Law and Development in Ethiopia: A Historical Overview

Firehiwot Wujira*

Abstract

Law and Development has been a field of academic study for almost half a century. Internationally, the law and development movement got momentum in 1960's and 70's. Despite contention on the nature of laws, the successive law and development movements have emphasized the significant role law plays in economic development. It is underlined that efficient and effective legal and judicial system is among the pillars which support economic development in developing countries.

This article attempts to explore the historical evolution of the relationship of law and development in Ethiopia. It gives highlight on how the international law and development paradigms shaped the law and development relationship in Ethiopia. It pinpoints how the different economic policies which prevailed in the country were able to shape the role of law in development.

Introduction

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This article attempts to explore the historical evolution of the relationship of law and development in Ethiopia. It gives highlight on how the international law and development paradigms shaped the law and development relationship in Ethiopia. It pinpoints how the different economic policies which prevailed in the country were able to shape the role of law in development. It also canvasses the nature of the Ethiopian legal system before the era of codification and how it relates with economic development. It argues that the existence of diverse,

unsystematic traditional, customary and religious rules and edicts created legal uncertainty and hence contributed little to economic development. It also examines the era of codification and how for the first time explicit link started to be made between law and economic development in Ethiopia. The failure of the socialist era laws to kick start economic development is also discussed before finally arguing the legal reform projects undergoing in 21st century Ethiopia seem to show the existence of conscious recognition of the link between formal law and economic development.

1. Law and Development Paradigms: A General Overview

Academic and scholarly interest in the relationship of Law and Development has a very long history dating as far back as the 18th century. Montesquieu, Maine and Weber were among the leading names interested in various aspects of the relationship between law and development.[1] Nonetheless, it was only since after World War II – around the 1960s – that systematized study of the subject matter and activities which targeted reform of legal institutions became part of international development practice. Law and Development as an academic field of study began in the US in the 1940s, reached its climax in the middle to late 1960 and was "declared to be dead and reached an impasse in late 1970s".[2] The activity and effort of the 20th century American legal scholars to study the role

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* Lecturer, Addis Ababa Science and Technology University.

[1] Davis, K & Treblicock, M., 'The Relationship between Law and Development: Optimists versus Skeptics', *American Journal of Comparative Law*, Vol.56 (4), 2008, p.899 [Hereinafter Davis & Treblicock]

[2] Cao, L., 'Book Review: Law and Economic Development: A New Beginning?', *Texas International Law Journal*, Vol.32, 1997, p.546.

of law in development is simply known as 'the law and development movement'.[3]

Law and Development as a discipline simply strives to study and figure out the role of law and its impact on a developing country development prospects. Trubek, a pioneer champion of the Law and Development Research Agenda with immense experience on the subject matter, argues "Law and Development" refers to the interaction and interface that exists between legal theory, economic development theory and international development practice and the potential of this interaction to promoting economic and social progress.[4]

Of course, a scholar's articulation of law and its role in development has been different depending on her conception of development. Some incline on the relationship of law and economic development (mainly due to their conception of development as economic growth) thereby suggesting legal reforms which are capable of bringing economic growth. Others on the contrary are interested on the role law plays in bringing social progresses including respect for human rights, gender equality and more generally distributive justice. Their idea of legal reform aims to achieve development which incorporates human development other than economic growth.[5]

The different role given to law by various law and development scholars is mainly due to the lack of universal consensus on the meaning of development. The idea of development has evolved through time and the contemporary

[3] Davis & Treblicock, p.899.

[4] Sherman, F., 'Law and Development Today: The New Developmentalism', 10 *German Law Journal* (2009), p.1260 [Hereinafter Sherman].

[5] Davis & Treblicock, p.898-9.

conception of development is different from the past. We are thus forced to canvass the wide contemporary perspectives on development and ask "what is development?"

Dubbed the central organizing concept of our time,[6] development and issues related to it concern national government agencies and different international organizations including the United Nations (UN) and World Bank (WB).[7] Citing Kathleen Staudt, Michael Cowen and Robert Shenton take development to mean:

> "a process of enlarging peoples' choices'; of enhancing participatory democratic processes and the 'ability of people to have a say in the decisions that shape their lives'; of providing 'human beings with the opportunity to develop their fullest potential' and of enabling the poor, women, and 'free independent peasants' to organize for themselves and work together. Simultaneously, development is defined as the means to 'carry out a nation's development goals' and to promote economic growth, equity and national self-reliance."[8]

Amartya Sen, a leading development thinker, defines development as a process of expanding the real freedoms that people enjoy.[9] Accordingly, development occurs when many "unfreedoms" like poverty, lack of public infrastructure, lack of educational and health opportunities, gender discrimination are removed.[10] Sen introduced a new concept that development

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[6] Cowen M. & Shenton R., 'The Invention of Development' *in* Crush, J. et al, *Power of Development*. Routledge, London, 1995, p.27 [Hereinafter Cowen & Shenton].

