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From the Selected Works of Ruth Gordon

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Organic Constitutions

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globally for his pioneering theoretical work regarding the rights of indigenous people in international law. He also puts his theory to work by representing indigenous groups in litigation throughout the world.

ORGANIC CONSTITUTIONS*

*by Ruth Gordon***

I have been studying the new and sometimes contested phenomena of collapsed, or "failed," states. By *collapsed states*, I mean states such as Somalia, where the central government has ceased to exist or is largely ineffective. The Republic of Somaliland has helped me focus on what might happen in the aftermath of state failure, as people proceed to reconstruct institutions to govern their lives. Somaliland declared its independence from the Republic of Somalia in 1991. In the interim, it has sought to rebuild itself with little or no assistance from the international community. How the international community might participate, or perhaps abstain from participating, in the rebuilding processes is a question that should be addressed.

I would venture that the answer lies in organic constitutions and institutions that are created from the bottom up and are firmly grounded in the cultures in which they must exist and flourish. Moreover, organic constitution making should be utilized even when the frameworks that emerge do not neatly fit within the contours of what the international community might deem representative democracy. I suggest that the answer is local, not universal.

It is not a revolutionary idea to advocate giving due regard to local custom and culture. But it is an approach that is often acknowledged in theory and then routinely ignored. This is especially true in Africa, where a tendency persists to assume that indigenous cultures offer little or nothing toward fashioning solutions to the problems of postcolonial Africa.

My starting point is the institutions and constitutions that were crafted in the wake of decolonization, and their decline into utter irrelevancy in the postcolonial state. My end point is the newly independent Republic of Somaliland. Since independence, an institutional framework has been evolving that appears to be planted in Somali clan culture. That this framework is so firmly grounded in Somali culture may afford a degree of pragmatism and legitimacy that may help it succeed. I will begin with a brief and admittedly very general (and therefore oversimplified) outline of the fate of postcolonial governing structures. I will then briefly review what has transpired in Somaliland over the last seven years.

The Postcolonial State

The postcolonial African state was erected upon the institutional foundation and political culture of the colonial state. The colonial state was the polar opposite of representative democracy. Legislative and administrative functions were largely merged into one entity, and that entity had absolute power over the indigenous population.¹ Designated "traditional leaders" usually enforced laws and collected taxes. "Chiefs" were often accorded plenary authority over their charges, which led to the systematic exploitation of the peasantry. Indirect rule also changed, and often distorted, aspects of "traditional" society.

*A greatly expanded version of the thoughts expressed in this paper can be found in Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. (forthcoming 1998).

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¹Colonial governments had a great deal of autonomy and generally operated quite independently from home governments.

Moreover, the concept of absolute and plenary state authority was extended to the postcolonial state.

The colonial economy had to be economically self-sustaining, and thus mechanisms were developed to extract resources from the populace. The systems that evolved were largely, and sometimes cruelly, coercive. They introduced a bureaucracy with tentacles reaching deep into the economy, which has also been a feature of the postcolonial state.

At independence, new governments were bequeathed constitutional democracy, with all its accompanying liberal abstractions and institutions, such as separation of powers, political parties and, of course, one person, one vote. Political power, which had been concentrated, was now to be diffused. Nonetheless, the administrative apparatus (the bureaucracy) inherited from the colonial system remained firmly in place and in fact grew larger as it began to take on new tasks, such as development, and as armies and police forces were expanded. The foremost transformation was that the bureaucracy was largely Africanized.

Yet, the elites who were to govern within the postcolonial systems did not cut their political teeth on democratic paradigms. Nor were constitutions based on precolonial political economies or organizational blueprints. Nor were they an amalgamation of the two. It is not as if folks could simply do what came naturally, so to speak, as things began to unravel. This is not to let the governing elites off the hook. Clearly, many proceeded to concentrate power in their own hands and to use the state as a source of wealth and power. Nonetheless, I do not believe that such large-scale difficulties, across so many nations, are simply the result of deficient leadership.

Other aspects of the colonial legacy compounded the difficulties faced by postcolonial governments. For instance, ethnic differences had often been accentuated and exacerbated during the colonial period; in the postcolonial era, ethnicity sometimes provided the basis for political parties and political claims, and were a basis for disbursing political favors. Moreover, as the state emerged as the only reliable source of wealth and advancement for elites, corruption and cronyism increased. At the same time, the populace was clamoring for better living conditions.

