

FROM NATION-STATE TO STATELESS NATION: THE SOMALI EXPERIENCE

by Michael van Notten (*)

Ten years ago, the Somali nation abolished its central government and became a stateless nation. The fears expressed by many international observers that Somalia would fall into chaos have not been realized; many Somalis are finding statelessness an agreeable condition. Today, not only are the Somali people more peaceful, but also they are becoming more prosperous than ever before. Bosaaso is a case in point. When Somalia still had a central government, Bosaaso was a small village on the coast of the Gulf of Aden. A few small fishing boats would come into its port each day and offload fish. Occasionally, a cargo vessel would come in. The officials of the Republic would crawl over these boats, collecting taxes and demanding payment for every kind of service, real or imagined.

With the demise of the Republic, the seaport became the property of the local community and began to be managed on a commercial basis. A lively import/export trade developed, soon reaching an estimated value of some 15 million Us dollars per year. Private enterprise began to provide public services, such as telecommunications and garbage collection. Parents and teachers built schools for their children and even a university.

(*) This text was to be submitted to *Africa* in 2002 by the author himself, but to our regret he died in July 2002 of a stroke. Mr. Michael van Notten was a lawyer and an entrepreneur active in Somalia and lived there many years. He acquired a vast knowledge of the country, society and culture of northern Somalia (Somaliland), in particular of the political and customary law system. This paper presents some of his new and challenging ideas on the subject that in our estimate could notably stimulate further research on Somali society.

The text was edited by Prof. Jon Abbink (the African Studies Centre, Leiden, the Netherlands), with whom the author was in close contact for the past two years on scholarly matters relating to Somalia. Michael van Notten's papers contain several manuscripts, among them an extensive one on the customary laws of northern Somalia, which is being considered for editing and publication.

In eight years, the population grew from 5.000 to 150.000. Conflicts no longer were settled by officials of the Republic, but by the heads of the extended families of the conflicting parties on the basis of the customary law.

Bosaaso is a striking example, but its experience is the rule rather than the exception throughout Somalia. Somalis are surviving and prospering without a central government. In 1998, exports were estimated to be five times greater than they had been under the Republic⁽¹⁾.

This remarkable change in Somalia's political structure shows that there is a viable alternative to democracy⁽²⁾. That comes as good news to many in Africa who have been dissatisfied with the results of that political system.

Democracy became popular in Europe because it promised less taxation and more freedom than under monarchy. But the democratic system failed to deliver on its promise. European governments now take on average half of every one's wealth while returning very little in the way of service. Moreover, its regulations severely hamper freedom and productivity. Reputable economists estimate that, without democratic regimentation of their behaviour, every person would create four to eight times more wealth⁽³⁾.

While it may look as if the Somalis were pioneering a new political system, in reality they have only returned to their traditional, pre-colonial system of clan government, a clan being an agglomerate of a large number of extended families. Before looking more closely at clan government, however, a few general observations on Somalia are in order.

The Somalis are an East African nation with a population of some 13 million. They inhabit a territory twice the size of France, approximately a million square kilometers, or 360.000 square miles. Shortly after the Suez Canal opened in 1869, large parts of the Somali-inhabited territory — especially the coastal area — was occupied by three Western colonial

(1) S.C. MACCALLUM, "A Peaceful Ferment in Somalia", *The Freeman* 48:6 (June 1998), pp. 351355, also published on <http://www.Awdal.com/plan/ferment.html>.

(2) The economic principles underlying such an alternative political structure are discussed by Peter BOETTKE, in "Why Culture Matters, Politics, Economics and the Imprint of History", in: *LSE-AMA-gi: Journal of the LSE Hayek Society*, 2(1), 1998, pp. 9-16 (Also at: <http://www.gmu.edu/departments/economics/pboettke/culture.pdf>).