[7] *Ibid*.

[8] *Id*, 28.

[9] Chimni, B, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels', *The Law and Development Review*, Vol.1 (1), 2008, p.3 [Hereinafter Chimni].

[10] *Ibid*.

is more than economic growth, technology transfer, or raising standards of living.[11]This is a paradigm shift from the previous thinking of development and is synonymous with the idea of "alternative development".

Alternative development is a new notion of development which emphasized human development[12] in addition to economic growth.[13] It expands the concept of development to incorporate, among other things, the fulfillment of food self sufficiency, basic needs to citizens measured by "millennium development goals" (MDG).[14] Before the ascendance of these recent views of development, modernization and dependency theories dominated theoretical perspectives on the relationship between law and development.[15]

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[11] *Id.*

[12] Since the early 1990s, human development has been famously defined as "a process of enlarging people's choices." The core capacities for human development are now said to include enjoying a long and healthy life, being educated, access to resources that enable people to live in dignity, being able to participate in decisions that affect their community; see <http://hdr.undp.org/en/humandev/lets-talk-hd/2010-05/>.

[13] Pieterse, J., 'After post-development,' *Third World Quarterly*, Vol. 21, No. 2, 2000, p.181 [Hereinafter Pieterse].

[14] *Ibid*; as one of the anonymous reviewers noted, Sen's conception of development as freedom "is not far away from the idea of 'alternative development'. Sen's 'development as freedom' points that people should have the freedoms (capabilities) to lead the kind of lives they want to lead, to do what they want to do and be the person they want to be. Hence, his theory evaluates policies according to their impact on people's capabilities (freedoms) to live the kind of life they desire. The fulfillment of basic freedoms or capabilities, such as being healthy, well nourished, political participation, high quality education etc serves as inputs for people to live the kind of life they want to live. The author believes "development as freedom" covers the full terrain of human well being and hence relates to the idea of "alternative development."

[15] Tamanaha, B., 'The Lessons of Law and Development Studies,' *American Journal of International Law,* Vol. 89, No.2, p.470 [Hereinafter Tamanaha].

Modernization Theory

US President Harry Truman, in his inaugural speech before congress in 1949, attempted to address the condition of developing countries and for the first time he defined those poorer countries as "underdeveloped areas".[16] This judgment was made mainly based on the level of industrialization and economic development of the third world countries compared with their northern developed counterparts. The level of production was taken as the means of measuring nation's civilization.[17] Following this speech, modernization theories and praxis came out.

The Cold War era created conducive environment for the west and the third world to create friendly environment. Driven by close relationship and the interest of the western countries to expand their sales market, the west set itself the ambitious goal of promoting development in and modernizing the third world.[18] Different domestic and international donors handed down massive financial support to facilitate this project. The ideological thrust of this movement can be found in "Modernization Theory" – originally a model for political development which had its origins in the writings of Max Weber.[19]

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[16] Esayas, B., 'Development as a Background', SSRN Working Paper Series (Posted June 2005), Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=740527> [Last accessed 10th November 2011].

[17] *Ibid.*

[18] Merryman, J. 'Comparative Law and Social Change: on the Origins, Style, Decline & Revival of the Law and Development Movement,' *The American Journal of Comparative Law*, Vol.25, No.3, 1977, p.457 [Hereinafter Merryman].

[19] Schmidbauer, R., 'Law and Development: Dawn of a New Era?' SSRN Working Paper Series (Posted January 2006), Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899217>. [Last accessed 10th November, 2011].

Modernization theorists contended that a society's underdevelopment was both caused by and reflected in its traditional economic, political, social and cultural characteristics or structures.[20]They argued evolution from traditionalism to modernity is a must in order for developing countries to achieve economic growth and reach the level of development attained by developed countries. The modernization of the third world would be accomplished by the diffusion of capital, institutions and values from the first world.[21] Developing countries "were advised to adopt, mimic and import the development pattern of the 'west'".[22] Hence, modernization theory presented the western model of development (industrialization, liberal democracy etc) as indispensable in solving development problems of third world countries.

Relying on modernization theory, the first law and development movement proposed that diffusion of western law to the third world would serve the modernization process.[23] It is inevitable, it was argued, that through evolutionary progress the third world ultimately establish legal ideas and institutions similar to those in the west. Modern law, a tool to mold and alter human behavior, was taken as an essential prerequisite for an industrial economy.[24] Modernization of laws through transplantation of western legal cultures in third world countries was thus thought to be the first step in the development process. Accordingly, in the first law and development movement projects intended to transplant western laws and legal institutions to third world countries were designed and implemented. The early law and development

[20] Davis & Treblicock, *supra* note 1, p.900.

[21] *Ibid.*

[22] Esayas, *supra* note 16, p.2.

[23] Sherman, *supra* note 4, p.6.

