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Theory in Practice: Code Drafting in Eritrea

Richard A. Rosen*

I. Introduction

The idea for this article had its genesis last spring, when the editors of this Journal asked me to review Professor Jamar's article on law and development. While discussing Jamar's article I mentioned that I found it especially interesting in light of my work helping draft new penal and criminal procedure codes for the recently independent East African state of Eritrea. This off-hand remark led to another request, that I describe that work in a short article to accompany Professor Jamar's. I agreed.

At one level, the law drafting that I was involved in for Eritrea seems inapposite to Professor Jamar's article, since a major focus of his piece is on the interplay between law and economic development. Maybe substantive and procedural criminal laws have some impact on economic development, but if they do, it is probably not much. In another way, however, the code drafting process in which I was involved is relevant to Jamar's article, because underlying his theory about the interplay between law creation and economic development is an argument which differentiates between different models for importing foreign legal norms into developing legal systems, suggesting an appropriate role for Western "experts" in this development.

Professor Jamar posits two archetypes of interaction between Western legal reformers and the developing world. He describes one as the "Weberian" approach, which focuses on the importation of allegedly universal norms from the developed world into the developing world: a "one size fits all" model that presupposes that the Western "expert" not only understands the issues facing the legal system of the recipient country, but also that the wholesale

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importation of Western norms will be sufficient to meet the needs of the developing country.\(^2\) The other archetype, based in part on theories of legal education and lawyering developed in the United States, Professor Jamar describes as the "lawyering approach." Under this methodology, problem solving is the key, and the lawyer must work hand in hand with the client, i.e., the nation seeking to write new laws, both in defining the problem and in developing the solutions.\(^3\)

I hope that the description of the four-year process of code drafting offered below will complement the theoretical discussion in Professor Jamar's article.

II. Drafting the Codes

A. Lessons Learned

Before I describe the code drafting work in Eritrea, I want to offer, in summary form, some basic conclusions that I have reached after and about all of my work in Eritrea.

1. If done right, the drafting of a comprehensive code is an enormous undertaking.

Not only is the scope of a comprehensive code very wide, but the degree of precision, attention to detail and consideration of external factors required to draft comprehensive laws are hard to foresee. It certainly was unlike any other work that I had done as a lawyer or law professor, and I believe that all of us involved seriously underestimated the amount of time and effort that would be required for the finished product. Of course, the work could

\(^2\) Id. at 35–41. The Weberian approach is a top-down method, which generally attempts to impose democratic institutions on the recipient country without regard for the local conditions and the practicality of implementing such reforms. Id. at 36. Inherent in this approach is the imposition of Western ideals to promote the optimal growth of the target country.

\(^3\) Id. at 41–47. Jamar cites the three central attributes of the lawyering approach as professionalism, client-centeredness, and problem-solving. Id. at 41. His definition of professionalism involves setting aside Western ideals and working within the reality of the country. Id. He believes that the client should be an active participant in all stages of the process, and that the practitioner and the client (state) should agree on what path to take. Id. at 42. He presents a problem-solving paradigm that involves problem identification, gathering and evaluating information, solution generation, solution evaluation, decision, and implementation. Id. at 42–43.
have been much easier. There were plenty of models floating around, and I'm sure a code could have been whipped out in a couple of months. But it wouldn't have done much good.

2. The involvement of a lot of people in our drafting process was a good thing.

This was counter-intuitive for me. I usually hate working in groups or doing anything by committee. I found, however, that different, and successive, readings, drafts, and critiques by people with varying perspectives were crucial to the drafting process.

3. It was essential that many of those involved (see item 2 above) were Eritreans.

I believe that the codes that we helped produce would not have been anywhere as good without the thousands of hours put into this project by our Eritrean counterparts. I am certain that the codes would have been far less useful in the Eritrean future. The Eritrean drafters brought a knowledge about their society, its history, problems, and resources, which no outsiders could have supplied.

4. There is a downside to agreeing to let others make the important decisions.

Jamar's lawyering method sounds great, especially because he assumes that the lawyers and the client state will always be able to come to an agreement on important issues. The reality is that someone will always have to have the final say, and for us it was the Eritreans. It was not always easy agreeing to implement decisions made by somebody else. For instance, I have a strong aversion to capital punishment, but it was made clear to us that the capital punishment question had been debated extensively in the recently completed Eritrean constitution-drafting process, and that the decision to keep it had been made and was binding on all of us. That was hard for me. I can say though, that although I was not always comfortable with the choices that were made, I was always comfortable with, and trusted, the people making the choices, as well as their reasons for choosing as they did.
5. *A little humility is a good thing to have in a project like this.*

Humility is not a prominent characteristic among law professors or among lawyers. Everybody makes mistakes, overlooks things, or approaches a problem too narrowly (or too broadly). It is also impossible to be an expert on everything.\(^4\) A drafter must be willing to listen and to accept criticism of his or her work.

6. *The code drafting work was immensely satisfying, and often even (dare I say it) fun.*

Law professors spend a good deal of our time analyzing and criticizing laws and cases, almost always reacting to the work of others.\(^5\) It is what we do in class and in our scholarly writing. This work, by contrast, was positive and creative: we were both participants in, and observers at the creation of, something tangible and fundamental to a society. We did it as part of a collective process that included people from a whole other part of the world. It sure beats grading exams and going to faculty meetings (of course, I still had to do that, back in my other life)!

**B. Would You, Could You, Help Draft Some Laws?**

I cannot say that I had any idea how to draft a comprehensive set of laws, nor was I aware of any theories about the best way to do that, when, in the spring of 1997, I got a call from a man identifying himself as Martin Ganzglass. Marty told me that he was a Washington, D.C. lawyer working as the U.S. attorney for the country of Eritrea. Marty had been asked by the Eritrean Minister of Justice, Fawzia Hashim,\(^6\) to recruit lawyers to work on

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\(^4\) I know a lot about sentencing and homicide law, but fifteen minutes of fruitlessly trying to follow a discussion about the scope of a proposed worthless check statute during a meeting in Asmara, the capital of Eritrea, gave me a reality check. The issue was whether to include all negotiable instruments under that provision. It may have been due to my poor attendance and lack of attention in my law school Sales class, but I had no idea what a negotiable instrument was. I therefore let others decide that point—demonstrating, I might add, the appropriate (if requisite) humility on this point.

