ADMINISTRATIVE CONTRACTS IN THE ETHIOPIAN CIVIL CODE*

by René David**

The title of this article may seem paradoxical. The term "administrative contract" is not used in all legal systems, but where it is used it designates contracts beyond the civil code's purview, contracts that are subject to special administrative law rules. Administrative contracts are, therefore, never dealt with in civil codes.

The Civil Code of Ethiopia is exceptional in this respect.[1] Book V of the Code, dealing with "Special Contracts,"[2] includes a title on "Administrative Contracts" (Title XIX, Art. 3136-306).[a] This title is preceded in Book V by titles dealing with "Contracts Relating to the Transfer of Rights" (XV),[b] "Contracts for the Performance of Services" (XVI), "Contracts for the Custody, Use or Possession of Things" (XVII),[c] and "Contracts Relating to Immovables" (XVIII); it is followed by a final title, which treats "Compromise and Arbitral Submission."

Why this anomaly in the Ethiopian Civil Code? Having prepared the preliminary draft of the Code, I may be able to answer the question. To a French jurist such as I, the distinction between public law and private law, and more particularly between civil law and administrative law, seems essential to legal classification. Government administrators are to represent and defend the public interest, and whether it is acknowledged or not, they are in fact in a different position from private individuals. It is in conformity with justice, properly under-

---

* This article was prepared in French for publication in the *Mélanges Sayagués-Laso* and has been translated into English by Michael Kindred, Assistant Professor and Assistant Dean, Faculty of Law, Haile Sellassie I University, for publication in the Journal of Ethiopian Law.
Footnotes added by the translator are indicated by letters; the arabic unumbered footnotes appear in the articles as written by Professor David.

** Professor of Law, Faculté de droit et des sciences économiques de Paris.

1. The Civil Code was promulated on May 5, 1960 and came into force on September 11, 1960. It was published in Amharic and in English in an extraordinary issue of the *Negarit Gazeta*, Ethiopia's official legislative reporter. Both of these versions, however, are translations from French, the language of the preliminary draft of the Code, which we had the honor of preparing. The Code was later published in French as the *Code civil de l'Ethiopie* (Librairie générale de droit et de jurisprudence, 1962). A detailed alphabetical index that was omitted in the Amharic and English editions is included in the French edition.

2. The Ethiopian Code is divided into five books: I — Persons, II — Family and Successions, III — Goods, IV — Obligations, V — Special Contracts. It is complemented by a Commercial Code which also came into force on September 11, 1960. The Commercial Code has been published in French as the *Code de Commerce de l'Empire d'Ethiopie de 1960* (Librairie générale de droit et de jurisprudence, 1965). The preliminary draft of the Commercial Code was prepared by two French jurists, Professors Escarra and Jauffret.

a. As this Article contains references to numerous specific provisions of Title XIX, the reader should have the *Civil Code of Ethiopia* available for consultation.

b. *Des contrats visant a, un transfert de droits*, translated as "Contracts Relating to the Assignment of Rights" in the English version of the Code.

c. *Des contrats visant à la grade, l'usage, ou la jouissance d'une chose*, translated as "Contracts for the Custody, Use, or Possession of Chattels" in the English version of the Code.

stood, to subject contracts concluded by them to special rules, other than those of the civil law, at least when these contracts have the characteristics peculiar to "administrative contracts."[3]

All legal systems have had to develop such special rules.[4] The only difference among various systems is that this development is less apparent in some than in others, either because administrative law or administrative contracts are not dealt with in specialized treatises, or simply because there are special administrative courts with jurisdiction over litigation concerning these contracts.

This was the situation in Ethiopia when codification was undertaken. There were not, and still are not, special administrative courts, although both the High Court and the Supreme Court in Addis Ababa contain a division that deals with government cases. In addition, since there were no treatises on Ethiopian law,[5] one could not be sure to what extent any of the western categories existed in Ethiopia. The choice was open as to whether or not to use the concept of administrative contract.

