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Abstract

This Essay is an attempt to make sense of the author's experiences working with legal reform in Eritrea. Specifically, what might drive people who are intelligent and informed to create statutes that: (a) probably will not work (the problem of "legal absorption" or "legal transplants"); or (b) if applied will have adverse consequences. In this Essay, the author: Gives a brief introduction on Eritrea; uses an Eritrean intellectual property example to illustrate why countries adopt laws that seem opposed to their interests; gives a brief history of Africa and the transplantation of Western law; gives a brief history of Tax Law in sub-Saharan Africa; moves to a specific Eritrean example and show why we would expect Eritrea to avoid some of the problems; gives examples of how Eritrea has failed to avoid problems confronted by other sub-Saharan African States; and finally presents a possible explanation for the Eritrean drive toward Western legal models.

ESSAY

HOMOGENIZED LAW: CAN THE UNITED STATES LEARN FROM AFRICAN MISTAKES?

*Beverly I. Moran**

INTRODUCTION

This Essay is an attempt to make sense of my experiences working with legal reform in Eritrea. Specifically, I try to understand what might drive people who are intelligent and informed to create statutes that:

(a) probably will not work—in the sense that the rules as written will not be applied (the problem of "legal absorption" or "legal transplants"); or
(b) if applied—will have adverse consequences.

In this sense, the Essay moves away from the question of why Western law fails to thrive in foreign soil and toward an earlier point in the law making process. In other words, my question is: What makes Western law attractive to non-Western law makers in the first place given the long history of legal transplants and their failures?[1]

My main concern in asking these questions is the law of taxation. But, as illustration, I begin with an intellectual property example because it more easily sets the stage for understanding the problem—particularly for people without tax backgrounds.

In this Essay, I:

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1. *See generally*, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 35, 73-87, 100-01 (2d ed. 1993); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 398-400 (1991) ("The borrowing of legal rules and institutions often gives rise to strange and artificial rationalizations"); Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT'L LAW. 875, 883 (1999).

- Give a brief introduction on Eritrea;
- Use an Eritrean intellectual property example to illustrate why countries adopt laws that seem opposed to their interests (the pre-absorption question);
- Give a brief history of Africa and the transplantation of Western law in order to provide an historical framework;
- Give a brief history of Tax Law in sub-Saharan Africa in order to show that governments suffer more when tax laws fail than when other laws fail;
- Move to a specific Eritrean example and show why we would expect Eritrea to avoid some of the problems that have plagued other African countries' law reform;
- Give examples of how Eritrea has failed to avoid problems confronted by other sub-Saharan African States; and finally,
- Present a possible explanation for the Eritrean drive toward Western legal models.

I. *ERITREA: AN INTRODUCTION*

Eritrea is an East African nation located on the southern Red Sea. Across the Red Sea to its east lies Yemen, with Saudi Arabia to the northeast. On the west Eritrea borders the Sudan; on the southeast it borders Djibouti; and to the south, lies Ethiopia.[2]

Eritrea has two distinct regions: a highlands traditionally dominated by Christians—particularly Christians from the Tigrinya-speaking ethnic group—and a Muslim lowlands where all nine of its major ethnic groups reside.

Eritrea received its independence in May 1991 after a thirty-year war waged against the Ethiopian regime of the Emperor Haile Selassie and the socialist government that followed the Emperor, which was known as the "Derg."[3]

There has been some relationship between Eritrea and Ethiopia since biblical times. The nature of that relationship is subject to tremendous dispute, especially given the recent Eritrean war against the Derg and the present Eritrean conflict with the new Ethiopia. Rather than enter into those disagreements, I

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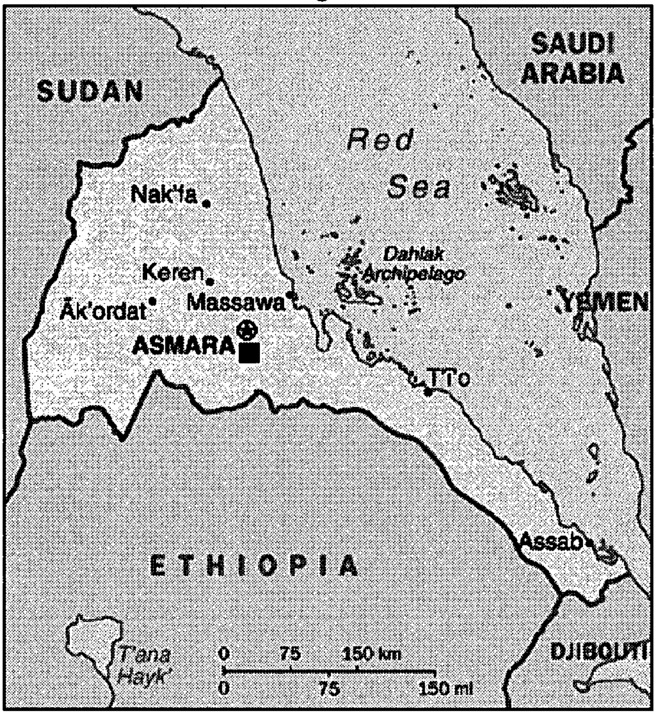
2. Figure 1 shows the geographic location of Eritrea. *See Eritrea*, http://www.state.gov/p/af/ci/er.

3. Amharic for "committee."

Fig. 1



shall give a short (and I hope uncontroversial) history of Eritrea, which necessitates some reference to Ethiopia.[4]

During the first thousand years of the Christian era, Eritrea was part of the Aksumite Kingdom. Aksum was a powerful trading nation that maintained relations with the Eastern and Western Roman Empires, Egypt, and various Arab kingdoms.[5]

4. The history of both Ethiopia and Eritrea is very controversial and quite frankly, is beyond the scope of this article. The history I present is intended to provide background information for the purpose of a tax discussion. Sources that focus on the history of these two countries are numerous. For the interested reader, see generally ERITREA AND ETHIOPIA FROM CONFLICT TO COOPERATION (Amare Tekle ed., 1994); ETHIOPIA AND ERITREA: A DOCUMENTARY STUDY (Habtu Ghebre-Ab ed., 1993); THE LONG STRUGGLE OF ERITREA FOR INDEPENDENCE AND CONSTRUCTIVE PEACE (Lionel Cliffe & Basil Davidson eds., 1988); HAROLD G. MARCUS, A HISTORY OF ETHIOPIA (1994); RICHARD PANKHURST, ECONOMIC HISTORY OF ETHIOPIA 1800-1935 (1968) [hereinafter PANKHURST, ECONOMIC HISTORY OF ETHIOPIA]; MARGERY PERHAM, THE GOVERNMENT OF ETHIOPIA (1969); 1 PROCEEDINGS OF THE ELEVENTH INTERNATIONAL CONFERENCE OF ETHIOPIAN STUDIES 1-373 (Bahru Zewde et al. eds., 1994); BAHRU ZEWDE, A SHORT HISTORY OF ETHIOPIA AND THE HORN (1998).

5. *See* RICHARD PANKHURST, ECONOMIC HISTORY OF ETHIOPIA EARLY TIMES TO 1800, at 16-24, 36-39 (1961) [hereinafter PANKHURST, EARLY TIMES]; Semere Haile, *Historical*

Christianity arrived in Eritrea in the 4th century A.D. and has remained strong in the highlands to the present day.[6] Islam penetrated the lowlands sometime later where it continues to flourish.[7] Starting in the 1400s, parts of what are now the Eritrean lowlands were dominated by various Muslim rulers including the Adal Sultanate (15th–19th century A.D.), the Aussa Sultanate (16th–19th century), the Egyptians (18th century), and the Ottoman Turks (16th–19th centuries).[8]

In the 14th century, Eritrea was recognized by Abyssinia as a vassal state.[9] The Abyssinian Empire was made up of a series of provinces that were ruled by kings who were supported by circles of under lords and peasants.[10] These kings were inconsistent in their abilities and resources. Accordingly, in each generation, one king would rise above his peers to the position of Emperor.[11]

By the early 1800s, Ethiopia was a diminished Empire. In contrast to the Middle Ages, 19th century Ethiopia began with weak emperors surrounded by strong kings.[12] Within this system, much of present-day Eritrea was included in the most important Ethiopian province, Tigray.[13] The present Eritrean Christian highlands were controlled by Ras Walda Selassie,[14] while the present Eritrean Muslim lowlands were in the hands of a semi-autonomous chief (the "Naib of Arkiko") who ruled subject to the Ottoman Empire.[15]

In Tigray, Ras Walda Selassie was followed by Dajazmach Wube (1839-1855) and Ras Kassa who later became Emperor Yohannes (1872-1889).[16] During this period, the Ottoman Turks usually controlled the Red Sea while the Eritrean port city

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Background to the Eritrea Conflict, *in* THE LONG STRUGGLE OF ERITREA FOR INDEPENDENCE AND CONSTRUCTIVE PEACE 11-12 (Lionel Cliffe & Basil Davidson eds., 1988).

