CODE AND CUSTOM IN ETHIOPIA

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Introduction

Ethiopia's juristic development presents, in most respects, a striking contrast to the rest of sub-Saharan Africa. Only Ethiopia had its own ancient code of law. Ethiopia alone evolved a unique legal system related to its tradition and to both continental and common law concepts. Also extremely original is the pace of development in, respectively, Ethiopian public and private law. Indeed, while in the constitutional field, Ethiopia can be distinguished from most of Africa by the caution and gradualness with which its political structures evolved from the traditional Ethiopian concepts of government,[2] in the sphere of private law the reverse is true: in another contrast to most of Africa, the recent reform of private law in Ethiopia was sudden and total. The reward for the gradualness in Ethiopian constitutional development has been a political stability unique on this strife-torn continent. As to the reasons for the abruptness of our private law reform, they are discussed below.

It is now generally admitted in Africa[3] that the diversity and the communal features of tribal custom in the fields of land tenure, family law and succession, and its voids in other areas of law (e.g. contract) hamper trade, investment and social progress. The necessary modernization of Africa's private law structures has started or is overdue. It is hardest to achieve in the above-named fields of law, wherein tradition is strongest and elaborate. Granted this, by what methods should *private law* be reformed: should there be a legal *evolution*, or a juristic *revolution?*

The expert drafter of the Ethiopian Civil Code, Professor R. David, has declared himself in favour of and has followed what may be called the "revolutionary" approach. He explained his attitude as follows:

> The development and modernization of Ethiopia necessitate the adoption of a "ready made" system ... in such a manner as to assure as quickly as possible a minimal security in legal relations.

1. This paper is largely based on G. Krzeczunowicz, "A New Legislative Approach to Customary Law", *J. Eth. Studies*, vol. I, no. 1 (1963), p. 57, which is out of print. The latter article was never published in a law journal or in the Amharic language.

2. *Cf.* G. Krzeczunowicz, "The Regime of Assembly in Ethiopia," *J. Eth. Studies*, vol. I, no. 1 (1963), p. 79.

3. For the last decade consult, *e.g.*, the several issues of *Journal of African Law* and of *Recueil Penant*.

> We [Europeans] observe the stability of our private law, and we believe with difficulty in the efficacy of laws which pretend to impose on private individuals another mode of conduct than that practiced by them ... This position is not that of the Ethiopians ... While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structures completely, even to the way of life of her people. Consequently Ethiopians do not expect the new Code to be a work of consolidation ... of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create, [further arguments are omitted].[4]

The above view has been substantially supported by this writer:

> No doubt the practical non-existence in Ethiopia of customary rules on certain matters (*e.g.* in contract law) and the fact that in other matters (*e.g.* in family law) most customs are uncertain or vary from place to place, group to group and time to time, made it inconceivable even to consider the idea of a mere legislative consolidation of all such customary rules as are found to be followed in practice. Law could not be simply "found" and affirmed in Ethiopia. It had to be "made" by rational choice from national and foreign sources. A homogeneous legal system for this Empire could only be created by a consciously reforming effort. In the Emperor's words ... the primary requirement was "the modernization of the legal framework of Our Empire's social structure." The tenets of those historical and sociological schools of jurisprudence which stress that law grows primarily from custom through an organic non-deliberate process, seem valid ... 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. (As evinced by the Fetha Nagast, such reforming aims are not novel in Ethiopian history.)[5]

The legal role of Ethiopia's traditional customs has thus dwindled and is now reduced. It has, however, not disappeared and may be researched with profit. We shall attempt in this paper to determine, by analytical process, the

4. R. David, "A Civil Code for Ethiopia", *Tulane L.R.*, vol. 37 (1963), pp. 188-89, p. 193.

5. G. Krzeczunowicz, "The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability", *J. African L.*, vol. 7 (1963), pp. 173-74. Such reforms perhaps owed their success in Ethiopia to the traditional attitude of, at the most, bare sufferance toward those customary rules which did not accord with christian ideals and equity (contrasting with the undiscerning reverence which was accorded to ancestral customs in other parts of Africa). It seems that foreign interest in the usages of Ethiopian society has failed to transform this soundly diffident attitude into one of enthusiasm for "customary law"!

domain of custom under the Civil Code. We shall discuss, in turn, the Code's repeals provision, the factors explaining it, and the five outlets for custom subsisting under the Code. This will be followed by a conclusion.

