

Chapter 15 - The Freeport-Clan

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Hong Kong had the advantage of a classical-liberal rule of law, without which any meaningful economic freedom would have been impossible. We saw in earlier chapters that Somali customary law protects persons and property and that, left alone, it might be expected to develop into a full body of common law capable of serving every need of a technically advanced society. This would provide for Somalia a rule of law such as made possible a prosperous Hong Kong. Customary law changes slowly, however, so in Chapter 11 we considered ways that the process might be accelerated. We looked at the potent catalyzing role that freeports might play in the growth of Somali law as well as in the growth of the economy.

Michael van Notten in the early 1990s married into the Samaron Clan and set about promoting economic development in the Awdal region of Somalia, founding and directing the Eastern Hararghe Development Agency. Influenced in part by Peter Drucker's writings and to a greater extent personally by Richard Bolin, dean of the *maquiladora* phenomenon in Mexico, Michael appreciated the economic leverage that freeports bring to poor countries. But in the absence of a central government, how could a freeport be promoted to investors and business people accustomed to relying on a central legislative authority to guarantee property and enforce contracts? On the other hand, absent a central government, how could it be integrated with traditional politics and customary law, as would have to be done in order to attract a motivated work force from the local population—not to mention prospective investors?

At this point, Michael's adoptive clansmen made the pregnant suggestion noted in Chapter 11. They said that to develop and operate a freeport in Somalia, Michael should bring together his business friends and form a new clan. They should design their own set of laws for compatibility with Somali customary law so that differences that arose could be settled in traditional courts.¹ If the law of the freeport were made to dovetail with the customary law of the surrounding region, then businessmen locating in the freeport could operate with equal ease in Somali society and in the world market, while Somalis could readily come and go and interact in the freeport.

The challenge would be to design a law system and a social structure that could interface with both Somali customary law and the conventions and usages of the global business community. To move from this vague but tantalizing idea to a

¹ Michael van Notten died without leaving a record of the author of this creative idea, which arose in conversation at a Somali gathering that included numerous elders. The idea was well received by everyone present.

developed concept and business plan would be no mean task. But Michael was undaunted. Here, he felt, might lie the key to a breakthrough in the legal and economic development of his adopted country.

By a fortuitous circumstance, I met Michael in 1997 and brought to the task a project of my own concerning the feasibility of developing a community in a stateless setting. It was a heuristic exercise of many years duration and one that involved the inputs of many different people. The object of the exercise was to design a means of providing privately, by purely free-market means without taxation, all of the public services of a community—which, of course, a freeport would be.

Such a community would operate on a land-lease basis like any multi-tenant income property, examples being shopping centers, hotels, professional centers, and so forth. These were the prototypes. But the exercise envisioned a fully generalized community in which the master-lease form would set out all of the expectations between landlord and tenant and between each tenant and his neighbors in sufficient detail to make a viable community without recourse to statutory law. Coincidentally, during the same years that I had been pursuing this, Michael had been working at drafting a proposal for a legal system consisting of an outline of natural law principles and their derivative natural rights, together with procedural rules for safeguarding those rights. It was to be a system that could serve a community in lieu of statutory law.

My leasehold structure had the drawback that it assumed, as a given, a sufficiently developed framework of common law to sustain a rule of law. Michael, on the other hand, had outlined a natural-law system but lacked a means of introducing it into a community consistent with the rights it sought to protect. When Michael and I met, we each found the other's work interesting and critiqued it, suggesting refinements. From our collaboration emerged an idea: introduce Michael's natural-law system into the freeport community by making it a matter of contractual agreement. A commitment by all parties to observe that rule of law could be a condition of each person's lease. Land lease thus afforded Michael the vehicle he lacked, while his outline gave me the rule of law I lacked. Together they suggested a package of social software that could generate a freeport-clan. On reading the proposed master-lease form now incorporating Michael's outline of law, natural-rights scholar Roy Halliday (2002) wrote that it

comes as close as anything I have seen to establishing the framework for a civil society consistent with liberty and natural rights. The idea of incorporating a description of natural rights into the master lease for a proprietary community is brilliant. It satisfies both the strong natural rights advocates .. and the skeptics who believe rights are created by contracts. The lease contract provides a way to specify how rights are to be enforced.

Because of its length and perhaps dryness for those not interested in following it in detail, a working draft of the master-lease form is not reproduced here but is set out in Appendix C, "Proposed Membership Agreement for a Freeport-Clan." The concept, however, can be explained as follows.

