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THE DEVELOPMENT OF LEGAL SYSTEMS: THE ETHIOPIAN EXPERIENCE

Robert Allen Sedler*

A complete, modern legal system must be created in each of the "developing nations" of the world to meet the needs of rapid social and economic growth. The problems experienced in imposing a new legal system upon a "developing" society are frequently similar among the various nations. Professor Sedler discusses these problems of general legal development with respect to several new nations. His detailed analysis of the progress of the Ethiopian legal system brings into focus the common denominators of legal and societal evolution. He is particularly qualified to discuss the Ethiopian experience because of his former position as Assistant Dean and Associate Professor of Law at Haile Sellassie I University from 1963-1966.

I. INTRODUCTION

The purpose of this article is to analyze the development of a modern legal system in what we have come to call a "developing nation." A number of nations fall into this category, and the problems they face with respect to the development of their legal systems are often similar. However, it is necessary to focus on a particular nation in order to obtain a comprehensive picture of the development process. While the problems of legal development will be discussed with reference to a number of nations, particularly African ones, the focus will be primarily on the development of the legal system of Ethiopia.

Today we are very conscious of the developing nation. Many nations of the world are trying to transform and modernize their societies and economies by a process of planned development. Ordinarily we think of such development in the material sense; a nation is trying to raise the living standards of its people, educate its children, and eliminate poverty, illiteracy, and disease. The process is a continuing one, involving the employment of all resources at hand. As part of this development, the legal system must also be radically altered to reflect the changes that are taking place in the society. Simply stated, a

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modern legal system must be established to meet the needs of the modern society to which the process of social and economic development is directed.

When we say that a nation's legal system is not developed, we mean that it is not the kind that can be employed effectively in a modern society.¹ Perhaps the best way to describe an underdeveloped or developing (this is the term presently used) legal system is to compare it with one that would be considered developed. A developed legal system, as the term is used here, is one that has a well-defined body of law and established institutions administering that law. The "law" of an American state, for example, consists of its constitution, legislation, and for most states, the common law. The common law forms a concrete body of law, which is to be the basis for decision in most cases coming before the courts. The relationship between the various sources of law is clear; the court is to apply the provisions of a statute instead of the common law where they are inconsistent. In a civil law jurisdiction, such as France, the primary source of law is the codes, and case law occupies a decidedly secondary position.² In neither country is there any real question as to whether the law shall consist primarily of legislation and case law or of comprehensive codes. There is but one system of law applicable to all persons subject to the state's jurisdiction. While the system is still evolving to some extent and changes will be made, they are essentially peripheral and within the framework of an established system.

The institutions by which the law is administered are equally defined. The boundaries of power between the courts and the legislature and between higher and subordinate courts have, on the whole, been marked out. In the United States, it is recognized that subordinate courts are bound by decisions on questions of law rendered by higher courts and by their own decisions unless they choose to overrule them, while in France the doctrines of binding precedent and *stare decisis* are not in effect. A basic structure of tribunals has been established, which are staffed by persons who must possess certain

¹ As the term "developed legal system" is used in this context, it is clear that a number of "developing nations" have "developed legal systems." Essentially the nations of sub-Saharan Africa are referred to when talking about nations who do not have "developed legal systems." Many nations of Latin America, the Middle East, and Asia can be said to be "developing" in the economic sense, but they have legal systems as developed as those of economically developed countries. India or Brazil would furnish a good example. In these countries too, however, changes will have to be made in the legal system to take account of the social and economic change taking place in the society. A discussion of this kind of legal development is necessarily beyond the scope of the paper.

² See the discussion of the French approach in R. DAVID & H. DE VRIES, *THE FRENCH LEGAL SYSTEM* 115-21 (1958).

qualifications and who are selected by prescribed methods.³ The place of the lawyer in the administration of justice and the organization of the legal profession have also been determined.⁴ Again, changes will be peripheral.

In a developing legal system this simply is not so. A planned development of the legal system must take place precisely because there is not a well-defined body of law and established legal institutions, or at least not such as are adequate and suitable for the modern society that is being created. Existing law is frequently uncertain and not uniformly applied; nor is it capable of providing the solution for the new kinds of legal problems that will be faced. The institutions administering the law have not taken on a definite form. Indeed, the place of law and legal institutions in the society itself may not be clear or understood. At the time that the development of the legal system is undertaken, *the fundamental questions of what the law will be and what institutions will administer it remain to be determined.* It is the fact that such questions are unanswered that marks the difference between a developed and a developing legal system.

Moreover, the development of the legal system will not be an evolutionary one, responding to societal needs as they appear at a given time. It will be a planned and structured development, an obviously different kind of development than that which has taken place in legal systems that presently would be considered developed. The Anglo-American system, as we know it—the content of its law and the nature of its legal institutions, has been the product of gradual and evolutionary growth. Dean Pound has traced this growth from the stage of primitive law to strict law, to equity, and finally to the stage of maturity.⁵ Its development has paralleled the development of the nation as a whole. As new societal institutions are created, new needs appear, and the law develops in response to those needs. Since the essence of the feudal system in England was the ownership and possession of land, a law of property came into being before other branches of private law,⁶ and that law was shaped by the requirements

³ Thus, in the United States and England judges are selected from the ranks of the bar, while in France and many other continental countries, where there is a career judiciary, a person must have special training to become a judge. For a discussion of the French approach see R. DAVID & H. DE VRIES, *supra* note 2, at 18-20.

⁴ In the United States there is only one type of lawyer while in England there is a divided profession, i.e., lawyers are either barristers or solicitors. See generally LUND, *The Legal Profession in England and Wales*, 35 J. AM. JUD. SOC'Y 134 (1952). In France the profession is even more divided. See generally M. AMOS & F. WALTON, *INTRODUCTION TO FRENCH LAW* 22-23 (2d ed. 1963).

⁵ R. POUND, *JURISPRUDENCE* 367-456 (1959).

⁶ See H. POTTER, *AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITU-*

of the feudal system. With the termination of feudalism, a new way of defining relationships was necessary, hence the "change from contract to status" and the development of a law of contracts.⁷ It is now recognized that, on the whole, the law of negligence was developed with a view toward meeting the problems of industrial activity and mechanization and was a method of restricting the liability of new enterprises.⁸ As those enterprises became more secure and risks were somewhat reduced, different pressures were put on the legal system, and in response to them a law relating to industrial accidents emerged, of which Workmens' Compensation, for example, is a part. Values had changed, and there was greater concern for the victim of industrialization and emphasis on the apportionment of loss resulting from industrial activity. The same kind of development took place with respect to legal institutions and procedure.⁹ Since the development was a gradual and evolutionary one, it may be carefully studied and analyzed. A body of past experience can guide those responsible for the administration of the law. A basic framework has been established, and changes will take place within that framework.

Today, this kind of evolutionary development cannot take place. The development must be deliberately planned and structured, and it is revolutionary in the sense that a substantially new legal system will be substituted for the old. This is so because the development of the society itself is planned and structured. The leaders of the nations now coming onto the world scene¹⁰ are trying to create a completely new society; the development extends not only to a country's economic system, but inevitably affects existing social patterns and the peoples' way of life. There is dissatisfaction with conditions as they now exist, and governments are trying to bring about change through a comprehensive system of planning.

TIONS 30-31 (A. Kiralfy ed. 1958).

⁷ *Id.* at 46-47. See also H. MAINE, *ANCIENT LAW* 170 (5th ed. 1873).

⁸ The concern with limiting liability is demonstrated by judicial opinions such as those in *Winterbottom v. Wright*, [1842] 10 M. & W. 109, 152 Eng. Rep. 402, and *Blyth v. Birmingham Waterworks*, [1856] 11 Excheq. 781, 156 Eng. Rep. 1047. See also *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), where the court invalidated a workmen's compensation law.

The French courts developed a law of negligence based on the provisions of art. 1384 of the Civil Code. See generally A. VON MEHREN, *THE CIVIL LAW SYSTEM* 367-414 (1957).

⁹ Modern procedure evolved only after experience with the restrictive and cumbersome procedure of the formulary period. The court of equity and the body of law it administered arose because of the rigidity of the common law and the dissatisfaction with the common-law courts—the stage of equity marked a definite point in the development of the Anglo-American legal system.

¹⁰ The United Nations has increased from a membership of 51 in 1945 to 122 in 1967.

This being so, there simply is no time for the law to evolve gradually in response to pressures of public opinion.¹¹ The legal system that exists was necessarily designed to meet the needs of the existing society, and it is clear that it will be inadequate to meet the needs of the new society that is sought to be created.¹² Since the effort is to transform the society rapidly, the legal system must be transformed at the same pace. New law and new legal institutions must be established in a relatively short period of time, and they will be so established according to a definite plan. It is this kind of development with which we will be concerned.

The development must also be considered in temporal perspective. The impetus for the development of the legal system is a revolutionary change in the nature of the existing society. A new legal system must be established to reflect the changed needs and values of the new society. The clearest example is the achieving of independence by a former colony. In such countries, modern concepts of law and modern legal institutions may exist to some extent, because they were imposed by the colonial power. But they were established in a colonial context, and upon independence, that nation must create the kind of legal system suitable for an independent nation in the process of modernization. An actual revolution, resulting in the overthrow of the existing government, may also betoken the need for a new legal system. Turkey, for example, had to develop a new legal system following the overthrow of the Ottoman Empire.¹³ It did not matter that a fully-developed legal system existed, since that system reflected the needs, values, and institutions of Ottoman society.¹⁴ When a conscious effort was made to abolish such values and institutions, the existing legal system was thereby rendered inadequate. The same was true in Japan following the Meiji Restoration of 1868. One writer has observed that the "history of Japanese law since the Restoration of 1868 is almost synonymous with an account of the reception of occidental law and legal science."¹⁵ The existing body of law had developed in response to the needs of the feudal society and would

¹¹ For a discussion of the relationship between public opinion and new law see W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 10-12 (1959). See generally A. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* (2d ed. 1963).

¹² See A. ALLOTT, *ESSAYS IN AFRICAN LAW* 55-56 (1960).

¹³ A concise summary of the development of this system will be found in K. REDDEN, *LEGAL EDUCATION IN TURKEY* 6-8 (Joint Publication Series No. 6, 1957).

¹⁴ Ottoman society had a religious base; the new society was to be completely secular.

¹⁵ Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN* 5, 36-37 (A. Von Mehren ed. 1963).

not be suitable for the westernized society that was the Emperor's objective.¹⁶

Another aspect of temporal development refers to the time at which the development may be said to have taken place. Development will be described here in terms of the actions taken to develop the system, namely the creation of the new law and the new legal institutions. Once the law and institutions have been established, the crucial problem of implementation remains. This aspect of the process of development will continue for many, many years. The concern of this article is with the creation of the structure of the system—the law and the institutions by which it will be administered.

Consideration can now be turned to when the process of development began in Ethiopia.¹⁷ While efforts at modernization of the country (which obviously included efforts at modernization of the legal system) were begun early in the reign of the present Emperor, Haile Selassie I,¹⁸ the development was a very gradual one and was interrupted by the Italian occupation. Realistically, the modern history of Ethiopia can be said to date only from the time of Liberation in 1941. It was during this time that the decision was made to modernize the country as rapidly as possible and with it, its legal system.

Let us look at the Ethiopian legal system as it then existed. There have always been legal institutions of some sort in Ethiopia, and the importance of "justice" to the Ethiopian people has long been recognized.¹⁹ There is little documentation on how those institutions operated in the past, but from such documentation as there is and from the "impressions" that contemporary Ethiopians have of this process, certain observations can be made. It appears that while what we would call "rules of law" existed, such rules did not necessarily have binding force. Among the Christian population there was the Fetha Negast,²⁰

¹⁶ See *id.* at 5, for a discussion of the changes that were effected.

¹⁷ This development is summarized in Vanderlinden, *Civil and Common Law Influences on the Developing Law of Ethiopia*, 16 *BUFF. L. REV.* 250 (1966).

¹⁸ The Emperor, as Ras Tafari Makonnen, was appointed regent in 1916 and was crowned as Emperor in 1930. For a discussion of the Emperor's rise to power and the confused political situation prevailing after the death of Menelik II, see L. MOSLEY, *HAILE SELASSIE: THE CONQUERING LION* 56-89 (1964). The dates used in this article are those of the Gregorian Calendar. Ethiopia, however, employs the Julian Calendar, which is seven years and eight months behind the Gregorian Calendar.

¹⁹ A number of scholars have commented on this point. For a discussion and summarization of the views of other authors see M. PERHAM, *THE GOVERNMENT OF ETHIOPIA* 143-44 (1948). As one writer put it, "The Ethiopians regarded injustice as the worst of enemies." A. ABBADIE, *DOUZE ANS DANS LA HAUTE-ETHIOPIA* 103 (1868).

²⁰ For a discussion of the place of the Fetha Negast in Ethiopian legal history,

a written compilation of religiously-oriented rules of conduct. In all parts of the country, there were also customary rules which, however, varied considerably from place to place. Each king or other ruler of territory administered justice in the area under his control. It can be said that the foremost consideration was to obtain cohesion in communities menaced by hostile neighbors and natural catastrophes.²¹ It was necessary that harmonious relationships exist between the inhabitants of those territories, and the disputes were adjudicated with a view toward achieving such harmony. Therefore, it is believed that the person adjudicating a dispute was not bound to decide the case in accordance with the Fetha Negast or the customary rules if the effect of the decision would have been to disrupt the harmony of the community.²² It was the ruler who was to render a "wise and just" decision, and it was to him rather than to the law as such that the people looked for protection of their rights. It may be supposed that some rules of law, such as those relating to land ownership, were more binding and could be disregarded only in exceptional cases. But they could be disregarded, and it was the decision of the ruler which was significant and which had legal force. The final authority was the Emperor, who exercised the power to review the decisions of local rulers.²³ He was recognized as the ultimate source of justice, and he was not considered to be bound by strict rules of law in rendering his decision.²⁴

The absence of binding effect to rules of law is a common feature in many societies in the early stages of legal development.²⁵ In the sense that the people look to the ruler rather than to the law, the ruler may be said to be "above the law." But a ruler who was arbitrary or unfair in the administration of justice would not long enjoy the confidence of the people under his jurisdiction. The peoples' sense of injustice²⁶ imposes limitations on his action more so than rules of law. In that stage of development, law cannot be separated from the men administering it.

The concept of law as a binding force in Ethiopia can best be viewed in the context of the power relationships of the Emperor and local

see Graven, *The Penal Code of the Empire of Ethiopia*, 1 J. ETH. L. 267, 268-72 (1964).

²¹ See David, *Les Sources du code civil éthiopien*, in REVUE INTERNATIONALE DE DROIT COMPARÉ 497, 498 (M. Kindred transl. 1962).

²² *Id.* at 498.

²³ See generally Sedler, *The Chilot Jurisdiction of the Emperor of Ethiopia*, 8 J. AFR. L. 59, 60-61 (1964).

²⁴ *Id.* at 65-66.

²⁵ For a discussion of the relationship between law and social control in the early stages of development, see R. POUND, *supra* note 5, at 369-75.

²⁶ See E. CAHN, *A SENSE OF INJUSTICE* 13-27 (1949).

rulers. As the power of the Emperor increased, local rulers were forced to apply the laws promulgated by him.²⁷ These laws were binding not for their own sake, but because they represented the will of the Emperor, which he could impose on the local rulers. During the reign of Menelik II,²⁸ the power of the central government was consolidated, and the political power of the local rulers was reduced. A number of Imperial Decrees were promulgated, and the decisions of the local rulers could be directly appealed to Imperial Judges,²⁹ who decided cases under the Fetha Negast or customary law. In light of these decrees and the powers of the Imperial Judges, the concept of the rule of law—those deciding cases were bound by laws which they could not disregard—began to emerge.

In the reign of the present Emperor, the power of the central government was fully consolidated,³⁰ and with such consolidation, the binding effect of legal rules increased. Government courts were established, and new laws were enacted. Early in his reign, Haile Selassie I promulgated laws regulating commercial transactions³¹ in an effort to provide some security in such transactions and to develop a more modern economy. More and more activity was brought under the orbit of the written law, and the judges were bound by that law. A major enactment at this time³² was the Penal Code of 1930, which was considered essential in order to create the conditions necessary for the modernization of society.³³ Under the prior practice the governor of the area sentenced the accused; the judges merely decided whether the conduct was wrongful.³⁴ The Code fixed the punishment for each crime and defined the offenses.³⁵ Only specific crimes and analogous offenses could be punished; there was no danger that an act could be punished because a judge or governor thought it wrongful. With the enactment of the 1930 Code binding law was in effect in penal cases.

²⁷ The same type of development took place in England. As the king consolidated his power, the seignorial and communal courts were eliminated, and a uniform or "common law" was applied throughout the land. See H. POTTER, *supra* note 6, at 18-30.

²⁸ Menelik II reigned from 1889 to 1913.

²⁹ We are fortunate to have a contemporary description of this process. See 2 G. SELASSIE, *CHRONIQUE DE RÉGNE DE S.M. IMPÉRIAL MÉNÉLIK* 531-32 (M. de Coppet ed. 1932).

³⁰ This is in a relative sense. There are still some remote parts of Ethiopia where the central government does not exercise effective control.

³¹ The most significant was the Law of Loans, promulgated in 1923.

³² The Emperor also promulgated a Constitution in 1930, which was considered a truly revolutionary development at that time.

³³ See Graven, *supra* note 20, at 272.

³⁴ *Id.*

³⁵ *Id.*

This was not as true in civil cases. There was no civil code, and most of the written law governing civil matters was concerned with commercial activity, which was not extensive. There was no law regulating land ownership, a frequent source of disputes. The Fetha Negast by this time was outdated and rarely applied.³⁶ Indeed, until the adoption of the Civil Code, civil adjudication was based primarily on "equity" and whatever customs prevailed in the area.³⁷

However, it was now accepted that judges were to decide the case on the basis of "law," such as it was. This concept was reflected in the 1931 Constitution, which provided that judges were to give judgment "in accordance with the law,"³⁸ and the concept of justice individually administered began to disappear.³⁹ Thus, a modern legal system had its genesis. Though much further development was necessary, a substantial start had been made.

As has been pointed out, this development was a gradual one, paralleling the gradual attempts at modernization of the country. All development stopped with the Italian occupation. Following the Liberation in 1941 and the decision to modernize the country as rapidly as possible, efforts were begun to develop the new legal system. This would obviously take some time and interim measures became necessary. The first step was to set up a system of courts, which was done in 1942.⁴⁰ At the same time an official gazette was established, and in the succeeding years a number of regulatory measures and a Revised Constitution were promulgated.⁴¹ All the while, work was progressing on the new law and legal institutions necessary for the modern legal system. A Codification Commission was organized, and foreign experts were retained to draft comprehensive codes. The first code to be enacted was the Penal Code in 1957. In rapid succession, a Civil Code, Commercial Code, Maritime Code,⁴² and Code of Criminal Pro-

³⁶ Krzeczunowicz, *A New Legislative Approach to Customary Law: The "Repeals" Provision of the Ethiopian Civil Code of 1960*, 1 JOURNAL OF ETHIOPIAN STUDIES 57, 58 (1963).

³⁷ *Id.* The author also points out that foreign precedents were sometimes considered where available.

³⁸ ETHIOPIA CONST. art. 50 (1931). See also ETHIOPIAN REVISED CONST. art. 110 (1955).

³⁹ As will be seen, however, the Emperor was not bound by the provisions of the law when he heard cases in Chilot.

⁴⁰ ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942, NEGARIT GAZETA (March 30, 1942).

⁴¹ The Negarit Gazeta is the official gazette of Ethiopia. It is published in Amharic and English and contains all laws and regulations. The Revised Constitution was promulgated in 1955. In many respects it is similar to the American Constitution and was drafted in part by American lawyers. See Russell, *The New Ethiopian Civil Code*, 29 BROOKLYN L. REV. 236 (1963).

⁴² In 1952, Eritrea, which had been under Italian occupation, was federated

cedure followed. The last code to be enacted was the Civil Procedure Code in 1965. There are still some areas that are uncodified, such as evidence and private international law, and codification of those areas will take place in the future. During the same time changes were taking place with regard to the courts, the judiciary, and the legal profession. In the sense that the term is used here, the legal system may be said to be substantially "developed" at the present time. Of course, serious problems of implementation remain. But a basic framework has been established, and future development will take place within that framework.

With this background, we may now proceed to consider the process of development. Earlier it was pointed out that there are two aspects to this process: the matter of what kind of law will form the basis of the system and the matter of what institutions will be established to administer the law. The question of institutions also includes the question of the procedure by which the law will be administered. The discussion will focus on each aspect separately. It should be noted that the discussion will not include the question of constitutional development, that is, the question of division of powers among the various agencies of government. While constitutional development may affect the content of the law and legal institutions, it takes place independently and should be approached in that context. A discussion of constitutional development is obviously beyond the scope of this writing. The concern will be with the law which governs the relationships between people and that which directly governs the relationships between people and the state, in other words, with the civil law and the penal law. Further, the institutions and procedures with reference to that law will be discussed.

II. WHAT KIND OF LAW WILL FORM THE BASIS OF THE SYSTEM?

There are four components of this question: (1) what will be the main body of law, and how will this body of law be created; (2) what should be the place of the existing or customary law;⁴³ (3) shall the law be uniform or shall there be different law for the different ethnic and religious groups, and if so, to what extent;⁴⁴ and (4) how shall the new law be applied? Each component will be considered separately.

with Ethiopia. Until that time Ethiopia was landlocked. Eritrea was incorporated as another province and the federation dissolved in 1963.