[24] Merryman, *supra* note18, p.457.

movement was therefore marked by the concept of legal transplants, mainly of economic law; African, Asian and Latin American countries being subjects of this modernization projects.[25]

Now, the question is "what was the degree of success of these modernization projects?" Were they able to bring the desired economic growth in the third world countries?

The first law and development movement was doomed to failure due to its inability to take into account the real conditions of developing countries.[26] It took little account of forms of legal ordering widespread in several developing countries (e.g. customary laws) and assumed that American legal culture can easily be transplanted to developing countries. Besides, the attempt to educate the society and eliminate traditional social values originating from custom and religion failed. And, American legal advisers working on legal modernization projects abroad were criticized for being ethnocentric, naive and imperialistic.[27]

The first movement was concluded with the perception that law is not of primary importance for development. Also, the limitations of the modernization theory created a suitable condition for the emergence of another development perspective – the dependency perspective.[28]

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[25] Sherman, p.1262.

[26] Tamanaha, *supra* note 15, p.474.

[27] The advisers however argued that developing countries lacked the proper political or civic culture necessary for successful maintenance of western institutions; see Cao, *supra* note 3, p.547.

[28] Esayas, *supra* note 16, p.3.

Dependency Theory

Inspired by Marxism, dependency theory dominated development thinking in 1970s.[29] Contrary to the modernization theory which exclusively focused on factors internal to developing countries as the causes of underdevelopment, dependency theory explains the poverty of developing nations in terms of the history and structure of the global capitalist system.[30]

Dependency theorists held colonialism and the colonial structure responsible for the underdevelopment of the third world. This theory views development differently and rejects the idea that countries are expected to experience similar forms of development.[31] The theory also advocates the replacement of regimes dominated by foreign actors or relatively small local elite with more populist governments that would adopt socialist economic policies. The introduction of socialism inevitably leads, it is argued, to a series of institutional reforms designed to induce significant redistributions of wealth and power.[32]

Dependency theorists, who view law as an instrument for the enforcement of socialist reform agendas like redistributing real property and reforming oppressive land tenure regimes, promoting worker ownership and governance of private enterprises and constitutionally enshrining economic and social rights,[33] are nonetheless skeptical of transplantation of legal institutions transplanted from developed countries to developing ones.

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[29] Snyder, G., 'Law and Development in the Light of Dependency Theory', *Law and Society Review*, Vol.14, No.3, 1980, p.737.

[30] Tamanaha, *supra* note 15, p.478.

[31] *Ibid.*

[32] Davis, K. & Trebilcock, M., 'Legal Reforms and Development', *Third World Quarterly*, Vol.22, No.1, 2001, p. 23. [Hereinafter Davis & Trebilcock *supra* note 32].

[33] *Ibid*, p.22.

The Soviet split and the crisis in the socialist ideology – for it failed to bring the desired economic changes in most developing countries – left dependency theorists without a source of inspiration. Also, the success of the newly industrialized Asian countries through export led industrialization reduced the prestige enjoyed by dependency theory.[34]

After the death of the first law and development movement and the drying up of financial assistance for law specific development research, development activities during the 1980s and early 1990s concentrated on macroeconomic stabilization, privatization and prices, with the law out of the main focus.[35] Amidst this, another development theory inspired by the neo-liberal thinking emerged since mid 1990s, when interest in the relationship between law and development revived. Major international financial institutions started financing law and development researches underlying that law and legal institutions play an important role in facilitating the market system by fostering investment and exchange.[36]

The hegemonic neo-liberal perspective gave law a different role in development. This new theory of law and development posits economic growth and development are subject to the composition and functioning of the institutional environment. Accordingly, certain legal institutions are seen as being particularly important for economic growth and development.[37] Proponents of the new movement contend that property rights should be

[34] Tamanaha, *supra* note 15, p.478.

[35] Schmidbauer, *supra* note 19, p.6.

[36] *Ibid.*

[37] Ohnesorge, J., 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience', *University of Pennsylvania Journal of International Economic Law*, Vol.28, No.2, 2007, p.247.

private rather than common. They also advocate for proper contract law regime and good commercial and corporate laws that enhance capital investment by protecting investor rights. Bankruptcy law (that enables fast exits of inefficient firms) and credible tax regime are also sought.[38] In general, in the new movement law is given the task of stimulating the market system and the participation of the private investors.

The debate on the role of law in development generally revolves around issues like which form of legal system, what type of law, developed where and by whom, which enforcement mechanisms, might improve economic growth and for whom.[39] Although there is no concrete empirical evidence verifying laws positive role in development, long-established and contemporary movements stress that there is enough reason to believe that law definitely has a place in development.[40] Legal systems have both an intrinsic value and an instrumental role in either promoting or retarding development.[41]

2. The Relation between Law and Development in Ethiopia: Past

The emergence of modern legal system in Ethiopia is a relatively recent phenomenon which occurred in the first half of the 20th century. Melaku[42] posits that pre-codification Ethiopia's lack of formal legal system coupled with the existence of scattered and various traditional, customary and religious laws

[38] *Ibid.*

[39] Barr, M. & Avi-Yonah, R., 'Globalization, Law and Development: Introduction and Overview', *Michigan Journal of International Law*, Vol.26, No.1, p.1 [Hereinafter Barr & Avi-Yonah].