The Freeport-Clan

The freeport-clan is a proposed organizational structure designed for the operation of freeports in a stateless environment. As a juridical entity, the freeport-clan includes both visitors and resident members. Precisely as traditional clansmen are related by a well-understood web of kinship, so are freeport-clansmen related by a well-understood web of relationships. Theirs is not a web of kinship status, however, but one arrived at by contract. Residents and personnel of the freeport commit in a lease or rental agreement to observe the law as set out in that agreement, while visitors consent to abide by that law during their stay.² A full member thus is anyone holding space by contract in the development, whether for as short a time as an overnight guest in a hotel or as permanent as, say, the owner of that hotel. Day visitors, on the other hand, stand in a relationship to the owners of the freeport more like that of a *marti* to an *abbaan* (guest and protective host) in Somali law.

Two Kinds of Law

The law of a freeport-clan, like that of any community, is of two kinds. There are rules and procedures applicable to everyone at all times and places (natural law), and there are rules and procedures specified in agreements between particular individuals and applicable to them alone (contract law). The former invariably take precedence.

The land-tenure agreements are contract law. These bind owners, residents, and visitors in a self-consistent network of relationships described in a complex cascade of subleases following the initial lease of land from the Somali host clan. To be consistent with the master-lease form and thereby valid, every lease, sub-lease, and sub-sub-lease, etc., requires a clear commitment by the contracting parties to a regime of natural law and procedural rules set forth in the master-lease form. The master-lease form thus brings together contract law and natural law in a single document. From this document is generated the written constitution of the community, which is the sum of all leases in effect at any given time.

Whereas the contract law is whatever the contracting parties may agree to so long as it is not inconsistent with the natural law, natural law principles and rules and the procedures for protecting and enforcing them are not as easily identified. They are the principles and rules of human social behavior that are essential to the functioning of any society at any time and place. As such they must be capable of being universalized. Precisely what they are has been the

² It should be emphasized that the development under discussion is not a subdivision in any of its forms, with or without homeowners' associations, and including condominiums, but strictly a multi-tenant income property. This is important for the following discussion, since many who are unaccustomed to making the distinction unthinkingly bracket these very different kinds of real property. The former, to the extent it has any organization at all, is essentially a cooperative. The latter is a commercial property.

subject of speculation and deliberation by ethicists, moralists, legal scholars, and social philosophers, among others.³ Humankind being part and product of the natural world, it is only reasonable to assume that scientific method ultimately will illumine the workings of human society and discover the natural laws that operate there as elsewhere in nature.⁴

It is expected that the proposed system of law will be readily enforceable through a decentralized (“polycentric”) justice and protection industry consisting of freely competing court and police services. The land-lease structure of the community resolves many objections commonly posed to the idea of competitive police services, since all such competing services are integrated into one and the same web of contractual relationships. Should anyone refuse to acknowledge a court summons or judgment, including any investor in or officer of the community or any member of a justice court or police, he will be in violation of his lease. Consequently, unless or until he redeems himself, he will be subject to eviction, losing figuratively and literally all standing in the community.

Two Contributions

Each of the two kinds of law giving structure to the freeport-clan, namely contract law (the lease agreement itself) and natural law (the outline of law incorporated in and made a part of the lease), has its independent history.

A practicing lawyer in the Netherlands, Michael first developed an interest in outlining principles of natural law in response to a competition in which he took first prize. The competition called for drafting a constitution for a free community. Mentored by his friend, Belgian legal philosopher Frank van Dun, and with the encouragement of many other friends, he went on to work for some years at teasing out a coherent formulation of a system of natural law. Then, in Somalia, he found a customary law system in place that resembled in important ways just such a system as he had come up with. His outline of a system harmonized with Somali customary law as no legislated body of rules ever could. When he formed a company with Jim Davidson in 1997 to develop, among other things, a Somali freeport that called for its own law that would be compatible with Somali customary law, he already had in outline form a law system that he could use for the purpose.

Michael believed that natural law describes the voluntary, universal order of human society, that it originates in our life as reasoning human beings among our kind, that it acknowledges the right of every person to live a life governed by his own goals, judgments, and beliefs, and serves to prevent as well as resolve conflicts among people. It stipulates that every person be free to dispose of his

³ See, for example, Roy Halliday (2000).

⁴ For some pregnant suggestions on this subject, see Alvin Lowi, Jr., *Scientific Method: In Search of Legitimate Authority in Society*, unpublished monograph available from the author (alowi@earthlink.net).

property as he will and refrain from disposing of the property of others without their permission. It permits all activities that do not infringe upon the person or property of another. This law takes priority over all other principles and rules shaping human society, including rules legislated by parliaments or established by contract. It requires, moreover, that enforcement be pursued in ways consistent with itself.

The natural law principles enumerated in the master lease form and all contractual obligations consistent with them and freely undertaken by residents and visitors would be the only law in the freeport-clan. Anyone would be free to offer and perform police and judicial services, provided only that they follow the procedural rules, or protocols, stipulated in their lease agreement.