The Repeals Provision.

Among the matters considered by the London Conference on "The Future of Law in Africa" (January, 1960) figured the problem of judicial and legislative adaptation of customary law to existing needs.[6] The methods of gradual adaptation therein preconized seem strikingly at variance with the all-out repeals contained in the comprehensive Ethiopian Civil Code of the same year (1960), whose Article 3347 (1) reads as follows regarding "Repeals":

> *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 above Article repeals prior law and custom whether it be *contra* or *praeter legem*. It might have been less destructive of tradition and custom to replace the sweeping terms "concerning matters provided for in this Code" by the terms "inconsistent with the provisions of this Code." Such terms would have restricted the repeal to what contradicts the law, without affecting what would merely supplement it.[7] As it stands, this *tabula rasa* repeal of the legal past is without precedent in Africa and can only be likened to the French law of Ventose 30, Year XII, on which M. Planiol, in his Civil Law Treatise,[8] comments as follows: "That statute, in promulgating the Civil Code, repealed in its entirety all the old law... No other repeal is comparable to this colossal operation..." But while the French Civil Code merely finalized a mature internal evolution, the Ethiopian one imports unfamiliar legal concepts from abroad. So it may indeed be expected that its effects will sometimes be "...stultified where the people themselves persist in doing a thing which they are supposed by legislation to have ceased from doing..."[9] Such persistence, if generalized, could undermine the public order; disputes might be settled prevalently out of court and law. One aim of this paper is to show that this need not necessarily or overwhelmingly happen. Indeed, there are certain (1) traditional, (2) actual and (3) technical factors supporting and explaining the Ethiopian choice of a comprehensive codification with all-out repeals. These explanatory factors are discussed below.

Explanatory Factors

6. See A.N. Allot (ed.), *The Future of Law in Africa* (London, Butterworth, 1960).
7. Or course, the same result, had it been desired, could have been attained by not enacting any general repeals clause (a less desirable method in a society not conversant with the concept of "implied" repeals).
8. M. Planiol and G. Ripert, *Treatise on the Civil Law* (12th ed. 1939), (Translation, Louisiana State Law Institute, 1959), vol. 1, no. 227.
9. Allot, *op. cit.* note 6, at p. 33.

Ethiopia cannot be considered in a purely African customary context. Its tradition embodies elements of Mediterranean (incorrectly called "Western") civilization, with its Judeo-Christian and Greco-Roman components. Constantine and the Nicaea council loom large in Ethiopian lore. The kingdom of Axum was an ally of Justinian. Above all, there is a tradition of one basic authority and law at the centre, which preserved this empire through centuries of tribulation. Codification is no new concept here. The Ethiopian Christians' ancient canon and civil law was comprehensively formulated — possibly in the 16th century — in the *Fetha Nagast* (Law of the Kings), drawing nearly all its precepts from the monophysite mother church at Alexandria. The civil law part contains, among others, elements of East-Roman law. Readers interested in this topic will find introductory information and further bibliography in R.R. Canevari's *Fetha Nagast*, Milano, 1936.[10]

Now let us pass to actuality. Though codification, in its comprehensive aspect, is a familiar concept here, the venerable *Fetha Negast* has become so outdated as to be rarely invoked. Prior to 1960 Ethiopian civil adjudication was based mainly on equity (including persuasive foreign precedents) and custom, the latter being varied and uncertain. Save for Eritrea,[11] Ethiopian customary laws were not reduced to writing, though descriptions of social customs have appeared, *e.g.*, in travellers' reports and in the ethnological bulletins of the University College of Addis Ababa.[12] The tribal and local variations of legal customs are legion. Their progressive unification by gradual processes might take generations, while Ethiopia's survival and progress in a non-leisurely age require speedier solutions. So rightly or wrongly, a short cut was taken in enacting the present Ethiopian Civil Code with its sweeping abrogation of the legal past. This most unusual method includes, however, devices for safeguarding some continuity. The new technique, of interest to the lawyer, will be discussed below at length. It is hoped that the distinguished expert[13] who drafted the code on continental lines, will be willing to add his *mises au point*, if any.

