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Foreign Inspired Courts as Agencies of Peace in Troubled Societies A Plea for Realism and for Creativity

Ugo Mattei
UC Hastings College of the Law, matteiu@uchastings.edu

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Abstract

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A Plea for Realism and for Creativity.

Ugo Mattei[1]

1. Puntland 1998-2001

I come to this debate with a grim spirit. Just three years ago, I spent a hard though hopeful time in Garowe helping in the preparation of the Constitutional Charter of Puntland. This remote north eastern region of Somalia has been relatively untouched both by the civil war and by the Restore Hope operation and, as a consequence, it was at the time a relatively peaceful area. More than two hundred people are now reported dead in Garowe. Even this happy exception in the Somali tragedy is over. Some day we will know if, once more, foreign chess playing in the area is to be blamed for this disruption.

The different political groups making the Preparatory Commettee of the Garowe Constitutional Convention were negotiating the text of the Provisional Charter[2]. They would occasionally call us, four experts hired by the United Nations Development Office for

[1] Ordinario di Diritto Civile, Università di Torino; Alfred and Hanna Fromm Professor of International and Comparative Law, University of California, Hastings College of Law. I wish to thank Elisabetta Grande and Rodolfo Sacco for constant support and for a number of insights developed in this paper. This paper is dedicated to the memory of Ahmed Askir Bootan, who taught me to love Somalia and its wonderful people and whom I loved as a brother.

[2] I discussed the constitution making process of Puntland, in comparison with the Eritrean and South African Experience in U.Mattei, Patterns of African Constitution in the Making, in V.Piergigli & I.Taddia (Eds) International Conference on African Constitutions, Turin, Giappichelli, 2000, p. 145 ff ; See also, in the same volume, F.Battera, Remarks on the 1998 Charter of Puntland State of Somalia, p.173

Somalia, explain what they did, and ask for advise about how to express it in legal English. We spent also a few days discussing, basic constitutional issues and other pieces of legislation. My expertise has proved useful in drafting the judiciary law now, so to say, "in place".

My philosophy was that of a humble translator. In a quite hard Islamic approach to Constitution drafting, that proved for me, risen as I've been in values of western leftist liberalism, an exercise in self disciplined cultural relativism. In the course of my life as a comparative legal scholar, I've been able to develop a fierce antagonism in front of any cryptic neo-colonial enterprise hiding behind universal assumptions about the law.

I have expressed my critical ideas, based on a fundamental *law in context* attitude, in a number of papers, some of which devoted to Africa[3]. A particularly critical one was presented at the World Bank [4]. I challenged the idea that law was like technology, easily transferable from one context (the rich and exploiting center) to another (the poor and exploited periphery). Law is a lively product of local people. It has no universal character[5]. In serving the Somali negotiators in Garowe, I had one and only one fundamental guideline. They were the masters and I was the servant. Whatever they would agree upon, assuming they were legitimate representatives of Puntland people, was the law for me. I would voice the interests of minorities when I thought it would be the case, but I would always assume that the negotiators were bringing the life into the law that we were helping to draft. Our fundamental beliefs as western scholars, imbedded in our tradition, should simply stay out of there as much as possible. Such beliefs simply would not help our understanding and, as a consequence, our capacity to provide the service we were there to offer.

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[3] See, for example, U.Mattei, The New Ethiopian Constitution: First Thoughts on Ethnic Federalism and the Reception of Western Institutions, in E.Grande (Ed.) Transplants, Innovation and Legal Tradition in The Horn of Africa, Torino, L' Harmattan Italia, 1995, p 111.

[4] See U.Mattei, Legal Pluralism, Legal Change and Economic Development, in L.Favali-E.Grande-M.Guadagni (Eds) New Laws For New States. Politica del Diritto in Eritrea, Torino, L' Harmattan Italia, 1998, 23 ff.