Given this option and conditions in Ethiopia, it seemed to me that one of two things would happen. Either rules relating to administrative contracts would be set forth in the Civil Code as a guide in this area, or no such rules would be included in the Code and great uncertainty would result. But the silence of the Code would not prevent these contracts from being subject to special rules; the special rules would simply not be stated in a statute.

It was very desirable to clarify the law in this area. Because of the increased functions assumed by the state and its administrative authorities, administrative contracts have become more important in all countries in recent years. True as this is in France, the United Kingdom, and even the United States, it is even more so in the developing countries. The economic development of these countries must come from public and semi-public undertakings as much as or more than from private enterprise. Even in the framework of a "liberal" economy, it will often be necessary to use administrative contracts to stimulate private enterprise.

This situation clearly prevails in Ethiopia, as in all countries where capital is scarce. The country's development must be aided by concessions given to domestic and foreign enterprises; it will require many public works, which will often involve contracts with private businesses. It would have been possible, of

3. Although we consider all contracts concluded by administrative authorities to be subject to administrative law, there is no reason why administrative law cannot treat some of these contracts one way and others another. It can subject some to the civil law and and create special rules for others as French law has done. The only problem then is to decide what criteria should be used to distinguish between the two classes of contracts.

4. Cf., for the common law, J. Mitchell, *The Contracts of Public Authorities* (1965); H. Street, *Governmental Liability* (Cambridge 1953); G. Langrod, "Administrative Contracts. A Comparative Study," *American J. of Comparative L.*, vol. 4 (1955), pp 325-64.

5. Before codification, Ethiopian law verged on chaos. While theoretically recognizing the authority of an ancient nomocanon, the *Fetha Negast*, for non-Muslims and of Islamic law for Muslims, Ethiopians in fact lived according to customs that varied from community to community, customs whose content was often unclear and whose authority was impaired by instability due to social change. Concerning Ethiopian customary law, cf. C. Conti-Rossini, *Diritto consuetudinario dell'Eritrea* (Roma 1916) and F. Ostini, *Diritto consuetudinario dell'Eritrea* (Asmara 1956). The work of N. Marein, *The Judicial System and the Laws of Ethiopia* (Rotterdam 1951), only deals with certain modern laws, particularly in the areas of government administration, commerce, customs and the like.

course, to draw up individual "charters" for each concession, as was done years ago for English "corporations" and French "*compagnies*." Each ministry could develop "form contracts" to be used for contracts of public works. These solutions, acceptable when the government's role in the economy was limited to regulation, seem outmoded now. Modern states have abandoned this approach and become more systematic, regulating by legislation things that were formely left to charters or to ordinary contracts. The shortage of trained lawyers in Ethiopia and lack of trained personnel in the government required that general rules be drawn up to deal with administrative contracts. A framework had to be provided, with the understanding that within this framework there would be room for adaptation by the administrative authorities and the persons with whom they contract.

Thus it was decided to provide in the Civil Code itself rules that would apply to administrative contracts. This decision was motivated by the feeling that it would lead to a security in contractual relations with the government that would enhance the country's development. It was particularly hoped that the clarification of the rules on administrative contracts would help attract foreign enterprises and capital to Ethiopia.

Once the decision was made, how was it to be carried out? It was soon apparent that it would not be enough to insert a few rules here and there in the title on "Contracts in General" and in the various titles dealing with the special contracts. Because of the particularity of administrative contracts and the importance of providing a clear and coherent system of rules for them, it was apparent that, like contracts relating to immovables, they should be dealt with in a special title.

But where could one find a model for such a set of rules? No previous legislation had dealt with it;[6] in France there had been no "consolidation" of the case-law of the Council of State[d] into a statute or code. As in some other titles and chapters of the Ethiopian Civil Code,[7] the basis here had to be scholarly writing. An excellent treatise on administrative contracts had just appeared in France.[8] We had only to put into legislative terms the propositions formulated by this work, and then of course to ask if the solutions adopted by the Council of State and French writers needed to be modified on account of conditions peculiar to Ethiopia.

