed by the notary was in fact performed. The conclusive nature of a notarial act can be challenged only in a *querela di falso* (complaint of falsification), a special proceeding of a criminal nature.

Notaries public are appointed by decree of the Secretary of State for Justice after open competitive examinations from among candidates who possess a degree in law or a diploma of the University Institute or its equivalent.

The Notarial Council has its seat in the Court of Appeal in Mogadiscio and consists of the President of the Court of Appeal as Chairman, a member of the Office of the Attorney General, and a practising notary public nominated annually by the Secretary of State for Justice. The Council exercises overall supervision over the working of the notaries public. It has also the power to conduct disciplinary proceedings against them in matters arising out of their official functions, and has the right to warn, censure, and impose fines on them.

Although a notary is considered a public official, he receives no salary, but is remunerated by his clients. The fees to be charged are laid down by decree of the Secretary of State for Justice, in consultation with the Notarial Council.

CHAPTER 12

CONCLUSION

This book has endeavored to describe the development of the legal system of the Somali Democratic Republic.

The notable feature of this legal system is that it is essentially eclectic. It has retained without radical change the vital principles of Shariat law, while incorporating considerable modifications in customary law and institutions. It has also adopted, after careful scrutiny and with suitable changes, the received laws, which are part of the legacy from the colonial rule. The Republic has thus welded together Shariat law and what it deems worthy of preservation in its customary law and institutions with what is good in the colonial heritage—so as to make a stable, healthy, and viable whole most suitable to the needs of its egalitarian society.

Many authoritative works are available on the anthropology and sociology of the Somali people and their fascinating country, but so far little research has been done on its laws and institutions. The background material presented in these pages will, it is hoped, stimulate the interest of some scholar to accept the challenge of this unexplored field of study.

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