SOURCES OF THE ETHIOPIAN CIVIL CODE*

*By René David***

I

His Imperial Majesty Haile Sellassie I decided in 1954 to provide Ethiopia with codes. Three advisors, two Frenchmen and a Swiss, were appointed and a codification commission formed to prepare five codes, as had been done in the Napoleonic codification. The Penal Code was completed first and was promulgated in 1957;[1] the Criminal Procedure Code came in 1961. The Civil Code and the Commercial Code were promulgated on May 5, 1960, and became effective on September 11, 1960, the first day of the Ethiopian calendar year 1953.[2] The Civil Procedure Code was promulgated as a decree in 1965 and was approved by Parliament in 1967.

The author had the honour of assisting the Ethiopian government as an advisor in the preparation of the Civil Code.

In the present article, we shall discuss the sources of the Civil Code. We shall try to describe the considerations and influences that guided its authors. How much and how were particular foreign codes and doctrinal works used? And on the other hand, how much and how were indigenous Ethiopian concepts incorporated in the Code and the rules and institutions associated with these concepts preserved?

In order to illuminate the context of the problem and the authors' conception of their task, we must describe summarily the state of Ethiopian law before the civil law codification was begun.

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Footnotes that appear in the French version of the article are indicated by Arabic numerals; those added by the translator are indicated by asterisks.

The substance of this article was first presented in a formal lecture by Professor David to the *Société de Législation comparée* on April 3, 1962. Other articles by Professor David that deal with the Ethiopian codification generally are "Structure et originalité du code civil éthiopien," *Zeitschrift für ausländisches und internationales Privatrecht*, 1962 (in French), and "A Civil Code for Ethiopia: Considerations on the Codification of Civil Law in African countries", *Tulane Law Review*, 1962 (in English). See also the comments of Professor David at the Dakar colloquium on Reform of the Civil Code in African Countries in *Receuil Penant*, 1962.

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1. A French version of the Ethiopian Penal Code, with an introduction by the Swiss advisor who prepared the preliminary draft, M. Graven, has been published by the Centre français de droit comparé in the *Nouvelle collection du Comité de législation étrangère et de droit international*.

2. The Civil and Commercial Codes were published in Amharic, with an English translation, in a special issue of the *Negarit Gazeta*, Ethiopia's official legislative reporter. French versions of these codes have been published by the Librairie générale de droit et de jurisprudence.

At the time of codification, Ethiopian law was unsystematised and often hard to discover. It differed from place to place. There were no codes, very few statutes,[3] no case reporting system, and no legal treatises. Now, where a country has neither codes, statutes, court reports, nor authoritative doctrinal works, it is often said that the country has a customary legal system, but this would not be an accurate description of the situation in Ethiopia.

Until the reign of Emperor Menelik II, Ethiopia was unable to live according to law. The foremost considcration was the cohesion of communities that were so constantly menaced by hostile neighbours and natural catastrophies that their very existence was precarious. Cohesion was assured, rather than by the idea of law, by a system of equity that attempted to maintain harmony and peace. This system was administered by local notables acting as arbitrators — and sometimes acting arbitrarily. Although customs spontaneously followed by the people would often influence arbitral decisions, these customs lacked the force of strict law. They had a persuasive authority, but arbitrators would not feel bound by them. Customary law did not rule Ethiopia.

Customary rules, used without being "legally obligatory," differed from one place to another. No effort was made to group and unify them on a territorial basis. In addition, they were often elusive, since they had not been systematically described. Their scope and effect were ambiguous, and it was often unclear under what conditions they would be obligatory.

Studies carried out in Eritrea by the Italian occupation authorities in order to define the local customary laws bring out this territorial variation and uncertainty and the absence among the people of a concept of legally binding customs, as contrasted with simple non-legal rules of social behavior and fair dealing.[4] Finally, one should note that for many years, and especially for the last fifty,[5] —customary rules have been very unstable, no effort having been made to freeze them.

Rather than associate the idea of law with the infinitely varied and always disputable customary rules, Ethiopians have connected it with compilations that were assumed to reflect great wisdom and eminent dignity. Leaving aside Islamic law, which Moslim Ethiopians consider, at least theoretically, to be sacred, Ethiopian Christians acknowledge the authority of a religious canon that was drafted in the mid-thirteenth century by an Egyptian scholar, Al-Asad Ibn-al-Assal, and translated in the sixteenth or seventeenth century from

3. The only statutes in the private law area were a 1923 "Law of Loans," a 1930 nationality law, and a 1948 statute of limitations. See N. Marein, *the Judicial System and the Laws of Ethiopia* (1951). The "Law of Loans" and the statute of limitations were repealed by the Civil Code (Art. 3347).