In many respects, Ethiopia differs from the countries of Western Europe. No rule of any foreign law whatsoever went into the Ethiopian Civil Code without our asking whether it was suitable for Ethiopia. We asked this question in drafting the title on administrative contracts just as we did for all the other titles of the

6. Since the enactment of the Ethiopian Civil Code, administrative contracts have been dealt with in comprehensive statutes or codes in Czechoslovakia and the Democratic Republic of Germany. These statutes did not exist, however, when the Ethiopian Civil Code was being prepared. In any case, they would not have been suitable as models, since they were prepared for "socialist" countries, which by virtue of their economic structures and political philosophies are very different from Ethiopia.

d. The *Conseil d'Etat* is the highest court in the French hierarchy of administrative courts. These courts are independent of the civil courts.

7. We are referring in particular to the chapter on "Extra-contractual liability" in Title XIII. Two works were used extensively in drafting this chapter of 133 articles: R. Rodière, *La responsabilité civile* (Paris 1952) and E. Jenks, *Digest of English Civil Law* (4th ed., London 1947).

8. A. Laubadère, *Traité théorique et pratique des contrats administratifs*, (3 vols., Paris 1956).

Code. This is evident from the rules that were finally adopted; the regulation of administrative contracts in the Ethiopian Civil Code differs in many respects from that in French administrative law. In its organization, the concepts it uses, the style of formulation of its rules, and the method of interpretation and application that it presupposes, the Ethiopian Civil Code is a product of French legal science, but in terms of the content of the rules it contains, is is no more French than Greek, Swiss, Egyptian, or English. Necessarily, it is an Ethiopian code from end to end.

Fortunately, there were checks to assure that the rules of the code would correspond to the needs and sentiments of the Ethiopian nation. I did not work alone on the codification. I prepared the preliminary draft of the Code, but this draft, after it was translated into Amharic, was studied and revised, first by a Codification Commission made up of Ethiopians and then by the Ethiopian Parliament, which had the final power to adopt the text of the Civil Code.

For many of the titles of the Code, this procedure worked well.[9] The task of the Commission was often facilitated by an *exposé des motifs*[e] that I submitted with the text of the preliminary draft. This procedure was not followed, however, for the title dealing with administrative contracts. The title "Administrative Contracts" was one of the last that I drafted for submission to the Codification Commission[10] and was not accompanied by an *exposé des motifs*. It was translated into Amharic, but the Commission was otherwise occupied[11] and apparently did not have time to go over the text in detail. At least, no comments or questions were sent to me concerning this title and it was not discussed with me. The preliminary draft became the proposal of the Commission without change, and it was adopted by Parliament without amendment.[12] This should not cause undue surprise or alarm, however, since the subject is highly technical and is not one on which there would be any customary law or any peculiarly Ethiopan feeling of what is just.

Nevertheless, this was clearly regrettable. In the case of the other titles, the discussion with the Commission resulted in improvements on the preliminary draft. Quite apart from critical observations made by the Commission, imperfections in my work became apparent to me as I was called upon to present it and discuss it with others. Title XIX was not the subject of such a discussion, and circumstances also prevented me from revising my preliminary draft six months or a year after

9. The Commission and Parliament thus revised very considerably Title IV ("Bonds of Relationship by Consanguinity and by Affinity"), Title VII ("Individual Ownership"), Title IX ("Collective Exploitation of Property"), and Title XIII ("Extra-contractual Liability and Unjust Enrichment"). Without making such radical changes, the Commission and Parliament revised and improved appreciably the majority of the other titles of the Civil Code.

e. A statement of the background of and reasons for the provisions recommended.