[5] See in general L.Nader, (Ed.) Law in Culture and Society, Berkeley, University of California Press, 1997.

I have always believed, following many towering judicial figures, such as the great American Judge Learned Hand, but also in Africa, Tanzanian Chief Justice Naylali, that the spirit of liberty and the sense of responsibility lies in the hearts of men and women. When it dies there, no Constitution, no law, no Court can save it.

My sense was that a Constitutional process, something that is not over once the Constitution is drafted and the institutions are eventually staffed with people, is like a hard gymnastics to train in tolerance, discussion and understanding[6]. The aim of such training program is to overcome the highest obstacle that any political organization must sooner or later face: succession in power with as little violence as possible. The Constitutional experience of Garowe has failed exactly in that fundamental mission. It is a dramatic metaphor of the last 10 years of Somali political life. Why?

2. Legitimacy and Disparity

The fundamental question, once proposed by former Somali National University law school dean Professor Rodolfo Sacco is still there: why the armed man should obey an unarmed leader?[7]

There are different ways in which this puzzle has been solved. Centralization of power can effectively reached, as in western countries, so that the unarmed leadership develops a thorough hierarchy becoming able to monopolized force. The hierarchy is organized by a variety of institutional means, some of those being formal, such as laws, constitutions and courts, some other being informal such as education, culture, and sense of institutional

[6] I owe this metaphor to Mario Raffaelli, Italian negotiator in the Mozambique piece process. See P. Morozzo della Rocca, Mozambico. Dalla Guerra alla Pace, 1994; For a broader theorization in the legal philosophy, J. Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy, Cambridge, Harvard U.P. 1996

[7] R. Sacco, Perché l' armato ubbidisce all' inerme?, Riv Dir Civ 1997 I, 1

belonging developed by the individuals staffing the institutions[8]. Legitimacy is the most powerful of the informal institutional constraints[9]. The authority of the leader when considered legitimate is internalised in the brains hearts and souls of the armed men making them willing to obey. Hence legitimacy can be seen as the soul of a constitutional body, that mysterious and mighty force that keeps it alive. Legitimacy, nevertheless, is a mysterious factor an history of mankind has seen it clothed in very different ways. Effective centralization of force can not live without legitimacy, because patterns of resistance, sooner or later, make it collapse.

The natural question to ask is then: what is legitimacy? And in the specific domain tackled by this paper, can courts of law create legitimacy or is legitimacy something that comes before courts of law?

Nowadays the kind of legitimacy that allows centralization of power is dressed up in democratic clothing. Democracy and the rule of law are the *logos* of this new wave of western propaganda carried on by a variety of political and self-defined technical agencies of globalisation. Among those, on top of most western Secretariats of State and the G8 (under U.S. leadership, of course), the World Bank, the WTO, The International Monetary Fund, the NATO, the European Union and many others[10]. Such rhetoric is less stringent at the UN level because of political expediency dearly paid in terms of effectiveness. This has not always been the case. And perhaps, these last few weeks are showing us the true face of Western-lead globalisation. No one has been more sincere and in a way more predictive of the future we are living now, that Director of Policy Planning of the U:S Department of State, George Kennan at the early stage of the present cycle of US World leadership writing in 1948: "We

[8] See D. North-R.P. Thomas, The Rise of the Western World: A New Economic History, Cambridge, Cambridge U.P. 1973

[9] See L.Nader, Controlling Processes. Tracing the Dynamic Components of Power, 38 Current Anthropology, 711 (1997).