⁴³ Customary law is the term generally used in Africa to describe the existing body of unwritten law.

⁴⁴ This question is to some extent related to the second question, since the retention of customary law usually means that the law will be different for different peoples.

A. *What Will Be the Main Body of Law?*

This is the most important consideration. There is no time for a body of law to evolve. The existing body of law is not adequate for the society that is being developed; thus, a new body of law must be created. Where shall this law be found, and what form will it take?⁴⁵ We may first consider how some other nations have dealt with this problem so as to compare their solutions with the solution that Ethiopia adopted.

Where a nation was under the control of a colonial power, a body of modern law had been incorporated into the legal system. After independence, when these nations had to decide what the main body of law would be, they generally retained that law as its basis. Just as the United States retained the common law that was "received" from England, the African countries that were former British colonies and had thereby "received" the common law, did likewise.⁴⁶ The nature and extent of the reception in Africa is a subject of much debate and has given rise to a number of problems, a discussion of which is necessarily beyond the scope of this article.⁴⁷ The "received" law included the "common law, principles of equity, and statutes of general application."⁴⁸ However, the received law was only applicable insofar as local circumstances permitted, which resulted in a certain degree

⁴⁵ The absence of an existing body of modern law makes the use of some foreign law imperative. The real question is the extent to which foreign law will be employed and the method by which this will be done.

⁴⁶ For a discussion of how this law was "received," see A. ALLOTT, *ESSAYS IN AFRICAN LAW* 3-10 (1960). In a "settled colony" such as the United States the "settlers" took the English law with them. But not all the law "survived the journey." See *Wagner v. Bissell*, 3 Iowa 396 (1856), where the rule of the common law imposing strict liability upon the owners of trespassing cattle did not make it to Iowa. In some of the ceded colonies and protectorates in Africa the common law was not imposed, but instead another general body of law was received, such as Roman-Dutch law in Basutoland.

⁴⁷ See generally A. ALLOTT, *supra* note 46; W. DANIELS, *THE COMMON LAW IN WEST AFRICA* 109-48 (1964); A. PARK, *THE SOURCES OF NIGERIAN LAW* 14-42 (1963).

⁴⁸ This was the "common form phrase" denoting the received English law. A. ALLOTT, *supra* note 46, at 7. The common law was not received this way in the Sudan. In matters not governed by statute or Mohammedan or customary law, the courts were directed to decide the case in accordance with "justice, equity and good conscience." To the British colonial judges and Sudanese judges trained in the common law, "justice, equity and good conscience" became practically synonymous with "common law, principles of equity and English statutes of general application." See Guttman, *The Reception of Common Law in the Sudan*, 6 *INT'L & COMP. L.Q.* 401 (1957). It was thus the "unexpressed consciousness of legal training and affinity," as Professor Guttman puts it, that caused the English law to be received in the Sudan rather than by way of express enactment as elsewhere. *Id.* at 413.

of adaptation.⁴⁹ There was also the interaction between the received English law and the indigenous or customary law, which, as will be seen, was retained for a number of purposes.⁵⁰ Penal and procedural codes were promulgated for each of the colonies, and other legislation was enacted by the colonial legislatures.

After independence, this law continued in effect. Thus, in Ghana,⁵¹ for example, the main body of law consists of the following: (1) the common law, equity, and statutes of general application in force in England on July 24, 1874;⁵² (2) imperial statutes specifically applied

⁴⁹ One of the most difficult problems has been to determine whether a statute was of general application *and* suitable for African circumstances. One writer is of the opinion that in Nigeria, for example, only between thirty and forty English statutes were received. His conclusion is that "only rarely is an English Act both of general application in England, and not prevented by local circumstances from operating in Nigeria." A. PARK, *supra* note 47, at 35.

As an example of a statute that was of general application in England but not suitable for local circumstances, Professor Guttman cites Section 4 of the Sale of Goods Act in the Sudan. The Sudan Court of Appeal, in an unreported case, characterized the provision as an "artificial qualification" and held that in the Sudan it would not be sound to require every contract of sale to be in writing. Guttman, *supra* note 48, at 411.

⁵⁰ One of the most interesting examples of interaction has been the use of writings in connection with customary transfers of land. See A. ALLOTT, *supra* note 46, at 242-82. The change of the very nature of customary law in Ghana as a result of English influence is effectively demonstrated in Asante, *Interests in Land in the Customary Law of Ghana—A New Appraisal*, 74 YALE L.J. 848 (1965). On the subject of the interaction between the received and the customary law see generally W. DANIELS, *supra* note 47, at 349-94; A. PARK, *supra* note 47, at 132-44; T. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* ch. 13 (1956).

⁵¹ The post-revolutionary government does not appear to have made any changes in this area.

⁵² There has been some dispute as to whether this refers to the common law as it existed on that date or whether it refers to the common-law system. Under the latter interpretation cases decided by the English courts after the date of reception would also form part of the received common law. Professor Allott is of the view that it refers to the common law as it existed at the date of reception. A. ALLOTT, *supra* note 46, at 31-32. This view is disputed by African commentators. W. DANIELS, *supra* note 45, at 122-23; A. PARK, *supra* note 47, at 22-24. In a sense this may be an academic controversy. Professor Allott is talking about the effect of the decisions as binding precedent. Mr. Park suggests that Professor Allott's concern is that African courts be free to develop an indigenous body of common law without the restraints of later English decisions. It must be remembered that these writers are thinking in terms of the very restrictive concept of binding precedent and *stare decisis*, from which English courts are only now beginning to depart. See *Chancery Lane Safe Deposit & Offices Co. v. Inland Revenue Comm'rs*, [1966] 1 All E.R. 1 (H.L.); *Re Holmden's Settlement Trusts*, [1966] 2 All E.R. 661 (C.A.). The House of Lords has also held that it now has the power to depart from past precedents. See *Practice Statement (Judicial Precedent)*, [1966] 3 All. E.R. 77 (H.L.). The solution, as Mr. Park sees it, is to enact a statute providing that no English case should be absolutely binding on

to the Gold Coast or adopted by the Gold Coast legislature after July 24, 1874 and Orders in Council applying to that territory; (3) colonial legislation enacted by the Gold Coast legislature; and (4) legislation by the Parliament of Ghana.⁵³ English law, however, is applicable only so far as local circumstances permit, and it is applied subject to such modifications as are necessary to render it suitable to local circumstances.⁵⁴ In the Sudan, it is provided that the laws in force before the Constitution remain valid unless replaced by Parliament or other competent authority.⁵⁵ This is generally the approach that has been taken in the other African states that were formerly British colonies.⁵⁶

In the French colonies, French codes were imposed and provided a *droit commun* throughout French West Africa and French Equatorial Africa.⁵⁷ Again, after independence these codes served as the main body of law. While countries such as Senegal⁵⁸ and the Ivory Coast⁵⁹ have enacted or are in process of enacting new codes, these codes will follow the civilian approach,⁶⁰ and in the former French colonies the main body of law will consist of comprehensive codes as before.

The pattern, then, has been for a new state to retain the main body of law that existed before independence. This appears to be a universal phenomenon. In North America, states like Louisiana and Quebec, which were under French rule, still employ codes as the primary basis of their law. Former British colonies throughout the world, such as the rest of Canada, Australia, India, and Pakistan, have retained the common law. This is understandable and generally desirable.

the courts of Nigeria. However, the "unexpressed consciousness of legal training and affinity," to which Professor Guttman refers, appears to have caused most African judges to treat English decisions with great reverence. Irrespective of whether the phrase "common law" refers to the common law as it existed at the date of reception or not, the English common law as pronounced by the latest decision of an English court will be the common law applied by most of the courts in Anglophonic Africa.

⁵³ A. ALLOTT, *supra* note 46, at 206. See also Harvey, *The Evolution of Ghana Law Since Independence*, 27 L. & CONTEMP. PROB. 581, 594-96 (1962).

⁵⁴ A. ALLOTT, *supra* note 46, at 206.

⁵⁵ GUTTMAN, *supra* note 48, at 417.

⁵⁶ For a discussion of the applicable law in each of the former British colonies, see A. ALLOTT, *JUDICIAL AND LEGAL SYSTEMS IN AFRICA* (1962).

⁵⁷ See Farnsworth, *Law Reform in a Developing Country: A New Code of Obligations for Senegal*, 8 J. AFR. L. 6, 7 (1964). For a general discussion of the legal systems of the French colonies during the colonial period, see Pageard, *La réforme des juridictions coutumières et musulmanes dans les nouveaux états de l'Ouest africain*, 1963 RECUEIL PENANT 462, 463-66 (J. Topping transl. 1963).

⁵⁸ Farnsworth, *supra* note 57.

⁵⁹ Pageard, *supra* note 57, at 479.

⁶⁰ The Senegalese code is largely inspired by French law and employs the style and terminology of the French code. Farnsworth, *supra* note 57, at 10.

The persons who are directing the development have been educated either in the common law or civil law and are familiar with one system or the other. Legal concepts and ideas based on the existing system have emerged. The existing body of law can form the starting point for further development. The real question in these countries is the extent to which the existing body of law shall be modified and adapted to suit the needs of the country after independence.

In a country such as Ethiopia, which has always been independent, a substantial body of modern law did not exist. It is natural that such a country would look to the two basic approaches to law, codification and the common law.⁶¹ Both systems have been highly developed by the more advanced nations, and one approach or the other can be adopted. Thus, a country could voluntarily adopt the common law, and it would be "received" there in the same manner as it was received in the British colonies. Liberia, which always had close ties with the United States,⁶² has done this. Such a reception began after the new nation was established⁶³ and has continued to the present. In cases not covered by legislation, the applicable law is, "(a) the rules adopted for chancery proceedings in England and, (b) the common law and usages of the courts of England and the United States of America, as set forth in case law and in Blackstone's and Kent's *Commentaries* and in other authoritative treatises and digests."⁶⁴ The court can consider any of these sources in arriving at its decision. Once the decision has been reached, it is binding under the principle of *stare decisis*. In this way a body of Liberian common law will gradually emerge.

When Turkey decided to modernize its legal system it chose to adopt, with very few changes, the Swiss Civil Code and Swiss Code of Obligations.⁶⁵ There was a true "reception" of the Swiss law, and

⁶¹The discussion here is in reference to the approach taken toward the substantive law. The approach taken toward procedure will be discussed in the next section of the article.

⁶²The Liberian Republic was established by emancipated American Negro slaves. The American influence is reflected in the Presidential system of government, the flag, and in a number of other ways.

⁶³See A. ALLOTT, *supra* note 46, at 11-12.

⁶⁴LIBERIAN CODE OF LAWS tit. 16, ch. 3, § 40 (1956).

⁶⁵See K. REDDEN, *supra* note 13, at 7. The author points out that the Turkish Code of Civil Procedure was based on the Civil Procedure Code of the Canton of Neuchatel and the Turkish Law of Bankruptcy was based on the Swiss Bankruptcy Code. The Turkish Penal Code was taken from the Italian Code of 1899 and the Penal Procedure Code from the German Code of 1877. For a discussion of some of the problems the rapid adoption of the new codes created, see Twining, *Some Aspects of Reception*, SUDAN L.J. & REPORTS 229, 244 (1957).

indeed, it has been contended that this included the reception of Swiss case law and doctrine as well.⁶⁶

In Japan of the late nineteenth century, comprehensive codes along continental lines were also adopted. The process took considerably longer than in Turkey, and there apparently was a very careful effort at adaptation. However, the Penal Code was based on French law, and the Civil and Commercial Codes were primarily German in inspiration, though there also was some French and British influence.⁶⁷

In Ethiopia, an entirely different type of development took place. No foreign body of law existed, nor were there ties to a particular foreign country so strong that the adoption of that country's law seemed natural. Those responsible for the development of the legal system were determined that a body of law, distinctively Ethiopian in character, would be fashioned. There was to be no "reception" of foreign law as such. Instead, modern codes based on a variety of comparative sources were to be created.⁶⁸ And as will be seen, although the substantive codes followed continental models, Ethiopia adopted the common-law approach to procedure.⁶⁹ In examining the process, we are fortunate to have available some commentaries by the drafters of the Civil and Penal Codes, detailing the factors that influenced the drafting of those codes.⁷⁰

It may be asked why it was decided to adopt comprehensive codes on the continental model instead of adopting the common law in the same manner as did a country like Liberia, which also had been independent. In the first place, there were not strong ties to a common-law country, as in Liberia. Although it is true that after Liberation

⁶⁶ See the discussion of this point in David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 *TUL. L. REV.* 187, 191 (1963). In any event, Swiss doctrine and case law sources are available for the purpose of clarifying the Turkish law in those fields. See the discussion of this point and the comparison with the situation in Ethiopia in Krzeczunowicz, *The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability*, 7 *J. AFR. L.* 172, 173 (1963).

⁶⁷ See Takayanagi, *supra* note 15, at 15-33.

⁶⁸ David, *supra* note 21, at 500.

⁶⁹ As pointed out previously, the Constitution is similar to that of the United States. This is true of a good deal of legislation in the public law field, such as the Labor Relations Act. Japan, on the other hand, based its procedural law on the same legal system as the corresponding substantive law. The Criminal Procedure Code was based on the French one and employed the semi-inquisitorial method. The Civil Procedure Code followed the German model. See Takayanagi, *supra* note 15, at 18-21, 32-33.

⁷⁰ The original drafter of the Commercial Code, Professor Jean Escarra of the University of Paris, died before completing the draft. The work was completed by Professor Alfred Jauffret of the University of Aix-Marseilles. No commentaries are available.

there were very close relations with England and later the United States, Professor David, the drafter of the Civil Code, suggests that this may have had the reverse effect—Ethiopia wanted a continental-based code to counteract excessive Anglo-American influence.⁷¹ In one sense this may be correct, but it was not a major factor. If it had been considered sound to adopt the common law, this concern would not have prevented Ethiopia from doing so. It had been able to absorb foreign ideas and assistance from a variety of sources without being dominated by any of them, and it was not in danger of being dominated by the Anglo-American influence. But the adoption of the common law would not have been sound. The most dominant motive for the modernization of the legal system was the desire to assure as quickly as possible a minimal security in legal relations.⁷² Incorporating a body of case law would not give that certainty. At least for the general expectancy of situations, a code will provide more certainty than the common law, particularly when the common law had never been applied before. It would be much easier for the judges to apply a code containing specific rules than principles developed from cases—cases which would not be in the official language of the country, which is Amharic,⁷³ but in English, which very few judges can read. Moreover, in a code it would be easier to make the necessary adaptations to Ethiopian conditions; rules needed in Ethiopia could be specifically incorporated into the provisions of the code. The adoption of the common law could not be seriously considered, and a code of some sort had to be constructed.

Why was it decided to adopt a code on the continental model? Professor David's position in this matter is sound; there was really no alternative. As he pointed out, continental codes "constitute an exposé of law sufficient in itself, which is the point of departure for a new development of juridical rules," while a common-law type code "systematically sets out existing principles."⁷⁴ He goes on to say that, "in the absence of an existing body of law, the continental conception of a code clearly triumphs."⁷⁵ There was no doubt that a new body of law containing detailed rules had to be established. The rules had to be sufficiently clear so that whenever possible, the judge could decide the case solely by referring to the text of the law. The "law-making"

⁷¹ David, *supra* note 66, at 192.

⁷² *Id.* at 189. As His Imperial Majesty's Preface to the Civil Code states: "It is essential that the law be clear and intelligible to each and every citizen of Our Empire so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life, and this has been accomplished in the Civil Code."

⁷³ ETHIOPIAN REVISED CONST. art. 125.

⁷⁴ David, *supra* note 66, at 190.

⁷⁵ *Id.* at 191.

power of the judge was to be limited, and despite the opportunity of a judge to "make law" under a code,⁷⁶ it was believed that a code would limit the judge's discretion and reduce the danger of arbitrariness. Moreover, the assumption of a common-law type code is that it can be employed in conjunction with the existing body of case law. Since the common law was not in force and there was no recorded case law, such an assumption could not hold. Consequently, the codes had to follow the continental model.

Once this was decided, the next, and crucial, question was what should be the sources of the substantive provisions of the codes. In the private law area, it was not believed feasible to build on existing law to any degree. It was agreed that the customary law, such as it was, was unsatisfactory, which point will be discussed subsequently in greater detail. There was little written law, and in some fields no law at all.⁷⁷ Therefore, it was necessary to look to foreign law, but—and this is the most significant feature of the adoption of the main body of law in Ethiopia—Ethiopia did not look to the law of any single legal system. If there had to be a borrowing, it was to be an eclectic one, drawing the best from the various legal systems.⁷⁸ Not only is this approach sound from the standpoint of alternatives for choice, but it was consistent with the Ethiopian tradition of independence not to "receive" the law of any foreign legal system. Professor David describes the process of the drafting of the Civil Code as one of synthesis; the Code was to be an original work based on comparative law, containing provisions which had been adopted from the laws of a number of states.⁷⁹ The drafter consulted the civil codes of France, Switzerland, Greece, Italy, and Egypt to determine what matters should be covered by the Code.⁸⁰ The formula that was chosen considered both the special needs of Ethiopia and modern tendencies, and the drafter points out that it is doubtful if a single article is identified in terminology with an article contained in any particular foreign code.⁸¹ In addition to the codes mentioned, other legal sources were consulted. The draft uniform laws on sale of goods, arbitration, and

⁷⁶ See M. PLANIOL, *TREATISE ON THE CIVIL LAW* § 122 (1959).

⁷⁷ See the discussion, *supra* note 36 and accompanying text.

⁷⁸ In the Preface to the Civil Code, His Imperial Majesty pointed out that "The rules of the Code have called upon the best systems of law in the world." Unfortunately, there is no Table of Concordances, so it is not possible to know the source of each of the provisions. The absence of a complete commentary by the drafter is also a handicap in this regard.

⁷⁹ David, *supra* note 21, at 503-04.

⁸⁰ *Id.* at 504.

⁸¹ *Id.* However, a number of provisions are identical in conception and effect with specific provisions of foreign law. Compare CIVIL CODE OF ETHIOPIA art. 1246 (dealing with the duties of lower riparian owners) with FRANCE C. CIV. art. 640.

liability of hotel owners served as the basis for some provisions of the Civil Code, and the Geneva Conventions of 1930-31 concerning negotiable instruments were used as a model for some of those provisions in the Commercial Code.⁸² Some common-law doctrines such as reasonable time in relation to damages for breach of contract⁸³ and specific torts⁸⁴ were also incorporated. Finally, some articles are original in the sense that they are not based either on existing Ethiopian law (as will be seen, some provisions had this source) or corresponding provisions of foreign law. In this category, the drafter lists the provisions relating to water rights and registers of civil status.⁸⁵

The same eclectic borrowing took place in the drafting of the Penal Code. Here, the drafter was aided by the existence of the 1930 Code, and the Ethiopian tradition as reflected in that Code was the point of departure.⁸⁶ As was pointed out earlier, penal law was the most important, and consequently, the most developed area of the law there.⁸⁷ Since the drafter, Professor Jean Graven, was an authority on Swiss penal law, many borrowings were made from the Swiss Penal Code, but a number of other codes were also consulted.⁸⁸ The final product incorporated the provisions of the 1930 Code that seemed desirable to retain and a number of provisions from foreign codes. Again, no foreign law was "received."

Moreover, there was a most careful effort at adaptation. The codes as will be seen, were not intended to be a codification of existing customary law, but new and original works.⁸⁹ Although the incorporation of customary law was fairly rare, there were numerous instances of provisions reflecting particular Ethiopian problems and needs. Adaptation is perhaps the most important part of the process of deciding what the law will be. Careful adaptation insures that the new law will have a truly national character and may minimize some of the problems of application.⁹⁰ The procedure by which the codes were adopted was designed to bring about such adaptation. There were three steps in this procedure: (1) the preparation of a projet by the

⁸² David, *supra* note 21, at 504.

⁸³ *Id.* at 505.

⁸⁴ See CIVIL CODE OF ETHIOPIA arts. 2038-65. See Russell, *supra* note 41, at 240-41.

⁸⁵ David, *supra* note 21, at 505-06.

⁸⁶ See Graven, *supra* note 20, at 279.

⁸⁷ See notes 32-35 *supra* and accompanying text.

⁸⁸ The citation to various sources of the Ethiopian Penal Code will be found in S. LOWENSTEIN, MATERIALS FOR THE STUDY OF THE PENAL LAW OF ETHIOPIA, app. (1965). A detailed citation to the sources of articles 1-84 will be found in P. GRAVEN, AN INTRODUCTION TO ETHIOPIAN PENAL LAW, app. (1965).

⁸⁹ See David, *supra* note 21, at 500.

⁹⁰ The absence of such adaptation in Turkey made itself felt in the early years following adoption. See Twining, *supra* note 65, at 244.

drafter; (2) consideration of the projet by the Codification Commission; and (3) consideration of the final draft by Parliament.⁹¹ The Codification Commission consisted of approximately twenty-five distinguished Ethiopians, representing law, government, and business. Most of the work was done by a smaller body consisting of the leading jurists and officials from the Ministry of Justice.⁹² The majority of changes, at least in the Civil Code projet, were made by this body.⁹³ The codes were then debated in Parliament, and some additional changes were made.⁹⁴

The drafters discussed the modifications that were made and the special factors that influenced the content of the various provisions. A consideration of the examples they gave will demonstrate the careful effort at adaptation that was made. With respect to the Penal Code, Professor Graven points out that it was necessary to "reconcile tradition and progress."⁹⁵ The question was whether the foundation of the Code was to be the penal punishment of offenders or the rehabilitation of those who have engaged in antisocial conduct. Should the provisions be designed to deter antisocial conduct by imposing the threat of punishment, or to treat and correct such conduct after it has occurred? Professor Graven further emphasized that since the concepts of fault, deterrence, and expiatory punishment were deeply ingrained in the Ethiopian mind and tradition, they could not be abandoned. The Code had to be drafted with reference to those concepts. The need for the preservation of public order—the essential condition for the development of the society—outweighed considerations of rehabilitation. Thus, the foundation of the Penal Code is the penal punishment of offenders as to whom deterrence has not proved effective rather than rehabilitation, though provisions for rehabilitation exist.⁹⁶

In the opinion of Parliament, this attempt at reconciliation neces-

⁹¹ David, *supra* note 66, at 197-201; Graven, *supra* note 20, at 280.