10. Document C. Civ. 64, sent to the Ethiopian Ministry of Justice on July 2, 1957.

11. It should be remembered that a commercial code had to be prepared for promulgation at the same time as the Civil Code.

12. This happened to only a very few titles. In addition to Title XIX, I can cite only Title III ("Bodies Corporate and Property with a Specific Destination"), Title X ("Registers of Immovable Property"), Title XIV ("Agency"), and Title XX ("Compromise and Arbitral Submission"). Even for these titles, it should be pointed out that the Commission is responsible for Chapter IV of Title III, but on the whole the modifications made by the Commission in these titles were minimal.

finishing it. Thus, a mere preliminary draft, rather than a true proposal, became law, and it is beyond doubt that various imperfections resulted from this procedural failing. Even so, it is fortunate that Title XIX was included in the Ethiopian Code.[13] This title can be improved at an appropriate time, but as it stands it can play a useful role in making legal relations more secure and, thus, in the economic development of Ethiopia.

The provisions of Title XIX of the Civil Code do not apply to all contracts concluded by the administrative authorities. As in France, the specialized rules only apply where they are needed, to contracts termed "administrative contracts" by the law. Sub-articles 3132(b) and (c) provide a general definition of administrative contracts, for the interpretation of which one can refer to French treatises. This definition cannot, however, eliminate all uncertainly, so Sub-article 3132(a) invites contracting parties to eliminate any possible doubt by expressly calling their contract an "administrative contract" where they wish the rules of Title XIX to apply.

Chapter I of Title XIX, entitled "General Provisions," after setting forth principles and definitions, is divided into two Sections, devoted respectively to the formation (Arts. 3134-71) and the effects (Arts. 3172-206) of administrative contracts.

In Paragraph 1 of Section 1, on "Consent," Article 3134 states the principle that silence is not acceptance, either where an administrative authority concludes a contract or where his approval is required for the validity of the contract. Article 3134 reiterates for administrative contracts the rule given for all contracts by Article 1682. Its purpose is to exclude, with respect to administrative contracts, the exceptions to Article 1682 that are provided in Articles 1683-86.

Article 1686, in the title on "Contracts In General," deals with general terms of business applied[f] by a contracting party, a matter of particular importance in administrative contracts. It is largely by having recourse to general terms of business that England has created the appearance that there is no special set of rules for contracts with the government. Articles 3135-39 define the various types of general terms to which administrative contracts may be subject and make an undisguised appeal to the various administrative authorities to develop such general terms, adapted to the various types of contracts that they have to conclude. The Code could not go further in the establishment of rules on this subject, since such rules must be appropriate to the needs of very different administrative bodies. Articles 3137-39 deal with the effect of general terms. Their effect differs according to whether they relate to the conclusion of the contract (Art. 3137) or to the interpretation, content and execution of the contract (Art. 3138). General terms have

13. This statement is inspired by a regret. There was not time to translate and examine the last titles that I sent to the Ethiopian Ministry of Justice: Title XXI on "The Application of Laws" (C. Civ. 86, of February 15, 1958) and Title XXII on the coming into force and the application of the Civil Code (C. Civ. 92, of April 15, 1958). Titles XXI and XXII of the Civil Code, as promulgated, are not related to these documents and were not prepared by the author of the preliminary draft. As a result, the Ethiopian Civil Code does not include, as had been planned, provisions on private international law and the application of laws in time, and its transitory provisions are far from adequate. One can only hope that these gaps will be filled in the not too distant future.

f. "General terms of business" are standard clauses printed in a form contract. A general term may deal with a particular problem or it may incorporate by reference a whole set of legislative or administrative rules.

the force of government regulations in the first case, while in the second they must be expressly incorporated by the contract in order to have obligatory force. On re-reading the Code, this distinction does not seem justified. In addition, Article 3138 is hard to reconcile with Article 1686, according to which general terms of business obligate a party even if they were unknown to him whenever they have been perscribed by the public authority. Article 3138 may be due to a *lapsus calami* on my part. This example and this confession show how useful a discussion between the expert and the commission could have been and how much it was missed. Article 3139 provides that a person contracting with an administrative authority shall not be affected by the authority's modifications of the general terms after the contract is concluded; it requires no comment.