(3) Many economists have dealt with the correlation between economic freedom and economic growth, including James Gwartney, Robert A. LAWSON and Randall HOLCOMBE in "Economic Freedom and the Environment for Economic Growth", *Journal of Institutional and Theoretical Economics*, 155(4), 1999, pp. 1-21, see also: <http://www.mohr.de/jrnl/jite/jite1554.htm> and their "The Scope of Government and the Wealth of Nations", *Cato Journal* 18(2), 1998, 163-190 (At: <http://capital2.capital.edu/faculty/rlawson/pubs/scope.pdf>).

powers: Britain, Italy, and France and by neighbouring Ethiopia under emperor Menelik II (the Ogaden and Haud areas). At the end of the colonial period, the territories then known as Italian Somaliland and British Somaliland joined to form the Republic of Somalia. Thirty years later, in January 1991, the government of Mohamed Siyaad Barre collapsed and was dismantled, whereupon each of the 60 Somali clans reaffirmed their sovereignty. Clan leaders assumed responsibility for maintaining law and order. It would not be inaccurate to say that private individuals participating in a free market for security services now assure order in Somalia. Several questions arise. How was this market-based political system: brought about, what problems arose, what solutions exist, and what has been achieved thus far?

Problems and Solutions

The Republic's 'central government was not abolished by an act of the government itself or through a referendum. It just happened. And it could happen because there was a popular consensus. This consensus started forming in 1978, when the Somali central government lost its war with neighbouring Ethiopia. From the time of that defeat, the people were ready to return to their previous forms of governance. Under the former system of government, the clans had provided such laws, judges and police as might be needed to prevent or resolve conflicts. The opportunity to return to clan government arose in 1991, when the people had rid themselves of their dictator. By a stroke of luck, each of the two candidates to succeed him was unwilling to give in to the other, creating a deadlock. With the government in limbo, the Somali civil and military servants were no longer paid, and since the people in each community regarded them as basically intruders, they fled together with the dictator. Thereupon, the people dismantled all government property. This was done partly in a spirit of opportunism, but partly also as a conscious effort to prevent the re-establishment of a central government.

The transition to a different political system was not easy. Bandits took advantage of the temporary lack of authority to commit crimes with impunity. Some former generals and colonels lined up with former politicians and soldiers in an effort to establish central governments on a town-by-town basis. They imposed taxes, and some even established quasi-diplomatic relations with foreign governments.

Meanwhile, the clans themselves were faced with numerous

problems. In the urban areas, where most modern business is conducted, statutes had replaced customary law. Consequently, the traditional law of the land had not continued developing to meet the requirements of a global economy. The clans, moreover, which prior to independence had served mainly to protect the customary law, had now become somewhat transformed into political pressure groups. Many Somalis who had opted out of the customary law system during the heyday of the Republic were unwilling to submit themselves again to the traditional ways. In many places politicians had confiscated land from the clans, and the clans were now repossessing those lands. Foreign reporters as well as Somali intellectuals filled the newspapers with horror stories to support their view that without a central government the nation was doomed, and these stories discouraged people from investing their time, knowledge, money and skills in the Somali economy. As if this were not enough, Muslim fundamentalists wanting to replace the clan system with a theocracy waged occasional small wars to remove perceived obstacles from that path. As a final insult, the United Nations in 1993 invaded Somalia with an international army of 38,000 troops in an unsuccessful attempt to restore democracy.

Freeports

Ten years have gone by since the Somalis went back to their traditional political system, and many problems have been resolved. All of the attempts of the United Nations and former Somali politicians to re-impose democratic government have failed. Where necessary, the Somalis expelled them by force. The main problem that still awaits solution is that of attracting investment capital. For this to happen, it would appear that Somalis must create freeports. As the reputable economist Professor Peter Drucker wrote recently: "To create wealth, jobs and incomes in desperately poor countries, the freeport is the only program that works" (4).

Freeports are industrial estates that are exempted from the laws of the country in which they are established. Thanks to this freedom, these estates can create a legal environment that is 100 percent protective of property rights and freedom of contract. Without such protection, most investors and business people would not risk their time and money in

(4) Letter to the Director of the Flagstaff Institute of 25 July 2001.

developing countries, where many aspects of the business environment are sub-optimal.

In the present political constellation that is the Somali nation, the authority that would authorize a freeport would be a Council of Elders. The law under which the freeport would be established would be a combination of laws of the clan that hosts the freeport and the laws of the freeport itself. In cases of conflict between the two bodies of law, the courts would have to find a compromise. Hence the importance of understanding clan law (5).