⁹² Graven, *supra* note 20, at 280.

⁹³ David, *supra* note 66, at 200.

⁹⁴ *Id.* at 200-01.

⁹⁵ Graven, *supra* note 20, at 288.

⁹⁶ *Id.* See ETH. PEN. CODE art. 1. There was no question that the death penalty was to be retained. Professor Graven has stated that there was practically no opposition to the death penalty among Ethiopians. Graven, *supra* note 20, at 289. It should be noted, however, that no sentence of death can be executed unless confirmed by the Emperor. ETHIOPIAN REVISED CONST. art. 59. See M. PERHAM, *supra* note 19, at 149; S. LOWENSTEIN, *supra* note 88, at 336. Lowenstein points out that according to the prison statistics of 1963-66, 997 persons were held in prison under sentence of death, and only 39 sentences were executed. He concludes that "although this may partially be due to inefficiency in obtaining confirmations, the more likely reason is the quite traditional leniency of the Emperor in use of His pardon and amnesty powers." *Id.*

sitated the inclusion of the penalty of corporal punishment, which had been very traditional in Ethiopia. More important than the pain inflicted was the disgrace and loss of status associated with that punishment. A person "flogged" was truly branded, and the punishment would only be imposed on lowly persons. The drafter and the Codification Commission recommended its abolition, but after a lengthy debate, a provision authorizing such punishment in cases of robbery or theft⁹⁷ was inserted by Parliament. Corporal punishment was considered a necessary deterrent to prevent crimes against property, which are very common particularly in urban areas. There is some evidence to the effect that the "professional thief" is now plying his trade in African urban areas; juvenile crime is also on the rise.⁹⁸ It is interesting to note that other African countries, such as Tanzania, have recently introduced corporal punishment for certain offenses against property.⁹⁹ There was general agreement in Ethiopia that corporal punishment is both degrading and brutal. It was imposed with reluctance and in as humane a way as possible, *e.g.*, the number of lashes is limited, and the punishment can be carried out only under medical supervision.¹⁰⁰ However, in light of present conditions it was considered necessary to deter crimes against property.

The effort at adaptation is also demonstrated by the types of offenses included in the Code. Since slavery had only been abolished in 1923, and there had been a long tradition of that institution, it was necessary to impose severe punishment for enslavement and maintenance in slavery to deter the possibility of its starting up again in the more remote areas.¹⁰¹ The Code also provides for offenses that may exist because of the underdeveloped nature of the country, such as the activities of magicians or sorcerers that cause injury to health.¹⁰² In view of the position of the Emperor in Ethiopian society, there are special provisions dealing with outrages against the Emperor, Imperial Family, and the Dynasty, and serious punishment is imposed for insult or defamation committed against the Emperor or Crown Prince.¹⁰³

⁹⁷ ETH. PEN. CODE art. 120A.

⁹⁸ See the discussion of the increase of crimes against property in Tanzania in Read, *Minimum Sentences in Tanzania*, 9 J. AFR. L. 20, 25 (1965).

⁹⁹ See generally Read, *supra* note 98.

¹⁰⁰ The punishment can only be imposed upon male offenders between the ages of 18 and 50. It may not exceed 40 lashes inflicted on the back. A physician must certify that the offender is able to undergo the punishment and may order it stopped at any time. Juvenile offenders may be punished by a maximum of 12 strokes inflicted with a cane upon the buttocks. ETH. PEN. CODE art. 172.

¹⁰¹ ETH. PEN. CODE arts. 558-65.

¹⁰² ETH. PEN. CODE art. 516. See also art. 815, dealing with the exploitation of public credulity by soothsayers.

¹⁰³ See ETH. PEN. CODE arts. 248, 249, 256.

Finally, certain admittedly desirable provisions were not adopted, because it would be impractical or impossible to do so at the present time. For example, the treatment of limited responsibility is "half restrictive and half therapeutic and protective."¹⁰⁴ A reduced punishment is imposed, and there are provisions for treatment by which the time spent in confinement for treatment may be deducted from the sentence.¹⁰⁵ The drafter believed that punishment should not be imposed at all and that there should only be internment for the deficiency that has caused the reduced responsibility. But, as he points out, such an approach presupposes a highly developed system of psychiatrists, penologists, specialized judges, and special establishments that simply cannot exist in Ethiopia in the foreseeable future.¹⁰⁶ Since the facilities for treatment are lacking, it is necessary to confine the offenders and give them such treatment as is feasible.

The same process of adaptation was carried out in the Civil Code. Certain changes were made to reflect the Ethiopian feeling for what is just, a factor which cannot be ignored if the new law is ultimately to be accepted by the people. The drafter had proposed that the spouse be entitled to succeed, as is the case in most western countries. This proposal was rejected, since the Ethiopians are attached to the idea of keeping the property within the blood family.¹⁰⁷ The spousal relationship, on the whole, is not as strong in Ethiopia as are ties to the blood family. Therefore, it is believed that property should not be taken out of the blood family unless the decedent had specifically provided so in his will. Another example occurs in the liability of the owner of a vehicle for harm caused by any user of the vehicle. The Civil Code makes the owner absolutely liable for such harm irrespective of his fault or control. The theory behind the imposition of such liability is that the owner will insure against it. This being so, it would make no difference whether the user had stolen the vehicle, and in the original draft no exception was made for such a situation. It may be questioned whether all owners of vehicles would insure against third party liability; therefore, perhaps some limitation of liability was necessary. But according to the drafter, the most important consideration was that the concept of a person's being made liable for the acts of one who had stolen his property was so offensive to the Ethiopian sense of justice that an exception had to be made,

¹⁰⁴ See Graven, *supra* note 20, at 290.

¹⁰⁵ ETH. PEN. CODE art. 137.

¹⁰⁶ Graven, *supra* note 20, at 290. Nor elsewhere in Africa. See Milner, *M'Naghten and the Witch-Doctor: Psychiatry and Crime in Africa*, 114 U. PA. L. REV. 1134 (1966).

¹⁰⁷ See David, *supra* note 21, at 501.

and the owner is not liable for the harm caused by a thief.¹⁰⁸

The inviolability of the human body was always considered very important in Ethiopia, and any injury to the body, even if unintentional, gave rise to liability. This principle is recognized in the Civil Code, and a person is liable where he inflicts bodily harm on another, even when he did not do so intentionally or even negligently. The only exception is where the act causing the harm was ordered by law or was done in self-defense or where the harm was due to the fault of the victim.¹⁰⁹

Another example that the drafter gives is the provisions relating to the rights of a person who sows, plants trees, or erects a structure on the property of another. The modern tendency is to allow compensation to such a person, particularly if he acted in good faith, on the theory that otherwise the owner will be unjustly enriched, and the drafter had proposed provisions allowing compensation in such cases. These provisions were substantially modified in Parliament, and the right to compensation was severely restricted.¹¹⁰ Ownership of land is highly prized and confers status even if the land is not economically productive. Because of the significance attached to land ownership, it was considered unjust that the owner be compelled to give up the fruits of his property, or something connected with that property, without an act of will.¹¹¹

Economic considerations also played a part in determining the content of the Code. A very significant example of this is found in the provisions relating to administrative contracts. It was decided to have special provisions governing such contracts, and Professor David has carefully discussed the reasons for that decision.¹¹² He points out that

¹⁰⁸ *Id.*

¹⁰⁹ See ETH. CIV. CODE art. 2067.

¹¹⁰ Where the sowing was against the will of the landowner or the landowner was unable to object, the landowner is entitled to the entire crop. He is always entitled to the entire crop, even in the absence of objection, if the sower acted in bad faith. If the landowner failed to object and the sower acted in good faith, the sower is entitled only to one-fourth of the crop. ETH. CIV. CODE arts. 1172, 1173.

¹¹¹ David, *supra* note 21, at 501.

¹¹² David, *Des contrats administratifs dans de Code Civil ethiopien*, to be published in the MELANGES SAYAGUES-LASO. The article was translated by M. Kindred for publication in the JOURNAL OF ETHIOPIAN LAW (1967). For a discussion of the reasons for the inclusion of a separate section on administrative contracts in the Senegal Code, see Farnsworth, *supra* note 57, at 11-12. Economic considerations also dictated that employee welfare benefits for agricultural workers be somewhat restricted. Ethiopia is an agricultural country and in order to develop the agricultural economy there is a need for infusions of foreign capital. In order to attract this capital labor costs and fringe benefits must be kept low. See David, *supra* note 21, at 503.

in all countries special rules for government contracts have resulted, and that even if the Civil Code did not contain such rules, they would necessarily arise. In the development of the economy, concessions would have to be given to foreign and domestic enterprises; it is also very likely that there would be a program of public works, involving contracts with private businesses. It was more systematic to regulate all such contracts by general rules. The existence of these rules would lead to greater security in contractual relations with the government. Indeed, the absence of such rules could create serious uncertainty, since investors and contractors might assume that they could not rely on the ordinary contractual provisions of the Civil Code in their dealings with the government. Therefore, it was decided to have special rules relating to administrative contracts, and it was hoped that the clarification of the rules would help to attract foreign capital and enterprises to Ethiopia.¹¹³

Finally, the Civil Code contains a number of transitory provisions that prevent situations from arising where the law cannot be enforced due to the absence of institutions provided for in the Code.¹¹⁴ For example, the Code provides for registers of immovable property under the control of the Ministry of Agriculture,¹¹⁵ but to date these registers have not been established. In the capital and in some of the municipalities, registration systems of some sort do exist, and in most other localities there are customary rules relating to the formalities of land transfer. The Code provides that the provisions relating to registers shall not come into force until a date to be fixed by an order published in the government gazette, and that until then the customary rules (which would include municipal registration) as to formalities of transfer shall apply.¹¹⁶ The same is true with respect to registers of civil status, since it will be some time before they can be established

¹¹³ The drafter's method of preparing the provisions is interesting. There was no legislation on the subject (in France, for example, the law of administrative contracts was developed through the jurisprudence of the Conseil d'Etat), but a treatise that the drafter regarded highly had just been published. He consulted A. LAUBADERE, *TRAITÉ THÉORIQUE ET PRATIQUE DES CONTRATS ADMINISTRATIFS* (1956), "put into legislative terms the propositions formulated by the work, and then asked if the solutions adopted by the Conseil d'Etat and the French writers needed to be modified to take account of conditions peculiar to Ethiopia." He indicates that in drafting the chapter on extra-contractual liability he followed a similar practice, consulting extensively one French and one English work.

¹¹⁴ See ETH. CIV. CODE arts. 3361-67; Krzeczunowicz, *supra* note 66, at 175.

¹¹⁵ ETH. CIV. CODE tit. X.

¹¹⁶ ETH. CIV. CODE arts. 3363, 3364. See also art. 1195, which provides that the person in possession of a title deed issued by the administrative authorities is presumed to be the owner of the land.

throughout the Empire. Until that time, other ways are provided for proving birth, marriage, and death.¹¹⁷

A deliberate effort has clearly been made to relate the new law to the needs of Ethiopia.¹¹⁸ However, these are the needs of the new and modern society in the process of development. Thus, the adaptations have been made within the framework of a new and modern law which was intended to be revolutionary in nature and to guide the future development of the country.¹¹⁹ Only to a limited extent were such adaptations made with reference to the present society, thereby presenting real problems of implementation, which will be discussed subsequently. As to the new law, the following observations may be made: (1) the law was to be codified along the lines of continental models; (2) substantial borrowing from foreign legal systems was necessary; (3) the borrowing was from a variety of foreign sources and was highly selective so that no body of law was "received" from a single foreign system; and (4) there was a careful adaptation. The final product was designed to reflect the needs of a modern society.

B. What Should Be the Place of Customary Law?

In determining the kind of law that will form the basis of the new legal system, thought must be given to what place, if any, existing law will have in that system. In African states the question has essentially revolved around what is called customary law.¹²⁰ In every society norms of conduct have grown up, some of which are obligatory and, therefore, may be said to have the force of law, hence the concept of customary law.¹²¹ Professor Allott has described customary law in the

¹¹⁷ See ETH. CIV. CODE art. 3361. The provisions relating to the Registers of Immovable Property and Registers of Civil Status are illustrative of the many dispositive provisions of the Code. The Code regulates a number of administrative matters in great detail, and it will obviously be some time before the provisions can be implemented. However, when the society is "ready" for such detailed regulation, the necessary institutions can be established in accordance with the provisions of the Code.

¹¹⁸ For a discussion of the adaptations made in the SENEGAL CIVIL CODE OF OBLIGATIONS, see Farnsworth, *supra* note 57. The new code did not contain the principle of *lésion* (right of contract avoidance due to unequal bargaining power). It was felt that such a provision would undermine security of transactions, which is unwise in a country hoping for rapid economic development. Also, since 80% of the population is illiterate, special provisions are made for the execution of contracts by illiterates.

¹¹⁹ David, *supra* note 66, at 193.

¹²⁰ It has been pointed out that customary law is not limited to Africa, although we most frequently think of it in the African context. See A. ALLOTT, *supra* note 46, at 63. The author contends that there is no principle of African customary law that is not shared by some non-African system.

¹²¹ See the discussion of the distinction between obligatory and nonobligatory

following way.¹²² It is unwritten, and the rules can be traced to the customs and practices of the people which have been handed down to succeeding generations. The law consists of different bodies of rules that may be invoked in different contexts. These rules are based on conceptions of morality and depend for their effectiveness on the approval and consent of the people. The law has evolved in response to the pressures put upon the people by their environment. It reflects their way of life and their adjustment to life in the particular society and environment. Professor Allott also contends that all unwritten customary laws, African or otherwise, resemble each other more than any single customary system resembles any written system.¹²³

Moreover, customary law must be viewed in the context of a method of resolving disputes as much as in the context of a body of law. The emphasis is on compromise as well as adjudication.¹²⁴ By submitting disputes to a respected figure in the community, the parties may be persuaded to reconcile their differences. The law is more of a guide to the resolution of disputes than a binding norm. The law itself cannot be separated from the traditional method of resolving disputes.

In all of the colonial countries some status was accorded to customary law, and by and large, the customary law was administered by separate courts.¹²⁵ The jurisdiction of these courts was limited to persons of African descent whose mode of life was that of the general African community.¹²⁶ In Ethiopia, as has been pointed out, customary law was also recognized and applied by the authorities adjudicating disputes. When Ethiopia and the other African countries undertook the development of a modern legal system, an obvious consideration was the place that customary law would have in that system. There

norms in B. NWABUEZE, *MACHINERY OF JUSTICE IN NIGERIA* 3 (1963).

As Hoebel put it, "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 28 (1954). See T. ELIAS, *supra* note 50, at 60-75.

¹²² The discussion that follows is taken from A. ALLOTT, *supra* note 46, at 55-68.

¹²³ *Id.* at 63. See also *PROCEEDINGS OF THE AFRICAN CONFERENCE ON LOCAL COURTS AND CUSTOMARY LAW* 20-24 (1960) [hereinafter cited as *PROCEEDINGS*].

¹²⁴ See A. ALLOTT, *supra* note 46, at 68. The concern with conciliation is reflected in the traditional judgment rendered at the end of the case. The judgment apportions blame or praise for particular acts or omissions. The party who, on balance, has the most points against him "loses." The judge also lectures the parties on their duties and responsibilities. See T. ELIAS, *supra* note 50, at 270-72.

¹²⁵ See Ollennu, *The Influence of English Law on West Africa*, 5 *J. AFR. L.* 21, 24-26 (1961); Pageard, *supra* note 57, at 463-64. For a history of the customary courts in British Africa see *PROCEEDINGS* 11-13.

¹²⁶ See Ollennu, *supra* note 125, at 25-26; Pageard, *supra* note 57, at 463. In French Africa customary law was not applicable in the contractual and commercial areas.

was no question of retaining customary law as the sole basis. Rather, the question was what to do with the customary law. Should it be looked to as a source of the new law, and if so, to what extent and with what considerations? Or should it be retained as a separate system of law applicable to certain persons in certain circumstances? If the latter approach is adopted, it must be recognized that in those matters governed by customary law there will be different law for different persons. Customary law operates in a particular locality and/or within a particular ethnic group. It represents the norms governing conduct of people in a given community, and in all African countries this community is necessarily limited by considerations of distance and frequently by ethnic composition.

The question ordinarily has been stated in terms of whether customary law should be retained as a separate body of law existing side by side with the main body of law, and it may be approached in that context. We may first consider the arguments that have been advanced in support of, and against, this proposition.

The strongest argument in favor of the retention of a body of customary law as a separate part of the legal system is that uniformity of law could destroy the social fabric of a community where the life of the community may be reflected in norms that govern the conduct of its members.¹²⁷ The sudden imposition of an entire body of alien rules upon illiterate peoples in rural areas could cause social upheaval.¹²⁸ The rules governing such matters as marriage and family relationships, succession to property, and land ownership, are often deeply rooted in religion and tradition;¹²⁹ any change could cause dangerous resentment.¹³⁰ There are certain advantages to having separate local courts administering the law: the proceedings are understood and accepted by the people; the courts are close to home; and the proceedings are inexpensive and expeditious.¹³¹ The emphasis is on conciliation; disputes could frequently be settled without formal adjudication or the ill-feeling that may result from a decision in favor of one

¹²⁷ See PROCEEDINGS OF THE LONDON CONFERENCE ON THE FUTURE OF LAW IN AFRICA 11 (1959-60) [hereinafter cited as LONDON CONFERENCE].

¹²⁸ See T. ELIAS, *THE NIGERIAN LEGAL SYSTEM* 377 (1963).

¹²⁹ See LONDON CONFERENCE 12. See also Pageard, *supra* note 57, at 44, wherein the author distinguishes between customs that have their source in the religious and cultural substrata of the people and those that have as their source the physical and human environment. He stresses the importance of the former and the disappearance of the latter in light of changed conditions.

¹³⁰ As the society modernizes, views on religion and tradition may also change, making new law in those areas more acceptable. For a discussion of social change in India as affecting the abolition of polygamy and the caste system, see W. FRIEDMAN, *supra* note 11, at 12.

¹³¹ PROCEEDINGS 14-15.

party against the other. Finally, in countries where there were local courts, these courts handled a very large number of cases. Their abolition would seriously disrupt the administration of justice and burden the regular courts.¹³²

The disadvantages of a separate system of customary law, however, are also readily apparent. Customary law itself contains many defects. First, a particular body of customary law operates in a relatively small area; there is often great variation in the law of adjoining geographical areas and even within a single tribal unit.¹³³ Since customary law is unwritten, it is frequently uncertain and difficult to ascertain. There is the resulting danger of arbitrariness, which might not be checked. And many of the rules of customary law simply do not correspond to modern notions of fairness and sound social policy.¹³⁴ The process of excising such rules is a very difficult one, and the abolition of some rules and not others may destroy the fabric of the particular system of customary law.

Second, the existence of different law for different persons impedes the development of national unity.¹³⁵ Tribalism has been a serious problem in most African states. Boundaries did not follow tribal lines. Many tribes live within a particular state, and some tribes will be found on both sides of national boundaries.¹³⁶ Many of these tribes have been traditionally hostile, and the leaders of the nation must overcome this hostility in order to develop a national consciousness.¹³⁷ Separate systems of law based on tribal or geographical groupings adversely affect this effort and can prevent the development of the needed national consciousness. A third major disadvantage is the effect that customary law may have on economic development—the prime concern of developing nations. A piecemeal system of law can discourage people of different groups from entering into economic relationships.¹³⁸ Traditional methods of land tenure and ownership

¹³² T. ELIAS, *supra* note 128, at 377.

¹³³ See Roberts-Wray, *The Need for Study of Native Law*, 1 J. AFR. L. 82 (1957). This has been particularly true in Ethiopia, as the subsequent discussion will indicate.

¹³⁴ Especially as regards the status of women, see Pageard, *supra* note 57, at 475-76.

¹³⁵ See Roberts-Wray, *supra* note 133, at 86; Cowen, *African Legal Studies—A Survey of the Field and the Role of the United States*, 27 LAW & CONTEMP. PROB. 545, 552 (1962).

¹³⁶ If customary law is employed in both countries, these tribes will have the same law, which may cause them to identify more with each other than with their own national unit.

¹³⁷ Practically all African countries agree that existing boundaries cannot be changed—to do so would require remaking the map of Africa. See CHARTER OF THE ORGANIZATION OF AFRICAN UNITY art. III.

¹³⁸ See LONDON CONFERENCE 23.

may inhibit the use of modern methods of cultivation and thereby prevent urgently needed increases in production. The uncertainty of title prevents free alienation and the development of a fully cash economy.¹³⁹

A number of other observations may be made about customary law. In certain fields, a significant body of customary law has never emerged. It is generally agreed that customary law is not very important in regard to contractual obligations and commercial law.¹⁴⁰ Customary law developed in response to the needs of people living in the traditional society, and their needs in these areas were minimal.¹⁴¹ In other areas, such as criminal law, modern conditions clearly demanded replacement, and so customary criminal law has not been retained.¹⁴² The real significance of customary law lies in matters such as family relations, succession, and land tenure,¹⁴³ which are closely connected with tradition and religion. Perhaps the real question is whether there should be a separate body of customary law in these areas rather than whether there should be a separate system of customary law as such.

