The Law of the Somalis, by Michael van Notten, edited by Spenceer Heath MacCallum, Published 2005 by the Red Sea Press, available at Amazon Books and through other bookstores.

Part 1 - The Law, Chapter 1 - Introduction

This book tells the story of a nation organised on the basis of folk law, or custom. This is unusual, since most nations in the world today are based on statutory law, or legislation. Statutory law is designed by politicians, whereas customary law consists of the rules that judges discern in the customary behaviour of people.

For most of its existence, humankind lived by customary law. But in very recent centuries statutory law, consisting mainly of regulation imposed by domestic or foreign rulers, has become the norm. This happened in Somalia as it did elsewhere. In 1991, however, the Somalis returned to their customary law. The Somali nation is the first in modern history to do that.

Somalis are strongly attached to their customary law, and they cherish the judges who adjudicate and enforce it. Foreigners may regard this as stubborn chauvinism, but Somalis believe they have good reasons. In this book I shall analyse their reasons, first describing their law as it functions today and then evaluating it to see why it is that, despite a number of evident weaknesses, Somalis value it so highly. I shall then speculate in what direction the Somali nation might develop and the effects that could have on other African nations. Finally, I shall evaluate United Nations policy with respect to Somalia.

The media often suggest that the political turmoil in Somalia is symptomatic of problems afflicting the entire African continent. They are right. The problems are largely a legacy of the colonial era and are much the same everywhere. Before Africa was colonised, nearly all African societies were based on customary law. Foreigners were welcome to visit or settle provided they respected their law. However, the European colonisers had other ideas. They set out to dominate the local populations. They did so by applying brute force to impose their colonial rule and its legal system. When the colonial era came to an end, the colonial administrators hastily trained a few indigenous politicians in the art of governing and set up each new nation with its own government. They modelled these governments on political democracy, despite the fact that such a political and legal system did not suit Africa. They did so because political democracy is premised on statutory law, which suited their own near-term interests.

The indigenous politicians soon flooded their countries with statutory laws, enacting these primarily to extort money from the population. Predictably, the inhabitants rebelled. Some rebelled in order to do some legal extorting themselves, but others only wanted to defend themselves from such extortion and preserve their own freedom. Indeed, not all of the political unrest in Africa has been due to the avarice of individuals wanting a larger slice of the central government's revenues. Some rebels have been motivated by a desire to preserve their customary laws and institutions.

How Europe Abandoned Customary Law

It was not long ago that something similar happened in the Western world. As recently as the eighteenth century, the bulk of law in Europe and North America was still based on custom. The massive change to statutory law first occurred in Napoleonic France following the 1789 Revolution. Politicians of other nations soon followed the French example.

At first, the attempt was to codify the customary law and make it conform to general principles of law and justice. It was thought that by weeding out the anomalies, injustices and other instances of corruption that had accumulated over time in the customary law, codification would prepare the way for a true "rule of law." All too often, the corruption of the customary law had provided a pretext for rulers to substitute their own legal order for the customary order. A purified customary law would destroy that pretext. It would make it possible to limit the role of the state to the formal administration of justice, the substance of which would be found in customary law. This idea provided the core of the program for constitutional government that many thinkers had begun to advocate in the seventeenth and eighteenth centuries as an antidote against the arbitrariness of absolutist royal rule. But the program contained a fatal flaw.

In the era of royal absolutism, a doctrine of "legislative sovereignty" had arisen and come to be accepted by most people. The doctrine implied that a group of rulers, calling themselves legislators, could make and impose any rule or regulation they wanted. The only proviso was that in so doing, they should act legally, in accordance with procedures they or their predecessors had prescribed. Although the program for constitutional government called for a drastic revision of the doctrine of legislative sovereignty, it nevertheless, despite the absolutist connotation, assumed that doctrine as a premise.

