

Volume 1 Issue 6

INQUISITORIAL LEGAL SYSTEM IN SOMALIA

Author: Ahmed Kheir Osman, E-mail: Ahmedkheirosj@gmail.com.

Lecturer at Somali National University, Somalia

Abstract

The inquisitorial legal framework in Somalia is rooted in Civil law traditions that were introduced during the period of Italian colonial governance, in conjunction with diverse legal systems, including Islamic (Sharia) law and customary law (Xeer), among others. Nevertheless, the system faces significant challenges, including underdeveloped judicial institutions, insufficient resources, corruption, and inconsistencies in legal processes. The study aims to analyze the functioning of Somalia's inquisitorial legal system, identifying its strengths and weaknesses in ensuring fair trials. This study employs a qualitative approach, drawing from legal texts, historical analysis, and case law. Primary sources include Somalia's Provisional Constitution, judicial rulings, and legal commentaries. The study finds that Somalia's inquisitorial system is influenced by colonial-era legal structures but faces significant limitations due to political instability, weak rule of law, and limited judicial independence. The inquisitorial legal system in Somalia faces numerous systemic issues that make it difficult for it to function, despite having its roots in civil law traditions. Harmonizing legal structures, improving legal education, and fortifying judicial institutions are all crucial to increasing the system's efficiency.

Keywords: Inquisitorial, Legal, System, Italy, Somalia

INTRODUCTION

The criminal justice system in Somalia is inquisitorial, meaning that the judge can examine witnesses to get the truth rather than acting as a referee for the contest between the Attorney-General (Prosecution) and the defense. According to *World Law Dictionary* defines inquisitorial system as a legal system in which the judge has a key role in investigating parts of a case, collecting evidence, and examining and asking witnesses questions. Inquisitorial systems are especially associated with civil law jurisdictions, and contrast with the adversarial system in place in common law jurisdictions.¹

The origin of 'Civil Legal System' can be traced to the old age Roman Empire of the 5th century A.D. during whose time many rules and regulations were compiled and were called 'Code'. Since most of Somalia's laws date back to the Italian colonial era, they can be considered 'Code'. For examples, the **Criminal**

1 [1] World Law Dictionary, available at <https://dictionary.translegal.com/en/inquisitorial-system/noun>. Accessed 26/1/2025

Procedure Code of 1973, the Somali Civil Code no. 37 of 1973, the Somali Civil Procedure Code law no. 19 of 1974 and the Somali Penal Code of 1964 among others.

THE SILENT FEATURES BASED ON SOMALIA'S CIVIL LEGAL SYSTEM ARE DISCUSSED BELOW: –

Legislation enacted by the Competent Authorities: The Civil legal system gives the utmost importance to Acts passed by Parliament or the relevant authorities. According to *Article 55 of the Somali Constitution* provides that the Federal Parliament of Somalia consists of (a) the National Assembly; and (b) The Upper House or Senate. The same Constitution offers both Houses the duty to enact, amend, approve and reject laws in respect of articles 61 and 71 of the Constitution of Somalia.

Judges then apply these laws, which were passed by Parliament, to settle disputes. Courts regard the rules framed by the Parliament as highest and do not try to change it by asserting their own authority as in the Common Law System.

However, the court may offer their own interpretations of the **vague language** used in the Act. In the case of *Fahad Yasin Vs. The Federal Electoral Implementation Team (FEIT), Election Petition no. 2 of 2022*, FEIT was a political Committee which was aim to facilitate the election of 11th Parliament of the Federal Republic of Somalia. If there is a dispute, the contested election shall be referred to the Electoral Dispute Resolution Committee and not to the Courts of L

The petitioners brought this petition, before the Federal High Court of Somalia, as an appeal against the decision of the FEIT, pursuant to *Article 34 of the Constitution of Somalia*, which states that every person is entitled to file a legal case before a competent court. The petitioner sought for a declaration from the court that his seat was validly elected as a Member of Parliament for Balad-weyn District. The State-Attorney of Somalia who represent the FEIT before the court raised the preliminary point of objection they had given notice of in the respective answers to the petition. **These are, in sum, as follows:**