4. See the customary laws published in the *Rassegna di studi etiopici*, especially *Consuetudini giuridiche del Serae* (supplement to the R.S.E., vol. XI, 1952 pp. 129-213).

5. It is interesting in this regard to compare two books written 40 years apart that have the same title *Trattato di diritto consuetudinario dell' Eritrea* by C. Conti-Rossini (1916) and by F. Ostini (1956). The fact that one was an eminent anthropologist and the second only a jurist can explain some, but by no means all, of the differences between the two descriptions.

Galla customary law is traditionally restated, and apparently somewhat modified, every eight years, at the coming of age of each new age group.

Arabic into Ge'ez, the liturgical language of the Coptic church. This collection, the *Fetha Negast* (Justice of the Kings), was invoked reverently, but the fact that it was never translated into Amharic, the official language of Ethiopia, and has never been printed in Ethiopia,[6] creates doubts as to whether courts have ever consistently applied it. What is interesting to note, however, is the concept of law that is revealed by the respect professed in Ethiopia for the *Fetha Negast*.

Ethiopians see the *Fetha Negast* as *The Law*, even though their customs and conduct do not strictly conform to its commands. For them, court decisions in disputes cannot embody *The Law*; since such decisions must be expedient and practical. Neither could *The Law* be defined as the prediction, even if sufficiently certain, of the solutions that the judges might give in future litigation. As in Europe before codification, as in Islam, *The Law* has a moral aspect for Ethiopians that removes it from practical affairs. It is a basis for social order, closely connected with the moral commands of religion. Ethiopians are not at all shocked that customs and court decisions are not in accordance with *The Law*. That is seen only as proof, alas wholly unnecessary, that society is imperfect. What would shock them would be for the sovereign, by adopting these customary rules, to require of them behaviour which is indeed their own, but whose reprehensible character they recognize fully and on occasion deplore. In order to understand the Ethiopian concept of *The Law*, we need only recall that all European universities until the nineteenth century taught principally, and often exclusively, a body of ideal law — Roman law or natural law — without bothering to describe the rules which, in practice, were being applied by the courts.

Although a century of legal positivism took us far from this concept of law, we seem to be rapidly returning to it by the circuitous route of teaching more social sciences in our law schools. In addition, the present trend toward a welfare state and the efforts that are being made, particularly in the socialist countries, to reorganize society on a new, more just, basis are leading us back to the idea that *The Law* ought not simply to reflect customary behaviour and the present state of human relations. Legislation must be progressive, ahead of present practice; it must be designed to reform the society. *The Law's* functions cannot be merely to declare and enforce custom.

If this be true in developed countries, it must be even more so in countries like Ethiopia, that are less developed, where everyone, and especially government leaders, wish to work a revolution that will close this gap. If the goal of codification had been seen as the enactment, articulation, and systematization of customary rules, tradition would have been maintained only in appearance. In reality, such a work would have betrayed this tradition, by

6. The *Fetha Negast* was published in Germany in A. Arnould's *Libri aethiopici* (Halle, 1841) and in Bachmann's *Corpus juris aethiopici* (Berlin, 1899). The most important edition was prepared in Italy in 1899 by Ignazio Guidi, an eminent Ethiopianist, with both the Ge'ez text and an Italian translation: *Il Fetha Negast o Legislatione dei Ré. Codice ecclesiastico e civil di Abissinia, tradotto e annotato*. A more modest version, which analyses and summarizes the provisions of the *Fetha Negast* according to a supposedly logical organization, was published in Italian by Roberto Rossi Canevari in 1936: *Fetha Negast (il libro dei rè), Codice delle leggi abissine con note e riferimenti al diritto italiano.*

abandoning its high idealism. An unjustified preoccupation with legislating anthropological findings would have perpetuated the mediocrity inherent in old customs rather than reforming them as was intended.

As a result, when the Ethiopian sovereign decided to codify Ethiopia's law, and particularly the civil law, he never intended that the new code should be based exclusively on Ethiopian customs. Rather he wanted a new edition of the *Fetha Negast*, just as the European codifications of the nineteenth and twentieth centuries aimed to renew the ideal base formerly furnished by Roman law, setting forth what was conceived to be natural law.

