

## REVIEWS

THE DEVELOPMENT OF THE CONSTITUTION OF THE SOMALI REPUBLIC: April, 1969. By Dr. Haji N. A. Noor Muhammad. Published by the Government of Somali Republic, Ministry of Grace and Justice, Mogadisciaio.

Constitution making in a new nation, which is coming to statehood, involves painstaking effort. A constitution in the mid-twentieth century cannot be written on a clean slate. There cannot be a total break with the past. The new constitution must provide for continuity as well as change. Most of the countries of Asia and Africa which gained freedom during the last twenty years were colonies of European powers. They had gained acquaintance with the constitutional system of the colonial power. It is, therefore, natural that these countries adopted the constitutional pattern of their former colonial power subject to modification so as to suit the local needs and aspirations. From the application of old Western models to new countries having entirely different socio-economic and cultural background, new constitutional patterns are bound to emerge. This should be one of the most fascinating areas for the study of comparative law in the coming years. However, such a study has to be preceded by authentic writings on the constitutional experience of the new countries. At present there is paucity of legal literature on this subject<sup>1</sup> and that makes research in comparative constitutional law difficult. Dr. Noor Muhammad's book on the Somali Republic, which is the "first full length study in English"<sup>2</sup> is, therefore, bound to prove very useful.

The Somali Republic's constitutional law shows a fusion of two main legal systems of the Western world, namely the Civil Law system and the Anglo-Saxon system. This is the result of Somali's acquaintance with three colonial powers, Italy, France and Britain. The author draws all important details of the political his-

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1. A very able and comprehensive study of the Afro-Asian, countries which are members of the Commonwealth, has been made. See Clarence J. Dias, *Fundamental Rights and Judicial Review in the Commonwealth: Study of the Societal Role of the Judiciary*, an unpublished Ph.D. thesis, University of Bombay, 1969.
  2. Noor Muhammad, *The Development of the Constitution of the Somali Republic*. April 1969. Hereinafter cited as *Noor Muhammad* at XVII, Foreword by Prof Antony Allot.

tory of Somali with a view to providing proper perspective of its constitutional development.

Somali has a small population which was 2.3 million in 1963.<sup>3</sup> It is homogeneous, culturally as well as ethnically. The people are Muslims and adhere to the Shafie school of Islam. Somali is, therefore, an Islamic Republic where the constitution provides that Islam shall be the state religion and that the doctrine of Islam shall be the main source of law.<sup>4</sup> The President of Somali is required to be a Muslim.<sup>5</sup>

The makers of the Somali Constitution have taken care to make a synthesis of the indigenous constitutional pattern with the modern. This makes the task of taking democracy to the grass-roots easy. The government is based on binding ties of patrilineal kinship. The people pay their allegiance to the dia-paying groups, class, sub-class and class families. The author tells us that "before the establishment of centralised administration, the Somalis depended for the protection of their life and property upon the protection they received as members of dia-paying groups,"<sup>6</sup> The dia-paying group is closely knit by two cardinal ties (1) *tol* (kinship and (ii) *berr* (agreement). *Tol* consists of members numbering from a few hundred to a few thousand who trace their descent through the agnatic line to a common male ancestor. The functioning of these tribal assemblies was democratic. Every man had the right to speak freely and decisions were taken by majority. This has been kept intact so as to maintain this as a link between the past and the present.

Somali has adopted the parliamentary form of government. This preference for the parliamentary form is in striking contrast to the preference for the presidential form which most African countries have shown. The countries which have adopted the parliamentary form of government often have to resolve the conflict between the President and the Prime Minister. In the absence of a body of conventions, the growth of which has provided the norms for governing such relationship in England, the tendency is to look to the letter of the law. As the letter tends to be interpreted in a strict manner,<sup>7</sup> the written law does not al-

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3. *Noor Muhammad* at 2.

4. *Id.* at 35.

5. *Id.* at 75.

6. *Id.* at 3.

