# THE SOMALI REPUBLIC: AN EXPERIMENT IN LEGAL INTEGRATION

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PAOLO CONTINI



FRANK CASS & CO. LTD.
1969

First published in 1969 by
FRANK CASS AND COMPANY LIMITED
67 Great Russell Street, London WC1

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SBN 7146 2395 4

Printed in Great Britain at
The Grange Press
Southwick, Sussex

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# PREFACE

ON June 26, 1960, the British Protectorate of Somaliland became the independent State of Somaliland. It was probably the shortest independence on record. Five days later, Somaliland joined with neighbouring Somalia, a United Nations Trust Territory under Italian Administration, which achieved independence on July 1, 1960, and together they formed a unitary State called the Somali Republic.

The Somali Republic has a total area of approximately 250,000 square miles and a population estimated at about 2.5 million. The size and population of the Northern Regions (the former British Protectorate of Somaliland) account for about one-fourth, whereas those of the Southern Regions (the former Trust Territory) account for approximately three fourths of the country as a whole. About 70 per cent of the people are nomadic or semi-nomadic herdsmen whose principal measure of wealth is the camel. The others are settled in the capital city of Mogadiscio, other towns, and in the agricultural areas bordering Somalia's two rivers, the Juba and the Uebi Shebeli.

The Somali language, with minor variations, is spoken throughout the country. About 99 per cent of the inhabitants are Muslims adhering to the Shafii School of Islam.

For three quarters of a century before the union the two territories comprising the Somali Republic had been administered by two different European states. The Northern laws and institutions were those of a British dependency; the South followed the Italian system developed during the colonial and trusteeship period.

For the new Republic to become a truly unitary state it was essential to bring about the legislative unification of the two parts of the country. In order to assist the Somali government in this endeavour a Consultative Commission for Integration (later re-named Consultative Commission for Legislation) was appointed in October 1960 by Presidential decree, and I had the honour of serving as chairman of the Commission from its establishment until the end of 1964.

After a survey of the steps leading to independence and the formation of the Somali Republic I have sought to describe the progress made in the process of legislative integration. This study attempts also to illustrate the interaction among the different legal systems co-existing in the country (common law, civil law, Islamic law and customary law) and their respective impact on the constitution, the laws and judicial decisions. Finally, there is a discussion of the role and rule of law in the Somali Republic.

This study is not intended to be a comprehensive survey of Somali law. It is based largely on the experience gained during my two assignments in Somalia, the first in 1957/58 as a member of the Technical Committee on the constitution and the second, after independence, as United Nations Legal Adviser to the Somali Government and chairman of the integration commission.

This bias is reflected both in the selection and in the treatment of the material included in this work. In describing the legislative and judicial developments since independence the main emphasis is on significant problems arising from the co-existence of different legal systems, and on the solutions adopted.

I should like to acknowledge my indebtedness to Dr. Haji N. A. Noor Muhammad, Legal Adviser to the Prime Minister of Somalia and formerly Vice-President of the Supreme Court, for making available his manuscript 'The Development of the Constitution of the Somali Republic' and other source material. I am also indebted to Mr. Martin Ganzglass, who was in Somalia from 1966 to 1968 with the Peace Corps as a legal adviser, for his helpful comments on the draft of this study. My special gratitude goes to my wife Jeanne for her patience and invaluable aid in editing and deobfuscating the text.

P.C.

Gobannimo dhowaatay
Oo labadan is u geynay e

Freedom and dignity have reached us,
We have brought together the two lands.

Anonymous Somali Poet

Reprinted from *Somali Poetry* by B. R. Andrzejewski and I. M. Lewis, pp. 148–149, Clarendon Press 1964.

CHAPTER I

# THE STEPS TOWARD INDEPENDENCE

## A. Italian Somalia

IN 1899 Italy established a protectorate over parts of the Somali coast on the Indian Ocean south of Cape Guardafui. In the succeeding years the Italian occupation and administrative control was gradually extended to cover the territory which became known as Italian Somalia.

In 1936 Somalia became part of the Italian East African Empire following Mussolini's conquest of Ethiopia. In 1941, during the Second World War, the Allies occupied the whole Italian Empire, and Somalia was placed under British military administration. In the Peace Treaty of February 10, 1947, Italy renounced all right and title to her territorial possessions in Africa. After the failure of the Four Powers to reach agreement on their disposition, the matter was referred to the General Assembly of the United Nations for a recommendation which the Four Powers agreed to accept as binding. In 1949 the General Assembly recommended[1] that Somalia should become independent after a ten-year trusteeship under Italian Administration.

The ten-year period was due to expire on December 2, 1960, but the General Assembly, on the request of the Somali Government supported by the Administering Authority, advanced the date of independence to July 1, 1960[2].

Italy had been given the specific mandate to administer the territory 'with a view to making the independence of the Territory effective at the end of ten years'[3]. Progress towards self-government and independence was gradual and carefully planned by the Italian Administering Authority with the 'aid and advice' of a United Nations Advisory Council consisting of Colombia, Egypt

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[1]General Assembly resolution 289 (IV) of November 21, 1949.
[2]General Assembly resolution 1418 (XIV) of December 5, 1959.
[3]Article 3 of the Trusteeship Agreement approved by General Assembly resolution 442 (V) of December 2, 1950.

and the Philippines[4]. At the beginning of the Trusteeship the Italian Administrator exercised full legislative and executive powers[5].

The first step towards self-government in the legislative field was taken at the end of 1950 with the establishment of a Territorial Council, an advisory body appointed by the Administrator[6]. In 1956 the Territorial Council was transformed into an elected Legislative Assembly consisting of sixty Somali deputies and ten deputies representing four foreign communities (Italians, Arabs, Indians and Pakistanis)[7]. The Assembly was given broad legislative powers subject, however, to final approval by the Administrator[8]. The first political elections were held in February 1956. While in the towns voting was by means of direct, male and secret suffrage, in rural areas the tribal councils (*shirs*) selected their electoral representatives who voted in the elections of the Assembly.

The second Legislative Assembly, consisting of ninety Somali deputies, was elected in March 1959 for a five-year term. This time a system of direct and secret voting was used in urban as well as rural areas, and women were given the right to vote[9].

A gradually increasing degree of executive authority was vested in the Somali Government, established in May 1956[10] and composed of Abdullahi Issa Mohamud as Prime Minister and six Ministries, later raised to nine[11]. In the second half of the Trusteeship period the Somalization of the top positions in the civil service was accelerated. By 1956 all the District and Regional

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[4]Article 2 of the Trusteeship Agreement provided that the Administering Authority 'shall be responsible to the United Nations for the peace, order and good government of the Territory' and 'shall be aided and advised by an Advisory Council composed of representatives of Colombia, Egypt and the Philippines'.

[5]Article 7 of the Trusteeship Agreement.

[6]Ordinance No. 144 of December 30, 1950.

[7]Ordinance No. 1 of January 5, 1956.

[8]Ordinance No. 2 of January 5, 1956.

[9]Law No. 26 of December 12, 1958.

[10]Law No. 1 of May 7, 1956.

[11]At the time of independence the Government was composed of the Prime Minister and the Ministries of Interior; Justice; Finance; Industry and Commerce; Public Works and Communications; Agriculture and Animal Husbandry; Education; Health, Veterinary Services and Labour; General Affairs. There were also two Ministers without Portfolio, one for relations with the Legislative Assembly, and the other for Constitutional and International Affairs.

Commissioners were Somalis, and Italian department heads were progressively replaced by Somalis. In December 1958 a Somali officer was appointed commander of the Police, and in March 1960 a National Army was established under a Somali commander.

At the local government level, the first municipal administration was established in the capital city of Mogadiscio in 1951[12] and was soon followed by others. The first election of Municipal Councils was held in 1954 and the second in 1958.

A judicial system for Somalia, entirely separate and independent from the Italian judiciary, was established in 1956[13], but at the date of independence the highest judicial posts were still held by Italians, owing to the lack of qualified Somali judges.

In the last three years of the Trusteeship period much time and effort was devoted to the preparation of a Constitution for the future independent State. For this purpose, a Technical Committee of experts was appointed by the Administrator in September 1957[14]. Between October 1957 and May 1959 the Technical Committee prepared a preliminary draft constitution of 141 articles, accompanied by a 316-page commentary. A revised and shorter draft constitution of 64 articles was prepared, with the assistance of an Italian expert, by Dr. Mohamed Scek Gabiou, who was appointed Minister for the Constitution in November 1959. Between April 4 and May 9, 1960 both drafts were examined in detail by a drafting Political Committee of fifty Somali members. The Committee approved a new draft of 100 articles and submitted it to the Constituent Assembly, comprising the ninety deputies of the Legislative Assembly and twenty additional Somali members. On May 23 the Constituent Assembly began its debate on the Political Committee's draft and approved it with a few changes. On June 21 the Constitution was adopted by acclamation by the Constituent Assembly and, upon being

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[12]Ordinance No. 9 of June 6, 1951.

[13]Ordinance No. 5 of February 2, 1956.

[14]Administrator's decree No. 140 of September 6, 1957. The Technical Committee, whose chairman was Professor G. A. Costanzo, comprised twenty-three members, including twelve Italian professors, government officials and judges, nine Somali officials and Kadis and two experts designated by the United Nations Advisory Council. The same decree established also a Political Committee which, however, never met and was superseded by the arrangement described in this chapter.

promulgated by the Provisional President of the Republic, it came into force on July 1, 1960[15].

Until independence the Administering Authority retained ultimate responsibility for foreign affairs, defence and security, and the Administrator had veto power with respect to laws adopted by the Legislative Assembly[16]. Nevertheless, as the foregoing sequence of events shows, in the last four years preceding independence the Somalis enjoyed a large measure of self-government and played a major role in the administration of the country and in the preparation of the Constitution.

### B. British Somaliland

The British Protectorate of Somaliland was established by means of a number of treaties of protection made by the British Government in 1894 and the following years with Somali clans inhabiting the African coast on the Gulf of Aden.

During the Second World War British Somaliland was captured by the Italians in August 1940, and seven months later (in March 1941) it was recaptured by the Allies. After a period of British military administration, civilian rule was re-established in 1948.

As there was no plan to grant early independence to the territory, progress towards self-government was slow until the second half of the fifties. Around that time, however, the pace was greatly accelerated owing chiefly to the growth of the nationalist

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[15]For a detailed account of the preparation of the Constitution see G. A. Costanzo, *Problemi Costituzionali della Somalia nella preparazione all'indipendenza (1957-1960)*, Giuffrè (1962). A textual analysis of each article of the Constitution and the preparatory work may be found in M. D'Antonio, *La Costituzione Somala – Precedenti storici e documenti costituzionali*, Presidenza del Consiglio dei Ministri, Roma (1962). See also R. Angeloni, *Diritto Costituzionale Somalo*, Giuffrè, Milano (1964). In English see N. A. Noor Muhammad, *The Development of the Constitution of the Somali Republic*, in the course of publication.

[16]However, as provided by Law No. 6 of January 8, 1960, this power did not apply to the Constituent Assembly. Accordingly, the text of the Constitution was not subject to the Administrator's approval.

movement and the approaching date of independence in the Trust Territory[17].

Until 1957 the Governor exercised full executive and legislative powers, and the only participation of the local inhabitants in the administration of the Territory on the national level was through an Advisory Council of appointed members representing all sections of the Somali community. In 1957, as a result of increased demands for self-government, a Legislative Council was established, consisting of eight official and *ex officio* (British) and six unofficial (Somali) members[18]; the latter were appointed by the Governor from a panel of candidates prepared by the Advisory Council. In March 1959, for the first time the unofficial members were elected rather than appointed; their number was increased to thirteen and that of the official and *ex officio* members to seventeen[19]. In November of the same year the elected members were increased to thirty-three and the appointed members were reduced to three[20].

After that, progress toward self-government proceeded even faster and the somalization of the civil service was greatly accelerated. In February 1960, a new Constitution was introduced[21]. While no change was made in the composition of the Legislative Council, an Executive Council was established, consisting of three *ex officio* members and four unofficial members appointed by the Governor from among the elected members of the Legislative Council. It was provided that the Executive Council 'shall be the principal instrument of policy' and its members 'shall be styled Ministers'. Elections for the new

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[17]An official description of events in British Somaliland during that period may be found in the Colonial Office's printed reports *Somaliland Protectorate 1956 and 1957*, H.M. Stationery Office, 1959, and *Somaliland 1958 and 1959*, H.M. Stationery Office, 1960. See also I. M. Lewis, *The Modern History of Somaliland*, Praeger, New York (1965), pp. 148-165, and S. Touval, *Somali Nationalism*, Harvard University Press, Cambridge, Mass. (1963), pp. 101-108.

[18]The Legislative Council had been established by the Somaliland (Constitution) Order in Council, 1955, which was made on February 10, 1955 but came into force more than two years later, on April 15, 1957.

[19]Somaliland (Constitution) Order in Council, 1959, in force on February 20, 1959.

[20]The Somaliland (Constitution) (No. 2) Order in Council, 1959, in force on November 21, 1959.

[21]Somaliland (Constitution) Order in Council, 1960, in force on February 16-20, 1960.

Legislative Council were held in February by universal adult male suffrage.

On April 6, 1960, the Legislative Council passed a resolution calling for 'independence and unification with Somalia' on July 1. At a conference held in London with the Somali Ministers in May, the British Government announced that the Protectorate would become independent on July 1, and the date was subsequently advanced to June 26, 1960, five days before the indepedence of the Trust Territory.

The last constitutional development was the enactment of the Somaliland Order in Council, 1960, with the Constitution of the independent State of Somaliland annexed to it. The Constitution, which came into force on June 26, established a Council of Ministers comprising a Prime Minister and three other Ministers, and a Legislative Assembly of thirty-three elected members. It was specified that the first Legislative Assembly would consist of the persons elected in 1959 to the Legislative Council, and that the four unofficial members of the Executive Council would become the members of the first Council of Ministers. Mohamed Haji Ibrahim Egal, who had been one of the unofficial members of the Executive Council and the Leader of Government Business in the Legislative Council, became Prime Minister of the State of Somaliland.

CHAPTER II

# THE UNION

## A. The union proclaimed

The decision to form a union was reached at a conference of Northern and Southern Somali leaders held in Mogadiscio between April 16 and 22, 1960. A joint communique issued at the end of the conference announced it had been agreed that the two territories would be united on July 1, 1960; the new Somali Republic would be a unitary, democratic and parliamentary State; the legislative bodies of the two territories would be merged into a National Assembly which would elect the President of the Republic; Mogadiscio would be the capital of the Republic and the seat of government; committees would be set up 'in order to investigate and propose convenient solutions to the problems connected with the administrative, financial and judicial systems now in force in the two Territories'; the United Nations would be asked 'to supply experts who may help in accelerating the integration of the two Territories'.

This programme constituted a formidable undertaking if one considers the already overcrowded agenda for the brief period of two months preceding independence. In the Trust Territory there was great pressure on Italian and Somali officials to arrange for an orderly transfer of powers five months earlier than the date originally fixed by the United Nations. Furthermore, even though there was no legal requirement to that effect, it was generally felt that, for the new State to be a truly sovereign and independent entity, the constitution should come into force not later than the first of July. When it was decided to unite with the Somaliland Protectorate, most of the political leaders of the Trust Territory were fully occupied with the proceedings of the Political Committee; and the work of the Constituent Assembly had not yet begun. Planning for the elaborate ceremonies celebrating independence also required a considerable amount of time and attention.

In the Somaliland Protectorate the British authorities and the Somali political leaders and civil servants were equally busy

hastening the preparation for independence on a date much earlier than anticipated.

Another complicating factor was that nobody had any official responsibility for laying the legal foundations for the union. The task of the United Nations and the Italian Government in the South, and of the British Government in the North, was confined to preparing the respective territories for independence and completing the transfer of powers on the appointed dates. Accordingly, in the period immediately preceding the union there was little, if any, consultation between the authorities ultimately responsible for the administration of the two territories.

In the circumstances, it is not surprising that, when what one author called 'the precipitate union'[22] came into being, there were several legal loose ends.

Having reached agreement at the Mogadiscio conference on the broad principles of the union, it was necessary to spell out its legal consequences. It was then planned that, following the proclamation of the independence of the Trust Territory, An Act of Union would be signed by the representatives of the independent States of Somaliland and Somalia[23]. This document would therefore be in the nature of an international agreement and would be legally binding on both States. To implement this plan, on June 18, 1960, during the last stage of the deliberations of the Constituent Assembly, the President of the Political Committee proposed the addition of the following clause in the Constitution:

> 'Immediately after signing the Act of Union of the two Somali Territories (Somalia and Somaliland), the new National Assembly[24] shall elect . . . a Provisional President of the Republic. . . .'

In the course of the discussion on this proposal, which was incorporated in the Transitional and Final Provisions of the Constitution[25], the President of the Constituent Assembly explained that the text of a proposed Act of Union had been received from the North. Apparently, it was intended that the

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[22]S. Touval, *op. cit.*, p. 110.

[23]See statements made by the President of the Political Committee and by the President of the Constituent Assembly at the 40th meeting of the Constituent Assembly on June 18, 1960 (Verbatim records of the Proceedings of the Constituent Assembly).

[24]It will be recalled that, as agreed at the Mogadiscio conference, the National Assembly was to comprise the legislative bodies of the two territories.

[25]Article I, paragraph 2 of the Transitional and Final Provisions.

document would be signed by representatives of the two States after approval by the Legislative Assembly of the South.

What actually happened, however, differed from the plan and from the above-mentioned provision of the Constitution. On June 27, the day after its independence, Somaliland's Legislative Assembly passed 'The Union of Somaliland and Somalia Law'[26], incorporating the proposed Act of Union previously sent to Mogadiscio. Section 1(a) stated that 'The State of Somaliland and the State of Somalia do hereby unite and shall forever remain united in a new, independent, democratic, unitary republic the name whereof shall be the SOMALI REPUBLIC'. The law contained detailed provisions concerning the 'conditions of union', citizenship, the Head of State, executive and legislative powers, the application of the Constitution, succession to rights and liabilities and other matters. This instrument was adopted as a law having effect only in the State of Somaliland. However, the preamble contained the following wording: 'NOW, we the signatories hereof being the duly authorized representatives of the peoples of Somaliland and Somalia and having vested in us the power to make and enter into this Law on behalf of our respective States and peoples do hereby solemnly and in the name of God the Compassionate and Merciful agree as follows'. This rather ambiguous clause apparently indicated an intent that the instrument would be signed by the representatives of Somaliland and Somalia, thus becoming binding on both. However, as it was not signed by the representatives of Somalia, it never acquired legal force in that territory.

On June 30 the Legislative Assembly of the Trust Territory met for the purpose of adopting an *Atto di Unione* (Act of Union), as had been announced at the June 18 meeting of the Constituent Assembly. Although the *Atto di Unione* was similar to the Union of Somaliland and Somalia Law, there were some significant differences between the two texts. After prolonged debate, in the evening of June 30 the Assembly approved the *Atto di Unione* 'in principle' and requested 'the Government of Somalia to establish with the Government of Somaliland a definitive single text of the Act of Union, to be submitted to the National Assembly for approval'. Apparently, it was envisioned that the adoption of the Act of Union by the National Assembly would constitute, in

[26]Law No. 1 of 1960.

effect, the 'signing of the Act of Union' which, according to the Transitional and Final Provisions of the Constitution, was supposed to precede the election of the Provisional President of the Republic.

The Legislative Assembly adjourned only a few hours before the day in which independence and the union were to be proclaimed. There was no time for the two Governments to reach agreement on a definitive single text, as the Assembly had requested.

At midnight of June 30, the Trusteeship Agreement ceased to be in force, and the President of the Legislative Assembly, acting in his capacity as Provisional President of the Republic, proclaimed the independence of the State of Somalia. During the same night he promulgated the Constitution, which came into force immediately. In the morning of July 1, the members of the Legislative Assemblies of Somaliland and Somalia met in joint session as the first National Assembly. The President of the Assembly proclaimed the union and the members sealed it by standing ovation. As of that moment, the Constitution was deemed to apply to both parts of the Somali Republic. In accordance with the Constitution, the Assembly then elected Aden Abdulla Osman as the Provisional President of the Republic.

There is no doubt that on the first of July a full and lawful union was formed by the will of the peoples of the two territories through their elected representatives. However, the legal formalities had not been completed in time. The Union of Somaliland and Somalia Law did not have any legal validity in the South, and the approval 'in principle' of the *Atto di Unione* by the Legislative Assembly of Somalia was not sufficient to make it legally binding in that territory. In a last minute attempt to formalize the union, on July 1 the Provisional President of the Republic signed a decree-law with a much shorter version of the *Atto di Unione*. However, this decree-law was never presented to the National Assembly for conversion into law, as provided in Article 63 of the Constitution, and therefore it never came into force.

Thus when the union was formed, its precise legal effects had not been laid down in any instrument having binding force in both parts of the State. As explained below[27], the matter was clarified seven months later by the adoption of a new Act of Union with

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[27] *Infra*, p. 13.

retroactive effect as from July 1, 1960 for the whole territory of the Republic.