Somali Clan Law

The laws of the Somalis are based on custom. That means that a rule becomes enforceable only when the great majority of the people have consistently shown that they abide by it. The basic rule that most Somalis customarily respect is the right of every individual to his or her life, liberty and property. Although Somali law, generally speaking, prohibits any violation of this right, one finds flaws, weaknesses and lacunae in the Somali legal order. No legal system is without imperfections. So there is room for improving and strengthening the Somali law. This is already happening in the course of being exposed to the hustle-bustle of daily life. The more people engage in business, the more quickly new rules will develop and the sooner the law will adapt itself to the requirements of a modern free-market society. Clan law has a built-in method for adapting itself to changing circumstances. It consists in the freedom of every court of justice to discover the law. A court is entitled to declare that a particular custom has become law when it finds that the great preponderance of the people abide by that custom.

Practitioners of the law can accelerate the creation of law by publishing their jurisprudence and by facilitating access to it. Scholars and teachers of the law can also contribute to the law's development by commenting on it. In this way the laws of the sixty Somali clans will gradually merge into a common law, a single body of law for all Somalis. In addition to growing by exposure to more Somalis practicing business,

(5) Also called *industrial parks* when, as is common in the United States, the land is parcelled by subdivision. For a number of reasons, including its compatibility with Somali customary law, leasehold is the tenure of choice for Somalia's freeports. For a general analysis of the issues, see: S.H. MacCallum, "Land Policy and the Open Community," *Laissez Faire City Times* 5(2), 2001 (also at: http://www.zolatimes.com/V5.2/maccallum_land.html).

another way the law will develop is through increased interaction with foreign business people so that a cross-fertilization can take place among the various ethical concepts, business methods and laws in the market place. Creating freeports will stimulate that interaction. Several clans along the Somali coast are already considering embarking on a freeport policy (See <http://www.awdal.com>).

Somali law is strikingly different from the prevailing legal systems of the Western world. Some of the major differences are the following:

- Criminals are not imprisoned, only forced to compensate their victims.
- Crimes against society do not exist, which obviates the need for public prosecutors.
- Fines must be paid to the victim or to his family, not to the clan or court.
- Every person must be insured for his liabilities under the law.
- Judges are appointed by the litigants, not by the clan.
- Courts of justice are paid for by the litigants, not from taxes.

The following commentary may help to clarify these differences:

No imprisonment. In a democracy, criminals are imprisoned or forced to pay heavy fines. Somalis, on the other hand, have no use for prisons and severely limit the level of fines. Their focus is on the victim, not on the criminal. Somali law requires that people who violate the rights of others must compensate their victims. The Somalis appear to realize that a prison term does not negate the original violence perpetrated against the victim. They also seem to realize that imprisonment does little to deter people from committing crimes, that prisons are costly to build and operate, and that prisons afford criminals opportunity to improve their criminal skills.

Defining crime. In a democracy, almost any conduct can be declared a crime, including smoking marijuana, reading pornography, using a monetary unit of one's own choosing, or criticizing a government. Also it happens that democratic governments do not prosecute a great many real crimes, such as police detaining and torturing innocent people or extorting money. Such abominations become possible when the law originates in parliaments. In the Somali nation, the law is not promulgated by politicians, but rather is discovered by judges. The only person who can start a criminal proceeding in a Somali court of justice is the victim or his family. For a crime to be committed, a natural right of a natural person must have been violated. The only authority that can establish whether

such a right exists and has been violated is an independent and impartial court of justice.

Fines to the victim. In a democracy, the government can impose almost any type and level of fines, and it usually stipulates that these be paid to the government. In this way it generates considerable revenue for itself. Such a practice constitutes an incentive to invent ever more crimes and to increase the level of the fines. Under Somali law, on the other hand, fines imposed for willful violation of the law rarely exceed the value of that which has been alienated or destroyed. Fines are always due to the victim and his family, rather than to the court of law or the clan as a whole.

Insurance. In a democracy, there is no obligation to insure one's liabilities under the law. Thus, large numbers of destitute people risk nothing but their freedom when committing a crime. This surely constitutes an incentive to commit crimes. In Somalia, on the other hand, every person must be insured for his liabilities under the customary law. A Somali must also retain a legal representative, *i.e.*, someone who will act on his behalf should he commit a crime or become a victim of one. Should he commit a second or a third crime, he will lose his insurance and be expelled from his clan, his country.