6. *See* Haile, *supra* note 5, at 12.

7. *See id.*

8. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 61, 65-66, 74-80, 105-06, 110; PERHAM, *supra* note 4, at 13, 36-37.

9. *See* PERHAM, *supra* note 4, at 12-13.

10. *See* ZEWDE, *supra* note 4, at 60; MARCUS, *supra* note 4, at 28.

11. *See* MARCUS, *supra* note 4, at 30-47; Haile, *supra* note 5, at 16.

12. *See* MARCUS, *supra* note 4, at 48-49; Haile, *supra* note 5, at 16.

13. *See* PERHAM, *supra* note 4, at 16.

14. *See* Haile, *supra* note 5, at 15.

15. *See id.* at 14-15; PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 529.

16. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 2-19.

Massawa passed between Ethiopian, Turkish, British, and Italian control.[17]

Assab, now an important Eritrean port, was purchased by an Italian firm in 1869, and was declared an Italian colony in 1882.[18] This was followed by the Italian occupation of Masawa in 1885.[19] Eritrea was established as an Italian colony in 1889.[20]

The Italian occupation of Eritrea lasted until World War II when Eritrea fell into British hands from 1941-1950.[21] In 1950, the United Nations turned Eritrea over to Ethiopia.[22] Although the arrangement began as a federation, the Emperor Haile Selassie incorporated Eritrea into Ethiopia in 1962.[23] This led to the resistance struggle, which continued through the Derg until independence was achieved in 1993.[24]

II. *THE PROBLEM OF LEGAL ABSORPTION—AN INTELLECTUAL PROPERTY EXAMPLE*

A. *Eritrean Commercial Law—Where Does It Come From?*

Eritrea currently operates under the Ethiopian Commercial Code. The Ethiopian Commercial Code was adopted in 1960.[25] The Code was commissioned by Emperor Haile Selassie who engaged French lawyers to write his Civil and Commercial Codes.[26] As a result, the Ethiopian Commercial Code is based on the French Commercial Code existing in the mid-20th century as interpreted by French courts of that period. From its adoption in 1960 to date, there have been few, if any, changes in the Ethio-

17. *See id.*; Haile, *supra* note 5, at 14-15.

18. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 17.

19. *See id.* at 18, 166.

20. *See id.* at 19; Haile, *supra* note 5, at 14-16.

21. *See* PERHAM, *supra* note 4, at 484.

22. *See id.* at xxi, 499, 502.

23. *See id.* at xxxiii.

24. *See* LUCA G. CASTELLANI, RECENT DEVELOPMENTS IN LAND TENURE LAW IN ERITREA, HORN OF AFRICA 1 (Land Tenure Center, Univ. of Wisconsin, Madison, WI, Working Paper No. 37, 2000); *see also* Mengesteab Negash, *Investment Laws in Eritrea*, 24 N.C. J. INT'L L. & COM. REG. 313, 314-15 (1999). Eritreans began the armed struggle against Ethiopia in September 1961, and defeated the Ethiopian army in May 1991. *Id.* Eritreans formally declared independence in May 1993. *Id.*

25. *See* BACKGROUND DOCUMENTS OF THE ETHIOPIAN COMMERCIAL CODE OF 1960, at iv, 37 (Peter Winship ed., 1974).

26. Professor René David drafted the Civil Code and Professor Jean Escarra drafted the Commercial Code. *See id.* at 164 n.1.

pian Commercial Code.[27]

Because of its age, the Eritrean Commercial Code lacks certain provisions that appear in later Western codes. Specifically, for our example, the Eritrean Commercial Code lacks rules concerning the protection of patents, copyrights, and trademarks. These intangible property rights that are so important in Western law are referred to collectively as "good will" in the Eritrean Commercial Code.[28]

Currently Eritrean legal reform emphasizes the need to expand protections for "good will" in the Revised Eritrean Commercial Code, which is essentially a revision of the 1960 Ethiopian Code.

B. *Problems with Revisions to Protect "Good Will" in the Eritrean Commercial Code*

There are two problems with the expansion of protections for "good will" in the Eritrean Commercial Code. One problem has to do with a strong Eritrean interest in economic development. The second problem has to do with the Eritrean lack of legal resources.

1. The Economic Development Problem

In order to understand the economic development problem associated with "good will," I ask you to engage in a thought experiment. Name an American or a Japanese brand name. You should be able to name a dozen without a moment's thought.

Now, try to name: an Indonesian, a Malaysian, a Singaporean, or a Hong Kong brand. I suspect that there was not a single brand you could name unless you have lived in these countries.

The purpose of this experiment is to illustrate that "good will" is not equally distributed across all economies. Instead, "good will" is primarily a property right that resides in the most developed ("OECD") nations. Not only do lesser developed countries ("LDCs") lack the property rights known as "good

27. For the Ethiopian Commercial Code, see COMMERCIAL LAWS OF THE WORLD, ETHIOPIA 1 (Foreign Tax Law Publishers, rev. Nov. 1997).

28. *See* ETH. COMM. C. ch. 2, § 1, arts. 100, 127, 130. Article 100 discusses the consistency of a business. *See id.* art. 100. Article 127 discusses good will and incorporeal elements. *See id.* art. 127. Article 130 defines "good will." *See id.* art. 130.

will," the protection of "good will" is not in the interest of lesser developed countries.

To understand how important this concept is, let us reflect on the history of economic development in sub-Saharan Africa. Every African country entered into its post-colonial era searching for a way to achieve rapid development.[29]

In the 1960s and 1970s, the economic development model for sub-Saharan Africa was the Soviet Union ("USSR") and the People's Republic of China ("PRC").[30] There were many reasons for these countries' attractiveness to emerging sub-Saharan States. The USSR's rapid expansion after its total devastation during World War II and the PRC's own colonial past and economic success were just two aspects of that attraction.[31]

In addition to the economic miracle represented by the USSR and PRC, Socialist law and politics were attractive to Africans because Socialist philosophy legitimizes African political trends as reflected in many sub-Saharan African countries both inside and outside the socialist sphere.[32] These political trends include single party States, military rule, a subordinate judiciary and legal system, and government control of natural resources.[33]

Further, neither the USSR nor PRC had an African colonial history. They were, therefore, less hated by African elites.[34] In

29. *See* Goran Hyden, *Development: Trends and Issues*, *in* 1 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 424, 425 (John Middleton ed., 1997).

30. *See* MICHAEL HODD, THE ECONOMIES OF AFRICA 34-35 (1991).

31. *See id.*; *see also* Salacuse, *supra* note 1, at 883.

32. *See* Samir Amin, *Neocolonialism*, *in* 3 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 286, 290-91 (John Middleton ed., 1997); Robert J. Berg, *Development: Models of Social and Economic Development*, *in* 1 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 429-30 (John Middleton ed., 1997); HODD, *supra* note 30, at 34-35; E. Wayne Nafziger, *Exchange and Market Systems: National and Regional Systems*, *in* 2 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 110 (John Middleton ed., 1997).