[10] The role of such institutions, as makers of an "Empire" substituting previous notions of "imperialism" is thoroughly discussed by A.Negri & M. Hardt, Empire, Cambridge, Harvard U.P. 2000

have 50% of the world's wealth, but only 6.3% of its population…our real task in the coming period is to devise a pattern of relationship which will allow us to maintain this position of disparity….we should cease to talk about the rising of the living standards, human rights and democratisation. The day is not far off when we are going to have to deal in straight power concepts. The less we are then hampered by idealistic slogans, the better".[11]

In the course of the cold war, the Kennan doctrine has been effectively carried on in the domain of the law by one fundamental assumption. Law is an essentially political apparatus that should not interfere with the straight power relationships plaid on the chessboard of the confrontation with the USSR. Consequently, international development agencies were not targeting the legal system, never really helping to build strong institutions (courts in particular), leaving in place the leftovers of the colonial period. Rather, the US foreign policy from Chile to Nicaragua, from Haiti to the Philippines, from Somalia to South Africa, was actively sustaining strong authoritarian regimes in which there was no space for the potentially counter-hegemonic use of legal culture and Courts of law[12]. With the end of the cold war, already beginning in the eighties, a rather dramatic change could be seen as happening in US foreign policy. In an attempt to reach a phase of "consensual hegemony" a praxis of promotion of what has been seen as "law intensity democracy" developed[13]. Law started to be characterized as "technical" and not political any more, International development agencies became involved in supporting institution building exercises through the world; the new wave of American inspired constitutionalism promoted by ruling elites in many African countries in the last decade of the last century (including South Africa,

[11] Department of State, Policy Planning Study (PPS) 23 Foreign Relations of The United States, 1948, Vol 1 (part 2) February 24 1948, p. 23. This statement is cited and discussed in W.I. Robinson, Promoting Poliarchy. Globalization, U.S.Intervention and Hegemony, Cambridge, Cambridge University Press 1996.

[12] The point is well documented, with wealth of first hand documents by Robinson, Promoting Poliarchy, cit. But , of course, the literature is by now immense.

[13] See W.I Robinson, Promoting Poliarchy. cit.

Ethiopia, Uganda, Namibia, Malawi, Benin and Burkina Faso[14]) has been supported in a rather generous way by a variety of western donors. Emphasis on elections and on independent courts of law as technical agencies of development has been remarkable through the periphery of the world. True, some success story can be accounted for. The ugly apartheid regime has been overthrown in South Africa[15]. But successes have been quite an exception. Constitutionalism and elections did not prove much effective pacification means in the Ethiopia and Eritrea saga, just to offer an example very close, at least geographically, to Somalia. And even in such contexts where the rule of law has been incrementally improving, such as Tanzania, it would be difficult to credit the merits to foreign aid [16].

What is more troublesome however, is not the limited rate of success of western-centric constitutional experiments in contexts radically foreign to western notions of legality. Nor it is the self serving and self interest nature of much foreign aid, particularly when, as in the case of "low intensity democracy" exercises, its real aim is the development of smoother hegemonic relationships in order to pave the way to unrestricted corporate rapacity[17]. The real troublesome aspect is the reaction happening when such offers of democratisation and international aid in building a western-like legality is declined. When this is the case, the rhetoric of human rights and the rule of law, unevenly applied according to political expediency[18], becomes a strong weapon to dissimulate the real stakes that are behind illegal

[14] Data on a number of these constitutional experiences can be found in Piergigli & Taddia (Eds), International Conference on African Constitutions, cit.

[15] Bibliography and discussion in Mattei, Sud Africa, in Digesto Discipline Privatistiche, Sezione Civile, Torino, Utet, 1999.

[16] See for a fascinating discussion of the Tanzania experience in the making of the rule of law see, most recently, J.A.Widner, Building The Rule of Law. Francis Nyalali and the Road to Judicial Independence in Africa, New York, Norton & Co. 2001; For a critical account stressing local creativity as a path to development despite government and International donor's policies, see A. Mari Tripp, Changing the Rules. The Politics of Liberation and the Urban Informal Economy in Tanzania, Berkeley, University of California Press, 1997

[17] See G.Arrighi & B.J. Silver, Chaos and Governance in the Modern World System, Minneapolis, University of Minnesota Press, 1999.

