# A FURTHER NOTE ON AN INTRODUCTION TO THE SOURCES OF ETHIOPIAN LAW

In my article, "Introduction to the Sources of Ethiopian Law," published in the preceding issue of the *Journal*,[1] I expressed the wish that people more experienced than I would take advantage of that preliminary essay to further develop a hitherto rather neglected field. With his wide experience in legal science and in the Ethiopian legal system in particular, Professor Krzeczunowicz has fulfilled that wish in the *Journal*'s present issue.[2]

Among his reflections, some deal with the wide field of jurisprudence (which field for obvious reasons was excluded from the "Introduction"), others with the specific field covered by the "Introduction," and yet others with the far-reaching consequences which that modest essay could have on the development of the Ethiopian legal system. Reading Professor Krzeczunowicz's comments, this author felt the need for a few complementary remarks in order to clarify some of the more important issues which might remain obscure to the reader.

## *The definition of "law" and "sources of law"*

As my colleague himself notes, discussion of the definitions of "law" and "sources of law" has been "enormous, controversial and partly futile."[3] My intent is not to follow him onto such ground but merely to underscore the diversity of views that exists among legal scholars.

On the question whether law consists of "acts and institutions" or "rules," a sufficient number of both continental and Anglo-Saxon authors have in recent years argued the inadequacy of a definition of law exclusively built on the concept of rules.[4] Similarly, the reference to the purpose of law in this author's definition would be considered irrelevant by some but an essential element of the definition by others.[5] As to this author's specific reference to the purpose of development, the term was meant in the broad sense of growth and not in the somewhat narrow sense given to it in referring to the so-called underdeveloped countries. In the former sense and when referring to society, it is obvious that the word has an essentially subjective meaning and that the conception of the means to develop a given society can vary greatly. Finally, as my colleague states, no socially recognized organs other than the state can *today* create or enforce law. The same was not true for earlier periods of Ethiopian history, however. If we applied to

1. *J. Eth. L.*, vol. 3 (1966), p. 255. (Hereinafter cited as "Introduction.")
2. *J. Eth. L.*, vol. 3 (1966), p. 621. (Hereinafter referred to as "Comments.")
3. Comments, p. 621.
4. See for example H. Bekaert, *Introduction a l'etude du droit* (Bruxelles 1964), pp. 138-41, 169-71, and 306-33, with many references to continental doctrines; see also M. Villey, "Une definition du droit," in *Archives de Philosophie du Droit, Droit et Histoire* (Paris 1959, pp. 48 ff. As for Llewellyn and the American realists, at short and clear introduction to their theories can be found in C. K. Allen, *Law In the Making* (Oxford 1964), pp. 41-48.
5. On the function of law as an element of its definition, see textbooks such as Allen, work cited above at note 4, pp. 27 ff; G. W. Paton, *A Text-Book of Jurisprudence* (Oxford 1964), pp. 21 ff.

fourteenth century Ethiopia, for example, a definition that referred only to state organs, we would for sure exclude from the field of law many acts and institutions which are undoubtedly legal.[6]

Turning now to the definition of the sources of the law, I must thank my colleague for devoting some part of his comments to the exact definition of "legal" and "non-legal," definitions which limited space prevented me from considering. It is hoped, however, that it was clear from the examples mentioned in my article that "legal" means productive of law while "non-legal" means evidencing the law. As for considering legislation the only "formally and properly called source of law,"[7] this again reflects views which are shared by some but strongly contested by others.[8] The same is true of my colleague's discussion of the meaning of custom.[9]

But this is already too much on the subject of definitions. Let me only emphasize that the object of the "Introduction" was to briefly describe, for the general reader, sources of Ethiopian law spanning five to six centuries. Definitions had to be found which were useful in that context, even though they did not in all cases reflect the legal and political theories of the last fifty years.[10]