\(^5\) One of my more astute friends with a background in both death penalty litigation and baseball describes us as third base coaches, waving people around the bases but not really playing the game.

\(^6\) For the remainder of this Article I will refer to Fawzia and other Eritreans by
a project sponsored by the U.N. Development Program to draft new laws for Eritrea. He called me on the recommendation of a mutual Eritrean friend, who knew that I had spent the 1995–96 school year on a Fulbright Fellowship teaching in the incipient Law Program at the University of Asmara in Eritrea and that I was familiar with the country and its laws.

Marty was not looking for me to work on the project myself, but rather for recommendations of lawyers or law professors to work on a new commercial code. I checked around with colleagues, gave him a few names, and mentioned that if he needed anybody to work in the criminal law area, I might be interested. A little while later Marty called me back. The Eritreans were indeed interested in drafting new penal (i.e., substantive criminal) and criminal procedure codes. He had run my name and background by Fawzia (whom I knew slightly from my time in Asmara), and had received her permission to approach me.

I did not consider myself an expert in comparative law—up until recently I thought that I was using foreign law when I relied on cases from South Carolina and Virginia, and most certainly from California. I had been broadening my horizons, though, and I had traveled to Russia in 1994 on a project sponsored by the United States Agency for International Development (USAID) to help set up trial advocacy programs in Russian law schools. My perspective broadened even more when I spent my year teaching in Asmara, since I discovered, after I arrived, that I was expected to leave my common law cocoon and teach, at least in part, using the laws then being applied in Eritrea. But I was still not a comparative law scholar.

Despite awareness of my intellectual and scholarly shortcomings for this work, I agreed to Marty’s proposal immediately. It would give me a chance to stay involved with Eritrea, something I was looking for, and it sounded like interesting work. Marty himself decided to join the work on the

their first names, since this is the Eritrean practice. Thus, in Eritrea and among Eritreans, President Isaias Afewerki is always referred to as Isaias. It took me a little while to figure out who this “President Afewerki” was. In the Eritrean practice, the second name is the father’s first name, and if a third name is used, it is the paternal grandfather’s first name.

7 See discussion infra notes 18–22 and accompanying text for a description of these laws.
criminal codes. Even though his practice was largely labor law (outside of his representation of Eritrea), in the 1960s he had served in the Peace Corps as a legal advisor to the Somali National Police, and on returning to the United States he had published a textbook about the Somali Penal Code. Like me, Marty had become quite attached to Eritrea and liked the idea of playing a role in helping in its development.

Marty and I decided that to help ward off the inevitable parochialism of U.S. lawyers, we wanted the third member of our team to be somebody from outside the United States. After further checking, Marty enlisted Professor Patrick Healy of McGill Law School in Montreal. Patrick had extensive comparative experience in Africa and Asia in addition to the dual common law/civil law background necessary to work and teach in the French-speaking province of Quebec.

Girding our legal loins, the three of us signed contracts, agreeing to act as legal consultants to the Ministry of Justice and to assist in the drafting of a new penal code for Eritrea. We also agreed to their request that, when our work on the penal code was done, we would move on to work on a new code of criminal procedure.

C. Working in Eritrea

In the following pages, I will describe a law-drafting process that seems to conform in large part to Professor Jamar's "lawyering approach." The work was client-centered, the Eritreans made the important decisions, and great attention was paid to specific Eritrean problems and solutions. I would be less than honest, however, if I heaped too much praise upon myself and my Western cohorts for this, since, appropriately enough, the decision to have this sort of process came from the Eritreans themselves.

To understand why our code-drafting work went the way that it did, it is first necessary to understand modern-day Eritrea.

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9 Concurrently, the Ministry of Justice found academics in the United States and Holland to work with them on drafting new commercial, civil procedure, and civil codes.
10 Jamar, supra note 1, at 41–47.
Articles providing background information about Eritrea have appeared in earlier volumes of this Journal, and there is no need to repeat that information in full here. For purposes of this Article, it is sufficient to refer to one predominant characteristic of modern day Eritrea: its strong sense of independence and self-reliance, nurtured during the long war for independence, when the Eritrean liberation fighters had few supporters apart from their own people. Both superpowers and almost all other states supported the Ethiopians. This self-reliant strain has led to a perhaps unique relationship between Eritrea and the outside world. In its brief ten years of self-rule, Eritrea has looked upon aid from outside sources as a necessary evil. They had accepted it when necessary, but always with an eye towards replacing it as soon as possible, and they had never let the donors of this aid dictate Eritrean policy. Thus, even before starting this project, Marty


12 I am using 1991, when the Ethiopian armies were defeated and the Ethiopian Dergue was deposed, as the date of independence, rather than the formal secession from Ethiopia following the U.N.-sponsored referendum in 1993.

13 The category of outside aid does not include support from Eritreans living abroad. The Eritrean diaspora played a critical support role in the struggle for independence, and also contributed greatly to the latest war effort, as well as to the ongoing work of rebuilding the country. Eritreans abroad are considered, for many purposes, Eritrean citizens. Many voted in the 1993 U.N.-supervised referendum that led to formal independence from Ethiopia, and many still pay a voluntary tax to the Eritrean government.

14 When I lived there, the Eritreans were regularly expelling Westerners whom they felt were interfering with the Eritreans’ efforts to build their own country. Missionaries were especially subject to being ordered out, but all sorts of foreign aid workers, whether employed by non-governmental organizations (NGOs) or by Western governments, were subject to becoming the focus of what the small (and growing smaller) expatriate community in Asmara laughingly described as the phenomenon of the expulsion du jour. This even included, for a brief time, the head of the USAID mission in Asmara, although in many other places the USAID chief, with the American dollars to hand out, is a person
and I both knew that the Eritreans would be in control, not because we thought it was a good thing (although we did), but because the Eritreans would have it no other way.

