Tort Law and Development: Insights into the Case of Ethiopia and Eritrea

Mauro Bussani
TORT LAW AND DEVELOPMENT: INSIGHTS INTO THE CASE OF ETHIOPIA AND ERITREA

MAURO BUSANI

INTRODUCTION

The primary purpose of this article is to enrich the understanding of tort law in Ethiopia and Eritrea and how it affects the environment. Its standpoint is both positive and normative. Its secondary goal is to clarify the affinities, often hidden, between the issues raised by tort law in developing countries now and the same issues as they emerged in the Western tradition in the past. Methodologically, the article considers the interplay between two powerful tools of analysis: law and economics, and legal pluralism (as informed by the doctrine of legal stratification).

It may seem strange to deal with two nations that have been separate since 1991. One reason is deference to the traditional categories of historiography; another is the existence of problems which, from our perspective, are common to both countries. A further reason is that even after independence, Eritrea preserved the series of rules (articles 2027-2161) contained in the 1960 Ethiopian Code, principally inspired by René David, which form some of the most important foundations of the legal framework for tort law.

TORT LAW AS A TEST

Tort law in Ethiopia and Eritrea provides a test of the methods of law and economics as well as legal pluralism. Tort law is central for understanding the relationship between the market and the institutional framework in a given legal system. One reason is that it allows one to compare several institutional frameworks: common law, civil law, and the legal systems outside the Western legal tradition. The frameworks differ, although legal scholarship on torts focuses on the same set of problems everywhere: essentially, the foundation of liability; the role of negligence and strict liability; causation; justifications; and remoteness of damage. It gives an homogeneous approach to the function of tort law:

---

* This article takes as its starting point the talk prepared for the Trento Conference on “Transplants, Innovations and Legal Traditions in the Horn of Africa”. The ideas contained there have been reformulated in the light of fresh stimuli arising from conversations with U. Mattei, R.D. Cooter and T.S. Ulen. A different version of this work is part of a broader paper written with Ugo Mattei, “Making the Other Path Efficient: Economic Analysis of Law in Less Developed Countries”, delivered to the First Congress of the Latin-American and Caribbean Association of Law and Economics, held in Mexico City on 2-3 February, 1995. It goes without saying that the ultimate responsibility for this article rests with me.

1 Concentrating on law and economics implies also attempting to gauge to what extent a methodological tool of Western law can be used in concrete terms to understand legal systems very different from those in which it has been applied so far. See C.J. Dias, R. Luckham, D.O. Lynch, J.C.N. Paul (eds.), Lawyers in the Third World: Comparative and Developmental Perspective, Uppsala, 1981.

2 The pioneer of this concept was R. Sacco, in Introduzione al Diritto Privato Semait, 1973.


4 These provisions are still in force in conformity with Proclamation 2/91 of the Eritrean Government.


compensation (over- and under-); deterrence (over- and under-); punishment;
and the relationship with other systems of compensation and welfare.

A second reason for the centrality of tort law is its scope. It is broad, and
covers the area between property rules (contract) and inalienability rules (crime).
"Tort law" can be found in all social structures, when consent cannot be given
and when society does not wish to ban a given activity. It has thus always faced
problems both of punitive justice (typical of criminal law) and contractual justice.
Indeed, after observing that no legal system can rely solely on the market, or
solely on regulation, one of the founding fathers of law and economics concluded
that tort law exemplified the law of the present (and future Western) mixed
society. Yet another reason is that tort law is an area of private law with a
potentially powerful influence on the economic system. As is well known, a fully-
flugged system of tort law is a powerful means of internalization. Consequently,
a market actor receives incentives to operate in a market with poorly developed
tort law rather than in a market in which tort law is well established. In a
situation in which parallel markets are available (such as different countries;
formal and informal markets) the lack of tort law may make one market more
attractive than another—for instance, tort law may be used to create incentives
for investors to operate in the informal market rather than in the formal one.

THE WESTERN PATH OF TORT DEVELOPMENT

Focusing on tort law in an analysis of Ethiopian and Eritrean legal systems
allows an important and usually neglected point to be made. In the last 200
years the history of Western societies has been one of development, and in that
history tort law has played an important role.

