

## **Editorial Preface**

This important and highly original work, outlining Somali customary law and pointing the way to a practical synthesis between the modern world economy and the traditional institutions of the Somali people, was interrupted by the untimely death of its author on June 5, 2002. Nevertheless, its message is clear. It addresses Somali customary law not only as it is, but also as it has been and may yet become.

A practicing lawyer in the Netherlands, Michael van Notten married into and lived as one of the Samaron Clan during the last twelve years of his life. His libertarian cast of mind was an asset in understanding the culture and institutions of this people whom he adopted and who received him as a kinsman. It enabled him to gain a deeper understanding of traditional African institutions than he might have otherwise. Readers need not share his personal libertarian philosophy in order to find enormous value in this descriptive account and assessment of traditional Somali law, economics, and politics.

At first, this book might seem to straddle two horses—law and commerce. But each presupposes the other. Economic development presupposes law, and the growth and development of the law proceeds largely from the hustle bustle of economic activity. In a stateless setting especially, these are two aspects of a single phenomenon. Hence the author's emphasis on economic development, in which he envisions freeports playing an important catalysing role. Economic development will have the capability of stimulating the growth of the customary law into a full body of common law capable of meeting the complex needs of a developed society. Such growth is essential if, as seems likely, Somalia is to continue without a central government.

The question as to whether significant economic development is even an option in a region lacking a legislative authority is squarely addressed in this book. The last chapter contains innovative thinking on how, in the absence of a central government, freeports might be designed to operate in the world economy while being fully compatible with traditional Somali institutions. Such tradition-friendly development could enable Somalis to assume a respected place in the world by leaving aside their colonial legacy and building on their indigenous institutions.

Michael van Notten's work adds to a growing interest in "polycentric," decentralized, or non-monopolistic systems of law. While his incomplete draft material did not adequately reference his indebtedness to scholars in this field, the reader who is interested in investigating the subject will find an early but useful introduction and guide in Tom W. Bell (1991). Other writers include Randy E. Barnett (1998), Bruce L. Benson (1990, 1998), A.S. Diamond (1975), David D. Friedman (2000), and Bruno Leoni (1961). Van Notten is no less indebted to the great classical-liberal tradition of, among others, Frederick Bastiat, Milton Friedman, Friedrich Hayek, Spencer Heath, Ludwig von Mises, Leonard Read, Murray Rothbard, Adam Smith, Lysander Spooner, and Herbert Spencer.

A word should be said about the author's reliance on the concept of natural law and natural rights, since this is a concept that is less fashionable in academia today than it once was (although that may be changing, see Barnett 1998, Tibor Machan 2001, Tara Smith 1995). Suffice it to say that there is nothing mystical about his use of the concept. He uses it, following the Belgian scholar Frank van Dun, to refer to underlying principles of successful human social organization—"successful" here meaning organization that can endure because it respects the integrity of the individuals ultimately comprising it. At one point, he simply characterizes it as the timeless and universal principles that protect life, liberty, and property.

It will interest Somalia scholars to know that, besides the draft of this book, the author left material sufficient for a second that, as a companion volume, could be titled *The Politics of the Somali*. That material addresses the prospect of a voluntary confederation of independent clans that would constitute a viable and distinctly African alternative to the European model of government.

## **Features of the law**

The kind of law system described in this book, once the norm for human society, is rare today. A striking

feature is that it is compensatory rather than punitive. Law-breakers, instead of being imprisoned or otherwise punished, are required to compensate their victims. Any fines that are to be paid go to the victim rather than to the government, and they seldom exceed the compensation due. As Anthony de Jasay (1997:240,fn.6) comments, "customary law is overwhelmingly restitution-based, while legal systems where justice is provided by the state tend to veer towards retribution."

Viewed in global perspective, Somali law stands with the Latin and Medieval laws and the English common law against the statutory law that only became prevalent in continental Europe with the rise of the modern nation state. Somali law requires no legislature because it is not made. Somali traditional judges never think of their activity as "law-making," and the assertion that anyone could make the law would strike them as weird, if not obscene. What Bruno Leoni (1991:81,83) says about Roman law holds for Somali:

A large part of the Roman rules of law was not due to any legislative process whatever .. private Roman law was something to be described or to be discovered, not something to be enacted.

Another feature of Somali law that is characteristic of many systems of customary law but sounds odd to the European ear is that every Somali is insured by near kin against his or her liabilities under the law. Consequently a victim seldom fails to receive compensation, even if his or her rights are violated by children or by adults who are penniless, mentally ill, or who have fled abroad.

Because Somali law, being based upon custom, has no need of legislation or legislators, it is free of political influences. That independence makes for better law. The author maintains that crime is lower where customary law is followed than would be the case under legislated law. He suggests that much of Somalia today comes close to what might be called the "natural order of human society"—the hypothetical pattern of human association absent social distortions by political governments. Even so, he points out areas in the law that are in need of change. But these do not require legislation. He explains how many desirable changes—such as ending restrictions on the sale of land and enhancing the status of women—are implicit in economic development.