So if we can congratulate ourselves for adopting a lawyering approach, it is in this respect that two of us from the very beginning, and the third later, accepted the fact that our project was going to be run by the Eritreans, for the Eritreans. This was made plain early in the process, when, in July 1997, we began our work by meeting in Washington, D.C. with Fawzia. Fawzia, a former fighter, had been one of the leaders in the Eritrean Peoples Liberation Front (EPLF) during the struggle. She was known for her intelligence and decisiveness and, even though not a lawyer, was widely respected by the small legal community in Eritrea.

Fawzia’s instructions to us were straightforward and simple. We had expertise, resources, and time. We were to use these to provide the Eritreans with suggestions and drafts for a new Penal Code (the Code). We would be reporting to a committee of Eritrean lawyers working under the auspices of the Ministry of Justice. We would need to take into consideration the severe resource constraints then existing in Asmara—the paucity of trained lawyers and judges, for one thing—but we were also to keep in mind that the Code had to be usable for future generations, when the resources would be more plentiful. We were to be mindful of, and to draft laws that would conform to, the provisions of the newly enacted (but still not implemented) Eritrean Constitution. The present code was outdated, cumbersome, and

15 The term “fighter” is used by Eritreans to refer to the participants in the war for independence, regardless of whether the fighters actually fought on the front lines. Many fighters spent a good part of their time helping set up and run the remarkable parallel society created in the areas liberated by the EPLF as they seized land from the Ethiopians. See Dan Connell, Against All Odds: A Chronicle of the Eritrean Revolution (1993); Ilfen Ghebra, Eritrea: Miracleland (1983); Thomas Keneally, To Asmara (1989); Adeba Tesfagiorgis, A Painful Season, A Stubborn Hope (1992).

16 The “struggle” is how Eritreans refer to the war for independence.

17 See Rosen, supra note 11; Selassie, supra note 11. The Constitution did not have a provision that put it into effect automatically. The Eritreans are taking their time with the implementation of the Constitution, moving at their self-proclaimed “pace of the tortoise.” Rosen, supra note 11 at 310 n.227. Since the conclusion of the latest war with
unwieldy. They wanted one that was concise, accessible, and adapted to the Eritrean conditions. We were to work with and for the Eritrean Committee, and our job was to use our technical expertise and access to resources to help the Eritreans draft a penal code that would serve their country well. Fawzia made it clear that what the Eritreans wanted were codes that reflected not our personal backgrounds or preferences but the best that the world had to offer. The final shape and content of the code was to be theirs.

D. The Starting Point—the Existing Codes

In 1997 the Eritreans were using a series of “transitional” codes; basically the laws inherited from Ethiopia, somewhat altered and supplemented by a series of post-liberation proclamations. We were concerned with two of them, the Transitional Penal Code and the Transitional Criminal Procedure Code.\(^\text{18}\) The source of the Transitional Penal Code was the Ethiopian Penal Code of 1957. This had been largely drafted by a Swiss law professor, Jean Graven, who had submitted his draft in French to a commission composed of Ethiopians and foreigners. After review and some alterations by the commission, it was then translated into Amharic (the prevailing language of Ethiopia at the

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\(^{18}\) See Eri. Proc. No. 4/1991 ("The Penal Code of Ethiopia (1957) is hereby adopted and shall enter into force as of 15 September, 1991 as the Transitional Penal Code of Eritrea with the following amendments, replacements, and repeals as appropriate"); Eri. Proc. No. 5/1991 ("The Criminal Procedure Code of Ethiopia which was in force in Eritrea is proclaimed to be effective in Eritrea as a Transitional Criminal Procedure Code of Eritrea, with the following amendments, replacements, and repeals as appropriate and replacing all words, phrases, names, dates designating the Government of Ethiopia with the Provisional Government of Eritrea, effective 15 September 1991.").
time) and English and officially adopted in 1957. It was modeled after continental penal codes, primarily the Swiss Penal Code. It is divided into a "General Part" containing the punishment provisions, defenses, and other fundamental principles of criminal law, followed by a "Special Part" detailing all of the specific crimes. It was sufficiently close to the Swiss Penal Code to allow Swiss cases and commentary to be considered authoritative in most instances.

In contrast to the continental model of the penal code, the Ethiopian Criminal Procedure Code of 1961 has more elements of the adversarial, common law approach. Professor Graven again had prepared a first draft and presented it to an Ethiopian Commission in 1956. The Ethiopians, however, had been using English-based adversarial procedures since 1941, and this led them to ask Sir Charles Mathew, a prominent English jurist with experience in Malaya and India, to rework Professor Graven's draft and to produce a code with more of a common law, adversarial bent. This he did.

As far as I am aware, both of these codes remained little changed in the intervening years until Eritrean independence, as there was little time or energy for reforming the criminal laws in an Ethiopia rent by war, famine, and revolution. Thus, in 1997 the Eritreans were using codes that not only were imported from Ethiopia, but also which reflected heavily the predilections and background of drafters foreign even to Ethiopia.

E. Drafting the Penal Code

The drafting process for both codes followed a certain rhythm. Marty, Patrick, and I would go to Asmara to get instructions and to

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19 Steven Lowenstein, Materials for the Study of the Penal Law of Ethiopia xix (1965).
20 Id. at xix-xx.
21 Stanley Z. Fisher, Ethiopian Criminal Procedure: A Sourcebook ix-xi (Oxford Univ. Press 1969). The inquisitorial roots of the code are most clearly evident in the articles allowing remand for investigation. See infra notes 44-45 and accompanying text. As Fisher notes, possibly because of the mixing of systems, the criminal procedure code that was adopted was less than satisfactory, and had many gaps and inconsistencies. Fisher, supra, at xii. I certainly found this to be the case when I attempted to teach it to my Eritrean students in 1995.
discuss the general principles underlying the code. We would return home, divide up the work, prepare drafts for each other, and then meet in Washington, Montreal, or Chapel Hill to go exhaustively through the drafts, article by article. Then another round of drafting, another meeting (or perhaps a conference call, if we were far enough along), until we were ready to submit our draft to Asmara. Then back to Asmara to start another round.