### B. Integration problems

The new State was described as a 'unitary Republic' in article 1, paragraph 1, of the Constitution. However, in the beginning the only unitary elements were at the top of the State pyramid: there was a single President, a single National Assembly and a single Government comprising ministers from the two parts of the Republic[28]. But in most respects the Northern and the Southern Regions were still two separate states. There were two different judicial systems; different currencies; different organization and conditions of service for the army, the police and the civil servants, as well as different training, outlook and working habits between Northern and Southern Somali officials; the governmental institutions, both at the central and local level were differently organized and had different powers; the systems and rates of taxation and customs were different, and so were the educational systems. Although the Somali tongue was spoken throughout the country, it was not a written language because of lack of agreement on whether to use the Latin or Arabic characters, or a specially devised script called Osmania. Thus, written official transactions were, and still are, conducted in English in the North, in Italian in the South, and sometimes in Arabic in both territories. While Shariat and customary law were the same, the general law in force in the two parts of the Republic was vastly different. The North followed the pattern of British dependencies in East Africa, and the law was a mixture of English common and statute law, Indian statutes and locally enacted ordinances; in the South it was a mixture of Italian law, colonial legislation and enactments issued during the trusteeship period.

In order to counteract divisive tendencies it was necessary and urgent to build a truly unitary state by integrating the laws and institutions of the Northern and Southern Regions. A Consultative Commission for Integration was established in October 1960[29] to assist the Somali Government in preparing

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[28]The first Government was formed on July 22, 1960, with Dr. Abdirashid Ali Shermarke as Prime Minister.

[29]Decree of the President of the Republic of October 13, 1960.

legislation for this purpose[30]. Four years later the Commission was reconstituted as Consultative Commission for Legislation[31] and given broader functions.

### C. The Act of Union

Soon after being established, the Integration Commission devoted its attention to the problems arising from the uncertainty surrounding the legal consequences of the union. There were no clear answers to some important and potentially troublesome questions. For instance: what was the effect of the union on the jurisdiction of the Northern and Southern courts, both territorially and as to subject matter? Did the laws in force in the North and in the South before the union continue to be applicable in the respective territories? Were the powers and competence of public authorities in the Northern and Southern Regions affected by the union? Was it permissible to use in the North moneys included in the budget for the South, and vice versa? Did a citizen of Somaliland or Somalia automatically become a citizen of the Somali Republic on the day of the union? Was a Northern civil servant transferred to the South entitled to his previous salary or was he subject to the different salary scale applicable to Southern civil servants? Was it permissible for imported goods to move freely throughout the territory of the Republic even though the custom tariffs in the South were generally higher than those in the North? Did treaties extended to one or both territories before independence become binding on the Republic as a whole upon the formation of the union?

To dispel some of the existing uncertainties, it was thought

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[30]The Commission, of which the author was chairman, originally consisted of five members, later increased to nine, and included the President of the Supreme Court (an Italian judge), two other Supreme Court judges (an Indian lawyer and a Somali Kadi), two Italian legal experts one of whom was the State Attorney, the Deputy Attorney-General (an English-educated Somali lawyer), the former Attorney-General of Somaliland (an Irish lawyer), an English-educated Somali judge and an Italian-educated Somali official. Thus in the Commission as a whole there was knowledge of Italian, English, Islamic and customary law.

[31]Decree of the President of the Republic No. 271 of October 29, 1964. The present Commission has a Somali chairman, Mr. Michael Mariano, and comprises most of the members of the previous Commission with the addition of two Somali lawyers, one educated in Italy and the other in England. In May 1969, Mr. Mariano was appointed Minister for Planning and Co-ordination.

desirable, as a first step, to enact a law applicable to the whole territory of the Republic, defining the legal effects of the union with as much precision as possible. This was done on January 31, 1961, when the National Assembly adopted by acclamation a new Act of Union[32], which repealed the Union of Somaliland and Somalia Law[33], and which was made retroactive as from July 1, 1960.

Some of the provisions of the Act of Union were declaratory of already existing conditions. Thus Article 1 provided that Somaliland and Somalia, being united, constitute the Somali Republic, 'which shall be an independent, democratic and unitary republic'; and Article 2 codified the fact that 'The legislative Assemblies of Somaliland and Somalia shall together comprise the first National Assembly of the Somali Republic'. An important institutional provision is contained in Article 6 which established that the armies of the Northern and Southern Regions 'shall constitute the National Army of the Somali Republic and shall be under the authority of the Minister of Defence'. The same article provided for the unification of the two police forces as the Police Force of the Somali Republic and, following the Italian system previously applied in the South, placed it under the authority of the Minister of Interior.

The Act of Union was based on the premise that in the beginning it would be undesirable to introduce drastic changes which might shake the freshly laid foundations of the Republic. Accordingly, it established that the courts and public bodies of the two territories would continue with their respective powers and jurisdictions until superseded by integrated legislation[34]. Following the same principle, it was provided that the laws in force in Somaliland and Somalia at the time of the establishment of the union would remain in full force and effect therein, until changed by future legislation[35]. Officials of the Northern and Southern Regions were assured conditions of service not less favourable than those applicable to them at the time of the establishment of the union[36]. However, the apprehension of those who feared that

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[32]Act of Union, Law No. 5 of January 31, 1961.
[33]*Supra*, p. 9. The repeal, however, did not apply to Section 11(4) of that law.
[34]Act of Union, Article 3, paragraphs 2 and 3.
[35]*Ibid.*, paragraph 1.
[36]*Ibid.*, paragraph 4.

the unification of the civil service would result in a cut in salary was confirmed because this guarantee was made 'subject to the provisions of any future law'. Until the establishment of a unified budget, the budgetary appropriations for Somaliland and Somalia would, as far as practicable, continue to be applied in the respective territories for the purposes for which they were originally intended[37]. All persons who on July 1, 1960 were citizens of Somaliland or Somalia became citizens of the Somali Republic *ope legis*[38]. The custom tariffs applicable in the two territories before the union remained unchanged. However, in the case of goods moving from North to South or vice versa, where the import duty in the territory to which the goods were proceeding was higher than in the other a duty equal to the difference between the two rates was charged[39].

An important question that had to be settled was whether the Somali Republic became the successor state with respect to treaties and other rights and obligations pre-existing the union. This matter was dealt with in Article 4 of the Act of Union as follows:

> '1. All rights lawfully vested in or obligations lawfully incurred by the independent Governments of Somaliland and Somalia or by any person on their behalf, shall be deemed to have been transferred to and accepted by the Somali Republic upon the establishment of the Union.
>
> 2. Whenever such rights or obligations arise from any international agreement their acceptance by the Somali Republic shall be subject to Article 67 of the Constitution.'

According to this provision the Somali Republic accepted to be the successor State only with respect to rights and obligations incurred by the *independent* governments of Somaliland and Somalia. Since the independence of Somalia coincided with the formation of the union, there never existed an independent government of Somalia. Consequently, Article 4 of the Act of Union had no practical application with respect to the Southern Regions.

In the North, on the other hand, there was an independent government of Somaliland for five days before the union. During that brief period Somaliland acquired the following rights and

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[37] *Ibid.*, Article 7.
[38] *Ibid.*, Article 5.
[39] *Ibid.*, Article 8.

obligations, which were then transferred to the Somali Republic by virtue of the Act of Union:

(a) Those vested until June 26, 1960 in Her Britannic Majesty 'for the purposes of the Government of the Protectorate of Somaliland'[40].

(b) Those arising from three agreements between Somaliland and the United Kingdom, i.e. (ii) the Agreement regarding interim arrangements in respect of the Somaliland Scouts; (i) the Interim Agreement for a United Kingdom Aid Mission, (iii) the Public Officers Agreement[41].

In addition to the Act of Union, the question of treaty succession was covered in an exchange of letters annexed to the treaty of friendship signed on July 1, 1960 by representatives of the Italian Republic and the Somali Republic[42]. It was agreed therein that the Somali Government would assume all rights and obligations deriving from international instruments concluded by the Italian Government on behalf of Somalia during the trusteeship administration, i.e. between December 2, 1950 and June 30, 1960[43].

Thus the undertaking assumed by the Somali Republic with respect to treaty succession was confined to the three above-mentioned agreements with the United Kingdom and the treaties and agreements concluded by Italy during the ten-year trusteeship. As to other international instruments preceding independence, it seems clear that the Somali Government intended to retain its freedom of action[44].

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[40]The Somaliland Order in Council, 1960 (Constitution of Somaliland), Sections 57 and 58.

[41]Section 11(4) of the Union of Somaliland and Somalia Law.

[42]On that day the following treaties were concluded between Italy and the Somali Republic: (1) Treaty of Friendship; (2) Consular Convention; (3) Treaty of commerce, payments and economic and technical collaboration; (4) Air Service Agreement; (5) Monetary Agreement.

[43]The exchange of letters was accompanied by a list of nineteen multilateral conventions entered into by Italy and extended to Somalia before the beginning of the trusteeship. This list was furnished by the Italian Government for information purposes only, and the Somali Government did not assume any undertaking with respect to those conventions.

[44]For the controversial boundary and territorial treaties concluded by the United Kingdom, Italy and Ethiopia, see J. Drysdale, *The Somali Dispute*, Pall Mall Press, London (1964).

CHAPTER III

# FORMING A UNITARY STATE

IN October 1960, the members of the newly-established Integration Commission made a trip to the Northern Regions to explain the work that had to be done. At a *shir* (traditional meeting) in Berbera an elderly chief welcomed the Commission and said 'The house of Union has already been built but it still lacks windows, facilities, furniture, in other words all that is necessary to make a house livable and comfortable'.

The foundations of the 'house of Union' was the Constitution[45], which provided the frame of reference for the integration process necessary to form a unitary state.

## A. Constitutional framework

Under the Constitution the Somali Republic is a unicameral parliamentary democracy. The principal organs of the State are the National Assembly, the President of the Republic, the Government and the Judiciary.

The legislative power is vested in the National Assembly[46] consisting of deputies elected for five years[47] by 'universal, free, direct and secret ballot'[48]. The Constitution lays down the powers of the Assembly with respect to the preparation of laws and other legislative measures[49], amnesty and indult[50], taxation and expenditure[51], budget and annual accounts[52], ratification of

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[45]Under the terms of Article III of the Transitional and Final Provisions, the Constitution came into force provisionally on July 1, 1960 and was subject to approval within one year by popular referendum. The referendum was held on June 20, 1961 and the Constitution was approved by 90.6 per cent of the voters.

[46]Constitution, Article 49.

[47]*Ibid.*, Article 52, paragraph 1.

[48]*Ibid.*, Article 51, paragraph 1.

[49]*Ibid.*, Articles 60-63.

[50]*Ibid.*, Article 64.

[51]*Ibid.*, Article 65.

[52]*Ibid.*, Article 66.

treaties[53], declaration of war[54] and parliamentary investigations[55].

The President of the Republic is elected by the National Assembly[56] for six years[57]. He has responsibilities 'in the legislative, executive and judicial fields[58]'. In the legislative field the President is empowered to dissolve the Assembly 'whenever it cannot discharge its functions or discharges them in a manner prejudicial to the normal exercise of legislative activity[59]'. He exercises a significant control over legislation in that (i) the presentation to the Assembly of draft laws originating with the Government must be authorized by the President[60] and (ii) he may 'veto' a law by requesting the Assembly to reconsider it, in which case a two-thirds majority of the Assembly is required to override the Presidential objection[61].

In the executive field the President has the power not only to appoint but also to dismiss the Prime Minister[62]. Thus the Government must at all times enjoy the confidence of the President as well as of the Assembly[63]. The President is the commander-in-chief of the armed forces[64] and appoints high civilian and military officers[65].

In the judicial field the President is empowered to grant

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[53]*Ibid.*, Article 67.
[54]*Ibid.*, Article 68.
[55]*Ibid.*, Article 69.
[56]*Ibid.*, Article 70.
[57]*Ibid.*, Article 72.
[58]*Ibid.*, Article 75.
[59]*Ibid.*, Article 53, paragraph 1. However, this important power is tempered by certain restrictions, i.e. that before dissolving the Assembly the President of the Republic must hear the opinion of the President of the Assembly (*Ibid.*); that by the same decree dissolving the Assembly the President must fix the date for new elections, which shall take place within sixty days of the dissolution (Art. 53, para. 2); that the Assembly cannot be dissolved during its first year in office or the last year in office of the President of the Republic (Art. 53, para. 3); and that the outgoing Assembly shall retain its powers until the proclamation of the electoral results of the new Assembly (Art. 53, para. 4).
[60]*Ibid.*, Article 75(a).
[61]*Ibid.*, Article 61, paragraphs 3 and 4.
[62]*Ibid.*, Article 78, paragraph 3.
[63]*Ibid.*, Article 82.
[64]*Ibid.*, Article 75(f).
[65]*Ibid.*, Article 87.

pardon and commute sentences[66] and to appoint, on the proposal of the Council of Ministers, two members to the Constitutional Court[67].

In the exercise of his functions, the President is not responsible, except for crimes of high treason or attempts against the constitutional order; the responsibility for his acts rests with the Prime Minister and the competent Ministers who subscribe to them[68].

The executive power is vested in the Government[69] consisting of the Prime Minister and the Ministers[70]. The Constitution lays down in detail the rules governing the confidence of the National Assembly[71] and the penal responsibility of the Prime Minister and the Ministers[72] but leaves it to subsequent legislation to establish the functions and organization of the government and subordinate offices[73].

Two 'auxiliary bodies' are mentioned in the Constitution: the Magistrate of Accounts[74] and the National Economic and Labour Council[75]. The former, an organ similar to the Court of Accounts in Italy, exercises a prior control over the legality of government acts involving financial obligations and a post-audit on the State budget. The National Economic and Labour Council was intended to be an advisory body to the Assembly and to the Government, but has not yet been set up.

The judicial power is vested in the Judiciary[76], which is independent of the executive and legislative powers[77]. The Supreme Court, described as 'the highest judicial organ of the Republic' has jurisdiction over the whole territory of the State in 'civil, criminal, administrative and accounting matters'[78]. The Constitution provides that the organization of the Judiciary and

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[66] *Ibid.*, Article 75(c).
[67] *Ibid.*, Article 99.
[68] *Ibid.*, Article 76.
[69] *Ibid.*, Article 77.
[70] *Ibid.*, Article 78, paragraph 1.
[71] *Ibid.*, Article 82.
[72] *Ibid.*, Article 84.
[73] *Ibid.*, Article 81.
[74] *Ibid.*, Article 90.
[75] *Ibid.*, Article 91.
[76] *Ibid.*, Article 92.
[77] *Ibid.*, Article 93.
[78] *Ibid.*, Article 94, paragraph 1.

the legal status and tenure of its members shall be established by law[79].

### B. Progress of legal integration

Considerable progress has been made since independence in welding the two parts of the Republic into a whole by the enactment of 'integrated laws', that is, laws which are applicable throughout the country and in some cases modify or replace legislation previously in force in the North or in the South, in other cases regulate *ex novo* matters not governed by any pre-existing law.

In the first seven years of the union the programme of legislative integration was devoted primarily to constructing the armature on which the state was to be shaped. The major laws enacted during that period are described in this chapter.

#### 1. The Legislature

The first National Assembly consisted of the ninety deputies of the Legislative Assembly of Somalia and the thirty-three elected members of the Legislative Assembly of Somaliland[80].

The members of Somaliland's Assembly had been elected in February 1960 by universal adult male suffrage on the single constituency system[81]; the voters had been registered in the five main urban centres but registration was not required in the rural districts[82].

The deputies of Somalia's Assembly had been elected in 1959 by universal suffrage, including women, on the proportional representation system[83]. Because of the difficulty of making a census of a predominantly nomadic population[84], it had been decided not to register the voters before the election. The voters were merely required to identify themselves to the Electoral Office

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[79] *Ibid.*, Article 94, paragraph 2, and Article 96, paragraphs 2 and 3.
[80] Act of Union, Law No. 5 of January 31, 1961, Article 2.
[81] Legislative Council (Elections) Ordinance No. 9 of 1958 as amended.
[82] See *Somaliland 1958 and 1959*, *op. cit.*, p. 7.
[83] Law No. 26 of December 12, 1958.
[84] The Italian Trust Administration had made a census of the urban population in 1953 in preparation for the municipal elections of 1954. However, an attempt made in 1957 to make a census of the whole population was abandoned when the partial results showed that the figures were being grossly inflated by tribal chiefs. See Costanzo, *op. cit.*, pp. 26-33.

as being eligible; to deter a voter from casting his ballot more than once, his left hand was marked with indelible ink immediately before voting.

The integrated law on Political Elections, adopted in 1964[85], followed closely the Southern law of 1958. Thus universal suffrage and proportional representation were extended to the whole country, and voters were not registered either in the urban or rural areas.

The country was divided into 47 electoral districts, and the number of deputies for each district was specified in a schedule annexed to the law. The total number of deputies was fixed at 123, the same as the first Assembly after independence.

To avoid the political difficulties inherent in any reapportionment, the distribution of seats between the two territories was also left unchanged, i.e. 90 for the Southern Regions and 33 for the Northern Regions; this proportion generally corresponds to the respective population of the two territories.

A political party was entitled to present a list of candidates in any or all electoral districts. However, each list had to be accompanied by the signature of at least five hundred supporting voters and by the deposit of 5,000 shillings (equivalent to US $700.00) as security[86]. The number of seats allotted to each list was proportional to the votes obtained by the list in the electoral district, calculated on the basis of quotients and remainders. The electoral quotient for a district was obtained by dividing the total number of votes cast therein by the number of deputies to be elected in that district. A list was allotted as many seats as the number of electoral quotients obtained. The remaining seats, if any, were allotted to the lists obtaining the highest remainders.

The first political elections under the new law were held in March 1964. The proportional representation system adopted resulted in a lively, and at times violent, competition among candidates within each political party for placement as high as possible on the lists. It happened in some cases that a candidate would fail to obtain the desired place on his party's list. In the hope of being able to receive the votes needed for at least one

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[85]Law No. 4 of January 22, 1964.

[86]Where a list did not obtain at least the votes necessary for the election of one deputy, one half of the deposit was forfeited to the state.

quotient, he would form a new political party and place himself at the top of its list. Thus twenty-one political parties competed in the 1964 elections, and no less than sixty-three in the 1969 elections. However, once elected, most deputies who had run as candidates of small parties rejoined their old party.

## 2. Central Government

The organization, powers and responsibilities of the central government have been laid down in a number of legislative measures enacted since 1962[87]. In addition to the Prime Minister, also called the President of the Council of Ministers, there are now sixteen Ministries and four Ministers of State without portfolio[88].

It is not required by the Constitution or by law that members of the government must be deputies. The Constitution only provides that any citizen possessing the qualifications required for election to the National Assembly as a deputy may be appointed Minister or Under-Secretary[89]. However, until now, following the normal practice in some other countries having a parliamentary form of government, the Prime Minister and all the Ministers and Under-Secretaries have always been selected among deputies.

The law of 1962 on the organization of the government sought to eliminate a potential source of trouble connected with the power to dismiss the Prime Minister, attributed by the Constitution to the President of the Republic[90].

A presidential decree dismissing the Prime Minister, like other presidential acts, must be countersigned by the responsible Minister[91], in this case the Prime Minister himself. The

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[87]Law on the Organization of the Government, Law No. 14 of June 3, 1962 as amended by Law No. 4 of June 1, 1965 and Law No. 10 of August 1, 1966; Organization of the Central Offices of the Administration, Presidential Decree D.P.R. No. 316 of December 17, 1962; Decree-Law No. 4 of September 24, 1967.

[88]Foreign Affairs, Interior, Defence, Information, Justice, Education, Health and Labour, Planning and Co-ordination, Finance, Public Works, Communications and Transport, Industry and Commerce, Agriculture, Animal Husbandry and Veterinary Services, Mineral Resources, Rural Development. Of the four Ministers without portfolio one is attached to the Presidency of the Council of Ministers and another to the Ministry of Foreign Affairs; the other two are in charge respectively of Religious Affairs and Somali Affairs.

[89]Constitution, Article 80, paragraph 1.

[90]Constitution, Article 78, paragraph 3.

[91]*Ibid.*, Article 76, paragraph 2.

Constitution did not specify whether such responsibility rests with the outgoing or the incoming Prime Minister. It would have been awkward to expect a Prime Minister to sign his own dismissal and assume responsibility for it. To avoid this difficulty it was expressly provided in the law of 1962 that a presidential decree appointing the Prime Minister shall be countersigned by the Prime Minister himself and a decree dismissing the Prime Minister shall be countersigned by his successor[92]. Thus if a President should decide to dismiss a Prime Minister, he would appoint by the same decree a new Prime Minister who would countersign it and assume responsibility both for the dismissal of his predecessor and for his own appointment.