The Agreement

The agreement itself, on the other hand, has a longer and quite different history. It was the culmination of an exercise in applied anthropology that I had conducted for more than a quarter of a century. During most of that time, it bore the title, "Drafting a Constitution for Orbis"—"Orbis" being the made-up name of one of a cluster of imaginary settlements in outer space. I promoted the exercise as a means of exploring how private contractual commitments might provide for community needs in the absence of a legislative government. Extrapolating from what is well known about clan societies, I had hypothesized that in contemporary society common or community goods, no less than private, should be able to be produced through the competitive market process in a manner fully consistent with normative property rights.

The exercise began in 1971 when Werner K. Stiefel, CEO of Stiefel Laboratories, commissioned me to draft, in exchange for a two-percent equity in the project, a master lease form for a floating community which he intended to develop on international waters. He had experienced Germany in the 1930s, and he thought that the same dynamic of political democracy would lead to similar results in the United States. He knew many who had escaped Germany by fleeing to the United States, but when the time came, where could people in the United States flee to? His dream was to found a new, free country on the high seas, starting small but with expectations that it would grow.

Werner devoted millions of dollars of his personal resources to the project but eventually had to discontinue it. At that point, he encouraged publication of the lease form, thinking to help stimulate innovative thinking about free-market provision of common goods. He only requested that it be placed in a fictional setting that would not draw political attention prematurely to the idea of settlement on the ocean. I distributed drafts and invited criticism. Several iterations were published as "Orbis" gradually took on a life of its own. Over the next 30 years, like the open software that it was, it came to reflect the inputs of many different people.

The intellectual challenge was to envision in a practical way how a hypothetical settlement, removed from all contact with earth's legislated laws, might be structured solely along lines of private agreements to meet all of the

needs of its inhabitants. The reality of stateless society at the clan level is well known to anthropologists. If statelessness is the normal mode at that level, I thought, why not at the level of a more developed, market society? The reason we don't see it may not be that it contradicts any law of social organization; it may simply have to do with the period in which we live, a function of evolutionary timing.

According to that hypothesis, humankind is navigating a transition from local cooperation based on kinship status to global cooperation based on contract, enabled by an evolving web of financial and other supportive business institutions and a market pricing system (MacCallum 1997). It is well known that times of change are marked by instabilities and stresses. In the present case, these manifest most poignantly as dehumanising,⁵ institutionalised coercions of various kinds that, taken together, we call "the state" and suppose to be normal for human society. But is this normal? Since it has yet to be demonstrated that statelessness in a market economy is self-contradictory, and considering the accelerating rate of social change leading toward conditions we cannot even guess at, an advanced stateless society cannot be denied as a possibility.

Moreover, a broad range of empirical data in contemporary society goes a long way toward putting the burden of proof on those who would argue for the inevitability of a state; for it suggests strongly that the private production and management of common goods for a community of any imaginable size is both feasible and potentially profitable. That body of data is found in the twentieth-century growth of multi-tenant income properties in real estate. What is significant about that growth is the fact that complex hotels, shopping malls, and many other such forms resemble in important respects what we are accustomed to think of as communities and require the same sort of administration. A hotel, for example, has private and public areas, a security office, a landscaped lobby corresponding to a town square, a public transit system which happens to operate vertically instead of horizontally, controlled climate, a system of public utilities, etc. The difference is that instead of being funded by taxation, the common goods are provided entrepreneurially for profit—quietly, effectively, and pleasantly.

A first step, therefore, in addressing the challenge of "Orbis" was to observe that all multi-tenant income properties share a common characteristic, namely, that they are structured on leasehold. Instead of a development upon completion being fragmented and sold for a one-time capital gain, the owners keep the land title intact, parceling it into usable sites by land-leasing. This enables the property to be managed as a long-term, conservative investment for income. It creates what might be called an *entrepreneurial* community as opposed to a political one, a community in which an entrepreneur, standing behind his product, creates and maintains optimal human environment for the particular market he targets. As he does so, he builds land value as measured by revenue flow. His customers pay for the privilege of living and/or working in an environment they find conducive to the realization of

⁵ See, for example, Butler Shaffer, "A Passion for Life," Chapter 55, *The Wizards of Ozymandias*, LewRockwell.com Ebooks. <http://www.lewrockwell.com/ozymandias/>

their particular goals. Ground rent pays the costs of the community administration and a profit besides.

Although seemingly novel, this entrepreneurial community does not represent a departure from tradition. Growing from rootstock antecedent to the state, it retains the structure and much of the function of seigniorial and manorial forms of human settlement in many parts of the lesser-developed world. The difference lies in the circumstances of the management and the services it can offer. Instead of a small and localized kin group pursuing an inevitably mixed agenda, the management is a specialized firm operating competitively within the richly supportive institutional context of a global economy and pricing system.