In the constitutional program, legislative sovereignty was to be restricted in two

ways. First, legislative power was to be transferred from an unaccountable king to representatives of the people, who could be removed from office in periodic elections. Second, that legislative authority was to be limited in its scope to the formal organization and operation of the state apparatus itself. While the people themselves would be subject only to the "rule of law," meaning the customary law, state and other political officials would be constrained, in addition, by "legal rules" imposed by the people. In short, the principle of legality would apply only to officials. It would not apply to ordinary individuals except on those rare occasions when they chose to act in an official capacity, as voters in a general election or as members of juries. In their daily life and work, they would be expected to conform to the general requirements of law, which meant in particular having respect for other persons and their property, good faith in contractual relations, and personal responsibility and liability for their own acts.

All of this was essential if the program for the constitutional state was to work. The purpose was not to create yet another institution of the rule of some over others, but to create an institution that would guarantee people their freedom while keeping the organisations of political power on a short leash. To ensure that political power would not be used to benefit some at the expense of others, but only to administer justice and maintain the order of law, required a strict separation of society and state.

Unfortunately, the representatives of the people soon extended their legislative power to cover not officials alone, but also private individuals and their families, associations, and organisations. They thought nothing of interfering with the requirements of natural and customary law, which they regarded as no more than another set of legal rules.

Thus began a process of weaning the population from a concern for natural law and justice and habituating it to accept the arbitrary commands of the rulers, all under the pretext that they, as elected officials, merely executed the desires of the people.

People began to feel increasing need to form associations (political parties and pressure groups) to secure legal powers, privileges and immunities, and material benefits for themselves, and to impose the costs of these advantages on others in the form of taxes and regulations. Increasingly, they came to realize that political power and influence often provided an easier path to their goals than the lawful instruments of work, saving, investing, and forming voluntary associations.

Thus, the separation of society and state gave way on the one hand to an extensive

politicisation of social life, and on the other to an equally extensive socialisation of politics. No longer was the state seen to have its raison d'être in the administration of justice. Instead, it now came to be seen as a tool that could serve any group or organisation for whatever purpose that group or organization could place on the political agenda.

At the root of this development was the assumption that the authority to codify implied authority to modify the natural and customary law. This had sparked a lively debate in the early nineteenth century between supporters and adversaries of the customary law. Prominent in the debate were the German professors Friedrich Karl von Savigny and Georg Wilhelm Friedrich Hegel. Savigny held that customary law is the only true law, and he feared that with codification it would stultify and die. Hegel, on the other hand, thought codification was necessary; he thought the customary law should be systematised, strengthened, and written down in a legal code. But both opposed the idea of modifying it.

For Europe, this spirited defence of the customary law came too late. The cult of national legislative sovereignty had emboldened its politicians to discard the long tradition of customary law. In a short time, almost all law on the European continent became statutory. Politicians came to be seen as the sole originators of the law. The result was that people became less free and less well off than they would have been had the system of customary law continued; for Europe's customary laws during previous centuries had more or less closely approximated natural law. Natural law implies a respect for property rights and for freedom of contract, whereas statutory law mostly infringes those rights and that freedom.

In Africa, customary law is still very much alive. People tend to follow it. They abhor the statutory laws made by politicians and only obey them when forced. Much of the political turmoil in Africa is caused by the fact that Africans find statutory laws oppressive; abolishing statutory laws, many believe, would end much of that political turmoil.

When the Italian, British, and French colonisers withdrew from the Horn of Africa in the 1960s and '70s, Somalis should have made their customary law the supreme law of the land as it had been from time immemorial before the colonial period. The traditional law system was still operational, the reason being that the colonial governments had abolished it only in their own dealings with the local population. Relations among their subjects being of little concern to them, they had left the settlement of violent conflict such as murder, rape, and robbery largely to the Somalis. But on departing, the colonisers pushed the Somalis into establishing legal and political structures like those of Italy, England and France, insensitive to the

fact that these structures, now almost wholly imbued with statutory law after the victory of the doctrine of legislative sovereignty, reflected a culture totally unlike that of the Africans. The result was that the Somalis found themselves at the mercy of a government soon to become an enemy of the common people and a destroyer of the economy.