1. Asmara, August 1997

Our first meeting in Asmara was soon after we agreed to do the drafting, in August 1997. In preparation, we all read the Transitional Penal Code. In my case it was a rereading, since I had taught from the Code in 1995–96. I also went back through my class notes to try to reconstruct some of the deficiencies that I remembered finding in the Code. I had translations of some of the post-liberation amendments, and the Ministry over time furnished us with translations of others. 23

We prepared a series of written questions about fundamental issues we knew would have to be resolved. For instance, did they want to keep the same general structure of the Code, with its civil law framework? How did they want to apportion discretion at the sentencing stage between the judge, executive (parole) officials, and legislature? What minimum age for criminal liability did they want to set? Did they want to keep the Transitional Code’s distinction between rigorous and simple imprisonment, 24 and the Code’s separate Code of Petty Offenses? 25

We also decided to present a first draft of a new sentencing procedure. I knew from my teaching in Asmara that the sentencing scheme used in the Transitional Code was too complicated to be kept. I had trouble understanding and synthesizing the almost one hundred articles in the general part which governed sentencing, and my students who had interned with the courts in Eritrea told me that the judges had great difficulties applying them. After one

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23 The amendments were translated from Tigrigna. My understanding is that all of the Proclamations were initially issued in Tigrigna and Arabic. Tigrigna is the most common language of highland Eritreans, and Arabic is the lingua franca among the literate lowland Eritreans.


25 Id. arts. 690–820.
reading of the Code, Marty and Patrick agreed. So we drafted the outline of a sentencing scheme which would divide all crimes into categories for purposes of punishment, with maximum and presumptive sentences for each category, and with the actual punishment to be determined by the court after the consideration of factors in aggravation and mitigation.\textsuperscript{26} We sent all of this ahead to Asmara.

We weren't sure what to expect when we got to Asmara in August 1997. We didn't know with whom we would be meeting, nor what the format would be. We knew that there would be an "Eritrean Working Committee" which would be providing guidance for us and would be our contact during the drafting process, but we knew little more than that.

We met in the large meeting room of the Chamber of Commerce, located not too far from the University in downtown Asmara. My memory is a bit unclear, but I think about twenty to twenty-five Eritrean lawyers and judges attended the meeting. The Minister of Justice was there, as was the Attorney General and the Legal Adviser to the President. Several academics and prominent lawyers in private practice joined in, as did some representatives of the police. The Chief Justice of the Eritrean High Court, Teame Beyene, chaired the meeting, and we sat up on a dais with him and several others.

We spent several days going over the sentencing proposals and some questions we had raised, as well as discussing other issues that the Eritreans believed important for us to consider in our drafting. In some areas we got clear directions: The Eritreans in general were very pleased with our outline for a new sentencing scheme, but they wanted less discretion given to the judges, especially for the more serious offenses. Instead of presumptive sentences, with judges free to depart from the presumptive at their discretion, they wanted minimum sentences for the gravest crimes. Most of the people in the room wanted to do away with the system of private prosecution for minor (petty) offenses, and they also saw no need to create a separate Code of Petty Offenses, like the one in the Transitional Code. Other than that, the overall structure of the Transitional Code was familiar to them, and they wanted us,

\textsuperscript{26} These provisions were patterned after the Alaska sentencing statutes. \textit{Alaska Stat.} \textsection 12.55.005 (Michie 2001).
to the extent possible, to keep this structure, with a General Part followed by a Special Part containing all of the different offenses.

Other issues were left more open and were the subject of heated debate. One was the minimum age for criminal responsibility. Some at the meeting argued for keeping the minimal age at twelve, where it had been placed after liberation. They believed that children younger than that did not have the maturity that should be required before assessing criminal culpability. Others argued for returning it to nine (where it had been before liberation), not to punish the young offenders but to enable the courts to take jurisdiction over them in order to help them.

The discussions were open and frank. Arguments were frequent and heated. We were expected to participate fully in the discussions, and were given as much respect as anyone else, but no more. The worst argument we could make to the Eritreans was, "This is the way it is done in the United States or Canada." The best argument was one that resonated the most with the Eritrean reality. Our knowledge and experience were acknowledged and respected but only to the extent that they deserved.

2. Preparing the First Draft

Returning home, we began the difficult, intensive drafting work. We already had some ideas on the General Part and split that between us. Then we divided up the Special Part. Patrick took on the responsibility of preparing drafts for articles governing offenses against the person: murder, rape, robbery, and the like. Marty's assignment was property and drug crimes, and mine was offenses against the State. We all went home to draft.

We took stock of the resources available to us. I certainly had

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27 See Transitional Penal Code, art. 52 (1991) (Eri.) ("Article 52 [of the Penal Code of Ethiopia] is hereby adopted with the phrase '... nine years' in the second line replaced with the phrase '... twelve years.'").

28 We eventually found a compromise that met both goals. The Greek Penal Code included provisions that allowed courts to take jurisdiction over a child between the ages of nine and twelve who was accused of a criminal offense, but would not allow any adjudication of guilt, nor the imposition of detention, fines, or any other punishment on this "child offender." Greek Penal Code, art. 121 (Nicholas B. Lolis trans., 1973). The only power granted to the courts for this limited class of offenders was to order rehabilitative measures, such as foster care and education.
not thought about it before, but given our mandate to look at codes around the world, language was an unexpected problem. Marty and I were pretty much restricted to codes that had been translated into English. Patrick, as a true Quebecois, could easily move between French and English, but that still left us unable to examine a large percentage of the world’s criminal codes. Luckily, F.B. Rothman Press had translated some penal codes into English in a set of slim volumes published beginning in the 1970s, and some more were available on the Internet.

