

THE PENAL CODE OF
THE SOMALI DEMOCRATIC
REPUBLIC

*With Cases, Commentary,
and Examples by*

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PREFACE

This is the first complete book about the Somali Penal Code and one of the few books on any aspect of the legal system of the Somali Democratic Republic. It was written while I was in Somalia, under the auspices of the United States Peace Corps, as Legal Adviser to the Somali National Police Force and Legal Assistant to the Ministry of Justice and Religious Affairs. It is based upon personal experience, observations, case files, court decisions, and other material generally unavailable outside the Republic.

The book has two main purposes: First, it shows how a Western European law, the Italian Penal Code, operates when superimposed upon a country with different social and political conditions, and how Islamic and Somali customary legal principles, in turn, have influenced this Penal Code.

Second, the book provides a detailed study of the operation of the Penal Code and how it relates to other laws in force in the Republic, such as the Maritime Code, the Citizenship Law, the Public Order Law, the Military Penal Code, the Criminal Procedure Code, the Law on the Organization of the Judiciary, the Civil Service Law, and the Constitution of the Republic.

The Somali Penal Code is almost a word for word replica of the Italian Penal Code, which was drafted by a special commission under the Chairmanship of Professor Arturo Rocco. Known as the "Rocco Code," it became effective on July 1, 1931, and was modified subsequently to some extent to suit the Italian Fascist doctrine. After the Second World War these modifications were deleted, and the Penal Code in force in Italy today is essentially the Code as approved in 1930. It is this Code, which, with the changes explained in the Introduction, is the Code in force in Somalia now.

Since the Somali Penal Code is based on the Italian one, it was drafted, passed, and officially published in Italian. A semiofficial English-language translation was prepared by United Nations personnel for use among English-speaking Somalis, primarily in the northern regions. The translation is confusing, ungrammatical, and often incorrect. However, because of its semiofficial status as a translation of an existing law, I have retained

the wording of the translation but pointed out errors in translation and grammar in the explanatory sections.

Relevant reported cases are used to illustrate articles of the Code but where no such case law exists, I have adopted the technique of hypothetical examples. However, as these examples are based upon my experience as legal adviser to the police force, most of them are simplified police case histories.

For purposes of clarity I have broken down each article into composite elements and used an outline format. In interpreting the Articles of the Code, I have relied upon the following major Italian authorities on the Italian Penal Code: F. Antolisei, *Manuale di Diritto Penale*, 5th ed. (Milano, A. Giuffrè, 1963), and E. F. Carabba, *Codice Penale* (Firenze, Ludus, 1963). In addition, Dr. Santiapichi's *Appunti di Diritto Penale della Somalia*, Parte Generale (Milano, A. Giuffrè, 1961) has been most useful. The Supreme Court decisions were taken from Somali Law Reports (Hargeisa and Burao regions), 1964-65.

As a result of a change in the form of government in the fall of 1969, the Constitution of the Republic is in the process of being redrafted. However, this change has not affected most of the basic laws of the land such as the Sharia Law regulating marriage, divorce and inheritance, the civil law, and the Penal Code. Thus this book which is essentially a publication and explanation of the Penal Code is a current, valid text about the functioning of the criminal law in Somalia.

In writing this book, I have had the help of many people. I cannot list them all but I would especially like to express my appreciation to Dr. Haji N. A. Noor Muhammad, former Legal Adviser to the Presidency of the Council of Ministers and Vice President of the Supreme Court of the Republic for his valuable technical advice and encouragement; Major General Mohammed Abshir Mussa, former Commandant of the Somali National Police Force, for his cooperation and support; Brigadier General Abdullahi Farah Ali Holif for his deep friendship and understanding; Dr. Mohamoud Ghelle for his assistance and tolerance of my meager knowledge of Italian; and to Dr. Paolo Contini for his helpful suggestions.

Finally, I would like to thank all the officers and men of the Somali National Police Force. They have caused me to love a country not my own, and by their example shown me the virtues of character all men aspire to but few obtain.

Martin R. Ganzglass

North Bergen, New Jersey
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GLOSSARY

The following words and terms are used throughout the text:

agal: A portable nomadic home, composed of woven mats and curved supporting poles

AGIP: The acronym for the Italian gasoline company

baksheesh: The Arabic word for alms

bud: A stick carried by nomads to aid in herding camels

CID: The acronym for the Criminal Investigation Division, the detective branch of the police force

Darawishta: The field force of the police, a highly trained combat unit. The name comes from the word “dervish,” the soldiers of the Somali national hero, Muhammed Abdille Hassan, who led the fight against the British at the turn of the century

dia: Blood money, or payment made to prevent retaliation by one group against another for death, injury, or insult caused by a member of the paying group

goa: A cloak or shawl, also used as a blanket

gudimo: A small hoe-like instrument

gurgi: A general term for house, including but not limited to *agals*

Illalos: A uniformed auxiliary force, outside of the police, usually charged with assisting the courts

mahawees: A saronglike garment worn by Somali men.

