CHALLENGES OF A TRANSITIONAL SOCIETY: LEGAL DEVELOPMENT IN ERITREA

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REVIEWED BY

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The end of the cold war and its political and economic impacts led to the resurgence of law reform in many transitional societies. What were the assumptions underlying the new surge of law reform in the 1990s? This question carries empirical as well as theoretical significance. Empirically, it is a challenging exercise for legal practitioners and scholars to analyze the complexities of law reform in different transitional societies with diverse political, social, cultural, and economic backgrounds. Theoretically, it challenges the legal scholar to test the validity of existing theories of legal development in transitional societies. With the availability of new empirical and analytical study. . .it becomes less daunting to refine existing theories or carve out new ones that will help explain the role and growth of law in transitional societies. . . [y]et there is no cogent theory that explains in general the complexities and dynamics of shaping and reshaping of laws in transitional societies. Devising such a broad theory is difficult, unless one analyzes each and every case of transitional society thoroughly and undertakes a comparative study to understand the similarities and differences between and among the cases. This study is not an attempt to carve out a broad theory of the development of law in transitional societies. It is rather an attempt to explain the role and growth of law during the different transitions that Eritrean society has undergone in the different phases of its history from a comparative perspective. It focuses on the nature and extent of internal and external factors involved in this process of legal development. However, as a thorough study of law development in one transitional society, it can serve as a basis for comparative studies by others.[1]

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[1] YOHANNES GEBREMEDHIN, CHALLENGES OF A TRANSITIONAL SOCIETY: LEGAL DEVELOPMENT IN ERITREA 2 (FORTHCOMING SPRING 2004 RED SEA PRESS).

In *Challenges of a Transitional Society: Legal Development in Eritrea*, Dr. Gebremedhin has produced that rarest of books: it is an academic work that not only offers many original ideas and introduces a number of primary sources, but also develops a thesis that could not have been adequately explored in an article or monograph. Although the copious original country-specific research and profound local insight incorporated in this work will no doubt make this book essential reading for the comparativist interested in East Africa, this is not a book about Eritrea. Rather, this book uses Eritrea as a case study to illuminate a thoughtful critique of the existing theories of legal development.

In addition to the author's highly relevant critique of "Law & Development" theories in practice, this book contains much that will prove valuable to scholars laboring in other legal domains. Although this review focuses on the author's primary thesis (and due to space considerations may nevertheless not do credit to the author's multilayered critique), several subsidiary themes deserve passing mention. To facilitate his analytical project, the author has prepared several comparative and historical studies. He has combined his original research with a thorough survey of customary legal practices among the various cultural groups within Eritrea. He has done the same with respect to the relationship between Italian and British colonial law and the preexisting law and legal institutions.[2] He offers a detailed, context-

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[2] Dr. Gebremedhin, following Alan Watson, believes that any general theory of legal development must be based on actual historical data. He provides this historical data in abundance, and in so doing offers many gems which merit reflection outside the four corners of his study. Consider the following colonial proclamation from 1889 in light of current geopolitics:

> Cultivators, traders. Do not fear. The Government will be the Government of Italy. Come: I will give you what belonged to your father. You who say that you had *gulti, resti and shumet*, and were dispossessed, come and let me know of this. . . . He who has committed murder or robbery in the past is pardoned. He will not be charged. . . . . .Woe to you who in the future make raids, rob the merchants or fail to respect the law. You will be severely punished. I am a Christian. Priests and lay persons continue in the religion of your fathers. I have come to protect and enrich the country, not to destroy it. I have fixed Thursday as the market day and the day for audiences in Asmara. . . Do not fear; sell and buy. . . He who is wronged come to me. This is said by the General who represents the Government of Italy in Hamasien.(signed) Baldissera

Id. at 44 (Citing Richard Pankhurst, *Italian Settlement Policy in Eritrea and its repercussions, 1889-1896*, *in* Boston University papers in African History, Vol. I,

specific analysis of the complex Eritrean property laws and their social import. He writes with a unique insider's perspective on the process of legal reform during the period of armed struggle and in the post-independence period and creates a historical exegesis which has no parallel in the literature. Finally, he lays the groundwork for additional, highly original theoretical contributions in the area of customary law. This review will briefly outline the structure of the book, discuss the author's theory of legal development, and then contrast the authors methods and conclusions with those of another popular strain of scholarship related to the transformation of legal systems, the so-called "legal origins" literature that attempts to relate various features of legal systems to economic outcomes.