### 3. Regions and Districts

Following the system prevailing in the South before independence, for administrative purposes the Somali Republic is divided into Regions and Districts[93]. There are eight Regions, of which two (Hargeisa and Burao) are in the North, and six (Benadir, Hiran, Lower Juba, Upper Juba, Migiurtinia and Mudugh) in the South.

Each Region is headed by a Governor who represents the Government therein, and is under the authority of the Ministry of Interior. The Governor is responsible for the maintenance of law and order in the Region, with the assistance of the police and the *Ilalos* (uniformed rural constabulary).

There are now fifty-nine Districts headed by District Commissioners who are under the authority of the Governors.

### 4. Local Government

Because of the long and narrow shape of the territory, the absence of railroads and the scarcity of all-weather roads, communications is one of the most difficult problems for the Somali Republic. After a heavy rainfall the roads or tracks are often impassable and many towns are cut off from the rest of the country. It is therefore especially important that local authorities should be able to run

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[92]Law No. 14 of June 3, 1962, Article 2.

[93]Presidential Decree, D.P.R. No. 218 of August 20, 1963; Law on the Territorial Organization of the State, adopted by the National Assembly on January 10, 1967.

their own affairs without depending too heavily on the central government.

The Local Administration and Local Council Elections Law[94] of 1963 was designed to promote decentralization and self-government by encouraging local authorities to assume greater responsibilities.

The preparation of the law was preceded by a study of the Northern and Southern systems of local administration[95], which revealed major differences between the two systems[96]. In the South the jurisdiction of the municipalities was confined to urban centres, whereas in the North the jurisdiction of Local Councils extended also to rural areas[97]. In the South all the councillors were elected; in the North some were elected and others appointed. In the South executive authority was vested primarily in the *Giunta* (Executive Committee) consisting of the *Sindaco* (Mayor) and two to six assessors elected by the Council from among its own members. In the North, on the other hand, executive responsibility was exercised mainly by an appointed, full-time executive officer, subject to the policies laid down by the Council and its committees.

While in both territories one of the major sources of revenue was market fees, there were considerable differences between the two systems of local government financing. In the North, Local Councils levied a house tax and collected land rents and fees. In the South municipal administrations were entitled to a share of certain taxes and dues levied by the central government (e.g. customs dues, income tax, house tax).

In the integrated law of 1963, following the Northern system, the distinction between urban and rural areas was abolished and the whole territory of the Republic was placed under the jurisdic-

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[94]Local Administration and Local Council Elections, Law No. 19 of August 14, 1963.

[95]A comprehensive report on the subject was prepared in March 1963 by C. C. Harris, O.B.E., an expert provided by the British Council.

[96]The principal laws relating to local government in the Southern Regions were Tax Law No. 1403 of 1939; Law No. 9 of September 30, 1956 on Municipal Administration; Law No. 15 of June 25, 1958 on Administrative Elections. In the Northern Regions, the Local Government Council Ordinance, 1953.

[97]Except for Hargeisa, the Northern capital, where the Council's jurisdiction was confined to the town.

tion of local administrations[98]. This decision was explained as follows in the report introducing the draft law to the National Assembly:

> 'It is considered essential that all citizens, including those living in isolated sections, should be able to look upon a local administration as the authority responsible for providing the essential services. The abolition of any distinction between urban and rural areas should prevent neglect for the sections of the Territory most distant from the main urban centres. At the same time, it should give the inhabitants of those sections a feeling of more direct participation in local government.'

In order to deal with problems as closely as possible to their source, the law provided also for the establishment of Area Committees consisting of members of the Council representing particular territorial units and invited persons residing therein[99].

The Northern approach was followed also on the question of executive responsibility. After weighing the relative merits of the two systems, the prevailing view was that for the sake of efficiency it would be preferable to rely on a full-time professional staff. Accordingly, the law gave a key role to an Executive Secretary appointed by the Minister of Interior in consultation with the Council, and made him responsible for the proper execution of the policies of the Council[100].

The Chairman of the Council, to be elected by the Council from among its members, was given mostly ceremonial and formal functions[101]. However, in deference to the Southern tradition, his title remained *Sindaco* (i.e. Mayor) in the Italian version. Thus in the Southern Regions the old denomination is still used.

Local administrations were given greater powers and responsibilities than those previously exercised in the Northern and Southern Regions. In view of the discrepancy in the competence and degree of preparation of different local authorities, a distinction was made in the law between mandatory and other functions. While all Councils were required to carry out the mandatory

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[98]Local Administration and Local Council Elections Law, *op. cit.*, Article 1, paragraph 1.
[99]*Ibid.*, Article 16.
[100]*Ibid.*, Articles 23 and 24. The law provided also for the appointment, in the same manner, of a Deputy Executive Secretary and Heads of Service, where deemed necessary.
[101]*Ibid.*, Article 12.

functions[102], each was free to choose whether or not to assume responsibility for the discharge of the other duties[103].

The law sought to provide local administrations with maximum financial autonomy. To this end, it increased considerably their taxation powers[104], correspondingly decreasing the need for direct subsidies or a share of the proceeds from central government taxes and fees. The Northern system of rates on land and buildings was extended to the whole Republic. As was explained in the report, the taxation policy guiding the law was 'based upon the principle that, whenever possible, taxes should be collected by the body ultimately benefitting from them. This would also ensure a better understanding by councillors and the public of the cost involved in providing services, and would constitute a stimulus to efficient revenue collection'. Nevertheless, recognizing that it would take time for local administrations to acquire complete financial autonomy, Local Councils were authorized to apply to the central government for a grant[105], where necessary.

Following the Southern system, the Minister of Interior (or the Regional Governor or District Commissioner if authorized by him) was empowered to act as Supervisory Authority of Local Councils[106]. The powers of the Minister as Supervisory Authority include dissolving a Local Council where it 'cannot perform its

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[102]These include co-operation with the central government in the maintenance of law and order; safeguarding and promoting public health and hygiene; controlling pests; regulating markets and buildings; abating nuisances; preventing or relieving famine (*Ibid.*, Art. 8).

[103]These include establishment and operation of Koranic and primary schools; water supplies; public utility services; maintenance and repair of streets; control of fires; agriculture, land conservation, animal husbandry, forestry and fisheries; register of the population and voters; town planning and public housing; records of ownership of real property; social welfare services; community development programmes; regulating traffic; commercial operations; information services; pensions and social security for staff of the Local Councils (*Ibid.*, Art. 9).

[104]Under Article 30 of the law, Local Administrations were enabled to levy and collect rates on land and buildings, trade licensing fees, market fees and others. However, the imposition of any rates, taxes or fees by a Local Council was subject to approval of the Minister of Interior (Art. 31). Pending the introduction of the new revenue system, Local Administrations continued to be financed as before (Art. 49).

[105]*Ibid.*, Article 28.

[106]*Ibid.*, Article 6.

functions or persistently makes default in performing the duties imposed on it by law, or exceeds or abuses its powers'[107].

The law established four classes of local administrations, depending on the size and importance of the town, with the number of councillors ranging from eleven to twenty-five, elected for a four-year term[108]. As in the case of the political elections, the proportional representation system prevailing in the South was preferred over the Northern single constituency[109]. The first local council elections took place in November 1963 throughout the Republic.

The law of 1963 introduced in the Somali Republic a modern and rather sophisticated system of local government. Education and training are the keys to its implementation. To achieve real self-government, elected councillors must learn how to use their newly acquired powers and how to carry out their duties; and appointed local government officials must become familiar with the mechanics of administration. While it may be too soon to expect the new system to be fully applied in practice, the law has provided at least the guidelines and the frame of reference for gradual progress in this area.

### 5. Public Bodies

Article 86 of the Constitution provides that 'Whenever possible, administrative functions shall be decentralized and performed by the local organs of the State and by public bodies'.

There are a number of semi-autonomous public bodies performing economic, social and cultural functions. Some of these already existed in the Southern Regions before independence, including the *Banca Nazionale Somala* (Somali National Bank), *Credito Somalo* (Bank for Development Loans), *Cassa Assicurazioni Sociali Somalia* (Health and Social Security Agency), *Istituto Universitario* (University Institute), *Ente Nazionale Incenso* (Incense Marketing Agency). Others have been established since independence, as for example the *Ente Nazionale Commercio Estero* (Foreign Trade Agency), the Port Authority of Somalia,

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[107] *Ibid.*, Article 44, paragraph 1. For an example of the exercise of this power in the dissolution of the Mogadiscio Local Council, see *infra*, pp. 85–86.

[108] *Ibid.*, Articles 3 and 4.

[109] Local Council Elections, *Ibid.*, Annex.

the Rural Development Agency, the Livestock Development Agency. These public bodies are juridical persons; their organization, functions and the degree of control exercised by the government over their activities are specified by law.

### 6. Civil Service

In the Northern Regions the civil service had been built on the basis of the non-political and technical tradition of the British system. Civil servants were forbidden to stand for elective office and were discouraged from engaging in political activities. In the Southern Regions, on the other hand, it was believed that since civil servants generally belonged to the best educated and most qualified segment of the population they should be permitted to stand as candidates for election to the Assembly in order to improve the quality of the legislature. Accordingly, before independence a substantial number of civil servants had been elected to the Legislative Assembly of Somalia and had been placed on leave without pay for the duration of their elective office.

In the last phase of preparation of the Constitution, Northern representatives proposed that the Constitution should prohibit civil servants from belonging to political parties and an independent Civil Service Commission should be established[110]. After exhaustive debate in the Constituent Assembly a compromise between the Northern and Southern approach was reached. In the Constitution civil servants were forbidden to be leaders of political parties[111], and it was provided that the law would determine the categories of civil servants who would not be allowed even to belong to political parties[112]. Moreover, a new article was included in the Constitution prescribing that a Civil Service Commission shall be established by law and the independence of its functions shall be guaranteed[113].

The issue arose again after independence during the debate on the law unifying the civil service[114]. The text proposed by the

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[110]See Costanzo, *op. cit.*, pp. 134-135, 141; D'Antonio, *op. cit.*, pp. 110-113.
[111]Constitution, Article 88, paragraph 2.
[112]*Ibid.*, Article 88, paragraph 3. Members of the judiciary were prohibited from belonging to any political party by Article 25 of the Law on the Organization of the Judiciary (Legislative Decree No. 3 of June 12, 1962).
[113]Constitution, Article 89. The Civil Service Commission was established by Law No. 9 of February 15, 1961.
[114]Civil Service, Law No. 7 of March 15, 1962.

government to the National Assembly contained two clauses reflecting the Northern desire to insulate civil servants from politics: (a) civil servants were forbidden not only to be leaders of political parties, as prescribed in the Constitution, but also to be actively engaged in any political activity; (b) in addition to annual leave and sick leave, a civil servant could be granted extraordinary leave without pay up to a maximum of four months within any period of three years. While the first provision was accepted without difficulty[115], the second was vehemently opposed by a group of Southern deputies who were on leave from the civil service and wanted to retain the right to return to it at the end of their tenure in the Assembly. The proposed maximum period of extraordinary leave obviously was not sufficient to enable them to serve for five years as deputies and remain civil servants. After a lively debate the clause was approved[116] on the understanding that it would not affect the acquired rights of the members of that legislature. However, beginning with the elections of 1964, it was no longer possible for a civil servant to be elected to the Assembly and maintain civil service status.

One of the major difficulties encountered in the integration of the civil service was that the salaries and other employment conditions in the North differed substantially from those in the South. Before the union a few of the top Northern officials received much higher emoluments than their opposite numbers in the South, while in other categories the Southern salaries were somewhat higher than those of the North. The Northern officials were entitled to pensions, whereas in the Southern Regions there were more fringe benefits but no pensions[117]. After considering and rejecting transitional arrangements which would have avoided a sharp cut in pay for some Northern officials, it was decided to introduce uniform rates of salary and conditions of service throughout the Republic[118], despite the opposition of those who were adversely affected by this measure.

In integrating the civil service the government had to wrestle with two contradictory but equally important exigencies. It was

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[115] *Ibid.*, Article 4, paragraph 2(a).
[116] *Ibid.*, Article 27.
[117] The right to pension, guaranteed by Article 37 of the Constitution to civil and military employees of the State, has not yet been fully implemented.
[118] Civil Service law, *op. cit.*, Article 15.

necessary to provide civil servants with maximum security and prevent favouritism and undue pressures in matters affecting their appointment and careers. On the other hand, it was also necessary to enable the government to effect the changes needed to unify the civil service, eliminate the incompetents, bring forth the best talent and try to reduce the excessive percentage of the budget devoted to the cost of the establishment. The first requirement called for a set of fixed rules with no exceptions; the second for flexibility and discretionary powers.

Both tendencies are reflected in the civil service law and inevitably both have been criticized. In 1961 and early 1962, when the civil service law was being prepared, the government was reluctant to decentralize authority in personnel matters, fearing that if officials were empowered to make appointments and other personnel decisions they would be exposed to temptation and pressure of clan loyalties. Therefore, a rigid centralized approach was adopted in connection with appointments, promotions and disciplinary measures.

The civil service was classified in four divisions (A, B, C and D) strictly on the basis of educational qualifications[119]. Save for a few exceptional appointments at the top level[120], all appointments must be at the initial grade of the respective division 'on the basis of open competitive examination or on the basis of examination and qualifications'[121]. This means that a university graduate returning to Somalia from abroad who wishes to enter the civil service would be admitted, if successful in the competitive examination, at the lowest level of Division A, earning a gross monthly salary of only 600 shillings (US $84.00) – an amount inadequate for maintaining a family on a modest white-collar scale. This system has been attacked for not providing sufficient incentive to attract university graduates to the government service.

The law prescribed that appointments, promotions, transfers and terminations relating to officers in Divisions A, B and C 'shall

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[119]Article 6 of the law lays down the following educational qualifications for appointment to the civil service: (a) a university degree or its equivalent for Division A; (b) a higher secondary school diploma or its equivalent for Division B; (c) a lower secondary school diploma or its equivalent for Division C; (d) an elementary school diploma or its equivalent for Division D.

[120]*Ibid.*, Article 9.

[121]*Ibid.*, Article 7, paragraph 1.

be effected by decree of the President of the Republic on the proposal of the competent Minister, approved by the Council of Ministers'[122] and those relating to Division D 'shall be effected by the Prime Minister, on the proposal of the Minister concerned'[123]. It was also provided that disciplinary measures relating to officers in Divisions A, B and C 'shall be imposed by decree of the President of the Republic, on the proposal of the Council of Ministers, having heard the Disciplinary Board'[124] and those relating to Division D 'shall be imposed by decree of the Prime Minister, on the proposal of the competent Minister, having heard the Disciplinary Board'[125]. These procedures have been criticized for being excessively centralized, cumbersome and time-consuming. In particular, it has been pointed out that it is often impractical and expensive to impose even the mildest disciplinary measure (written censure) on a civil servant of any rank because he must be sent to the capital for a hearing before the Disciplinary Board sitting in Mogadiscio.

In order to safeguard the security of tenure of career civil servants, it was provided that their appointments could be terminated by the government only for certain specified reasons[126]. Disciplinary offences and disciplinary measures were spelled out in the law[127], which guaranteed a hearing before the Disciplinary Board[128]. A civil servant was given the right to challenge any administrative decision concerning him first through channels to the competent Minister[129] and then by appealing to the Supreme Court[130]. Thus the law sought to insure the civil service against arbitrary action of any kind.

The need for giving the government discretionary powers and a degree of flexibility was manifest for the purpose of forming a permanent establishment. The government was confronted with

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[122] *Ibid.*, Article 14, paragraph 2.
[123] *Ibid.*, Article 14, paragraph 1.
[124] *Ibid.*, Article 22, paragraph 2.
[125] *Ibid.*, Article 22, paragraph 1.
[126] Under Article 32 of the civil service law an officer's appointment may be terminated for reduction of staff, physical or mental incapacity, unsatisfactory service, disciplinary action and conviction for certain offences.
[127] *Ibid.*, Articles 19 and 20.
[128] *Ibid.*, Article 22.
[129] *Ibid.*, Article 33.
[130] *Ibid.*, Article 34.

the problem of reducing the size of a civil service accounting for almost 90 per cent of the budget, filling the available posts with the most qualified personnel and removing employees regarded as unsuitable. To this end, the government was given one year to form the permanent establishment and was empowered, during that period, to re-shuffle the civil service and terminate the appointment of redundant personnel without being bound by the strict requirements imposed by the law[131]. To assist the government in this endeavour an Establishment Commission was appointed with a membership consisting of Somali officials as well as United Nations and Italian experts.

The Establishment Commission had to devise an organizational plan for each government department and scrutinize the qualifications, ability and experience of all the government employees. This entailed a critical review of the entire public administration, which could not be done within the allotted time. Accordingly, the Commission's mandate, which was due to expire on March 31, 1963, was extended until March 31, 1965. Since, however, on that date the work had not yet been completed, a new Civil Service Establishment Commission was created[132], with functions similar to its predecessor's; and the government was granted additional time (until January 1968) to complete the permanent establishment[133].

The fact that the discretionary powers originally given the government during the transitional period have been extended from one to six years has delayed the application of the safeguards laid down in the law for the protection of civil servants against arbitrary action. As a consequence, there is a degree of

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[131] *Ibid.*, Article 35. Forty-three among the civil servants whose appointments were terminated for redundancy under this article have appealed to the Supreme Court challenging the government's authority in this respect. In *Dr. Mohamed Farah Siad et al. v. The Prime Minister* (Supreme Court Full Bench, Judgment of December 16, 1965) the Supreme Court, on its own motion, raised the question whether Article 35 of the law authorizing the Public Administration to change the status of civil servants in temporary exemption from the application of the safeguards laid down in the same law, was compatible with Article 88, paragraph 5 of the Constitution providing that 'The status of civil servants shall be established by law'. This constitutional issue was referred to the Constitutional Court, which has not yet been set up. (See *Infra*, p. 40.)

[132] Presidential Decree D.P.R. No. 59321 of August 5, 1966.

[133] Law No. 10 of August 1, 1966.

disquietude among government employees, who fear that the security of tenure guaranteed by the law is receding into the future.

The integration and streamlining of the civil service has confronted the Somali Government with difficult problems. Despite the considerable amount of time and attention devoted to it since independence, a sustained effort is still needed to bring the process to a successful conclusion.

### 7. The Judiciary

After independence a variety of legal, practical and policy issues emerged in the judicial field. Many of them might have remained dormant had not the problem of integration brought them to a head.

The Northern and Southern courts had been separate, operating under different procedures, applying different laws and using different languages. Should they be allowed to continue as in the past or should an attempt be made to integrate them into a single judicial system? If there was to be a unified judiciary, should the court procedures be unified as well? In both parts of the Republic, the Shariatic and non-Shariatic jurisdictions had been separate: should this separation be abolished? If so, how would the Kadis be able to decide on non-Shariatic matters and the lay judges on Shariatic matters? Considering that when the union was formed there were almost no qualified Somali lay judges, would it be practical to launch an ambitious reform of the judiciary?

While these and other questions were being studied, a more urgent problem demanded prompt attention. This was how to enable the Supreme Court to exercise appellate jurisdiction over decisions of the High Court of Hargeisa, the highest tribunal of the Northern Regions.

#### (a) *Appellate jurisdiction of the Supreme Court over decisions of the High Court of Hargeisa*

Before the independence of Somaliland, decisions of the High Court could be appealed to the Court of Appeal for Eastern Africa in Nairobi[134] and thence to the Judicial Committee of the

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[134] Appeal to the Court of Appeal Ordinance No. 24 of 1950 as amended by Ordinance No. 14 of 1957.

Privy Council[135]. The Order-in-Council 1960, which came into force when Somaliland became independent, abolished appeals to the Court of Appeals for Eastern Africa and to the Privy Council. On the date of the union there were numerous appeals pending against decisions of the High Court and other appeals were lodged in the first months of independence.

Article 94 of the Constitution provided that the Supreme Court, sitting in Mogadiscio, 'shall be the highest judicial organ of the Republic' and 'shall have jurisdiction over the whole territory of the State'. Despite this clear language, there were doubts as to whether the Supreme Court was empowered to exercise this appellate jurisdiction in the absence of legislation laying down the precise conditions and procedures for appeals against decisions of the High Court. And in any event, how could this jurisdiction be exercised in practice by a Supreme Court consisting of Italian judges and Somali Kadis, none of whom was familiar with either the law of the Northern Regions or the English language?

The problem was solved by a law enacted in 1961[136] which expressly vested in the Supreme Court appellate jurisdiction over the High Court and prescribed that when the Supreme Court hears appeals against judgments of the High Court at least one of the judges must be learned in the laws of the Northern Regions[137].

(b) *Unification of the judiciary*

At the time of the union, in the Northern Regions the Shariatic jurisdiction consisted of the Kadis' Courts with original jurisdiction and the Court of the Chief Kadi with appellate jurisdiction. In non-Shariatic matters the Subordinate Courts had original jurisdiction in minor civil and criminal matters; the District Courts had original jurisdiction in more important civil and criminal matters and, together with the Subordinate Courts of Civil Appeal, had appellate jurisdiction over the Subordinate Courts. The High Court had original jurisdiction in certain civil

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[135]Eastern African (Appeal to Privy Council) Order-in-Council, 1951.