Two hundred years ago, in Western societies, tort law was subsidiary, marginal
and not clearly distinguished from criminal law. Nevertheless, it developed
deeply rooted in the principle according to which "the people generally profit
by individual activity. As action cannot be avoided and tends to the public good,
there is obviously no policy in throwing the hazard of what is at once desirable
and inevitable upon the actor." Hence the conclusion that "the general principle
of our law is that loss from accidents must lie where it falls, and this principle
is not affected by the fact that a human being is the instrument of misfortune.
Unless my act is of a nature to threaten others, unless under the circumstances
a prudent man would have foreseen the possibility of harm, it is no more
justifiable to make me indemnify my neighbour against the consequences that
make me do the same thing if I had fallen upon him in a fit or to compel me
to insure him against lightning." By supporting the expansion of the negligence
principle, and by shifting the burden (and the risks) of proving negligence on
to the plaintiff, judges (in common law) and legislators (in civil law) were
apparently limiting the influence and the extension of tort law in the economic
system.

---

8 See C.H.S. Felbo, History and Sources of the Common Law: Tort and Contract, London, 1949, 4ff; G.
Ponzanelli, La Responsabilità Civile. Primi di Diritto Compasiva, 1992, 12ff; G. Viney, Les Obligations. La
10 As to the civil law systems it should be remembered that the culpa principle dates back to Lex
Aquila (3rd century B.C.) and to its applications which gradually added to the objective notion of
The introduction (or the re-affirmation of the role) of the negligence system may be seen as a major step forward towards the internalization of social costs, but what is not underlining is that during the 19th century it came to represent an efficient first step in reducing unequal regimes of liability: even in civil law countries, in fact (outside the sphere of application of culpa principle), some harmful activities were subject to strict liability while others were sheltered from all liability. So, rather than talking about a shield offered by the negligence rules to rising capitalism (subsidy theory), it is more realistic to say that courts, legislators and lawyers throughout the Western legal tradition were simply not used to reasoning in terms of allocating losses. They were confined by the rules of contract and property law (based on regimes of strict liability) and were therefore moving from one extreme to the other.

In many of the areas presently belonging to tort law the alternative was not, as in developed systems today, between strict liability or negligence but between negligence or non-liability. In case of injury to workers or injury created by unsafe products and so on, the fault principle was responsible for a hitherto unknown duty to internalize. Before the existence of a negligence law, recovery was never possible except in the case of violation of clearly specified property rights (everywhere protected by rules of strict liability such as trespass in common law and actio negatoria in civil law).

With the appearance of massive industrial production and consumption, and extensive motor transport, explosive urbanization and population increase, the occasions for causing damage obviously greatly increased. The challenges faced by tort law grew accordingly. A tension arose between the old structure of tort law, sufficient for a less developed society, and the new complex society. Advanced tort doctrine both in common law and in civil law came to focus on compensation. Although this process of development was common, it took different paths in different legal cultures. In the common law system, the leading

damage caused affairia (without right) the notion of individual culpability. On this evolution see a careful summary in P. Steins, Legal Institutions: The Development of Dispute Settlement, London, 1984, 194 ff.


A conclusion which should not conceal the various obstacles that the recovery might encounter in court, such as the fellow servant rule and assumption of risk as to workers compensation and requirement of privity of contract for product liability. See the survey in Prosser and Keeton on The Law of Torts, St. Paul, Min, 5th ed., 1984, 677 ff.

See B.S. Markesinis, Liability for Unintentional Harm in the Civil Law and in the Common Law, 83; R. Oppen, "Actio negatoria und industrielle beeinträchtigung des grundrechts", in H. Coing and W. Wilhlem (eds.), Wissenschaft und Reifigung des Privatrechts im 19 Jahrhundert, 1979, 40 ff. It should be added, however, that for a long period, even in the cases in which liability was to be based upon negligence, nevertheless liability came to arise only when the victim was injured in one of the legal interests deemed worthy of protection (essentially, life, physical integrity, property). On all these points see the summary in K. Zweigert and H. Kocz, An Introduction to Comparative Law, Vol. II, Amsterdam, 2nd ed., 1987, 293 ff.