33. *See* Amin, *supra* note 32, at 290; Berg, *supra* note 32, at 430; William J. Foltz, *Military Government and Armies*, *in* 3 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 156-57 (John Middleton ed., 1997); Rhoda E. Howard, *Human Rights*, *in* 2 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 355-56 (John Middleton ed., 1997). These characteristics are part of many contemporary African States whether socialist or not. These political aspects of the State allow one ethnic group to control and dominate another. *See id.* This pattern of ethnic domination is a common bond between African political systems and Socialist States. *See id.*

34. *See* GEORGE B.N. AYITTEY, THE END OF AFRICAN SOCIALISM? 3 (The Heritage Lectures No. 250, 1990) [hereinafter AYITTEY, END OF SOCIALISM]; Amin, *supra* note 32, at 286, 290-91; HODD, *supra* note 30, at 34; *see also* Jeffrey Sachs, *Growth in Africa: It Can Be Done*, ECONOMIST, June 29, 1996, at 19-20 (explaining that African nations were skeptical of free trade because of years of colonization by open-market countries).

addition, during the Cold War, the ability to play Western States against Communist States was a way to increase foreign aid.[35] Finally, American development experts, the European Economic Community, and the World Bank copied Soviet models, favoring single-party and strong state intervention as a means to development.[36]

In the 1980s and 1990s, the economic development model for sub-Saharan Africa shifted from the USSR and the PRC toward East and Southeast Asia.[37] That shift is not surprising when we consider that, in the 1960s, Ghana and Singapore were considered on the same economic level.[38] Yet, today, no one calls Singapore a Third World nation while Ghana and the rest of Africa remain behind the development curve. However, just as the African interest in the USSR and PRC had more to it than economic development, so does the African attraction to emerging Asia. Although the Asian economic miracle is one major reason for the African attraction towards the mid-level Asian states, similar political structures make the Asian states attractive as well.[39]

So how did the Indonesians, Malaysians and Singaporeans achieve their economic development? In part, by stealing Western "good will."[40] By producing "knock-off" Calvin Klein jeans

35. *See* Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167, 174 (1997).

36. *See* GEORGE B.N. AYITTEY, AFRICA IN CHAOS 269-71 (1998) [hereinafter AYITTEY, AFRICA IN CHAOS]; AYITTEY, END OF SOCIALISM, *supra* note 34, at 2; Amin, *supra* note 32, at 290. It was believed that democracy and free enterprise would be injected into the system once the economies of these African countries were solidified. *See id.* Ruth Gordon stated, "[p]ostcolonial institutions were prescribed on top of the still-existing coercive and anti-democratic structures of the colonial era." Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 532 (1999) [hereinafter Gordon, *Growing Constitutions*].

37. *See* David L. Lindauer & Michael Roemer, *Legacies and Opportunities*, *in* ASIA AND AFRICA: LEGACIES AND OPPORTUNITIES IN DEVELOPMENT 1, 5-6, 23 n.5 (David L. Lindauer & Michael Roemer eds., 1994); *see also* Salacuse, *supra* note 1, at 882-83.

38. *See* Kenneth M. Kauffman & Helena Stalson, *U.S. Assistance to Less Developed Countries, 1956-65*, 45 FOREIGN AFF. 715, 716 (1967) (categorizing Ghana and Singapore as "Less Developed Countries").

39. Singapore, for example, although clearly not socialist, mirrors many of the political features of African States, e.g., single party politics, military dominance, and a subordinate judiciary. *See* 2 FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, SINGAPORE: A COUNTRY STUDY 184-85, 192-93, 197-98, 237 (Louis R. Mortimer ed., 1991).

40. *See generally*, David Holley, *South Korea's Counterfeiters Make It Hard to Knock Off Knockoffs*, L.A. TIMES, Jan. 8, 1996, at D1; Carol Pucci, *Sell, Sell: Bye-Bye-Hong Kong, the Capital of Capital, Is on the Brink of Political Transition*, SEATTLE TIMES, Mar. 3, 1996, at K1;

and Rolex watches, Asia moved ahead while Africa stayed behind.

Obviously, the theft of "good will" is not the whole explanation for Asia's economic advancement. Yet, to the extent that the story of Asia's development reveals anything, it certainly argues against protecting other countries' "good will."

2. Limited Legal Resources

Eritrea is like most LDCs in at least two respects: it has limited legal resources and it has a great interest in economic development. Having discussed why Eritrea's economic development argues against the protection of "good will," let us now turn to why limited legal resources argue against the protection of "good will" in the Eritrean Commercial Code.

Apart from symbolic impact, law is useless without enforcement—whether by the State or by social convention.[41] Enforcement creates problems of interpretation because government workers and others involved in the State-run legal system must know what to enforce.[42] Both enforcement and interpretation require legal resources. Yet, most LDCs have very few legal resources.

Eritrea is particularly vulnerable in this regard. Eritrea has no more than 100 lawyers and almost no paralegal workers.[43] Based on a population of over 3,000,000, even a Japanese model would predict approximately 500 lawyers in that country plus a wide variety of other legal professionals.[44] Accordingly, Eritrea

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Nick B. Williams, Jr., *Thai Producers Grapple with Growing Piracy: Protection Issue Simmers As Moral, Economic Dilemma*, L.A. TIMES, Mar. 14, 1988, § 4, at 2.

41. *See* Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, *in* READINGS ON THE SOCIAL STUDY OF LAW 509, 510-12 (Stewart Macaulay et al. eds., 1995).

42. *See* Shari Seidman Diamond, *Directing Legal Change and Its Impact*, 2 APPLIED SOC. PSYCHOL. ANN. 139, 142-45 (Leonard Bickman ed., 1981); Doreen McBarnet, *Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?*, 15 J.L. & SOC'Y 113, 113-14 (1988); Doreen McBarnet, *Whiter Than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma*, 42 BRIT. J. SOC. 323, 323-24 (1991).

43. *See* Negash, *supra* note 24, at 375-76.

44. *See* Toshimitsu Takaesu, *Japan's Legal System's More Than the Sum of U.S. Lawyers*, SEATTLE TIMES, July 24, 1994, at B5 (stating that the number of official lawyers in Japan is approximately 16,000 to serve a population of 125,000,000). However, in Japan, nonlawyers perform much of the work performed by lawyers in the United States. *See id.*; Neil Boyden Tanner, *The Failure of International Law to Internationalize the Legal Profession*, 17 J.L. & COM. 131, 134-38 (1997).

has little hope of enforcing any law, much less a law that works against its economic interests.

When a country has so few legal resources, it should be extremely careful about how those resources are spent, particularly if these resources are used to protect another country's property rights. Yet, there is no doubt that the Eritrean Commercial Code will give greater protections to "good will."

III. *HISTORY OF SUB-SAHARAN AFRICA AND ITS ADOPTION OF WESTERN LAW*

The answer to why countries make legal choices must come, at least in part, from legal context, that is, the interaction of history and culture with legal rules.[45]

The Eritrean legal context is part of the larger African context. Accordingly, this part of the Essay gives some very basic background into the forces that helped shape modern law reform in Eritrea in particular and in sub-Saharan Africa in general. In other words, how does Western law look when it comes to Africa?

A. *The Colonial Era*

In general, in sub-Saharan Africa's Colonial era, we see almost no transfer of Western law to Europe's sub-Saharan African subjects.[46] Instead, we see Western law applied almost exclusively to European colonists with some general European rules imposed on parts of the urban African population.[47] For example, in litigations involving at least one European. Given that most Africans lived outside urban areas, often because they were not allowed to reside in colonial cities, the majority of the African population used traditional law during the colonial period.[48] Although customary court decisions were subject to colonial control and traditional law was subject to "repugnancy" tests,[49]

45. *See* E. ADAMSON HOEBEL, THE LAW OF THE PRIMITIVE MAN 5-17 (1st ed. 1954).

46. *See* KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 173-74 (1992); AYITTEY, AFRICA IN CHAOS, *supra* note 36, at 85-86; Sally Falk Moore, *Law: Customary Law, in* 2 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 526, 529 (John Middleton ed., 1997).

47. *See* Falk Moore, *supra* note 46, at 526, 529; *see also* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Nation*, 12 AM. U. J. INT'L L. & POL'Y 903, 934-35 (1997).

48. *See* Falk Moore, *supra* note 46, at 527.

49. *See id.*

Western law, like the Chinese Emperors, remained far away from most native populations.