[136]Law No. 18 of May 24, 1961.

[137]In order to meet this requirement Dr. Haji N. A. Noor Muhammad, an Indian legal expert serving in Somalia under the United Nations technical assistance programme, was appointed judge of the Supreme Court in February 1962.

matters and in the most serious crimes, and appellate jurisdiction in all non-Shariatic matters.

In the Southern Regions the Kadis had original jurisdiction in Shariatic matters; the Tribunal of the Kadis heard appeals from the Kadis; the Shariatic section of the Supreme Court, consisting of the President of the Court (an Italian judge) and two Kadis, had appellate jurisdiction over decisions of the Tribunal of the Kadis. In non-Shariatic matters the civil jurisdiction was exercised by the Regional Judge as court of first instance, the Judge of Appeal and the Supreme Court with appellate jurisdiction; the criminal jurisdiction was exercised by the District Courts, the Regional Judge and the Assize Court as courts of first instance depending on the seriousness of the offence, and by the Judge of Appeal, the Assize Court of Appeal and the Supreme Court with appellate jurisdiction. There was also a Military Tribunal comprising the Regional Judge of Mogadiscio and two military members, with competence in criminal military offences[138].

Shortly after independence, the Somali government decided, as a matter of policy, that the continuation of two separate judicial systems would not be consistent with a unitary state.

The integration or the judiciary was accomplished by a law entitled 'Organization of the Judiciary', adopted by the National Assembly in June 1962[139].

(i) Merger of Shariatic and non-Shariatic courts

In the course of preparing the judiciary law two conflicting views emerged on whether or not the Shariatic and non-Shariatic courts should be unified. Those in favour of maintaining the separation which existed in both parts of the Republic strongly opposed unification on the ground that it would empower lay judges to decide on Shariatic matters. They argued that only Kadis had the necessary specialized knowledge and only they should sit as judges in cases involving religious law. They also resisted unification on the ground that for years to come there would continue to be some foreign non-Muslim judges who should not be allowed to decide on Shariatic affairs.

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[138]For a description of the judicial system in Somalia during the Trusteeship period and earlier, see V. Mellana, *Nozioni di diritto giudiziario somalo*, Mogadiscio, 1957.

[139]Legislative Decree No. 3 of June 12, 1962 – Organization of the Judiciary.

The supporters of unification, on the other hand, stressed that the abolition of the dual system would contribute to the development of a national consciousness. By requiring Kadis to learn state law and lay judges to learn Shariat law, a merger would gradually bring about the formation of a single body of judges familiar with both types of law. The participation of judges versed in other branches of the law would stimulate a dynamic application of Islamic and customary law in a manner responsive to the evolution of Somali society.

The unitary trend prevailed. It was decided to abolish the Kadis as a separate jurisdiction and to create, in each of the District Headquarters, a District Court consisting of a civil section and a criminal section[140]. The civil section was empowered to deal with Shariatic and customary law matters and other civil controversies not exceeding 3,000 shillings[141]; the criminal section was given jurisdiction with respect to offences punishable with imprisonment not exceeding three years or a fine up to 3,000 shillings, or both[142].

(ii) Area of application of Shariat law

The area of application of Shariat law was another difficult and controversial issue. Before integration, in the North Shariat law was applied by the Kadis' Courts in all matters regarding marriage, divorce, family relationship, *wakf*, gift, succession and wills[143]. In the South there was a rather complicated system whereby the Kadis had 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. It was also provided that the Regional Judge, who applied Italian law, had exclusive jurisdiction over controversies based on a written document and those where 'it appears that the juridical relationship has arisen or is governed by formalities different from those of the Islamic or

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[140] *Ibid.*, Article 2, paragraph 2.

[141] *Ibid.*, Article 2, paragraph 3. However, so as not to burden District judges with excessively complicated civil matters, the President of the Court of Appeal was authorized to transfer a civil case to the Regional Court, where the judges are generally better qualified (Art. 2, para. 3).

[142] *Ibid.*, Article 2, paragraph 4.

[143] Subordinate Courts Ordinance, 1944, Sec. 10(2).

customary law'[144]. Thus the North followed the classic system of specifying the subjects governed by Islamic law. In the South, in some respects the Shariat had wider application because it encompassed any controversy between Muslims; but in other respects it was narrower because a Muslim was permitted to opt out of the application of Islamic or customary law, and because the Kadis had no jurisdiction whenever written documents or other Western-type legal formalities were involved.

In the process of seeking a single solution for the whole Republic, two conflicting views emerged. The 'traditionalists' believed that the application of the Shariat should not in any way be conditioned or restricted. The 'modernists' argued that religious law should be applied only in matters of personal status and everyone should be given a choice of law.

A number of proposals were considered during the preparation of the new law. One, which was a variation of the Southern formula, was that Islamic or local customary law would apply to all disputes between Muslims except those matters where it appeared that the juridical relationship had come into being or was governed by rules or in a manner different from that provided by Islamic or local customary law. Another, deriving from the Northern formula, was that Shariat law would apply to any question regarding marriage, guardianship, family relationship, *wakf*, gift, succession or wills and any other question governed by Shariat law, provided all the parties agreed to be bound by Shariat law.

After much discussion the following solution was agreed and incorporated in Article 9 of the law under the heading '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 all other matters.'

It has been said that, unlike other Muslim countries, such as the Sudan and Northern Nigeria, where the application of Islamic law is confined to personal matters (e.g. marriage, divorce, succession, guardianship), this provision would entitle the courts of the Somali Republic to apply Islamic law in all civil matters (e.g.

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[144]Ordinance No. 5 of February 2, 1956, Article 2.

contractual and land disputes, claims in tort, etc.), so long as the dispute has arisen under the law[145]. The solution adopted has also been described as rather vague[146].

Whatever may be its merits, the formulation of Article 9 was the result of a compromise between conflicting views. On the one hand, it may have the effect of extending the application of Shariat law beyond the categories specified in the law previously in force in the Northern Regions; on the other hand, the parties appear to have been given a freedom of choice as to the law governing their relationship.

(iii) Role of assessors in criminal proceedings

The question of the role of assessors in criminal proceedings gave rise to an interesting debate during the preparation of the judiciary law. Although assessors existed in both parts of the Republic, their role was quite different. In the Northern Regions assessors were persons familiar with local customs who assisted the judge in an advisory capacity[147]. In the South, on the other hand, the assessors were part of the Bench, like the 'popular judges' in Italy, and participated in the decision on both questions of fact and law[148].

The advantages and disadvantages of the two systems were discussed at length. Those accustomed to the Northern system argued that while assessors might have performed a practical role in the past as native advisers to foreign judges on local customs, the gradual Somalization of the judiciary greatly reduced their usefulness. Furthermore, it was said, the experience with assessors in the former Protectorate had not been satisfactory: it frequently happened that the assessors, being motivated by personal or clan loyalty, would recommend the acquittal of the accused, and the judge would have to disregard their advice. It was feared that if the assessors were given full judicial powers and outnumbered the professional judges, the administration of justice would suffer.

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[145]E. Cotran, 'Legal Problems Arising Out of the Formation of the Somali Republic', (1963) *International and Comparative Law Quarterly*, Vol. 12, p. 1021.

[146]S. Santiapichi, *Il prezzo del sangue e l'omicidio nel diritto somalo*, Giuffrè (1963), p. 26.

[147]Subordinate Courts Ordinance, 1944, Section 4(1).

[148]Ordinance No. 5 of February 2, 1956, Articles 6 and 7.

Therefore, the assessors should either be abolished or retained only in an advisory capacity.

The opposite view held that the system of assessors prevailing in the Southern Regions had been embodied in Article 95 of the Constitution, providing that 'the people shall participate directly in assize proceedings in the manner prescribed by law'. It was thus intended that the Somali Republic should continue the system of assessors which had been satisfactorily applied in the former Trust Territory since 1956. To reduce the role of the assessors was regarded as inconsistent with the Constitution and a retrograde step.

In the end, an intermediate solution was adopted. Following the Southern system, it was decided that assessors would form part of the Bench in assize proceedings dealing with the most serious crimes[149]. On the other hand, while the law prescribed that questions of fact would be decided jointly by judges and assessors, decisions on questions of law were reserved to the judges, who were also given sole authority in the imposition of punishment[150]. Thus, except for sitting on the Bench, in the integrated system the assessors' duties are equivalent to those of jurors in a jury trial.

(c) *The courts*

In addition to the District Courts, described above[151], the law on the organization of the judiciary laid down the composition and jurisdiction of the Regional Courts, the Courts of Appeal and the Supreme Court.

The Regional Court, one in each Regional Headquarters, has no appellate jurisdiction, and consists of a General Section and an Assize Section. In the General Section, as in the District Court, cases are heard by a single judge. In civil matters, the General Section has jurisdiction over controversies where the value exceeds 3,000 shillings except those governed by Shariatic

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[149]Under Article 3 of the law the Assize Section of the Regional Court consists of the President of the Regional Court and two assessors and has jurisdiction with respect to crimes punishable with death, imprisonment for life, or imprisonment for not less than ten years. The Assize Appellate Section of the Court of Appeal consists of the President of the Court of Appeal, a judge of the Court and three assessors.

[150]Article 12.

[151]*Supra*, p. 35.

or customary law which fall within the competence of the District Court. In criminal matters, the General Section of the Regional Court has jurisdiction with respect to offences more serious than those dealt with by the District Court but less than those within the jurisdiction of the Assize Section. The Assize Section, comprising the President of the Regional Court and two assessors, deals with crimes punishable with death or imprisonment for not less than ten years.

The Court of Appeal, having its seat in each Regional Headquarters[152], has a General Appellate Section, and an Assize Appellate Section. The General Appellate Section, consisting of a single judge, hears appeals against judgments of the District Court and of the General Section of the Regional Court. The Assize Appellate Section, comprising the President of the Court of Appeal, another judge and three assessors, hears appeals against judgments of the Assize Section of the Regional Court.

The Supreme Court has its seat in Mogadiscio and consists of a President, a Vice-President and four other judges. A Division Bench of three judges has appellate jurisdiction in civil matters, appellate and revisionary jurisdiction in criminal matters, and original jurisdiction in administrative and accounting matters. A full Bench of five judges decides on petitions challenging the qualifications of deputies elected to the National Assembly, controversies relating to conflict of jurisdiction among judicial organs, and other matters considered by the President of the Court to be of particular importance.

In civil and criminal matters the Supreme Court has appellate jurisdiction on questions of fact and on specified questions of law[153]. In administrative matters it has jurisdiction against final decisions of the Public Administration[154] on questions of law and, where expressly provided by law, on questions of fact as

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[152]Until now only two Courts of Appeal have been established, one in Mogadiscio and the other in Hargeisa.

[153]Following the Italian system these are '(a) lack of jurisdiction or incompetence of the lower court; (b) violation or erroneous application of legal provisions; (c) nullity of the judgment or the proceedings; (d) omission, insufficiency or contradiction in the grounds on which the judgment is based, relating to a material point raised by either party or by the court on its own motion.' (Art. 10.)

[154]Article 5, paragraph 3(b).

well[155]. The attribution to the Supreme Court of jurisdiction in administrative matters without a right to appeal was challenged as unconstitutional in a recent case. In *Dr. Mohamed Farah Siad et al. v. the Prime Minister* (Supreme Court Full Bench, Judgment of December 16, 1965), forty-three civil servants petitioned the Supreme Court for annulment of the termination of their appointments under Article 35 of the Civil Service law. On behalf of the government, the State Attorney contended that the provision of the law on the organization of the judiciary giving the Supreme Court sole jurisdiction over petitions against final administrative decisions had the effect of denying the right of appeal and was therefore incompatible with Article 97, paragraph 3, of the Constitution, providing that 'All judicial decisions . . . shall be subject to appeal in accordance with law'. In its judgment of December 16, 1965, the Supreme Court referred the question to the Constitutional Court[156].

The unification of the court system has not been accompanied by a corresponding unification of court rules and procedures. Pending the enactment of integrated measures on this subject, it was decided to continue the arrangements existing in the two parts of the Republic. Accordingly, Article 33 of the law specified in detail the procedures to be applied by each of the newly established courts.

(d) *Constitutional Court and High Court of Justice*

Articles 98-103 of the Constitution envisaged the creation of a Constitutional Court to review the constitutionality of laws, and a High Court of Justice with jurisdiction in criminal proceedings against the President of the Republic, the Prime Minister and the other Ministers. To implement these articles the law on the organization of the judiciary contains an annex providing for the establishment of the Constitutional Court, comprising the judges of the Supreme Court and four additional members, and the High Court of Justice, comprising the judges of the Supreme Court and six additional members. Of the additional members of the Constitutional Court two were to be appointed by the President of the Republic and two elected by the National Assembly.

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155Article 10, paragraph 4.

156See the following section 'Constitutional Court and High Court of Justice'.

The additional members of the High Court of Justice were to be drawn by lot from a list of twelve citizens elected by the National Assembly from among persons not members of the Assembly.

Until now, however, no additional member has been chosen, and therefore neither the Constitutional Court nor the High Court of Justice has yet come into existence. Since there have been no cases of impeachment, the delay in establishing the High Court of Justice has not caused any practical problem. On the other hand, the failure to set up the Constitutional Court has given rise to an awkward situation.

The constitutionality of certain provisions of law was challenged in three cases before the Supreme Court. In *Somali National Congress v. the State* (Supreme Court Full Bench, Judgment of November 5, 1963) and *Ahmed Muddei Hussen and others v. The Minister of Interior* (Supreme Court Full Bench, Judgment of March 7, 1964) the Court held that, in the absence of an actually functioning Constitutional Court, the Supreme Court was automatically competent to decide a constitutional question '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'.

However, in *Dr. Mohamed Farah Siad et al. v. the Prime Minister* (Supreme Court Full Bench, Judgment of December 16, 1965) the Supreme Court, under the new Presidency of Dr. Aldo Peronaci, reversed its previous decisions and held that under the Constitution and the law on the organization of the judiciary the Constitutional Court had been given exclusive jurisdiction on constitutional matters, thus 'implicitly sanctioning the incompetence of the Supreme Court in this respect'. Accordingly, the Supreme Court declared itself incompetent with respect to the constitutional questions raised in this case and referred them to the Constitutional Court.

Under Article 98 of the Constitution and the annex to the law on the organization of the judiciary a constitutional question may be raised in the course of any judicial proceeding by a party, the Attorney General or the court on its own motion. If the court seized with the proceeding finds that the petition challenging the constitutionality of a legislative measure is not manifestly unfounded, judgment is suspended and the matter is referred to the Constitutional Court. A law or provision having the force of law

declared unconstitutional ceases to be in force on the day when the judgment declaring its unconstitutionality is published.

Since the Supreme Court, in its latest decision, declined to pronounce itself on constitutional questions, the administration of justice could seriously suffer if the Constitutional Court is not established soon.

(e) *Judicial guarantees*

The independence of the members of the judiciary was safeguarded by a variety of guarantees[157]. The most important is the provision that appointments, transfers, promotions and separation of members of the judiciary are subject to the 'binding recommendation' of the Higher Judicial Council consisting of the President of the Supreme Court, the Attorney General, the members of the Supreme Court and three members elected by the National Assembly[158].

(f) *The Attorney General*

The status and functions of the Attorney General are similar, but by no means identical to those of the *Pubblico Ministero* in the former Trust Territory and in Italy. In the integrated system the Attorney General and his Deputies are members of the Judiciary, a concept alien to the Anglo-American legal world. On the other hand, the powers of the Attorney General as prosecutor are substantially different from those previously existing in the South. Before independence, in the Trust Territory the prosecution was exercised by the Regional Judge for lesser criminal offences and by the *Pubblico Ministero* for major crimes. This procedure was criticized for combining judicial and prosecuting functions in the Regional Judge and for its slowness owing to excessive centralization of powers in the *Pubblico Ministero*. To remedy these shortcomings the Police was given broad powers not only to carry out investigations but also to institute and conduct criminal proceedings on behalf of the Attorney General[159].

On civil matters the Attorney General was authorized to institute and conduct, or intervene in civil proceedings and to prefer appeals. In Shariatic matters this function is exercised by

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[157]Constitution, Article 96.

[158]Law on the Organization of the Judiciary, Articles 27 and 28.

[159]Law on the Organization of the Judiciary, Article 8; Criminal Procedure Code (Legislative Decree No. 1 of June 1, 1963), Article 12.

the Deputy Attorney General for Shariatic Affairs. This, for the first time, provides a useful degree of supervision of the administration of Shariatic justice[160]. The Attorney General was also authorized to prefer appeals in criminal matters, to direct the Police in the investigation and suppression of crimes and to exercise general supervision of prisons.

(g) *Progress and shortcomings in the administration of justice*

Nine years after independence and seven years after the unification of the judiciary, progress has been made in the administration of justice, but there are important problems still unresolved.

The positive elements of the picture include the efficiency of the police in apprehending and prosecuting criminals; the gradual development of a Somali case law; and the manner in which the Supreme Court has been able to master the intricacies of co-existing legal systems and administer justice throughout the country with competence and integrity.

On the negative side the most serious problem is that there are not enough judges, and only a few of them have adequate legal training[161]. In Somalia, as elsewhere in Africa, it is difficult to induce university graduates returning from their studies abroad to take up a judicial career in their country. With its modest salaries and inadequate services, housing, office equipment and transport facilities, the judiciary cannot easily compete with the more prestigious positions available to young Somali laywers.

As a consequence of the scarcity of judges there has been a chronic backlog of cases, and often an excessive time-lag between the arrest and the trial of an accused who, when charged with a major crime, may be kept in jail up to six months before a date for the trial is set[162].

Another major problem is the difficulty encountered, especially by Shariatic judges, in administering unfamiliar laws. The abolition of the Kadis' courts as a separate jurisdiction was

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[160]See Mohamud Ahmed Addan (former Minister of Justice), *L'Organizzazione Giurisdizionale*, Mogadiscio (1962), p. 16.

[161]The law on the organization of the judiciary required a 'degree in legal subjects' for admission to the judiciary (Art. 19). However, as a transitional measure, it was permitted to include in the judicial establishment persons not possessing the prescribed educational qualifications (Art. 34). This made it possible to retain in the judiciary Kadis and other judges who did not have the required formal legal training.

[162]Article 47 of the Code of Criminal Procedure.

accompanied by the transfer of most of the Shariatic judges to the District Courts, where they have been called upon to deal not only with Shariatic and customary law, but with civil and criminal law and procedure as well.

For the Kadis the process of learning new legal techniques has been one of trial and error. This is not surprising if one considers that certain civil and criminal laws are available only in English and Italian, and many Kadis can only read Arabic. There have been complaints that former Kadis, on account of their Shariatic background, still rely as evidence on eye witness testimony rather than on scientific tests. It is well-known that a large number of cases have been remanded by higher courts for trial because of the lower courts' failure to comply with the criminal procedure code.

The decision to unify the judiciary is being reappraised, currently, in the light of the experience of the past seven years. If the view prevails that the unification of the judiciary was premature, Somalia might revert to a dual system of Shariatic and ordinary courts.

## 8. Codification

### (a) *Integrated codes*

Since independence the following new Codes have been enacted: the *Penal Code*[163], the *Criminal Procedure Code*[164], the *Code of Military Criminal Law in Peace and War*[165], the *Code of Military Criminal Procedure in Peace and War*[166] and the *Traffic Code*[167]. In addition, the *Labour Code* and the *Maritime Code* previously in force in the Southern Regions have been extended, with minor modifications, to the whole territory of the Republic[168].

An analysis of all the above legislation would exceed the scope of this study. This section will therefore be confined to some remarks concerning the most important codification work, i.e. the Penal Code and the Code of Criminal Procedure.

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[163]Legislative Decree No. 5 of December 16, 1962.
[164]Legislative Decree No. 1 of June 1, 1963.
[165]Legislative Decree No. 2 of December 24, 1963.
[166]Legislative Decree No. 1 of March 31, 1964.
[167]Legislative Decree No. 4 of December 16, 1962.
[168]The Labour Code was extended to the whole Republic by Law No. 2 of January 9, 1964; the Maritime Code by law adopted by the National Assembly on December 22, 1966.

(b) *Criminal legislation*

Before integration, the Indian Penal and Criminal Procedure Codes were applicable in the North and the Italian Penal and Criminal Procedure Codes in the South.

On January 30, 1962 the National Assembly passed a law[169] delegating to the Government the power to enact the following legislation: Penal Code, Criminal Procedure Code, Traffic Code and a law on the organization of the judiciary. This delegation of legislative power to the Government, expressly provided for in Article 62 of the Constitution, was especially suitable in cases such as this, where the Assembly itself preferred not to have to examine lengthy and technically complicated draft legislation. However, the *legge delega* (law delegating legislative authority) of January 30, 1962 contained an unusual feature: it directed the Government to enact, within six months[170], the above-mentioned laws on the basis of the binding recommendations of a Special Commission presided by the Minister of Justice and comprising eleven deputies appointed by the President of the National Assembly and nine experts, including the members of the Integration Commission. Thus, in effect, legislative power was delegated to a mixed commission of deputies and individual experts.