agents of tort law development (and for a long time the only ones) were the courts, which were particularly sensitive to the pressures that an increasingly complex society was placing upon them. Often, statutes came only after decades of changes via case law. In civil law, by contrast, the burden of legal change has been shared by courts and legal scholars, who were sometimes able to persuade legislators to enact new statutes. 17

17 Think, for example, of the leading cases which marked the path of product liability: MacPherson v. Buick Motor (1916) 217 N.Y. 382, 111 N.E. 1050; Daugther v. Simmons (1932) A.C. 567; Escola v. Coca Cola Bottling Co. of Peru (1944) 24 Cal. 2d 145; 150 P. 2d 3. Compare them with those followed by European civil law systems. In the latter the very different and sometimes contradictory path followed by national courts has long been bearable only thanks to scholarly efforts of rationalization. In the end, such scholarly efforts have been successful also at the E.U. level leading the enactment of a directive. See G. Pozzaneli, La Responsabilità Civile. Profili di Diritto Comparato, 1992, 67ff and 107ff.

TORT LAW IN ETHIOPIA AND ERITREA

In the analysis of tort law in Ethiopia and Eritrea one must start with a structural observation of crucial importance—often neglected because of the same kind of cultural imperialism affecting the American law and development movement in the 1960s and 1970s, which eventually led to its failure. 18 This observation concerns the phenomenon called legal stratification 19 that can be observed at two different levels.

First, the legal system of these countries is made up of legal layers imposed on one another in the course of history. In Ethiopia and Eritrea, much earlier than in other parts of Africa, 20 religious law (the Christian-Coptic and later the Islamic Sharia) was superimposed on the previous layer of local customary law. 21


21 See for example, F. Ostini, Trattato di Diritto Costituzionale dell'Etiopia, 1960; F.F. Russell, "Eritrean customary law", (1959) 3 J. AL 99ff; Zaki Mustafa, "The substantive law applied by Muslim courts in Ethiopia. Possible justifications for the continued application of the Sharia", (1975) 9 J.E.L. 138ff. As to the Fetha Negast (the term derives from Ge'ez, the ancient language of Ethiopia, and can be understood to mean "justice of the Kings") which is a sort of compilation of religious and civil precepts, whose sources seem to have been the Old and New Testament, a certain number of original Apostolic writings, the canons of early Councils, other writings which reflected the principles both of the compilation of Julian as appearing in the books of Syro-Roman Law, and of Mohammed Law School of Cairo, see L. Guidi, Il Fetha Negast o Legislatore del Re. Codice Civile e Civile dell'Abyssinia, 2 vols, 1895–1899; M. Perham, The Government of Ethiopia, 1948, 138ff; Y. Berhane, Delict and Torts: An Introduction to the Sources of the Law of Civil Wrongs in Contemporary Ethiopia, 1969, 5ff. As to the influence of Fetha Negast on the civil codification works, see R. David, "Le rapport entre le nouveau code civil et l'ancien Fetha Negast est facile à reconnaître", in R. David, "Les sources du Code Civil Ethiopien", in (1962) 14 Rev. Int. De Comp. 497; and see also the Preface to the Civil Code by Emperor Haile Selassie I: "the codification Commission has been inspired in its labours by the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable Fetha Negast".
Colonial law was then, at least partially, superimposed on both these layers. On top of this, the law of the modern independent state (socialist during the period 1974–91) created a new layer. No legal order had enough power completely to supplant previous layers, and legal scholars had little influence on the development of the phenomenon. Secondly, even the customary informal legal system resulted from a historical process of superimposition and integration of different components. What is usually referred to as the customary layer is made up of heterogeneous customs which interacted with each other historically. Though the absence of written sources makes it difficult to know the exact details of the history of the different ethnic groups, it is known that they experienced migrations, conquests and invasions which modified the customs of both the victorious and defeated groups. This phenomenon is neither structurally different nor less complex than the processes that took place in Europe with the clash and interplay of the flux of different legal cultures.