To start with, it may be in point to quote from His Majesty the Emperor's preface to the Ethiopian Civil Code.

> *The rules contained in this Code are in harmony with the well-established legal traditions of Our Empire . . ., and have called, as well, upon the best systems of law in the world. No law which is designed to define the rights*

10. A complete annotated English translation of the *Fetha Nagast* by Abba Paulos Tzadua will be published in the near future by the Faculty of Law, Haile Sellassie I University.

11. See F.F. Russel, "Eritrean Customary Law," *J. African L.*, vol. 3 (1959), p. 99. The leading recent work in this field is F. Ostini, *Trattato di Diritto Consuetudinario dell'Eritrea* (Asmara, Corriere Eritreo, 1956).

12. Also, e.g., in various issues of *Ethiopia Observer*, and in Amharic books by Balambaras Mahtema Selassie Wolde Maskal.

13. Professor Réne David, the renowned comparativist of the University of Paris Law Faculty.

and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the hearts of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice.

This most wise and generous pronouncement seems, *prima facie*, incompatible with the above-mentioned "repeals" provision. To cite again:

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.

But a closer analysis will reveal five avenues along which traditional rules and customs are or may be preserved. These outlets for custom are: 1. incorporation[14] of custom, 2. reference to custom, 3. filling code vacuums, 4. judicial interpretation and 5. para-legal outlets. We shall discuss them in turn.

Outlets for Custom.

1. *Incorporation of Custom.*

A large core of Ethiopian customary law is preserved through its incorporation into the Civil Code. In this way, formulated custom becomes general statute law. The very nature of this method precludes its application to local customs. But even within general custom, the codifier's approach was discriminatory. Below, is a tentative outline of the Ethiopian legislator's sensible standards of choice in this field. The choice is all-important here, since under the "repeals" provision what is not included in the Code is abrogated.

The Codification Commission's and Parliament's records are not yet published. But we can already assume — judging not merely from hearsay but from the very results of the codification work — that the "general" custom of the land (its "common law") has been more or less included in the Ethiopian Civil Code where: (a) it is sufficiently "general" as to be practised by at least a majority of the highland population; (b) it is not repugnant to the natural justice which permeated that ultimate old authority, the *Fetha Negast;* (c) it is not contrary to imperatives of social and economic progress (the retention of retrograde practices in land transfers[15] is provisional and non-uniform: it concerns local customs); (d) it is sufficiently clear and articulate as to be capable of definition in civil law terms. The incorporated custom has indeed been molded, together with "received" foreign solutions, into the technical

14. Rather than "codification", since the customs are not intact but were reshaped to fit in with solutions received from abroad, or "consolidation", which term would, in addition, suggest a retention of past incidences of custom.

15. Civ. Co., Arts. 3363-67.

frame of civil law concepts, categories and classifications.[16] Incidentally, the above four requirements are somewhat implicit in the Emperor's cited preface, which shows appreciation of (a) traditional "customs", (b) "natural justice", (c) "needs" of the recipients and (d) legal clarity.[17]

The mentioned standards of choice caused the Civil Code's Book on Obligations and the separately enacted Commercial Code to be overwhelmingly foreign in origin, as in these essentially modern branches of law there was an understandable lack of indigenous rules responding to the set requirements. On the contrary, in the traditionally cultivated branches of law concerning family, land and succession, many fitting general customs have been preserved through their inclusion in the Code.

It would be beyond the scope of this paper to attempt an enumeration of the Code-incorporated general customs (as distinct from "received" law). Several of them concern personal and family law, which is now one for all, whatever the particular family customs held by distinct groups. As this uniformity has been widely warned against and is unique in Africa, the devices mitigating its impact on dissenters will be stressed throughout this paper. Some fine points of law are involved in the question whether — on the face of the sweeping "repeals" provision — the distinct personal status recognized to Moslems in a prior procedural proclamation[18] must be deemed abrogated with the rest of past civil law and custom. I do not feel entitled to pronounce on this question (which has political implications). It seems provisionally solved — in favour of Moslems — by the continuing factual recognition by state courts of the jurisdiction of Kadis Councils applying Moslem personal law. Clarifying legislation might follow in due time.