To produce an integrated Penal Code and Criminal Procedure Code within such a short time was a herculean endeavour[171], especially since they had to be drafted in two languages, English and Italian, all the legal experts who were expected to do the technical work had other responsibilities and none of them was in a position to devote his full time to this task.

Since it would have been obviously impossible to produce *ex-novo* two original codes within the allotted time[172], the first question was whether to use the Northern or the Southern approach as a guideline. As most of the ministers and government officials were Italian-trained, there was some preference for the adoption of a penal code along the lines of the Italian law. On the

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169Law No. 5 of January 30, 1962.

170This period was later extended for another ten months.

171The problem was less acute in the case of the other two laws because a draft law on the judiciary had already been prepared by the Integration Commission and a draft Traffic Code by an *Ad Hoc* Commission.

172It may be recalled that it took twenty-three years, under the leadership of Lord Macauley, to prepare the Indian Penal Code. As to the Italian Penal Code, it has been in the process of revision since 1945, and the work has not yet been completed.

other hand, Southern Somali leaders had been impressed with the expeditious handling of criminal cases during the British military administration of the South in the forties. In the light of these factors the Minister of Justice requested the legal experts to prepare a draft Penal Code on the basis of the Italian Penal Code and a draft Criminal Procedure Code based on that of the Northern Regions.

(i) Penal Code

The Penal Code was prepared by a sub-committee of the Special Commission at break-neck speed in about two months and approved by the Commission itself within another two months. The draft was then sent to the Northern Regions for comments. Owing to the difficulties encountered by the Northern judges and police officers in understanding many of its provisions, a working group of three experts, appointed by the Minister of Justice, proposed a number of amendments for the purpose of clarifying and simplifying the text. The Special Commission, however, decided not to consider the proposed amendments and, on December 12, 1962, transmitted to the Council of Ministers the text previously approved. The Penal Code was approved by the Council of Ministers on the following day and signed by the President of the Republic three days later.

Except for the omission of several articles and certain modifications, the Somali Penal Code is virtually a replica of the Italian Penal Code of 1930. English-trained judges were therefore required to adapt themselves to radically different legal techniques.

For example, Book I, Part II, Chapter IV, entitled 'The Circumstances of the Offence', lists the aggravating and extenuating circumstances applicable to any criminal offence. In each case the judge must determine whether a particular aggravating circumstance (such as having acted for abject or futile motives) or an extenuating circumstance (such as having acted for motives having a particular moral or social value) is applicable to the offence committed. This differs from the Northern system where the aggravating or extenuating circumstances were specified for each offence, making it somewhat easier for the judge to apply the proper sanction.

As in the Italian Penal Code, the Somali Penal Code frequently prescribes the maximum and minimum punishment for a given offence. Thus the judge was given less discretion than in the Indian Penal Code, where no minimum punishment is specified.

One of the difficulties with the new Penal Code is that the Italian terminology and legal concepts reflected therein sometimes cannot be rendered into intelligible English legal language, thus presenting quite a challenge to English-trained judges, and particularly to those Somali judges who have scarce legal training[173]. Another is that occasionally, owing to lack of time for a

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[173]Articles 21 and 22 of the Penal Code, under the heading 'Material Elements of Offences', are an example of these difficulties:

'21. *Concurrence of Causes*

'1. The concurrence of pre-existing or simultaneous or supervening causes, even though independent of the act or omission of the offender, shall not exclude the relation of causality between the act or omission and the event.

'2. Supervening causes shall exclude the relation of causality only when they have been by themselves sufficient to determine the event. However, if the act or omission previously committed constitutes in itself an offence, the punishment prescribed therefore shall be applied.

'3. The preceding provisions shall also apply where the pre-existing or simultaneous or supervening cause consists of the unlawful act of another person.

'22. *Offences Punishable Subject to Existence of a Condition*

'Where the law requires the existence of a condition in order to render an act punishable, the offender shall be responsible for the offence, even though the consequence, which is a necessary condition for rendering the act punishable, was not desired by him.'

Another example is Article 117, entitled 'Increase or Reduction of Punishment':

'1. Where the law provides that the punishment be increased or reduced within specified limits, the increase or reduction shall apply to the total punishment which the judge would impose on the offender if the circumstances which cause its increase or reduction did not exist.

'2. Where more than one aggravating circumstance or more than one extenuating circumstance occur, the increase or reduction of punishment shall apply to the total punishment resulting from the aforesaid increase or reduction.

'3. Whenever for any circumstance the law prescribes a punishment of a different nature, or fixes its measure differently from the ordinary punishment for the offence, the increase or reduction for the other circumstances shall not apply to the ordinary punishment for the offence, but to the punishment fixed for the aforesaid circumstance.

'4. Where there occur more than one aggravating circumstance among those mentioned in the third paragraph of this article, only the punishment prescribed for the most serious circumstance shall be applied; but the judge may increase it.

'5. Where there occurs more than one extenuating circumstance among those mentioned in the third paragraph of this article, only the least serious punishment prescribed for the aforesaid circumstances shall be applied; but the judge may reduce it.'

critical analysis, certain provisions of the Italian Penal Code have been retained in the Somali Penal Code even though they have no relevance to local conditions[174].

Some provisions of the Somali Penal Code are influenced by Islamic or customary law. An example is the prohibition to drink alcoholic beverages, applicable to all Somali citizens and foreign Muslims[175]. Another is in the case of murder, which is punished with death[176], except that, where the crime is committed by a parent and the victim is subject to his parental authority, the punishment is reduced from death to imprisonment from ten to fifteen years[177].

This provision superseded a similar clause contained in a short-lived law on homicide[178], which provided that where murder was committed by an ascendant, the punishment was reduced from death to imprisonment from ten to fifteen years. This reduction of the punishment benefited not only a parent, but any ascendant, and applied to any descendant, regardless of age or social status.

During the preparation of the penal code the view prevailed that, although the reduction in punishment could not be eliminated, it should be restricted to cases where the victim is a child subject to the offender's parental authority. The result appears to reflect the Roman law *jus vitae necisque* and the principle of the Shafii School of Islam that the law of talion is not applicable to premeditated homicide of a descendant committed by an ascendant, on the ground that the offender's social status is higher than the victim's[179].

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[174]For example, Article 4, paragraph 1, reads:

> 'For the purposes of penal law, Somali citizens shall include persons belonging by origin or election to places subject to the sovereignty of the State and stateless persons residing in the territory of the State.'

The reference to persons belonging to places subject to the sovereignty of the State in the Italian Penal Code of 1930 apparently applied to colonial subjects of Italy at the time, but is meaningless in the context of the Somali Republic.

[175]Penal Code, Articles 411, 412. The prohibition is applicable to all alcoholic beverages 'of a strength exceeding 3 per centum of proof spirit' (Art. 417).

[176]*Ibid.*, Article 434.

[177]*Ibid.*, Article 442.

[178]Law No. 6 of February 10, 1962. This law was implicitly abrogated by the new Penal Code.

[179]Minhadj At-Talibin, *Manuel de Jurisprudence Musulmane selon le Rite Chafi'i*, Batavia, 1884, Vol. III, pp. 117-118.

(ii) Code of Criminal Procedure

The Code of Criminal Procedure is greatly influenced by English and Indian law. A notable example is the writ of *Habeas Corpus*, unknown in the former Italian territory, which was introduced in the unified criminal procedure by a provision of Article 66 of the Criminal Procedure Code enabling the Supreme Court and the Court of Appeal to order that any person held in arbitrary detention or in cases other than those provided by law be set at liberty.

Sometimes the new criminal procedure is not easy reading for Italian-trained Southern judges. For instance, the rules of evidence were taken, with a few changes, from the Indian Evidence Act and tend to be excessively technical.

While the influence of English law is prevalent in the Code of Criminal Procedure, some of its provisions derive from Italian law. For instance, in the course of a criminal proceeding, the injured party ('parte civile' in Italian law) may petition the Court for the recovery of civil damages arising from the offence committed. If the accused is found guilty the Court, in addition to pronouncing sentence, must decide upon the civil claim brought by the injured party. This joinder of criminal and civil proceedings, unknown in common law countries, makes it unnecessary for the injured party to bring a separate civil action and speeds up the judicial settlement of the civil as well as the penal consequences of a criminal offence.

Owing to the introduction of the integrated Penal Code and Code of Criminal Procedure judges, police officers and other officials had to familiarize themselves with new legal techniques. To cushion the abrupt change, the Penal Code, enacted on December 16, 1962, did not come into force until April 2, 1964; the Code of Criminal Procedure, enacted on June 1, 1963, came into force on March 31, 1965. In the interval several booklets were prepared, in English and Italian, explaining in simple terms the main provisions of the new codes. Courses for judges and police officers have also been helpful in training them in the implementation of the integrated codes.

9. CITIZENSHIP

A constant factor in Somali society and politics is the general conviction that all Somalis, both inside and outside the borders of the Republic, belong to a homogeneous national entity having a common ancestry. The resulting irredentism is manifested in

the five-pointed star in the flag of the Somali Republic[180]; two of the points represent former British Somaliland and former Italian Somalia, and the other three stand for the other territories prevalently inhabited by Somalis, i.e. the Ogaden region of Ethiopia, the Northern Frontier District of Kenya and French Somaliland. It is also expressed in a provision of the Constitution, which has been the subject of much controversy between Somalia and her neighbours: 'The Somali Republic shall promote, by legal and peaceful means, the union of Somali territories . . .'[181].

The Constitution made a distinction between 'fundamental rights and duties of the citizen' and 'fundamental rights and duties of man'. While certain rights (e.g. right to life and personal integrity, personal liberty, freedom of domicile, correspondence, assembly, association, opinion and religion) apply to all men, other rights (e.g. vote, access to public office, petition, residence, right to associate in political parties) extend only to citizens[182].

Clearly, the questions of who is a Somali and who is a citizen have important political and legal connotations. Both have been dealt with in the Somali Citizenship law of 1962[183].

Before the enactment of the integrated citizenship law, the Act of Union provided that 'all persons who on the date of the establishment of the Union possessed the citizenship of Somaliland or Somalia shall become citizens of the Somali Republic'[184]. To understand the meaning of this clause it is necessary to ascertain what rules governed Somali citizenship in the Northern and Southern Regions before the establishment of the union.

In the North, the Nationality and Citizenship Ordinance, 1960, was enacted on June 23, 1960 and came into operation three days later, on the date of independence of Somaliland. In the Ordinance a 'Somali' was defined as 'any person whose mother tongue is the Somali language and who follows Somali customs'[185]. Upon the coming into operation of the Ordinance, citizenship was automatically acquired by every Somali who did

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[180]Article 1, paragraph 4 of the Constitution reads: 'The national flag shall be azure in colour, rectangular, and shall have a white star with five equal points emblazoned in its centre'.
[181]Constitution, Article 6, paragraph 4.
[182]*Ibid.*, Articles 8-15.
[183]Law No. 28 of December 22, 1962.
[184]*Supra*, p. 14.
[185]Nationality and Citizenship Ordinance, 1960, Section 2.

not then have any other citizenship and (a) who was born in the Territory of Somaliland or (b) whose father (or in the case of an illegitimate child whose mother) was born in the said Territory[186]. Any Somali who, whilst having another citizenship, possessed the above qualifications, was entitled to be registered as a citizen of Somaliland, upon application, provided he renounced any other citizenship. He also had to be resident in Somaliland for at least twelve months at the time of the application, and had to declare his intention to reside normally therein in the future[187]. The right to be registered as a citizen was extended also, upon application, to any person other than a Somali who, upon the coming into operation of the Ordinance, possessed the same qualifications[188]. Thus any person, whether or not a Somali according to the above definition, was entitled to acquire the citizenship of Somaliland if he or his father (or in the case of an illegitimate child his mother) was born in the Territory of Somaliland before June 26, 1960. As for persons born after that date, citizenship was automatically acquired by any Somali born in the Territory of Somaliland or whose father (or in the case of an illegitimate child, whose mother) was a citizen of Somaliland at the time of the child's birth.

In the South, four months before independence a citizenship law was enacted[189] which abrogated a law on the same subject previously passed also during the Trusteeship period[190].

In contrast to the Northern Ordinance, the Southern law did not contain a definition of 'Somali'. As a transitional measure it was provided that, upon the entry into force of the law, Somali citizenship was automatically acquired by any person who did not possess a foreign citizenship and whose father was either a Somali originating in the Territory of Somalia or a Somali who, whilst not originating in that territory, had established residence therein[191]. The expression 'Somali originating in the Territory of Somalia' (in Italian 'Somalo originario del territorio della

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186 *Ibid.*, Section 3.
187 *Ibid.*, Section 5, paragraphs (1) and (4).
188 *Ibid.*, Section 5, paragraph (2).
189 Law No. 9 of February 12, 1960.
190 Law No. 2 of December 1, 1957.
191 Law No. 9 of February 12, 1960, Article 15. The same article provided also that any woman, by virtue of marriage to a Somali citizen, acquired Somali citizenship.

Somalia') was not explained in the law. It was apparently intended to indicate people belonging to Somali clans established within the area of the Trust Territory, as distinguished from those established in the territories of the neighbouring countries.

Having determined in the transitional measure who was entitled to Somali citizenship the law laid down the rules governing acquisition of citizenship by birth, by operation of law and by grant. Any child whose father was a citizen became a citizen by birth[192]. Citizenship by operation of law was acquired by any foreigner or stateless person whose father was a Somali, provided he was of age, had established permanent residence in Somalia, and renounced foreign citizenship, if any[193]. While acquisition of citizenship by birth and by operation of law was automatic once the prescribed conditions were met, citizenship could also be obtained by grant, at the discretion of the government, under conditions laid down in the law[194].

In preparing an integrated citizenship law the question arose whether to define the expression 'Somali', as in the Northern law. That approach had the advantage of clarifying a fundamental concept from which important legal and political consequences derived. On the other hand, there was some hesitation in attempting to formulate in precise legal language a concept basically ethnic and sociological. In the end, it was decided to define a 'Somali' in order to dispel any uncertainty. This definition is contained in Article 3 of the Citizenship law of 1962 as follows:

> 'For the purpose of this law, any person who – by origin, language or tradition – belongs to the Somali Nation, shall be considered a "Somali".'

There are significant differences between this definition and that contained in the Northern Ordinance of 1960 which described a 'Somali' as 'any person whose mother tongue is the Somali language and who follows Somali customs'.

At first sight it might seem that the definition in the 1962 law is more restrictive than that of the Northern Ordinance because, in addition to language and tradition (or customs), it introduced the ethnic concept of 'origin'. However, under the ordinance a person qualified as a Somali only if he met both

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192 *Ibid.*, Article 1.
193 *Ibid.*, Article 2.
194 *Ibid.*, Articles 3 and 4.

requirements, i.e. he had to have the Somali language as mother tongue *and* had to follow Somali customs. On the other hand, the conjunction 'or' instead of 'and' in the expresson 'origin, language *or* tradition' contained in the 1962 law was intended to extend the scope of the definition to certain groups not belonging to Somali clans. For example, some of the riverine populations in the South are of Bantu rather than Somali ethnic origin and, although they speak Somali, their mother tongue is often a local dialect. However, having settled in Somali territory for generations, their customs and traditions are sufficiently similar to those of the 'Somali Nation' to qualify them as Somalis for the purposes of the citizenship law.

The law of 1962 established two modes of acquisition of citizenship, by operation of law and by grant. Following the principle of *jus sanguinis* prevailing in the South, Article 2 provides that any person whose father is a Somali citizen 'shall be a Somali citizen by operation of law'. This applies also to any person 'who is a Somali residing in the Territory of the Somali Republic or abroad and declares to be willing to renounce any status as citizen or subject of a foreign country'[195]. The words 'or abroad', which were inserted on the initiative of the National Assembly in the text submitted by the Government, went beyond the scope of the previous legislation in the two parts of the Republic. While both the Northern Ordinance and the Southern law enabled a Somali to acquire citizenship on condition that he established residence in the respective territories, the removal of that condition in the 1962 law would entitle a Somali residing in another country to obtain Somali citizenship merely by declaring before any Somali Consulate that he is willing to renounce foreign citizenship, if any[196].

Somali citizenship may be granted, on the discretion of the Government, to persons who have established residence in the Somali Republic for at least seven years[197]. This period is reduced to two years if the applicant is the child of a Somali mother[198].

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[195]Law No. 28 of December 22, 1962, Article 2(b).
[196]*Ibid.*, Article 6; Regulations for the implementation of Citizenship Law, D.P.R. No. 129 of February 19, 1963, Article 2.
[197]Law No. 28 of December 22, 1962, Article 4.
[198]*Ibid.*, Article 5.

As regards married women, the law provides that 'any woman who is not a citizen and marries a citizen shall acquire Somali citizenship'[199]. Conversely, any woman citizen who marries an alien loses her Somali citizenship if, by her marriage, she acquires her husband's citizenship[200]. This proviso was intended to avoid the possibility that a woman who is a Somali citizen might become stateless by marrying an alien where the marriage does not automatically entitle her to acquire the citizenship of her husband.

Any minor, i.e. a person under 15 years[201], who is the child of unknown parents and was born in the territory of the Somali Republic is considered a Somali citizen[202], and any child of unknown parents found in that territory is presumed to have been born in the Somali Republic[203].

Confirming what had been established in the Act of Union[204], Article 18 of the citizenship law provides that 'any person who, at the date of the entry into force of this law, had acquired Somali citizenship under the provisions of previous legislation, shall retain his citizenship for all purposes'.

### 10. Other Major Legislation

Other important integration laws have been enacted since independence. The *Public Order Law*[205] established the powers of the police and other authorities in the protection of public order and security, and defined the limits of such powers. The rules for the administration of state property, government contracts, revenue and expenditure, audit and control, were laid down in the *Financial and Accounting Procedure of the State*[206]. In the economic and financial area, a *unified currency*[207] and *banking system*[208] have been established, and a uniform regulation of *foreign trade and foreign exchange transactions*[209] has been

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[199] *Ibid.*, Article 13, paragraph 1.
[200] *Ibid.*, Article 13, paragraph 3.
[201] *Ibid.*, Article 16.
[202] *Ibid.*, Article 15, paragraph 1.
[203] *Ibid.*, Article 15, paragraph 2.
[204] *Supra*, p. 50.
[205] Law No. 21 of August 26, 1963.
[206] Legislative Decree No. 2 of December 29, 1961.
[207] Law No. 13 of May 23, 1961.
[208] Law No. 18 of August 14, 1963.
[209] Law No. 8 of October 29, 1964.

introduced. In the fiscal area the *income tax*, which existed only in the Southern Regions, was extended to the whole Republic[210]. The *customs law*[211] laid down the basic rules for an integrated customs system and the *tariffs* have been unified[212].

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[210]Law No. 3 of January 19, 1963.
[211]Legislative Decree No. 1 of March 31, 1961.
[212]Law No. 7 of June 10, 1963.

CHAPTER IV

# INTERACTION OF DIFFERENT LEGAL SYSTEMS

THE law of the Somali Republic is a unique case of confluence, within a unitary State, of legal institutions deriving from English, Italian, Islamic and customary law.

In the preceding chapter, illustrations have been given of the interaction of those legal systems in the light of their impact on the legislation enacted since independence. This chapter will give some illustrations of the interaction of those legal systems in the light of their impact on the Constitution and judicial decisions.

## A. Impact on the Constitution

The Constitution was prepared in Mogadiscio during the Italian Trust Administration and was originally intended to apply only to the Southern Regions at the end of the trusteeship[213]. The Technical Committee which drew up the first draft consisted mostly of Italian jurists and officials, as well as Italian-trained Somalis. It is not surprising, therefore, that the form and substance of the Somali Constitution were strongly influenced by the Italian Constitution.

The chapters on rights and duties are essentially a rearrangement of the equivalent chapters in the Constitution of Italy, except for some adaptations required by local conditions. For instance, Article 29 of the Italian Constitution prescribes that 'Marriage is based on the moral and legal equality of the spouses'. This provision, which would not have been suitable to a society

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[213] *Supra*, p. 3. After the decision to form a union, the Constituent Assembly discussed the question whether some modifications in the Constitution would be required in order to apply it also to former British Somaliland. Most of the members of the Assembly preferred to complete the work on the Constitution and extend it to the whole Republic without change. Their views were expressed by Ali Mohamed Irave with this homey image: 'If you wish to invite a guest to your house you must go to the kitchen and prepare dinner before the guest arrives'. (Constituent Assembly, verbatim records, meeting No. 39 of June 18, 1960.)

governed by Islamic law, was omitted from the Somali Constitution. The death penalty, forbidden by the Italian Constitution, is provided in the Somali Constitution, but 'only for the most serious crimes against human life or the personality of the State' (Article 16, paragraph 3). The provision of the Italian Constitution concerning the right to associate in political parties was qualified in the Somali Constitution by a prohibition of political parties 'which are secret, have an organization of a military character or have a tribal denomination' (Article 12, paragraph 2)[214].