In this process of stratification, the imposition of a new legal system did not cancel out the old legal order, but instead coexisted with it, officially or unofficially. It restricted the application of the old law and modified it or was modified by it in turn. This coexistence of different legal orders created a remarkable legal pluralism in Ethiopia and Eritrea, as in many other African countries. Such pluralism, which may depend on the nature of the legal transaction (such as family law, customary or business law), survived even when the Ethiopian state attempted to unify its law and disregard customary law. In fact the latter flourished de facto, since the state lacked sufficient resources to impose its own choice.

One can say the same about the organization of justice. The judicial system is unified but, within it, different courts apply a different law (state law, customary law, Islamic law). The legal culture of the judge and the even the process of selection may change depending on the law which is to be applied. All this, of course, is crucially important to an understanding of Ethiopian and Eritrean tort law.

Modern law adopted a Western model proposed by René David when drafting the Ethiopian Civil Code (Chapter XIII, consisting of no fewer than 135 articles,


18 Compare D. Haile, “Law and social change in Africa: preliminary look at the Ethiopian experience”, (1973) 9 J.E.L. 380ff; P.L. Strauss and M.R. Topping, “Decision trees”, (1970) 7 J.E.L. 447ff; T. Geraghty, “People, practice, attitudes and problems in the courts of Ethiopia”, (1969) 6 J.E.L. 426ff. It seems, however, unlikely that the exporters and the drafters of legal models and codes failed to take these problems into consideration. What may be more likely is that this issue was underestimated by the various African intellectuals who gained power, who had studied overseas and come under the influence of “traditional” Western legal models; on this point see D. Haile, “Ethiopia”, in M. Guadagni (ed.), Legal Scholarship in Africa, 1989, 29ff.


As far as Ethiopia and Eritrea are concerned, see for example, Haile, op. cit.; Strauss and Topping, op. cit.
is devoted to tort law. Modern tort law, even where it is actually applied by
the courts, has failed to undermine the strong hold of customary law on
interpersonal conflicts.

One should not forget that tort law in its function of conflict resolution plays
a very important role in the social life of the Ethiopian and Eritrean groups, as
it does in every African country. The solution of a legal dispute, even when
clearly the chief's responsibility, is a collective enterprise involving the active
participation of the whole community. Everybody has the right and the duty to
participate in the process and to propose solutions to the conflict. Of course, the
last word belongs to the chief, and the most authoritative points of view are
those of the elderly. However, the consent of the whole community is still the
main legitimation of the decision. Similarly, the general blame of the community
for the wrong and the fear of supernatural reaction forces the guilty party to
accept the sanction even when it could be easily avoided because of the lack of
effective enforcement machinery. Ultimately, the judicial process is aimed at re-
establishing social peace in order to avoid feuds.

A consequence of this approach is the high level of flexibility typical of
customary law. What may appear as a violation of this law may sometimes be
the establishment of a new rule, accepted and promoted by the community
because it is more sensitive to its present needs. Particularly interesting are the
rules by which the harm is made good. Most often compensation (blood money)
is paid to the kin group of the victim by that of the wrongdoer, and not by the
wrongdoer himself. Customary tort law thus functions as an instrument of peace-
keeping and provides an efficient tool to spread the loss crucial to a subsistence
economy.

To sum up, Ethiopian and Eritrean tort law shows the following characteristics:
stratification; legal pluralism, with a marked differentiation of liability from one
sector to the other; and absence of interaction between the different sources of
the law (tradition, judges, legislators) and a very limited role of legal scholars.

**Law and Economics Facing the Challenge of Environmental Protection**

Comparative law and economics can be seen as a powerful tool for problem-
solving, which focuses on a social problem and evaluates institutional reactions
to it in terms of economic efficiency. It may therefore be moved from its
familiar Western context and applied to one of the most pressing problems of
this century: environmental harm.

