Gaal Dil Gartiisa Sii

Do not kill even the infidel without giving
him the natural right of every man.

by

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Introduction:

From its inception up until the khaki-uniformed men took over, Somali Society was known for its respect of the freedom of the individual. The title, a Somali proverb, is an indication of the extent to which Somali society cherishes the freedom of the individual. Even though this freedom of the individual as a cultural value was held dear in Somali society, the proverb as such presumably came about at the turn of the century when European colonialism commenced in the Somalilands. The logic of the proverb was that the infidel, who in this context means a non-Muslim, was a colonizer and an intruder, and was, therefore, perceived as the sole enemy of Somali society. Nevertheless, even though the infidel was apprehended as an enemy who came to tear the society apart, his being killed or deprived of his rights, as the proverb stresses, was unwarranted if he was not given a fair trial. A fair trial didn't necessarily entail trying the infidel in a western-type court of law; rather it might have meant the handing-over of the infidel to the *Heerbeegti* institution, whose role in society was the dispensation of justice. Further discussion of the *Heerbeegti* will be engaged in the text of the paper; however, for the moment, it is important to point out that traditional Somali society had rigorously protected the freedom of the individual regardless of one's religion or nationality.

Among the Somalis, the proverb "Gaal Dil Gartiisa Sii" has become the motto in dispute settlement councils. In this connection, there is enough literature to support the claim that the freedom of the individual had flourished in Somalia until 1969. Ironically, there is also a lot of literature to support the claim that the freedom of the individual has been relegated to a despicable state in Somalia since 1969. While the former claim could be substantiated by taking into account the *Heerbeegti's* administration of Somali customary law and the Supreme Court's dispensation of justice during the civilian government, the latter claim finds its justification in the malicious manner in which the national security court has been dispensing justice since 1969.

The *Heerbeegti* Institution

As has been noted, the *Heerbeegti's* role in traditional Somali society was the dispensation of customary law. The way in which cases were deliberated, as well as the nature of the *Heerbeegti*, could be illustrated with a homicide case between two clans.
Homicide, under Somali customary law, was considered a private civil case until colonial governments took control of the country.[1] If a person of one clan killed a member of another clan and there was no denial about the killing, the case was redressed with the payment of one hundred camels. If the accused clan denied having perpetrated the killing, the case either resulted in more fighting or went into an ad hoc court or council. In the ad hoc court, the chiefs of the warring clans met and discussed the case with the intention of settlement. The process that the ad hoc court followed is better explained by I.M. Lewis:

> Those claiming compensation may require members of the accused group chosen for their probity and good character to swear fifty oaths to the effect that no member of their lineage is implicated in the case. The latter are then left with the choice either of swearing the oaths, paying the blood wealth required, or of returning the oaths to their adversaries. If the latter testify by fifty oaths to the truth of their allegation they are entitled to payment.[2]

The ad hoc court could settle the case only if the warring clans had the intention of making peace. If the elders of the two clans could not settle the matter and an impasse developed, the case was submitted to a traditional council of impartial arbitrators--the *Heerbeegti*. The members of the *Heerbeegti* were selected from outside clans. Their selection was based on their knowledge of customary law and tradition. However, unless the warring clans approved the members of the *Heerbeegti* or customary law judges, they could not serve on the panel of the *Heerbeegti*. The *Heerbeegti* had no way of enforcing its decision on either clan; however, since they were perceived as impartial their decision was usually accepted. A working definition of the *Heerbeegti* is given by Said Samatar:

> *Heerbeegti* . . is a collective term referring to a body of legal experts who mediate in individual, intra-clan and inter-clan disputes and have, therefore, risen to positions of prominence and prestige in the land. Their chief power and influence seem to derive from two sources: their knowledge of customary law and legal precedents on the one hand, and, on the other, their

ability to persuade litigants as to the soundness of their decision.[3]

It was this institution and other lower-level dispute-settlement institutions which impressed Sir Richard Burton so much as to describe the Somalis: " . . . as free as nature ever made man."[4] Burton, describing the independence and the freedom-loving nature of the Somalis, noted that they don't even recognize their rulers' authority when it comes to their personal liberty. In Burton's words, "every free born man holds himself equal to his ruler and allows no royalties or prerogatives to abridge his birth right of liberty."[5]

In no way can one deduce from the above excerpts of Burton a perception of anarchy in the sense that Somalis don't abide by laws. In this connection, Burton went on to report "yet I have observed, that with all their passion for independence, the Somali, when subjected to strict rule . . . are both apt to discipline and subservient to command."[6] However, the *Heerbeegti*'s authority was superseded by colonial courts and later, by the Supreme Court of an independent Somali Republic.

The Supreme Court of the Somali Republic (1960-1969)

Since the Supreme Court's source of authority was the Constitution, some discussion about the Constitution is in order at this point. The Constitution of the Somali Republic (1960-69) vested the powers of the state in three branches of government: the Legislative, the Executive and the Judiciary. All laws enacted by the Somali Parliament of the civilian government had to conform to the Constitution and were subjected to judicial review in that regard. Unlike the British system where the courts do not have constitutional power to nullify an act of Parliament, the Somali Supreme Court had constitutional power to nullify an act of parliament if the latter was judged to be inconsistent with the Constitution. In comparison with the United States Constitution, judicial review of congressional acts was not explicitly defined in the Constitution at the time of its formation. However, the classic case of Murbury V Madison which became constitutional law, marked the first measure intended to answer the question of judicial review of congressional acts in the United States. On the other hand, the Somali Constitution explicitly stated that an act of Parliament, in order to have the effect of law in the Republic, should be unequivocally consistent with the Constitution. The Somali Constitution of the civilian government practically guaranteed judicial rights. These judicial rights included the right to institute judicial proceedings, the right to be protected against illegal acts of the public administration, and the right to defense in legal proceedings. One constitutional expert who was

present in Somalia when the Constitution was approved by a popular referendum made the following comment: "While the Soviet Ambassador referred to it as just another bourgeois constitution, it is deserving of more honor as a basically European conception providing for fundamental civil liberties not at wide variance with what appear to be Somali Traditions."[7] There is an international consensus to prove that the rule of law had prevailed in Somalia during the civilian government. The Somali constitution of this period protected human rights. During this period, "the country's record of honoring these rights was impressive not only by the standards of developing states but even by those of developed western democracies."[8]