Following the Italian system, legislative acts are called laws (*leggi*), legislative decrees (*decreti legislativi*), decree-laws (*decreti-legge*), decrees (*decreti*) and regulations (*regolamenti*), rather than ordinances, statutes, acts or orders, as in British Somaliland before the Union.

While the Somali parliament is unicameral and not bicameral as in Italy, the provisions of the Somali Constitution relating to the organization and powers of the legislature are similar to those of the Italian Constitution.

The chapter on the President of the Republic is based on the Italian pattern but, in addition to the powers of the President of the Italian Republic, the President of the Somali Republic has the authority to dismiss the Prime Minister.

There are also close similarities between the two Constitutions in their treatment of the organization and powers of the government and the judiciary.

The only examples of English influence on the Constitution are the inclusion, at the request of representatives of former British Somaliland, of an article on the Civil Service Commission and of certain other provisions relating to the civil service[215].

The importance of Islam in Somali society is reflected in several clauses of the Constitution. Islam, which is practiced by 99 per cent of the population, is declared to be the religion of

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[214]In 1958, when the Constitution was being drafted, the prohibition of political parties with a tribal denomination was aimed primarily at the main opposition party, the *Hizbia Dighil Mirifle Somali* (HDMS), i.e. the Somali Party of the Tribes Dighil and Mirifle. The party, however, found an ingenious way to circumvent the prohibition by changing its name to *Hizbia Destur Mustagil Somali* (Somali Independent Constitutional Party) while preserving the initials HDMS and its tribal affiliation.

[215]*Supra*, p. 27.

the State[216]. The Somali Republic shall 'encourage solidarity among the peoples of the world, and in particular among African and Islamic peoples'[217]. Article 29, entitled 'Freedom of Religion', reads

> 'Every person shall have the right to freedom of conscience and freely to profess his own religion and to worship it subject to any limitation which may be prescribed by law for the purpose of safeguarding morals, public health or order. However, it shall not be permissible to spread or propagandize any religion other than the religion of Islam'[218].

As to personal status, Article 30 provides:

> '1. Every person shall have the right to a personal status in accordance with his respective laws or customs.
>
> '2. The personal status of Muslims is governed by the general principles of the Islamic Sharia.'

Article 35, dealing with education, prescribes that the teaching of Islam shall be compulsory for pupils of Islamic faith in primary and secondary state schools, and 'Teaching of Holy Koran shall be a fundamental element in primary and secondary State schools for Muslims'.

The President of the Republic must be a 'Muslim citizen'.[219]

There are two particularly significant and related clauses concerning the role of Islam in Somali law: the first provides that 'The doctrine of Islam shall be the main source of the laws of the State'[220], and the second prescribes that 'Laws and provisions having the force of law shall conform to the Constitution and to the general principles of Islam'[221]. Thus a law might be declared

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[216]Constitution, Article 1, paragraph 3.
[217]*Ibid.*, Article 6, paragraph 4.
[218]The last sentence of the Italian text as adopted by the National Assembly is 'non é tuttavia permesso diffondere e propagandare religioni diverse da quella retta dell' Islam', which, literally translated, means: 'However, it shall not be permissible to spread or propagandize any religion other than the true faith of Islam'. This article is an amendment, adopted by Law No. 16 of June 29, 1963, of Article 29 of the Constitution. The original text, which gave broader scope to freedom of religion, read: 'Every person shall have the right to freedom of conscience and freely to profess his own religion, to worship it and impart its teaching, subject to any limitations which may be prescribed by law for the purpose of safeguarding morality, public health or order.'
[219]Constitution, Article 71, paragraph 1.
[220]*Ibid.*, Article 50.
[221]*Ibid.*, Article 98, paragraph 1.

null and void by the Constitutional Court not only if it contravenes a specific provision of the Constitution but also if it contravenes the general principles of Islam.

### B. Impact on judicial decisions

#### 1. Reception of Italian Law in Northern Cases

As provided in the Act of Union[222], in matters where no integrated legislation has yet been enacted the courts continue to apply different pre-independence laws in the two parts of the Republic. On the other hand, the extension of the Constitution to the whole country has resulted, in some instances, in a uniform application of Italian legal concepts in both Northern and Southern cases.

This reception of Italian law is particularly evident in the field of administrative law. For example, in 1964 a petition was filed with the Supreme Court against the results of the 1964 political elections in some districts of the Northern Regions[223]. The Court was called upon to decide whether the plaintiffs were entitled to file the petitions. This in turn depended on the meaning of the expression 'interested party' in Article 5, paragraph 2, of the Constitution providing that an administrative act contrary to law may be invalidated on the initiative of the interested party. Although the petitioners were from the North and the judgment was delivered by Dr. N. A. Noor Muhammad, the Indian Vice-President of the Supreme Court, it was held that the concept of 'interested party' should be examined in the light of Italian law[224]. After an analysis of the highly technical distinctions between *diritto soggettivo* (subjective right) and *interesse legittimo* (legitimate interest) and between *interesse protetto* (protected interest), *interesse materiale* (material interest), *interesse al ricorso* (interest to file a petition) and *interesse formale* (formal interest)[225], the Court decided that some of the petitioners (the defeated candidates) were entitled to file the petition, while others (the local branch of a political party and the President of that party) were not.

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[222] *Supra*, p. 13.

[223] Judgment of the Supreme Court delivered on July 2, 1964.

[224] See N. A. Noor Muhammad, 'Judicial Review of Administrative Action in the Somali Republic'. (1966) *Journal of African Law*, Vol. 10, No. 1, p. 9.

[225] The words within brackets are a literal translation of Italian terms which have no exact equivalent in English legal language.

Under the Rules of Procedure of the Supreme Court[226], a petition in administrative matters may be filed, as under Italian law, only on the grounds of lack of jurisdiction (*incompetenza*), excess of power (*eccesso di potere*) and violation of law (*violazione di legge*). In Northern as well as Southern cases, any issue relating to these grounds is examined by the Supreme Court on the basis of Italian law.

## 2. A Case of Legal Disintegration

In the early phase of integration the co-existence of different legal systems occasionally brought about extraordinary results in the administration of justice.

The most dramatic example was the case of twenty-one junior officers and cadets tried on the charge of having 'waged war against the Government of the Somali Republic'.

On December 9 and 10, 1961 an attempted coup took place in Hargeisa and other principal towns of the Northern Region. The insurgents seized the Commanding Officer and other senior army personnel, occupied several key points and announced to the population that they had taken power on behalf of the army. About twenty-four hours later the forces loyal to the Government, after a brief battle, put down the rebellion and arrested the twenty-one accused, most of whom were young cadets and Sandhurst-trained officers from the North.

Since the offence had been committed in the North the Regional Court of Hargeisa had jurisdiction in the case. For security reasons, however, the Supreme Court directed the Hargeisa court to hold the trial in the capital city of Mogadiscio.

For the duration of the trial, which lasted two months, the area surrounding the court house was cordoned off by armed military guards and mounted police.

The circumstances and outcome of the trial were most unusual.

The court comprised an English judge and two Somali assessors. Although the Hargeisa court was physically located in Mogadiscio the trial was governed by the Northern law which, at

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[226]Approved by Decree No. 29 of February 24, 1956. These rules of procedure, adopted during the Trusteeship period, are still in force.

the time, was the Indian Penal Code and the Indian Code of Criminal Procedure[227].

The accused were charged with waging war against the state, punishable by death under Section 121 of the Indian Penal Code.

The prosecutor was an Italian lawyer unfamiliar with Indian law and the English language. The defence consisted of two Indian attorneys practicing in Kenya.

During the trial (January-March 1963) eighty-four prosecution witnesses were heard. They testified in Somali, which was translated first by a Somali interpreter into Italian for the benefit of the prosecutor and then by an American interpreter into English for the benefit of the judge and the defence attorneys.

The trial had been preceded by a 14-month investigation conducted by the Italian Attorney General, mostly in the Northern Region, with considerable language difficulty.

The written depositions taken during the investigation and the testimony of the witnesses at the trial brought out in great detail the events of December 9 and 10, 1961 and the role of the accused. However, all of the twenty-one accused were acquitted.

The transcript of the court proceeding records what happened after the case for the prosecution was closed.

The defense, submitting that each case should be examined separately, pleaded for the acquittal of five of the accused:

> '. . . in case of 5 no witness pointed to them or referred to similar name or alleged name of prisoner – these last 5 are Accused 11, Accused 13, Accused 18, Accused 19 and Accused 21 – here submission is that case must end.'

The prosecution replied that:

> '. . . adequate proof of proceedings v last 5 accused – they have been identified by rank and presence and conduct – therefore defence must be rejected.'

The Court ruled:

> 'There is no record on the case of any evidence against Accused 11, 13, 18, 19, 21. They have never been named or identified in any way. There is in my opinion no case for them to answer and I direct that they be acquitted.'

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[227]The integrated Somali Penal Code and Code of Criminal Procedure had not yet been enacted when the trial took place.

The defence then took up the case of two other accused:

> 'Regarding Accused 12 and Accused 20 these have only been mentioned once and then under circumstances of hearsay. Re Accused 12 only reference by P.W.53. This witness did not return for X-examination and his evidence cannot be accepted. Furthermore the mention of time is hearsay.... Regarding Accused 20 the only evidence against him is P.W.23. . . This is hearsay unless the witness has pointed out Accused 20 in the dock as the person who said this.'

The prosecutor replied:

> '. . . as far as Accused 20 is concerned P.W.23's evidence is sufficient as said by accused. Re Accused 12 there is sufficient evidence.'

The Court ruled:

> 'Evidence of P.W.53 is expunged. Even if not so expunged evidence that a man was brought and all that came out was his name cannot establish a prima facie case of waging war. (Accused 12.)
>
> 'Evidence of P.W.23 is hearsay and even so the action of Accused 20 to take a platoon to a police station is hardly an act of war. (Accused 20.)
>
> 'I rule that there is no prima facie case to answer by these accused and they must be acquitted.'

Having obtained the acquittal of seven of the accused the defence submitted that 'with the exception of five of the prisoners in the dock . . . none of the other prisoners were touched or otherwise indicated by any prosecution witness'. Accordingly, a plea was made for the acquittal of nine more of the accused. The prosecution replied that:

> 'Issues presented are related to actions by judge who should have raised them at time of witness's evidence. Record presumed true – objection to non-identity should have been raised then.... No doubt about identifications as made before questions on identification raised – witnesses knew Accused or [were] under them – rank and position in Army, time, place, arrest – clear instances of identification – defence stated statements re identification are in some cases all alike – presume each witness statement is proof of another witness statement – if witness has pointed out or identified (which may be done by different ways) must identification be done by parade – no need – when witnesses know accused it is farce . . . – should accused be pointed out by finger . . . – case must proceed – rely on Court.'

The Court acquitted the nine accused with the following ruling:

> 'Judge must accept evidence – Must not intervene and to help one side means censure from higher tribunal – not his business help prosecution or defence – silent judge – at end must produce finding sans fear or

favour that he thinks right – 2 legal systems – no disrespect to Italian where identification may be different – British system strictest proof required – Pacific ocean can be assumed but so far as say evidence v own father among 21 accused identification of father must be exact – ideally every witness asked if accused referred to in Court should go and touch accused referred to such would be acceptable – witnesses may know accused under them but not absolved from proving identity – not profitable go round and round on arguments on record – Northern Court and their standards must apply – by Northern Standards identity of the 9 accused are not established and if no such establishment of identity prosecution not proved prima facie case. If no prima facie case no need for accused defend.

'I find there is no prima facie case against . . . and I order that they be acquitted.'

Turning to the five remaining accused who had been properly identified the defence submitted that the case against them must be 'restricted to evidence based on identifying witness'.

The prosecutor replied that 'When witness identifies accused and makes statement, conduct of accused linked with other witness'.

After an exchange between prosecution and defence about the first of the five identified accused, the Court ruled:

'Only evidence v accused that he came to Regional Governor's house – did nothing – in spite of prosecution no proof he even said R.G. must speak to people – essential commit some act to constitute waging war – done nothing only possible house trespass – would have dismissed this accused if no identification – presence at riot not proof of rioting.

'There is no prima facie case against this accused and I direct he be acquitted.'

The second accused was also acquitted by the Court:

'What action did Accused do to constitute waging war? He arrived and was shown round and the witness against him left. It is *essential* for the prosecution to prove some specific action against an accused in reference to charge and to arrive at a place and be shown round is not an action of waging war against the state.

'There is no prima facie case against this accused and I order his acquittal.'

The third prisoner was accused of having been the commander of a group of soldiers who blocked the Police Headquarters and arrested the sentries. The Court ruled:

'It *is* important whether Accused 6 commander or not of group that arrested police. If he was he might be tried on minor charge but if not and he did nothing what evidence of waging war? . . . No evidence of

which of these 2 men Accused was. Court cannot say he must have been the one that arrested the police. If any doubt as to which he was benefit must go to him. Blocking Police HQ might be act of war but no evidence that Accused blocked it.

'Again there is no prima facie case to this charge and accused . . . must be acquitted.'

The next accused was commonly known as the leader of the attempted coup. The Court acquitted him with the following ruling:

'. . . if witness identifies as accused that identity is only valid as far as that witness is concerned. What other witnesses may have said about a person with a name similar to the name this accused is alleged to have had and whom they themselves have not identified is neither here nor there. Again question of action. What has Accused done as regards this witness? Nothing except arrive, make some remarks and go away. This action could by no stretch of imagination be an act of waging war against a state and we must work on the evidence of this witness only as he is the only one who has identified this accused.

'Again on this evidence there can be no prima facie case and this accused . . . must be acquitted.'

Regarding the last accused (Accused 3), a witness had testified as follows during the trial:

'In December 1961 I was serving as a policeman in Borama. On 10.12.61 I was guard commander at the police quarter guard. About 6.0 a.m. some military entered the room where I was asleep on a bed. The Lieutenant in charge pointed his gun at me and said "Get up". I identify this Lieutenant as Accused 3. I got up and he asked me if I was guard commander and I said I was. 2 other policemen who were on guard with me were being held up by some soldiers. Accused 3 said "These men are prisoners. Do not let them come out". Accused 3 went out and we continued to be held as prisoners by the military until about 9.0. Later on Accused 3 returned and asked me for the keys of the armoury and the safe. I replied that as we were prisoners why did he want the keys from us and Accused 3 said "If you don't give the key in this manner you will give it in some other manner". I then gave him the keys.'

The defence was 'prepared to allow that these actions might constitute minor offence', but submitted that they did not amount to 'waging war'. The Court ruled:

'It is true that here there is some action but the definition given of waging war against the state . . . clearly shows the action to be far less – minor charge possibly – it would be impossible to base a charge of waging war on these actions in the absence of further evidence showing an intention to wage war and if it were so based the case would be dismissed. I agree with defence.

'There is no prima facie case against this accused *on this charge* and he must be acquitted.'

At the end of the proceeding the Court handed down the following verdict:

> 'In no case has the prosecution established a prima facie case requiring any accused to make his defence. All accused are acquitted.'

The State promptly appealed against the verdict of the Regional Court of Hargeisa. In the memorandum of appeal it was stated:

> 'The lack of understanding of the real functions of a judge caused the trial to degenerate into an undignified exhibition of an attitude of mind which is not in keeping with the present historical situation.
>
> 'Senior officers were insulted, while the Court was laughing at them, and they were never allowed to defend their dignity . . .
>
> 'Senior officers were asked to about turn in public for the sole reason of despising them.
>
> 'If a trial is a theatrical show, this was a trial – if not, this could never be considered as a trial.'

Referring to the Court's decision to acquit some of the accused on the ground that the witnesses had not pointed them out, the memorandum went on to say: 'Least we can say is the reason on which Judge based decision is childish and, in any case, it is inspired by the principle that *'uti lingua noncupassit ita ius esto*'. In this case, it was said, witnesses who appeared before the Court had known all the accused for a long time, had worked with them and were therefore in a position to know them by name. What doubt, then, could arise as to the identification of the accused? A formal procedure for the identification of a person should be applied where a question on the identity of such person arises. Otherwise, this procedure becomes 'an unnecessary theatrical performance'. If the Court thought that procedure necessary, why did it not apply it, as the Court has a right to put questions to witnesses?'

These questions were never resolved. The date for hearing the appeal was postponed several times until, early in 1965, all the defendants benefited from an amnesty, and the appeal was dropped.

In the history of integration in Somalia, this trial was probably the clearest case of two legal traditions being unable or unwilling to understand each other. The requirement of formal identification of the accused, the refusal to admit hearsay evidence, the silent judge equidistant between prosecution and defence – all

elements regarded by one side as basic features of a fair trial – were criticized by the other side as components of a travesty of justice. Where the detailed circumstances of the offence and the identity of the offenders were matters of common knowledge, it was inconceivable to one side that the trial could end in the acquittal of all the defendants; but the other side was equally convinced that the defendants were as entitled to benefit from all the procedural formalities laid down by the law as the state was entitled to seek the conviction of the accused.

### 3. Evolution of Customary Law

The evolution of customary law[228] as a result of court decisions presents an interesting picture of interaction of co-existing legal systems in the Somali Republic. Where there is a dual system of courts, customary law and ordinary law generally develop as separate water-tight compartments. A unified judiciary, instead, tends to stimulate the growth of unitary case law, inspired by common principles and responsive to the requirements of an evolving society. Customary law is then constantly subject to objective scrutiny by the best qualified judges. As a result, those rules of customary law that survive the test emerge strengthened, while others are discarded. This conclusion is borne out by decisions of the Somali Supreme Court handed down since the unification of the judiciary[229].

#### (a) *Blood money* (*dia*)

According to some authorities[230], in the past it was Somali custom for the tribe of a person who killed a member of another

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[228]On Somali customary law in the Northern Regions see I. M. Lewis, *A Pastoral Democracy*, Oxford University Press, London (1961); I. M. Lewis, *Peoples of the Horn of Africa*, International African Institute, London (1955); A. C. A. Wright, 'The Interaction of Law and Custom in British Somaliland and their Relation with Social Life' in (1943) *Journal of the East African Natural History Society*, 62. On customary law in the Southern Regions see M. Colucci, *Diritto consuetudinario della Somalia italiana meridionale*, Firenze (1924); E. Cerulli, *Somalia*, Vol. I, A.F.I.S., Mogadiscio (1957).

[229]See P. Contini, 'Integration of legal systems in the Somali Republic', (1967) *International and Comparative Law Quarterly*, Vol. 16, p. 1088 (reproducing the text of a paper delivered in 1964 at the Ibadan Conference on integration of customary and modern legal systems); N. A. Noor Muhammad, 'Civil Wrongs under customary law in the Northern Regions of the Somali Republic', (1967) *Journal of African Law*, Vol. II, p. 99.

[230]Cerulli, *op. cit.*, p. 209.

tribe to turn over the culprit to the latter. This was eventually replaced by the payment of blood money (*dia*) as the price payable in lieu of the life of the offender.

For homicide, whether voluntary, involuntary or premeditated, *dia* normally amounts to one hundred camels for the life of a man and fifty camels for the life of a woman[231]. *Dia* is payable by the group of the offender to that of the deceased, on the basis of the principle that 'no man receives or pays compensation individually'[232].

The payment of *dia* provides a kind of insurance against reprisals and tribal warfare which would otherwise result from homicide. In a society still consisting predominantly of nomadic tribal groups this method of peaceful settlement of disputes is of paramount importance.

In the last few years *dia* has been the object of careful scrutiny by the Supreme Court in the light of the principles of the Constitution and the development of Somali society. In *Hussein Hersi and Ahmed Aden v. Yusuf Deria Ali* (Civil Appeal No. 2 of 1964, Supreme Court Judgment of May 16, 1964)[233] the following questions were examined:

(1) Whether *dia* constitutes a penal punishment or civil damages;
(2) Whether it falls within the constitutional prohibition against collective punishment;
(3) Whether it is contrary to public policy;
(4) Whether it is applicable to deaths caused by motor-car accidents;
(5) Whether it is applicable throughout the country, including towns, or only in rural areas.

In this case the brother of a girl who had been knocked down and killed by a truck in the town of Hargeisa brought a claim for *dia* against Hussein Hersi, the driver, and his *dia*-paying group represented by Ahmed Aden.

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[231] At present *dia* is normally paid in cash. In *Hussein Hersi and Ahmed Aden v. Yusuf Deria Ali* (Supreme Court Civil Appeal No. 2 of 1964) it was decided that for purposes of *dia* camels should be valued at the rate of 75 shillings each. However, the market value of a camel is much higher.

[232] *Yusuf Abdi v. Gulaid Samater* (Subordinate Court of Civil Appeal, Civil Revision Case No. 3 of 1957).