B. *Post-Colonial Era*

After independence, a different pattern emerged. In part as a response to the drive for development, and in part as an attempt to become modern States, African States began adopting Western laws and attempting to apply these laws to the general population.[50] However, this African movement toward Western law often failed because of the problem of legal absorption, that is, State-created rules that exist on paper but which are ignored in practice because the population continues to rely on a rich traditional legal system.[51]

IV. *LEGAL ABSORPTION AND TAX LAW*

The failure of Western law to take root in foreign soil has mixed results. Sometimes the failure is not a great problem because other institutions fill the gap. For example, in bankruptcy or in contract disputes, traditional rules and long-standing course of dealings handle transactions outside Western law.[52] Consider that ten years after the adoption of the Ethiopian Commercial Code, John Beckstrom found that there was not one bankruptcy filed in Addis Ababa, the capital city and the major trading and legal center for all of Ethiopia.[53] Yet, this failure was not problematic because traders continued to use traditional methods to handle firm failures.[54]

However, relying on other institutions is not an option in taxation because, generally, there is no other institution to fill the gap. This lack of alternative institutions results because—as opposed to contract or bankruptcy law, where the people involved are motivated to work things out in order to have contin-

50. *See* Gordon, *Growing Constitutions*, *supra* note 36, at 542, 550; Basil Davidson, *Nationalism*, *in* 3 ENCYCLOPEDIA OF AFRICA SOUTH OF THE SAHARA 270-71 (John Middleton ed., 1997); Falk Moore, *supra* note 46, at 528-29; Hyden, *supra* note 29, at 429.

51. *See* B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 24-25 (1973); Gordon, *Growing Constitutions*, *supra* note 36, at 542-43, 546-47; Falk Moore, *supra* note 46, at 528-29.

52. *See* Falk Moore, *supra* note 46, at 528-29.

53. *See* John H. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 AM. J. COMP. L. 557, 570 (1973) (citing Ross & Zemarian Berhe report on doing business in Addis Ababa).

54. *See id.* at 573-74.

uing relationships—in tax law, avoidance is often the only motivation. The fact is that no one wants to pay taxes, and this attitude makes tax administration and enforcement extremely important. Applying a second thought experiment to illustrate the point, how many of us would commit multiple murders if we thought we could avoid punishment? In contrast, how many of us would pay our taxes if we thought we could escape payment and avoid punishment?[55]

True, there are alternatives to taxation just as there are alternatives to bankruptcy. But alternatives to taxation are more harmful to the central State than most other types of alternative legal systems. For example, people sometimes pay tributes either to local organizations, elders, mafias, or landlords who then distribute governmental benefits such as distribution of grazing rights.[56] However, these alternative institutions threaten the central state from the bottom up by depriving the state of funds and making it irrelevant besides.

V. *AFRICAN TAX LAW*

The history of taxation in Africa would not predict the African tax systems we see today. In fact, for most of its history, Africa had fairly efficient to very efficient tax systems. In other words, Africa has both traditional and colonial models that raised large revenues at low administrative costs. Yet today these systems are neglected in favor of Western tax models that are less successful.

A. *Traditional Systems*

Traditional taxation in sub-Saharan Africa mirrors traditional taxation in the rest of the world. Thus, "in-kind" taxation was the dominant African model, which is no surprise given that "in-kind" taxation was the primary mode of taxation throughout most of human history. For example, the Old Testament story of Ruth and Naomi illustrates a type of "in-kind" taxation.[57] "In-

55. *See* Leo P. Martinez, *Taxes, Morals, and Legitimacy*, 1994 BYU L. REV. 521, 548-67 (1994).

56. *See* PERHAM, *supra* note 4, at 191, 193; *see also* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 504-05.

57. Naomi and Ruth returned to Bethlehem at the beginning of the barley harvest. For food, Ruth was allowed to gather the grain left behind by the reapers. *See Ruth* 1:22-2:23.

kind" taxation existed in Japan into the late 19th century.[58] In contemporary Europe we see "in-kind" taxation in the form of required national service. In the Eritrean context we see "in-kind" herd taxes as late as the Haile Selassie regime.[59] Today, some oil producing countries continue to collect taxes "in kind."[60]

Without an established monetary system, most tax collection must be "in kind."[61] Pre-colonial African tax systems, like other pre-modern tax systems, addressed the challenge of no common monetary source by diversifying payment type. Based on what each region produced, the collector might demand cotton, cloth, ivory, gold, crops, or domestic animals.[62] Often, these taxes supported great Empires not only in Abyssinia but in Western and Southern Africa as well.[63]

B. *Taxation in Eritrea before Italian Colonization*

Richard Pankhurst is the main source on historical tax systems in Ethiopia. Pankhurst identifies thirteen items subject to tax in Tigray (the Ethiopian province now partially included in modern Eritrea).[64] These taxes were almost exclusively paid "in

58. The late 19th century saw the imposition of cash payment of taxes in Japan. Before that, the Japanese economy was a subsistence economy. *See* Harry T. Oshima, *Meiji Fiscal Policy and Agricultural Progress*, *in* THE STATE AND ECONOMIC ENTERPRISE IN JAPAN 353, 362-63 (William W. Lockwood ed., 1965); *see also* WILLIAM W. LOCKWOOD, THE ECONOMIC DEVELOPMENT OF JAPAN: GROWTH AND STRUCTURAL CHANGE 9, 521 (1968). However, "in-kind" agricultural taxes were collected in Japan immediately after World War II. *See* RICHARD GOODE, GOVERNMENT FINANCE IN DEVELOPING COUNTRIES 75-76 (1984).

59. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 504-10.

60. *See* GOODE, *supra* note 58, at 75-76.

61. *See* PERHAM, *supra* note 4, at 190.

62. *See id.* at 191-92.

63. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 514-20.

64. These taxes were:

Fasas – a tax on grain measured by the number of oxen owned;
Hudad – a tax paid in money in lieu of harvesting and cultivating state lands;
Mar – a tax paid in honey;
Asrat – one tenth of harvested crops;
Frida – tax paid in cattle;
A tax paid on grain measured by the amount collected by tax collectors and paid to the collector;
A tax paid in livestock or honey on feast days;
Banquets for visiting officials;
A tax consisting of beer, meat and bread on feast days;
The contribution of labor for building;

kind" or "in labor."[65] For example, Tigray farmers were obligated to give labor in the form of ploughing, harvesting, and sowing seeds.[66]

Because amounts were not consistent, it is difficult to say what was paid in any particular period.[67] Pankhurst reports a ten percent harvest tax in the 1830s and a tax of one cow in the dry season and half of all sterile cattle.[68] Sometimes serfs were required to give butter based on the number of sheep and goats herded.[69] In western Eritrea, serfs were required to give the tongue of all cattle slaughtered for weddings and funerals and the breast and fillet of all cattle slaughtered for other reasons.[70]

The pre-colonial tax systems were part of a wealth redistribution network in which the central government, provincial rulers and nobles, government workers, and clergymen lived off the flow of tribute up from the peasant and merchant classes and down again to the poor.[71] The taxes were set from above by one level of ruler over another until the obligation rested at the village level with the *chiqa shum* ("local chief") who was required to meet the quota set by his lord.[72]

The Abyssinian political system allowed for a series of tax collections. Village chiefs were the actual collectors of agricultural taxes of crops and animals.[73] The Eritrean Rural Agricultural Income Tax, which is designed to be collected and administered on the local level, reflects this system today.[74] Merchants, who paid the required sum in advance, generally collected the non-agricultural taxes based on local practice.[75] Taxation was

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A tax on livestock;

A cash tax on weaving;

A tax for the telephonist, if there was one, paid in grain.

See id. at 514.

65. *See id.* at 504; *see also* PERHAM, *supra* note 4, at 190.

66. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 511.

67. *See id.* at 504-05.

68. *See id.* at 506-08.

69. *See id.* at 508.

70. *See id.*

71. *See id.* at 504; *see also* PERHAM, *supra* note 4, at 191-93.

72. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 505, 533.

73. *See id.* at 504-08.

74. *See Legal Notice No. 20/1995 Income Tax Regulations, Legal Notice No. 21/1995 Rural Agriculture Income Tax and Cattle Tax Regulations, in* GAZETTE OF ERITREAN LAWS, Vol. 5/1995 No. 5, July 20, 1995 (Eritrea).

75. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 519-20, 524-25.

fairly arbitrary because it had no regularly set season or rate.[76] Often, taxation was burdensome.[77]

Local governors collected taxes at territorial borders.[78] In Tigray, the fee was paid in pepper, cloth, and glass.[79] These custom charges were imposed as frequently as every twenty miles.[80] Thus, from Massawa to Addis Ababa, a merchant could pay customs as many as twenty times.[81] These internal trade taxes were large revenue producers and consequently difficult to reform.[82] Even pressure from France, England, and Italy did not produce significant modification.[83]

Import and export duties over foreign borders were slower to materialize.[84] They were most successful in Massawa where Turks, Egyptians, and the Naib collected port duties, head taxes on slaves and traders, and duties on imports, exports, and foreign travelers.[85] Ras Kassa, who later became Emperor Yohannes, also instituted a tax on looms.[86] Market taxes on purchased goods were charged in the larger trading centers.[87]

The amount each king raised varied from region to region and is difficult to express in dollars given how much was collected "in kind."[88] However, certain kings, including the Naib of Arkiko and Emperor Yohannes did well under any measure.[89]

C. *Sub-Saharan African Colonial Taxation in General*

In general, colonial tax systems were some of the most clever ever devised. Because the only point of these tax systems was to raise revenues as cheaply as possible, colonial tax systems

76. These *chiqa shum* retained their positions through many administrations and so presented a level of consistency to average people even when there were massive shifts in the upper echelons of power. *See id.* at 504-05.

77. *See id.* at 504-06.

78. *See id.* at 521.

79. *See id.*

80. *See id.* at 522-23.

81. *See id.* at 522.

82. *See id.* at 524-26.

83. *See id.*

84. *See id.* at 527-29.

85. *See id.* at 529-31.

86. *See id.* at 510.

87. *See id.* at 520.

88. *See id.* at 505, 533-40.

89. *See id.* at 536.

were simple, efficient, and ruthless in their ability to raise revenues at little or no economic or political cost.

The classic Colonial African tax was the schedular system used by the French and the Belgians.[90] In a schedular system, the government identifies two or three types of easily collected income groups—for example, government employee salaries and rents received from urban housing—and taxes only those items.[91] Thus, many of the concepts that we expect in a Western tax system drop out of schedular tax systems. For example, the fairness of horizontal equity (people with equal incomes paying equal amounts of tax) is absent from a schedular system.[92]

Further, in a schedular system, each income type is taxed differently based on the government's view of that item's tax avoidance potential. As a result, government employees might face a ten percent rate because they cannot lie about the amount of their government salary, while business people might face a fifty percent rate because of their ability to hide income.[93]

In contrast to the French and Belgians, the English claimed to follow a unitary (global) pattern in their African colonial tax systems, although this claim may have been more rhetorical than real.[94] A unitary tax system claims to reach all types of income.[95] Yet, we know that the Hut tax imposed by the English in Kenya, subjecting only one type of property to tax, had more in common with schedular taxes than global taxes.[96]

90. *See* Richard Goode, *Implementing Tax Reform in Sub-Saharan Africa*, *in* AFRICA BUREAU OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, TAX POLICY FOR SUB-SAHARAN AFRICA: PAPERS AND PROCEEDINGS 17 (USAID Doc. No. PN-ABE-524, Oct. 29-30, 1987).

91. *See id.* ("In a pure schedular system, each of the principal income flows—salaries and wages, earnings from professional activities, business profits, dividends and interest, rent—is subject to a separate, flat-rate schedular tax, and rates differ among the schedules.").

92. *See id.* at 5.

93. *See* RICHARD M. BIRD, TAX POLICY AND ECONOMIC DEVELOPMENT 11 (1992); Goode, *supra* note 90, at 18. These differential rates are somewhat similar to American tax rules on certain business deductions such as the 50% limit on meals under I.R.C. § 274. *See* 26 U.S.C.A. § 274 (1997).

94. *See* BIRD, *supra* note 93, at 88-89; Goode, *supra* note 90, at 17.

95. *See* Goode, *supra* note 90, at 19.

96. *See* MARJORIE RUTH DILLEY, BRITISH POLICY IN KENYA COLONY 239-47 (2d ed. 1966); *see also* JOMO KENYATTA, FACING MOUNT KENYA: THE TRADITIONAL LIFE OF THE GIKUYU 77 (African Writer Series 1979) (stating that British Government imposed heavy taxes on owners of huts).

D. *Taxation in Eritrea in the Colonial Era*

The modern Eritrean tax system shifted away from the Ethiopian tax system at the beginning of Italian colonization.[97] In 1898, the Italians abolished "in kind" taxes in favor of cash payments.[98] This created problems for peasants who had little access to cash.[99]

In the Italian colony of Eritrea, there were two major taxes: *tasse* and *imposte*.[100] These taxes were mostly imposed on Italian colonialists. However, the taxes also applied to Eritreans who stood in the same shoes as colonists, for example, Eritrean merchants.[101]

The most important tax was a *tassa* on business, which corresponded to the Italian registry tax.[102] In many ways, the *tassa* corresponds to the American understanding of a stamp tax because it was collected through the sale of special stamps. The *tassa* applied to every kind of transaction (both civil and commercial),[103] and on inheritance.[104] The *tassa* on business operations was sometimes fixed and sometimes proportional.[105] The Italian government also imposed *tasse* on mortgages, documents drafted by a notary public, hunting licenses, trademarks, cars, and the provision of health services.[106]

The main *imposta* was on real estate.[107] It was paid according to the estimated net income from the property.[108] Another important *imposta* was on income.[109] This income tax was progressive.[110] It applied to people with a trade, professionals, re-

97. Italian occupation of Massawa began in 1885, and established as an Italian colony in late 1889. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 19; *see also* CASTELLANI, *supra* note 24, at 3.

98. *See* PANKHURST, ECONOMIC HISTORY OF ETHIOPIA, *supra* note 4, at 510.

99. *See id.*

100. *See* ERNESTO CUCINOTTA, ISTITUZIONI DI DIRITTO COLONIALE ITALIANO § 286, at 365-66 (1930).

101. *See id.* § 287, at 367-68.

102. *See id.* at 367.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

tailers, and providers of goods in general.[111] Public clerks were initially exempted, but they were made subject to the tax after 1928.[112]

Italian colonial municipal governments had the right to levy taxes on the municipal level independent of the Italian government in Rome.[113] These *tasse* were imposed on retail commerce and commercial (but not traditional) slaughtering.[114]

African Eritreans were subject to two special *imposte*. First, all local populations were forced to pay a "tribute on indigenous populations," which was fixed yearly by a royal decree according to the political and economic condition of the people following the advice of the Superior Colonial Council and the Ministries Council.[115] This tribute was levied according to local custom with the help of local chiefs.[116]

The second *imposta* dealt with the use of State lands.[117] Because the State owned these lands, they were not directly subject to tax.[118] Nevertheless, the use of the lands by local people following traditional customs was taxed.[119]

E. *Modern African Tax Systems*

Post-colonial tax systems follow the pattern of other African legal systems. Just as in other legal matters, the newly independent African nations tended to reject traditional law and adopt Western law in its place.

Today most African countries have a number of different taxes including:

1. Import and export taxes—usually producing about twenty-five to fifty percent of tax revenues for the period between 1992 to 1998;[120]

111. *See id.* § 287, at 367-68.

112. *See id.*

113. *See id.* at 368.

114. *See id.*

115. This *imposta* was called "tributo sulle popolazioni indigene." *See id.* § 288, at 368.

116. *See id.* at 369.

117. *See id.* at 368. This *imposta* was called "imposta fondiaria." *See id.*

118. *See id.* at 369.