The Federal High Court has no jurisdiction to entertain the petition and the petitioner has no *locus Standi* in this Court

- a) The Court has duly framed the issues for its determination as follows; –
- a) Whether this Court has Jurisdiction to consider the petition and
- a) Whether the petition has *locus standi* to bring this petition

THE COURT'S CONSIDERATION AND RESOLUTION OF THESE ISSUES

The Federal High Court of Somalia has made a sudden decision to reject the case of Fahad Yasin and dismissed his seat as a member of parliament. The Federal High Court gave its decision as the reason for its lack of jurisdiction over the complaints arising from the administrative decisions of the indirect election of the

11th Parliament of Somalia, and accepted the objection of the State Attorney's office representing the Electoral Implementation Committee. The ruling was delivered by the three judges who heard the case: **Justice Salah Sh. Ibrahim Dhiblawe, Justice Abdulazis Mohamed Yusuf, and the Chief Justice of the Federal High Court (Supreme Court) Bashe Yusuf Ahmed.**

Nonetheless, the jurisdiction of the Federal High Courts (**Supreme Court**) was recognized by many different laws of the Country such as the Constitution which is the supreme law of the land to which all Citizens, state and federal is subject. The power of the judiciary is vested by the court and members of the judiciary shall be subject only to the law as per **article 105 of the Constitution.**

Under *Article 10 of the Somali Civil Procedure Code of 1974* provides that the Supreme Court (Federal High Court) has jurisdiction in all matters within the Republic as well as all the administrative cases. The same provisions can be seen in the *Judicature Act of 1962 and the Criminal Procedure Code of 1973* among others.

I. Judges and Law-making Power in Civil Law System:

In countries where civil law is applied, the law making process is bound by statutory law which judges are allowed to declare (by the means provided by the system) the sense and content of the rules already displayed in the statutory system. It is important to mention, the civil law system (at least originally) provided with the statutory law the power to create, modify and extinguish any right whatsoever it may be and or belongs to. **Thus, the judge has been put in a secondary role, out of the process.**²

II. Inquisitorial approach of the court proceedings:

In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case.³[3] He actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Judges may also go to the crime scene and gather evidence themselves if they believe that the evidence presented by the lawyers of the parties to the dispute leaves some doubt as to the truth of the matter. In Somalia, judges usually get directly involved in calling witnesses or presenting evidence. A Court may order, on its own motion, that evidence be produced which it considers proper and useful in order to ascertain the truth as stipulated under *article 118 of the Criminal Procedure Code*

2 Rafael de Oliveira Rodrigues, 'Judges and Law-making Authority: The New Brazilian Civil Procedure Code and the Limits of How a Civil Law Judge Could Act Such as a Common Law Judge' Athens Journal of Law – Volume 6, Issue 2, April 2020 – Pages 191-208 <https://www.athensjournals.gr/law/2020-6-2-5-Rodrigues.pdf>.

3 Zahid Islam, 'Strengthening State-led Rural Justice in Bangladesh' (2015) printed in Bangladesh by CCB foundation, Dhaka 2nd Edition at 87

of 1973.

Under **Article 186 of the Criminal Procedure Code** permits the court to gather evidence outside the court premises. The presiding judge shall go to the place agreed upon with such witness in order to receive his evidence. Whereas **Article 198 of the same Code** gives powers and discretion to the court in order to discover or obtain proper proof of relevant facts and to conduct any questions it pleases in any format at any time.