*The sources of Ethiopian law*

Let us now consider the Ethiopian law's sources before turning to watch-makers' problems and trying to set the clock on time. A first comment worth discussion concerns the relevance of custom in contemporary Ethiopia. As pointed out in the "Introduction," this is a field in which Professor Krzeczunowicz has been working for some years.[11] In the "Introduction" I noted only two points of disagreement with the views of Professor Krzeczunowicz. First, the number of outlets detailed by Professor Krzeczunowicz in his principal essay on this subject did not seem to me to justify his conclusion that the field of custom is severely or strictly limited.[12] One can of course argue about the meaning of words such as "severely," but I would still maintain my previously expressed view. Second, some important provisions of the Civil Code, qualified as "transitional" *but valid for the present time*, were neglected by my colleague in the same essay, namely Articles 3348 and 3351. That they also provide (for the moment) an outlet for custom would be difficult to challenge and is in fact not challenged by

6. This was mentioned in the Introduction, p. 227. When dealing with either comparative or historical techniques, one is bound not to adhere to terms of reference conceived in a narrow way.
7. See Comments, p. 622.
8. See again Bekaert, cited above at note 4, pp. 169-71 and references to continental doctrine. These pages are developed in Part II of Professor Bekaert's book.
9. All standard text-books, but for a few possible exceptions, refer to "custom" or, in French, "la coutume," as a source of law. On the other hand, the term "customary law" or "droit coutumier" is generally attached to native law or *droit indigene* to qualify that part of African, American or Asian law which was left in force by the colonizing powers. It is the more a mistake because modern studies of colonized societies show clearly that they knew legislation, case-law or legal science as well as custom.
10. See remark in note 6 above.
11. See the articles mentioned in footnote 17 to the contribution cited above in note 2.
12. See the discussion of that masterful analysis in the Introduction, pp. 244-46, and in the Comments, pp. 623-24.

my colleague. But he also indicates that this author's construction of these articles is misguided. Having re-read carefully his much more sophisticated statement (whose language obviously could not have been used in an introduction for the general public), I cannot help feeling that the position stated in the "Introduction" and his comments are fully concurrent.

A second point for discussion is whether marriage *is* an institution, as Professor Krzeczunowicz states, or *could* be a contract, as I suggested. The arguments in favor of the "is" are that the agreement is of a non-proprietary nature and that it is governed by mandatory provisions.[13] The counter-arguments are as follows.

The Ethiopian Civil Code knows agreements of a non-proprietary nature which still clearly do not establish institutions. For instance, one can agree not to reside in or go to a specified place (as long as this is justified by a legitimate interest), to engage in or not engage in a certain activity (subject to the same basic limitation), or to dispose of one's body after death. In each case the purpose of the act can be, and in many cases will be, of a non-proprietary nature.[14] Could we therefore conclude that each of these agreements leads to an institution? It seems highly doubtful that we could.

The Civil Code also includes many articles relating to marriage which are far from mandatory but, on the contrary, are permissive within the general framework of the law. (In the same way, the permissive contractual provisions of the Code operate only within the framework fixed by the mandatory provisions limiting the parties' freedom.) The example given in the "Introduction," and perhaps the best one as it departs so much from the traditional institutional framework in other legal systems, is Article 627(2), which allows the spouses to determine personal relations in the marriage contract. When this author stated that the only limitation on that freedom was imposed by Article 636, it was by way of condensing things which are obvious at a first reading of the Code. The provisions of Articles 638, 639 and 640 (those which the Code expressly forbids to be modified through the marriage contract) are but the detailed expression of the requirements of respect, support and assistance mentioned in Article 636. But these limits do not eliminate the fact that Article 627(2) has a distinctly contractual flavour which cannot be found in the systems where the theory of marriage-institution has been developed.[15] In this respect Professor Krzeczunowicz is pleading the law in the books and the law in the courts, unfortunately with no references to any of these sources, while this author has only looked at the law in the Code for the possible justification of a careful "could."

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13. See Comments, p. 625.
14. This point is underscored by Article 9 of the Code, which puts such rights "extra commercium."
15. In that sense one cannot say in Ethiopian law that the parties to a marriage are *only* entering it by the way of an agreement, but are completely bound by the Code as soon as they have entered the agreement. This impression is reinforced by a provision like Article 643, which excludes from the mandatory provisions the duty of fidelity. In that respect, the reference to the Penal Code made by our colleague is open to discussion. The Penal Code clearly decides that there will be no proceedings in the case where the spouse complaining has consented to the adultery. Thus, if the contract of marriage includes a provision allowing the adultery of one of the spouses, the other one will have no grounds of complaint under the penal law, as he has consented to it. As a result, one cannot doubt that the provisions of Article 643 of the Civil Code are purely permissive.