qaadi: A religious judge learned in Koranic law

qat: A non-habit-forming drug, grown mainly in the Ethiopian highlands and chewed as a stimulant

rer: A family grouping of close relatives

SEIS: The acronym for the electric power company in Mogadishu

shah: A commonly played game, consisting of a board drawn in the sand and stone markers

Sharia law: Another term for Koranic law

shifta: A robber or bandit

Sh. So.: The abbreviation for Somali shillings used throughout the text of the Penal Code

tobe: A word of Arabic derivation meaning cloak or shawl

tug: A ravine or river bed, usually dry except during the rainy season

INTRODUCTION

At the end of World War II, Italian Somaliland became a trust territory under the supervision of the United Nations with Italy as the administering power. Italy was charged with preparing the country for independence by 1960. The British, who retained control of British Somaliland, likewise prepared their colony for independence. British Somaliland became independent at the end of June, 1960, and Italian Somaliland obtained its independence on July 1, 1960. On that date, the two united to become the Somali Republic, with Mogadishu in former Italian Somaliland as the capital and Hargeisa in former British Somaliland as the northern administrative capital.

The Somali Republic comprises the horn of East Africa, hooking up into the Gulf of Aden. It is bounded on the east by the Indian Ocean, on the west by Ethiopia and French Somaliland, and on the south by Kenya. Generally, the northern part of the country is dry and brown, turning green briefly during the rainy season. The south is more tropical, having a humid climate and lush vegetation. Whereas in the north the thorn tree is the typical vegetation, the south has banana and mango trees, coconut palms, and many colorful flowers.

The country has a population of about two and one half million people who share a common language, culture, and religion. These common bonds enabled the new country to surmount the problems arising from the diverse colonial history of its separate parts.

Unlike other Africans, all Somalis speak one language—Somali. There are no major tribal languages to cause problems of oral communication. The unwritten aspect of the language in turn gives rise to part of the common cultural heritage of all Somalis—oral poetry. Somali oral poetry is recited and memorized from generation to generation. Somali is a descriptive language, rich in figures of speech, and the poetry is alliterative in style to aid in memorization. The poems may be on any subject—politics, war, satire, history, or love. They have different rhythms depending on the topic. Almost all of the Somali heroes have been great poets, and the Somali national hero Sayid Muhammed Abdille Hassan, who fought the British for twenty years, is considered one of the greatest. Today most Somali children can recite the Sayid's poems about victories

over the British camel corps, about treacherous allies, steadfast friends, and hazardous treks across barren lands. The poetry thus serves to remind Somalis of their unity and strengthens the nationalism of the people.

In addition, eighty percent of the population are nomadic. Therefore the people share a homogeneous way of life, centered around the ceaseless search for water and grazing land for their animals. The plenty of the rainy seasons and the harshness of life during severe drought create common moods among the people. The rainy seasons are times for feasting, marriages, and social gatherings. The dry seasons result in their moving on to other places, dislocation, frustration, and violence. But while temporary differences may arise, the oneness of Somalis is even then emphasized by their common needs—water and pastures for their animals.

As part of their shared cultural heritage, Somalis can trace their lineage back to a common ancestor. Somalis can recite as many as thirty to forty names of their fathers, grandfathers, and great-grandfathers, going back to the person who is believed to have started their tribe or grouping. Thus they can determine their blood relationship by reciting their lineage.

As a people, compared to other Africans the Somalis are one. They have no tribes existing as semiautonomous nations with hereditary chiefs or rulers, as do most other African nations. Somali tribes are determined by blood lineage. The tribes have traditional areas of grazing, and it is during the dry seasons that feelings run high and tribal disputes occur. However, the very method of settling disputes emphasizes the common cultural heritage of the people. As nomads, Somalis place great significance upon camels as a source of wealth. In order to avoid widespread violence among tribes, they have evolved the system of blood money or *dia*. If a member of a tribe is injured or killed, the offending tribe may pay for the crime by giving a number of camels to the tribe of the victim. This prevents the outbreak of further violence in the form of revenge killings, which in turn would trigger further acts of revenge until both tribes would be engaged in full-scale warfare. The state participates actively in this traditional mode of settlement; one of the functions of the police is to seize and hold the camels from the offending tribe, to guarantee payment of the blood money and avoid further bloodshed.

Somali tribes are not ruled by hereditary chiefs. They are run by elders who are elected by tribal members. Somalis have been ruling themselves by these tribal councils for generations, thus practicing a form of democracy long before they were colonized by the British and Italians.