The fact cannot be ignored that customary law represents a truly indigenous law as opposed to foreign law, which has been imported in African states in one form or another. There may be a tendency to exaggerate the significance and merits of customary law in reaction to the presence of the foreign law.¹⁴⁴ Moreover, the existence of a separate body of customary law argues for its retention. Such law has become a recognized part of the legal system, and a change may be more violently resisted than if such law had not existed at all. Op-

¹³⁹ See Roberts-Wray, *supra* note 133, at 85; Cowen, *supra* note 135, at 559-60.

¹⁴⁰ See PROCEEDINGS 22; T. ELLIAS, *BRITISH COLONIAL LAW* 273 (1962). Note that it was not applicable in those fields in French Africa, *supra* note 126.

¹⁴¹ However, the fact that separate law exists in some fields could inhibit commercial transactions between people of different tribal groups who might think that their commercial transactions would be governed by customary law.

¹⁴² See PROCEEDINGS 22. For examples of customary practices that were made offenses by the penal law in the Sudan, see Guttman, *supra* note 48, at 405. However, it must be remembered that in certain parts of Africa, such as Northern Nigeria, much of the criminal law is administered by customary courts. See Anderson, *The Northern Nigerian Codes: A Major Advance*, 24 *MODERN L. REV.* 616, 617 (1961).

¹⁴³ There is general agreement on this point. See, e.g., PROCEEDINGS 23; Roberts-Wray, *supra* note 133, at 84-85; T. ELLIAS, *supra* note 140, at 274; Pageard, *supra* note 57, at 475.

¹⁴⁴ A. ALLOTT, *supra* note 46, at 55. The author points out, however, that Africans trained in a foreign legal system may tend to undervalue their own legal institutions, and one writer has contended that the indigenous nature of customary law causes trained lawyers to advocate its abolition because it is inconsistent with the law they have studied. T. ELLIAS, *supra* note 128, at 376.

position will come from traditional authorities, who see the abolition of customary law as an erosion of their power.

Finally, we may ask whether customary law can exist in a modern legal system in the same form as previously. In all countries there has been an interaction of formal and customary law which may have changed the character of the customary law. As has been said, customary law cannot be separated from the customary process of resolving disputes, which stressed conciliation as much as, if not more than, adjudication. When this system becomes regulated by the governmental authorities—as it has invariably become¹⁴⁵—and lawyers are involved in the process of litigation, directly or indirectly, the character of customary proceedings will become more adjudicative than conciliatory.¹⁴⁶ One commentator has observed that in the British colonies the rules of procedure and evidence have been effectively employed to excavate and crystallize the principles of the customary law and that the customary law has been molded to the general principles of English law while the English law has been adapted to conform with the circumstances of each African country.¹⁴⁷ He refers to a “marriage between the two systems.” If this is so, then it may be asked whether customary law can be the same or have the same place in the society as it once did. Finally, the quest for certainty may cause efforts to be undertaken to reduce customary law to writing, and as has been observed, “this could not fail to have a very important effect on the administration of customary law, which will then be applied in a different way and upon a different juristic basis.”¹⁴⁸

It seems that the real question is the extent to which a separate system of law based on custom shall be retained in areas deeply rooted in tradition and religion, such as family law, succession, and land tenure.¹⁴⁹ Customary law does not play a very important role in most

¹⁴⁵ See PROCEEDINGS 13-18.

¹⁴⁶ See *id.* at 41-44, for a discussion of the advantages and disadvantages of having lawyers appear before customary courts. To the extent that customary law is applied by the regular courts, the conciliatory aspect is also likely to be lost.

¹⁴⁷ Ollennu, *supra* note 125, at 26. During the colonial period a number of changes in the content and form of customary law took place. Local enactments repealed some of the customary law, and certain provisions of customary law were declared to be “repugnant to natural justice, equity and good conscience” and, therefore, not enforced. See B. NWABUEZE, *supra* note 121, at 6-10. This was particularly true as regards many aspects of customary procedure, and there has been a trend to impose uniform procedural and evidence law on the customary courts. The London Conference, for example, agreed that there was no danger in having a uniform adjective law. LONDON CONFERENCE 12.

¹⁴⁸ PROCEEDINGS 22-23.

¹⁴⁹ However, as will be seen, some countries have retained customary law in other areas.

other areas of law, and the impact of unfamiliar law will not be so great there.¹⁵⁰ If customary law is to be retained, it will likely be in the areas of family law, succession, and land tenure. In those areas there will be different law for different peoples. There will either be separate courts, primarily applying customary law,¹⁵¹ or the regular courts will apply customary law in appropriate cases, or both methods may be employed.

The other alternative is to avoid any separate system of customary law. There will be only one body of law, though customary concepts may be embodied in that law, and in certain instances customary law may be incorporated by reference.¹⁵² The significant feature of this approach is that customary law does not exist as such except in the few cases where it may have been incorporated by reference.

We may now consider how some other African countries have dealt with this question. Upon such a consideration, we observe that almost universally they have chosen to retain customary law as a separate body of law, though limiting its operation and effect.¹⁵³ In Ghana, customary law is to be applied by all courts where it is applicable, and its applicability is specifically defined.¹⁵⁴ For example, if all the parties claiming to be entitled to land trace their claims to a person subject to customary law or from a family or group of persons subject to the same customary law, the issue is to be determined according to customary law.¹⁵⁵ The circumstances in which customary law is applicable are comparatively few. The initial presumption favors the application of the common law, and the burden is on the person seeking the application of customary law to prove its applicability.¹⁵⁶ The theory is that all persons are subject to the common law, but that when a person shows that as a member of a particular locality he is entitled to the benefit of a local custom in accordance with the law,

¹⁵⁰ See note 129 *supra*.

¹⁵¹ In some countries these courts have limited jurisdiction in penal matters and may apply the formal law in certain cases.

¹⁵² To the extent that customary law is incorporated by reference there will be different law for different peoples.

¹⁵³ At present it appears that Guinea is the only other country that has completely abolished customary law. See Pageard, *supra* note 57, at 479.

¹⁵⁴ See A. ALLOTT, *supra* note 56, at 34-36. The former rules made customary law applicable in cases between natives and between natives and non-natives if the application of the English law would work an injustice and the parties had not agreed to be bound by English law. The new approach avoids ethnic criteria; it creates a concept of personal law and a series of rules to determine whether the personal law is applicable. Harvey, *supra* note 53, at 599. There are also local courts having jurisdiction in certain cases involving customary law. See A. ALLOTT, *supra* note 56, at 40-43.

¹⁵⁵ A. ALLOTT, *supra* note 56, at 34.

¹⁵⁶ Harvey, *supra* note 53, at 600.

he will be given the benefit of that custom.¹⁵⁷ Professor Harvey has pointed out¹⁵⁸ that customary law must be viewed in the larger perspective of the relations between traditional tribal institutions and power centers of the new national state, and that in the new order the center of activity in the creation and adaptation of norms will be the national legislature. He also observed that since the adoption of a republican form of government in Ghana, that part of the legal order derived from indigenous sources has suffered continued attrition in favor of legal norms received from nonindigenous (English) sources and incorporated in a rapidly growing body of national legislation.

In Nigeria, the approach has been to have customary law applied in certain circumstances by all courts and to establish customary courts in various regions, applying customary law in cases within their jurisdiction.¹⁵⁹ The criteria for the applicability of customary law is substantially the same in all the regions, and it is broad. Customary law may be applied in cases between natives or between a native and non-native where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the formal law. Customary law will not be applied if "repugnant to natural justice, equity or good conscience" or incompatible with existing legislation. A party who has agreed not to be bound by customary law, either expressly or from the nature of the transaction, cannot claim the benefit of such law.¹⁶⁰ There are also directions as to what customary law shall be applied. The basic approach is the same as that in Ghana, where the presumption is that the common law is applicable, but in appropriate cases a party can claim the benefit of customary law.

In the Sudan, customary law is made applicable in cases involving succession, inheritance, wills, legacies, gifts, marriage, and family relations. In such cases customary law is the *only* law to be applied. This parallels a provision requiring the application of Mohammedan law in such cases where the parties are Mohammedan. The customary law must not be "contrary to justice, equity or good conscience," and

¹⁵⁷ Ollennu, *supra* note 125, at 34.

¹⁵⁸ Harvey, *supra* note 53, at 601-03.

¹⁵⁹ In Northern Nigeria, which is predominantly Moslem, there are Moslem and non-Moslem native courts and a Sharia Court of Appeal which hears appeals from the Moslem Native Courts. A. ALLOTT, *supra* note 56, at 70-75. The customary courts have jurisdiction for the most part over persons of African descent provided that their mode of life is that of the general community. *Id.* at 55, 64, 71. The terminology varies from region to region, but there appears to be no substantive difference. The discussion of customary law in Nigeria refers to the situation as it existed prior to the political upheavals of 1966 and 1967.

¹⁶⁰ *Id.* at 48.

specific provisions may be altered by legislative enactment or declared void by the courts.¹⁶¹ The approach in the Sudan has been to apply customary law to all persons in those areas of law where customary law is most important.

In the countries that were former French colonies the position of customary law must be viewed in the context of the situation prevailing during French rule. The policy of direct rule was aimed at creating an indigenous elite who achieved legal rights by conforming to French patterns.¹⁶² The distinction was drawn between the *evolués* and the natives, and two types of civil jurisdictions were established with little contact between them. As to French nationals and *evolués*, customary law was not applicable. The native inhabitants (those who had not been assimilated) were governed by customary law in matters of family law, succession, and gifts, though in matters of obligations they were subject to French law.¹⁶³ There were customary courts with jurisdiction in matters governed by customary law and limited jurisdiction in matters governed by civil and commercial law; they were without jurisdiction in penal matters.¹⁶⁴

Following independence, the various countries treated customary law and customary courts differently. Guinea abolished all customary law.¹⁶⁵ In Senegal it was provided that the existing customary law was to be retained, but customary courts were abolished. The regular courts would apply customary law in matters of family law, succession, and property where the parties were subject to such law (that is, where they would be considered natives rather than *evolués*). They could also apply customary law to such persons in other cases if the customary law was not inconsistent with the codes or contrary to public order.¹⁶⁶ The same approach was taken in Niger.¹⁶⁷ In Senegal, particularly, the trend is against customary law. A party must affirmatively claim that his case is to be judged by customary law. If he does not do so, the court may decide according to the codes.¹⁶⁸ It is likely that in the future a series of codes of universal application will be enacted resulting in the abolition of customary law.¹⁶⁹

¹⁶¹ *Id.* at 127. See also Guttman, *supra* note 47, at 406-07. The Chief Justice is authorized to establish native courts and define their jurisdiction in cases involving customary law.

¹⁶² See Farnsworth, *supra* note 57, at 15.

¹⁶³ Pageard, *supra* note 57, at 463-64.

¹⁶⁴ *Id.* at 463.

¹⁶⁵ *Id.* at 479.

¹⁶⁶ Farnsworth, *supra* note 57, at 15.

¹⁶⁷ Pageard, *supra* note 57, at 479.

¹⁶⁸ *Id.* at 486-87.

¹⁶⁹ See Farnsworth, *supra* note 57, at 14. He points out that customary law had declined in importance even before independence.

Most of the other former French colonies have adopted the same approach—customary law is applicable to the persons formerly subject to customary law in matters of family law, succession, and property, but there are not separate customary tribunals.¹⁷⁰ In some countries, however, separate tribunals continue to exist.¹⁷¹ The point is that in most of the former French colonies customary law retains the place it had under colonial rule, though the trend in some countries, at least, favors the abolition of customary law.

Finally, we may look at Liberia, the only sub-Saharan country other than Ethiopia that has not been under colonial rule. A dual system has always existed, very similar to that prevailing in French Africa. The population has been divided between the American-Liberians (descendants of the liberated American slaves who founded the republic) and the indigenous tribal population or, as they are referred to in legislation, the aborigines. The common law was applicable to the American-Liberians and assimilated tribal persons. Customary law was applicable to nonassimilated tribal persons, and a separate system of tribal courts was established.¹⁷² There is an interaction between the two court systems. In cases involving tribal persons the regular courts must apply customary law; in some circumstances the tribal courts will be applying non-customary law. The question of the applicable law is often difficult to determine since it depends on the degree of affiliation which a party, if an aborigine by birth, retains to his tribe.¹⁷³ The present government is pursuing an extensive policy of unification to obliterate the distinction between American-Liberians and aborigines.¹⁷⁴ In time, the tribal population will become fully integrated. When this occurs, the need for a separate system of customary law will disappear and there will be only one body of law.

We may now consider the approach that was taken to customary law in Ethiopia. Unlike practically all the other sub-Saharan countries, *Ethiopia did not retain a separate system of customary law.* Article 3347 (1) of the Civil Code provides that:

Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed.

The key words are "concerning matters provided for in this Code." It does not matter that the customary rule is not inconsistent with the Code. The Code is to be the only source of law in all cases, and cus-

¹⁷⁰ See Pageard, *supra* note 57, for a discussion of the approaches taken by each of the countries.

¹⁷¹ *Id.*

¹⁷² A. ALLOTT, *supra* note 56, at 82.

¹⁷³ *Id.* at 84.

¹⁷⁴ See the discussion of the government's unification policy in L. MARINELLI, *THE NEW LIBERIA* 61-72 (1964).

tomary law as such has no place in the legal system. In most other sub-Saharan countries there are two sources of law, the formal law and customary law, each applicable in certain circumstances. This is not so in Ethiopia and it is therefore important to analyze why Ethiopia has taken such a different position.

In the first place, unlike the other African countries there had never been a body of customary law separate and distinct from the formal law. Nor were there customary courts as such, though frequently disputes were brought before the traditional authorities. What we call customary law was recognized as a source of law and could form the basis of judicial decision. But so could the Fetha Negast and other "rules." And as was seen, in the earlier stages of the administration of justice, the concept of legal rules as binding norms did not exist. In more recent times when the courts considered custom, it was one of a number of sources that could be drawn upon along with foreign precedents and principles of "equity."¹⁷⁵ Customary law was not a separate body of law to be applied in certain cases or to certain persons.

Thus, customary law did not develop as a defined body of law. The customary law that existed was very uncertain, and varied considerably from place to place, group to group, and even from time to time.¹⁷⁶ Moreover, as Professor Krzeczunowicz has pointed out,¹⁷⁷ Ethiopia cannot be considered in the purely African customary context. The Ethiopian tradition included Western, Judeo-Christian, and Greco-Roman concepts. In the hierarchy of laws custom was considered inferior to the Fetha Negast. Although the Fetha Negast was not consistently followed,¹⁷⁸ it was considered a compilation of great dignity and wisdom, a status that customary law did not have.¹⁷⁹

In light of these factors, to have a separate body of customary law as distinct from the formal law *would be to introduce a new concept into Ethiopia*. There had been no customary courts nor a separate system of customary law, as in other African countries. It was not the policy of the government that one set of laws could be applicable to one person and another set of laws applicable to another.¹⁸⁰ Where laws had been promulgated by the central government, e.g., the Law

¹⁷⁵ See Krzeczunowicz, *supra* note 36, at 58.

¹⁷⁶ David, *supra* note 21, at 489. In Eritrea some efforts at unifying the customary law were made, and some of the customary law was recorded. Krzeczunowicz, *supra* note 36, at 58.

¹⁷⁷ Krzeczunowicz, *supra* note 66, at 173.

¹⁷⁸ Krzeczunowicz, *supra* note 36, at 58.

¹⁷⁹ See David, *supra* note 21, at 499.

¹⁸⁰ Except as regards the Moslem population at present, for the reasons to be discussed subsequently.

of Loans, they were applied by the courts in all cases¹⁸¹ irrespective of the identity of the parties. In a sense there was the tradition of a national uniform law representing the power of the Emperor to bind all his subjects.¹⁸² Customary law did not represent indigenous Ethiopian law as opposed to foreign law, which was the case elsewhere. Although the codes were to borrow from foreign sources, they were considered as Ethiopian works adapted to the needs of Ethiopia, and thus there was no "nationalistic sentiment" arguing for the retention of customary law. The absence of a separate system of customary law and the fact that it would be introducing a new concept into Ethiopian law to adopt one were the strongest factors militating against the maintenance of customary law in Ethiopia.

A separate system of customary law would also have prevented uniform application of the law. In light of the tremendous variations in customary law, even among the major tribes which shared a common culture, this would have produced a very fragmented legal system. Ethiopia comprises many tribes, some of whom have radically different cultures and beliefs. All of the tribes historically waged war against one another, uniting only in the face of foreign aggression. Every effort has been made to eliminate tribalism and the feeling of separateness, and a different law applicable to different persons would impede the efforts toward unification. There is still a question as to separate law for Moslems in family and succession matters, as the subsequent discussion will indicate. But there was not to be a separate law for all persons in those matters. A uniform system of law was considered necessary to further the process of unification and the development of a sense of Ethiopian identity. Therefore, a separate system of customary law could not be permitted to exist.

The matter of a separate system of customary law is really part of a broader question and is only one answer to it. The question is the extent to which new and unfamiliar law is to be imposed upon the people, law which is contrary to their practices and which may even alter their way of life. One way to deal with the problem is to retain customary law in the areas that vitally affect the people's way of life and are deeply rooted in tradition and religion, such as family law, succession, and land tenure. This, however, is not the only answer. This problem was carefully considered in Ethiopia, but the solution adopted was not to maintain customary law as a separate part of the system.

Rather, the solution was to take account of customary law and

¹⁸¹ Except in the more remote areas where the laws were not available to the judges.

¹⁸² The Fetha Negast, also, was assumed to be applicable to all Christians irrespective of their ethnic affiliation.

practice in shaping the codes along the lines suited to Ethiopia. Such law could be a source of some of the provisions of the codes, and it was so employed. But customary law was to be viewed in the context of incorporation in the codes and not in the context of a separate body of law. The choice of this solution was sound for Ethiopia in the light of the factors previously discussed.

It should also be pointed out that there was great dissatisfaction with the customary law that existed. It is not inaccurate to say that among most Ethiopian jurists and lawyers customary law is generally associated with a backwardness that the modern society is trying to eliminate. As Professor David has stated,¹⁸³ the Ethiopians had no fear of changing customs; they sorted out their customs "keeping only the necessary ones which either correspond to their profound sentiment of justice" or were too deeply rooted to be taken away¹⁸⁴—and it may be added, for the most part, the customs that would not impede the development of a modern society. Professor Krzeczunowicz has listed four conditions for the inclusion of customs in the codes:¹⁸⁵ (1) the custom was sufficiently general as to be practiced by at least a majority of the highland population;¹⁸⁶ (2) it was not repugnant to the Ethiopian concept of natural justice as reflected in the Fetha Negast;¹⁸⁷ (3) it was not contrary to economic progress;¹⁸⁸ and (4) it was sufficiently clear and articulate as to be capable of definition in civil law terms.

In other words, the drafter and the Codification Commission considered customary law and practice as a possible source of the law just as they considered foreign sources. In certain cases customary law was incorporated into the codes either because it was considered sound and suitable or because it was too deeply rooted to be taken away. In a number of cases, on the other hand, the codes deliberately went contrary to customary law because of the desire to eliminate the practices sanctioned by that law. The fundamental question was the extent to which customary law would become the basis for provisions of the formal law.

¹⁸³ David, *supra* note 66, at 194-95.

¹⁸⁴ In his Preface to the Civil Code, His Imperial Majesty refers to the fact that law must respond to the people's needs and customs, and to natural justice. It is those customs that were retained, and the Preface makes clear that the Code was not to be a compilation of customary law.

¹⁸⁵ Krzeczunowicz, *supra* note 36, at 59.

¹⁸⁶ This is the more developed population, for whom Professor David says the codes were primarily drafted. David, *supra* note 66, at 202.

¹⁸⁷ Professor David contends that it did not shock the Ethiopians to see that customary law and court decisions were not in accordance with the Fetha Negast. They recognized the authority of that compilation, but realized that human beings could often not live up to it. David, *supra* note 21, at 499.

¹⁸⁸ He says that the retention of some of the provisions relating to land transfers could be considered an exception to this principle.

We may first examine how custom was incorporated into the codes. Earlier it was discussed how certain code provisions were adapted to the Ethiopian situation. The use of customary law and practice as a source of code provisions is but another part of this process. The main incorporation of custom was in the areas of family law and succession, areas that are often deeply rooted in tradition and religion. The succession¹⁸⁹ provisions to a large extent reproduce customary practice. Not only were the traditional rules very important to the people, but for the most part there was nothing unjust or regressive about them. For example, the concept of illegitimacy never existed in Ethiopia, and once filiation was established, a child had the same rights against the parents irrespective of whether or not they were married. Therefore, in keeping with custom it is provided that the legitimacy or illegitimacy of the deceased or the heir does not affect succession rights.¹⁹⁰ Earlier it was pointed out that spousal succession was not authorized because of the Ethiopian belief that property should be kept in the blood line.¹⁹¹ In the succession provisions there is also a good example of the attempt to impose a uniform law where diverse practices previously existed. Among some tribal groups females were not permitted to inherit, but among the majority of groups they were. Under the Code it is provided that the sex of the heir does not affect succession rights.¹⁹²

A rule of customary law that has been retained on the theory that its abolition would cause too great an opposition is that of unlimited divorce. In effect, divorce is granted whenever one of the spouses insists on it. The drafter proposed that divorce be granted only on certain grounds, but the Codification Commission rejected the proposal.¹⁹³ However, again in keeping with tradition the Code makes provision for marital arbitration, and where there is not "serious cause" for divorce, the arbitrators have a year in which to try to reconcile the parties.¹⁹⁴ Divorce had been very frequent and easily available. It was recognized that the law could not change this attitude toward divorce overnight, but the provisions relating to reconciliation will at least prevent hasty and ill-considered divorce.¹⁹⁵

¹⁸⁹ The use of the term includes testate and intestate succession.