Dr. Gebremedhin's analytical account of the role and development of law in societies undergoing transition from one political order to another focuses on the legal transitions that Eritrea experienced. He traces the path of legal development from the inception of European colonialism through the protracted struggle for independence and the reforms initiated in the post-sovereignty period. The book draws upon the developmental outcomes achieved by past legal development projects to assess the validity of the various law and development theories and their potential applicability to developing societies. Throughout, the author advances a pragmatic perspective, arguing that legal reform ought to be practical and informed by the totality of domestic circumstances. Specifically, he argues that although many societies in transition have attempted to use law as a vehicle for social and economic reform, they have often failed to achieve the desired ends because these legal reforms were undertaken without due regard to the specific social, historical, institutional, and cultural contexts in which the reformed legal institutions were to operate. Also throughout, the author deftly transitions from the theoretical to the empirical and from the broad sweep of Eritrean legal history to a particular incident which eloquently illustrates his point.

The author prefaces his analysis with an introduction to the political history of Eritrea and a detailed exposition of Eritrea's diverse legal cultures. He then closely examines the process of

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122-123(1964) (citing A. Mori, Manuale di Legislazione della Colonia Eritrea, 17n (1913))).

legal development in what is now Eritrea from the customary laws of the pre-colonial period through the ongoing reform efforts of the post-independence government. In addition to preparing the lay reader to follow his references to Eritrea in the latter sections of the book, the author also uses this history lesson to begin his exploration of "Law & Development" theories and examine the impact of these theories on developing societies. Along the way, the reader comes to appreciate the advantage Eritrea offers as the touchstone for these meditations: Eritrea encompasses a number of different cultures which retain elements of their customary legal systems; due to the relatively large number of discrete "law reform events" that Eritrea has experienced in the last 150 years, these customary legal systems are overlaid with the residue of successive attempts at institutional and doctrinal transplantation; some persistent, others not.

Dr. Gebremedhin recognizes that law can be used as a tool for social and economic change. However, a central theme of his work is that "not all domains of the law are responsive to drastic legal change." He warns that legal reformers must be cautious when dealing with areas of the law that reflect deeply entrenched values and traditions of the target society. Dr. Gebremedhin uses rural land law in Eritrea to illustrate that top-down drastic legal change in the face of deeply rooted norms cannot bring about the desired change in behavior.

Soon after Eritrea achieved its independence in 1993, the government of Eritrea proclaimed a new development-oriented land law that sought to abolish traditional (predominantly village or family ownership) tenure systems. The main purpose of the Land Proclamation of 1994 was to replace traditional tenure systems with a "new dynamic system", which aimed at increasing productivity and accelerating economic development. State-ownership is at the heart of the new so-called "dynamic" system. Pursuant to the Land Proclamation of 1994, the government is empowered to grant two kinds of private rights over rural land: 1) usufruct for rural housing, and 2) agricultural usufruct.

According to the Eritrean Land Proclamation of 1994, any right to a particular tract of land is effective only upon the recognition and approval of the government. This means that any person who held a land right under one of the traditional tenure

systems no longer holds a valid right unless he/she secures government recognition and approval. Naturally, the government-approved right would not constitute land ownership. It would appear that this law is primarily meant to empower the government to reallocate land as it deems suitable for its development agenda and without any legal obligation to respect rights held under the traditional tenure systems.

The implementation of the new land law has been controversial and unsuccessful. Dr. Gebremedhin assesses both the theoretical merits and practical implications of the Proclamation. In theory, the provision of agricultural usufruct for a lifetime under the state ownership model adopted by the Land Proclamation should offer improved tenure security as compared to traditional village or family ownership models. Moreover, the state ownership model, if supported by appropriate management and reforestation measures, could reverse land degradation. In practice, however, haphazard implementation of the Land Proclamation has resulted in dispossession and disenfranchisement. Implementation of the new land law has not only strained the administrative capabilities of the government, but has also resulted in legal and practical confusion due to the coexistence of two entirely incompatible layers of rules in one and the same legal domain.

Dr. Gebremedhin states that village communities view government (re)allocation of land without their consent as a violation of their customary norms and laws. Newly created rights have in many instances resulted in friction between villagers and the new right holders. This is one of the major practical problems facing the implementation of the Proclamation. A second major implementation problem stems from "the lack of framing problems and their proposed solutions in context." The reform strategy mirrored by the Land Proclamation of 1994 is centered on land problems in the capital city and surrounding peri-urban areas. The approach of legal centralism adopted by the Land Proclamation ignores the existence of pluralistic social norms, climatic conditions, traditions, and heterogeneous land pressures applying in various parts of the country. Another implementation problem discussed by Dr. Gebremedhin is the aforementioned lack of institutional capacity to administer the Proclamation (*i.e.* new governmental responsibilities such as of survey, allocation, and registry).