[18] See S.D. Krasner, Sovereignty. Organized Hypocrisy, Princeton, Princeton U.P. 1999

and inhuman armed interventions like those in Iraq, Somalia, Yugoslavia and most recently Afghanistan.

If this cursory analysis is at least in part correct, the "rule of law" becomes a potentially very dangerous product that any scholar interested in truthful accounts of historical dynamics of power should handle with the utmost care in order to avoid being taken in by dominant mythology.

Even after the cold war, law still has a strong, very strong political element. Any attempt to characterize it as neutral hides a hidden agenda that limits the truthfulness of our perception[19]. In order to understand what is going on and to give some meaning to the idea of legality in the Somali context it is therefore necessary to understand what are the alternatives to western inspired legal institution (and in particular courts of law). And such an alternative today are, one like it or not, a version of Islamic Courts implementing a very basic police power by means of a spectacular use of sometimes invented or reinvented Sharaitic punishments. Such courts are not mere quasi-police agencies even when established in troubled conditions[20]. Like western courts can not live without a western based legal culture, so Islamic courts find their life in the different and complex varieties of Islamic schools that are in place through Somalia. Just like western financial aid attempts to support western courts staffed with western trained layers[21], similarly aid from Islamic countries such as Saudi Arabia, Yemen, Malaysia, Libia and many others fund Islamic schools and courts, creating the conditions for local legitimacy[22]. Indeed courts, Islamic as well as Western, are reactive not proactive institutions [23]. Their legitimacy is a function of their effectiveness in providing satisfaction for

[19] This point is the leitmotive of L.Nader, Law in Motion. Anthropological Projects, Berkeley, University of California Press, 2002 (Forthcoming)

[2020] See F. Castro, Quadi, in Digesto Discipline Privatistiche, Sezione Civile, Torino, Utet, 1997; E. Tyan, Histoire de l' Organization Judiciaire en Pays d' Islam---

[21] See the classic Gardner, Legal Imperialism, Madison, University of Wisconsin Press, 1980

[22] The Afghan context, very similar from this perspective, is discussed, in A. Rashid, Talibans, New Haven, Yale U.P. 1999

[23] See for a classic comparative discussion, M.Shapiro, Courts, ---

the fundamental human quest for justice (and peace). I submit that both western courts and this version of sharaitic courts are foreign to many fundamental aspects of Somali society. Their claim of universality, both in terms of serving the creation of a new Somali State (western courts) or in terms of assuming territorial jurisdiction (Islamic courts) is a foreign idea that, as much foreign intervention through the history of Somalia has only created more suffering to the people.

One can therefore observe two different notions of legality competing with each other, both sharing a somewhat foreign character if approached as pure models. The challenge we are facing is, consequently to workout a model of legality that might share aspects of both but that is able to better reflect the local conditions in order to gain some legitimacy in this dramatic moment of Somali history [24].

Building legality has not proven an easy task in Africa. A general increase of small scale delinquency and a generalized failure of traditional controlling processes mostly based on arm's lengths patterns of relationship, has accounted for a general increase in resorting to Courts of law well documented in many different African environments such as Tanzania, Uganda or Botswana.[25] But one thing is the slightly better functioning of Courts of law in those places where there are minimal conditions of peace in society, an entirely different question is the possible role of lawyers, judges and Courts to be themselves at the roots of pacification or of prevention of deadly conflict. And indeed it is extremely unlikely that Courts, patterned in the classic western posture of agencies "without the purse and without the sward" could have much a role to play in countries experiencing a really deep revision of the

[24] On competition as a necessary notion to understand African legal pluralism see E. Grande, Preface in Transplants, Innovation and Legal Tradition, cit.
[25] See J. Widner, Building the Rule of Law, cit supra at p. 24

Western model of State through civil war and unrest, like Somalia, Rwanda[26], or in the Asian context, Afghanistan.