By way of example and by number, here are a few of the Civil Code articles which seem to incorporate, wholly or partly, an important customary rule: 560 ff., 652, 725, 849, 852 (implying exclusion of spouse from intestate inheritance), 1168, 1170-79, 2067 with 2113-14, 2142.

2. *References to Custom.*

The "repeals" provision under discussion abrogates, within the Code's wide ambit, all past customary rules "unless otherwise expressly provided," that is, save where the Code itself expressly refers to custom. The Code repeals what it has not incorporated or included by reference. Legislative provisions,

16. Incidentally, this caused some insuperable difficulties in translations from the Code's French master draft into the uncongenial official languages of Amharic (authoritative) and English. Amharic lacks legal terminology. As for English legal terms, they do not fit in. See G. Krzeczunowicz, "Ethiopian Legal Education" (*s.v.* Language Problem), *J. Eth. Studies*, vol. I, no. 1 (1963), pp. 69-70.

17. The relevant quotation being: "It is essential that the law be clear....."

18. Kadis and Naibas Councils Proclamation, 1944, Proc. No. 62, *Neg. Gaz.*, year 3, no. 9.

far from supplementing custom, are not even supplemented by it.[19] And the Code only in few instances refers to custom. It may be instructive to summarize those instances. They concern varying local customs, as distinct from the general ones discussed above. Clearly, where an approved custom is general, it need not be referred to but is "incorporated" in the Code.

Below is an illuminating list of the Ethiopian Civil Code's rare references to local usage. Their rarity reflects the prevailing trend for unification. We shall quote or outline them under the headings Family, Succession, Property, Contracts, Torts.

Family

Art. 567. — *Form of betrothal.*

The form of betrothal shall be regulated by the usage of the place where it is celebrated.

Art. 573. — 2. *Moral prejudice* [caused by breach of betrothal].

(2) In establishing the amount of indemnity and who is qualified for requiring it, the court shall have regard to local custom.

Art. 577. — *Various kinds of marriages.*

(1) Marriages may be contracted before an officer of civil status [such officers are non-existent in the countryside; *cf.* Article 3361 on suspension of the introduction of civil status registers].

(2) Marriages contracted according to the religion of the parties or to local custom[20] shall also be valid under this Code.

Art. 580. — [Customary marriage results from such rites as, under a community's rules, constitute a permanent union.]

Art. 606. — *Marriage according to custom.*

(1) The conditions on which a marriage according to custom may be celebrated and the formalities of such celebration shall be as prescribed by local custom.

Art. 624. — [The conditions and formalities of customary marriage may be sanctioned by customary fines or damages.]

Arts. 807-8. — [The legal obligations of maintenance between relatives by blood or marriage in the direct line, and between full and half brothers and sisters, are assessed having regard to local customs.]

19. It remains to be seen whether this exclusion need apply to future customs. The Code repeals only those "previously in force." But what will give "force" to future customs? Their force may be mainly persuasive in that they influence the judges in their interpretation of laws (*cf.*, *infra*, our remarks on the outlet of "Judicial Interpretation"). How different is this French-Ethiopian approach from, *e.g.*, the Swiss Civil Code which, so far from repealing custom, clearly enjoins its application *praeter legem* (Art. 1)!

20. Paradoxically, members of the national established church marry more often in customary than in religious forms.

Note: It has been stated that several of the Code-incorporated general customs are found in the family law. We now see that the latter also contains some references to local customs. These provide a welcome mitigation of the law's impact on groups of distinct family custom. Other cushioning devices *coram mores familiae* will be described below *s.v.* "Para-Legal Outlets".

Succession

Note: The law of succession contains no references to custom, so that distinct customs of inheritance have now no independent validity and can survive only by being followed in testaments or in compromises. The law of intestate inheritance — while incorporating the general customary rule of *paterna paternis, materna maternis* (Art. 849 ff.) — disregards local variations in the order of intestacy. Local practices may, in turn, disregard that law — through effecting those customary compromises described below *s.v.* "Para-Legal Outlets".

Property

Art. 1132. — *Definition* [of "intrinsic element"].

(1) Anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof [for the purpose of dealings in such things — Art. 1131].

Art. 1168. — *Principle* [of usucaption].

(1) [establishes a fifteen year period for land-acquisition by adverse possession] Provided that no land which is jointly owned by members of one family in accordance with custom may be acquired by usucaption and that any member of such family may at any time claim such land.