The difference is that the way for this European exposition of natural law was well prepared by the successive schools of Roman law scholars and writers, from the glossators to the pandectists, with the aid of political scientists and anthropologists of the time. In Ethiopia, nothing of this sort could have taken place, and it was to foreign legal scholarship, to comparative law, that one had to look to determine what rules would be proposed as the model for the Ethiopian people.

There was a danger that one consequence of this would be that the new code would be foreign to Ethiopia, and that though the Code might be admired as a masterpiece, it would become irrelevant to legal practice, as the *Fetha Negast* had too often come to be. The Code's authors were aware of this danger and, without reproducing customary rules, which had to be reformed, they sought to create a work that would be, in spite of its progressive character, or because of this character, an Ethiopian work, and thus be capable of guiding legal practice in the future.

The preceding considerations explain the importance and role of both Ethiopian and foreign sources in the Civil code of Ethiopia. Its authors wanted the new code to correspond to what Ethiopians consider just, but at the same time they had to create a useful work. Thus, they tried to renovate, modernise and supplement Ethiopian customs by utilizing comparative law.

The Ethiopian feeling for justice is the basis of the Code. No rule in the Code violates this feeling. The dispositions of the preliminary draft, prepared by a foreign jurist, were rejected or modified whenever they seemed contrary to it, even when the foreign advisor considered them just and advantageous for Ethiopia. Let us look at some examples of this process.

In the area of successions, the preliminary draft gave the surviving spouse fairly important rights of inheritance. But an Ethiopian concern for keeping property within the blood family required that these provisions be eliminated. It was inadmissible that a spouse might inherit property that the deceased had received from his family. The spouse does not even inherit where the deceased leaves no relatives; the State is preferred.

The preliminary draft contained several provisions protecting a person who, even in bad faith, knowing that he is not the owner, sewes, plants trees, or builds something on the property of another. It also provided for usucapion with respect to immovable property. And in order to combat the excessive breaking up of land, it gave neighbours a right of recovery. All of these provisions were substantially revised because they did not accord with Ethio-

pian values, which are passionately attached to immovable property and reject the idea that a person might be deprived of his property without an intentional act on his part.

The preliminary draft made the owner liable for accidents caused by his automobile even where it was driven by a thief that had stolen it from him. The drafter argued that the owner of the automobile ought to carry liability insurance and that the insurance premium would not be any higher if it covered the risk of an accident caused by a thief. The victim of an accident, on the other hand, was in danger of not being indemnified if the Code provided that only the thief who caused the accident would be liable. Although no answer could be given to these arguments, the result so offended the Ethiopian sense of justice that it was not possible to include this extreme case of liability without fault. Thus, the preliminary draft's recommendation was rejected.

On the other hand, the Ethiopian code includes a case of liability without fault that is not to be found in western codes but that is in accord with Ethiopian concepts and customs. A person who causes death or bodily injury to another is liable to the victim or his family even in the absence of any fault. This provision was included because of the great concern of the Code's authors to have it be in harmony with the Ethiopian sense of justice.

Many other examples could be given. They are found primarily in the first three books of the Code (Persons, Family and Successions, Goods) and in the chapter on extra-contractual liability. To read these parts of the Code is to be convinced that it is an Ethiopian civil code, made for a society which is different in many respects from the societies of Western Europe. The relation between the new Civil Code and the old *Fetha Negast* is easy to see in these parts.

While reflecting Ethiopian society, these provisions still do not reproduce past customary rules without change. Rather they endeavor to respect these customs, while taking a forward step to guide Ethiopian society toward a level which is more developed and, in the author's eyes, more just.

The rules on divorce show how this approach worked. On divorce, the Code does not follow the *Fetha Negast*, which only deals with religious marriage and thus prohibits divorce. The Code's drafters thought that their work would be useless if they disregarded the facts that religious marriage is fairly rare and ordinarily contracted late in life and that divorce can be obtained without difficulty and occurs frequently. The Civil Code follows custom in providing that divorce ought to be pronounced whenever one of the spouses insists. The concern for progress, however, is apparent in these divorce provisions. The Code differentiates according to whether or not there exists a "serious cause", or ground, for divorce. If there is a serious ground, divorce must be pronounced quickly, and the spouse who is at fault may be subject to sanctions. But if there is no serious ground, divorce need not be pronounced so quickly and sanctions may be imposed against he who, without a serious ground, has requested the divorce.

What about the law of property? The Code keeps the right of recovery which was customarily given to the family when an immovable is sold. But

the possible inconveniences of this rule are attenuated by specifying the persons who can claim the right and by setting forth the way in which it must be exercised.