It is the time to understand that the experiment of transplanting western institutions (and the very western idea of State) in African countries has failed[27]. It is difficult to build legitimacy and legality in the periphery when legitimacy and legality are not exercised at the center to begin with. It is impossible to build legality on the modernist notions of boundaries and of state authority in societies rooted in decentralization and with a radically different idea of territoriality[28]. Legitimacy comes from a general sense of fairness, something that can not develop if the relationship of power and the division of world wealth is even worse today than it was when the honest remarks of Mr. Kennan were offered more than fifty years ago. The possibility to develop legality in Somalia is then linked to the capacity to walk an independent path, without persevering in attempts of top down modernization carried on as controlling processes imposed by dominant elites to the people [29]. Nor the path can be a reversal to equally foreign ideas of fundamentalist Islamic legality. The history of Islam in Somalia has been a story of incremental adaptation to local condition with sensitivity for differences and realistic compromise for the needs of a highly decentralized society[30]. How to walk this path? What is, if any, the role of courts in finding a Somali way to pacification? Can Italy or any other Western power help in this task acknowledging the failure of top-down imposition?

3. Remembering Bootan. Education and culture as prerequisites of legality.

[26] The use of traditional elderly Court, the so called Macaca, is now explored in Rwanda as an alternative to the western inspires special court sitting in Tanzania.
[27] See B.Badie, The Imported State. The Westernization of the Political Order, Stanford, Stanford U. Press, 2000
[28] See R.Sacco, Conclusions, in E.Grande (Ed.) Transplants, Innovation and Legal Tradition, cit.
[29] See L.Nader, Controlling Processes, cit
[30] See R. Sacco, Le grandi linee del sistema giuridico somalo, Giuffre, Milano, 1988

The man who taught me everything I know about Somalia, former Rector of Somali National University Ahmed Bootan, died poor and in exile last spring in Holland leaving four small children. This was a man, let me tell this incidentally in this paper dedicated to his memory, that for years has proved the most reliable and sensitive counterpart of western (and particularly Italian) diplomacy in Somalia, so that it is a scandal the degree of oblivion that covered his personal tragedy and that of his family. The last time we discussed Somali matters, not long before his death, he was critical of the Puntland experiment of which I was so fond. He was a moderate Muslim, a naturally born teacher and one of the few decent members of Siad's government. His attempt to persuade Muhamed Siad Barre to open up the constitutional system was relentless until the very last days before the outbreak of the civil war quite exactly ten years ago. He was a true believer in Somali nationhood and in the capacity of a well organized State, finally free from corruption, to grant peace and development[31]. He believed in culture, education and equality. Like Nyerere in Tanzania, he believed that brotherhood came first, both as a personal and a political value. When in 1993 we travelled together to the first negotiation conference on Somalia, hosted by President Melles Zenawy at Addis Ababa, to present some ideas for a constitution building exercise (basically to discuss the chances of the constitutional document that he was not able to have Siad sign two years before), he justified his preference for centralized institutions by use of the following popular story : "The world against Africa; Africa against Somalia; Somalia against my clan; my clan against my family; my family against me and my brother; my brother against me!" To tackle this trend that he used to call "clanic canton division"[32] he claimed there was the need of a strong Somali state and he used to offer as proof of a previous

[31] See A.Bootan, La Costituzione Somala del 1990, in E.Grande (Ed.) Transplants, cit. p. 131
[32] See A. Bootan, Somalia, Stato Multietnico o Canonizzazione Clanica? in Studi in Onore di Rodolfo Sacco, Milano, Giuffre' 1994

Somali nation building success story the development of a common written Somali language, official after independence.