For a nomadic Somali the thorn tree in the center of a village on a barren plain—the tree of the elders or council tree—is as much a symbol of self-government and justice as the village green or town meeting hall was to the early settlers of New England.

Above all, Somalis are bound together by their religion. Somalia is a Moslem country. Every child learns passages from the Koran from religious men before attending regular school. Arabic is taught in most schools, and students may study subject matter in that language.

Despite the common language, culture, and religion, Somalia's colonial history initially created severe problems for the new nation. First, there was the problem of written language. Most of the civil servants in the north wrote English while those in the south used Italian. Thus all debates, draft laws, and official publications of the new government had to be printed in both English and Italian, and in some cases in Arabic.

Second, the northern region inherited the British system of common law while the south was under the Italian civil system. The basic difference between the systems is that common law proceeds from a general law that is broadly drafted to cover a type of situation and leaves it to judges who have broad powers of interpretation; whereas the civil law system proceeds from a comprehensive law, encompassing every conceivable situation, leaving the judge little or no power to interpret the law. Consequently judges trained in one system had to be taught to apply the law under the other. Moreover, the laws in force in the two regions were in most cases different.

In addition, both regions had their own systems of administration under differing civil service rules and regulations. Record keeping, seniority, rates of pay, retirement benefits—all were different in a country now under one government. Thus the legal systems of the two former colonies had to be combined into one administration and uniform laws of nationwide application enacted.

What happened in the area of criminal law demonstrates how the Somalis coped with the problems of integration. Shortly after independence a special commission was appointed to prepare uniform criminal legislation. At one of the first meetings, the commission agreed to use the Indian Criminal Procedure Code and the Italian Penal Code as the basis for new uniform legislation. Thus these two basic codes, modified to suit the Somali situation, became the laws currently in force in the Republic.

The Somali Penal Code, which was officially published on October 19, 1960, is almost a replica of the Italian Penal Code, which became effective on July 1, 1931. But several of the differences between the two codes are important. Italy has abolished the death penalty and imposed a minimum term of twenty-one years imprisonment for murder; Somalia has retained the death penalty. Italy has passed special legislation to deal with prostitution, which is not covered by its Penal Code; Somalia has no such special legislation, and prostitution is dealt with

as a crime covered by one article of the Code. Article 215 of the Somali Code makes it a crime to conduct propaganda "to destroy or impair the national sentiment"; the Italian counterpart of this article was declared unconstitutional by the Italian Constitutional Court, but this provision of the Somali Penal Code has not yet been constitutionally tested. Under the Italian Penal Code, a judge has the power to order a prisoner released during the day to work outside the prison; the Somali judge does not have this power.

While the Constitution of Somalia guarantees freedom of religion to all persons, Islam is the official religion, only Islam may be spread or propagandized in the Republic, and many Moslem legal principles have been incorporated into the Somali Penal Code. According to the Koran, a Moslem may not drink alcoholic beverages, hence several articles of the Code make it a crime to sell or use alcohol, both in places open to the public and in private homes as well. These articles apply not only to Somalis but to all Moslems within the jurisdiction of the Republic.

The provisions of the Code relating to marriage, the family, and parental responsibility have also been modified to conform to Koranic law. The crimes of incest and marriage to a close relative are determined by personal status between the parties as defined by the Koran. The Code also makes it an offense to "avoid the obligations relating to the exercise of parental authority." The Koran is the source for defining what these obligations are.

Somali customary law has also left its imprint on the Penal Code. The Somali lineage system is male oriented, and much of Somali customary law evolves around the role of the male as parent and patriarch of the family. Under the Italian Penal Code, a man convicted of certain crimes loses his paternal power over his children and his marital power over his wife; this provision has been omitted from the Somali Penal Code because of the strong role of the father in Somali family life. On the other hand, the Somali Penal Code contains an article decreasing the punishment where a child has been injured by a parent.

With regard to the practice of paying blood money, the Code provides for a reduction in punishment where full compensation has been paid before trial; a similar provision exists under the Italian Penal Code. The question of whether a person accused of murder should be prosecuted where the blood money has been paid has not yet been determined by Somali courts. With regard to lesser offenses, the payment of blood money has resulted in the dismissal of criminal charges in some cases.

Generally speaking, all codified law in Somalia originates from a foreign source. This is a natural result of Somali colonial history. However, laws are shaped by the people they apply to as well as the people

who administer them. Any law in Somalia is subject in varying degrees to the influence of Islamic and Somali customary law. What emerges is a truly integrated law, modified to some extent prior to enactment and adapted, as actually enforced, to fit the needs of the Somali people.

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