The next few articles clarify certain points concerning the administration's freedom to contract and the time when a contract is concluded where approval by a supervisory authority is required. Among these provisions, one should note Article 3142, which provides that a contract concluded by an administrative authority is valid even in the absence of the appropriation necessary for the performance of the contract. This article is included so as to exclude the adoption of a line of English cases that might seem to reach the contrary result.[14] Similarly noteworthy is Article 3145, which permits a person contracting with an administrative authority to withdraw from a contract where approval by a supervisory authority is required, if such approval is not forthcoming within six months. In Ethiopia as in other countries, it is useful to protect against excessive bureaucratic delays. Finally, Article 3146 gives a right of compensation to one who has incurred certain expenses with a view to contracting with the administrative authorities where the contract is not concluded. In such a situation, compensation can be granted on either of two grounds, fault *(culpa in contrahendu)* or unjust enrichment of the administrative authorities.

Articles 3147-69 deal with the allocation of contracts by tender. Although the Code itself never requires the use of this procedure, it regulates it where the administrative authority, whether or not required to do so by law, does decide to use it. On this subject, the Ethiopian Code reproduces the rules of French law, which seemed satisfactory.

Articles 3170 and 3171, on cause, are designed to protect the public interest against administrative carelessness and against collusion between administrators and scoundrels. These articles may seem incomplete, but it seemed impossible to develop them more fully with the present aspirations for a liberal economy. The courts can interpret the the principles set forth here as extensively as appears appropriate to them.

Articles 3172-78, in the section relating to the effect of contracts, include two noteworthy rules. Article 3177 provides that ordinarily a person who has contracted with the administrative authorities may not invoke the *exceptio non adimpleti contractus*,[g] and Article 3178 denies to a co-contractant of the government the possibility of setting off tax debts owing to him. Article 3175 should also be noted:

14. Churchward V. Regina (Eng. 1865), *L. Reps. Queen's Bench*, vol. 1, p. 173; Street, work cited at note 4, pp. 85 ff.; Mitchell, work cited at note 4, p. 69.

g. The right of a person to refuse to perform his obligations under a bilateral contract where the other party has not performed his obligations even though they are due.

if the contract so provides, the administrative authorities may unilaterally impose on the other party by requisition orders a time limit for the performance of his obligations. Article 3175 is intended to call to the attention of the authorities, at the time the contract is being made, the possible usefulness of such a stipulation.

The modification of countries is dealt with in the title on "Contracts. In General" in Articles 1763-70 of the Civil Code. The corresponding rules concerning administrative contracts appear in Articles 3179-93 and differ considerably from these general rules. Articles 3179-93 grant certain prerogatives to the administrative authorities, adopt the theory of *imprevision*,[h] and deal with acts of the government affecting administrative contracts.

Articles 3180 and 3181 incorporate the principle of "governmental effectiveness," of which Professor Mitchell has been the advocate in the United Kingdom. The authorities may terminate a contract in the absence of any fault by the other party where the contract has become useless to the public service or unsuited to its requirements. Although they do not commit a "breach of contract" in so doing, since they are only exercising a right given them by law, compensation must be paid to the other party. On re-reading Article 3181, the basis for compensation seems too generous. Here again, the preliminary draft might have been improved by a discussion in the Codification Commission.

The administrative authorities' rights are not limited to the termination of the contract. They may unilaterally impose modifications of its terms (Art. 3179), but again the other party has a right to compensation and, in some cases to termination of the contract (Art. 3182).