As an eager reader of Adam Smith earlier in my life, I used to reply that good institutions are those capable to channel the selfish interest of each one of us in the direction of the common good. That was why starting from the very same premises of Bootan, I would reach opposite institutional consequences. I always believed in *ujamaa* (the Nyerere doctrine of brotherhood in African Agrarian Socialism) as a path to African development (though the corrupt praxis betrayed "Mwalimu"'s theory). I also believed that culture and education as a prerequisite for development of any sense of legality (of western legality, of socialist legality, or of *ujamaa* legality alike). I just could not believe in a centralized state, since I've considered the notion too deeply at odds with the way in which Somali society works. Good institutions should attempt reducing transaction costs by adapting as much as possible to their human constituency [33]. If the human constituency is mobile, decentralized, anti hierarchical, and connected only by unanimity and consent, so should be the institutions serving that society. Institutions should serve the people not the other way around. These beliefs based on a rather realistic idea of institutions grounded in neo-institutional economics paradigms, made me excited about the Somaliland and then Puntland constitutional experiments of decentralization. I looked with favour the invention of *Isimada*, as an informal chamber representing traditional leadership in Puntland. I thought it was a good idea to keep its role less defined than the corresponding *Guurti* of Somaliland [34]. At Garowe, I was particularly pleased with the idea of endorsing mediation centers (unfortunately called ADR) despite my awareness of the possible abuses that such consent based institutions might force upon the

[33] D. North, Institutions, Institutional ch'ange and Economic Performance
[34] See F.Battera, Remarks on the 1998 Charter, cit. ;

weaker party[35]. I was never particularly concerned about the less than clear status of Sool and Sonang at the boarders between Puntland and Somaliland. My idea was then, as it is now, that territorial boundaries do not and should not matter that much in a decentralized non territorial political system[36]. The question now is whether and at what level courts of law can serve this purpose given the particular conditions of Somalia.

Law has to be rooted in culture in order to be legitimate. The effectiveness of Courts to grant peace and stability only depend from legitimacy. There is no question about this. It might be a professional legal culture, relatively independent from both the religious and the political process as it is the case in the West, or it might be a culture rooted in Islam as it is the case for sharaitic law[37]. The real tragedy of Somalia is that very soon there will be no diffused culture at all. Ten years of civil conflict and disruption have as a consequence an appalling percentage of youth that did not receive any schooling. The collapse of traditional patterns of transmission of knowledge and culture in non literate societies is practically disappeared in Somalia as elsewhere in Africa without being substituted by any amount of formal education. Legal culture, in these conditions, is only vested either in a senior and fast declining percentage of Somalis trained in the law many years ago, or in the case of Islamic courts, in Mullahs active in Madrassas or other institutions of not rarely radicalised Islamic education. A professional legal culture can simply not develop in these conditions. Consequently Courts of law patterned on the Western models are either impossible or destined to die with the aging of the population still qualified to staff them. On the other hand, Quadi courts, with the radicalisation of the confrontation due to the present brutal handling on the international

[35] See E. Grande, Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context, 43 J. of African Law, 63, 1999.

[36] On the importance of territoriality in the western idea of State see A.D. Smith, Nationalism and Modernism, Routledge, London, 1998 p. 71 ff. See also, A.M. Thiesse, La creazione delle identità nazionali in Europa, Bologna, Il Mulino 2001, with emphasis on different factors.

[37] See, U.Mattei, Three Patterns of Law. Taxonomy and Change in The World's Legal Systems, in 45 Am. J. Comp Law (1997) 5

contingency by the Bush administration and its puppet alleys, are very unlikely to produce a degree of moderation and adaptability to local conditions sufficient to reach an acceptable degree of legitimacy.