But, we may ask, isn't some government needed? Isn't some regulation of conduct required in an entrepreneurial community? It is, of course. But what form need that take? Observe that the sum of the lease agreements in effect at any time is analogous to the written constitution of a traditional, political community. The difference is that here is a self-regulating system within a competitive market. Instead of bureaucratically legislated rules, private lease agreements, individually negotiated, set out not only each person's obligations to the community proprietary and theirs to him, but in all important particulars his and his neighbours' behaviour vis-a-vis one another.

Life in a generalized entrepreneurial community of any significant size or complexity is likely to be highly decentralised, since most tenants deal not with the primary lessor, but with any one of a great variety of sub-lessors who operate at various degrees of remove from the primary lessor as the land continues to be parceled into use. Moreover, short of conflicting with provisions in the master-lease form, agreements can be customized to suit many tastes. Adding to this potential for variety is the fact that only the underlying land need remain in single title; improvements can be individually leased, owned outright, or financed.

The challenge, therefore, of the Orbis project was to design some social software that, absent any possibility of falling back on statutory law, would anticipate every need and contingency of life in a complex community. The assignment turned out to be less daunting than might be imagined. It was made simpler by its focus being upon *means* rather than upon any particular Utopian end. Human ends are infinite, limited only by the power of the human imagination, but effective means derive from principles that are few in number and involve the *how* of things on an abstract level. These principles partake of natural law, the rationale of nature, and are to be discovered through examining successful behaviour and what makes it so. Understanding what makes for successful social behaviour in any place and in any age was the genius of Michael van Notten and his mentor, Frank van Dun.

In 1997, in exchange for a small equity in Awdal Roads Company, Michael commissioned an application of the Orbis master-lease form for his proposed Somali freeport. He had promoted the idea of freeports among his Samaron clansmen, noting that, among other advantages, freeports would enable Somalis to capitalize on their stateless tradition. World-class professional and business talent would be attracted to a setting in which they could be freed of the uncertainties, delays, and hardships associated with taxation and bureaucratic regulation.

The multi-tenant income property afforded a nearly perfect model for a freeport-clan. Invariably, the more successful freeports have been developed as land-lease communities rather than as subdivisions. Moreover, unlike subdivisions, multi-tenant income properties can be developed on leased land. This is fortuitous, since Somali law is receptive to leasing land, even long-term, but does not entertain the idea of selling or otherwise permanently alienating land from the clan. Further still, leasing rather than purchasing land saves the entrepreneur having to tie up capital that might be put to better use in development and operations.

Finally, the multi-tenant-income-property model has broad areas of congruence with traditional life in a clan society. The important and complex role of insurance in the former, for example, finds its functional parallel in the requirement of Somali customary law that every person be insured against any liabilities he might incur under the law. In a shopping centre, moreover, the manager's concentrated entrepreneurial interest in the whole enables and encourages him to act as a facilitator rather than as a ruler—precisely like the head of a traditional African village or clan.

Free Cities

Freeport-clans could function as a latter-day "free city" not unlike those of the late Middle Ages that gave rise to the modern era. Like those cities, which offered enterprising individuals a path out of feudal servitude, the freeport-clan would invite migration to escape oppressive governments or unduly restrictive practices found in other parts of Africa or the world. As elements of its freer business environment spread by adoption to other clans, it would become easy for people to migrate to the Horn of Africa, adopt its language and ways, and become productive members of a new Somali society without the limitations of the clan system. And yet it would not be an altogether new society, because the 'new Somalia' would be but a more evolved version of traditional, pre-colonial Somalia. It would have the promise of becoming a beacon to a world ravaged by political democracy, a beacon to a humanity that has lost its bearings.

The free cities of a new Somalia could become a light to the world for these reasons:

- Community services and amenities would be provided in abundance and variety through exclusively proprietary means in a competitive market, for profit, without recourse to taxation.
- The community authority would exercise leadership that was interested yet impartial, since it would have a personal and business interest in the success of the community as a whole. Private interest and public interest would be aligned.

- The community authority would not exercise any police function. It would serve in a facilitative role like that of a clan or lineage head in many stateless societies.
- A flexible system of land-use control—leasehold—would allow incremental land-use changes over time without eminent domain or other prejudice to property rights.
- A quantitative feedback, namely land revenue, would permit rational evaluation of planning projects and policies for their effect on the attractiveness of the community as judged by its present and prospective members—its clientele.
- The community would be served by a comprehensive, polycentric (non-monopolistic) police and justice system for the adjudication of disputes and protection of natural rights, a system agreed to individually and before the fact by every community member.
- The economy would be freely competitive, with no coercive restraints on entry or trade, and the community management would have incentive to make and keep it so.

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