Articles 3183-89 adopt for Ethiopia the theory of *imprevision*. The law specifies the circumstances in which this theory can be invoked and the measure of compensation due from the authorities. The equitable compensation provided for by the law here differs greatly from the case, considered above, where the modification or termination of the contract results from a unilateral decision of the administrative authorities.

Finally, Articles 3190-93 specify the consequences of new legislation or administrative regulations (*faits du prince*) that upset the balance of a contract concluded by the administrative authorities. Since these measures are not a direct termination or modification of the contract, the situation is different from that provided for in Articles 3179-82. Nevertheless, it seems impossible to ignore the fact that they emanate from an organ of the same State as the contracting authority. The community of interests of the various organs of the State justifies some protection for a person who has contracted with the administrative authorities. To go too far in this direction, however, might create instability in all government contracts, so the Ethiopian Civil Code seeks a compromise position by distinguishing between general and particular measures. For the former, a further distinction is made according to whether they affect the very terms of the contract or just make performance more onerous. For the latter, a distinction is made according to the authority from which they emanate; it may be the contracting administrative authority itself (acting by a procedure other than the direct modifica-

h. A doctrine according to which a contract may be modified by the court where unforseeable occurences alter radically the conditions for performance of the contract. See A. Von Mehren, *The Civil Law System* (Englewood Cliffs, New Jersey, 1957), pp. 705-24.

tion of the contract, provided for in Article 3179), or it may be a different administrative or governmental authority.

Articles 3194-200 clarify and modify, for administrative contracts, the general rule concerning the effects of non-performance of contracts. Specific performance may not be ordered against the administrative authorities (Art. 3194), just as in the common law orders of mandamus cannot be used to force the Crown to perform contractual obligations. Ethiopian law thus resembles both English and French law in this respect. Articles 3196 and 3197 are inspired by the same concern as Article 3135. Bureaucratic procrastination is as common in Ethiopia as in other countries, and the Code realistically acknowledges and deals with this universally deplored situation. Damages for delay in performance are thus made to run automatically against administrative authorities in various circumstances without a preliminary *mise en demeure*.[i] In addition, only limited effect is given to clauses which pretend to free the administrative authorities from liability for such damages.

Tardy performance by a person who contracts with the administrative authorities is dealt with in Articles 3198 and 3199, which protect the public interest by excluding certain claims and tactics such a person might employ. He does not profit from delay by the administrative authorities in applying sanctions for late performance (Art. 3198), and delay by his suppliers do not excuse his own tardiness, unless the suppliers were previously approved by the administrative authorities (Article 3199).[j] Finally, Article 3200 provides that the administrative authorities may not impose a penalty on the other party without the latter having a right to appeal to a court. This rule is reaffirmed at various points in Title XIX.

Articles 3201 to 3206 close the chapter of "General Provisions" by dealing with sub-contracts and the assignment of contracts.

The three following chapters of Title XIX are devoted, respectively, to the three principal types of administrative contracts: the "Concession of Public Service" (Arts. 3207-43), the "Contract of Public Works" (Arts. 3244-96), and the "Contract of Supplies" (Arts. 3297-306).

The Code defines the concession of public service in Article 3207 and then begins the regulation of this kind of contract by considering the relations between the administrative authority and the grantee of the concession. It deals with the right of the authority to control the way the grantee performs his obligations. There are rules for the interpretation and application of concession clauses allowing the modification of prices and rates in certain circumstances, and others dealing with modifications that the administrative authorities may make unilaterally in the original terms of the concession. These provisions simultaneously grant administrative authorities certain prerogatives and limit the possibility of arbitrary action. They specify that some kinds of clauses in the concession may be modified but that others may not, and they establish the grantee's right to compensation where the

i. A formal act ordinarily required by the Code before damages for delay in performance begin to run. See Civ. C., Arts. 1772-75 and 1803.

j. This last phrase is a correct paraphrasing of the French version of Article 3199(2), but 3199(2) is completely different in the English and Amharic version of the Code, where it simply repeats 3199(1) in slightly different language. Thus, in the English and Amharic versions of Article 3199, no exception is provided for the case where the suppliers were approved by the administrative authorities.

modification of the contract increases his costs. These dispositions clearly show that the concession of public service cannot be treated as an ordinary contract. Because its function is the fulfillment of a public interest, it differs from those where the parties simply seek profit or pursue a personal interest.