Art. 1371. — *Rights of way and rural servitudes.*

[They] shall be of such extent as is recognized by local custom.

Art. 1489. — *Principle* [of communal exploitation].

Land owned by an agricultural community such as a village or tribe shall be exploited collectively whenever such mode of exploitation conforms to the tradition and custom of the community concerned.

Art. 1490. — [providing for future codification of such customs by charters.]

Arts. 1496-97 — [giving further recognition to customary modes of communal exploitation.]

Note: Procedures for progressive revision of such "modes" (rules) are facilitated by Articles 1498-99 .

Arts. 3363-67. — [retaining the customary practices as to transfers of rights in

land *erga omnes*, for as long as land registration provisions[21] are not in force].

Note: In a few developing areas the customary practice already is registration.

Contracts

Art. 1713. — *Contents of contract.*

The parties shall be bound by the terms of the contract and by such incidental effects as are attached to the obligations concerned by custom ...

Note: This important recognition of "conventional usages" hardly calls for comment, since it is part of most legal systems. Its specific applications in Ethiopia are most frequent and interesting in lease of land: see Arts. 2983(2), 2990(1-2), 2997(2), 3006(2), 3013(3).

Torts

Art. 2116. — *Custom.*

(1) In fixing the amount of the fair compensation [for moral injury] provided for in the preceding Articles, and in establishing who is qualified to act as representative of the family, the court shall have regard to local usages.

(2) The court may not disregard such usages unless they are anachronistic or manifestly contrary to reason or morals.

Note: This reference to local usage supplements incorporated general custom on moral injury.[22] The latter includes (Art. 2113) what was once, with less sophistication, called blood money, with this basic difference: the "blood" money of old did stop penal proceedings, which our "moral" compensation does not.

3. *Filling Code Vacuums*

The discussed "repeals" provision abrogates all prior customary rules "concerning matters provided for in this code." *A contrario*, customary law may apply to matters not provided for therein. But in the fields covered by the Code, custom does not even supplement particular legal provisions. Otherwise, the legislator would have repealed only those rules inconsistent with the enacted ones, and not all rules *in pari materia*.

As pointed out, in matters lying beyond the Code's ambit, customary law is preserved (where not inconsistent with other legislation). But the Ethiopian Civil Code, with its 3,367 articles, is so comprehensive that hardly any fitting field was left out. So far, only one occurs to me, in relation to a chain of legislative omissions: the Civil Code says nothing about co-operatives, except for the money-saving ones; such "saving" co-operatives are merely subjected (Art. 405(1)) to "the provisions of the Commercial Code" which (Art. 212),

21. Title X, Civ. C.
22. Civ. C., Arts. 2105-15.

in turn, subjects them to possible enactments, which have not existed so far, but are in the process of enactment at the time of writing. Now, in this country, various groups co-operating through mutual savings, loans, etc. are customary (*e.g.* the *Ekub*). Most of their rules seem to have originated among the Gurage tribes. Their description is beyond the range of this paper.[23] But it is submitted that such rules did fill a code vacuum and thus could have been applied autonomously, apart from using the concept of conventional usage under Art. 1713.

4. *Judicial Interpretation.*

The Ethiopian codes are of continental type. In pure continental theory, judicial interpretation is no source of binding law, which cannot be judge-made. But appeal courts being guardians of continuity, the persuasive force of their judgments is such that, as M. Planiol puts it,[24] "in fact the amount of law established [in France] by decisions of the courts since 1804 is considerable." And continental law treatises, just as the common law ones, are overwhelmingly based on case law. The latter will be created by Ethiopian higher courts when, in order to decide a case, they will have to apply code rules whose meaning is disputed before them. For this reason — after having discussed incorporation of custom, reference to custom, and code vacuums — we set out judicial interpretation as the fourth legal avenue along which Ethiopian customary law may be preserved.