[40] Schmidbauer, *supra* note 19, p.6.

[41] Hereinafter Barr & Avi-Yonah, *supra* note 39, p.1.

[42] Melaku, G., *The law as an Instrument of Social Change with Particular Reference to the Condition of Marriage under the Civil Code of Ethiopia: Failure and Successes of the Code* (Addis Ababa University, Faculty of Law, 1993, Unpublished), p.20 [Hereinafter Melaku].

has contributed little to the country's economic development; the inconsistency, uncertainty, lack of structure and enforceability are some of the reasons why religious and customary laws of Ethiopia contributed little to the nation's development. Given Ethiopia is home to various ethnic groups with diverse customs and traditions – there is even a possibility that similar ethnic groups located in different location practice different customs and customary practices might also vary in time and treat similar subject matter differently – one may reckon with Melaku's assertion that customary laws of Ethiopia contributed little to the country's economic development. Of course, the diversity in customary laws and practices might entail uncertainty, arbitrariness and lack of uniformity in customary practices.[43]

René David, the drafter of the 1960 Ethiopian Civil Code, supports the view that the diverse customary laws of Ethiopia are inimical to development.[44] He particularly bemoans the instability and the lack of jurisprudence in pre-codification Ethiopia.[45] The low levels of economic development and the near marginal conditions by which people in the rural areas live have prompted suggestions that such customary systems of rules are inimical to economic progress. Some customary laws and institutions affecting the lives of millions are much more practical and more applicable than the state made laws. However, the critical problem inherent in oral customary law is its inability to govern modern and complex commercial transactions and public matters which are essential for development. Even if customary laws and practices can efficiently govern the daily private life of their respective community, it is difficult for these laws to cope up with complex economic and trade issues and administer sophisticated public matters that cosmopolitanism has brought. Thus, in this regard we might support Melaku's and Rene David's argument that customary

[43] David, R, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review*, Vol. 37,1962-3, p.188.

[44] *Ibid.*

[45] *Ibid.*

laws (if not modified and supported with modern formal state laws) can be hindrances to economic development. Nevertheless, we must not entirely deny the importance of customary laws in development.

Apart from customary law, religious laws played significant role in regulating the conduct of traditional Ethiopians. In particular, Christianity and Islam have provided material sources for religious *cum* secular rules. Religion also shaped the traditional Ethiopian conception of law as "the will of God".[46] Orthodox Christianity, a state religion until 1974,[47] through its strong relationship with the Church of Alexandria reinforced the tie between Ethiopian Kings and the Mediterranean world.[48] This relationship enabled the Christian community to get a historic and monumental compilation of religious and secular laws – the *Fetha Negest*.[49]

It is difficult to trace back the exact time when the *Fetha Negest* was introduced in Ethiopia. Some claim that it was brought to Ethiopia at the request of the mid fifteenth century Emperor Zara Yacob, seeking a written basis for law by which to govern its people.[50] No one also knows when it started to be cited as an authority in the process of adjudication of cases by courts. Yet, the *Fetha Negest* served as an important source of legal principles and a major source of law for the imperial courts.[51] The formal position of the *Fetha Negest* as the supreme ruling law of Ethiopia in civil and penal matters is confirmed by a law issued by Emperor Menelik II – the law states that "the minister of justice must make sure that every judgment is compatible with the

[46] Melaku, *supra* note 42, p.18.

[47] See Article 126, the Imperial Constitution of the Empire of Ethiopia (4th November, 1955)

[48] Melaku, *supra* note 42, p.23.

[49] Tzadua, A., The Fetha Nagast: the Law of the Kings, *in* Uhlig, S. (ed.), *Encyclopaedia Aethopica*, Durham, Carolina Academic Press, 1968, p.6 [Hereinafter Tzadua].

[50] *Ibid.*

[51] *Ibid.*

expression of the *Fetha Negest*."[52] This compiled transplanted written law was a major domestic material source during the codification of the 1930 and 1957 penal codes and the 1960 Civil Code as well.[53]

The secular part of the *Fetha Negest* contains rules on trade, donation, loan, pledge, guaranty, debt settlement, sales, purchase, partnerships, coercion and duress, lease and rent, commercial ventures, lost things and things without owner, judges and judicial procedure, and penal provisions for different crimes.[54] To what extent these detailed laws governed the daily routine relationships of Ethiopians remain elusive. However, there is argument that the *Fetha Negest* was never consistently applied in Ethiopia; the application of customary laws persisted despite its introduction. This was mainly, it is argued,[55] due to the availability of the code in Ge'ez language and its inaccessibility to the majority except the highly educated.