119. *See id.*

120. Current and complete data on tax revenue in sub-Saharan Africa is difficult to locate. The most complete data for the region is from 1985. *See* WORLD BANK, LESSONS OF TAX REFORM 16 (1991) [hereinafter LESSONS OF TAX REFORM]. More current data is

2. Sales and excise taxes—usually producing about fifteen to thirty percent of tax revenues for the period between 1992 to 1998;[121]
3. Income taxes—which are, in reality, almost always company and wage taxes given the difficulty of identifying other income sources,[122] producing about ten percent of tax revenues for the period between 1992 and 1998;[123]
4. Stamp taxes;[124]
5. Wealth taxes (generally property and agricultural taxes)—which produce very little revenue.[125]

reported for various time periods. *See* INTERNATIONAL MONETARY FUND, GOVERNMENT FINANCE STATISTICS YEARBOOK 4, 186, 246, 376, 434 (1999). Tables 1 and 2 present data on tax revenue. For the countries listed in Table 2, import and export tax revenue averaged 33.55% of total revenue over the 1992 to 1998 period. Guinea reported the highest percent of total revenue 75.14% (1998), while South Africa reported the lowest import and export tax revenue, .26% (1997) of total revenue. *Id.* at 186, 376.

121. For the countries listed in Table 2, general sales tax and value added tax ("VAT") revenue averaged 13.10% of total tax revenues over the 1992 to 1998 period. *See* INTERNATIONAL MONETARY FUND, *supra* note 120, at 4, 186, 246, 376, 434. Excise tax revenue averaged 9.39% of total revenue for the same period. *See id.* at 22, 68, 82, 85, 89, 107, 109, 114, 150, 165, 175, 186, 228, 246, 259, 270, 283, 288, 353, 364, 366, 376, 408, 434, 437. General sales and VAT tax revenue varied from a high of 31.61% of total revenue in the Gambia (1993) to a low of 2.34% of total revenue in Republic of Congo (1997). *See id.* at 4. Excise tax revenue was the greatest in Burundi (1997) at 28.44% of total tax revenue and was .05% of total tax revenue for the Gambia (1993). *See id.* at 85, 165.

122. *See* LESSONS OF TAX REFORM, *supra* note 120, at 15-16.

123. For the countries listed in Table 2, individual tax revenue averaged 9.80% of total tax revenue over the 1992 to 1998 period. *See* INTERNATIONAL MONETARY FUND, *supra* note 120, at 4, 186, 246, 376, 434. Corporate tax revenue averaged 8.82% over the 1992 to 1998 period. *See id.* Individual tax revenue was the highest in South Africa (1997) at 38.97% and Zimbabwe (1997) at 30.02% of total tax revenue. Individual tax revenue was the lowest in Seychelles (1998) at .01% of total revenue. *See id.* Corporate tax revenue was the highest in the Democratic Republic of Congo (1997) at 15.34% of total tax revenue and the lowest in Republic of Congo (1997) at .18% of total tax revenue. *See id.*

124. Stamp taxes are included in Tables 1 and 2 as part of the other tax category. *See* LESSONS OF TAX REFORM, *supra* note 120, at 16.

125. For countries listed in Table 2, "—" indicates data for which the figure is zero or less than half of a significant digit and ". . . ." indicates data that is not available. INTERNATIONAL MONETARY FUND, *supra* note 120, at x. Table 2 indicates that property tax revenue averaged .84% of total tax revenue over the 1992 to 1998 period.

TABLE 1. Tax Revenue in Sub-Saharan Africa† *(1985)*

Type	Income & Wealth (direct)	Individual	Corporate	Property	Goods & Services (indirect)	Domestic Sales, VAT turnover	Excises	Import	Export	Other‡
Sub-Saharan Africa	39	12	20	1	61	15	9	26	8	3

Totals do not add up to 100 because not all categories of tax revenues are represented and categories may be subcategories.
†: Comprised of all countries south of the Sahara except South Africa.
‡: Includes stamp taxes.
Source: LESSONS OF TAX REFORM (World Bank 1991).

TABLE 2. Tax Revenue Africa (various years)

Africa	Year	Taxes on Income, Profits, and Cap. Gains	Individual	Corporate	Taxes on Property	Domestic Taxes on Goods & Services	General Sales Turnover or VAT.	Excise	Taxes on International Trade & Transactions	Other Taxes
Algeria	1996	68.29	4.03	4.16	—	10.43	6.00	4.43	15.49	1.11
Botswana	1996	17.01	3.35	11.50	.08	3.74	3.43	....	12.36	—
Burkina Faso	1992	21.42	12.07	7.87	2.22	....	....	4.74	....	.85
Burundi	1997	22.32	9.67	11.13	—	44.85	15.74	28.44	15.63	1.57
Cameroon	1995	16.99	8.29	8.70	1.14	25.14	20.79	3.42	27.58	1.48
Congo, Dem. Rep. Of	1997	24.94	9.61	15.34	.05	18.35	9.74	8.61	27.66	8.16
Congo, Rep. of	1997	8.54	8.36	.18	—	4.72	2.34	2.39	8.79	.45
Cote d'Ivoire	1998	20.72	8.78	11.94	.96	16.84	12.00	1.77	50.71	.40
Ethiopia	1995	21.20	5.20	14.40	.99	14.53	6.82	6.22	29.73	1.88
Gambia, The	1993	14.49^P	4.22^P	10.27^P	—^P	32.41^P	31.61^P	.05	42.04^P	.20^P
Ghana	1993	16.77	6.74	8.26	—	33.89	4.75	6.04	26.76	—
Guinea	1998	9.99	5.96	3.63	1.89	5.46	5.33	.12	75.14	—
Kenya	1996	33.60	....	....	—	37.22	19.85	15.87	14.80	.85
Lesotho	1997	15.13	9.86	3.10	—	12.05	9.94	2.11	52.17	—
Madagascar	1996	18.35	4.19	11.63	1.24	24.28	11.85	5.29	53.32	.47
Mauritius	1998	11.85	6.09	5.76	5.42	29.93	13.77	7.52	30.29	.06

(Table 2, continued)

Africa	Year	Taxes on Income, Profits, and Cap. Gains	Individual	Corporate	Taxes on Property	Domestic Taxes on Goods & Services	General Sales Turnover or VAT.	Excise	Taxes on International Trade & Transactions	Other Taxes
Morocco	1995	19.37	10.32	6.28	1.95	38.38	19.29	16.67	14.44	1.00
Namibia	1993	28.61[f]	17.64[f]	10.96[f]	.68[f]	28.68[f]	16.90[f]	8.11[f]	30.49[f]	.61[f]
Rwanda	1992	15.62[p]	6.19[p]	5.25[p]	.28[p]	34.72[p]	9.79[p]	22.91[p]	31.06[p]	3.93[p]
Seychelles	1998	11.61	—	11.60	.11	6.49	. . . .	. . . .	40.47	.89
Sierra Leone	1997	17.04	7.04	9.18	—	32.88	3.20	24.59	46.48	.10
South Africa	1997	54.30[p]	38.97[p]	14.74[p]	1.63[p]	34.50[p]	22.86[p]	11.39[p]	.26[p]	.84[p]
Tunisia	1996	15.66	8.16	4.84	.07	20.78	8.60	9.63	25.57	3.28
Zambia	1997	31.88	10.31	9.38	.06	50.00	28.15	21.58	13.30	—
Zimbabwe	1997	42.33	30.02	11.50	2.12	23.25	18.51	4.06	20.06	—

f forecasted or projected data
p preliminary or provisional data
□ Totals do not add to 100 because not all categories of tax revenues are represented and categories may be subcategories.
"—" figure is zero or less than half of a significant digit.
". . . ." absence of data
Source: GOVERNMENT FINANCE STATISTICS YEARBOOK (International Monetary Fund 1999).

1. Problems of Administration

Creating administrable laws is extremely important in the tax area because no country can expect an alternative system to come in and save the day. Yet, African countries generally lack administrative capacity.[126] Thus, a logical tax structure in sub-Saharan Africa would be to tax as few people as possible, while raising as much revenue as possible, so that a minimal degree of administrative capacity would be involved in collecting revenue from 1,000 people rather than a large amount of capacity expended collecting revenue from 500,000 people. Further, the most efficient tax systems in the colonial and pre-colonial periods usually covered a limited geographic area that was easily controlled. Thus, port taxes, transit taxes, and internal customs were popular in pre-colonial Ethiopian tax systems and are major revenue generators today.[127]

2. Problems of Revenue

Given the revenue sources that each tax system provides, we would expect sub-Saharan African governments to spend most of their legal resources on import and export duties.[128] Yet, in most countries, the vast majority of administrative resources are expended on income taxes and value added taxes ("VATs").[129] Not surprisingly, income taxes and VATs are the most popular taxes in OECD countries.[130]

Income taxes and VATs are also the taxes most likely to have problems with legal absorption because they are new to Africa, complicated, and hard to apply.[131] If legal absorption is so im-

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126. *See* LESSONS OF TAX REFORM, *supra* note 120, at 26-27.