This avenue becomes of overriding importance when we consider the Emperor's preface to the code. The Ruler's pronouncement is of legal significance, emanating as it does from He who shares the supreme legislative power under the Ethiopian Constitution of 1955.[25] His preface, as quoted *supra s.v.* "Explanatory Factors", clearly shows that, contrary to what the sole "repeals" provision would suggest, a break with tradition and custom was not contemplated. There can be no better evidence of the legislator's intent which, according to continental doctrine, should guide our interpretations of recent law. A break with legal tradition not being intended, it is indeed submitted that Ethiopian courts should, where appropriate, assign customary meanings to the Code's phraseology.

In doing it, they must act discerningly. Article 1733 forbids interpretation of contracts and, *a fortiori*, statutes whose provisions are clear. Many Code articles are clear, or fully clarified by the context or the French mastertext. Among those that, being less clear, or too general, admit of more than one meaning, we must distinguish. Customary meanings (1) should be assigned to Code texts incorporating prior custom or referring to it (*e.g.* in family law) and (2) should not be undiscerningly assigned to texts representing "received" law, as these may lose sense and consistency unless interpreted through their doctrines of

23. On this topic see Asfaw Damte, "Ekub", *Univ. Coll. of Addis Ababa Ethnol. Soc. Bull.*, no. 3 (1958), p. 63.

24. Planiol and Ripert, *op. cit. note* 8, at no. 14b.

25. See, *e.g.*, Art. 88, Rev. Const.

origin (*e.g.* in obligations law). Being borrowed from "the best systems of law in the world" (Emperor's preface, *op. cit.*), such texts were intended to mean here what they meant there.

We shall now exemplify the above propositions:

(1) (a) In the section on References to Custom, we quoted Article 1168 which excludes usucaptions of land held in customary joint ownership by "members of one family", who can always claim such land. The term "family" without qualification usually means in Europe "single" family (parents with children). It is submitted that here the term "family" must acquire the customary meaning of an extended mass of persons descending from an even remote common ancestor from whom the undivided property originated; this allows each such person at all time to claim the joint land or his share in it. Incidentally, Article 551(2) seems to set a limit to such claims by implying that the claimant (who challenges the usucaption) must not be separated by more than seven generations from the ancestor concerned.

(b) The so called "irregular union" (Art. 708) between man and woman has, in common with marriage, the following two effects: the *praesumptio paternitatis* with respect to children conceived or born during the union (Arts. 715 and 745), and the man's liability for the woman's household debts (Art. 714, *cf.* Art. 660). By virtue of Article 709 (1) such irregular unions arise where the behaviour of the man and woman is "analogous to that of married people." Now, should such analogy be extended to cover behaviour typical for those customary unions called *ba-damoz*, in which the woman is temporarily hired for all-round duties somewhat similar to those of a regular, permanent (*cf.* Art. 580) wife? Here affirmative decisions may satisfy custom without being legally unsound. They may create precedents in assigning a (limited) significance to *ba-damoz* unions. Thus, in such unions, credit will be obtained, and off-springs' filiation affirmed.

(2) (a) The degenerate practice of "artificial insemination" being unknown to Ethiopian custom, the meaning of this term for the purpose of Article 794 (dealing with the effect of such insemination on child disowning) must needs be drawn from its foreign usage.

(b) Much of the Code's "received" contract law is abstract and makes little sense unless explained through its Romanistic doctrines of origin.

(c) But this is needless where the contract law is clear; e.g. such familiar rule as "Offer or acceptance may be made ... by signs normally in use ..." (Art. 1681) — means quite obviously that

whatever be the customary concluding handshake or drink etc., it seals the acceptance (the rule actually amounting to one of those references to custom discussed in a prior section).

Whether the courts will or will not choose to accept our suggestions, it is essential that they be consistent and do not vary their interpretations, as this in lieu of case law would produce lawlessness. Case reporting in this Journal will help to ensure such consistency. As to basic rules of interpretation under Ethiopian law, the reader is referred to G. Krzeczunowicz, "Statutory Interpretation in Ethiopia", in vol. I (1964), p. 315 of this Journal.

5. *Para-Legal Outlets*

The above discussed "legal" outlets for customary law, *i.e.*, the incorporation of custom, references to custom, filling code-vacuums, and judicial interpretation, do not exhaust the problem of the incidences of customary rules in practice. There remain for us to examine certain peculiar "para-legal" outlets for the factual reappearance of such customary rules as have no independent validity in terms of the "repeals" provision[26]. We shall analyze in turn: (1) provisions of family law leaving certain discretionary powers with marriage parties or arbitrators; (2) provisions of the contract of compromise, giving indirect sanction to various customary arrangements; (3) the outlet "Associations".