7. In *Adegbenro v. Akintola and Another* (1963) 3 All E.R. 544, the Privy Council upheld the Nigerian Governor's power to dismiss the Premier when he felt that the latter did not command majority support in

ways provide the right answers. In India this problem is troubling the constitutionalists at both the levels, the central as well as the state. An interpretation of the relevant provisions of the Constitution of the Somali Republic may project the image of the President as a strong executive, at least stronger than the head of the executive, in a parliamentary government, is supposed to be. His discretion in appointing the Prime Minister is significantly wide. There is neither any convention nor a constitutional provision which requires him to appoint the leader of the majority party as Prime Minister. He can dismiss the Prime Minister. Such dismissal is required to be countersigned by the incoming Prime Minister. The author hopes that ultimately the President would be controlled by the National Assembly which in its turn would express its confidence in the government headed by the Prime Minister.<sup>8</sup> Such a hope is often expressed by constitutional pandits. But events in India have shown that in politically less mature societies the above calculation does not always work. Ten years' period is too short to assess Somali's experience in this respect. However, the author has ably pin-pointed this as a possible area of constitutional controversy.

The constitution contains a declaration of fundamental rights. Such a declaration, although generally disapproved by British constitutional lawyers,<sup>9</sup> has found place in a number of constitutions drafted after the Second World war. The Constitution of Somali makes fundamental rights immune from constitutional amendment. The constitution has thus entrenched the fundamental rights. It would be interesting to know whether the decision to make the fundamental rights unamendable was influenced by the Indian Supreme Court's decision in *Shankari Prasad*<sup>10</sup> case where the court held that the fundamental rights were subject to constitutional amendment. It is now well known that in *Goloknath v. State of Punjab*,<sup>11</sup> the Court overruled the

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the Legislature. The same view has been held by the High Court of Calcutta in *Mahabir Prasad v. Prafulla Chandra*, A.I.R. 1969, Cal. 198. Referring to the above Privy Council decision, K. Subba Rao, former Chief Justice of India, has remarked that "we need not adopt the colonial instance as a convention to govern our republican policy". See *Some Constitutional Problems*, p. 309 (Chimanlal Setalvad Lectures, University of Bombay, 1970).

8. Noor Muhammad at 82.

9. See generally S.A. De Smith, *Fundamental Rights in the Commonwealth*, 10 I.C.L.Q. 83, 215 (1961)

10. *Shankari Prasad v. Union of India*. A.I.R 1951 S.C. 458.

11. A.I.R. 1967 S.C. 1643.

*Shankari Prasad* decision and held, that the Parliament cannot amend the constitution so as to take away or abridge the fundamental rights. Does this trend show greater reliance and dependence on the *judiciary* in the developing countries?

The Constitution of Somali contains an express provision for judicial review. One novel feature of the Constitution of the Somali Republic is that the power of judicial review of legislation is to be exercised by the Supreme Court constituted as the 'Constitutional Court'. The Constitutional Court consists of the judges of the Supreme Court plus two additional members appointed for three years by the President on the proposal of the Council of ministers and two members elected by the National Assembly. Until now the Constitutional Court has not been formally constituted, and hence there has not been any occasion for the exercise of constitutional review. The inclusion of those additional members politicises the court and the experience of Somali in this regard will be of interest to all those who are engaged in the sociological study of judicial behaviour. It is hoped that the author will enlighten us on the constitutional experience of Somali regarding constitutional review either in the second edition of the present book or through other writings.

There is an express provision for judicial review of administrative action. The author says that scope of judicial review of administrative action is wider under the Somali Constitution than it is in the United Kingdom. The author points out that "in England acts which are described as ministerial and acts where the administration may act in a summary manner without notice and hearing, are not amendable to judicial review. In the Somali Republic, under the constitutional provision mentioned above, no such exception can be made, as *all acts of the administration contrary to law are made subject to judicial review.*"<sup>12</sup> One cannot expect the author to give details of how administrative action is controlled, in a book of this type. However, it would have enhanced the value of his contribution if he had acquainted the readers with the difference between English and Italian systems of judicial control of administrative action so that they could appreciate the more extensive nature of the Italian system which has been adopted in Somali. It was proposed that judicial review of administrative action should be vested in *Consiglio di stato* which is the highest administrative organ. This suggestion was rejected by the Constituent Assembly. Here we find a definite rejection of the continental pattern and acceptance of the Anglo-Saxon model.

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12. Noor Muhammad at 151.

Dr. Noor Muhammad's book gives us a very interesting summary of the constitutional development in the Somali Republic. This book will doubtless be read with interest by all those who are interested in knowing how familiar concepts and institutions develop in varied social contexts.

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