127. *See supra* Table 2.

128. *See* U.N. DEP'T FOR DEV. SUPPORT & MGMT, GUIDELINES FOR IMPROVING TAX ADMINISTRATION IN DEVELOPING COUNTRIES 19 (1997) [hereinafter UNITED NATIONS] (stating that import-export taxes are easy to administer and "relatively difficult to elude"). On the other hand, income taxes may be difficult to administer due to complex laws and procedures. *See id.* at 19-20; LESSONS OF TAX REFORM, *supra* note 120, at 26-27.

129. A VAT is a complicated consumption tax system. For a detailed discussion of VATs, see JAMES M. BICKLEY, VALUE-ADDED TAX: CONCEPTS, POLICY ISSUES, AND OECD EXPERIENCES 1-5 (1995), *microformed on* Major Studies and Issues Briefs of the Congressional Research Service 95-500-E (Univ. Publications of Am.); *see also* LESSONS OF TAX REFORM, *supra* note 120, at 31-33.

130. *See* BICKLEY, *supra* note 129, at 5-6; VITO TANZI, TAXATION IN AN INTEGRATING WORLD 45-46 (1995).

131. *See* LESSONS OF TAX REFORM, *supra* note 120, at 51.

portant in tax law, why are Western tax laws like the VAT and the income tax adopted by so many sub-Saharan States? Further, why do most sub-Saharan African tax systems, as written, attempt to tax as many people as possible over a wide territory, instead of taxing a few people over a limited territory? By using income taxes on individuals and consumption taxes that go down to the retail level,[132] African tax systems take up administrative resources without producing the revenues associated with import taxes, customs, and duties that tax a few people in limited and easily controlled areas.[133]

VI. *TAXATION IN ERITREA*

Since independence, Eritrea has adopted a number of taxes many of which are very similar to taxes employed in Ethiopia.[134] Some of these taxes are generally enforced, some are enforced only in limited areas or among specific populations, and some exist only on the books, with no enforcement at all. The most generally enforced taxes are the import duties and customs.[135] This is hardly surprising given that goods must come in from relatively limited and easily controlled ports and border crossings, and that import duties are most likely to produce hard currency.

The taxes that are not presently enforced are the Agricultural Income Tax (which is actually a wealth tax on land and domestic animals), the Petroleum Extraction Tax, and the Mining Tax. If they were enforced, the Petroleum and Mining Taxes might adversely affect the environment because of the tax incentives they provide for environmentally harmful activities.

132. *See* Seth E. Terkper, *African Development Bank Workshop on Tax Reforms in Africa*, 50 BULL. INT'L FISCAL DOCUMENTATION 120, 120-24 (1996).

133. From 1986 to 1992, income tax and VATs contributed only 17.7% of the total tax revenues in African countries, compared with 30.4% of the OECD countries. On the other hand, for the same time period, import and export duties contributed 35% of total tax revenues for African countries, compared with less than 1% for O.E.C.D. countries. *See id.* at 121.

134. Eritrea uses customs and duties (Proc. 64/1994), an income tax (Proc. 62/1994), a stamp tax (Proc. 65/1994), a sales and excise tax (Proc. 64/1994), a rural agricultural tax (Proc. 63/1994), a petroleum tax and a mining tax (Proc. 40/1993 and 41/1993) and an income tax on Eritreans working abroad (Proc. 67/1995). *See generally* INTERNATIONAL MONETARY FUND, IMF STAFF COUNTRY REPORT NO. 98/91, ERITREA: SELECTED ISSUES 28-34 (1998).

135. Since October 5, 1994, Eritrea has exempted locally manufactured goods from export duties. *See id.* at 34.

In Eritrea, the most time and administrative attention is given to the Income Tax. In terms of impact, eighty percent of Eritreans are herders or small farmers who are not covered by this tax.[136] Further, many urban dwellers avoid the tax. This includes even very obvious candidates for the tax, such as foreign professors at the University of Asmara and domestic workers.

There are no publicly available figures on how much revenue the Eritrean Income Tax produces, but I was told by government officials that ninety percent of Department of Inland Revenue time is spent on populations that produce ten percent of the income tax revenue. Although income taxes are difficult to administer, Eritrea is attempting to enforce that tax. Enforcement is not going well and revenues are uneven. As a result, the Eritrean system is moving towards presumptive taxation.[137]

VII. *EXPLANATIONS FOR ADOPTION OF WESTERN TAX LAW*

There are at least three possible explanations for the adoption of income taxes and VATs (as well as other Western style taxes) by sub-Saharan States over "in-kind" taxes, other traditional taxes and even Colonial taxes. These three reasons are:

(1) pressures from the global economy;[138]
(2) pressure from experts;[139] and,
(3) lack of knowledge.

A. *Pressures of Global Trade*

One explanation for the adoption of Western tax laws is outside pressure in the form of trade agreements and treaties.[140] The last twenty years have seen an international push towards the flow of goods across borders.[141] This trend towards a global economy puts pressure on African States to eliminate import

136. *See id.* at 31.

137. Presumptive taxation occurs when a tax is computed based on gross estimates of revenues usually formed by observations of entire industries rather than on an individual company's actual records. *See* GÜNTHER TAUBE & HELAWAY TADESSE, PRESUMPTIVE TAXATION IN SUB-SAHARAN AFRICA: EXPERIENCES AND PROSPECTS 1-3 (International Monetary Fund Working Paper No. WP/96/5, 1996).

138. *See* TANZI, *supra* note 130, at 42-47.

139. *See* LESSONS OF TAX REFORM, *supra* note 120, at 8; Terkper, *supra* note 132, at 121.

140. *See* TANZI, *supra* note 130, at 42-44.

141. *See id.*

and export taxes.[142]

The problem for most African States is that they collect twenty-five to fifty percent of their tax revenue from import and export taxes.[143] Because of this dependence, there are waivers within the major trade agreements that allow African States to keep at least some of their customs and duties.[144] But even with waivers, international trade treaties convey a message to African policy makers that import and export taxes are old-fashioned and pathetic, as if true economic development cannot coexist with customs and tariffs. The truth is that most modern industrial states achieved the largest part of their economic development in the age of customs and tariffs.[145]

Further, this attack on the most productive source of tax revenues can only result in a decline in tax revenues. An inability to raise tax revenues forces African countries to rely on other sources of public finance, such as the sale of natural resources, foreign aid, and foreign debt, all of which are problematic.[146]

B. *Pressures from Outside Experts*

The second outside force that might explain the African move towards Western tax systems is the pressure of experts from the World Bank, the International Monetary Fund ("IMF"), and other international agencies who advise developing countries on their tax codes. These experts come from OECD countries that are not dependent on trade taxes, and instead rely on income taxes on individuals or companies and VATs for a large percent of their tax revenue. Accordingly, what these experts understand and attempt to recreate are these same tax systems

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142. *See id.* In most industrial countries, import and export duties generate insignificant amounts of revenue. *See* INTERNATIONAL MONETARY FUND, *supra* note 120, at 4.

143. *See* INTERNATIONAL MONETARY FUND, *supra* note 120, at 4; *see also* LESSONS OF TAX REFORM, *supra* note 120, at 16-17; TANZI, *supra* note 130, at 43.

144. *See* CHRISTOPHER S. ADAM & STEPHEN A. O'CONNELL, AID, TAXATION, AND DEVELOPMENT: ANALYTICAL PERSPECTIVES ON AID EFFECTIVENESS IN SUB-SAHARAN AFRICA 6 (World Bank Policy Research Working Paper No. 1885, 1998); RALPH H. FOLSOM ET AL., INTERNATIONAL TRADE AND INVESTMENT IN A NUTSHELL 115-16 (1996); UNCTAD, THE LEAST DEVELOPED COUNTRIES 1998 REPORT 71-72 (1998); WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 61 (1989).