¹⁹⁰ ETH. CIV. CODE art. 836(1).

¹⁹¹ See note 107 *supra* and accompanying text.

¹⁹² ETH. CIV. CODE art. 837.

¹⁹³ David, *supra* note 21, at 502.

¹⁹⁴ See ETH. CIV. CODE arts. 666, 725, 768.

¹⁹⁵ The institution of betrothal and sanctions for breach of a contract of betrothal represent another customary concept that has been incorporated into the Code, as does the institution of marital property. See Krzeczunowicz, *supra* note 36, at 60. Another example would be compensation to the husband or family where a woman or girl has been raped or indecently assaulted. The compensa-

These provisions are illustrative of the situations where the customary law and practice has been the source of the formal law. They represent customs that were considered sound or too deeply rooted to change. The customs incorporated satisfy the criteria set forth by Professor Krzeczunowicz above. In addition, there are a number of references to custom; that is, certain matters are to be determined according to the customary law or practice. In those areas, the law will not be uniform. But for the most part those references do not significantly affect substantive rights, and either concern matters of form or matters to which references to custom are made in other legal systems.¹⁹⁶

It is only in the area of adverse possession that substantial rights can be determined according to customary law. This is a result of a change made in the draft by Parliament. Under Article 1168 of the Civil Code, a possessor who for fifteen consecutive years had paid the taxes relating to the ownership of an immovable acquires ownership. There is, however, a proviso to the effect that land which is jointly owned by members of one family in accordance with custom may not be acquired by adverse possession and that any member of the family may claim the land. If the law of prescription is not applicable in the area and the conditions of the proviso are met, adverse possession creates no rights.¹⁹⁷ So, the legal effect of adverse possession depends on whether the law of prescription was traditionally applicable in the area and whether the land is deemed to be owned by a family in accordance with custom.

This, then, is the extent of customary law in Ethiopia today. Customary law and practice were the source of some of the provisions of the formal law, and there are some references to custom, only one of which significantly affects substantial rights. This is not likely to change, as customary law is not looked upon with favor by most Ethiopian jurists and lawyers. Experience may indicate that some dispositions of the Code may have to be modified to take account of customary practices, but even this is not too likely. Clearly, customary law will not be included as a separate system.

Most significantly, there are a number of instances where the law

tion is for redress of the insult to the husband or the family and represents a traditional practice. *Id.* at 62.

¹⁹⁶ See the discussion and list of examples in Krzeczunowicz, *supra* note 36, at 60.

¹⁹⁷ The Supreme Imperial Court passed on this article in a fairly recent case, *Tefera Sebhat & Eskias Sebhat v. Bahta Tesfaye* (1965), 2 J. ETH. L. 202 (1965). It found that the plaintiff was not a member of the defendant's family claiming an interest in family land and that, therefore, the exception to article 1168 was not applicable. It is also reported that the government has a register showing the areas where the law of prescription is applicable and where it is not.

deliberately abolished practices sanctioned under customary law. There was an intentional effort to modify the people's way of life in certain respects, and the Code is designed to set out new rules to govern the conduct of people in the society which is being created.¹⁹⁸ A clear example of such a rule is that relating to customary marriage. The customary types and incidents of marriage have been abolished, and the only type of marriage recognized under the Code is that of a union which is permanent unless terminated by death or divorce.¹⁹⁹ A form of "marriage for hire" or "marriage by the month" has long existed in the rural areas. Rather than take a permanent wife a man would have a woman live with him as his "wife," but he could dismiss her at any time. His only obligation was to pay her maintenance for the time she lived with him, hence the concept of marriage for hire.²⁰⁰ No legal status whatsoever is now accorded to this relationship.²⁰¹ This is directly contrary to the practice of many persons in rural areas, but the existence of such an institution could not be permitted in the modern society.

Another major change from customary law is the abolition of the effect of the payment of "blood money" upon a criminal prosecution. Traditionally, the payment of such money to the family of the deceased would prevent a criminal prosecution for homicide, even for what would be considered first-degree murder. In the traditional society the concept of a wrong against the state was not sharply differentiated from the wrong committed against the victim.²⁰² The family of the victim felt that their honor was satisfied and the victim avenged by the payment of the blood money, which was an admission of wrongdoing. Criminal prosecution was not necessary nor desired, and following the payment of blood money, a reconciliation of the families took place. This tradition was so strong that it was retained in the 1930 Penal Code; payment of blood money would prevent execution of a penal sentence for homicide.²⁰³ Such a situation could not be per-

¹⁹⁸ This point is constantly stressed by the drafter of the Civil Code. See David, *supra* note 66, at 193. The codes basically are viewed in the same way by most Ethiopians connected with the administration of justice.

¹⁹⁹ See ETH. CIV. CODE arts. 625, 662, 663.

²⁰⁰ Recognizing this institution as a marriage of sorts helped to establish filiation of children. A child was filiated as to the man with whom the mother was living in such a relationship at the time of conception. It still may do so if the relationship will be considered to constitute an irregular union. See ETH. CIV. CODE arts. 708, 709, 715, 745.

²⁰¹ See ETH. CIV. CODE art. 721.

²⁰² See notes 285-89 *infra* and accompanying text.

²⁰³ There was some question as to whether it would prevent execution of a death sentence. Under the English version of the Code an exception was made in such cases, but no exception was made in the Amharic version. See Neddi Haile v. Advocate General (1964), 2 J. ETH. L. 42 (1965).

mitted to continue. It had to be recognized that homicide was an offense against the interests of the state as well as against the victim and his family. Therefore, under the Penal Code payment of blood money has no effect on the criminal prosecution, although it may constitute an extenuating circumstance.²⁰⁴

A very significant change is the abolition of personal servitudes in connection with immovable property.²⁰⁵ It had been a traditional practice to require the user of land to perform services for the person who granted him the land, particularly if the grantor were a powerful nobleman or a religious official. This gave the grantor some hold over the land and prevented alienability.²⁰⁶ Also, the user was less able to work his land properly because he had to perform the services for the grantor. The existence of personal servitudes is inconsistent with a modern economy, and despite the widespread practice they were abolished. And even though obtaining land by adverse possession is limited to some extent, the principle is entirely new and runs counter to the very traditional concept that an owner cannot be deprived of his property without an act of will. By the same token, the provisions to the effect that the good faith purchaser of a movable acquires ownership by taking possession, even though the other contracting party was not the owner,²⁰⁷ are quite contrary to traditional ideas. Again, an owner may be deprived of his property without an act of will; the only exception is where the movable has been stolen. Finally, the Code requires that a guarantee be in writing and that the amount of the guarantee be stated in the instrument.²⁰⁸ This is designed to change the prior practice of giving an unlimited guarantee, often oral, which spawned many disputes.

These are some of the most significant examples of where the law is inconsistent with prior practice. However, it must be remembered that except to the extent that the code provisions were based on customary law or make reference to custom, the codes in their entirety contain new ideas. The new codes represent a revolutionary break with the past and an attempt to use law as an instrument of social control. Subsequently, we will discuss the impact of the new law and the problem of its application at the present time. As regards our present inquiry, the point to be stressed is that there is no sep-

²⁰⁴ ETH. PEN. CODE art. 79(1) (e).

²⁰⁵ ETH. CIV. CODE art. 1360.

²⁰⁶ Large quantities of land are owned by the church, which leases much of it to the "faithful" in exchange for servitudes of a religious nature. Such servitudes seem somewhat irrelevant in a modern economy. They do not produce income to the church and create uncertainty of ownership, since in all probability, the holder would lose the land if he became "less faithful."

²⁰⁷ ETH. CIV. CODE art. 1161.

²⁰⁸ *Id.* arts. 1722, 1925.

arate body of customary law in Ethiopia.²⁰⁹ In resolving legal questions the courts are bound by the provisions of the law,²¹⁰ which means the Constitution, codes, and legislation. The absence of a separate body of customary law makes Ethiopia practically unique among the nations of sub-Saharan Africa.

C. Shall There Be Different Law for Different Religious Groups?

Although this question may seem a strange one to the American reader, the matter of different law based on religion is a real problem for many African countries in the process of developing their legal systems, since frequently an African country has large Moslem and Christian populations. The line between customary and religious law is not a sharp one, so that as separate systems of customary law were recognized, separate systems of religious law were recognized as well. This was of primary importance to the Moslem population. For Moslems, the law of marriage, family relations, and succession has been regarded as intimately connected with the practice of their religion. In almost all Moslem countries a different law of family relations is still applied according to the religion of the parties.²¹¹ This is also true in African countries which are predominantly Moslem or have a large Moslem population. In the Sudan, for example, a system of Moslem courts was established with jurisdiction over Moslems in these matters.²¹² Likewise, in Northern Nigeria all the courts are to ad-

²⁰⁹ Dr. Jacques Vanderlinden would disagree with this unequivocal statement. Dr. Vanderlinden contends that the "existing legal situations" provision of the Civil Code, art. 3348, requires the application of customary law to the legal situations created prior to the code, that is, to legal situations created under customary law. This being so, customary law is not completely abolished as a separate system, but continues to be in force with respect to legal situations created prior to the code. See Vanderlinden, *An Introduction to the Sources of Ethiopian Law*, 3 J. ETH. L. 244-46 (1966). He hereby challenges the position taken by Professor Krzeczunowicz, *supra* note 36. See Professor Krzeczunowicz's reply and Dr. Vanderlinden's counter-reply, 3 J. ETH. L. 621, 635 (1966). I cannot agree with Dr. Vanderlinden's position in light of the circumstances surrounding the adoption of the new code. The clear intention of all concerned was that customary law should not exist as a separate part of the legal system, and it is difficult to see customary law "coming in by the back door," so to speak, under a general provision. The provision only requires that the existence of the legal situations be recognized, but they are now subject to the provisions of the code.

²¹⁰ ETHIOPIAN REVISED CONST. art. 110.

²¹¹ See Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa*, 27 LAW & CONTEMP. PROB. 617, 619-21 (1962). In Egypt, for example, although separate courts based on religion have been abolished, the courts apply to every Egyptian a personal law based on his religion in family and succession matters.

²¹² A. ALLOTT, *supra* note 56, at 134-35. See also Guttman, *supra* note 48, at 407. Professor Guttman also discusses why Mohammedan law was not to be

minister Mohammedan Law in such matters where the parties are Moslems, and there is also a Moslem court system.²¹³

Ethiopia has been confronted with the same question. It is a predominantly Christian country, where Christianity is the state religion.²¹⁴ There is, however, a large Moslem population, estimated to be at least a third and possibly more, and some of the provinces are predominantly Moslem. Moslem religious courts had long existed, and following the Liberation they were given official recognition.²¹⁵ These courts had jurisdiction in two classes of cases: (1) questions regarding marriage, divorce, maintenance and guardianship of minors, and family relationships where the marriage to which the question related was concluded in accordance with Mohammedan law or the parties were all Moslems; and (2) questions regarding Wakf (religious endowment), gift, and succession or wills provided that the endower, donor, or deceased was a Moslem. These courts applied Mohammedan religious law. In addition, under the Penal Code of 1930, bigamy was an offense only if committed by a Christian. To this extent there was a separate law for the Moslem population in Ethiopia.

The question is whether this separate law based on religion will be retained in the new system. In Moslem countries the attitude toward traditional religious practices is changing, and such changes are reflected in the law. The unsoundness of polygamy from an economic and social standpoint is clear, and it has been severely restricted and even abolished in some Moslem countries.²¹⁶ In those countries a conflict between tradition and modernization is taking place, but it is one that will be resolved within a Moslem context. Moslems will be making the decision as to which traditional practices will be retained and which will be abolished. In Ethiopia, on the other hand, while the conflict is the same, it must be resolved in the context of the rights of a Moslem minority in a predominantly Christian society. Ethiopia's law dealing with family law and succession, as reflected in the Code, is based on Christian concepts, e.g., bigamy is forbidden. Therefore, in Ethiopia the question necessarily is one of whether there should

applied in the civil courts. He points out that there is a large non-Moslem minority and that Mohammedan law has not adapted itself to modern needs. *Id.* at 408. Note that in matters of family law, succession, and the like, the non-Moslem population is governed by customary law. See the discussion, *supra* note 161 and accompanying text.

²¹³ A. ALLOTT, *supra* note 56, at 67-68, 70-75.

²¹⁴ ETHIOPIAN REVISED CONST. arts. 126, 127.

²¹⁵ The present law is THE NAIBA AND KADIS COUNCILS PROCLAMATION OF 1944, NEGARIT GAZETA (May 29, 1944). This replaced a 1942 Proclamation.

²¹⁶ See Anderson, *supra* note 211, at 30. See also Anderson, *Reform of Family Law in Morocco*, 2 J. AFR. L. 146 (1958); Anderson, *The Tunisian Law of Personal Status*, 7 INT'L & COMP. L.Q. 262 (1958).

be separate law for a strong minority group in matters that are considered by them to be religious in nature.

This question has not yet been resolved. While the Penal Code of 1957 prohibits bigamy, it also provides that bigamy shall not be an offense if the civil law provides an exception.²¹⁷ No such exception is contained in the Civil Code, which voids bigamous marriages.²¹⁸ However, to the best of my knowledge, there has never been a prosecution against a Moslem for bigamy, and those persons that practice plural marriage do so openly. It can also be argued that the Civil Code, which contains no provisions applicable to Moslems, impliedly repealed the jurisdiction of the Moslem courts. Since the Civil Code repeals all other law and the law is to be uniform throughout the Empire,²¹⁹ the argument is that Mohammedan law is no longer recognized and the jurisdiction of courts to apply such law is repealed. The alternative argument is that since such courts were in existence and were applying Mohammedan law, the Civil Code, which makes no reference to courts, was not intended to abolish their jurisdiction in cases assigned to them by existing law. Subsequent laws, however, dealing with the courts and their jurisdiction have made no reference to the Moslem courts.

These courts continue to function. It is reported that shortly after the promulgation of the Civil Code, the Minister of Justice by circular instructed the courts to continue to exercise their jurisdiction under the 1944 Proclamation, applying Mohammedan law. Indeed, the Sharia Court of Appeal now sits as a division of the Supreme Imperial Court. On the other hand, if the intention were that these courts remain a permanent part of the judicial system, new legislation to that effect would have been promulgated. But none has been. It is obvious that Ethiopia has not come to grips with the question of separate law for the Moslem population in these matters. The failure to do so appears to be deliberate and despite the resulting ambiguity and uncertainty, this was desirable.

As was seen earlier, the desire for a uniform law is strong. Separate laws, even in limited cases, encourage divisiveness. On the other hand, the matters governed by religious law are vitally important to the Moslem population. Any effort to bind them by a uniform law based in part on "Christian values" would be strongly resisted and could cause a serious upheaval. Perhaps the fact that they are a minority makes their religious law more important to them than in a country such as the Sudan where they are in the majority. In any event, it

²¹⁷ ETH. PEN. CODE arts. 616, 617.

²¹⁸ ETH. CIV. CODE art. 585.

²¹⁹ See *id.* art. 3347.

would clearly be unwise to attempt to impose the uniform law on the Moslem population at this time.

The experience in a number of Moslem countries indicates that traditional practices such as polygamy are on the decline.²²⁰ This appears to be true in Ethiopia as well. Polygamy is not very common among Moslems in the urban areas, and even where it is practiced, the tendency is only to take a second wife. As a society develops, the disadvantages of polygamy become more apparent, and fewer and fewer people will engage in plural marriage. With the secularization that inevitably results from economic progress, traditional religious ties will not be as strong, and doctrines that cannot survive the test of modernization will not be as readily accepted. When this occurs in Ethiopia, the law can be uniformly applied, since resistance will no longer be strong. Perhaps some modifications can be made in the law to reflect Moslem needs, e.g., the authorization of limited religious endowment. The goal is one system of law, and in the future it is likely that the Moslem courts will be abolished. To do so at present would create great opposition. It can be done only when the ties to the traditional practices are no longer so strong, which is likely to happen. Therefore, the present solution which avoids a clear-cut decision now is sound and is really the only one that is feasible.

Traditionally, the Ethiopian Orthodox Church had its own courts which exercised jurisdiction, particularly in family matters. However, their jurisdiction was abolished in 1942,²²¹ and no system of religious courts for Christians was contemplated.²²²

D. How Shall the New Law Be Applied?

The new law was intended to have a revolutionary effect and to offer a legal model for the society to come.²²³ It was developed for the more

²²⁰ See note 216 *supra*. See also J. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* ch. 5 (1959).

²²¹ REGULATIONS CONCERNING THE ADMINISTRATION OF THE CHURCH art. 10, *NEGART GAZETA* (November 30, 1942).

²²² It is reported, however, that in some areas church courts continue to function, hearing cases involving marriage and divorce where the parties were married in the church.

²²³ As Professor Krzeczunowicz has observed, "The tenets of those historical and sociological schools of jurisprudence which stress that law grows primarily from custom through an organic, non-deliberative process, seem valid only for private law, and only in circumstances of relative stability. They are hardly appropriate for those ancient societies which, as in Ethiopia, are suddenly exposed to the impact of a violently competitive outside world. In such circumstances, the aim of our code was, rather than to sanctify existing practices, to offer a unified legal model for the society to come." Krzeczunowicz, *supra* note 66, at 174. The same view has been expressed by Professor David, *supra* note 66, at 193. He dis-

advanced people of the highland areas, but even there it is often far in advance of the people's thinking.²²⁴ We have seen that while the codes retained some customary concepts and practices, they abolished many others and provided a binding written law where none had existed before.²²⁵ And although the codes were very carefully adapted, the adaptation was with a view toward the needs of the new society more so than the needs and conditions of the existing one. In light of this, consideration must be given to how the codes can be applied effectively, what resistance the application of the codes will meet, and how this resistance can be overcome.

There was no question as to the immediate application of the Penal Code. The 1930 Code had been applied, and all that was necessary was that the courts apply the new Code. The judges would have greater difficulty in applying this more sophisticated and modern work, but this is inevitable. Moreover, in cases where a prosecution would seem unjust and no societal interest was adversely affected by the commission of the particular crime, the government could decide not to prosecute. The impact of the new codes would be much greater in the private law area, which more directly involves the day-to-day life of the people.

Professor David proposed that in civil cases the codes not be applied universally in all their dispositions. His proposal was as follows:²²⁶ the Civil Code was to be applied immediately by the judges in Addis Ababa; all the provisions relating to contracts and the entire Commercial Code would be applied universally; the other provisions would be applied outside of Addis Ababa only insofar as they did not run counter to strong customary practices; the Code would represent a model to guide decision rather than binding rules, and a decision would be reversed only where it was contrary to "elementary principles of justice" rather than to the provisions of the Code. He envisaged a provision to this effect in the yet-to-be-enacted Code of Civil Procedure.

This proposal was not adopted. Professor Krzeczunowicz has pointed out that this would defeat the purpose of the codes to insure a minimal security in the legal relations. Litigants would not know where they stood if the failure to adhere to the provisions of the Code

cusses the theory that law will not be effective if it imposes on individuals another mode of conduct than that practiced according to tradition. He insists that this view should not be accepted in countries like Ethiopia, "which are looking toward a total renewal of the basis of their society." The goal is to modify the structure of the society completely, even to the people's way of life. Compare the views expressed in W. FRIEDMAN, *supra* note 11, at 10-12.

²²⁴ See the discussion of this point in Krzeczunowicz, *supra* note 66, at 176.

²²⁵ As pointed out previously, the Fetha Negast was rarely applied.

²²⁶ David, *supra* note 66, at 204.

was not a ground for reversal.²²⁷ Moreover, there would be a real danger of arbitrariness. The judge could apply the codes in some cases and not in others, depending on which litigant he wanted to favor. The concept of the law as a guide to decision rather than a binding norm had existed previously in Ethiopia, and the modern trend had been away from this concept. The proposal would revive the past practice which had been a source of arbitrariness. The judges must be conditioned to decide cases in accordance with the codes and must recognize their binding force. To permit them to decide in accordance with "elementary principles of justice" would open the way for the introduction of customary law, which is exactly contrary to the purpose of the Code in abolishing such law. The judges, on the whole, are not sophisticated enough to choose between the codes and customary law in individual cases, and the codes would be likely to suffer attrition in favor of the customary law. In order for the codes to be effective, the judges must be instructed to apply them immediately as best as they are able.²²⁸

However, as a practical matter, an uneven application of the codes will take place, and though undesirable from many standpoints, this uneven application will cushion the impact of the new law. The simple fact is that in some parts of the country the judges will not be able to apply the codes, will not try to do so, and the parties will not be concerned with the codes but only with the customary law. This is not entirely undesirable. The judges cannot be given a choice to decide the cases in accordance with either the codes or with custom, but where they in fact do not apply the codes (because they cannot),²²⁹ and no objection is made by the litigants (who are not thinking in terms of the codes, but only in terms of the customary law), no harm is done. In some of the very remote areas where the imposition of the codes would have the greatest effect, there are no government courts. In time, these areas will be brought under effective government control, and as development progresses all people will be less resistant to the new laws. Moreover, more qualified persons will be staffing the courts, and they can apply the codes more effectively. What is suggested here is that the people will grow into the codes, so to speak. There will be a coincidence between the progress of the

²²⁷ Krzeczunowicz, *supra* note 66, at 176-77.