This book argues that the Somalis' traditional system of law and politics is capable of maintaining a peaceful society and guiding them to prosperity. In the absence of legislation at home and interventions from abroad (which fuels clan conflict by keeping alive the expectation of a central government with its awesome powers that each clan, in self defence, must attempt to control), natural adjustments can be expected that will enable Somalis to maintain internal peace and participate fully in the global economy. Not only is there no need to set up a democracy, the author shows why any attempt to do so must inevitably produce chaos.

Among the controversial propositions in this book are these:

1. The concepts of property, freedom of contract, and justice were discovered and first developed not by the technologically advanced societies but by tribal societies.
2. Crime can be defined in terms of property rights.
3. Governments can neither add to nor subtract from the principle just stated, since property rights do not demand that criminals be punished but only that they compensate their victims.
4. Property rights are better protected by private agencies such as insurance companies than by a central government.
5. Every person should be insured for his liabilities under the law.
6. Law consists solely of principles and rules relating to property rights.
7. Custom provides a better basis for law than legislation.

8. Customary law generally shows a high regard for property rights.
9. Where the two conflict, Somalis usually prefer their customary law to Koranic law.
10. Political democracy is incompatible with property rights. The political system that is compatible with property rights is called "kritarchy."
11. Many Somalis prefer kritarchy to democracy.
12. Democracy is incompatible with a close-knit clan society.

### **A Note on the Editing of this Book**

A major problem in editing this book was the fact that Chapter 8, "Economics," was unwritten. It had only a brief start and the cryptic note, "Further information to be drawn from the books of George Ayittey. Start with describing the economic miracles of Bossaso .. Idem Merka." On reflection, however, it seemed that Bossaso and its implications for the future of Somalia did not fit the book's order of presentation of traditional Somali law and politics. This lack of logical fit may have accounted in part for the chapter remaining unwritten. Accordingly, with critical input from George A. N. Ayittey, I prepared a brief text for Chapter 8 relating to traditional economics and then dealt with the question of economic development, including an account of the "miracle" of Bossaso, in two chapters added at the end.

Among the lesser problems was the fact that the author had indicated by asterisks, throughout the manuscript, references he intended to make, but the references were not found. Also, throughout the manuscript and especially in Chapter 5, "Rules of Conduct," the author left notations about questions of fact and information he had yet to gather. For the reader to whom these might suggest interesting avenues for further research, they are available on request.

I had assisted Michael van Notten in editing several published articles. It was an honour to be named in his will as the principal editor of this work. John Mukum Mbaku, Mauro Tosco, and Frank van Dun became major editors with me by virtue of volunteering many long hours of work. Mauro Tosco painstakingly checked Somali terms for accuracy and spelling; Frank van Dun contributed substantially to the organization of Appendix C and helped to clarify the author's references to natural law; and John Mukum Mbaku suggested that I retrieve material I had written and placed in the Appendix, where he felt it would be ignored by students, and place it instead at the end of the book under a new section, "Part III—Economic Development." Since several people joined in the editing, the occasional editorial footnotes are identified by initials.

Michael was competent in eight languages, including two Somali dialects. But English not being native to him, he always encouraged a free hand in editing to make his thought more idiomatic. I have taken the liberty, therefore, as if he were at my shoulder, of editing the draft material freely, while taking care not to change his meaning. In the section on sale of land in Chapter 11, I expanded the discussion in ways I believe are consistent with his thought. The term "freeport-clan" is mine. Most of my contribution, however, aside from Chapters 8, 14, and 15, and Appendix C, had to do with smoothness of expression and transition.

Many people contributed in many different ways to the completion of this work, proof of the saying that the gods provide thread for the web begun. I am grateful for their assistance. Dr. Mohamed Buwe Osman, a noted artist originally from Merka in southern Somalia and now practicing medicine in Fayetteville, North Carolina, generously volunteered his art for the jacket, adding warmth and colour and perhaps a measure of geographic balance to a text that mainly reflects the central and northern region of Somalia. Michael van Notten's daughters, Marina (executor of her father's estate), Henriette, Isabelle, and Ariane worked diligently to locate and send from Holland the draft materials for this book. Roy Halliday contributed hours of meticulous proofreading and made suggestions in the section on natural rights. The author's friend, Bob Haywood, also proofread the entire manuscript and made welcome suggestions, as did Jon Abbink, George A.N. Ayittey, Stefan Blankertz, Faisal Ahmed Hassan, Emalie MacCallum, John Mukum Mbaku, Mauro Tosco, Frank van Dun, Kevin S. van Horn, Isabelle van Notten, and Carl Watner. The greater contribution of Faisal Ahmed

Hassan still waits. He has volunteered to translate this book into his native Somali.

Spencer Heath MacCallum