As the drafting process evolved, we ended up relying on a fairly ecumenical range of laws as models for our work. Marty knew that the Australians had just spent a great deal of time and effort drafting comprehensive drug laws, so we took their new Model Code as our starting point in that area. We looked to Singapore, England, and Israel for laws prohibiting official (and, in a future draft, private) corruption, and to Germany for serious crimes against the state. The Greek Penal Code became a favorite, not because of any great affinity for Greek culture or law, but because we found it, or at least the English language translation of it, to be clear and simple.

Besides the Alaska statutes, which served as the basis for our initial sentencing draft, we relied on relatively few U.S. models: some definitions from the Model Penal Code, several federal customs and tax statutes, and a few others. There were several reasons for this. One certainly was our sensitivity to the issue of what could be called legal imperialism, or what Jamar would call the Weberian method of top-down reform from the outside. Another was the incredible prolixity of many American statutes: page-long monsters with acres of colons and semi-colons, rendered intelligible only through continuous court interpretation. Also, codification is not an especially developed craft in this country, with many jurisdictions still leaving all or large parts of

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29 My Russian had fallen well below the level necessary for this sort of work. Marty still had Italian expertise, but that was of limited usefulness.

30 Though, to his eternal embarrassment and my eternal amusement, he had actually been born in Brooklyn, New York.

31 Although, as an e-medium Neanderthal, I only made use of the electronically published codes when I began work on the Criminal Procedure Code almost two years later.

32 See Jamar, supra note 1, at 32.
the substantive criminal law to the common law. We tended to rely a bit more on Canadian law, perhaps because the Canadians have devoted more energy and focus to written codes, perhaps because the threat of cultural imperialism did not seem quite as threatening when it came from our neighbor to the north.

We tried to be careful about how we used primarily various models from other countries. We looked to these laws as resources. We were also aware of a need to craft a code with a consistent voice throughout, so it was a rare event for us to copy a foreign law verbatim. We also retained parts of the Transitional Code, modifying the language but keeping the essence of many articles.

For a good part of a year we drafted, reviewed, revised, and then redrafted. By the spring of 1998, we had put together a draft Penal Code of a little over 300 articles (down from over 800 in the Transitional Code), together with comments explaining the articles, detailing the sources of the articles, and describing changes from the Transitional Code. When we were unsure of what to do, or wanted to present alternatives, we added notes addressed to the Eritrean Committee, highlighting issues that still needed to be resolved.

We decided that it was premature and inappropriate for us to try to determine the amount of punishment to be imposed for specific offenses. We did proscribe an overall structure, dividing crimes into categories, and proposed tentative punishment ranges for each category. We suggested that the Eritreans review these ranges, and left it to the Eritrean Committee to determine in which category to place the various offenses.

We sent our draft Penal Code to Asmara in May 1998, the same month a new war with Ethiopia started. During the summer we inquired about whether we should assume that our work would be postponed until the fighting stopped. We received word that this "latest unpleasantness" was not expected to impede our work. We should keep doing our part, and the Eritreans would do theirs. We should also plan to return to Asmara in October.

3. Asmara, October 1998

We arrived in Asmara expecting to put the finishing touches on the Penal Code. We knew that the Eritrean Committee, a small group of lawyers and judges, some from the Ministry and some from the private sector, had been going over our draft. We assumed that we would meet with that Committee and resolve any problems right then and there. We even discussed whether we should bring our own computers so that we could more easily do the revisions and put together the final draft on the spot. Then we could move ahead and start work on the Criminal Procedure Code.

However, we were wrong! The first thing we received when we stepped off of the plane was a typed, fifty-seven page compilation of notes, criticisms, suggestions, and questions from the Eritrean Committee. It turned out that the Eritrean Committee had met every weekday afternoon for the entire summer after receiving our May draft. The participants told us that the meetings had often been intense, with the heated discussions sometimes going on into the evening hours. And these were all people—attorneys, judges, the Attorney General, the Chief Justice—who had other full-time jobs and responsibilities.

We also received copies of written comments on the Code from the various Ministries, including Health, Agriculture, Transport, and Communication, as well as the National Union of Eritrean Women and an experienced Ethiopian judge who had just been expelled from Ethiopia in the recent ethnic cleansing. Finally, we were given an agenda for a four-day Penal Code Drafting Workshop to discuss major issues identified by the Eritrean Committee. We were obviously far from done.

The meeting, again held in the large hall of the Chamber of Commerce, was one of the highlights of my professional life. This time more than fifty people attended. Almost all of the judges, law professors, and lawyers who had been at our first meeting were there, but this time they were supplemented by a good part of the rest of the lawyers in the country, along with representatives from the police, the women’s union, the commercial sector, and many of the government Ministries.

With tens of thousands of soldiers poised on the front lines no

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34 See Wilson, supra note 11.
more than fifty miles away, we spent the next four days going through the draft Code from beginning to end, at times discussing the issues raised in the agenda or by the Committee’s written comments, at times turning to problems and questions raised by participants on the floor. It would take far too long to describe all of the discussions, for they ranged over the entire spectrum of the criminal law. Over the course of the four days we talked about the basic principles of crimes and punishment, self-defense and insanity. We discussed the merits of giving discretion to judges or parole boards, and whether juvenile offenders should be treated as criminals or children. We wrestled with ways to ensure the continued vitality of the informal courts, which operated according to customary law. We spent a great deal of time talking about corruption and the most effective way to fight it, and we debated whether money laundering laws were needed.