[233] See text of the judgment in (1965) *Journal of African Law*, Vol. 9, No. 3, p. 170.

Article 43, paragraph 1, of the Constitution reads 'Penal liability shall be personal. Any kind of collective punishment shall be forbidden.' Accordingly, should the payment of *dia* be regarded as a penal liability it could be imposed on the offender but it would not be permissible to extend it to his next of kin. Moreover, should *dia* be in the nature of a collective punishment it could not be imposed on the offender's next of kin as a group.

On the first question the Court held that while *dia* is a penal punishment under Shariat law, it is considered civil damages under Somali customary law. This conclusion was reached on the basis of the following analysis of the nature of *dia:*

> 'Under the Shariat law, "dia" or blood money is a penal punishment. In cases of premeditated homicide the offender alone is liable for blood money; and in cases of involuntary homicide the "aakila" of the offender, i.e. the agnates of the offender on the collateral line, are responsible for the blood money.
>
> 'But Shariat law as applied in the Somali Republic has been modified in certain respects by customary law. First, even though the spread of Islam among the Hamitic tribes put an Islamic gloss upon the customary organization existing in the country, it did not produce any effective change in the tribal customs relating to compensation. The law of talion, which . . . is the 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. When the Colonial Powers took over the administration of criminal law, the Indian Penal Code was made applicable in the former Somaliland Protectorate and the Italian Penal Code in Somalia. Under the above Codes, homicide became an offence against the State; the tribe of the victim, however, continued to exercise a right to claim damages, apparently as compensation for the loss of one of its members. Thus "dia", which is a penal punishment under Shariat law, is considered civil damages in this country.'

On the second question the Court found that, as indicated in the preparatory work of the Constitution, the prohibition of collective punishment was intended to prevent the imposition of fines on communities for offences committed by any of its members, a practice permissible before independence in both parts of the Republic under colonial legislation. The Court held that the collective responsibility of a tribal group to pay *dia* to another group in case of homicide cannot be considered a collective punishment falling within the scope of the constitutional prohibition.

The third question was considered in the context of the contention of counsel for the appellant that to hold the tribal group liable for the payment of *dia* would be 'contrary to the

public policy of the State, namely, of gradually transforming the Somali society from the present largely tribal structure into a detribalized closely knit national State'.

The Court observed that the proceedings of the Constituent Assembly indicated there was no intention to abolish the collective responsibility of the tribe for the payment of *dia*. Furthermore, the Public Order Law adopted by the National Assembly since independence implicitly confirmed collective responsibility for the payment of compensation[234]. It was concluded: '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 the custom, the Supreme Court cannot hold that the collective responsibility is against the public policy of the State.'

Regarding the fourth question, whether *dia* is applicable to motor car accidents, the Court held that 'under Somali customary law, there is no distinction between deliberate and accidental homicide, and *dia* is applicable in both types of homicide'. The Court went on to say:

> 'Traffic accidents are comparatively a new problem, and such problems could not have been contemplated under Somali customary law.
> 'Law, whether Shariatic or customary, is not static; and Shariat law definitely provides that, in the absence of specific provisions under Shariat to cover any particular matter or situation, analogy (*oiyas*) should be resorted to . . . The Court of Justice, which was the highest Court in the former Trust Territory of Somalia under Italian Administration, has laid down in *Dahabo Abdi v. Haleima Abdulla* (Judgment of March 11, 1957) that:

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[234]Article 69 of the Public Order Law (Law No. 21 of August 26, 1963) provides that where, following the commission of a crime against the life or safety of a person, there is reason to believe that acts of retaliation or vengeance will be committed by a person or group of persons, or that serious breach of the peace will occur, the police or other public order authority may order the sequestration of animals or other property belonging to the persons who are presumably liable to pay compensation. The purpose of this measure is to prevent the group to which the offender belongs from removing its livestock to distant places so as to avoid paying compensation under customary law. Since such removal is likely to bring about reprisals and bloodshed the law gave the police authority to seize the cattle or other property belonging to the offender's group. A similar provision had been in force in the Northern Regions [Political Cases (Attachment of Livestock) Ordinance, 1937, S.6] and was extended to the Southern Regions during the British Military Administration.

> ". . . in the absence of provisions in customary law for the payment of damages under Shariat law, the Judge can apply by way of analogy the criteria applied in similar cases."
>
> 'The above ruling approves the application of analogy in customary law, with which principle this Court respectfully agrees.
>
> '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 another ground for the extension of *dia* to motor car accidents, the Court quoted with approval the following ruling of the Court of Appeal of Hargeisa:

> 'Under the British (and I believe many other) legal system, the driver and owner of a vehicle causing an accident would be liable to compensate the victim, but this liability would normally be covered by compulsory car insurance. There is no compulsory insurance here and under the existing circumstances it would be impracticable to introduce it. Somali *herr*[235] provides a form of insurance. In natural justice the victim of a traffic accident should be entitled to compensation where the accident is due to the other party's negligence. Obviously, if his only claim lies against the driver, the victim will have little hope of recovering compensation awarded, as in most cases the driver would be unable to pay. In the circumstances I feel I cannot agree with the defence submission that *herr* should not apply to such cases.'

The Court considered then the fifth question, i.e. the contention of counsel for the appellants that *dia* should not be applicable to motor car accidents occurring in towns. It was stated by counsel that

> 'Tribal groups accept collective responsibility for acts of individuals only in matters which directly affect the interests and security of the group as a whole. The extent of their responsibility is moreover clearly known to them. The tribe has no interest in the traffic misfortunes to which urbanized members of the group are parties and they have no control over townsmen who take to driving motor cars for business or pleasure.'

This argument was not upheld by the Court, which 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

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[235] *Herr* means both customary law and tribal agreement.

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.'

In *Akil Gulaid Jama v. Abdullahi Ali* (Supreme Court Full Bench, Civil Appeal No. 25 of 1964, Judgment of June 16, 1965) the Supreme Court decided the question of whether a person has the right to opt out of his *dia*-paying group. This is a matter of great importance in view of the gradual growth of urban society and its effect on tribal ties and was decided by the Full Bench of the Supreme Court[236].

A taxi driven by Dahir Ahmed Magan ran over Yunus Boni, who died as a result of the injuries sustained in the accident. The nephew of the deceased, Abdullahi Ali, filed a civil suit for compensation (*dia*) against the driver of the vehicle and his *dia*-paying group, represented by Akil Gulaid Jama.

The Court considered the question whether Dahir Ahmed Magan's *dia*-paying group, which had been disowned by him, should be held civilly liable for his actions. Both the Regional Court and the Court of Appeal of Hargeisa had held the group liable on the ground that according to Somali *herr* no one can leave his *dia*-paying group. The Supreme Court, in reversing the lower court's decision, discussed in detail the nature of the tribal bond in relation to the Constitution:

'Tribal ties, which in the Somali *herr* were created chiefly for purposes of collective defence, should, in view of their historical origin, be interpreted according to 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 have been acquired by birth and have been maintained by consent: in other words, they are formed *jure sanguinis*, but can be severed by decision either of the whole group ("recession" and joining of another group), or by an individual (leaving the tribe). The fact that this last event had, in the past, occurred only very rarely does not at all affect the consensual nature of the maintenance of tribal ties.

'. . . the consensual nature of tribal ties has been emphasized by the Somali Constitution. The Constitution, in fact, clearly shows the intention to depart from tribal customs, without expressly abolishing them

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[236]The matter had first been considered by the Supreme Court in its judgment of March 9, 1965. It was stated therein that the issue was 'of particular importance to the Somali society', and it was decided therefore to refer it to the Full Bench of the Supreme Court.

(Constitution, Article 12 (2))[237], and to confer on the State alone not only sovereignty, but also the protection of the rights of the citizens (Constitution, Part II) and of the rights of man in general (Constitution, Part III), which were formerly conferred on the tribe. It follows that the tribe, whatever interpretation is given of its past nature and structure, has lost its original character of an "organic entity" ("*ente originario*") having a certain degree of sovereignty, as it had at its origin, but survives only within the limits established by the Constitution, i.e. as a free association which, although created and kept in existence by the *herr*, is today based only on the free will of those who wish to remain members (Constitution, Article 26 (1))[238] and who are therefore free to renounce their membership in it (Constitution, Article 26 (2))[239].

'As in the case in all free associations tribal ties are, therefore, based on the "voluntary element" (which the Romans called "*affectio societatis*"), i.e. the will of the individuals to maintain membership in the tribe. This will – if one makes a comparison with the other free associations, created by their founders and not kept in existence, like this one, by *herr* – presents only one characteristic feature, namely that, owing to the historical origin of this institution, the will need not necessarily be expressed by an explicit act of adhesion, but is presumed to exist *jure sanguinis* in all those who are born in the group, by the simple fact of their existing inside the group. However, this assumption always gives way before an act of free "recession", expressed either explicitly or *per facta concludentia*, i.e. with acts that exclude on the part of a person the will to maintain membership in the group.

'It follows, in the first place, that the explicit declaration of the intention to terminate the relationship of association (in whatever manner it is made, since no specific procedure is required), brings it to an end at once, *ipso jure*. It also follows that, while the fact of being absent from the group does not *per se* terminate the relationship, such relationship will be brought to an end *ipso facto* if the absence is accompanied by the will to terminate it.

'A contrary view would, in fact, be in conflict with Article 26 (2) of the Constitution, which lays down that the constant intention to maintain membership (*affectio societatis*) is necessary.'

As a result of this judgment the following principles have been established:

(1) A person is free to leave his *dia*-paying group;

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[237]Article 12, paragraph 2 reads 'Political parties and associations which are secret, have an organization of a military character or have a tribal denomination shall be prohibited'.

[238]Article 26, paragraph 1 reads 'Every person shall have the right freely to form associations without authorization'.

[239]Article 26, paragraph 2 reads 'No person may be compelled to join an association of any kind or to continue to belong to it'.

(2) The relationship of association may be terminated by any explicit declaration of intention to bring it to an end[240];

(3) A *dia*-paying group is not civilly liable for the acts committed by a person who is no longer a member of the group.

In *Habr Awal. Abdulla Saad v. Arap Samaneh. Boho Samaneh* (Civil Appeal No. 7 of 1962, Supreme Court Judgment of February 9, 1963) certain issues relating to *dia* were decided in the light of rules of common law and private international law. The respondents sued the appellants in the District Court of Hargeisa claiming *dia* for the death of Ahmed Sultan Farah who had been killed by a member of the group H. A. Abdullah Saad in Djibouti, French Somaliland. The District Judge ordered that H. A. Abdullah Saad should pay a full *dia* of one hundred camels. On appeal to the Court of Appeal of Hargeisa the respondents argued, *inter alia*, that since the cause of action had arisen in Djibouti the District Court of Hargeisa had no jurisdiction to try the case. The Court of Appeal held that the Hargeisa District Court had jurisdiction and observed

> 'that the claim is under the Somali *herr*, i.e. customary law and by the very nomadic way in which the Somalis live it is a law that was designed to regulate relations by the Somalis irrespective of political boundaries. This law was laid down long before any boundaries came into existence in this part of the world and by the logic of our mode of life it transcends boundaries and barriers.'

The Court of Appeal also upheld the decision of the lower court to apply the rate of *dia* prevailing in Hargeisa, observing 'I do not see any reason why the Djibouti rates would be applied. They are not recognized here in any way.'

The Supreme Court agreed, albeit for different reasons, with the decision of the Court of Appeal as to jurisdiction, and disagreed as to the rate of *dia*. It was held that 'a claim for *dia* arising out of homicide is similar to a claim in Torts' and 'where homicide is committed abroad, the jurisdiction of the courts within the Republic to award compensation will be subject to rules of Private International Law governing the rights and liabilities of

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[240]This rule was confirmed expressly in a third judgment of the Supreme Court relating to the same case (*Abdillahi Ali Bon v. Akil Gulaid Jama*, Civil Appeal No. 10 of 1966, Judgment of October 31, 1966).

the parties'. Having cited with approval a dictum by Justice Holmes in a torts action in the United States Supreme Court case of *Slater v. Mexican National Railway Co.* ((1904)) 194, U.S. 120; 24 Sup. Ct. 58), the Court concluded 'first, that the obligation may be enforced wherever the person may be found, and secondly, the extent of the obligation is determined by the law of the place of the act'. Accordingly, the Supreme Court decided that the Hargeisa court had jurisdiction but the rate of *dia* should be that prevailing under Djibouti law and custom rather than the one prevailing in Hargeisa.

This case, in which an issue relating to customary law was decided on the basis of a rule of private international law applicable to the common law concept of torts, is a remarkable example of mingling of different legal systems in the administration of justice in the Somali Republic.

As a result of the above-mentioned court decisions the concept of *dia*, has undergone a process of evolution and clarification since independence.

It has been established that in Somalia *dia* should be regarded as civil damages, similar to a claim in torts, and not a penal punishment; the collective responsibility of a tribal group for the payment of *dia* is compatible with the constitutional provision that penal liability shall be personal; *dia* is not forbidden by the Constitution as a collective punishment; even though the declared policy of the government has been consistently against tribalism and in favour of the formation of a detribalized national society, *dia* has not been found to be against the public policy of the State; *dia* is applicable in case of deliberate as well as accidental homicide, and extends to motor car accidents; *dia* is applicable in towns as well as in the bush; a person is entitled to leave his *dia*-paying group by making an explicit declaration to that effect; a *dia*-paying group is not liable for the acts committed by a person who is no longer a member of the group; the obligation of payment of *dia* may be enforced wherever the person liable may be found, even when it arose out of an act committed abroad, in which case, however, the rate of *dia* is determined by the law of the place where the act was committed.

(b) *Interaction of customary and Shariatic law*

The case of *Hassan Hussein and Isman Farah v. Sulbub Aw Abdi* (Civil Appeal No. 5 of 1962, Supreme Court Judgment of

January 30, 1963) is an example of interaction of customary and Shariatic law. A girl called Amina had been betrothed by her brothers to Hassan Hussein, who gave Amina's brothers 250 shillings and 50 sheep and goats towards *yarad* (bride's price) and *gabati* (advance on *yarad*). The girl, however, refused to marry Hassan Hussein and, instead, married Sulbub Aw Abdi, the respondent. The jilted fiance claimed 25 camels, under Somali customary law, from the bridegroom as *haal* (compensation for insult).

The Subordinate Court decided that the appellants had not produced any evidence to show that the respondent knew that the girl was betrothed and that, in the absence of such proof, the respondent was not liable to pay *haal* under Somali custom.

The case was appealed to the District Court of Hargeisa which reversed the decree of the lower court on the ground that under Somali custom the respondent had a duty to ascertain before marriage whether the girl was betrothed to another man, that the respondent had married Amina without making such enquiry and he should therefore face the consequences.

The respondent appealed to the Court of Appeal of Hargeisa which reversed the decision of the District Court on the following grounds:

> 'It is a matter of common knowledge that young ladies occasionally leave their *rers*[241] in search of future husbands and it is known as *heerin* in Somali. Similarly even in towns a young lady enters the house of a man she fancies, refuses to leave and insists to be married. It is a Somali custom that such girls should not be turned out or else such an act would be received by the entire girl's tribe as an insult in that it suggests that the girl is not of good birth and is not worth marrying. The man who turns out such a girl is liable to pay *haal*.
>
> 'To hold therefore that the defendant has got to find out facts and marries the girl at his risk may sometimes constitute for young men who have been fancied by unwooed girls a dilemma.
> 'I think the District Court misdirected itself as to the customary law. The correct decision is that of the Subordinate Court.'

The appellants then filed an appeal to the Supreme Court stating that the girl had been betrothed to Hassan Hussein, that according to Somali custom the father and the brother of the girl have the right to give her in marriage to any man they think

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[241] *Rer* is a collection of portable huts mainly made of grass and mattings.

fit, that in case the girl is not willing to marry the man, she should report to the District Commissioner and apply for a freedom certificate, and that if anybody marries her before she obtains the freedom certificate, he would be liable to pay *haal*, whether he knew that the girl was previously betrothed or not.

The Supreme Court observed that unless there was a valid betrothal between Hassan Hussein and Amina, the marriage of the respondent to the girl would not give rise to any liability for the payment of *haal*. The Court then proceeded to examine the question whether, 'on the basis of the Shariat law applicable to Shafis'[242] a girl may be betrothed by her brothers without her consent. In its judgment the Court quoted the following excerpt from *Minhaj Et Talibin*, the Manual of Jurisprudence of the Shafi School (Book XXXIII, Title I, Section IV, 322, 323):

> 'A father can dispose as he pleases the hand of his daughter, without asking her consent, whatever her age may be, provided she is a virgin. It is, however, always commendable to consult her as to her future husband; and her formal consent to the marriage is necessary if she has lost her virginity. If the father disposes of the hand of his daughter while she is under age, the girl cannot be delivered to the man before reaching the age of puberty. In the absence of the father, all his rights shall be exercised by the paternal grandfather. A girl cannot be given in marriage without her consent if she has lost her virginity and for this purpose it is irrelevant whether her virginity was lost as a consequence of a lawful or unlawful cohabitation. The father maintains his right to give his daughter in marriage if the loss of virginity is not the consequence of carnal intercourse; for example, if the girl fell to the ground and lost her virginity as a consequence thereof. Collateral agnates, such as brothers or paternal uncles, cannot give in marriage a girl who is under age; where the woman who has lost her virginity is given in marriage by her collateral agnates, she must give her express consent. A virgin of age can be given in marriage by her collateral agnates provided she does not oppose their choice. For this purpose, the patron and the Sultan shall by law have the same powers as those of the collateral agnates.'

In the light of the foregoing statement the Court concluded that collateral agnates such as brothers and paternal uncles cannot give a virgin girl in marriage if she opposes the choice. It was therefore held: 'There cannot be . . . a valid betrothal where she is opposed to the choice. The appellants' claim to *haal* could arise only if there was a valid betrothal, and if Amina

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[242]Somalis generally belong to the Shafi school of Islam.

married the respondent during the subsistence of a valid betrothal. The claim of the appellants for *haal* cannot therefore be sustained'.

An interesting aspect of this decision is that the Supreme Court ignored the appellants' argument that according to Somali custom the father and the brother of a girl have the right to give her in marriage to any man they think fit. The Court, instead of examining the validity of that contention under Somali customary law, considered it on the basis of Shariat law.

In commenting on this decision E. Cotran said: 'Instead of enquiring whether Amina's consent to the betrothal was necessary under Islamic law, the court should have discovered whether *haal* was payable under Somali customary law, since the cause of action had arisen under that law'[243].

The approach followed by the Supreme Court may indeed be at variance with the rule that 'the courts shall apply the Shariat law or customary law in civil controversies where the cause of action has arisen under the said law'[244]. However, that approach might be explained in the light of the constitutional requirement that 'laws and provisions having the force of law shall conform to the Constitution and the general principles of Islam'[245]. If, as the Court's judgment seems to imply, Amina's betrothal by her brothers without her consent did not conform to the general principles of Islam, it was properly declared invalid regardless of whether it conformed to customary law.

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[243]E. Cotran, 'Somali Republic Supreme Court' (1964) *Journal of African Law*, Vol. 8, No. 2, p. 139.
[244]*Supra*, p. 36.
[245]Constitution, Article 98, paragraph 1.

CHAPTER V

# CHECKS AND BALANCES

A working system of checks and balances among state authorities and an independent exercise of judicial powers are among the most effective safeguards against abuse. Both of these ingredients of the rule of law have been present in the Somali Republic since independence[246].

## A. Checks and balances under the Constitution

The Constitution contains a variety of provisions aimed at preventing the predominance of one branch of government over another. There are important limitations to the legislative powers of the National Assembly. The constitutionality of any law adopted by the Assembly is subject to review[247] by the Constitutional Court[248]. It is provided that the decisions of the Constitutional Court have effect *erga omnes*, and that a law declared unconstitutional ceases to be in force on the day of publication of the judgment[249].

Another limitation to the powers of the legislature lies in the authority of the President of the Republic to dissolve the National Assembly[250] and to veto laws adopted by it[251]. Moreover, the Assembly cannot amend the Constitution 'for the purpose of modifying the republican and democratic form of government or for restricting the fundamental rights and freedoms of the citizen and of man guaranteed by the Constitution'[252].

The powers of the executive branch are subject to important checks and balances exercised by parliament, the courts and the

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[246]See N. A. Noor Muhammad, 'The rule of law in the Somali Republic' (1964) *Journal of the International Commission of Jurists*, Vol. V, No. 2, p. 275.
[247]Constitution, Articles 98-100.
[248]Not yet established. *Supra*, pp. 40–42.
[249]*Ibid.*, Article 6, paragraph 4.
[250]For the restrictions on these powers of the President of the Republic, see *supra*, footnote 59.
[251]*Supra*, p. 17.
[252]Constitution, Article 105.