The concession of public service requires rules that derogate in another respect from the general law of contracts. Ordinarily, contracts involve only the contracting parties. Ethiopian law, like French law (French Civil Code, Art. 1145) and English doctrine (privity of contract), provides that ordinarily contracts only affect the contracting parties (Civ. C., Art 1952). The concession of public service, however, though concluded between the administrative authorities and the grantee of the concession, is designed to satisfy needs of other persons, the users of the service. The administrative authorities stipulate for their benefit, although it cannot technically be said to represent them. A second group of provisions in the Chapter regulating the concession of public service deals with the position of these third persons. In particular, it is provided that users must be treated equally by the grantee (Arts. 3223-24), and users are given the right to sue in place of the administrative authorities in certain circumstances (Arts. 3225-26).

Articles 3227 and 3228 deal with the duration and extension of the concession. Article 3227 declares that the concession may not exceed sixty years, but this is not a provision of constitutional force. It only means that an administrative act is insufficient to grant a concession for more than sixty years; the approval of Parliament must be obtained.

The winding up of the concession raises difficult problems which are dealt with in Articles 3229-35. It is not enough to protect the legitimate interests of the grantee. Neglect of the concession by the grantee, as he sees its expiration approaching, must be prevented, and the continuation of the public service under the best possible conditions, either by the State or by a new grantee, must be assured. The subrogation by Article 3234 of the grantor of the concession to the grantee in the performance of contracts passed by the latter with third persons accentuates again the uniqueness of this administrative contract in relation to ordinary contracts.

The right to redeem concessions, given to the administrative authority by Articles 3236 and 3237, is similar to its general right under Article 3180 to terminate unilaterally any administrative contract. The possibility of redemption of a concession is not limited, however, to the cases provided in Article 3180, and compensation is not fixed according to the rules of Article 3181.

Loss of right (*déchéance*) and sequestration are provided for in the closing articles of Chapter II. These are sanctions that the administrative authorities can order, but the courts have the final task of deciding if they are justified. The court may cancel the sanctions and, if necessary, order the authorities to compensate the grantee for any loss sustained (Art. 3243).

Chapter III, on the "Contract of Public Works," also begins by defining and specifying the contracts to which it applies (Arts. 3244-45). It then deals with the formation of the contract where the authorities hold a competition to choose their contractor (Arts. 3246-49).

The administration is given a right of direction as well as of supervision in the case of contracts of public works. The uniqueness of this contract, resulting from its being an administrative contract, is evident from a comparision of Articles

3250-60 with Articles 3019-40, which are generally applicable to contracts of work and labour relating to immovables. The administrative authority, even as it enters into contracts, is unlike private contracting parties. The contracts it concludes affect the public interest and should not be treated as if this were of no importance. Of course one must not permit arbitrary action, but the balance established between the contracting parties must take into account the fact that it is an administrative contract. The authority must remain master of the undertaking in some circumstances where an ordinary individual would not remain in charge of a project he contracted to have done. Special provisions seem to be justified for administrative contracts with respect to the timing and supervision of the work to be done. The Ethiopian Civil Code has attempted to formulate these rules.

Articles 3261-73 contain rules relating to payment. Various methods of payment are first defined. The Articles that follow guarantee a person who contracts with the administrative authorities against certain delays (Art. 3268) and give him the right ordinarily to require the payment of installments to the extent that he has performed his obligations (Arts. 3269 and 3270). On the other hand, the Code limits the possibility of obtaining advances for work that has not yet been done (Art. 3271).