(1) *Family Law.*

It has been shown that the impact of the uniform family law on groups of distinct custom is mitigated by references to local usage. Here we shall examine two general devices cushioning that impact through sanctioning the traditional inter-familial autonomy in marriage affairs:

(a) Within an elastic frame of binding substantive law, the Code vests a largely discretionary[27] legal jurisdiction in the customary "family arbitrators" (the marriage witnesses). They decide on marriage disputes[28] and on the granting of and the personal and pecuniary effects of divorce, which is pronounced by them legally out of court.[29] Their decisions are without appeal save by special impeachment (Art. 736).

26. The *main* such loophole for custom, but one not amenable to analysis within this article, perhaps consists in the absence in our Code of a concept of *void* marriage. Even bigamous marriage, prohibited by Art. 585, can only be "dissolved" on application of spouse or prosecutor (Art. 612), which the latter hardly ever bothers and the former (who is punishable under Pen. C. Art. 616) dares to do! The sweeping consequences of this "loophole" with respect to factual preservation of custom call for a field study rather than a discussion in this paper.

27. See, *e. g.*, Art. 695 (2).

28. See Civ. C., Arts. 641(2), 648(2), 655(2), 656(c), 660(3) and basically, Art. 725 pointing at that customary figure, the Nagar Abbat ("father of the case") or pre-agreed arbiter of marriage, who may also be "first witness" and/or guarantor of the marriage compact.

29. See Civ. C., Arts. 666-82, 691-95 and basically, Art. 727-28.

Betrothal witnesses similarly arbitrate betrothal disputes (Art. 723). This opens a back door, in fact if not in theory, to local customs which are "repealed", that is, not referred to by the Code in the express way required by the "repeals" provision. Repealed customary law may thus re-appear *via* compulsory arbitration.

(b) Articles 627 and 632-33 provide another para-legal outlet for family customs. They allow the spouse or spouses, either jointly (before marriage) or through the family arbitrators (during marriage), to fix or vary both their personal status in the marriage and its pecuniary effects (the Code rules in these respects being, save exceptions, permissive — *cf.* Art. 634). Clearly customs of no independent validity will permeate such marriage arrangements, which must, however, respect the mandatory legal duties of support and cohabitation.[30] One effect of this system is that, contrary to a world-wide principle that personal status is not *in commercio*, the spouses may set somewhat freely even "their reciprocal rights and obligations in matters concerning their personal relations" (Art. 627(2), which rights the family arbitrators may later modify (Art. 632(2)). Such marriage arrangement or modification may for instance, contrary to a non-mandatory rule provide that it is the husband who "is bound to attend to the household duties" (*cf.* Art. 646) (an improbable conjecture). Or, that it is the wife who chooses the common residence (*cf.* Art. 641). *Prima facie*, a marriage arrangement could also cancel the duty of fidelity provided by Article 643[31] or, in accordance with some customs, limit such duty to the wife.[32] But our Penal Code makes such inference inadmissable; under its Article 618, adultery is a punishable offence.

Ethiopian marriage may thus be viewed as a status whose proximate incidences may be partly fixed by the parties entering it, possibly in accordance with custom, and whose remote incidences and/or termination by divorce are made dependent on arbitral decisions which are also open to "customary" influences. "Pure and simple" reference to custom is, however, prohibited (Art. 631(2)).

(2) *Compromise.*

We have discussed the legal jurisdiction of family arbitrators (marriage witnesses). But more matters may be affected by factual arbitration by elders,[33] which is neither compulsory, nor usually contractual in terms of Arts. 3325-26, but in which customary disputants often cannot help but concur, effecting a compromise. For example, inheritance conflicts may be thus adjused by the "repealed" customary rules, the resulting arrangements being valid as contracts

30. Arts. 636 and 640. See also mandatory Arts. 638-39.
31. Whose Sub-article (3), forbidding contrary arrangements, was struck out by the Codification commission: see *Corrigenda* of Ethiopian Civil Code.
32. Which would not prevent adultery from being a cause for quick divorce under Arts. 668-69.
33. The so-called *semagellé*.

under the Code's regulation of compromises,[34] which are made unassailable by Article 3312, regarding the "Mistake of right," to wit:

> (1) As between the parties, the compromise shall have the force of *res judicata* without appeal.
>
> (2) It may not be contested on the ground of a mistake made by one or both of the parties concerning the rights on which they have compromised.