In Criminal Cases, the Courts also has the power to change or modify the indictment that contained the original charges against the accused by its own motion or *sua sponte* and that the court bring charges that were not brought by the Attorney-General hereinafter the Prosecution. This was illustrated in the case of *Somalia vs. Mohamed Aden Abdulahi & others (Criminal Case MGB/DCL/938 of 2023)* The accused were indicted for corruption, false accounting and false receipt contrary to **article 241, 71, 39 of the Somali Penal Code** and read with article 28 of the Ant-money laundry and countering the financing of terrorist act. The Attorney General (Prosecution) had previously brought all these cases against Mohamed Aden. However, the **Regional Court of Banadir** annulled them all.

However, in accordance with **Article 124 of the Criminal Procedure Code** and read with **Article 42 of the Public Finance Management Act**, the court sentenced the accused of two years in jail on its own motion. Hence, the court does not found guilty of an offense based on a formal written accusation made by a police officer or the attorney general without specific consent, since the Attorney General should have the burden of proof beyond a reasonable doubt in criminal cases in accordance with **article 110 of the Criminal Procedure Code of Somalia**.

Abdullahi Dudaaye, a Defence Counsel, condemn fabricated charges and unfair legal procedures by the court. According to him, **article 124 of the Criminal Procedure Code of Somalia** should be repealed because it violates the rights of the accused, especially **article 35 of the constitution**, and any law made in contravention of this Constitution shall, to the extent of the contravention, be void.

III. Somali Judicial Precedents and case law:

Precedent is the cornerstone of common law method.⁴ This idea is that the decisions of higher courts take precedence over the decisions of lower courts. In deciding any given legal issue, precedents serve

4 William D. Bader & David R. Cleveland, Precedent and Justice, 49 Duq. L. Rev. 35 (2011). Available at https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1155&context=law_fac_pubs#:~:text=Precedent%20is%20the%20cornerstone%20of,law%20seeks%20to%20produce%20justice. Accessed 30/1/2025

a persuasive role. The higher the level of uniformity in past precedents, the greater the persuasive force of case law. While Civil law jurisdictions do not allow dissenting judges to attach a dissent to a majority opinion, cases that do not conform to the dominant trend serve as a signal of disagreement within the court System.⁵

Due to Somalia's civil law system, decisions made by one judge may not fully clarify the effect on other judges because precedents are either nonexistent or do not have any legal weight. It is well-established that case law does not serve as a source for law in the country. Judges are subject only to the law in accordance with *article 105 of the Constitution* and not by the previous decisions of higher courts. This is the result of a specific constitutional choice of maintaining the principle of *separation of powers* very rigid: The Judicial body must not interfere with the legislative power of the Parliament.

IV. Structure of the judicial system in Somalia:

The judiciary of Somalia were established within the Civil Law System which is made up of individuals from various professions, allowing anyone from any background to serve as a judge in this legal and institutional framework. Under article 19 *of the Judicature Act of 1962* of Somalia states that “...*the competitive exam for selecting judicial officers is open to any adult citizen with a university degree or its equivalent....*”. Consequently, an engineer, a physician, and any other filed could potentially become a judge. There is no obligation to pursue law as a distinct field of study for a specified duration and subsequently practice in a court of law. *Judge Mohamud Geelle Yusuf*, who oversaw the *National Security Court in 1970*, is one example. Mr. Geelle did not possess a legal education, legal experience, or a legal diploma. He has some advisors who interprets the laws, which is shocking. These presiding judges have heard cases involving the death penalty and other capital punishments.

RECOGNITION OF FOREIGN PRECEDENCE IN SOMALIA

Under *article 40 (2) of the Somalia Constitution* clearly states that when the Court interpreting human rights, the court may consider the Shari'ah law, International Instruments (Treaties, Convention and declaration), and **decisions of courts in other countries**, though it is not bound to follow these decisions and only act as a persuasive manner. Contrary, foreign precedents were recognized as having more weight than domestic court precedents in Somalia; however, this does not mean that it must adhere to these rulings

The criminal and civil law rulings made by courts elsewhere in the world are recognized by the Somali