The most important accomplishment of the civil code in the areas of persons, family law, property, and delictual liability was clearly, rather than to change the customary rules, to clarify these rules, to distill their essence and to unify them on the basis of those which appeared most reasonable. Our goal was to end an intolerable confusion and uncertainty by choosing the rule most in conformity with the Ethiopian sense of justice and Ethiopia's interests, economic and otherwise.

In these traditional areas, the principal contributions of western legal systems relate to the critical process used to select those rules that appear best suited to Ethiopia and the techniques used to formulate the rules. Thus, the Code limits itself to suggesting some new approaches and solutions, sometimes inspired by western practices, sometimes different from these practices but judged desirable in the social context of Ethiopia.

The western contribution is much more important, and in some cases even exclusive, in those parts of the Civil Code where Ethiopian customs provided no assistance. This is particularly true of most of Books IV and V of the Civil Code (*Obligations In General* and *Special Contracts*) and of the chapter on *Registers of Immovable Property* and *Literary* and *Artistic Property* in Book III (goods). In these areas it is not just a technique, a system, and directives for further development that are adopted from the west. Whole slices of western law have been imported to Ethiopian law.

Still, even here the importation is not total and conditions peculiar to Ethiopia have of course been considered. This can be seen easily if one reads the Title dealing with Contracts for the Performance of Services, and particularly the Chapter of this Title which deals with contracts for agricultural employment. Ethiopia is not in a position to offer its citizens the same social security benefits that are enjoyed by citizens of economically more developed, western states, and the need to attract foreign capital often prevailed over considerations of what was humane and even just, which might have discouraged the establishment of foreign enterprises in Ethiopia. It has been rightly said that "Before having anti-trust laws, one must have trusts"; before thinking of protecting Ethiopians in their labour relations, attention must be given to securing work for Ethiopians. On contracts relating to immovable property, also, one will often find reflections of conditions peculiar to Ethiopia.

Reservation made for provisions particularly suited to Ethiopia, it is nevertheless a modern, western system that has been adopted in these areas. The word "reception" cannot properly be used, for no specific code or western legal system has been adopted. The Ethiopian Civil Code is an original creation, based on comparative law, in which rules have been selectively adopted from various foreign legal systems, supplemented, and organized in a manner that is unique in some respects. Thus, we have a synthesis, put together with an effort to be comprehensive, rather than a reception. In these areas, the Ethiopian Civil Code could best be viewed as a possible uniform European law, rather than a reproduction of some particular national law.

In this work of synthesis, it was natural to utilize the efforts which have been made from time to time to create uniform European law. Thus, the

draft uniform laws that were prepared in Rome on sale of goods, arbitration, and liability of hotel owners were generally adopted by the Ethiopian Civil Code, just as the Ethiopian Commercial Code adopted, in the area of checks and bills of exchange, the provisions of the international conventions signed in Geneva in 1930 and 1931. The provisions of the Rome draft laws were modified slightly, but only in their presentation so they would conform to the style of other articles of the Code; these are divided into a maximum of three sub-articles, each sub-article being composed of a single sentence. Only in very exceptional cases was the substance of the draft uniform rules modified.

Where there was no international statute or draft statute, it was necessary to start from the various national laws and develop rules to regulate the subject as seemed best.

The principal sources that were used in this way were the civil codes of Egypt, France, Greece, Italy and Switzerland. In the area of obligations, the author of the preliminary draft gathered together the provisions of these five codes, for the most part in order to supplement each by the others. He endeavored to make the code as complete as possible. To this same end he went beyond the codes and considered some non-code statutes and treatises. This was necessary because of the absence of judicial decisions or scholarly writings that could otherwise have filled the gaps in the Ethiopian Code. The authors of the Ethiopian Civil Code did, however, readily eliminate provisions contained in foreign codes where they seemed either to deal with questions of no practical importance, to introduce uselessly subtle distinctions, or to deal with situations peculiar to the foreign country that do not exist in Ethiopia.

Our primary purpose in considering these various codes was to see what questions need to be covered. The solutions of the various codes relating to each of these questions were then compared and their differences noted. Finally we asked what formula would be best, whether imported or original, for the Ethiopian Civil code, in light of the special circumstances that exist in Ethiopia and of the most modern tendencies. In fact, it is doubtful that a single article of the Ethiopian Civil Code is absolutely identical with an article of the codes considered, since the rules that governed the formal presentation of the articles and the choice of terminology led the authors of the preliminary draft in almost all cases, if not in all, to avoid the formulas employed elsewhere.