Constitutional structures were discarded en masse and at will, although not the constitutional form itself. I believe that one of the reasons this occurred is that the frameworks adopted were not grounded in the social and political realities these fledgling nations confronted. Because these frameworks were alien structures, with little or no connection to the social realities of the people they were to govern, there was no reservoir of understanding or shared meaning to fall back on. Having failed to meet the needs of any segment of the population, these imported systems were abandoned.

Where does this leave us, if we are witnessing the rebuilding of a society where postcolonial frameworks have been destroyed? What might emerge if we leave societies to their own devices?² Again, the answer is local, and must hinge on the culture and history of the people at hand. In the case of African nations, that history will encompass both the colonial state and the postcolonial state. I am not advocating a return to some mythical traditional past where all was well and everyone lived a pristine existence. Doubts about whether such a past ever existed aside, it is clear that cultures are not static, but change as they come in contact with and are affected by other cultures and peoples. Clearly, colonialism and the postcolonial experience have contributed to who and what the peoples of sub-Saharan Africa are today.

²Of course, I am talking about what would arise after humanitarian crises are taken care of and fighting ceases.

Somaliland

Somaliland represents one example of what might ensue if people are permitted to design their own imagined communities. Somaliland is not a panacea. It is clearly an evolving system, and the outcome is uncertain. Nonetheless, Somaliland represents a combination of returning to the source and incorporating contemporary institutions.

Northern Somalis are primarily nomadic herders, who have grazed camels, sheep, goats and cattle over the plains of the Horn of Africa for centuries. Precolonial Somali society was characterized by a decentralized political system that was comprised of an elaborate succession of clan families, clans and subclans. Within this system, political identity and loyalty were determined by degree of genealogical proximity. This acephalous society was highly egalitarian and democratic, but was also susceptible to internecine feuds. Somalis make many distinctions both within and without clan families, and much of this differentiation is tied to migration. These differences were exacerbated by the colonial experience. Regions are dominated by clans and clan families. And the liberation groups that waged war against the regime of Siad Barre, longtime ruler of Somalia, were clan based.

The Republic of Somaliland was born in May 1991, when the Issaq clan-based Somali National Movement declared independence from Somalia. The borders of Somaliland are approximately coterminous with those of what was formerly British Somaliland. Since British and Italian Somaliland were merged in 1960 to form the Republic of Somalia, the north had been marginalized by the national government. It had also borne the brunt of some of the most brutal destruction unleashed by Said Barre during the Somali civil war.

After declaring independence, Somalis set about halting the bloodshed and restoring order. Clan elders took the lead when infighting continued between modern rebel leaders. Groups of elders were selected to resolve disputes before they erupted into violence, and clan elders proved to be pivotal as a source of guidance and counsel to many political leaders. Clan elders employed traditional diplomacy to initiate a series of peace conferences in an effort to broker peace between Somaliland's different communities. These peace conferences, which were held in towns throughout Somaliland, included religious leaders, politicians, intellectuals, leaders of social groups, business communities and ordinary citizens. All were able to air their numerous grievances.

In April 1993, participants in a conference at Boramo endorsed state structures for Somaliland. These bodies are (1) the Council of Elders (or Guurti),³ (2) a constituent assembly, and (3) an executive.

The president was initially elected by a national council of clan elders, and was recently reelected by the national assembly. President Mohamed Egal had been the first prime minister of Somaliland for five days in 1960 (before Italian and British Somaliland merged to form Somalia), and the prime minister of the last civilian government of Somalia. He was jailed by Siad Barre for twelve years. He has formed a functioning cabinet and has been pushing for international recognition and foreign aid. He carefully selected his cabinet to include members of all of the different groups in Somaliland.

Unfortunately, of late he has been exhibiting a tendency toward the exercise of expansive executive powers while trying to check other sources of authority in Somaliland. It remains to be seen if he will succeed.

The national Guurti is a powerful check on the executive. This interclan organization encompasses the various clans of Somaliland. Those who serve are both traditional agents

³If circumstances arise that prevent state bodies from performing their national duties, the Council of Elders can convene a conference, which includes all of the communities of Somaliland. This conference then determines the political measures needed to resolve outstanding problems.