Judges. In a democracy, the courts of justice are controlled solely by the government. This enables the government to organize the courts in such a way that it will not be condemned if it violates true property rights. Somali law, on the contrary, consists of only those rules that the community customarily abides by. Therefore, as long as the Somalis continue to respect property rights, government officials will not be allowed to "pass a law" abridging those rights. Another safeguard is that Somalis have the right to ignore any court of justice whose judges have not been freely chosen by the conflicting parties. This rule gives judges an incentive to render just verdicts. If a judge renders even one unjust verdict, he might not be asked again to provide judicial services.

No taxation. In a democracy, the rendering of justice is a costly process. Raising revenues to pay for it from taxation makes it even more costly. Economists agree that taxation tends to destroy more wealth — or even prevents it from being created — than the money that it collects in that manner. Rendering justice under the Somali law, on the other hand, is done at almost no cost to the nation as a whole, and without need of taxation. The judges and policemen of the Somalis do their job on a part-time basis, and often without asking a reward. In Somalia, it is

considered a great honour to be a judge. The Somali system has the further virtue of being very largely immune to political manipulation. Hence, no laws come into being that serve primarily the interest of a particular political pressure group.

Kritarchy

Some features of the Somali traditional law are not in tune with property rights. We will not specify these features here, however, our focus being on how the Somalis managed to bring about, in a relatively short time, a complete change in their system of governance. They succeeded because their new system is in fact the system they always had. Indeed, in the rural areas, which include probably 90 percent of the country, the Somali customary law never ceased to command respect. The customary courts of justice continued operating there. This situation resembles that of North America in 1776. The Americans waged war against the British government in order to preserve the freedom they had enjoyed during the preceding 150 years. In like manner, the chief concern of the Somalis after removing their dictator was not to innovate a new kind of politics, but to preserve their indigenous system of governance.

Political scientists have coined a special term for clan government. It is *kritarchy*, a composite of the Greek words *kriteis* or *krito* (judge, to judge) and *arche* (principle). The name is apt, since in many clan societies, as in all societies that respect property rights, justice is the ruling principle and judges are among the most prominent individuals. In a democracy, on the other hand, the source of all legal actions is the dictate of the parliament. It seems useful to generalize the term *kritarchy* beyond its ethnic or tribal context to mean any political system that is based on equal justice for all that respects the rules of society inherent in human nature. Because most of the rules of the Somali customary law are compatible with property rights, the Somali political system might then be characterized as a near-kritarchy⁽⁶⁾.

Champions of Democracy

Opponents of Somalia's near-kritarchy are those who champion 'democracy'. It came as a surprise to many Somalis that so many foreign

(6) A discussion of pure kritarchy can be found at: <http://allserv.rug.ac.be/~frvandun/Texts/Articles/Kritarch1.htm>.

governments were eager to re-establish a conventional political democracy in Somalia. This eagerness originated partly in the fact that several governments had lent money to Somalia's dictator and wanted to recover their money. These creditor governments don't care whether the government they lend money to is a criminal or a just government; their only concern is that the borrowing countries practice taxation. Moreover, these champions of democracy have invested so much in convincing the world that the only options are a tax levying democracy and/or a tax-levying dictatorship that they can never allow a no-tax alternative such as *kritarchy* to emerge. It doesn't bother them that a democracy is prone to collapse, bringing dictatorship in its wake, because eventually the citizens will call again for democracy. But woe to the nation that opts for *kritarchy*. The recent experience of Somalia shows that when it comes to restoring a government with the power to tax, almost no cost is too high for the United Nations and its supporters. Nevertheless, for ten years Somalia has withstood such pressures and is prospering without a central government, without taxation. It has shown critically to have found a viable alternative.

Visualizing a Pure Kritarchy

Although a pure *kritarchy* exists only as a theoretical possibility in today's world, the mere concept fulfils an important need. It gives us an ideal toward which to aspire. It serves as a direction marker, enabling us to keep on course throughout the complexity and distractions of our daily lives. Holding an ideal concept of a truly free society is as essential as the north star to the mariner. Though the mariner may never reach the star, following it brings him to the country and port where he wants to go. We must visualize as clearly as possible, therefore, the rationale under which a pure *kritarchy* might function in the future.