4. Pluralism.

One should however remember that there is no incompatibility between western and Islamic ideas of justice and peace. There are success stories to be told in which Islamic and Western jurisprudence have found a way to peacefully coexist in an integrated legal system.[38] From a general comparative legal perspective one can offer the following suggestions, for what they are worth in a moment in which violence and brutality seems to dominate human reason. Somalia, as (and perhaps more than) most countries in the periphery, is dominated by legal pluralism[39]. Legal pluralism does not necessarily undermine legality nor legitimacy but it makes it harder a job for any judge to adjudicate[40]. As everywhere in pluralistic settings, the choice of law might determine the outcome, so that the decision is exceedingly difficult. For judges called to adjudicate in the present conditions of Somalia, the obstacles might be just too high [41]. Who has to make the decision on what law governs? What should be the structure of decision-makers? Here is the real difficulty because in traditional Somali *Xeer*[42] , both the Western and the Islamic idea of adjudication as a zero sum game, in which one party is right

[38] See D. Horowitz, The Qu' ran and the Common Law. Islamic Law Reform and the Theory of Legal Change 42 Am J.Comp Law 233 (1994)
[39] See M. Guadagni, Legal Pluralism, in The New Palgrave. A Dictionary of Economics and The Law, P.Newman Ed, Mc Millan, London, 1998
[40] For an interesting discussion of legal pluralism on adjudication in Eastern Africa see Widner, Building The Rule of Law, cit. 75 ff
[41] For exceedingly interesting data on the present conditions of the judiciary in Sonmaliland, See F. Battera & A. Campo, The Evolution and Integration of Different Legal Systems in The Horn of Africa: The Case of Somaliland, in Global Jurist Topics, 2001 Vol 1 Issue 1 Art 4, www.bepress.com
[42] See M. Guadagni, Xeera Berhaha. Diritto fondiario Somalo, Milano, Giuffre---; R. Sacco, Grandi linee, cit.

and the other one is wrong, is simply absent. In decentralized societies without State[43], the possible ways are: a) prevention of the conflict by internalisation of customs in each member of the group, due to a large amount of shared principles and ideas. This preventive controlling process was certainly at play in traditional African societies but it has been dramatically disrupted by colonialism and by ideas of modernity and impersonal transactions as paths to development[44]. b) Negotiation and consent, patterns in which the alleged victim (and his group) and the alleged wrongdoer (and his group) work out some mutually agreeable deal to solve the conflict. c) War. These three models are sustained by ideas of legitimacy compatible with a decentralized society. They are all at odds with the western style adjudication[45].

In this scenario, judicial bodies applying rules in an abstract setting without taking into consideration the real life relationships of power between the parties in a dispute, focusing on the specific case and not on the history of he relationship between the parties, have very limited possibilities to succeed, outside of a broader educational process aimed at the internalisation of the values of peace. True and lasting peace can only be reached by consent. And consent itself can be reached either with the sward (i.e. with a monopolization of force) or with the purse (i.e. by buying it).

Majority decision making (such as that grounding western ideas of electoral democracy) and impartial decisions legitimised by some ex ante standard or rule (such as that grounding western ideas of the rule of law) are all connected with a thick and territorial idea of State effectively monopolizing force. In such a setting Courts can operate without the sward and without the purse just because other coordinated but separate agencies can use these tools of pacification *and* in their own self interest accept (many time reluctantly) an impartial decision

[43] See, on the legal structure of society without state, R. Sacco, Le Grandi Epoche del Diritto, L' Harmattan Italia, Torino, 1996

[44] See M.B. Traore, Systeme Juridique et Regulation Sociale chez le Mandeng du Mali, in Penant, 1986, 257

[45] The classic comparative discussion is Llewellyn-Hoebel, The Cheyenne Way, 1941

maker [46]. All these pre-requisites are not in place in Somalia. This is why the idea to introduce supreme courts patterned on the western (particularly American) model as arbitrators of political conflicts is simply absurd [47].

5. Proposals for discussion

Two alternatives are in my mind possible, taking into consideration the fact that history can not be unmade and that contacts between Somalia and the international world, dramatic as they have been and are today, can not be avoided. We can sketch, for the sake of discussion and with no claim whatsoever of elaborating a detailed proposal, a top down and a bottom up alternative. It is not to be excluded that both can be fruitfully pursued in the long run.