President of the Republic. Thus the government must resign if it does not enjoy the confidence of the National Assembly[253], and the Prime Minister may be dismissed by the President of the Republic[254]. In accordance with the constitutional rule establishing judicial review of administrative action[255], any final decision of the Public Administration may be challenged before the Supreme Court[256].

The authority of the President of the Republic to veto legislation is not absolute since the Assembly may override it by a two-third majority[257]. Moreover, the exercise of presidential powers in matters affecting the National Assembly is tempered by the fact that it is the Assembly that elects the President.

The judiciary is the only branch of government which, in the exercise of its powers, is not subject to checks from the other branches, and this exception is a confirmation, rather than a deviation from the principle of the rule of law. The independence of the judiciary is repeatedly stressed in the Constitution[258] and spelled out in the law on the organization of the judiciary. Although the Minister of Justice is responsible for 'the administrative organization of judicial organs'[259], the appointment, transfer, promotion, termination and disciplinary measures concerning members of the judiciary are subject to the *binding* recommendation of the Higher Judicial Council, an organ consisting predominantly of judges and entirely independent of the executive branch[260].

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[253]*Ibid.*, Article 82.

[254]*Ibid.*, Article 78, paragraph 3.

[255]Article 39 of the Constitution reads: 'Judicial protection against acts of the public administration shall be allowed in all cases, in the manner and with the effects precribed by law'.

[256]Organization of the Judiciary, Legislative Decree No. 3 of June 12, 1962, Article 5, paragraph 3(b).

[257]Constitution, Article 61, paragraph 4.

[258]Article 93 of the Constitution reads: 'The Judiciary shall be independent of the executive and legislative powers'. Article 96, paragraph 1, reads: 'In the exercise of their judicial functions, the members of the Judiciary shall be subject only to law'.

[259]Decree-Law No. 1 of February 7, 1965 (Amendments to Law No. 14 of June 3, 1962 on the Organization of the Government), Article 10.

[260]Organization of the Judiciary, Legislative Decree No. 3 of June 12, 1962, Article 28. The Higher Judicial Council is composed of the President of the Supreme Court, the Attorney-General, the members of the Supreme Court and three members elected by the National Assembly (*Ibid.*, Art. 27).

In the exercise of judicial review of administrative action, the Supreme Court was given an unusual power, which it had not possessed either in the North or the South before independence. This is the provision that, should the Public Administration fail to comply with a Supreme Court judgment in an administrative matter, 'the Supreme Court shall, at the instance of the party concerned, take the necessary action to carry out its judgment'[261]. Thus the Supreme Court was authorized, if necessary, to perform even functions of an executive nature in order to make sure that judgments against the Public Administration are properly observed.

### B. Checks and balances in operation

Marco Lombardo, speaking to Dante in Purgatory asked the poet: 'Le leggi son, ma chi pon mano ad esse?'[262] (There are laws, but who implements them?)

Whether legal safeguards are a dead letter or a living reality depends in large measure on how effectively rights are enjoyed and powers are wielded. The record of the first nine years of independence shows that the Somali people and authorities have exercised in full their legal rights and powers.

Every time the voters have been asked to vote – in the 1961 constitutional referendum, the 1963 administrative elections and the 1964 and 1969 political elections – they have gone to the polls with enthusiasm, often trekking for many miles in the bush to reach isolated polling booths put up in the middle of nowhere. There has never been any problem of voters' absenteeism; on the contrary, at every election the problem is how to prevent over-zealous voters from scouring the 'indelible' ink from their hands and voting again and again in different booths.

Women are not shy in exercising their recently-acquired franchise and queue up patiently awaiting their turn to cast the ballot. At the time of the constitutional referendum a woman gave birth to a baby girl inside a polling booth, and the child was appropriately named Referendum. Another woman, after casting her ballot in the black box reserved for the negative votes, walked out with the white ballot box hidden under her ample robe, to make sure that nobody else would have a chance to vote in favour of the Constitution.

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261 *Ibid.*, Article 10, paragraph 4.
262 *Divina Commedia*, Purgatorio, Canto XVI, 97.

The constitutional right 'to associate in political parties'[263] has been exercised by numerous political parties[264]. The opposition is free to hold meetings and political rallies[265] and is uninhibited in criticizing the government.

While there are two government newspapers[266], freedom of the press has been enjoyed by a number of periodicals[267], some of which have particularly indulged their constitutional right to vituperate the public authorities[268].

The deputies in the National Assembly are fully aware of their prerogatives and powers as legislators and of their duties to the constituents. As to the latter, not even prominent leaders can take their office for granted unless they keep in close touch with the electors. Because of insufficient grass-root support several nationally known figures failed in the 1964 and 1969 elections.

The National Assembly uses its powers in a spirited and independent manner. The absence of 'personality cult' in the Assembly's deliberations is illustrated by the two presidential elections of July 1961 and June 1967. In the first, Aden Abdulla Osman was elected President of the Republic[269] on the third ballot[270] in a close contest with Sheikh Ali Jumale. In the second, Avdirashid Ali Shermarke, who had been Prime Minister between 1960 and 1964, was elected over the incumbent President, also on the third ballot.

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[263]Constitution, Article 12.

[264]*Supra*, p. 21. In the 1969 elections, the Somali Youth League (S.Y.L.) won 73 seats; the Somali National Congress (S.N.C.), 11; the Somali African National Union (S.A.N.U.), 6; the *Hizbia Destur Mustaqil Somali* (H.D.M.S.) and the *Partito Liberale Giovani Somali* (P.L.G.S.), 3 each; 22 smaller parties won 2 or 1 seats each. Shortly after the elections almost all the deputies from other parties joined the S.Y.L.

[265]Freedom of assembly is guaranteed in Article 25 of the Constitution.

[266]The Italian language daily *Corriere della Somalia* and the English language weekly *Somali News*.

[267]E.g. the English language *Dalka*, the English and Arabic language *The Nation*, the Italian language *La Tribuna*, the Arabic language *Itihaad-la-Shaab*.

[268]Freedom of opinion is guaranteed in Article 28 of the Constitution.

[269]Aden Abdulla Osman had been elected Provisional President of the Republic on July 1, 1960. After the approval of the Constitution by popular referendum on June 20, 1961, the National Assembly elected him as the first President of the Republic on July 6, 1961.

[270]A two-thirds majority of the members of the Assembly is required in the first and second ballots, and an absolute majority in subsequent ballots (Constitution, Article 70).

In dealing with the government the Assembly has not shown any inclination to be subservient. For example, in July 1961 the new government formed after the presidential election, in introducing its programme, requested the confidence of the Assembly for a cabinet composed of sixteen ministers. The Assembly, before beginning the debate on the programme, passed a law limiting the number of ministries to twelve, whereupon the government tendered its resignation. The President of the Republic, however, requested it to reconsider and eventually the new government, pruned to twelve ministries, obtained the confidence of the Assembly.

Bills submitted by the government to the Assembly are subject to close scrutiny and often generate lively debate. According to a procedure inherited from the trusteeship period[271] the Assembly votes twice on each bill, the first time by open ballot and the second time, on the bill in its entirety, by secret ballot. Occasionally, this peculiar system has proved a nemesis for the government. For example, in June 1966 two non-controversial government-sponsored bills were overwhelmingly defeated in secret ballot after being overwhelmingly approved in open ballot. Since this action indicated opposition to the government rather than to the proposed legislation Abdirizak Haji Hussen, then Prime Minister, submitted the government's resignation. The President, however, requested him to continue in office until after the end of the celebrations of the sixth anniversary of independence on July 1. Later that month the government requested and obtained a vote of confidence and despite the defeat of the two bills, continued in office until a year later, when the newly elected President chose Mohamed Haji Ibrahim Egal as Prime Minister.

The executive has also shown a disposition to exercise its authority to the full extent permissible by the Constitution and by law. The normal powers of the government were increased by a state of emergency proclaimed early in 1964[272] as a consequence of border hostilities with Ethiopia. Moreover, the

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[271]Published in the *Bollettino Ufficiale della Somalia* Supp. No. 2 to No. 12 of December 20, 1959.

[272]Presidential Decree D.P.R. No. 13 of February 8, 1964. The state of emergency was proclaimed in accordance with Article 70 of the Public Order law (Law No. 21 of August 26, 1963).

government has frequently used its power to issue decree-laws[273] as a means of expediting the legislative process.

The powers conferred by the Constitution on the President of the Republic have been vigorously wielded by the first two Presidents since independence. For example, on several occasions the President returned unsigned measures adopted by the Assembly on its own initiative, and the Assembly has never been able to muster the two-third majority required to override a presidential veto[274]. Other presidential functions have also been carried out with active determination.

### C. Independent exercise of judicial powers

Although feuds and tribal warfare are not infrequent in Somali nomadic society, disputes are often settled by arbitration and other semi-judicial means on the basis of established rules of customary law. This tradition may partly explain a generally positive attitude towards the judiciary as an impartial and trustworthy instrument for the settlement of controversial issues. An illustration of this attitude may be found in the debates on article 59 of the Constitution concerning the validity of the qualifications of deputies elected to the National Assembly.

The Technical Committee, in its commentary on the first draft of the Constitution[275], remarked that in many countries decisions on whether a member of the legislature should be seated are made exclusively by the legislative body itself, on the ground that parliament should enjoy sovereign autonomy in the conduct of its own affairs. However, the Technical Committee pointed out that with this solution there was always the danger that decisions might be made by the majority on political grounds, to the detriment of the minority. In the end the Committee put forward three alternatives: the first provided that any challenge to the qualifications of a deputy would be decided exclusively by the Assembly; the second, that a deputy would be entitled to appeal to the

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[273]Decree-laws may be issued by the government 'in case of urgent necessity', but must be subsequently converted into law by the National Assembly. A decree-law not converted into law ceases to have effect *ab initio* (Constitution, Article 63).

[274]*Supra*, p. 17.

[275]*Supra*, p. 3.

Constitutional Court against a decision of the Assembly concerning his qualifications; the third gave jurisdiction to the Constitutional Court over petitions challenging the qualifications of deputies. The commentary mentioned a number of constitutions as following the first or second alternative, but did not cite any precedent for the third.

The first alternative was chosen by the Minister for the Constitution in his draft and, after extensive debate, in the draft approved by the Political Committee. In the Constituent Assembly the matter was brought up again and a number of deputies expressed fear that in deciding on the qualifications of a deputy the Assembly would use political instead of legal criteria. The position of those who would rather rely on the judiciary was expressed by one of the deputies in the following words: 'There are two things that can be obtained from judicial organs, but not from legislative bodies. These are the patience and calm which are attributes of the judiciary, and also impartiality'[276]. This view prevailed, and in the end the Constituent Assembly decided that 'the Supreme Court shall have jurisdiction over petitions challenging the qualifications of deputies'[277]. Thus the Somali politicians preferred to deprive themselves of this important power and vest it in the judiciary. This decision is particularly significant when one considers that the members of the Constituent Assembly were aware that for some time to come the Supreme Court would continue to include foreign judges[278]. It is also interesting that on this point the Somali Constitution differs from the Italian Constitution[279], where each of the two branches of parliament

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[276]Constituent Assembly, Verbatim Records, Meeting No. 28 of June 8, 1960, p. 6.

[277]Constitution, Article 59, paragraph 1.

[278]Late in 1964 a bill was introduced in the National Assembly requiring that all members of the judiciary should be Somali nationals within one year. The bill was defeated on January 4, 1965 after Prime Minister Abdirizak Haji Hussen told the Assembly that although there were several young Somali law graduates 'mere possession of a degree does not seriously permit immediately entrusting them with criminal cases involving decision on earth's greatest boon – personal liberty'. The Prime Minister added that the government could not allow the administration of justice to be used as an experimental laboratory for inexperienced Somali judges.

[279]For the influence of the Italian Constitution on the Somali Constitution, see *supra*, pp. 56–57.

has exclusive jurisdiction as to the qualifications of its members[280].

Justice in the Somali Republic has been administered with a high degree of independence. Since the establishment of the union, judges have repeatedly shown themselves to be free of political influence, and the state authorities have refrained from interfering in the formation and implementation of court decisions.

It would have been remarkable in any country for a group of army officers who attempted a coup d'Etat to be tried in a civilian court, acquitted on a technicality, allowed to go free and later amnestied, as happened in Somalia[281].

In several instances the Supreme Court did not hesitate to hand down decisions annulling governmental actions in politically or economically sensitive areas.

Perhaps the most important case in this respect is *Ahmed Muddei Hussen and others v. The Minister of Interior* (Supreme Court Full Bench, Judgment of March 7, 1964). The Local Council of Mogadiscio, which had just been elected, met for the first time on January 2, 1964, and elected Ahmed Muddei Hussen as Mayor. On the same day the Minister of Interior issued a decree[282] dissolving the Council on the ground that, having chosen as Mayor the person who had served in the same capacity during the previous administration, which had been dissolved in 1962 on the ground of 'serious administrative deficiencies and irregularities', the new Council gave no assurance of being able to perform its functions.

The Mayor and a number of Councillors petitioned the Supreme Court for the annulment of the Minister's decree. The Supreme Court noted that the Minister of Interior was authorized to dissolve a Local Council 'where a Council cannot perform its functions'[283]. It held that this impossibility should be evaluated *a posteriori*, whereas the grounds stated in the decree were based on *a priori* judgment of how the Council would perform its

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[280]Constitution of the Italian Republic, Article 66. The debate in the Italian Constituent Assembly on this article paralleled closely that of the Somali Constituent Assembly. The Italian Assembly, however, rejected two proposals to give a role to the judiciary in this matter. See V. Falzone, F. Palermo, F. Cosentino, *La Costituzione della Repubblica Italiana*, Colombo, Rome (1954), p. 171.

[281]*Supra*, Chapter IV, section B2.

[282]Ministerial Decree No. 9 of January 2, 1964.

[283]Law No. 19 of August 14, 1963, Article 44, paragraph 1.

functions in the future. Accordingly, the Supreme Court annulled the Minister's decree, and the same Minister reinstated the dissolved Local Council. Considering that the government attached much political importance to the dissolution of the Mogadiscio Council, this Supreme Court decision and its immediate implementation are a significant example of application of the rule of law in the Somali Republic.

The decision of the Supreme Court in *Haji Mohamed Hussen and others* (Supreme Court Judgment of July 9, 1964) resulted in seating in the National Assembly one of the most militant opponents of the government. In the course of the electoral operations relating to the political elections of 1964 the Chairman of the Electoral Central Office ascertained that in one of the electoral sections of the district of Merca the number of voters had been 395, and not 695 as shown in the record, and that the 300 additional votes, not lawfully cast, had been assigned to the Somali Youth League (S.Y.L.), i.e. the majority party.

Because of this irregularity the S.Y.L. candidate in the Merca district received a slightly higher number of votes than Haji Mohamed Hussen, the leader of the opposition party Somali Democratic Union (S.D.U.). The Chairman of the Electoral Central Office had to decide whether to subtract 300 votes from the total cast for the S.Y.L. in the Merca district, which would have brought about the election of the opposition candidate, or set aside the electoral results and call for new elections in the whole district, where more than 20,000 votes had been cast. The latter course of action was followed, whereupon the petitioners appealed to the Supreme Court claiming that under the Political Elections law the Chairman of the Electoral Central Office had no authority to set aside the elections for the district.

The Supreme Court held that the Chairman of the Central Electoral Office had no other power except to correct the results of the counting by subtracting the 300 invalid votes assigned to the S.Y.L. On this ground the Court annulled the Chairman's decision and directed him to allot one seat to the S.D.U. instead of the S.Y.L. The order was carried out promptly and Haji Mohamed Hussen was seated in the National Assembly.

*Società Agraria Coltivatori Agricoli* (*S.A.C.A.*) *v. The Minister of Industry and Commerce and La Società Agricola Somala* (*S.A.S.*) (Supreme Court Full Bench, Judgment of April 30, 1966) involved important financial interests and touched

also upon the question of whether foreigners were entitled to enjoy the constitutional right of economic initiative in the same degree as citizens.

The Minister of Industry and Commerce had issued a decree granting to S.A.S. an exclusive licence for the export of bananas to the countries of the Persian Gulf for a period of three years. S.A.C.A. contended that while the export of certain products was subject to licence, bananas were not included among the products specified in the regulations issued under the law on Foreign Economic Transactions[284]. It was argued therefore that the decree granting to S.A.S. an exclusive licence to export bananas was illegal.

The State Attorney, on behalf of the Government, maintained that the action of the Minister was justified on the ground that Article 14, paragraph 2, of the Constitution[285] and certain provisions of the law on Foreign Economic Transactions gave the Ministry the power to apply those provisions with discretion according to the spirit of the law.

The Supreme Court held that Article 14 of the Constitution could not be construed as granting any discretion to the Ministry but merely enabled the Legislature to make laws on the subject. The Court observed that the law on Foreign Economic Transactions provided that restrictions and prohibitions may be imposed in the national interest, and the purposes for which they may be imposed had been enumerated in the law. The Minister's 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.

It was also argued on behalf of the Government that the right of economic initiative guaranteed by Article 14, paragraph 1, of the Constitution applied only to citizens, and not to foreigners[286]. The Court, observing that the question of citizenship was not relevant in respect of a juridical person, rejected this contention and decided that the decree of the Minister of Industry and Commerce was illegal.

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[284]D.P.R. No. 203 of September 26, 1964. Subsequently, however, the exportation of bananas to the Middle East was expressly made subject to licence by Presidential Decree D.P.R. No. 89 of March 23, 1966.

[285]Article 14, paragraph 2, of the Constitution reads: 'The law may control the exploitation of the economic resources of the territory of the State'.

[286]Article 14, paragraph 1 reads: 'Every citizen shall have the right to economic initiative within the framework of the laws'.

# CONCLUSIONS

WHEN the Somali Republic became independent it had, like almost all African countries, a traditional law existing side by side with imported western law. However, unlike most other African countries, in Somalia there was not a single, but two western legal systems, one introduced by the British in the North, the other by the Italians in the South.

Since independence and the formation of a unitary state the main emphasis has been in replacing the differing imported laws with unified legislation, rather than attempting to abolish the dualism between traditional (i.e. Islamic and customary) and general law[287].

The approach followed by the Somali legislator has been essentially pragmatic in the sense that priorities were dictated primarily by practical exigencies. For example, it was considered most urgent to build the main structure of a unitary state and to give the public authorities the powers necessary to operate in both parts of the Republic. Thus priority was given to unifying the civil service and the judiciary and laying down the organization and functions of governmental and other public bodies. As the term of office of the National Assembly was nearing its end it became necessary to prepare a new political elections law. The fact that the police had different powers in the North and the South was considered a divisive element; consequently, early attention was given to a unified public order law. It was thought intolerable that in a unitary state a person could be put to death in the North for an offence which in the South was punishable with a jail sentence. Accordingly a 'homicide law' imposing the death penalty for murder throughout the Republic was pushed through during the early phase of integration. Similar considerations influenced the decision to proceed with the utmost speed in the preparation of a unified penal code and criminal procedure code.

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[287]See A. A. Allott, 'Towards the unification of law in Africa' (1965) *International and Comparative Law Quarterly*, Vol. XIV, 366.

As a result of this approach, the greatest progress in legislative integration has been made in the domain of public law, where pre-independence western laws have been supplanted by unified legislation.

In other areas different western laws continue to apply to the two territories. For example, obligations, contracts and torts are still governed by English (and Indian) law in the North and by Italian law in the South.

The same traditional law applies throughout the country in respect of personal status, marriage and divorce, and successions, where no attempt has yet been made towards either codification or a restatement of the law.

Although a self-contained body of Somali law is being developed owing to the gradual replacement of pre-independence laws by integrated legislation and the growth of case law[288], at this stage Somali law may be described as an essentially eclectic system where different legal institutions have been brought together in peaceful coexistence.

In the absence of an overall policy in favour of one or another legal family, Somali law has been about equally influenced by common law and civil law concepts.

The freedom of choice available to the courts under an eclectic system which is also in a state of transition may make it difficult to ascertain the rules applicable to a given situation. Consequently, the predictability of the law is reduced. On the other hand, legal non-alignment has a distinct advantage for a newly independent country. There is less temptation to accept uncritically models of the former colonial powers, which may be unsuitable to the conditions prevailing in that country. The comparative freedom from legal dogma increases the kind of flexibility required by a society that is changing at a fast pace.

The Somali Republic has been equipped with the essential elements of the rule of law and the Somali authorities and people have been generally inclined to abide by it. Legal institutions cannot, of course, by themselves provide an absolute guarantee against abuse of power or a water-tight protection of individual

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[288]See *Somali Law Reports, Hargeisa and Burao Regions, 1961-1963* and *1964-1965*. These two mimeographed volumes contain selected judgments of the Supreme Court in civil and criminal appeals from the Northern Regions. The judgments relating to the Southern Regions have not yet been published.

rights and freedoms. However the chances of gross disregard for legality are diminished where those institutions are nurtured by people determined to exercise vigorously their rights and powers and intolerant of authoritarian rule. These qualities abound among the Somalis who have been aptly described as belonging by tradition to an egalitarian society.

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