The government of the Republic of Somalia began in 1960 as a democracy. Nine years later, it became a dictatorship. When in 1978 the Republic of Somalia lost its war with Ethiopia, Somalis realised that both democracy and dictatorship had totally failed them. Many wished for an opportunity to return to their traditional form of governance. That opportunity came in 1991 when, on the ouster of dictator Siad Barre, no consensus emerged for appointing a new head of the Republic. In that stalemate the government disintegrated, and its erstwhile citizens returned to their traditional system of law and politics.

The transition was not easy and is still far from complete, for the demise of the central government did little to end the ravaging of Somali society and culture that it had set in motion, especially in the area around Mogadishu, the former capitol. The reason is that the expectation, actively promoted by the United Nations, that a central government would be re-established in the near future led clan militias and remnants of the former government into armed conflict, often in disregard of customary law and their elders. Each group manoeuvred to be in the most favourable position to capture the formidable array of powers of the future government when it was re-established. Because any clan that controlled the government could be expected to use it in the interest of its own members at the expense of all others, each felt compelled in self-defence to enter the fray. In this situation, order could only resume when the expectation of a central government receded. But the United Nations has spent billions keeping that expectation alive.

What is Overlooked in Somalia

Many commentators describe Somalia today as lawless and chaotic. But that description makes no sense. Most Somalis abide by their customary law and respect the verdicts of their courts of justice. Disorder prevails only in those few areas where politicians of the defunct Somali Republic, frequently called "warlords," still try to impose their will.

What commentators miss is that traditional Somali society is organised more or less like the Internet. Like that communications system, the Somali way of maintaining law and order has no head or tail. Its system of governance has no executive and

no legislature. It functions without a minister of justice or a supreme court, and yet it provides for rule making and adjudication. Many outsiders fail to understand how this works. Because they see no one making and enforcing laws, they think there are no laws. Consequently they propose that the Somalis establish a democracy. They overlook the fact that democracy is incompatible with the egalitarian character of Somali society. Somalis strongly oppose being divided into two political groups, those that rule and those that are ruled. And that is precisely what democracy does.

A complicating factor in understanding Somali society is that, during the past 30 years, a million or more Somalis have emigrated to Europe and North America. From there, they have become a highly vocal political lobby in their country of origin. These Somalis are enjoying every advantage of the clan system while being spared most of its disadvantages. The advantages they enjoy are mutual support and comradeship. The main disadvantage they are spared is the clans' destructive involvement in politics. While these Somalis of the diaspora see that the clan structure has become a system pitting all clans and even all sub-clans against one another, they generally fail to detect the cause. They don't see that the clan system only became such a monster with the introduction of democracy. They also overlook the fact that the essence of Somali society consists not in the clans, but in the customary law. Finally, they don't understand that "the West" owes its wealth not to democracy, but rather to the protection of property rights, and that democracy is undermining and destroying those rights.

Because of these weaknesses in their political analysis, Westernised Somalis see no solution for the difficulties of the clan system but to abolish the entire traditional political and legal structure of Somali society. So they propose introducing one or another form of democracy, without realizing that in doing so they are unwittingly compounding the problem.

Of the many books that have been written about the Somalis, those of I.M. Lewis excel in their scholarly approach. Almost everything he has found corresponds with what I have discovered myself. Like Lewis, I found that the Somali nation consists of many independent families, each with its own government. The average family consists of from 600 to 6,000 people. Officials of these "family governments" perform their duties on a part-time basis and are remunerated by those who require their services—their clients. These family governments form more or less temporary alliances with other family governments, depending on the policy they happen to pursue. The Somali system of governance, therefore, is best described as a network of independent organisations, each exercising its authority over a particular extended family irrespective of where its members reside. This is indeed

unusual. Most governments in the world consist of a single organisation exercising authority over all the people within a given territory, irrespective of their relationship to each other.

Given this character of the Somali political system, and the attachment that the Somalis have to it, Lewis correctly concludes that all efforts to establish a Western type of democracy in Somalia will be doomed to fail.

It is at this point that I wish to enter the public discussion on Somalia. Most observers of the Somali political scene suggest that the Somalis need to improve their structure of law and politics. But that is more easily said than done. Which laws and which institutions should be changed, and how should the people effect such change? In this book, I shall endeavour to give some answers to those questions.

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