In the first alternative the Supreme court could be *granted the purse*, by making it the recipient of international aid, provided that it can be engineered to show certain standards of impartiality and provided that it can be staffed in a way that makes its fairness perceived as real. It could be put in charge of avoiding and deciding conflicts between different, non territorial, political constituencies of the Somali people (wherever they are located) creating a light, quasi-private law system to substitute the thick notion of territorial State that should be acknowledged dead in Somalia. Such court would have the crucial role to arbitrate conflict between different political constituencies by the use of financial incentives, with the fundamental role of facilitating the reaching of consent to their decision making. This solution, deeply transforming the western idea of judicial decision making to capture a different reality, of course would turn courts of law into strong political actors legitimised by an internationally guaranteed peacekeeping function. Given the needs of international representation of Somalia, and given the necessity to save diversity and local autonomy, such

[46] See Hart & Sacks, The Legal Process,---
[47] See, in a different context, Mattei, The New Ethiopian Constitution, cit

super-court should also supervise at Somali international representation by setting turnery systems and setting limits to the reach of political activity. No other agency of Somalia as such should be in place, only local not necessarily territorial institutional actors. After all in Africa ethnic conflict became particularly bloody whenever the western notion of territorial state, established in the interest of colonial powers, offered a mighty machine to one ethnic group to impose it rules to another. This reality should be recognized and handled as such by getting rid of a foreign machine of oppression, as it is the State in many non western countries.

The bottom up alternative is grounded in the notion and in the assumption that in any society there is a demand for justice, peace and order that has to be satisfied. Such satisfaction grants legitimacy to judicial authority[48]. Rather than military intervention, the international community should therefore encourage any one of such agencies of justice that are currently in place creating the material condition for justice to reach the people[49]. Of course, once more the idea of consensual justice should be kept present, because realistically there are no means to enforce judgments that are not internalised by the parties or their groups. History has shown many examples of justice reaching people at the beginning of a long and difficult journey to judicial legitimacy. Judges travelling on circuit were present in eleventh century England [50], and that humble and proactive posture has been used by Justice Nyalali, the great Tanzanian Chief Justice, in his quite successful effort to build legitimacy for the rule of law in independent Tanzania[51]. Again, this model requires adaptation to local contingencies which only the Somali people are in the position to assess. I believe that, once more, consent (and a

[48] Very instructive is from this perspective the otherwise in my opinion overoptimistic account of J. Widner, Building the Rule of Law, cit.

[49] Surveys such as the excellent Battera & Campo's one on the "formal" adjudication setting should be extended to the informal one, including a thorough understanding, outside of mythology of the working of Quadi Courts in today's Somalia.

[50] See U.Mattei, Common Law. Il Diritto Anglo-Americano, Utet, Torino 1992, p. Circuit riding was an important factor for building judicial legitimacy in the days of early independent USA.

[51] See, on the history of this towering judicial figure, J. Widner, Building, cit.

purse) should be the pre-requisite of any such attempt. To build consent the process of decision making should be deeply modified from the right or wrong attitude of western courts of law. An example could be a particular use of assessors, with the court sitting with both the parties and one or more relative of each of them to work out a mutually agreeable solution with resort to vote as limited as possible.

Is all of any of this feasible? It would be arrogant for me to claim it is. Others, in particular our Somali friends, are in better conditions to tell if there is any hope that intellectual creativity can still play a role in Somalia. As a scholar it is my desire to still believe that human reason should have a role in exploring alternatives to war and destruction in approaching international problems. As an Italian and U.S. taxpayer it is my duty to assert, with the highest emphasis, that money should be used for intelligent institution building rather than for building destruction and death. We still have debts towards Somalia for shameful past deeds. Are we at the eve of contracting even more despicable ones, like those recently contracted in front of so many Afghani civilians crippled by Italian made mines and killed by U.S. made bombs? We will know this in the next few days.