Ethiopia got on board on a politically motivated modernization of its laws with the coming to power of Emperor Haile Selassie I and the adoption of the 1931 Constitution.[56] The Constitution expresses the Emperor's ambition to replace the traditional, decentralized governance structure with more modern centralized state machinery.[57] It was politically motivated because it intended to reduce fragmentation of power and enhance centralization.[58] The constitution was doctored to meet imperial needs – to ensure that the throne will remain within the Emperor's family and not to put the law above him. Conversely,

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[52] *Ibid.*

[53] Murado, A., *Legal History and Traditions*, Part II, JLSRI, Addis Ababa, 2007, p.197.

[54] Tzadua, *supra* note 47, p.14.

[55] Van Doren, J., 'Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System', *Journal of Transnational Law & Policy*, Vol.3, No.1, 1994, p.172.

[56] Van Der Beken, C., 'Ethiopia: From A Centralized Monarchy to a Federal Republic', *Afrika Focus,* Vol. 20, 2007, p.22.

[57] *Ibid.*

[58] *Ibid.*

Bejirond Takla Hawaryat, the drafter of the constitution, is reported to have stated that the constitution had the central objective of restricting the powers of the hereditary aristocracy.[59] Despite the limitations and the wicked intentions of the constitution, it is possible to argue that the constitution served as a stepping stone for further legal developments in Ethiopia. In 1930's and 1940's, statutes on company, bankruptcy, business registration, banking and loan were legislated. These laws, which marked the introduction of modern commercial and business laws in Ethiopia, were however incomplete and unsystematic; hence, the decision to embark on the 1950's and 60's codification.[60]

3. The Relation between Law and Development in Ethiopia during Codification and Since

As briefly explained in the first section of this article, the first law and development movement singled out traditional social, cultural, economic and political institutions for the underdevelopment of most third world countries. The solution proposed was modernization. Legal transplantation was advocated by the first law and development movements of the 1960s and 1970s as a means to the modernization process and materialization of economic development through changing traditional values, institutions and social behaviors.[61] And comprehensive, centralized and top-down legislative reform aimed at modernizing public and private laws characterizes the legal history of many

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[59] Bahiru, Z., *Pioneers of Change in Ethiopia: the Reformist Intellectuals of the Early Twentieth Century*, Ohio University Press, Athens, p.182.

[60] Alemayehu, F., *Legal Pluralism in light of the Federal and State Constitutions of Ethiopia: A Critical Approach* (Addis Ababa University, Faculty of Law, Unpublished, 2004), p.98 [Hereinafter Alemayehu].

[61] Qing, Y., *Court Delay and Law Enforcement in China: Civil Process and Economic Perspective*, Deutscher Universitats-Verlag, Wiesbaden, 2006, p.15; Sherman, *supra* note4, p.1262.

developing countries who in 1960s and afterwards transplanted western laws and legal institutions to modernize their legal system. The 1950's-60's codification projects in Ethiopia belong to this legal history.

During Emperor Haile Selassie's reign, Ethiopia decided to depart from the diverse and incomplete customary laws so as to respond to international criticisms directed against her disorganized and incomplete legal system.[62] Modern legal codes, bearing little resemblance to local traditions, were enacted. The idea of the first law and development movement, the role of modern laws for economic development, seems to have been clearly understood. To quote René David:

> "Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitates the adoption of a 'ready-made' system: they force the reception of a foreign system of law in such a manner as to assure minimal security in legal relations."[63]

In the preambles of the 1960 Civil Code, the Emperor also states that "the civil code has been promulgated in order to modernize the legal framework of the country so as to keep pace with the changing circumstances of this world of today." It stresses that modern laws are so crucial in order to consolidate the progress already registered and also to enhance and facilitate further growth and economic development in Ethiopia.[64] On a similar note, the preamble of the 1960 Commercial Code reiterates the need for modern codified commercial laws to Ethiopia's progress.[65]

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[62] Alemayheu, *supra* note 60, p.90.

[63] David, *supra* note 43, p.189.

[64] Preamble, Civil Code of Ethiopia, 1960, *Negarit Gazeta,* Proclamation No. 165/1960, 19th Year, No.2.

[65] Commercial Code of Ethiopia, 1960, *Negarit Gazeta,* Proclamation No. 166/1960, 19th Year, No.3. Attention was given to the enactment of the commercial code believing that

The codes were written with the assumption that the country would head for the market economy. In a fully developed market economy, several legal disputes were expected to arise and the codes provisions were believed to easily address these issues and capture the future development of the country.[66]