By now, it is well known that one of the gravest problems facing mankind
this century is damage to the environment. This can no longer be considered

---

30 On tort law provisions of the Code, see Y. Berhane, Delict and Torts: An Introduction to the Sources of
the Law of Civil Wrongs in Contemporary Ethiopia, 1969; G. Krzyczkowicz, The Ethiopian Law of
Extraterritorial Liability, 1970. As to the civil code as a whole, R. David, "Civil code for Ethiopia",

31 Compare with articles cited in n. 29 above.


33 With specific regard to Ethiopia and Eritrea, see Y. Berhane, op. cit.

34 Cf. M. Bussani, "Short notes on tort law in Ethiopia and Eritrea", in E. Grande (ed.), Transplants,

35 The spread of law and economics is one of the most important examples of methodological
legal transplants in Western law. For its methodological development see R. Sacco, "Legal forms
as a local issue, since events on the other side of the world will eventually affect everyone. In the economic analysis of law, the “non-accidental” perspective that characterizes environmental tort law and the consequent problems of causation and evaluation of harm has long been clear. Pollution may be an incremental, day-by-day problem involving a multiplicity of actors rather than being a one-off accident caused by one determinate wrongdoer to one determinate victim. Even when pollution results from a given act, its consequences are likely to be spread over time and space.

The problem of allocating liability and costs of environmental harm can be tackled in many different ways, and the Western legal tradition offers a variety of approaches. On the one hand, there is an administrative command and control approach enforced by criminal sanctions which may be regarded as an _ex ante_ approach. On the other hand, tort law acts _ex post_ through the court system. A combination of the two may be the most effective solution. In particular, the command and control approach is not best for cases in which a short time elapses between the production of new risks for the environment and the causation of damages. It is also sometimes rigid and may be difficult for regulators effectively to distinguish the class of different behaviour that they wish to regulate.

Tort law alone, however, cannot achieve its goals. Litigation and administrative costs are usually high. There may be discontinuity in the anticipated costs faced by the enterprise. In short “where pollution is zero, liability is zero; but when pollution is infinitesimal, liability may then be complete.” Even when this is not the case because a market share liability system is adopted, it remains extremely difficult to choose the most efficient course of private behaviour: the optimal strategy, which some enterprises follow, is to save by reducing precaution costs. Here the savings that any one enterprise achieves can be substantial and the loss that it creates will not be borne exclusively by itself, but by other enterprises operating in that field. An obvious “tragedy of the commons” problem is involved. Moreover, even reliance on insurance can be both inefficient and unsuited to the goals of tort law. Since the system is based on standard terms, there is an automatic tendency to make premiums uniform for the various participants in the same activity. There is therefore no incentive for the single participant to use more efficient precautions, with the consequent failure of the deterrence potentiality of the system.

**CUSTOMARY LAW AND ENVIRONMENTAL LAW**

Law and economics, grounded as it is in American legal culture, seems likely to recommend the court system as the best way to approach environmental problems. Taking a comparative perspective, however, the institutional frame-

---

30 See F.I. Michelman, “Pollution as a tort: A non accidental perspective on Calabresi’s costs”, (1971) 80 Yale L. J. 647.
33 See ibid., at 54.
work of American law is not an independent variable. Outside American law, law and economics has a good chance of enriching its understanding by abandoning a rather parochial attitude and thinking about the institutional peculiarities of the system it wishes to analyse.12

Turning now to consider Ethiopian and Eritrean law with regard to environmental problems, as in many other African countries, state justice and other public institutions are very weak13; that is to say that the modern law layer does not seem able to govern environmental problems efficiently. However, if this layer cannot tackle a problem efficiently, one may still be able to find the proper solution elsewhere, perhaps in customary law with its decentralized hold on the territory.14 Collective property rights are usually combined with an inalienability rule in favour of future generations and are policed by local chiefs and/or elders. Thus they appear to many scholars to be projected into the future and environmentally protective by their very nature.15 One may add that, at the customary level, remedies for property-rights violations are focused on re-establishing social order and are enforced by a high level of social stigma which may ensure their deterrence role. Customary law, therefore, may guarantee a rather efficient level of environmental protection at least against smaller injuries.

THE PROPER ROLE OF MODERN TORT LAW IN ETHIOPIA AND ERITREA

At the risk of sounding ethnocentric, it is suggested that some aspects of the Western model of tort law are worth retaining as a tool for tackling environmental problems in Ethiopia and Eritrea. The issue at stake here is the correct level upon which the different solutions can be grounded. Because of its intrinsic localism and limited receptivity in the face of technological expertise, customary law in these two countries seems unable to provide an adequate approach to the macro-problems of environmental externalities.16 Moreover, as is known, there is a problem of effective enforcement of judicial decisions and generally of state-made rules.