²²⁸ For the contrary view, see Vanderlinden, *supra* note 17, at 264-66. Dr. Vanderlinden contends that the Supreme Imperial Court should have the power to "depart from a strict provision of the code in order to insure that justice was effectively done," at least during the transitional period. He admits, however, that the existence of the institution of the Emperor's *chilot* presents an obstacle to conferring this power on the Supreme Imperial Court.

²²⁹ If judges are required by law to apply the codes, it must be assumed that they will try to do so.

nation as a whole, with a greater readiness and desire to accept new ideas, and the application of the codes by judges capable of doing so.²³⁰

In the interim, of course, there will be conflicts. Some judges will try to apply the codes while others will not. A case decided by a lower court judge on the basis of customary law may be decided by the appellate court on the basis of the codes, of which up to that time the litigants may have been unaware. When the codes are applied in such a case, the result may "shock" the parties and cause them to resent the decision. This is unavoidable when society is changing, and this was foreseen when the codes were adopted. All that can be said is that this period will end at some time. Once the people are aware of the new codes and their traditional way of life has been changed somewhat by economic progress, they will conform their conduct to the codes. The transition will be difficult, but this is inevitable in a developing society.

There are other outlets, however, by which the impact of the new law can be cushioned during the transitional period. In the first place, the codes will only be applied in cases coming before the courts. It has been traditional to submit disputes to elders and other respected persons in the community. The people were frequently suspicious of the government courts where such courts existed. These courts represented governmental authority, and the social mores of the particular area may have demanded that the people avoid them. The elders would try to persuade the parties to compromise their dispute, but failing compromise, they would render a decision. The basis of their decision would be the customary rules prevailing in the community. This practice will continue, and a decision by the elders would constitute an "arbitration," which would be legally binding on the parties.²³¹ Indeed, to the extent that litigants do resort to the courts and are dissatisfied with the decisions because not based on the customary rules, they will return to the customary mode of adjudication. Parenthetically, the increasing recourse to arbitration may be noted in developed countries because of dissatisfaction with the results of judicial litigation. The availability of customary adjudication then will lessen the impact of the application of the new law. As the people become more "advanced," they are more likely to want to have their cases decided by the courts under the new law, and reliance on customary adjudication will decrease.²³²

²³⁰ As to the applicability of the numerous regulatory provisions, see note 117 *supra*.

²³¹ See Krzeczunowicz, *supra* note 36, at 65.

²³² It is interesting to note that in countries with highly-developed legal systems the trend is toward removing disputes from the courts and submitting them to arbitration or giving jurisdiction to administrative tribunals.

Outlets also exist in some of the legal institutions of Ethiopia, which will be discussed in more detail in the next section. Cases of a minor nature may be brought before the *Atbia Danias*—local officials, who may be likened to justices of the peace. Their duty is to assist the parties in compromising their dispute, but failing this, they may adjudicate the case as do the elders. They are likely to try to compromise and adjudicate with reference to the customary law rather than the codes, and this is the kind of decision the parties expect. The Emperor has the power to review cases on petition, and as we will see, he is not bound to decide cases according to the strict law. In an appropriate case he may conclude that it would be unjust to decide the case according to the codes and he can decide it under customary law or on some other basis.

Thus, there are devices by which the impact of the new law can be cushioned. The codes will not be applied in the more remote parts of the country until the judges are trained to use them. This should coincide with the development of the people in those areas, and they will be more disposed to accept the new law when it is applied. The parties may resort to customary adjudication, or the case may be brought before the *Atbia Danias*. In cases reviewed by the Emperor, he may decide the case without reference to the codes. The fact that there are such devices does not mean that the impact of the new law will not be felt before the people are ready to accept the new ideas contained therein. It will, and the society will be profoundly affected by the new law. Some opposition and hostility will exist. It simply is not known what is happening in many parts of the country, or what will happen, and any prediction is hazardous. However, particularly among the highland population, there is a tradition of codified law as reflected in the *Fetha Negast*.²³³ The concept of a higher law was recognized even where it was not followed in practice.²³⁴ The codes may be accepted as a modern version of the *Fetha Negast*²³⁵ and the traditional respect for law may help to pave the way for the acceptance of the new law.

Now that the "law" of the new system has been considered, attention may be turned to the other part of the system—the institutions and procedures by which the law is administered.

III. WHAT SHALL BE THE INSTITUTIONS AND PROCEDURES BY WHICH THE LAW IS ADMINISTERED?

In a developing country the institutions and procedures by which

²³³ See Krzeczunowicz, *supra* note 66, at 176.

²³⁴ See David, *supra* note 21, at 499.

²³⁵ See David, *supra* note 66, at 93.

the law is administered may be more significant than the law itself. In order for the law to have meaning and to accomplish its purposes, it must be properly administered. The absence of a trained bench and bar, which is an obvious feature of a developing legal system, hinders such administration. As with the law itself, institutions and procedures must be adapted to the needs of the country, both present and future. In order for the rule of law to exist, it must be demonstrated that the law can work, that rights can be enforced under the law, and that a person will be treated fairly when he resorts to the courts. Therefore, the question of institutions and procedures is a crucial one. Consideration will be given to the following: (1) what will be the institutions of the new legal system; (2) what will be the procedural law; and (3) what persons will staff these institutions and assist in the administration of justice.

A. *The Legal Institutions*

The following questions may be asked regarding legal institutions. Should there be courts in the sense that we understand the term, and if so, what should be their jurisdiction and the relationship between one court and another? How many levels of courts should there be? What other institutions, if any, should be established, and what should be their powers?

It has been pointed out that historically in Ethiopia the law was administered by local rulers with an ultimate appeal to the Emperor. As the authority of the central government was consolidated, government courts were established in the various areas of the country. As soon as the government was functioning following the Liberation, the government courts were reconstituted.²³⁶ The highest court was the Supreme Imperial Court, and the Afe Negus (literally, "mouth of the King"), a traditional judicial official, was designated as chief justice.²³⁷ The Court only exercised appellate jurisdiction. There were five lower courts: the High Court, which at that time sat only in Addis Ababa, and a court in each of the four administrative units into which the country was divided: Taklay Guezat (province); Awradja (region); Woreda (commune); Mektil-Woreda (subcommune). The original jurisdiction of each court depended on the amount in controversy in civil cases and the authorized punishment in criminal ones.²³⁸

²³⁶ ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942, NEGARIT GAZETA (March 30, 1942).

²³⁷ The Revised Constitution provides for the Supreme Imperial Court and such other courts as may be authorized or established by law. ETHIOPIAN REVISED CONST. art. 109. This follows the pattern of the U.S. CONST. art. III, § 2.

²³⁸ The High Court had jurisdiction in civil cases where the amount in controversy exceeded Eth. \$2000 (the Ethiopian dollar is the equivalent of U.S. \$0.40).

The primary consideration was to provide a court that people could reach and where disputes of a relatively minor nature could be heard. The means of transportation existing at that time were poor, as it has always been difficult to travel great distances in Ethiopia.²³⁹ This consideration dictated the establishment of a court in the lowest administrative unit. The more important the case, the further the parties could be expected to travel—thus, the concept of a tiered court system based on administrative units.

Each court heard appeals from the next lowest court and there was to be only one appeal.²⁴⁰ In practice, however, multiple appeals were taken. The higher courts would often hear the appeal, although they had no jurisdiction to do so. When courts were first established, there apparently was a tendency on the part of dissatisfied litigants to seek review in higher courts, and thus it may have been difficult for them to accept the limitation of a single appeal. The higher courts may have believed that they should not refuse to hear the appeal in view of the prior practice or may not have trusted the lower courts to arrive at a sound decision. Whatever the reason, the appeals often were heard. Moreover, an appeal was usually a trial *de novo*, with the appellate court rehearing all the evidence. These factors, coupled with an absence of effective procedure, resulted in endless delays in litigation. It was also possible for a defendant to obtain a transfer of his case to the High Court upon posting security for costs.²⁴¹ This enabled foreigners and wealthier Ethiopians to have their cases heard in the High Court, where there were some foreign judges²⁴² and where the more competent Ethiopian judges sat. In addition to imposing a hard burden on the plaintiff who would often have to travel to Addis Ababa to have his case heard, these transfers had the effect of substantially increasing the case load of the High Court.

Furthermore, there was not a sharp distinction between the executive and the judiciary functions of government. The governor of the

and in criminal ones where the authorized punishment exceeded five years imprisonment or a fine of Eth. \$2000.

²³⁹ Because of the mountainous nature of the country a modern transportation system has been difficult to develop. Substantial improvement has been made since 1942, but lack of adequate means of transportation remains a problem.

²⁴⁰ ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942 arts. 17, 18, NEGARIT GAZETA (March 30, 1942).

²⁴¹ COURT PROCEDURE RULES OF 1943 art. 93, NEGARIT GAZETA (October 31, 1943).

²⁴² Mostly of British nationality. THE ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942 art. 4, NEGARIT GAZETA (March 30, 1942), provided that the High Court should contain such number of judges of British nationality as the Emperor considered desirable. In recent years, however, the number of foreign judges on the High Court has declined considerably. It is interesting to note that there is no requirement in the Constitution that judges be of Ethiopian nationality.

administrative area was the president of the court in that area.²⁴³ This had a two-fold purpose. In the first place, it avoided the necessity of sending additional judicial personnel to those areas at a time when many officials were reluctant to leave the capital. Second, and more important, the governors insisted that they had to exercise judicial power as well as executive power to keep order. This was continuing the past tradition of the ruler of territory adjudicating the cases that arose there with a view toward maintaining order in the territory. The governors also had a good deal to say about who were appointed as judges. In more recent years most governors usually did not sit, but their influence could be very strong. Such a situation tended to prevent the growth of an independent judiciary outside of the capital. There is not much information about the administration of justice in the provinces. But it appears that because of the position of the governor and his role in such administration, it may have been assumed that the judges were subservient to him. Cases have been reported where the governor set aside decisions of the courts. Even though there may have been respect for judges in the provincial areas—the tradition of the wise judge may be deep-rooted, it appears likely that the concept of an independent judiciary free from executive control was not fully understood or accepted, and may not be even now.

At the same time, however, the courts in Addis Ababa, particularly the High Court and the Supreme Imperial Court, were functioning more effectively. A number of British judges came following the Liberation and together with the Chief Justice, senior Ethiopian judges, and Ministry of Justice officials, undertook to develop a modern system of administering justice. In 1943 procedural rules following the common-law model were promulgated. Written judgments were issued, though they were not reported. Judges of these courts began to enjoy some prestige, though except for the Chief Justice it was not comparable to that enjoyed by high government officials.

Litigation has always been a prominent feature of the Ethiopian scene, as it is in many developing societies. Once courts had been established, people resorted to them frequently, even with minor cases. The burden was excessive. To reduce this burden, in 1947 a system of *Atbia Danias*, or local judges, was inaugurated.²⁴⁴ Traditionally, people submitted their disputes to local elders, and under the 1947 Proclamation an attempt was made to institutionalize this process. An *Atbia Dania* was appointed for each "locality." His jurisdic-

²⁴³ ADMINISTRATIVE REGULATIONS, DECREE No. 1 OF 1942 art. X, NEGARIT GAZETA (August 27, 1942). It is interesting to note that the Amharic word for governor "geji," traditionally meant one who taxes and judges as well as governs.

²⁴⁴ ESTABLISHMENT OF LOCAL JUDGES PROCLAMATION, NEGARIT GAZETA (June 28, 1947).

tion was limited to civil cases not exceeding twenty-five Ethiopian dollars and to very minor criminal offenses in which he could impose a fine of fifteen Ethiopian dollars. He was to be assisted by two "assessors." First, he was to try to reconcile the parties, but if this failed, he could adjudicate the case. The decision could be appealed to the Woreda Court, which tried the case *de novo*.

This, then, was the system of courts that existed at the time the new codes were promulgated. For some time there had been dissatisfaction with the number of courts and the way in which they operated. Despite the provisions of law to the contrary, multiple appeals were taken. As has been said, perhaps the reason that the higher courts accepted the appeals was that they did not have confidence in the lower courts and believed that the final decision should not be given by a low-level court. The dissatisfaction with the number of courts centered around those in the lowest and highest administrative units, the Mektl-Woreda and Taklay Guezat Courts. With improved transportation, people could come to the Woreda more easily. In the few areas where this was not possible, resort usually could be had to the Atbia Danias. The Mektl-Woreda Court was not necessary, as it had been in 1942, and there was general agreement that it could be abolished. As to the Taklay Guezat Courts, the officials involved with the administration of justice were concerned about the powers of the provincial governors and their influence over the judges. The High Court, which was a court of nationwide jurisdiction, had begun to sit in the more important provincial capitals, thereby rendering unnecessary the separate provincial courts. Also, the High Court judges apparently were less likely to be under the influence of the governors.

Moreover, with the increased economic development of the country, the 1942 jurisdictional limits in civil cases were no longer realistic. The High Court was hearing a very large number of cases, not only because of the low jurisdictional limits, but also because of the relatively liberal transfer provisions. Reform, then, would have the following objectives: (1) reduce the number of courts; (2) increase the jurisdictional limits with a view toward limiting the number of cases that would come before the High Court; (3) prevent easy transfer; and (4) limit the number of appeals, but insure that the case would "end" before a higher court.

The first change took place in criminal cases with the enactment of the Criminal Procedure Code of 1961. The Mektl-Woreda and Taklay Guezat Courts were deprived of jurisdiction in criminal cases. The more serious crimes were to be tried in the High Court, and the court having jurisdiction to try each offense was specified in the First Schedule to the Code. However, because of the significance of criminal cases in Ethiopia and the fact that deprivation of liberty was involved,

a second appeal was authorized.²⁴⁵ Therefore, there is the possibility that each case could finally be determined by the High Court (if the case began in the Woreda Court) or the Supreme Imperial Court (if it began in the Awradja Court). This set the pattern for future reform; there would be four levels of courts, three of which would exercise original jurisdiction.

In 1962 this reform was undertaken. Parliament enacted the Courts Proclamation Act, which abolished the Mektl-Woreda and Taklay Guezat Courts, and substantially increased the jurisdictional limits of the others. Depending on the kind of case and the court, it might take five to ten times the amount in controversy to bring the case now before a particular court.²⁴⁶ Moreover, there was to be only one appeal, the theory being that a single appeal would be acceptable in civil cases if the case would end before the Awradja Court or High Court. It was contemplated that the Awradja Courts would fulfill the role previously filled by the Taklay Guezat Courts. The more important cases would be heard by the High Court, which was to sit in every Taklay Guezat. The Atbia Danias were retained with their previous jurisdiction.

There had been considerable opposition to the new proclamation, which crystallized soon after passage. As a result, the proclamation was not implemented, and two months after it was to go into effect, Parliament suspended its operation.²⁴⁷ The only reason given in the

²⁴⁵ There is some confusion as to whether the second appeal exists as of right, or as in civil cases, only where the court hearing the first appeal disagreed with the judgment of the trial court. Art. 182 of the Criminal Procedure Code authorizes a second appeal without restriction, unlike art. 321 of the Civil Procedure Code, which authorizes a second appeal only where the first appellate court "varies" the judgment. However, art. 195(3) of the Criminal Procedure Code provides that "where the court of appeal confirms the conviction but alters the sentence or vice-versa, a second appeal shall lie only in respect of the conviction or sentence which has been altered." This provision has been interpreted as qualifying art. 182 so as to preclude a second appeal where the first appellate court confirmed both the conviction and sentence. *Ansa Haile v. Feleketch Negussie*, High Court (unreported 1966). Such an interpretation is questionable, because it appears that Parliament deleted from art. 182 a provision limiting the second appeal to cases where the first appellate court varied the judgment of the trial court.

²⁴⁶ COURTS PROCLAMATION ACT OF 1962, NEGARIT GAZETA (December 31, 1962). It is interesting to note that under the Proclamation as well as under the subsequent Civil Procedure Code it takes more money to get a case involving land before a higher court than a case not involving land. For example, the High Court would have jurisdiction in land cases only if the amount in controversy exceeded Eth. \$10,000, while in other cases a claim in excess of Eth. \$5,000. Land litigation in Ethiopia is very common; it is not inaccurate to say that it comprises at least half of all the civil cases. In order to prevent the higher courts from being overrun with land cases, a higher jurisdictional limit was necessary.

²⁴⁷ COURTS (AMENDMENT) PROCLAMATION OF 1962, NEGARIT GAZETA (July 12, 1963).

suspending proclamation was that "it was necessary that arrangements be made before full effect could be given to the 1962 Proclamation."²⁴⁸ It has never been put into effect and one can only speculate on the reasons for this. Perhaps the two essential reasons were the opposition from the provincial governors to the abolition of the Taklay Guezat Courts and the widespread belief that the Awradja and Woreda Courts, as constituted, were not competent to handle cases involving the amount of money within their new jurisdiction.

As was noted earlier, the distinction between the executive and the judiciary was not accepted by the provincial governors. They contended that they had to have judicial power and some control over the courts to properly administer the province. The abolition of the Taklay Guezat Courts would remove the governors from the judicial process. The main court in the province would be the High Court, controlled by the Ministry of Justice. The judges would look to the Ministry rather than to the governors for advancement; thus, they would not be subject to their influence. The desire of the governors to have some control over judicial administration in the province should not necessarily be considered as improper. In the past, the governor did control the administration of justice in his province and it could legitimately be contended that depriving him of this power would impair his ability to maintain order there. The governor of a province is in a very difficult position. He must administer the affairs of the province, often with insufficient personnel; he is responsible to the central government and at the same time must have the cooperation of local leaders. Taking the responsibility for the administration of justice from him could seriously affect his prestige and authority in the province and thereby limit his effectiveness.

On the other hand, a judiciary under his control could not be truly independent. The existence of a Taklay Guezat Court meant that, in all likelihood, the governor would have a degree of control. He could insist on a voice in the appointment of judges, and as long as a court was designated as a Taklay Guezat Court, the people probably would assume that the judges were responsible to the governor. To prevent this and to create the concept of an independent judiciary, it was absolutely necessary to abolish the Taklay Guezat Courts. But the

²⁴⁸ The Proclamation was put into effect in Eritrea. At the time of the enactment of the Proclamation, Eritrea had just been incorporated into Ethiopia, ending its federated status. It abolished the former court system and implemented the new Proclamation on its effective date, May 5, 1963. With suspension, Eritrea had no system to which it could return. It is reported that the Minister of the Pen sent a letter to the governor-general of Eritrea permitting the Proclamation to continue in effect with the consent of the Emperor.

opposition of the governors may have been a factor in causing suspension of the proclamation.

While there was some degree of confidence in the High Court, there was often much less confidence in the lower courts. The best Ethiopian judges were appointed to the High Court, and prominent Ethiopians were accustomed to having their cases heard there. With the change in jurisdictional limits and the abolition of easy transfer, many more cases would have to be heard in the lower courts, which caused objection. Apart from this, there was a serious question as to whether the present judges of the lower courts were competent to handle cases involving the amount of money within their jurisdiction. There was also the question of what to do with the existing Taklay Guezat Court judges. All could not and should not be promoted to the High Court, and they might consider appointment to the Awradja Court a demotion. Despite the admitted need to reduce the number of cases coming before the High Court, the objection to having important cases tried before the lower courts may have been another factor causing the suspension of the proclamation.

As best as can be determined, the decision was made to postpone a final solution until the adoption of the Civil Procedure Code. The question, therefore, could be reviewed and debated further. Perhaps the opposition of the provincial governors might be overcome; at least they would have more time to adjust to the new state of things. More competent judges could be appointed to the Awradja and Woreda Courts,²⁴⁹ and satisfactory arrangements could be made for the transfer of Taklay Guezat judges.

The Civil Procedure Code was promulgated in October, 1965.²⁵⁰ The Code incorporated the basic structure and jurisdiction of the 1962 Proclamation, though some changes were made. The High Court is given exclusive jurisdiction in a number of cases irrespective of jurisdictional amount,²⁵¹ and there are more such cases than there were under the 1962 Proclamation. There are also provisions for a second appeal. There is one appeal as of right, but if the appellate court varies the judgment, there is a second appeal.²⁵² The theory is that a litigant should be satisfied if two courts agree. This should appease

²⁴⁹ An examination for appointment to those courts has been established, which will be discussed subsequently.

²⁵⁰ It was promulgated by the Emperor as an emergency decree under his constitutional powers. ETHIOPIAN REVISED CONST. art. 92. The draft had been submitted to Parliament late in the session, and it was not acted upon. Because of the urgent need for a new civil procedure code, the Emperor resorted to his emergency powers. Parliament could disapprove the decree, but it is not likely that it will do so, though some amendments might be made.

²⁵¹ ETH. CIV. PRO. CODE art. 15.

²⁵² *Id.* art. 321.

the desire of people for further review, and it insures that a case will be finally disposed of by the High Court unless two lower courts agree. The Civil Procedure Code also eliminates the former practice by which a case could be transferred to the High Court upon payment of security for costs. This practice had resulted in the transfer of many cases to the High Court and increased the court's workload substantially. Now a case can be transferred only in accordance with the provisions of the *Code* relating to change of venue.²⁵³ The High Court can no longer be resorted to on the ground that a litigant prefers to have his case tried before a better court and can afford to post security for costs.