Unfortunately, the legal transplantation was not as successful as it was originally planned. Some argue that the codes were still unable to get the acceptance of the addressees even after 40 years of its enactment.[67] The common causes for disappointment elsewhere were also responsible for the limited successes of legal transplantation in Ethiopia. Like many developing countries that adopted western laws, the situation on the ground was unhelpful. The main challenge of legal transplantation and of law reform, i.e. overcoming the difficulty of creating legal institutions that are able to achieve certain ends by mixing foreign laws with domestic, social, political, economic, cultural and legal circumstances,[68] was present in Ethiopia as well. The preparation of the codes was not supplemented by adequate capacity building of local courts and law enforcement organs which eventually failed to meaningfully enforce transplanted laws. Further, the codes faced substantial resistance as customary laws and institutions hold strong foot in Ethiopian society. Beckstrom[69] also contends that the high illiteracy rate of the population, the non existence of educated attorneys and lack of communication networks have contributed to paltry reception of the laws.[70] The fact that customary laws were not properly incorporated in the modern laws has also been identified to the poor

modern commercial laws are get ways to the existing and future economic evolution (see Murado, *supra* note 53, p.204).

[66] Murado, *supra* note 53, p. 218.

[67] *Ibid*, p. 205.

[68] Davis & Treblicock, *supra* note 1, p. 899.

[69] Beckstrome, J., 'Transplantation of Legal Systems: An Early Report on the Reception of Western Law in Ethiopia', *American Journal of Comparative Law*, Vol.21, 1973, pp.557 *et seq.*

[70] Van Doren, *supra* note 55, p.176.

implementation of the codified laws.[71] In sum, the above factors played their part in the poor implementation of transplanted laws and hence in the limited impact of imported laws in the nation's modernization and economic development.

The 1974 Ethiopian Revolution overthrew the pro-capitalist imperial regime. *Derg* – the military junta that seized political power for 17 years after the revolution – declared socialism as an ideological guiding principle for its policies.[72] Apparently, this was the result of the 1970's development thinking shaped by Marxist dependency ideology. As explained in the first section of this article, dependency theory promoted aggressive economic nationalism in developing countries emphasizing import substitution and protectionism.[73] The role of law in economic development was denied; law was rather seen as instrument which benefits few local elites at the expense of the mass.[74] The outlook on the role of transplanted western laws in fostering economic growth in developing nations was cold. The theory rather advocates the employment of law in redistribution of wealth. In line with this theoretical viewpoint, socialist Ethiopia used law as an instrument of wealth distribution. Hence, the government nationalized private banks, insurance companies, real property and all rural land.[75] Law was used to assist various socialist agenda, e.g. reforming oppressive land tenure regimes, promotion of workers' rights and consolidation of command economy. Also, the 1960 codes, which assumed capitalist *laissez fair* system,[76] were put on mute and were not thus widely applied.

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[71] Yet, René David posits that customary laws are incorporated in the Civil Code wherever it is not found to be against modernization and economic progress; David, *supra* note 43, p.196.

[72] Van der Beken, *supra* note 56, p.26.

[73] Tamanaha, *supra* note15, p.478.

[74] *Ibid.*

[75] Van der Beken, *supra* note 56, p.23.

[76] Murado, *supra* note 53, p.160.

4. Law and Development in Contemporary Ethiopia

The 1980's saw the gradual decline of communism and the rising hegemony of neo-liberal economic perspectives. International financial institutions blamed internal policy errors (than exogenous influences) to developing nation's economic problems.[77] Internal economic policy fixes and structural adjustment were recommended to address underdevelopment.[78] The development policy prescriptions championed free markets through privatization, deregulation, liberalization and micro economic stabilization; and, law was denied major attention.[79] Also, the law and development academic movement came "under withering critique and had largely dissipated."[80]

The revival of law and development in 1990s was facilitated by huge financial assistance from the World Bank. The Bank gave particular focus to the rule of law in development. Under the new law and development doctrine, the primary function of law reform was to dismantle command or authoritarian institutions and protect private rights against state intervention.[81] The orthodoxy, centered on promoting a market-oriented rule of law, considered law as the magic potion for third world economic ills.[82] Convinced that the law and legal institutions could be used as a tool to promote social and economic

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[77] Cornia, G. with Helleiner, G., *From Adjustment to Development in Africa: Conflict, Controversy, Convergence, Consensus?*, UNICEF ICDC, Florence, p.3.

[78] *Ibid.*

[79] Sherman, *supra* note 4, p.33.

[80] *Workshop Proposal*, Workshop on Role of Law in Developing and Transitional Countries, Lubar Commons, University of Wisconsin Law School, Dec 5-6, 2008, p.1. Available at: <http://www.law.wisc.edu/gls/rol.workshop.dec08.html>. [Hereinafter Workshop Proposal]

[81] Shermann, *supra* note 4, p.1260.