Consequently, a party's ignorance, which is bound to be common, of Code law as to the true extent of the rights (*e.g.* succession rights) compromised by him does not invalidate the compromise applying customary rules. Rules repealed in law may thus reappear in fact. They will not bind *qua* customary rules but *qua* legal compromise. They are not a fit study object for the lawyer, but for the ethnologist. The same is true of the customary rules applied para-legally in marriage. They have no independent validity but bind *qua* marriage contract or *qua* arbitral decision, as shown above.

(3) *Associations.*

It is possible to recognize certain traditional age-grade, blood, worship (Art. 407) or other customary groupings as valid "non-profit" associations (Art. 404). If this ever happens, their rules will naturally bind not *qua* custom but *qua* legal memoranda of association (Art. 408). The point may often be practically irrelevant because "legal" proceedings seem needless, indeed unwelcome, in most such tribal groupings.

Conclusion

The Civil Code's "repeals" provision severely limits the field of legal application of custom in Ethiopia. This limitation is the outcome of the specific tradition and conditions of the country which resulted in a strong unification trend. Nevertheless, and apart from the just discussed para-legal outlets for custom, analysis has revealed four legal outlets for customary law. The legal outlet of custom-incorporation is now frozen, barring further supplementation from outside. The remaining three legal outlets, to wit, Code-references to custom, Code vacuums and judicial interpretation, safeguard a minimum field for study of customary laws. There is, of course, no "minimum" for the ethnologist who studies usage irrespective of its binding force in law. But the lawyer is, in his research, restricted to what is sanctioned at state level. Furthermore, though he can attempt, where appropriate, juridical analyses of the ethnologist's material, his proper source for research is court reports of cases wherein binding custom is proved or noticed, or customary interpretations sanctioned. The Ethiopian Civil Code being recent, and a reporting system not yet developed, there are no such case reports yet on the issues discuss-

34. Civ. C., Arts. 3307-24.

ed in this paper. There is thus little scope for law research in reported cases. This explains the rather abstract character of my argument, for which I beg forgiveness.

Doubts have been expressed by eminent lawyers [35] on the practicability of a uniform Ethiopian codification of civil law including that of family, land and succession, wherein customs are strongest. This feat, unprecedented in Africa, is now achieved in Ethiopia by the techniques discussed above. It would be presumptuous to emit detailed prognostics on the future measure of success of that gigantic piece of legislation with its sweeping repeals and all-embracing content. A new legal tunic, even from the best jural tailors, is bound to scratch the social body. It is to be hoped that the Ethiopian judiciary, using the indicated outlets for custom in a consistent way and reporting decisions relevant thereto, will succeed in mitigating the harshness and incertitudes of transition from the ancient to the new ways.[36]

35. *E.g.* Ostini, *op. cit.* note 11, at p., 8.

36. At the time of going to press, we were shown Professor Vanderlinden's pamphlet "An Introduction to the Sources of Ethiopian Law", appearing in Vol. III No. 1 of the *Journal of Ethiopian Law*. The historical and bibliographical aspects of Professor Vanderlinden's work are very valuable. Some of his legal analyses are less so. In Part I, dealing with Custom, Professor Vanderlinden discusses our earlier paper, of which this article is but a development (see note 1, *supra*). His discussion includes some rather inaccurate references to and unwarranted constructions of the Civil Code. With respect to the enforceability of customary law (and of Moslem law: see Part IV) in Ethiopia, our learned colleague reaches exaggerated conclusions which, in our view, are quite incompatible with the law on the books and contrary to, both legislative intent and judicial decisions.

Professor Vanderlinden seems to advocate the study of customs for the sake of advancing the law. But his attempt, if followed would amount rather to "putting the legal clock *back*" for the sake of studying customs! In order to prevent such untoward result, we shall comment on this matter as soon as space is available in the *Journal of Ethiopian Law*. Such comment will not affect the mentioned great merits of Professor Vanderlinden's work in its major aspect.