145. *See* TANZI, *supra* note 130, at 42-44.

146. *See* Terkper, *supra* note 132, at 120. Some believe that the reduction in tax revenues, especially trade taxes, should be weighed against the benefits of trade liberalization. *See* Dean A. DeRosa, *Protection and Export Performance in Sub-Saharan Africa*, 128 WELTWIRTSCHAFTLICHES ARCHIV 88, 119-20 (1992).

in Africa.[147]

In the 1960s and 1970s, income tax systems were popular with Western tax advisors who were interested in progressively broadening the tax base.[148] In the 1980s and 1990s, VATS were popular with advisors because of the Western emphasis on consumption taxes.[149]

C. *Lack of Knowledge about More Efficient Systems*

Is lack of knowledge a cause for the African emphasis on Western tax law? The answer is an emphatic *no.*

What is interesting about Africa is how recently independence came to the continent.[150] Because independence began in the 1960s and continued into the 1990s, many African tax administrators actually lived and worked under Colonial regimes. These Colonial regimes used the type of tax systems that raise the most revenue with the smallest administrative effort.[151] Thus, African tax administrators know more about efficient tax systems than the experts they rely on. Lack of knowledge is not the problem.

But, if lack of knowledge is not the answer, can we return to outside pressure as the explanation for Western tax law in sub-Saharan Africa?

VIII. *WHY ERITREA SHOULD BE ABLE TO AVOID THE PROBLEMS FACED BY OTHER SUB-SAHARAN AFRICAN STATES*

Up to now you might conclude that my opinion is that the sub-Saharan African move towards inefficient tax systems results from outside pressure. But in Eritrea, that is not the case.

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147. *See* LESSONS OF TAX REFORM, *supra* note 120, at 8.

148. *See* Vito Tanzi & Joseph Aschheim, *Why Tax Corporations?*, *in* 4 READINGS ON TAXATION IN DEVELOPING COUNTRIES 227-32 (Richard M. Bird & Oliver Oldman eds., 1990) (describing policy shift from income to consumption taxes); LESSONS OF TAX REFORM, *supra* note 120, at 24; UNITED NATIONS, *supra* note 128, at 10; Terkper, *supra* note 132, at 121.

149. *See* READINGS ON TAXATION IN DEVELOPING COUNTRIES, *supra* note 148, at 227; UNITED NATIONS, *supra* note 128, at 10. Today, all European and American countries except the United States have the VAT. In the 1960s, only nine countries had the tax and by 1994, ninety countries had the VAT. *See* TANZI, *supra* note 130, at 45-46.

150. *See* HODD, *supra* note 30, at 34.

151. *See id.* at 34, 35. For general discussion, see LESSONS OF TAX REFORM, *supra* note 120, at 51-54; Goode, *supra* note 90, at 17-18.

Eritreans pride themselves on not being subject to outside pressure. This comes from the fact that the political leadership spent thirty years in the desert fighting for independence.[152] The result was minimal contact with the outside world and a feeling that Eritrea does not need the outside world. Further, the Eritrean government is very outspoken about its ability to learn from mistakes of other African nations. It has banned most nongovernmental organizations ("NGOs") because it believes that NGOs undermine other African States.[153] It only recently allowed the Internet, and media is censored in accordance with the Press Proclamation.[154] Further, the general population has little access to electricity much less radios or televisions that might bring in foreign ideas.[155] The combination of these factors should mean that Eritreans, at least, would avoid OECD style tax systems in favor of more efficient methods. But that is not the case.

Why has Eritrea fallen into the same problems of Western transplants that plague the rest of Africa?

Why would people with:

- knowledge of older systems that worked,
- knowledge of the thirty years of problems other African States experienced with their Western style tax systems,
- a well-known antipathy towards foreign ideas and advisors, and,
- an isolation which might protect them from outside influence,

make the same decisions and fall into the same problems as other African states without these advantages?

I believe that, in some sense, these laws operate symboli-

152. *See* CASTELLANI, *supra* note 24, at 1.

153. *See* Bureau for Africa, United States Agency for International Development, Eritrea: Population, Health, and Nutrition Briefing Sheet 2 (1998); Jeffrey Goldberg, *Our African Problem*, N.Y. TIMES, Mar. 2, 1997, § 6, at 34.

154. *See* Awate Research Unit, *Halloween Scare: Eritrean Press Proclamation*, *available at* http://www.awate.com/documents/pressproclamation.htm (last modified Oct. 16, 2000); Carol Pineau, *Eritrean Press Gains Momentum from Conflict*, AGENCE FR.-PRESSE, Oct. 4, 1999, *available at* 1999 WL 25118279.

155. *See* INTERNATIONAL MONETARY FUND, STAFF COUNTRY REPORT NO. 96/66, ERITREA: RECENT ECONOMIC DEVELOPMENTS 3 (1996) ("Approximately 80% of Eritrea's population is rural, and the urban dwellers are concentrated in the country's capital Asmara").

cally. That is, their purpose is not to be enforced and thereby produce revenues or protect copyrights. Rather, they serve as a way of signaling both to insiders and outsiders that a nation State is formed and functioning.

This need to signal statehood, informs at least some of the law reform occurring in Eritrea today. What is interesting about Eritrea is how this concept might have penetrated into the national consciousness. In other African nations we may claim that concepts of the nation State travel through a type of "colored" class.[156] This is not a mixed race class in terms of blood, but in terms of experience. In other words, many African countries get their Western ideas from native people who have foreign training or experience.[157] What is fascinating about Eritrea is that we see the same emphasis on the nation State without as many government people with Western training or experience. What this says to me is that the concept of modernity has become so strong in sub-Saharan Africa that it can penetrate into countries in ways that are more subtle and pervasive than previously suspected.

IX. *WHY CONCEPTS OF A NATION STATE MAKE A DIFFERENCE HERE*

What I have described here is a process of legal homogenization. Through a variety of mechanisms—in this case, I argue, the concept of the nation State—African tax laws are meant to look more and more like Western tax laws. Because law must harmonize with indigenous political, economic, and administrative systems, homogenization fails. Laws are not administered. Revenues are not collected.

What has this to do with the United States? Are we bystanders merely witnessing the train wreck? Are we part of the problem? Through our own international agencies and our influence over the United Nations, IMF, and World Bank, through our exportation of American culture, do we help create the atmosphere that encourages this attempted homogenization? Certainly. But what is perhaps more important for us is that, in the end, our own tax systems are also under pressure to homogenize and we may have to face our own legal absorption problem soon.

In the tax area we see this creeping homogenization in the

156. *See* BASIL DAVIDSON, THE BLACK MAN'S BURDEN 246-48 (1992).
157. *See id.*

many academic articles favoring consumption taxes.[158] These are the same taxes that are most in vogue in Western Europe and Asia. They are the same taxes encouraged for Africa. They are not necessarily the taxes best suited for American culture or politics. Thus, adoption of these types of taxes could result in an American legal absorption problem.

In the trade area, we see the move toward homogenization in the controversies surrounding the World Trade Organization ("WTO"). Much more than in the tax area, the public has responded to the attempt to use trade to shape our internal laws. Yet, although trade is a powerful force and the WTO has great influence, it is not the only force or body driving the United States to look like everywhere else. For now, we see ourselves in control; we see other countries trying to (or being forced to) look like us. Soon, we may find the tables turned and, by then, it might be too late.

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158. *See, e.g.,* William D. Andrews, *A Consumption Type or Cash-Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974); Joseph Bankman & Barbara H. Fried, *Winners and Losers in the Shift to a Consumption Tax*, 86 GEO L.J. 539, 565-68 (1998); Charles E. McLure, Jr., *The U.S. Debate on Consumption-Based Taxes: Implications for the Americas*, 29 U. MIAMI INTER-AM. L. REV. 143 (1998); Peggy B. Musgrove, *Consumption Tax Proposals in International Settings*, 54 TAX L. REV. 77 (2000); John K. McNulty, *Flat Tax Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CALIF. L. REV. 2095 (2000); Alvin C. Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?* 89 YALE L.J. 1081 (1980); Laurence J. Kotlidoff, *Consumption Taxation—The A,B,C's That Every Politician Should Know*, 48 EMORY L.J. 823 (1999).