The search for the best legal rules went beyond examination and comparison of the codes cited above. Comparative law research was pushed even further, and, in particular, some articles of the Ethiopian Civil Code are of common law inspiration. Examples of this are the manner of determining breach of contract damages, the frequent reference to the idea of "reasonable time," and the detailed rules provided for specific cases of delictual liability.

*** Translator's note: In fact, recent investigations indicate that didactic manuscripts of the Fetha Negast, alternating Ge'ez passages with Amharic translation and commentary, have been in circulation in Ethiopia for several centuries. An edition of such a manuscript was printed just before 1935 under the auspices of H.I.M. Haile Sellassie I, but was destroyed before binding during the invasion. In 1966, the Berhanenna Selam Printing Press of Addis Ababa printed a photo offset edition of such a manuscript.

On the whole, however, it is possible to say that the principal source of the Ethiopian Civil Code with respect to the law of obligations was the Swiss Federal Code of Obligations. And French law was a very important source. The French Civil Code itself seemed to us to have surprising merits in spite of its age when put to the test of comparison. In addition, doctrinal works were used where it appeared opportune to cover an area but there was no appropriate legislative regulation. Thus M. Rodière's "*La responsabilité civile*" was used extensively in preparing the rules on delictual liability, M. Waline's "*Droit administratif*" in the area of expropriation, and M. de Laubadère's "*Traité théorique et pratique des contrats administratifs*" for administrative contracts. The other codes, in the final analysis, provided less material: the Italian Civil Code often appeared too dogmatic and too subtle, the Greek Civil Code too casuistic, and the Egyptian Civil Code too concise. These comments are not criticisms of these codes; for the countries they serve, they may be perfectly appropriate. We are setting forth here only the difficulties that were experienced in using them to prepare a civil code for Ethiopia. Similar considerations dissuaded us, for example, from using the German Civil Code (BGB), in spite of the admiration that this work deserves from a scientific point of view.

Outside the area of obligations, a wider group of sources was used. A Portuguese draft law and an Isreali draft law thus served as the basis for the successions provisions. Rules were borrowed from the former Turkish Civil Code (*Medjelle*) and from the Iranian Civil Code concerning the ownership of water. Even the agrarian code of Soviet Russia was used, along with a Russian treatise on *Kolkhozes*, in order to regulate the position of certain collective exploitations, although this part of the preliminary draft was rejected later in the codification process. Also abandoned was the idea of beginning the Ethiopian Civil Code with general principles, presented as "Rules for Judges," after the Swedish tradition of "*Domarereglerna*"; the Swedish code also abandoned this technique several years ago.

Finally, it should be added that some parts of the Ethiopian Code are "original" in the sense that they are based neither on Ethiopian customs nor on provisions of foreign legal systems. Of particular note are the rules governing water rights, those on registers of civil status, and to a lesser degree the provisions on registers of immovable property, guardianship, and wills. In these areas, it was thought imperative to establish rules, but the Ethiopian customs did not offer a solid basis for the rules and the regulations found in western countries were unsuitable. Creative legislation was therefore required and it seemed possible to integrate it into the code's general system.

As the preliminary draft of the Code's various titles was prepared, the drafter prepared a commentary to accompany them. This commentary set forth the rationale of the preliminary draft and indicated the sources that were used in drafting the Civil Code articles. By means of these, it would be simple to establish with greater precision the origin of these articles and the changes that were made in them. Unfortunately, the commentaries in question have not been published. In addition although they were relatively complete with respect to the first titles drafted, they became more concise later as it became clear that the Ministry of Justice could not assure their translation into Amharic and that the commission was more interested in the texts proposed than in their origin or the manner in which they had been drafted. A con-

cordance between the articles of the Ethiopian Civil Code and the corresponding articles of the other codes had at first been envisioned. The idea that they might be published in the *Negarit Gazeta* at the same time as the Code was rejected, and no doubt rightly so. Such a table might have a place in a commentary on the code; it would be out of place in an official gazette.

The compilation of a manual on the Ethiopian Civil Code in Amharic is presently envisioned in Ethiopia, where such a manual seems the necessary complement of the Civil Code. It is possible to think that this manual might contain more complete and precise indications of the materials which aided in the preparation of the Code in order to guide Ethiopian jurists interpreting it. They will permit one to see to what extent it is correct to say that the Ethiopian Civil Code is a modern work based on comparative law.