The literature on how far the constitutional government of Somalia was democratic cannot be reviewed in a paper of this length. However, it is noteworthy to report that "some observers believed that Somalia's institutions suffered from a surfeit of democracy."[9]

The Somali Supreme Court hinged for its legal authority on the above explained constitution. A case that reached the Somali Supreme Court for settlement was just like a case that made its way to the Supreme Court for final judgement here in the United States. During the period of its operation, the Somali Supreme Court had demonstrated more than once that only the law of the land is supreme. An administrative law case that can illustrate the above argument is Ahmed Mudde Hussein and others vs the Minister of Interior.[10]

In this case, the Minister of Interior using the power vested in him by article 44(a) of the local administration and local elections law dissolved the City Council of Mogadishu for the second time. The first time the city council of Mogadishu was dissolved by the Minister of the Interior was 1962, when the city council was accused of mismanagement and other administrative irregularities. This time the city council did not petition the Supreme Court. However, the same City Council stood for re-election and won in 1963. The newly elected council met and elected Ahmed Mudde Hussein as its mayor. That same day, the Minister of Interior issued a decree dissolving the Mayor and his council. The Minister claimed that he acted on the prerogative vested in him by article 44(1) of the local administration and local elections law. Article 44(1) of the said law stated that where a local administration or city council could not perform its duties as required by law, the Minister of Interior is empowered to dissolve it by decree. The Minister reasoned that since this council, with Ahmed Mudde Hussein as its mayor, was dissolved before and the new council elected Ahmed Mudde Hussein as its mayor, there was no reason to believe that the new council, with Ahmed Mudde as its mayor, would perform better than they did before.

Against the aforesaid backdrop, Ahmed Mudde and City Council members petitioned the Supreme Court in order to annul the ministerial decree dissolving them. The question that the Supreme Court had to consider was whether the ministerial decree dissolving the council was within the legal boundary of article 44(1) of the local administration and local elections law. The Supreme Court, dismissing the State Attorney's argument that the dissolution of the Council by the Minister's decree was not subject to any limitation since the power of the Minister emanated from the law, pointed out that the expression "where a council can not perform its function" must not be construed in any other way than the impossibility to carry out its obligations imposed by law. The Court further noted that the impossibility of the Council to perform its duties had to be evaluated on an *a posteriori*, and not on an *a priori* judgment. Finally, the Supreme Court annulled the ministerial decree dissolving the Council and its Mayor and also ordered the Minister to immediately reinstate Mogadishu City Council and its Mayor. The Minister accepted the court's judgment, and reinstated the Council and its Mayor in toto.

Thus, it can be concluded that during its existence as the highest judicial organ in the Somali Republic, the Supreme Court administered justice with vigor and struck down all ultra vires behavior from any office of the government.

It is this kind of practice that led one scholar to make the following comments:

> The adoption of constitution by popular referendum, the establishment of the national assembly in accordance with the will of the people, the recognition of the fundamental human rights and freedoms and the separation of powers embodied in the constitution with the judiciary as the guardian of individual liberty have all made the Somali Republic a model democratic state in the continent of Africa.[11]

However, in citing this conclusion, one is still led to ask what propelled the military to reverse the course of the justice system in Somalia and what was the subsequent effect of that reversal. When it came to power in Somalia in 1969, the Military Government not only suspended the Constitution and the legislative body of the civilian government, but it also assumed the powers of the suspended institutions and relegated the judiciary's role to one of subservience to its command. The Military Government, at the time of its subversion of the justice system, claimed that the changes were required by the conditions of the time and would be provisional. Now, twenty years have lapsed, and one can only hope that the time has come when some

dignity will be injected into the judiciary system of Somalia. While ending the paper without resolving the issues I have raised, I hope I have underscored the importance of the independence of the judiciary in Somali society, or in any society for that matter, that values the freedom of the individual.

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[1]Noor Muhammad, The Legal System of Somali Democratic Republic (Charlottesville, Va: The Michie Co., 1972), p.81.

[2]I.M. Lewis, The Modern History of Somaliland (New York: Fredrick A Preager, Publishers, 1965), p.40.

[3]Said S. Samatar, Oral Poetry and Somali Nationalism (Cambridge: Cambridge University Press, 1982), p.33

[4]Sir Richard Burton, First Footsteps in East Africa (1st published in 1856); Republished, Ed. by Gordon Waterfield with Addenda (New York: Fredrick A. Praeger, Publishers, 1965), p. 31.

[5]Ibid. P. 31.

[6]Ibid. PP. 31-32.

[7]E.A.Bayne , Four Ways of Politics (New York: American Universities Field Staff, Inc., 1965), p. 103.

[8]Harold D. Nelson, ed., Somalia: A Country Study, 3rd ed. (Washington, D.C.: The American University, 1982) p. 198.

[9]Ibid., P. 35.

[10]Noor Muhammad, Op. Cit., p. 265-7.

[11]Noor Muhammad, "The Republican Constitution Of Somalia," Indian and Foreign Review, Vol. 31, no. 3 (Nov.- Oct. 1965-1966): 15-16.