Although the consumer-driven rural economy, perpetuated by the traditional tenure systems, is at the center of the country's development problems, Dr. Gebremedhin notes that "implementing hasty and over-ambitious replacement policy before putting in place the necessary infrastructure and institutional prerequisites would not provide an appropriate answer." Dr. Gebremedhin believes that the role of tradition in the rural economic sphere must be steadily, incrementally reduced rather than suddenly eliminated; drastic replacement of the traditional tenure system would destroy the economic and social basis of the rural communities without providing adequate alternative modes of social and economic organization. Thus, Dr. Gebremedhin argues that the most feasible approach to land reform in Eritrea is "to build-on the customary tenure systems in an incremental way." This argument is based on the premise that in traditional rural economies the limits to tenure reform are determined by the stakeholders' level of acceptance of, and the government's institutional capacity to administer changes envisaged by, new legislative measures.

The author's conclusions about the development of appropriate legal institutions and the failings of current "Law & Development" theories, in his own words but divorced from the careful reasoning and extensive reference to empirical data from which they were distilled, are as follows:

> I argue that incomprehensive adoption or adaptation of the past laws hampered orderly transition and legal continuity in several other areas[3]. . .Adopting or adapting the law at independence would have resulted in less social and economic cost[4]. . .[T]ime, financial, and technical constraints [are] clearly valid justifications for seeking incremental legal change. . .The multiple social and economic problems that the [society in transition must] tackle [are] immense and complex[5]. . . [G]radual fine-tuning of laws would be [a] more practical approach in terms of identifying problems and proposing solutions for specific problem

[3] *Id.* at 98.

[4] *Id.* at 99.

[5] *Id.* at 101.

> areas or lacunae in a way befitting to the social and legal context of the country.[6]
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> . . .Drastic replacement of the existing substantive codes to respond to global economic developments, regardless of domestic social repercussions, will likely exacerbate the gulf between the urban rich and both the rural population and the urban poor[7]. . .It will be imperative that the lawmakers consider basic ethical and moral questions about the role of law in society and the potential social and economic repercussions of drastic and wholesale legal change.[8]. . .Prior to discussing the development aspect of the reform objective, it is imperative to address one basic question – what is development?[9] (Citations omitted.)
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> Comparative analysis of law reform programs in the developing world leads to the conclusion that. . .law reform should be practical and relevant. What is practical and relevant should be primarily determined by domestic circumstances. The first and 'new' law and development movements reveal the limits of law as a vehicle for social and economic change. Although law can be employed as a vehicle for social and economic change, not all domains of the law are responsive to drastic legislative change. . .[T]op-down drastic legal change, contrary to entrenched legal and social norms, can hardly bring about change in behavior. . . The replacement model. . .has not been successful. . .[A] new legal model that contradicts entrenched social and legal norms is less likely to function as an effective tool to achieve the legislative purpose.[10] (Citations omitted.)

Although these conclusions would appear to be unexceptionable, the particular merit of Dr. Gebremedhin's work is readily apparent when his method is compared with that of the fashionable so-called "legal origins" literature. In this literature:

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[6] *Id*. at 109.

[7] *Id*. at 110.

[8] *Id.* at 111.

[9] *Id.* at 203.

[10] YOHANNES GEBREMEDHIN, CHALLENGES OF A TRANSITIONAL SOCIETY: LEGAL DEVELOPMENT IN ERITREA 147

> The method, simply stated, is to identify some function or aspect that is understood to apply to all legal systems, such as the degree of protection afforded to the rights of minority shareholders, the relative importance of statutory versus case law, or the level of compliance with the "rule of law." A large number of legal systems are then assigned numerical scores to quantify the chosen variable(s), and the studies then attempt to use these scores to explain, in part, broader social phenomena, such as economic growth, or "good governance." Alternatively, they have been linked in a deterministic sense to the historical origins of the legal systems studied.[11] (Citations omitted.)

Although it should be noted that the "legal origins" scholars are not necessarily writing for those seeking to use the law as an instrument of development, the primary consumers of modern legal development rhetoric (institutions such as the World Bank and International Monetary Fund) are very enthusiastic about this strain of scholarship. This might be because of pragmatic considerations: it is much more difficult and time-consuming to achieve the kind of deep, sensitive empiricism argued for by Dr. Gebremedhin than it is to manipulate statistics and legal history. It might also have something to do with the uncanny sympathy between the conclusions of the legal origins literature and the dictates of the Washington Consensus (*i.e.* the promotion of free markets, privatization, deregulation, and globalization). No matter the reason, this literature is used to justify legal development initiatives that promote convergence on a particular instantiation of legal order that has been 'mathematically proven' to promote economic development.