Thus, the court structure of Ethiopia now consists of four levels: the Supreme Imperial Court; the High Court; the Awradja Court; and the Woreda Court.²⁵⁴ The Woreda Court is close enough to most population areas so that a lower court is not necessary. All cases have the possibility of ending before the High Court unless two lower courts agree. Jurisdictional amounts are more realistic. Coupled with the abolition of easy transfer, the burden on the High Court will be reduced. The abolition of the Taklay Guezat Court lessens the power of executive officials in the administration of justice and represents the first step in the development of the concept of a truly independent judiciary in the provinces.

There is a problem as to the position of the Atbia Danias, and they are the subject of much controversy. The establishment of Atbia Danias was an attempt to institutionalize the traditional practice of resorting to the arbitration of local elders. Apparently, the institution has worked well in some areas, but not in others. There may be a conflict between the Atbia Dania and the elders in the area. The Atbia Danias are appointed by the government²⁵⁵ and may not enjoy the status that the elders do. The elders may be jealous of the Atbia Dania and may employ community sanctions to prevent the parties from going to him.²⁵⁶ The Atbia Danias are not paid, and in some areas it is reported that they charge fees to the litigants, which creates

²⁵³ *Id.* art. 31. One ground on which a change of venue is authorized is that the case presents a question of law "of unusual difficulty." Such a case would be transferred to the High Court.

²⁵⁴ Technically, the Taklay Guezat and Maktil-Woreda courts are not abolished, since the 1942 Proclamation has not been repealed. But the judges have been transferred, and for all practical purposes, they may be considered abolished.

²⁵⁵ The Minister of Justice makes the appointment upon the advice of the presidents of the Awradja and Woreda courts for the "locality." The presidents are to consult with local elders before making their recommendation.

²⁵⁶ In some areas, however, it is reported that the elders and the Atbia Dania cooperate. The Atbia Danias are authorized to sit with two assessors, and the elders serve as assessors.

the suspicion that they favor the party who brings the case to them.²⁵⁷

It is clear that some institution of this sort is desirable. Not only does it substantially reduce the burden on the regular courts, but it provides a device by which cases may be settled in the traditional way with reference to traditional rules, thereby mitigating the effect of the new and unfamiliar law. However, there is sentiment that the jurisdiction of the Atbia Danias be abolished.²⁵⁸ Perhaps there will be reliance on the elders, and ultimately it could be provided that persons recognized as elders in the community would have the power to hear the cases now within the jurisdiction of the Atbia Danias and render a binding decision. Another possibility might be to appoint an elder as Atbia Dania for a term and rotate the position among the elders in the community. The effort to institutionalize the process of customary adjudication in the person of the Atbia Dania has not been uniformly successful, but there should be a recognized place for customary adjudication in the new system. Additional efforts in this direction may have to be undertaken.

Consideration may now be given a very important Ethiopian legal institution, His Imperial Majesty's *chilot*.²⁵⁹ In *chilot* the Emperor reviews a case that has been heard previously by the courts and renders the final decision.²⁶⁰ Historically, the Emperor was recognized as the ultimate source of justice, and as such he had the power to review the judgments of kings and other rulers of territory.²⁶¹ The Emperor's sovereign prerogative to see that justice was done is similar to that once exercised by the King of England in the *Curia Regis* and by the King's representative, the Chancellor, in the Court of Chan-

²⁵⁷ As in the United States, where justices of the peace and magistrates continue to collect fees.

²⁵⁸ Some officials in the Ministry of Justice take the position that the jurisdiction of the Atbia Danias was repealed by implication in the Civil Procedure Code, since no provision was made for the exercise of such jurisdiction. It appears, however, that they continue to function.

²⁵⁹ This institution has been discussed more fully elsewhere. Sedler, *The Chilot Jurisdiction of the Emperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective*, 8 J. AFR. L. 59 (1964).

²⁶⁰ The applicant must have exhausted all appeals before petitioning the *chilot*. ETH. CRIM. PRO. CODE art. 183; ETH. CIV. PRO. CODE art. 322.

²⁶¹ For a discussion of the historical exercise of this power, see F. ALVAREZ, *THE PRESTER JOHN OF THE INDIES* 128 (C. Beckingham & G. Huntingford eds. 1961) (sixteenth century); 3 J. BRUCE, *TRAVELS TO DISCOVER THE SOURCE OF THE NILE* 265 (1790) (late eighteenth century); 2 L. DE CASTRO, *NELLA TERRA DEI NEGUS* 131-32 (1915) (late nineteenth and early twentieth century). See also the sources discussed in M. PERHAM, *THE GOVERNMENT OF ETHIOPIA* 145-47 (1948). As one observer put it, "It is a thought dear to most Ethiopians that they can obtain justice from His Imperial Majesty even if the courts have failed them." Hambro, *The Rebellion Trials in Ethiopia*, 12 BULL. INT. COMM. JUR. 29, 30 (1961).

cery.²⁶² This prerogative may be considered to survive notwithstanding the establishment of a court system, since it does not directly interfere with the power of the courts to decide cases before them.²⁶³ In any event, review in *chilot* is exercised in accordance with the sovereign's traditional prerogative to see that justice is done. Review is discretionary,²⁶⁴ and most significantly, the Emperor is not bound to decide the cases in accordance with the strict law, as are the courts.²⁶⁵ "Justice" may require that in certain cases the strict law be disregarded. Thus, the English King was not bound by the common law in the *Curia Regis*, and, as we know, the Court of Chancery—established pursuant to the King's prerogative—developed an entirely separate body of law, founded on concepts of "equity, justice and good conscience."²⁶⁶

It is this latter aspect of *chilot* jurisdiction that is extremely important today. Cases have been reported where the Emperor granted relief where such relief was not available under the law.²⁶⁷ The existence of *chilot* provides a sound device by which the impact of the new law can be cushioned during the transitional period. The concept of the Emperor as the ultimate source of justice is very strong in Ethiopia. If the Emperor decides that the law should not be applied in a particular case, this will be accepted. Because the Emperor made the decision, the litigant who has the stronger case under the law will not feel that he has been unjustly treated. The courts must decide cases under the law to prevent any impression that they are acting arbitrarily and cannot be authorized to disregard it. The existence of *chilot* serves to reduce the pressure on the courts to disregard the law where the application of the law in a particular case would appear to produce a harsh result. The courts can decide the case in accordance

²⁶² See Sedler, *supra* note 259, at 61-66.

²⁶³ As to the vesting of judicial power in the courts, see ETHIOPIAN REVISED CONST. art. 108. For a complete discussion of the constitutionality of *chilot*, see Sedler, *supra* note 259, at 66-69.

²⁶⁴ All persons have the right to submit petitions to the Emperor. ETHIOPIAN REVISED CONST. art. 63. But since the exercise of jurisdiction in *chilot* is based on the Emperor's sovereign prerogative to see that justice is done, he has the prerogative to decline to hear the case. See Sedler, *supra* note 259, at 69-70.

²⁶⁵ As to the duty of the courts to decide cases in accordance with the law, see ETHIOPIAN REVISED CONST. art. 110.

²⁶⁶ See Sedler, *supra* note 259, at 71.

²⁶⁷ A famous case involved the situation where a man persuaded a woman to sleep with him and paid her Eth. \$5 for the night. They continued to live together, but were not married and did not hold themselves out as man and wife. The man paid her nothing more and turned her out. Although the woman was not entitled to any relief under the law, it is reported that the Emperor ordered the man to pay her Eth. \$5 for each day spent with him. See *id.* at 71-72.

with the law and advise the party of his right to petition for review in *chilot*.

However, the fact that there is the opportunity for review in *chilot* may operate to destroy confidence in the courts. Many cases are reviewed in *chilot* in the same manner as if they had been appealed to a higher court. The decision is on the basis of the law, and when the *chilot* reverses a court on a question of law, the position of the courts in the legal system is accordingly weakened. Many people are reluctant to accept the judgment of the court as final so long as there is the opportunity for review in *chilot*; they believe that they have not received "justice" unless His Imperial Majesty confirms the court's judgment. The number of petitions for review in *chilot* is staggering, and the Emperor spends a substantial amount of time reviewing cases.²⁶⁸ The opportunity for such review prolongs litigation, produces uncertainty, and may impair confidence in the courts.

The problem is that while *chilot* may provide a very desirable device by which the impact of the new and unfamiliar law can be cushioned during the transitional period, the existence of the institution creates additional problems and, most significantly, may weaken the position of the courts in the legal system. The dilemma is not completely soluble, but the situation can be improved. In time, review in *chilot* may be limited to those cases where the Emperor believes that the application of the strict law may produce an unjust result. It must then be made clear that the decision of the court is to be final except in relatively few cases where the Emperor will exercise his prerogative. The authority of the courts as the body to decide cases under the law will correspondingly be recognized. If review in *chilot* will be limited to those cases where the decision will not be based on the law, the number of petitions should decrease in time, as those cases will become fewer and fewer. At present, however, *chilot* if properly employed can provide a device by which the application of the new law in the transitional period will be cushioned while at the same time retaining its legal force and effect.

In summary, there are three institutions in Ethiopia by which the law is administered. The primary institution is the courts, which exist in the same sense as do courts in a developed legal system. There is only one kind of court, and the courts are bound to decide cases in accordance with the formal law.²⁶⁹ In addition, there are local judges, the *Atbia Danias*, whose function it is to conciliate and arbitrate as well

²⁶⁸ The Civil Procedure Code attempts to regularize the filing of petitions. The Emperor has set up a tribunal, the *Fird Mirmera*, to assist him in screening petitions seeking review in *chilot*. See *id.* at 73-74.

²⁶⁹ Except for the Mohammedan courts as previously discussed. It is predicted that in the future they will be abolished.

as to adjudicate. They operate with reference to the customary law and practices prevailing in the area and therefore, provide a device to lessen the impact of the new law. Finally, a case can always be reviewed by the Emperor in *chilot*. Though he has the power to review cases on the law, as does an appellate court, the most useful contribution this institution can make is to provide a device by which the rigors of the strict law can be mitigated in a particular case. The clear import of the system is that the courts have the primary responsibility for administering the law, and every effort is being made toward strengthening the power and position of the courts.

B. The Procedure

Now that we have considered the institutions that administer the law, attention can be focused on the procedures by which the law is to be administered. The most significant characteristic of a developing legal system is demonstrable weakness in the procedural area. The absence of trained personnel is reflected in the procedure—or lack of procedure—that exists. Litigation is confused and delayed. Cases are not presented to the courts in an orderly manner and often are not properly disposed of. In developing its legal system a nation must adopt a method of procedure that will eliminate these problems as rapidly as possible. At the same time, it must take account of the shortage of trained lawyers and judges, and the method of procedure must be one that will function best in the circumstances. The same careful consideration that was seen in the development of the substantive law in Ethiopia took place in the field of procedure.

Although this may be an oversimplification, it perhaps is not inaccurate to refer to two basic approaches to procedure, the common-law approach and the civilian approach, and to define them as follows. Under the common-law approach the primary responsibility for developing the case rests with the parties, and the conduct of the litigation is governed by detailed procedural rules. Under the civilian approach the court has the primary responsibility for developing the case, and the judge has great discretion in the conduct of the litigation.²⁷⁰ In part, the difference in approach may stem from the difference in the function that litigation plays in the theoretical organization of each system. Litigation lies at the heart of the common-law system—the law develops through a series of decided cases. In the civil law countries, litigation has not been the “heart of the definition of law;” a right has various consequences, of which the possibility of

²⁷⁰ See generally Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 *BUFF. L. REV.* 409 (1960).

enforcement in the courts is only one.²⁷¹ At least theoretically, then, litigation takes on a greater role in the common-law system, and detailed rules have been developed to govern the conduct of litigation.

A nation developing its procedural system will essentially follow one or the other approach to litigation. Ethiopia has opted for the common-law approach. Under the Criminal Procedure Code, the prosecution is adversary rather than inquisitorial, and the traditional guarantees of the criminal accused which form an integral part of common-law criminal procedure exist in Ethiopia.²⁷² The Civil Procedure Code contains the features of common-law procedure with which we are familiar: pleading,²⁷³ stage preclusion, a separate trial as opposed to conferences and proof-taking, direct and cross-examination, and specific powers and limitations for the judge. The adversary system of litigation with party responsibility for presentation of the case is also employed. Consideration may now be given the reasons why Ethiopia adopted the common-law approach toward procedure despite the fact the substantive law was based on continental models.

There appear to be four factors which led to the adoption of this approach: (1) the traditional method of litigation was adversary and depended on party presentation; (2) following the Liberation, a number of British judges were appointed to the High Court who influenced the attitudes of Ethiopian judges toward procedure; (3) litigation had always been considered extremely important and would continue to be so, which necessitated procedural rules that would expedite the conduct of such litigation; and (4) the judiciary did not enjoy such confidence that they could be trusted with wide discretion.

First, litigation, as has been pointed out repeatedly, was long a prominent feature of the Ethiopian scene. This litigation was an individual matter; one person accused another before the judge. As such, he presented his own case, and the judge was in the position of arbiter.²⁷⁴ The proceedings were completely adversary in nature. In criminal cases also, the concept of private prosecution was well-established.²⁷⁵ Thus, these proceedings were adversary rather than inquisitorial.

Second, when the British judges presented the idea of the adversary

²⁷¹ R. DAVID & H. DE VRIES, *THE FRENCH LEGAL SYSTEM* 79 (1958).

²⁷² Such guarantees are also contained in the Constitution. See *ETHIOPIAN REVISED CONST.* arts. 51-57.

²⁷³ For a discussion of the distinction between the place of pleading in the common-law and civil-law systems, see C. CLARK, *CODE PLEADING* 9-12 (2d ed. 1947). Pleading is virtually of no importance in the civilian system, and the issues are developed by the court during the conferences.

²⁷⁴ See Graven, *La Nouvelle procedure penale ethiopienne*, 79 *REVUE PENALE SUISSE* 70, 75-76 (S. Mikael transl. 1963).

²⁷⁵ *Id.* at 71-72.

system and party presentation as representing a modern method of procedure, it was readily accepted by the Ethiopian judges, because it conformed to traditional practice. The new feature introduced was rules of procedure, which followed the common-law model.²⁷⁶ In 1943, procedural rules were promulgated by the High Court,²⁷⁷ and some additional rules were established at a later time. Those rules, though sketchy, governed procedure until the adoption of the Criminal Procedure Code and Civil Procedure Code. So, the judges operated under common-law procedure and to the extent they were familiar with procedure at all, it was with the common-law notion.

Third, despite the adoption of civilian-based codes, litigation will have the same place in Ethiopia that it does in the common-law system. To the Ethiopian, a right necessarily means something that he can enforce in court, and he will be insistent on enforcing rights. Litigation will continue to be very frequent, and vindication of rights in court will be very important to the people. The hope was that detailed procedural rules, if properly applied, could significantly expedite the conduct of litigation, and it was necessary to have a process by which each phase of the litigation would be controlled.

Finally, the judiciary did not enjoy such confidence or have such experience that it seemed wise to entrust them with wide discretion in the conduct of litigation. By demanding adherence to the rules of procedure, higher courts could insure that a fair trial was had in the lower courts. Arbitrary action, particularly that delaying the case, would be inhibited by the presence of procedural rules. The civilian approach, giving wide discretion to the judge, assumes a professional career judiciary which was lacking in Ethiopia. It was considered necessary to tell the judges what to do at each stage of the litigation and to oversee their actions.²⁷⁸

Therefore, just as it was sound for Ethiopia to adopt codes on the continental model, it was sound to adopt the common-law approach to procedure. A mixed legal system in Ethiopia was a matter of necessity rather than, as elsewhere, a product of historical development.

Originally, Professor Graven, the drafter of the Penal Code, had drafted a comprehensive judicial code following continental lines which covered evidence, civil procedure, and criminal procedure. The Codification Commission, however, decided that in Ethiopia the com-

²⁷⁶ Except for the institution of the jury, which was never introduced in Ethiopia.

²⁷⁷ Under the ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942 art. 20, the Supreme Imperial Court and the High Court were authorized to promulgate rules with the approval of the Minister of Justice. The rules promulgated by the High Court were to be employed by the lower courts as well.

²⁷⁸ See Graven, *supra* note 274, at 74.

mon-law approach to adjective law should be followed, and consequently, the idea of a judicial code was abandoned. The draft provisions on criminal procedure were substantially revised by Sir Charles Mathew, the President of the High Court, and the Criminal Procedure Code, promulgated in 1961, is primarily a common-law type code.²⁷⁹ The same is true of the Civil Procedure Code, which was promulgated in 1965.²⁸⁰ An evidence code is now in the process of being drafted, and it is anticipated that the common-law concept of binding rules of evidence will form the basis of the code.²⁸¹

As with the substantive codes, there was no wholesale borrowing from the law of one country or any type of "reception." A number of codes were consulted, and various dispositions were taken from each.²⁸² There was also a careful adaptation. The codes, as finally promulgated, were designed to establish a procedural system that could work in Ethiopia.

This process of adaptation may now be considered. In the first place, both codes are comparatively brief, the Criminal Procedure Code containing 224 articles and the Civil Procedure Code containing 483.²⁸³ The goal was to produce a concise work that could be applied by the judges without too much difficulty. The rules are rather strict, with little discretion left to the judges.²⁸⁴ Both codes have appendices that contain model pleadings and other forms which must be employed. These models will be helpful to the judges and lawyers, many of whom have had no formal legal training, and they are designed to insure a uniformity that will reduce errors in practice.

A number of provisions were drafted with a view toward special problems that existed because of past practice. This was particularly true as regards the Criminal Procedure Code. Private prosecution

²⁷⁹ See Fisher, *Some Aspects of Ethiopian Arrest Law*, 3 J. ETH. L. 463, 464 n.6 (1966).

²⁸⁰ See generally R. SEDLER, *ETHIOPIAN CIVIL PROCEDURE* ch. 1 (1967).

²⁸¹ For a discussion of the distinction between the common-law and civilian (in this case French) approach to evidence, see R. DAVID & H. DE VRIES, *supra* note 271, at 74-77. The French judge is given a great deal of discretion under the principle of *intime conviction* and is not limited in what he can consider by rules of evidence.

²⁸² For a discussion of the sources of the Criminal Procedure Code, see Graven, *supra* note 274, at 76.

²⁸³ Compare the length of the Indian Codes which were the source of a number of provisions. If the number of articles seems large to the American reader, it must be remembered that all the procedural "law" is contained in the codes. The Indian Code, for example, was intended to be a compilation of many of the rules of common-law procedure. The codes are applied without reference to a body of decided cases.

²⁸⁴ See the prior discussion as to the necessity for such rules, *supra* note 278 and accompanying text.

was a well-recognized principle. There was a marked tendency to resort to criminal proceedings to obtain satisfaction in private disputes. In the new Code, it was necessary to reduce the influence of the private prosecutor and to establish that the primary purpose of a criminal prosecution was to vindicate the interest of society rather than the interest of the private complainant.²⁸⁵ At the same time, it was not possible to abolish the role of the private prosecutor altogether, and some recognition had to be given his interest. The Code attempts to reconcile the interest of the state and the interest of the private prosecutor. It draws a distinction between offenses punishable on complaint and others; certain offenses are punishable only if a complaint has been filed by the victim.²⁸⁶ Where the offense is punishable on complaint and the prosecutor refuses to institute the proceedings on the ground that there is not sufficient evidence to justify a conviction, the complainant can take over and prosecute the case himself.²⁸⁷ Where the offense is not one punishable on complaint and the prosecutor refuses to prosecute on the basis of insufficient evidence, the injured party, his spouse, or legal representative can appeal the prosecutor's refusal to prosecute, and the appellate court may order a prosecution where it finds that the refusal is unwarranted.²⁸⁸ Moreover, in certain cases, the injured party can join a claim for damages with the criminal prosecution.²⁸⁹

The major adaptation in the Civil Procedure Code is the degree of control that the court is given over the litigation despite the general utilization of the adversary system and party presentation. There is a first hearing, which may be likened to an expanded pre-trial conference. The court examines the parties orally as to whether they admit or deny the allegations of the pleadings, so that there is no danger of an inadvertent omission by failure to deny.²⁹⁰ In addition, the court may insist on proof of an allegation that has been admitted by the defendant in his pleading.²⁹¹ Most importantly, the court frames the issues for trial not only on the basis of the pleadings, but also on the basis of the parties' testimony at the first hearing.²⁹² Liberal amendment of the pleadings and the framing of additional issues

²⁸⁵ See Graven, *supra* note 274, at 73.

²⁸⁶ See generally Graven, *Prosecuting Criminal Offenses Publishable Only Upon Private Complaint*, 2 J. ETH. L. 121 (1965).

²⁸⁷ ETH. CRIM. PRO. CODE art. 44(1). See Graven, *supra* note 286, at 125.

²⁸⁸ ETH. CRIM. PRO. CODE art. 44(2). See Graven, *supra* note 274, at 77.

²⁸⁹ See generally Graven, *Joinder of Criminal and Civil Proceedings*, 1 J. ETH. L. 135 (1964).

²⁹⁰ ETH. CIV. PRO. CODE art. 241.

²⁹¹ *Id.* art. 235.

²⁹² *Id.* art. 246-48.

on the court's own motion are also authorized.²⁹³ Finally, the court is given broad powers with respect to the conduct of the trial and the summoning and examination of witnesses.²⁹⁴ Because of the absence of trained lawyers, these provisions are particularly necessary to protect the parties from the consequences of procedural errors.