Acceptance of work done is dealt with in Articles 3274-81. Also dealt with in these articles is the warranty of the contractor against defects of construction.

In Section III of the chapter various possibilities for the modification of contracts of public works are set forth. Modifications can result from a unilateral decision of the authorities (Arts. 3283-85). It can also occur in case of "unforeseen difficulties" (Arts. 3286-87), where the contractor encounters in the performance of his contract abnormal material difficulties that could not reasonably be foreseen at the time of the conclusion of the contract. The contractor's right to terminate the contract and the amount of compensation he may claim are dealt with in the Code at this point.

Articles 3288-92 provide sanctions that the administrative authorities may take against their contractor when he does not perform his obligations as he should: placing the undertaking under State control, or re-allocation of the contract by auction. These sanctions are subject to the control of the courts, who, however, cannot cancel them. If the sanctions are not justified, the court may only order the administrative authorities to compensate the contractor (Art. 3292).

Section V of Chapter III deals with assignment of the contract and giving it as security. These operations are frequently used to finance work and to speed its performance. The distinction has been made here again between the position of the assignee and that of the sub-contractor.

The contract of supplies presents fewer peculiarities than the concession of public service and the contract of public works. Nevertheless, it has received special attention in the Code. Ten articles are devoted to it in a last chapter of the title on "Administrative Contracts."

In brief, this is how administrative contracts have been dealt with in the Ehiopian Civil Code. These provisions certainly are far from perfect and we have pointed out one of the reasons for this. In addition, one might ask whether the subject is not insufficiently settled, too much in flux, to be able to be regulated in a code. This argument is frequently invoked to explain why administrative law has

not been codified in countries where, for other areas of the law, codification is the norm. Is the argument not valid *a fortiori* for a country like Ethiopia where neither case-law nor administrative practice affords a solid basis for codification?

We considered this problem at length, but concluded that these objections must be ignored. Because administrative law has only been in existence, even in France, for about 100 years, it is a relative newcomer to legal study. No doubt it lacks, for this reason, the stability of some branches of civil law. The transformation of the State's role in recent years has upset the foundations of administrative law at the very moment when it seemed to be reaching maturity, and no one knows, in the uncertainty of this world, what is its destiny. Is that, however, a reason to refuse to try to develop it? And is the legislator not as able as judges to establish its general rules, for the present conditions of society?

A negative answer to this last question must rest on an assumption that statutes inhibit the evolution of the law more than do customs and case-law. This assumption, on which Savigny based his opposition — actually of circumstance more than of principle — to codification in general, is unproved; quite the contrary. Legislation of the kind we have tried to elaborate for Ethiopia includes enough general formulas and leaves sufficient room for the contractual practice of the administrative authorities to be not unduly restrictive.

In a country like Ethiopia, where there is no tradition to guide the administrative authorities and where judges are still usually not jurists, it is particularly important to establish a framework for administrative action. Ethiopia has neither the time nor the means to elaborate its own law judicially as the common law has done and as France has done in the area of administrative law.

Codification is an imperative for a country that wants to renovate its structure rapidly in order to modernize and raise its standard of living. This is as true for administrative law as for civil law. Formation of the law by judges might result in a law richer in nuances and better adapted to the society for which it is made, although even this advantage is far from established. The plodding of judges has cost much in certain periods and in the common law countries the law would be filled with archaic concepts and rules if the legislator had not frequently intervened. In any case, Ethiopia cannot wait the several centuries that would be needed for the elaboration of a judge-made law just so it will fit like a custom-made suit.

We have, therefore, given her one ready-made. We are no more ashamed of having done it than we were hesitant to undertake it. And the way is certainly not closed to the development of the law. Judges and jurists will be able in Ethiopia, as they have been in other countries, to adapt the code to circumstances. We only hope, and firmly believe, that we have assisted them in providing a foundation on which they can build, principles on which they can base their reasoning, a framework in which they will be able to move. That is all a code ever is.