One important enabling principle of a pure *kritarchy* is that its 'operatives' would be not only private judges, police and soldiers but also, and even primarily, insurance companies. In a pure *kritarchy*, as Somali practice suggests, every person would be insured against his legal liabilities under the law. In clan-based society, kin groups perform this function. As in Somalia today, the uninsured would be handicapped in doing business or finding employment, being regarded as irresponsible and reckless. Insured persons, should they be caught transgressing the law, would face higher premiums, giving them added incentive to respect the natural rights of others. Finally, in contrast to a democracy, where government benefits

from crime, insurance companies in a kritarchy would thrive by preventing crime. The fewer crimes and torts, the less they would have to pay out to their customers.

In addition to judges, policemen, soldiers and insurance companies helping to maintain the peace, a viable kritarchy would require suppliers of infrastructure such as electric power and water utilities, roads, sewerage, telecommunications, education. Such suppliers can be found in droves with companies and educational institutions that already supply these services on a free-market basis. The more such provider organizations grow and prosper under economic freedom, the easier will be the transition to kritarchy.

Many would like to stop the seemingly endless seesaw between democracy and dictatorship but see no way out. In Somalia, the obvious way was to return to clan government, but the people needed a catalyst to put them on that road. The catalyst when it came had two parts. One was that the dictator had lost a war and with it his already precarious popular support. The other was that Somali opinion makers knew enough of the strengths of kritarchy and the weaknesses of democracy to swing the popular consensus in favour of kritarchy. These opinion makers were the heads of the families (known as elders) and the religious officials. The Somali intellectuals, who were mostly trained in government-owned universities and championed democracy, did not have the ear of the people.

Conclusion

The Somali experience shows that there exists a political system better than "democracy". Kritarchy has proved its viability during the past ten years in Somalia and has the potentiality of wider application in Africa. Somalis have succeeded in making the transition despite massive efforts by the United Nations to re-impose "democracy" in Somalia.

Somalis succeeded in fending off the champions of democracy because they already had the necessary operatives in place for maintaining a kritarchy. Had the traditional institutions of law and order failed to do their job, the Somali nation might have fallen into chaos. And had the people not been ready to defend their clan government to which they returned, the United Nations might indeed have succeeded in re-imposing democracy in Somalia.

Increasing numbers of private business firms and association now offer the services needed to support Somalia's near-kritarchy. Given the presence of these providers, and the widespread dissatisfaction with democracy among Africans, one might not be wrong in predicting a new political trend over the entire African continent.

MICHAEL VAN NOTTEN

SOMMARIO

Dopo il dissolvimento di un governo centrale oppressivo, la Somalia sta riprendendosi dalla devastazione della guerra civile e dal caos politico rifacendosi al diritto consuetudinario e al concetto tradizionale di autorità politica.

In molte parti del paese, la società si è ricostruita con successo senza alcuna interferenza da parte dello stato centrale che fu un'eredità politica coloniale che non è mai stata adatta alla realtà della politica e dei legami clan-famiglia esistenti nel paese.

Basato sulla revisione critica di questo concetto e degli sviluppi a livello locale, l'articolo offre un approccio innovativo alla cultura politica e all'economia della Somalia, sulla falsa riga non di una democrazia politica convenzionale, come raccomandato dalla comunità internazionale, ma su quello di una "kritarchy" - il dominio della giustizia e dei giudici locali. Questo sistema è quello che è stato in realtà fino ad oggi applicato.

RÉSUMÉ

Après la dissolution d'un gouvernement central oppressif, la Somalie est en train de se redresser après les ravages de la guerre civile et du chaos politique en se rattachant à son droit coutumier et au concept traditionnel d'autorité politique.

Dans plusieurs régions du pays, la société s'est reconstituée avec succès sans aucune ingérence de l'état centrale qui était un héritage politique coloniale toujours en conflit avec les réalités de la politique et les liens clan-famille existant dans le pays.

Basé sur la reconsidération de la notion indigène et des développements à niveau locale, l'article offre une approche innovative à la culture politique et à l'économie somalienne qui ne suit pas les lignes d'une démocratie politique conventionnelle — imposée à la Somalie par la communauté internationale — mais celles d'une "kritarchy" — les pouvoirs de la justice et des juges locaux. Ce système est effectivement déjà appliqué.