Next, consideration will be given to the problems of having a mixed system of law. The substantive law is based on continental models while the procedural law follows the common-law approach. As has been demonstrated, such a system was necessary in Ethiopia, but because of it certain problems may arise. Some are of a technical nature, resulting from the different form in which the substantive and procedural codes were drafted and the different terminology employed. These can be remedied by proper interpretation.²⁹⁵ The real question concerns the effect that common-law procedure will have on the application and interpretation of the substantive law. In the first place, in civil law systems the law is not considered to develop through litigation; theoretically, the system of rights, rules, and principles exist apart from the process of litigation.²⁹⁶ In such systems, the courts are formally denied a creative role. Solutions for new situations, not specifically covered by the codes, must come from legal scholars and the "idée-force of Droit."²⁹⁷

This is not likely to happen in Ethiopia. Litigation has been far too important for the concept of the law apart from litigation to exist, and the judges are oriented to see the law through the process of litigation. They will not interpret the codes in the abstract, but will see the provisions only in relation to the facts of a particular case. There is not, nor is there likely to be in the foreseeable future, a complete body of doctrine explaining and commenting upon the codes.²⁹⁸ The

²⁹³ *Id.* art. 91, 251.

²⁹⁴ *See, e.g., id.* arts. 111, 264, 265, 272.

²⁹⁵ One example is the matter of joinder of a third party defendant on the ground that the original defendant is entitled to contribution from him. ETH. CIV. PRO. CODE art. 43. However, art. 1908 of the Civil Code provides that "a debtor who pays in excess of his share may claim the amount paid in excess from the co-debtors." The article on contribution in tort cases, art. 2161, also refers to "a person who has paid the whole debt." Since the substantive law must determine whether a right to contribution exists, *see Brown v. Cranston*, 132 F.2d 631 (2d Cir. 1942), it could be contended that third party joinder was not authorized, since there is no right to contribution until the defendant has paid. Such a construction would render art. 43 inoperative. The problem results from the different terminology employed in the two codes, and art. 43 should be construed to authorize joinder where the "debtor may be compelled to pay in excess of his share."

²⁹⁶ *See R. DAVID & H. DE VRIES, supra note 271, at 73-74.*

²⁹⁷ *Id.*

²⁹⁸ Efforts are being made by the members of the Faculty of Law to prepare

procedural system with its stress on litigation encourages the judges to view the law in that context. One writer has suggested that if common-law trained judges interpreted a civilian code, the code in the long run would not remain civilian.²⁹⁹ There is this danger in Ethiopia, at least at present. However, persons who have received legal training will understand how a civilian code has traditionally been interpreted, and as more trained persons enter upon the bench, the civilian approach may be more extensively employed.³⁰⁰

On the other hand, the common-law orientation of the present judges and the common-law concept of litigation could have some very desirable benefits. It may be possible to formulate an approach that will combine the best features of both systems. For example, judicial opinions follow the common-law form as opposed to, say, the French form.³⁰¹ The facts are set out in detail, the provisions of law relied on are fully analyzed, and the *ratio decidendi* is given. The French method of decision—a recital of the applicable code provisions and the court's holding as deductively derived from the cited provisions³⁰²—would not be suitable. The litigants want the court's specific reasons for deciding as it did, and whether or not binding precedent and *stare decisis* are followed, judicial decisions will help to clarify the law. Judicial decision based on deduction without specific reasons for the court's conclusion could be a cloak for arbitrariness. Particularly, where many judges have not had formal training, the reasons for their decisions are very important. There will also be many problems of interpretation. Not only are the codes new, but the legislative debates and reports of the Codification Commission have not been published. The codes were drafted in French and translated into Amharic and English, and there are a number of terminological inconsistencies.³⁰³ It is, therefore, necessary to know precisely why the court decided a particular case as it did. The common-law method of judicial decision is necessary in Ethiopia, at least for the foreseeable future.

Moreover, the codes must be interpreted in the context of litigation. A provision may look differently to a judge when compelled to apply

commentaries on the various areas of law, but it will take some time before even a body of basic works exists.

²⁹⁹ Twining, *supra* note 65, at 235.

³⁰⁰ Dr. Vanderlinden, however, is of the opinion that the present system of legal education, in which the University Law School is staffed primarily by American lawyers, cannot help but produce lawyers oriented to the common-law approach. Vanderlinden, *supra* note 17, at 260-64.

³⁰¹ For a comparison of the form and content of judicial decision in common-law and civil courts, see A. VON MEHREN, *supra* note 8, at 832-33.

³⁰² *Id.* at 833.

³⁰³ See Krzeczunowicz, *Statutory Interpretation in Ethiopia*, 1 J. ETH. L. 315, 317-20 (1964).

it to a case before him than it would in the abstract, and any interpretation of the code must take account of the fact that the code has significance primarily as the basis of decision in litigated cases. The pragmatism inherent in the common-law approach to judicial decision may prevent unrealistic interpretations. So long as the judges do not engraft common-law principles on civilian-based provisions of the codes, interpretation of the codes in the context of actual litigation may have a beneficial effect on the development of the substantive law.³⁰⁴

The existence of a mixed legal system also raises the question of binding precedent and *stare decisis*. This question has not yet been resolved in Ethiopia. The 1962 Proclamation provided for binding precedent in that lower courts were required to follow the decisions of higher courts on questions of law, but with the suspension of the Proclamation this provision is no longer effective. Since Ethiopia's substantive law is based on codes, these doctrines would have to be employed in a different fashion and on a different basis than in common-law countries. As in civil law countries, the starting point for judicial reasoning would be the provisions of the codes rather than previously decided cases.³⁰⁵ In many situations the judge will be able to base his decision on the clear language of the codes. But, there frequently will be times when the codes must be interpreted. In such a case there is no reason why the judge cannot consult prior decisions interpreting the codes; this is done in civil law countries.³⁰⁶ If he can consult them, there is no reason why he cannot be bound by them. He would be bound by the interpretation put on an article of the code and the application of a code article to a particular fact situation.³⁰⁷ These doctrines are not incompatible with a substantive law based on codes.

There are strong arguments favoring the imposition of binding precedent on lower court judges, and it can be predicted that this will be done. With more qualified judges sitting on the higher courts, better decisions are likely to be coming from those courts. The utili-

³⁰⁴ Dr. Vanderlinden's conclusion is that the common-law influences in Ethiopia will outweigh the civil law ones and that, in effect, the development of Ethiopia's legal system will be along common-law lines. Vanderlinden, *supra* note 17, at 264. While I prefer to think of the legal system as "mixed," I share Dr. Vanderlinden's optimism that a distinctly Ethiopian approach to the solution of Ethiopian legal problems will emerge. *Id.* at 266.

³⁰⁵ See A. VON MEHREN, *supra* note 8, at 827-28.

³⁰⁶ See M. PLANIOL, *TREATISE ON THE CIVIL LAW* § 124; R. DAVID & H. DE VRIES, *supra* note 271, at 116-17.

³⁰⁷ In effect, this is what is done in mixed jurisdictions where these doctrines are applicable. See J. CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC* 230 (1962).

zation of binding precedent insures greater certainty. A judge of the lower court will have no excuse for disregarding a decision of the higher court, and the litigant will not have to appeal to that court. Judges will be more apt to try to apply the provisions of the codes if they can look to decisions of higher courts for guidance. The adoption of binding precedent will aid the development of the legal system, as it insures a greater degree of uniformity, possibly fewer appeals, and in all likelihood better decisions in the lower courts.

As to *stare decisis*, however, there are grave reservations about the adoption of that doctrine in a country that is in the process of developing its legal system.³⁰⁸ It does insure greater certainty, which is of course desirable. But under this doctrine, as we have seen from our own experience, unsound decisions can often be perpetuated. In the future, it is likely that more qualified persons will be appointed to the courts, and even now judges are receiving some formal legal instruction.³⁰⁹ Consequently, the quality of judicial decision is likely to improve in the future. It would be unwise to bind future courts by present decisions. It does not appear likely that this doctrine will be adopted in the foreseeable future.³¹⁰

C. *The Bench and Bar*

The third area to be considered is that of the persons who are responsible for the administration of justice: the judges who staff the courts and the lawyers who practice before them. Attention will first center on the judiciary. Here must be asked: how shall judges be appointed; what qualifications should they have; and what shall be their tenure of office?

In Ethiopia, the judiciary is in a state of transition. As pointed

³⁰⁸ Where a country has adopted the common law as the basis of its system, the doctrine would have to be employed so that a body of precedent can be established. As to the problems this can produce, see W. DANIELS, *THE COMMON LAW IN WEST AFRICA* 174 (1964).

³⁰⁹ See the discussion of extension instruction in law, note 321 *infra* and accompanying text.

³¹⁰ A very practical problem is the absence of a system of court reporting. This would be very expensive to undertake because of very high printing costs. There may be a reluctance on the part of many judges to have their decisions reported because of the criticism that might result. It would also be difficult to obtain court decisions, because most courts lack adequate stenographic help. The Faculty of Law does publish the *Journal of Ethiopian Law*, which includes selected court decisions that have been made available to the *Journal*. Since the *Journal* is published in Amharic as well as English and has a fairly wide circulation, some decisions are made known to the judges. But obviously this is no substitute for a comprehensive system of reporting. As to the necessity for judges to be aware of the decisions of their fellow judges as opposed to foreign decisions, see Guttman, *Law Reporting in the Sudan*, 6 *INT'L & COMP. L.Q.* 685 (1957).

out earlier, justice was traditionally administered by the king or other ruler of territory. He might have "judges" to assist him, but they were clearly subordinate. When the Emperor heard cases, he would sit with the "wamber," who advised him, but he rendered the final decision.³¹¹ And when government courts were established, the judges apparently were considered subordinate to the governor of the area. He was the president of the court and had a large say in judicial appointments.³¹² Consequently, judges did not enjoy great prestige. They were simply officials assisting the governor in performing his duties. The only prominent judicial official was the Afe Negus, who traditionally assisted the Emperor in the performance of his judicial duties and who pronounced the Emperor's decisions.

Following the Liberation, the first steps toward raising the status of the judge and creating an independent judiciary were undertaken. The Afe Negus was constituted as the President of the Supreme Imperial Court. Judges were appointed to the High Court, and this became an official rank and title.³¹³ Some of these judges were appointed to the Supreme Imperial Court to hear particular cases, and a later practice was to appoint them to the Supreme Imperial Court for indefinite periods.³¹⁴ Other persons were appointed as Vice-Afe Negus, a new position. As a result of these actions, the judges of the High Court and Supreme Imperial Court began to enjoy some prestige, though it was not comparable, except for the Afe Negus, to that enjoyed by high officials in the Ministry of Justice. The salaries paid to the judges were and continue to be relatively low.³¹⁵ The judges were appointed by the Emperor on the advice of the Minister of Justice,³¹⁶ and they could be removed at any time.

The Revised Constitution of 1955 provides for an "independent judiciary."³¹⁷ Appointment, tenure, and the like are to be governed by

³¹¹ Sedler, *supra* note 259, at 61.

³¹² See the prior discussion, note 243 *supra* and accompanying text.

³¹³ ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942 arts. 4, 5, NEGARIT GAZETA (March 30, 1942).

³¹⁴ The appointment of judges to hear particular cases was authorized by art. 3 of the 1942 Proclamation. Judges appointed to the Supreme Imperial Court in more recent years have not been transferred back to the High Court, although they have the rank and salary of a High Court judge.

³¹⁵ When a person is appointed to the bench from a position carrying a higher salary, he retains that salary.

³¹⁶ ADMINISTRATION OF JUSTICE PROCLAMATION OF 1942, arts. 4, 5, 12, NEGARIT GAZETA (March 30, 1942); ORDER DEFINING THE POWERS AND DUTIES OF MINISTERS art. 61(a), NEGARIT GAZETA (January 29, 1943).

³¹⁷ ETHIOPIAN REVISED CONST. art. 110 provides as follows:

The judges shall be independent in conducting trials and giving judgments in accordance with the law. In the administration of justice, they submit to no other authority than that of the law.

a special law; however, that law has not yet been enacted. Judges continue to be appointed by the Emperor upon the recommendation of the Minister of Justice. The matter of appointment and tenure of judges is of prime concern today. A judge can now be removed or transferred at any time and enjoys no security of tenure. He must look to the Ministry of Justice for advancement. In light of this, it may be asked just how independent a judge can be.³¹⁸

The Ministry of Justice has attempted to regularize the process of judicial appointment.³¹⁹ A system of examinations has been instituted for appointment to the Woreda and Awradja Courts. Anyone may take the examination, which has been drafted by qualified lawyers in the Ministry, and appointment is primarily on the basis of successful performance on the examination. It is contemplated that judges appointed to the Woreda Court will be promoted to the Awradja Court on the basis of their performance as Woreda Court judges. Appointment to the High Court is on the basis of recommendation by a special commission, consisting of the Afe Negus, the President of the High Court, and other high judicial and Ministry officials.³²⁰ The commission makes recommendations to the Minister of Justice, who in turn makes them to the Emperor. The Emperor makes the final decision. In practice, few judges are removed, and it seems that once a person has been appointed as a judge, he has a tenure of sorts. The fact that the present system has worked fairly well has reduced the pressure to

³¹⁸ The problem of judicial independence is not unique to a developing country. In those states of the United States where judges are popularly elected, they may be responsive to political and public pressures. Moreover, despite such conditions, judges may display independence. Cases have been reported in Ethiopia where the courts have invalidated actions and assertions of power by government agencies.

In *Advocate of the Ministry of Fin. v. Nicola Sarris* (1959), 1 J. ETH. L. 198 (1964), the High Court held that it had the power to review a tax assessment of the Ministry of Finance. In *Woube Wolde Selassie v. Kefelew Wolde Tsadik* (1962), 2 J. ETH. L. 54 (1965), the court voided an order of a governor directing that land, which was the subject of litigation in the courts, be turned over to one party. In *S.A.C.A.F.E.T., Societa Anonima v. The Ministry of State Domains and Mines* (1962), 2 J. ETH. L. 60 (1965), the court enjoined the Ministry from carrying out an expropriation order on the ground that it had not followed the proper procedure. Finally, in *Ato Kidane Melkue Tsedek v. The Ministry of Fin.* (1962), (unreported), the Supreme Imperial Court rejected the contention of the government that claims against the government by employees had to be instituted before an administrative tribunal in the Prime Minister's Office. The court pointed out that art. 62 of the Revised Constitution gave everyone the right to sue the government in the courts.

³¹⁹ The material that follows is taken from a paper, *The Position of the Judiciary in Ethiopia*, submitted by Ato Aberra Bantiwalu, a recent graduate of the Faculty of Law. Ato Aberra has done extensive field research on the subject.

³²⁰ Many appointments are made from the ranks of the lower court judges.

enact the special law referred to in the Constitution. Nonetheless, the uncertainty of tenure and the possibility of removal or transfer to an undesirable post may be a factor inhibiting complete judicial independence.

The problem of judicial appointment and tenure is a crucial one for developing countries. A sufficient number of persons "learned in the law" simply are not available. Persons must be appointed to the bench who often times lack any formal training. Their qualifications must be determined by some method, and once on the bench, they must be "upgraded." Judges need a certain amount of security of tenure if they are to be independent at all, but a judge who does not adequately perform must be removed if the quality of the judiciary is to be improved. As more persons are legally trained, they must replace the less competent judges. In Ethiopia, there is a problem in appointing younger, educated men to the bench. As pointed out, a judicial position is not prestigious. Moreover, Ethiopia is an age-oriented society. It is doubtful if the people would be willing to accept younger judges, particularly in the rural areas. It may be assumed that, for the most part, the judiciary will consist of persons without law degrees or any formal legal training.

In order to deal with such a situation, it is necessary to insure that the more qualified persons get appointed to the bench in the first place and that retention following appointment is conditional upon improved qualification. The examination system, as presently employed, is a step in the right direction. This is all the more feasible because extension training in law is now becoming more available. In 1962, some of Ethiopia's university-trained lawyers started a program of very basic extension instruction in Amharic, the official language. The courses were held in Addis Ababa and were attended by many judges and other legal personnel. This two year program proved to be very effective. An advanced program was started, and similar instruction was also offered in Asmara, the second largest city. All the programs are now under the jurisdiction of Haile Sellassie I University's Faculty of Law. It is contemplated that law graduates from that University will each spend a year offering instruction in the provincial capitals.³²¹ To the extent, then, that instruction in law becomes available, it is very sound to relate appointment to the passing of examinations.

The passing of examinations may also provide the solution to the problem of tenure. While some degree of tenure is desirable to pro-

³²¹All University students must spend a year performing "University Service" as a condition to receiving their degrees. This is designed not only to alleviate some of the manpower needs in the rural areas, but to familiarize University students with the problems in those areas.

mote judicial independence, tenure for any lengthy period unrelated to improved qualification would be very detrimental, since a sharp upgrading of the quality of the judiciary is necessary. A judge could be appointed for a fixed period, say three years, after passing the initial qualifying examination. At the end of that period he would have to pass a more rigorous examination for retention. This would insure that the matter of his retention would depend on objective criteria, and his decisions would not be influenced by a concern for retention. Thus, there would be examinations at a different level for appointment to each court, and a more rigorous examination for retention at the end of the judge's term. Lower judges could be promoted to higher courts by passing the examinations for that court.

Since standards for retention and, of course, promotion would be higher than standards for appointment, the judges would have the incentive to improve their qualifications. The qualifying examinations could be made progressively more difficult. Until such time as trained persons are available to staff all the judicial positions, the examination approach to appointment and retention can insure the desired upgrading of the judiciary while at the same time developing judicial independence.

The trend in Ethiopia is in this direction. The absence of trained persons, coupled with the traditional position of the judiciary, makes it difficult to achieve the goal of a competent and independent judiciary. Until such a judiciary is established, it will be difficult to implement the new law effectively.

Finally, the role of the legal profession may be considered. As with the judges, the absence of trained lawyers is a most serious handicap. The concept of a "spokesman" or "pleader" has long existed. But the emphasis apparently was on oral ability and persuasiveness; a lawyer was thought of as one who could speak well before the judge. Knowledge of the law was not nearly as important as this ability, and anyone could act as a "spokesman" or "pleader" for another. There were no requirements for admission to practice, and standards of professionalism could not be said to exist.

It is now necessary to transform the image of the lawyer from that of one who is a skillful pleader to one who is learned in the law. Some efforts in this direction have been undertaken. There are now rules governing admission to practice.³²² The authority to determine qualifications is vested in the Minister of Justice. There is no admission examination as such, although the Minister may impose a test in individual cases. An advocate (as such persons are called) may be limited to practice before the Awradja and Woreda courts, which is

³²² REGISTRATION OF ADVOCATES RULES OF 1952, NEGARIT GAZETA (July 28, 1952).

sound in light of the differing degrees of competency that are necessary for practice in the various courts. There are also provisions for suspension and disbarment of advocates. Charges of improper conduct are referred to a committee which makes recommendations to the Minister of Justice. The Minister then makes the final decision.

In practice, most of the advocates have had no formal legal training, and the level of practice is not high. The emphasis on orality and presentation before the court remains. Most of the advocates are not skilled in drafting pleadings, legal documents, or in following proper procedure. This situation is likely to continue for some time. The needs of the government for qualified lawyers are so great that practically all of the university-trained lawyers are employed by government agencies, and this will continue to be so. There seem to be no present plans for the upgrading of the profession by more formalized admission requirements, though tests are being given more frequently to applicants.

It would not be feasible to upgrade admission requirements sharply at this time. This would simply mean that there would be fewer persons to practice law, and an advocate who has at least some experience is likely to do a better job of presenting the case than the parties. However, some improvements might be desirable. The most effective method might be to seize upon the provision in the rules authorizing the Minister to limit an advocate to practice before the lower courts. An advocate would be limited to such practice unless he could pass a fairly rigorous examination. Since the more important cases come before the High Court, an advocate would have more inducement to improve his knowledge of law and procedure. This would insure that the more qualified advocates were practicing before the High Court, which is where the more qualified judges are sitting. Also, it would be desirable if a uniform admission test, such as that given to applicants for Woreda judgeships, were employed. However, the primary efforts must be to upgrade the quality of the judges. When this is done, the standards of legal practice can be raised accordingly. In the final analysis, though, it will be quite a while before the legal profession may be considered to be "developed."

IV. CONCLUSION

In tracing the development of a legal system such as that of Ethiopia, it can be seen that the evolutionary development with which we are familiar could not take place. There was the need to create a modern legal system as soon as possible. The development of that system had to be structured and planned. It was decided that the main body of law should consist of comprehensive codes along the continental model.

The codes were carefully drafted with a view toward making the necessary adaptations for Ethiopian society. The finished product was a body of law distinctly Ethiopian in character which would form the basis of the new legal order. Unlike practically all the other sub-Saharan African countries, Ethiopia did not include a separate body of customary law in its legal system. Rather, it took account of custom and looked upon it as a source of some of the provisions of the codes. The new law was designed to eliminate practices sanctioned under the customary law and to establish legal norms suitable for a modern society. After some experimentation, a satisfactory structure of courts was established. In view of the importance of litigation in Ethiopia, it was necessary to adopt a law of procedure along common-law lines. At this point in Ethiopia's history a modern legal system can now be said to have been established.

But this system must be administered by persons, and there is an extreme shortage of persons qualified to do so. The new law can be expected to meet substantial resistance in its application. The problems in completely developing a legal system are awesome, and such development requires a substantial period of time.

There is every confidence that full development will take place in Ethiopia. Historically, there has been a deep-rooted respect for justice among the Ethiopian people.³²³ Now it is necessary to transform the respect for justice into respect for the law itself and to develop the concept that all men are subject to the law. It is toward this goal that the Ethiopians are striving, and those of us fortunate enough to be part of a highly-developed legal system can only wish them well.

³²³ This has been pointed out by all those who have written about Ethiopia. See generally the authorities cited in note 261 *supra*.