So, in developing countries such as Ethiopia and Eritrea where the modern layer of the law is not rooted in the local tradition and therefore can be either chosen (among various models) or rejected,17 one could, without any cultural problem, bypass the historical phase that preceded the expansion of negligence
in (developing) Western countries. Indeed, considering the phenomenon of dualism (with its formal and informal market) and the massive presence of Western market actors, the efficient solution might call for a co-existence of tort law models. If the goal is to favour the growth of local enterprises which can play a role in the informal market, and not to sterilize the beneficial effects of foreign investment, a balanced tort law must use both strict liability and negligence rules. In the short and medium term, more friendly negligence law rules focused on a level of care positioned to guarantee the efficient level of precaution is probably advisable for damage created by local entrepreneurs; such levels should consider the foreseeability of the harm for a less equipped market actor.

On the other hand, strict liability, possibly focused on a market share mechanism, may be the most efficient rule to apply to Western investors and to public-owned local corporations. True, damages can be difficult to account for, but—besides the traditional justification grounded on the deep pocket argument—it would be sufficient to introduce devices (such as minimum levels of compensation related to a typical series of events) in order to make it possible to over-estimate rather than under-estimate damages, thus introducing a subsidy effect on the informal economy.

One should also consider the introduction of an insurance regime able to reflect the needs of weaker market actors. In a context in which the insurance market is not perfectly competitive, local enterprises should be allowed to purchase third-party insurance policies with low (maximum) ceilings for compensation. Such limits, by keeping low the cost of liability insurance (that is premium rates, which are usually graduated according to those ceilings of compensation), should favour the diffusion of third-party insurance also at this level. Stronger market actors may furthermore find incentives thereby to purchase first-party insurance, since they may be affected by the low level of compensation covered by insurance in case of harm created by weaker market actors (insured third parties).

AN EFFICIENT INTERNATIONAL ENVIRONMENTAL TORT LAW?

An approach to environmental problems is to look at them from a transnational perspective. At this level, the scarcity of concrete results is bewildering. The international community has so far adopted around 200 environmental agreements covering atmospheric, marine and land pollution, protection of wildlife and preservation of shared global resources. Most of these agreements were reached after the environmental emergencies of the 1970s. While some have been satisfactory, others remain largely rhetoric.

The best solution to such problems might be to re-think the allocation of Western aid, not only to re-direct resources in favour of non-polluting businesses (preferably engaged in producing primary goods), but also to promote a legal education which will foster a local legal culture and consciousness. This alternative respects freedom, gives individuals responsibility and, most importantly, does not impair the process of development. It promotes the development of specifically local legal rules to be applied by judges who should be the best product of their own legal culture. These judges should not be bureaucrats or politicians. They should be technocrats, social engineers and, most of all, scholars on the bench.

45 At that time, as has been seen (in 2 and 3), a vast number of growing industrial activities were allowed to externalize their costs with appalling consequences for the environment.
Consequently there must be a multilateral concerted effort, and especially technical co-operation, to develop this kind of legal culture.

In this perspective, and in conclusion, a few insights can be added about solving international problems. Any solution should reflect the need both to enhance monitoring and verification, and to provide more systematic funding; to make better use of international institutions, to create and/or expand supplemental regimes such as those related to liability and compensation, and to make international agreements effective by improving local and international judicial institutions. The need for incentives rather than authority to attain social goals is clear. Incentives, however, could be given to local groups (associations, trade unions, agricultural communities) working as private environmental attorney generals. International organizations should then be prohibited from giving aid to countries which do not respect international standards of environmental protection, and/or forced to grant aid that favours, directly or indirectly, sustainable environmental protection. There is also a need for decentralized enforcement.

With regard to tort law, fast and sufficient compensation to protect the environment should be provided by making the international organizations and the local states jointly liable. Residual liability (if they cannot be held liable on other grounds) could be grounded upon the failure to conform to the minimum standard of investments required, under the circumstances, to meet the monitoring of environmental quality. This, one hopes, is one way of applying the lesson of a charming Ethiopian fable, aptly entitled "The Idiot", whose moral is "the lid which refuses to fit its pot sooner or later shatters into a thousand pieces".