Another point of contention, this time not pertaining to customary law, concerns the role of family arbitrators. This author has accepted Professor Krzeczunowicz's invitation to his readers simply to read the Code on this topic, and nowhere have I found that there are authorities other than family arbitrators who may decide upon a divorce. Article 736, mentioned by my colleague, refers to cases where decisions have been made by arbitrators under Article 722 and subsequent articles. The validity of such decisions can be impugned in court by interested parties on certain limited grounds under Article 736, but this provision does not modify in any sense the exclusive primary jurisdiction of the arbitrators so far as divorce is concerned.

As to the enforceability of custom as a reason for its study,[16] one could argue that there are also other reasons for the study of custom. However, this author would assert that from a lawyer's point of view this is the *only* reason for its study. If custom has no legal significance, it can be left to anthropologists and others. For the lawyer it is only as custom is law (whether or not incorporated in the Code) that it should be studied. This is as true for Ethiopia as for other countries.

Professor Krzeczunowicz argues about the meaning which should be given to "law" in Article 110 of the Constitution.[17] This author asks the reader to go back to the "Introduction," where he will find expressed the ideas that case-law is "non-normative" and that "preeminence is always given in Ethiopia to enactments originating in the exercise of legislative power as representing the common will of the nation,"[18] points which are only stated in another way by my colleague. The only question to be decided is whether the judge can base his decisions on anything other than legislation. He of course may not base it on something *inconsistent* with legislation, but judges might enforce custom, precedents or even legal science if these do not conflict with the legislator's supreme will. The fact that no system of binding precedent has yet been introduced is no decisive argument that legislation should be the exclusive "source" of law. Rather, the abortive attempt to introduce such a system indicates that the Ethiopian legislator has not considered precedent as distinct from "law" in Article 110.

Finally, to end these few examples of possible remarks on my colleague's comments, I would like to consider the case of Muslim law. It has never been my contention that there should be "a separate law for privileged followers of another religion."[19] I said only that Muslim law is still enforced in this country. No explanation seemed necessary for this statement, as it is obvious that the bulk of Muslim law still in force could be considered a possible part of still valid custom and that, in any event, the existence of Muslim courts is sufficient evidence of the enforceability of such law. That this is considered a temporary remedy is pro-

16 See Comments, p. 625.
17. *Idem*, p. 626. Then he nearly annuls the effects of his argumentation through his last footnote (51), in which he states that the fundamental purpose of the article is totally different. We would in fact concur with the main ideas reflected in that footnote, but the discussion between us would still exist on the basis of Article 110, first sentence, which expresses the idea that judges must decide "in accordance with the law."
18. See Introduction, p. 246.
19. See Comments, p. 627.

able; the "Introduction" was concerned only with the present situation of the sources of law in the Empire and thus could not ignore Muslim law. As for the production of Code text books, its importance is perfectly clear; this author is currently working in that direction.[20]

### *The legal clock*

In the final lines of his essay Professor Krzeczunowicz comes to the problem of putting the legal clock back. On the basis of the evidence brought forward in his comments (of which we have discussed the essential), he implies that this author's theoretical premises and conclusions may be endangering legal certitude, which would in this author's understanding amount to impeding Ethiopian legal development. I cannot help feeling that he attributes excessive importance to my "Introduction" and more particularly to such matters of academic controversy as jurisprudential definitions. On the other hand, custom undeniably is still enforceable in this country. Professor Krzeczunowicz has indeed opened the way to this conclusion. And I think he would himself agree that the promotion of the knowledge of custom as it has been defined in the "Introduction" will not impede the progress of Ethiopian law; if it would, one could not see the justification for the development of institutions of learning and research that is now occurring throughout the country.

Jacques Vanderlinden
Faculty of Law,
Haile Sellassie I University

20. He has now in preparation a manual on the law of persons and family in the Ethiopian Civil Code.