Several conversations stick out in my mind. The Transitional Code, following the European model, treated conspiracy as an aggravating element at sentencing, and aside from several narrow categories of criminal combinations, it was not a distinct crime under that code. We knew that the Eritreans were seriously concerned about corruption and other white-collar crime. We


36 The proceedings were videotaped in their entirety, and brief clips were shown on the nightly news.

37 To make room for the village courts and customary courts, which operate informally, we were asked to create a special category of crimes for the minor offenses which so often clog the criminal courts around the world—fights charged as assaults, insults which become defamation, petty thefts by young people. These offenses would be heard by the traditional dispute resolution institutions that had grown up over the centuries in all of the different ethnic groups in Eritrea. These institutions would not be allowed to imprison people, but it was hoped that, by giving them this role, they would be allowed to continue, and hopefully would even be fostered, by this statutory recognition.
therefore decided to add a provision to the Code making it a crime to conspire to commit an offense, with punishment limited to one-half the maximum punishment allowed for commission of the target offense. This provision was nothing special in our minds, and certainly not overly harsh by common law standards. The reaction in Asmara was almost unanimous. They did not like the crime of conspiracy. It was a “common law creature” subject to abuse by prosecutors (boy, did I agree with that one). They did not need it in their Code—they could wait until somebody actually did something before they attached criminal liability. So, not unhappily, we removed that provision.

The most heated and memorable discussions were those in which the Code treaded most directly on major issues facing Eritrean society, as, for instance, on the role of women in Eritrean society. This of course arose during the debate about abortion, but the most heated debate occurred when we turned to the laws of sexual assault and kidnapping of a female victim.

Under the Transitional Code, a man charged with rape or kidnapping of a female had a complete defense if they got married to each other after the abduction or rape. During our initial drafting we had not paid these provisions much mind and without much ado had suggested eliminating them. The Eritrean Committee, being more aware than we were of the sensitive nature of this issue, had flagged it for discussion.

What we had not known was that a number of ethnic groups in Eritrea (and, I understand, in other countries in that area of the world) had a courtship tradition that involved an abduction ritual.

38 I have written elsewhere about the priority that the Eritrean leadership has placed on changing the status and role of women in Eritrean society and about the difficulties they have encountered as they try to shift age-old traditions. See Rosen, supra note 11, at 282–83, 292, 297–98.

39 The representative from the Women’s Union also took a strong stand on abortion, advocating that it be made legal in all circumstances. In our first draft, we effectively punted the issue, saying that a person who terminates a pregnancy in accord with health regulations (yet to be issued) would not be punished. We were sent back to the drawing board after the meeting in Asmara, and our final version provided that the woman and her licensed medical practitioner could not be prosecuted if, in the opinion of a medical practitioner, the pregnancy might endanger the woman’s physical or mental health. Forceful abortion, abortion by unlicensed providers, and abortions obtained by force, fraud or deceit are all illegal. See Transitional Penal Code, arts. 528–536 (Eri.).

40 Transitional Penal Code, art. 558(2) (Eri.).
The man, along with male family and friends, would sneak in and take the woman from her family. Sometimes the woman abducted had planned this out with the abductor, but in other cases it was a way for a man to obtain a wife by force. He would take her away against her will, and then her family would have to consent to the marriage because she was shamed before society, and nobody else would have her.

Two arguments were advanced in favor of keeping the defense. One was that it really was better for women to keep it, since it provided a raped woman, or an involuntarily kidnapped woman, with after-the-fact legitimation. The other was that if this defense were eliminated even those who were only carrying out a voluntary abduction would be prosecuted when they were doing nothing more than continuing a traditional practice.

The argument raged for quite a while. We pointed out that in a voluntary abduction, the “kidnapper” would not be guilty under our proposal because a planned elopement would not be an unlawful kidnapping or abduction in the first place. Others argued that the defense was an insult to women, reflecting a sexist view of raped women as “damaged goods,” and that it had no place in modern society. Finally, the chair called on a woman who had previously not spoken. She was introduced as a representative of the Eritrean Women’s Union. She spoke a few words in halting English—even though English was at most a second or third language for everybody there but us, the proceedings up until then had been conducted entirely in English—but then switched to Tigrigna, obviously asking a question. The chair informed us that she had asked for, and been granted, permission to speak in Tigrigna. Tekle, my old officemate from the University Law Program, was designated as the interpreter. He was an ex-fighter who had spent seventeen years in the field and was fluent in at least seven languages.

The woman’s speech was delivered with vehemence and conviction. (I could tell this even before it was translated.) Her message was unequivocal: The Women’s Union had discussed this

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41 English had long been a part of higher education in Eritrea and Ethiopia, and thus almost all educated Eritreans had some degree of fluency in the language. While the meeting was conducted in English, it was of course common for the participants to use Tigrigna or other native tongue in the debates and conversations that raged in the halls and around the tables whenever there was a break in the action.
issue, and they strongly felt that the marriage defense had to be eliminated. Marriage by abduction and after-the-fact legitimation of rape were the vestiges of a patriarchal past, and as such had no place in modern-day Eritrea. Women had not fought beside men for more than thirty years to go back to a feudal society.

More discussion ensued, but the matter was effectively decided. Post-abduction marriage, no matter how voluntary, would not be a defense (but, like many factors, could be considered at sentencing).

We left Asmara exhausted by four days of intense debate. We were not going to make a few minor changes and leave a final draft behind when we left. To the contrary, we had months of work left, and in fact we did not ship off our final draft until February 1999.

When we passed our final draft to the committee we understood that we were finished. After review by the Eritrean Committee, it would be forwarded to the Ministry of Justice. We assumed it would then be reviewed by the President’s Office before it would finally be submitted to the Eritrean legislature.

F. Drafting the Criminal Procedure Code

I. Starting in Asmara

Our work on the Criminal Procedure Code actually started before we finished the Penal Code. Immediately following the completion of the October Penal Code Workshop in Asmara, we sat down with the Working Committee for the Procedure Code for our initial discussions. We needed to know what kind of criminal procedure they wanted. Did they want to keep the common law system that they were using, or did they want to switch to an inquisitorial, civil law model? Did they want jury trials? What were their major concerns with the way the Transitional Code operated?