[82] Workshop Proposal, *supra* note 80, p.2.

development,[83] the World Bank attempted to introduce neoliberal rule of law[84] through legal and judicial reforms that foster free market, investment and exchange.[85] World Bank studies indicate that the judicial system is among the top significant constraints to private sector development.[86] It is also contended that the quality and availability of court services affect private investment decisions and economic behavior regarding, for example, domestic partnerships and foreign investment.[87]

Since the early 1990s Ethiopia partly endorsed the neo-liberal approach – it promoted macroeconomic stability, privatized a significant number of state-owned businesses, eased constraints on foreign investment, and enacted laws that helped restore free market.[88] Significant legal revisions to replace the socialist-era laws and re-establish a functioning legal system have also been undertaken.[89] Incidentally, the application of the 1960 Civil and Commercial Codes revived with the return of market economy.

Currently, there seems a conscious and clear recognition on the part of the Ethiopian government that legal and judicial reforms promote economic growth and poverty alleviation. This can easily be shown from the undergoing

[83] Barron, G., 'World Bank and Rule of Law Reforms', *London School of Economics Working Paper Series* (December 2005), p.3.

[84] Despite the universal consensus on the importance of rule of law, the meaning of the term is debated. As some posit, it appears to be "the proverbial blind man's elephant – a trunk to one person, a tail to another; see Trebilcock, M. & Daniels, R., *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Edward Elgar Publishing, Inc., Cheltenham, 2010, p.2.

[85] Schmidbauer, *supra* note 19, p.6.

[86] Qing, *supra* note 61, p.1264.

[87] *Ibid.*

[88] *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic* (USAID, January 2007), p.58 [Hereinafter Ethiopia Commercial Law].

[89] Barron, *supra* note 83, p.3.

justice sector reform efforts.[90] The need for improving the country's legal and justice system has also been clearly indicated in various national poverty reduction strategic papers.[91] The Growth and Transformation Plan (GTP)[92] renews the state's resolve to promote development through a mix of strategies including judicial reform.[93] Studies[94] reveal the registration of some positive results. For instance, the annual clearance rate of cases has been maintained at above 80 percent in federal and regional Supreme Courts.[95] This may help in facilitating domestic and foreign investment and hence development. It also changes the image of the Ethiopian justice system which has long been characterized by delays in dispensation and institutional incapacity.[96]

Despite arguments that western market economy is characterized by transactions between independent economic agents facilitated by the formal

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[90] See, e.g., *Comprehensive Justice System Reform Program: Baseline Study Report* (Ministry of Capacity Building, Addis Ababa, February 2005), p.11 [Hereinafter Comprehensive Justice System Reform Program]

[91] See, e.g., *Ethiopia: Building on Progress: A Plan for Accelerated and Sustained Development to End Poverty (PASDEP)*, Annual Progress Report 2006/07 (Ministry of Finance and Economic Development, December 2007, Addis Ababa), p.115.

[92] See, *የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ የዕድገትና የትራንስፎርሜሽን ዕቅድ 2003-2007* (የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር፣ ህዳር 2003፣ አዲስ አበባ) ፣ ገፅ 122-125; GTP is a medium term strategic framework for the five-year period (2010/11-2014-15).

[93] United Nations Development Assistance Framework Ethiopia 2012-2015, (United Nations Country Team, March 2011), p.30. Can be accessed at: http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.et.undp.org%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D123&ei=94fMUIncCsbOtAb4noGICQ&usg=AFQjCNEBSZ4A383gMGO6ghhDFBw-qq9tTA&bvm=bv.1355325884,d.Yms&cad=rja.

[94] See, e.g., Comprehensive Justice System Reform Program, *supra* note 90, p.250.

[95] *Reforming Ethiopia's Justice System –World Bank*, available at: <http://www.worldbank.org/en/country/ethiopia> [Last accessed on 15 November, 2011].

[96] *Ibid.*

legal system, capitalism in East Asia seems to function differently.[97] Informal legal systems have played significant role in East Asia's economic miracle.[98] For instance, China's astonishing economic development was scored under "low quality laws and legal institutions". Informal mechanisms that recognize and protect private property rights and ensure performance of contracts have often been effective substitutes.[99]

The recent Ethiopian experience however appears to show that informal and customary legal systems have been sidelined. The legal reform efforts primarily focused on the formal legal system. This is so despite the prevalence of informal legal institutions even in urban areas where, for example, commercial disputes are still resolved according to custom, moral, trust and reputation.[100] Attention must be paid to the relationship of economic development and customary legal systems.[101] This is mainly due to the active nature of customary practices[102] in the fabric of the Ethiopian society. Also, China's positive experience in embracing customary legal systems with development should be given more weight in Ethiopia as well. Efforts must

[97] Davis & Treblicock, *supra* note 1, p.993.

[98] *Ibid*.

[99] *Ibid*, p.49.

[100] In Ethiopia, commercial disputes are still resolved through informal mediation or arbitration. Businesspersons in Mercato, the largest open air market in Addis Ababa, as well as rural farmers usually prefer mediators to resolve dispute; see Ethiopia Commercial Law, p.1; see also Mintwab Zelelew & Mellese Madda, 'Alternative Dispute Resolution in Addis Ababa: the Case of Markato', *in* Alula, Pankhurst & Getachew Assefa, *Grass-roots Justice in Ethiopia: the Contribution of Customary Dispute Resolution,* Addis Ababa, CFEE, 2008, pp.250 *et seq*.