⁵ Vincy Fon, Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2007), International Review of Law and Economics, Volume 26, Issue 4, December 2006, Pages 519-535 at <https://doi.org/10.1016/j.irl.2007.01.005>. Accessed 3/ 2/2025

legislation as being enforceable within the country. *Under article 10 of the Somalia Penal Code* asserts that a foreign criminal judgment may be recognized if it pronounced by the judicial authority. Whereas, *paragraph (f) of article 10* states that: where the foreign judgment orders restitution or compensation for damages or any other purpose of civil nature. Similar provisions can be found in other national laws, such as *Article 286 of the Criminal Procedure Code and Articles 312, 314, and 315 of the Civil Procedure Code*.

However, the room for debate arises the possibility of how can be implemented. Reliance on foreign laws and judgments has been criticized by prominent Somali lawyers and academics in this regard, particularly when it has been applied to civil provisions in a liberal.

There are three different ways through which foreign precedents are considered, namely: ⁶[6]

1. **By vertical means**, that is, when national courts make reference to the rulings of international dispute mechanisms, regardless of whether the State is Contracting Parties to the international agreement that governs the operation of the aforementioned adjudicatory body. This makes it possible that in the future, domestic courts will rely on the rulings of other supranational bodies.
2. **By horizontal means**, e. when a domestic court looks to precedents from other national jurisdictions to interpret its own laws. In common law jurisdictions where the doctrine of *stare decisis* is followed, such comparative analysis is considered especially useful in relatively newer constitutional systems which are yet to develop a substantial body of case-law. For example, the Constitutional Courts set up in Canada and South Africa have frequently cited foreign precedents to interpret the bill of rights in their respective legal systems.
3. **By Combination of vertical and horizontal means**, i.e. when a national court may cite the decision of a foreign court on the interpretation applicable to both jurisdictions under an international instrument. For example, courts in several European countries freely cite decisions that deal with the interpretation of the growing bod Community [hereinafter “EC”] law. It is reasoned that if judge refer to applicable international obligations, they should also refer to the understanding and application of the same in other national jurisdictions.

Finally, in civil law systems, although decisions might have only persuasive force, the more cases are decided with consistent reasoning the more weight they acquire: this is the phenomenon of Constant Jurisprudence, a way to give “quasi legislative” effects to the Somali pronounces without violating the principle of separation of powers. Indeed, the Stare Decisis principle is not followed in Somalia because it violates the principle that only the Parliament should make law; therefore, as aforementioned, Somalia’s judgements only

6 Ibid, (Note, 5)

have effect between the parties and lower courts are not bound to precedents established by higher courts.

BIBLIOGRAPHY

Rafael de Oliveira Rodrigues, 'Judges and Law-making Authority: The New Brazilian Civil Procedure Code and the Limits of How a Civil Law Judge Could Act Such as a Common Law Judge' *Athens Journal of Law* – Volume 6, Issue 2, April 2020 – Pages 191-208 <https://www.athensjournals.gr/law/2020-6-2-5-Rodrigues.pdf>.

William D. Bader & David R. Cleveland, Precedent and Justice, 49 Duq. L. Rev. 35 (2011). Available at https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1155&context=law_fac_pubs#:~:text=Precedent%20is%20the%20cornerstone%20of,law%20seeks%20to%20produce%20justice.

Vincy Fon, Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2007), *International Review of Law and Economics*, Volume 26, Issue 4, December 2006, Pages 519-535 at <https://doi.org/10.1016/j.irl.2007.01.005>.

Zahid Islam, 'Strengthening State-led Rural Justice in Bangladesh' (2015) *Printed in Bangladesh by CCB Foundation*, Dhaka 2nd Edition at 87

NATIONAL LAWS

The Constitution of Somalia of 2012

Criminal Procedure Code of 1973, the Somali Civil Code no. 37 of 1973,

Somali Civil Procedure Code law no. 19 of 1974

Somali Penal Code of 1964