The directions again were relatively clear. They were comfortable with an adversarial system of justice, and they wanted to continue with that model. They wanted a better one than the one they had, but they had no desire to move to a continental, inquisitorial system. They did not want jury trials. They wanted to make sure that the new code protected the liberties enshrined in the new constitution, and they wanted to make sure that the code
required everybody, especially the police, to operate under the rule of law.

2. The First Draft

In the spring of 1999, having finally shipped off our final revision of the Penal Code, we got back to drafting. We were exhausted from the work on the Penal Code, but after a break we were ready to move ahead. To some degree, the decision to stick to an adversarial system of justice made our job easier. We no longer had to comb the world for examples of criminal procedure, since the inquisitorial systems were now largely irrelevant to our work. Further, most of the countries that used the common law approach did so because they were former British colonies. Thus, most of their codes had either been written in English or had been translated into English. We also had the advantage of experience on our side. We were surer of ourselves and had a better idea of what the Eritreans were looking for. We knew what they wanted for a starting point and were more comfortable relying on our own drafting abilities to make the changes necessary. There were plenty of good models to look at, including some modern codes from Zambia, India, and Uganda. We even had a copy of the EPLF Criminal Procedure Code, a relatively progressive code that the Eritreans had drafted in the liberated territories in 1989.

The actual drafting work followed the same pattern as the Penal Code drafting. We divided up the tasks, sent each other drafts, met in person and by phone, argued, cajoled, and agreed. We provided comments explaining our draft articles along with notes to the Eritrean Committee, suggesting alternatives or asking questions.

Although we had been told that the Eritreans wanted to keep their adversarial system, we still had to look at a number of difficult issues. Some of the issues were matters of policy, but others were ones of craft. The question of how much detail to include in the code was a recurring issue. The three of us were familiar with a system of criminal procedure which relied to some extent on evolving case law to set out the rules and fill in the gaps in statutes. The Eritreans did not want that. So we had to decide, for example, how detailed we should make the evidentiary provisions of the code, since there was no separate code of evidence. How would the absence of juries affect that decision?
How specific should we make the provisions governing police conduct in making arrests and in carrying out searches and seizures? Did we need a provision for every eventuality? At what point would the detail overwhelm the substance? How realistic were extensive provisions in a developing country with relatively low rates of education and literacy? Certainly a code that contained all of the nuances of U.S. case law in this area would be impractically long and confusing.42

One of my most vivid memories of the Criminal Procedure Code drafting time reflects not so much on the code, but on the very strange feeling you get drafting a law for a country under siege. Our October 1998 meeting on the Penal Code had occurred during a lull in the fighting with Ethiopia. Asmara was calm and the most noticeable effect of the war was the presence of people expelled from Ethiopia because of their Eritrean descent—as noted earlier, this included one prominent judge who was enlisted to participate in the meeting. During the next two years, however, the war would periodically heat back up again and the Eritreans were time and again fending off huge Ethiopian armies. So every day began with a gut-wrenching rush to the computer to check e-mail and the Internet to see if the country for which we were working would survive.43

Whatever our concerns over the war situation, we followed our instructions and kept working, and in May 2000 we sent our first draft off to Asmara. Soon afterwards, in the summer of 2000, the Ethiopians broke through the Eritrean lines, and it looked possible that they would take Asmara. The University of Asmara was closed as the students rushed off to the front, together with a huge portion of the fighting-age population. Nevertheless, in the middle of all of this, with much of the nation’s human power at the front

42 We compromised in these areas, hopefully providing rules general enough to provide guidance to the police and courts, but simple enough to be readily applicable. Time and experience will tell whether the decisions were correct.

43 The only exception to this was when I was actually in Asmara, where I found everybody going about business as usual. I was there at the very beginning of the conflict, in May 1998, and then again for our meeting in October 1998. I spent a month there teaching summer school in July 1999, when the battlefield was relatively quiet, and I was back in December 2000, when I had the pleasure of watching, on Eritrean television, the signing of the peace agreement in Algiers. All throughout this period I found the anxiety level much lower among those in Asmara than among Eritreans and their friends who found themselves abroad, watching from afar.
lines or mobilized in other ways, the Eritrean Working Committee met again, day after day, to go over our draft. I do not know how they managed to keep their concentration with the guns booming so close, but evidently they did. By the end of the summer, with a ceasefire announced, we received twenty-six single-spaced pages of comments from our Eritrean counterparts, and we were informed that it was time to schedule another meeting in Asmara.

3. Asmara, December 2000

The meeting was held in December 2000. Because of difficulties with U.N. funding, I went alone to represent the three of us. Around Asmara, things were different. U.N. peacekeepers were pouring in. The streets, hotels, restaurants, and bars were filled with uniformed soldiers from places like Kenya, South Africa, and Denmark, along with hordes of civilian relief workers, all there to help implement the looming peace agreement and disengagement plan. It was so crowded that I ended up abandoning my attempts to find a suitable hotel room and stayed with Eritrean friends. It was in their home one evening that I sat and watched Eritrean television, wrapped for warmth in a “gabi,” a traditional Eritrean blanket, as the presidents of Eritrea and Ethiopia signed the peace agreement that would hopefully end the latest, and perhaps bloodiest, chapter in their long-lasting war.

Inside the by-now familiar environs of the Asmara Chamber of Commerce things were largely the same. There were fewer Eritrean participants, maybe thirty, mainly because the representatives from the various Ministries and popular organization representatives who had come to the earlier Penal Code meeting were not there. Instead, it was the professionals who had gathered: lawyers, judges, prosecutors, academics, those in private practice, and representatives from the police and security agencies.

The Eritrean Committee had set out an agenda highlighting twenty-two major issues that needed to be decided, and while participants were allowed to raise other issues, for most of the three and one-half days we stuck to discussing the issues contained in the agenda. On these twenty-two issues, I witnessed and participated in a debate that was a dream for a criminal procedure professor.