Other scholars, notably John Ohnesorge, have noted a variety of weaknesses inherent to this theory-driven analytic method. Nevertheless, it is interesting to juxtapose Dr. Gebremedhin's work with that of a legal origins scholar such as Paul Mahoney. Consider the dramatic methodological and philosophical differences between Dr. Gebremedhin's method and that of the primary strain of new law and development scholarship implied by the following representative quotation:

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[11] John K.M. Ohnesorge, China's Economic Transition and the New Legal Origins Literature, citation info not yet available.

> Why should legal origin affect economic growth? One possibility is that *the average quality of legal rules varies by origin*. . .Although there are substantive differences, [both the common law and the civil law] perform[ ] well on the most important measures, providing for enforcement of property and contract rights and requiring compensation for certain wrongful (tortious) acts. The creation of a system of enforceable property rights is one of the most important institutional prerequisites to economic growth.[12] (Citations omitted, emphasis added.)
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> In the tradition of cross-country growth studies, I examine differences in average annual growth in real per capita GDP. . . Growth rates are averaged over the period 1960-92. . .For all but a handful of countries, assignment to a legal family is straightforward. There are a few countries in east Asia and Africa that have had both English and French influence. . .I eliminate only Cameroon from the sample on the basis that French and English influences are too mixed to make a choice. I also exclude some Middle Eastern countries whose legal systems are almost entirely based on Islamic law (such as Saudi Arabia and Oman) and a few countries whose legal systems have been largely free of European influence (*such as Ethiopia* and Iceland). Finally, all socialist countries are eliminated in order to focus strictly on differences between the common and civil law.[13] (Citations omitted, emphasis added.)

These short paragraphs display sharp political and methodological differences, to be sure. Dr. Gebremedhin would probably take issue with many of the root assumptions involved in Mahoney's work. For example, in addition to a rather a more flexible, context-specific approach to the question of what might make a given rule better or worse, a skilled comparativist like the

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[12] Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. Legal Stud. 503, 506

[13] *Id.* at 514-516. After performing an ordinary least squares regression (average annual rate of real per capita GDP growth as the dependent variable and a dummy variable representing common law family membership as the dependent variable) the author concludes that "[t]he coefficient on the common-law dummy variable is both economically and statistically significant. Controlling for the other variables, the common-law countries grew, on average, .71 percent per year faster than the civil-law countries (p = .007)." *Id.* at 516.

author might scoff at the casual simplification of legal cultures that is implied by the binary categorization "Common" or "Civil." What, we wonder, would the author make of the assertion that Ethiopia's legal system has been largely free of European influence? Might he offer a caveat drawn from the Law & Development movement's rich history of catastrophe to suggest that the particular system of property rights most appropriate for furthering economic growth in a particular social context might well be some form of collective ownership managed at the village level? If he did, could the reader easily ignore him? To whose methods would the reader rather entrust the task of legal development in his or her community?

When we compare the legal origins literature's regressions and theories with Dr. Gebremedhin's praxis, the legal origins literature seems deeply unsatisfactory as a theoretical underpinning for the development of legal institutions in transitional societies. Not only is it backwards insofar as its analytic method seeks to minimize the impact of the differences between different highly context-specific legal cultures, but it is also backwards in that it seeks to promulgate a Platonic legal ideal upon which developing societies ought to converge. As we can see from Dr. Gebremedhin's work, not only are there various institutional problems which impede drastic law reform in transitional societies, but even if resources were available to implement convergence on a universal idealized body of doctrine, that idealized code would be ill-suited for the particular social and cultural context in which it was to operate. The Gebremedhin model of pragmatic, sensitive empiricism offers a more sensible approach to legal development in transitional societies.[14]

For scholars interested in the role of evolving legal institutions in social and economic development, Dr. Gebremedhin's pragmatic, empirical, culturally-informed critique of the instrumental uses (and misuses) of law offers an appealing alternative to the "one size fits all" approach suggested by the tedious,

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[14] The legal origins literature may always be with us. The genius of this relentlessly expanding body of work is not only that it is highly malleable, but also that to thoroughly refute any given statistical construct put forward by a proponent would require a phenomenal amount of drudgery. To date, no one who isn't a true believer has been willing to put in the work. *But see* Mark D. West, *Legal Determinants of World Cup Success*, http://www.law.umich.edu/centersandprograms/olin/abstracts/discussionpapers/2002/west02-009.PDF.

pseudo-empirical "Legal Origins" literature promoted by the sponsors of legal development projects in transitional societies. Those interested in comparative scholarship pertaining to the legal institutions of East Africa will be fascinated by the author's extensive original research, thorough assay of the existing literature, and careful analysis. Readers of any stripe are likely to come away from the book impressed by the author's keen intelligence, humanity, and dry wit.