[101] For an emerging literature on the role of customary law in development (rather sustainable development), see, e.g., Ørebech, T. et al., *The Role of Customary Law in Sustainable Development*, Cambridge, Cambridge University Press, 2005.

[102] Although it might be difficult for customary dispute resolution mechanisms to squarely deal with complicated trade disputes, reform efforts must give due concern for the role of customary legal systems as they are pervasive in developing Ethiopia.

also be coiled to figure out how we can mingle the two legal systems (formal and informal) and address the development needs of our country.

Lately, neo-liberalism's failure to deliver on its developmental promises in the developing world coupled with the rejection of "one size fits all development strategy" helped an alternative concept – new developmentalism – to hold foot.[103] This model acknowledges the role of market and the private sector in economic development but rejects the neo-liberal prescription of minimalist state. The theory also posits that developing states must enable markets to grow.[104] The new developmental states seeks to empower the private sector through extensive collaboration and communication between public and private sectors in policy formulation, promotion of foreign direct investment towards growth sectors and pushing firms and industries towards competitiveness rather than shielding them with protection.[105] This new theory has not reached a full grown model. Rather, it is in the making.

Ethiopia's government favors the new development paradigm.[106] In his opening speech at the sixth African Economic Conference, the late Prime Minister Melese Zenawi reiterated his long held firm belief in the role of the state in development and relegated the neo-liberal ideology. He boldly underscored that Africa cannot alleviate poverty and underdevelopment by limiting the role of the state and leaving everything to the private sector.[107]

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[103] Trubek, D, 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law', p.2 (A paper presented at the Conference on Social Science in the Age of Globalization National Institute for Advanced Study on Social Science, Fudan University, Shanghai December, 2008). Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349163>.

[104] Sherman, supra note 4, p.1267.

[105] *Ibid*, p.1268.

[106] 'Emerging to BRICs' *Addis Fortune*, Vol.12, No.600, (Oct 30th 2011)

[107] *Ibid*; see also Meles, Z., 'States and Markets: Neoliberal Limitations and the Case for a Developmental State' *in* Noman, A. et al. (eds.), *Good Growth and Governance in Africa: Rethinking Development Strategies*, Oxford University Press, Oxford, 2012, pp. 140 *et seq.*

It seems that the role of law in the new developmental state has not yet been well constructed.[108] Nonetheless, it is generally believed that the new developmental state's legal regime would guide and direct public and private institutions in the implementation of development strategies. The law of the new developmental state is given the task of governing and regulating the hybrid state led and neoliberal economic policy. Legislators will of course find it challenging to enact laws that keep balance between flexibility (for the state to pursue its policy objectives) and firmness that limit state interference through predictable and stable legal regime.[109] Only time will tell if enacting such laws and facilitating growth through them is possible.

Conclusion

The paper has modestly attempted to highlight the relationship between law and development in Ethiopia. And, it is shown that the relationship has been highly influenced by the prevailing dominant economic theories and paradigms. Law and development movements generally guided efforts in most developing countries including Ethiopia to foster growth through legal reform.

Pre-codification period Ethiopia's legal system was characterized by scattered and various traditional, customary and religious laws that have contributed little to support the country's economic development. Among others, the codification of western-style laws during Haile Selassie's reign was meant to facilitate progress and modernization in the country. The codification was influenced by the contemporaneous law and development movement which prescribed modernization and modern legal systems to curb third world's development problems. For reasons seen earlier, the codified laws were

[108] Trubek, *supra* note 103, p.3.

[109] *Ibid.*

unable to be effectively implemented and hence contribute meaningfully to Ethiopia's development.

The Derg, a regime with Marxist inclinations, redefined the role of law in development. Law was primarily used to implement socialist agenda of wealth distribution and nationalization. Yet, socialist laws were not seen to deliver the promised economic development.

With the restoration of market economy in the 1990's, a new vigor for law and development emerged. Ethiopia embraced neo-liberal prescription that rule of law is a prerequisite for well functioning market system and hence economic development. Ethiopia has executed various reform projects including revision of substantive laws and capacity building of the judicial sector.

Despite the rebirth of legal reform programs in pursuit of development, there is a great doubt on the direct relationship between legal reforms and development. In particular, China's astonishing economic growth amidst "low quality laws and institutions" and active use of informal legal systems create doubt on the relevance of reforms on formal legal system. Ethiopia, where customary legal systems are still pervasive, may take some lesson from China's experience.

Finally, in numerous developing countries including Ethiopia there is a shift of development ideology from neo-liberalism to developmental state. The role of law in this new development paradigm is still under construction. That said, I must conclude by noting that law cannot be a panacea for all economic ills of developing countries notwithstanding anecdotal empirical findings on the positive role of law in development.