Most of us who teach criminal procedure have come to
understand the competing, and equally legitimate, needs for security and liberty that have to be accommodated in any such code of criminal procedure. We know that this balancing is especially needed, and difficult, in relation to those provisions which govern and limit the activities of the police. Knowing these things and conveying them to students are two different matters. I only wish that I could have captured the debate in Asmara for my classroom.

The debate swirled mostly around a few critical issues involving the police. The first was whether to keep the semi-inquisitorial procedure of the Transitional Code which allowed the police and prosecution to ask the court for an order of remand, which would keep a suspect in pretrial custody for the sole purpose of further interrogation and investigation. The second was whether to exclude from evidence anything seized in violation of the Constitution or the code. In our draft we had proposed doing away with the remand procedure, but we compromised on the exclusionary rule. We tentatively recommended the adoption of the Canadian/English optional exclusionary rule allowing, but not requiring, the judge to exclude illegally seized evidence. That exclusionary rule depends, among other things, on the flagrancy and purposefulness of the illegal behavior. We had added, however, a note to the Eritrean Committee suggesting that this was a matter of great significance that needed further discussion.

Both issues were the subjects of intense debate. For hours I watched, transfixed, as the arguments flowed back and forth. The representatives from the police, most of whom had no formal legal training, eloquently argued that the absence of remand powers and the adoption of a strict exclusionary rule would hamper their ability to enforce the law and protect the public. Many of the lawyers countered that the remand procedure was a relic of a totalitarian past and that only a strict exclusionary rule would suffice to curb inevitable police abuse and to protect individual rights.

There were far more lawyers there than law enforcement officers, and the lawyers carried the day on both questions.

44 Under the Transitional Code, the police could ask the court to order a remand to police custody for up to twenty-eight days for the reason that the investigation had not been completed. See Transitional Criminal Procedure Code, art. 59 (Eri.) (as amended).
Remand for investigation was kept out of the Code, and our recommended partial exclusionary rule was changed to an absolute prohibition on the introduction of any evidence obtained in violation of the Constitution or the Criminal Procedure Code. At the end, one of the police representatives, wryly noting that the deck was stacked by the preponderance of lawyers in the room, announced that he was reserving the right to raise these issues again when the code got to a more balanced forum—the legislature.

There were several other hotly debated topics regarding how criminal trials and appeals would be conducted. The longest debate of the week, to my recollection, was about whether to keep the Transitional Code provisions for trial in absentia. The eventual solution was to allow this in a limited class of cases; with many qualifications and only when adequate notice was provided (thus practically limiting it to cases in which the defendant skips out on a pending trial). Other issues discussed included: how to treat the defendant as a witness (the Transitional Code had only allowed an unsworn statement from the defendant); how to protect family members from being compelled to testify against each other; and how to integrate the constitutionally created Supreme Court, with its power to enforce the Constitution, into the appellate process.

I took notes on everything and on my return, immediately drafted a report for Patrick and Marty. We took that report and the Committee’s written comments, and proceeded to prepare a final draft. At the beginning of June 2001, almost four years from when we started work, Marty and Tempi Bobrowski put the final draft

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45 A similar debate arose over the Transitional Code provisions allowing the police the power to officially summon witnesses and suspects to the police station for questioning. We suggested doing away with the police summons: under our proposal, the police were free to talk to witnesses at any reasonable time or place, and could ask someone to come to the station, but had no summons or arrest power in this regard. Again, it was the lawyers on one side and the police on the other. A compromise on language was reached: the police could issue a “directive” to someone to go to the police station for questioning, but a provision was also added that specifically noted that someone could not be arrested or otherwise punished for failure to appear.

46 What I remember most about this portion of the debate was that during the course of the discussion, the participants often succeeded in convincing each other of their respective positions, thus causing many in the hall, including myself, to switch their own positions back and forth.

47 Ms. Bobrowski, Marty’s secretary, had worked hard to support all of us through
together and brought it to the Eritrean Embassy for shipment to Asmara. We were done.

III. Conclusion

I am hesitant to make too many claims for the codes we helped draft. These laws are so long, so detailed, and attempt to cover so much that I am sure there are things we missed, maybe even whole areas that we should have covered and did not. I do not doubt that someone could go back over the codes and point to errors in drafting, or dispute some of the judgments that we helped make. Perhaps somebody will claim that they could have done a better job, in a much quicker time, and maybe that is true. Only time will tell.

For many of the same reasons, I am reluctant to make too strong a claim about the extent to which the code drafting process I have just described supports Professor Jamar’s thesis of the superiority of a “lawyering approach.” I do believe that the codes that we helped produce are better because the work was done under the direction of the Eritreans, because they made the important decisions. But that belief, I have to admit, is probably also shaped by another belief that the Eritreans and I both hold: that whatever the product, the important thing was for the Eritreans themselves to own and control the process. My feelings about this work, however, are unequivocal. It was, simply, a great experience. True, it was not always easy. Looking back, the last four years of code-drafting activity seem like a blur: early Sunday mornings at the computer, getting the work done before the kids would wake up; hours spent in conference calls with Patrick and Marty; day-long meetings in Washington, Montreal, or Chapel Hill; and endless plane flights and days in the Frankfurt, Germany airport, the transit point for flights to and from Asmara.

All of this was offset by so much on the other side. There were the feelings of returning home, feelings I got not only when I returned to Chapel Hill, but also when I got off the plane at midnight in the cool night air of Asmara. There was the joy of seeing friends, friends living thousands of miles away, friends whom I thought I might never see again when I left Asmara in June 1996. There was the intellectual rigor of the drafting and the whole process. She was indispensable.
debating, the excitement of being part of a society at the beginning. Most of all, there was the feeling that I was incredibly fortunate to have had the opportunity to be both an observer and a participant in this law creation process, a process that perhaps engendered a legitimacy in the resulting laws, which can only come from the organic creation of a society's law by the society itself.