AGRICULTURAL COMMUNITIES AND THE CIVIL CODE
A COMMENTARY

*by Bilillign Mandefro**

Introduction

The purpose of this article is to comment on the provisions of the Civil Code of Ethiopia on Agricultural Communities, Articles 1489-1500, in the light of the social milieu in which they were drafted. Indeed those provisions make little sense in the absence of some knowledge of the communities concerned and the problems these provisions were intended to resolve.

As is evident from a first reading of the introductory article, Article 1489,[1] that chapter of the Code purports to preserve custom and tradition. The chapter is, therefore, not innovation in the strict sense, but rather is declaratory of existing custom which consequently became legally binding.

The original draft on Agricultural Communities[2] had envisaged two types of communities. This division was based on the twin factors of religion and what may loosely be described as the "mode of life" of a community.[3]

The first type of communities envisaged were those of the *Christian highlanders of Eritrea,* notably those in Akkele Guzai, Serae and Hamasien, and those of Tigré. In these communities, people lead a sedentary mode of life based on agriculture, and most conceive of land as belonging to "a family" (in a very loose sense), or "a village".

The second type of communities envisaged were those of the *non-Christian pastoralists,* notably those of Adal and Somali,[4] who live scattered throughout the lowlands of Eritrea and other parts of the Empire. These conceive of land as belonging to "a tribe".

Despite variations of custom and tradition even within each type of community, it was the belief of the drafter that sufficient similarities existed between the sed-

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1. "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."
2. R. David, *De l'exploitation collective des Immeubles: Chapitre I. Des Communautés Agraires,* C.Civ. 51, (1957, unpublished) (not available).
3. *R. David, Exposé des motifs et commentaire des documents C.Civ. 59 et C.Civ 51. relatifs au domaine public, à l'expropriation, et à l'exploitation collective des biens, Document C.Civ.* 63, (1957, unpublished) (not available), p. 3.
4. Interview with H.E. Afe Negus Kitaw Yitateku, President of the Supreme Imperial Court, member of the Codification Commission, Nov. 13, 1967.

entary and pasturalist communities to make it feasible to govern them by the same chapter of the Code.[5]

Thus the term "Agricultural Communities" (les Communautés Agraires), despite its sedentary and farming connotation in common parlance, is used by the Code in a very loose fashion to cover the two types of Communities described above. It is in this sense that the term will be used in this article.

Part I of this article is devoted to a detailed examination of the kind of communities to be governed by Article 1489, ff. and particularly those which inspired the drafter.[6] The choice to examine in detail the agricultural communities of Eritrea was thus primarily dictated by the fact that the drafter borrowed the necessary background material from works devoted to those communities.[7] Although it is lamentable that there is such a dearth of information on those communities, the present author has been fortunate in discovering copies of their leading customary laws.

An examination of the major features of traditional agricultural communities is then followed by a section devoted to the original draft. Although it does not have the force of law, the draft, like the *exposé des motifs*, is crucial to an understanding of the final version. That may be said of any draft and any final version of any piece of legislation. However, when one considers that the final draft on agricultural communities represents roughly one-tenth of the original draft and that it is a mutilated précis, one realizes the value of the original draft.

Having examined the original draft, the reader will have understood most of the skeleton provisions of Article 1489-1500. The last chapter of this article — the commentary — is, therefore, simply limited to the analysis of some major questions that may be raised about the Code articles in an attempt, among other things, to harmonize their seemingly contradictory provisions.

As progress was made on a preliminary examination of the code provisions on agricultural communities. the authors felt that something was perhaps wrong. It was feared that the Code assumed the existence of "collective exploitation" of land in some parts of the Empire. In an attempt to collect information about the mode of exploitation of some of the important communities intended to be governed by the Code, the author discovered a good deal of material about them: material which is generally rare, and which ought to be given an important place in a "commentary" on the communities concerned. This material is extremely useful in view of an amendment that, the present author submits, Article 1489 ff. requires.

Moreover, as has been stated, Article 1489 governs matters whicn cannot be fully appreciated without an examination of their social background — the whole fabric of life, unique and limited only to certain parts of the Empire.[8]

5. David, cited above at note 3, p. 3.
6. *Ibid.*
7. These are F. Ostini, *Diritto consuetudinario dell'Eritrea* (1957) and C. Rossini, *Diritto consuetudinario dell'Eritrea* (1916).
8. "The traditional land tenure [of Eritrea] is interwoven with historical, social [factors] and customs of the inhabitants. Unless salient points of these interlocked subjects are related, the picture will not be clear. ..." Ambaye Zekarias, *Land Tenure in Eritrea* (1966), p. 1.

Part I: Major Features of Traditional Agricultural Communities

"In some parts of the northern provinces, the seemingly innocent question of 'Do you possess any land?' may be easily taken as an insult. If the proud person to whom the question is addressed chooses to be polite, he may grin and reply, 'I may be poor, but I am a human being *(Yesew lij)*'. What he means is that any human being ... possesses land simply by virtue of his being *yesew lij*. It is a birth-right for any *yesew lij*.

This is the social basis of land ownership in Ethiopia. Land ownership is sought not merely for the economic gains that may follow, but for the social status of the individual and the family. The possession of land is the symbol of respectability, human dignity and pride. The division, therefore, between those who have the right (to land) ... and those who do not have it, has more than just economic significance. To be landless, is to be sub-human."[9]

In this Part, we shall examine the major features of the most important agricultural communities of Eritrea, the Christian sedentary communities in Serae, Hamasien and Akkele Guzai, on the one hand, and the non Christian, pasturalist communities in the eastern and western plains. Variations of local custom aside, certain outstanding features will be described.

It may be remarked that the physical and climatic structure of Eritrea has, in the past, played a major role in providing a boundary line between two groups of communities — the sedentary and the pasturalist. Thus, "(t)he physically uniform and relatively fertile central plateau is inhabited by the solid block of a sedentary agricultural population possessed of common language (Tigrigna), a largely common religion (coptic-Christianity) and a common civilzation. The arid plains in the east and west are the habitat of numerous scattered tribes of varying size and origins and yet united by the common livelihood of nomadic herdsmen and the common religion of Islam".[10]

One consequently finds that "...the three plateau divisions of Hamasien, Akkle Guzai and Serae are different 'countries' in the true sense of the word, with different history, different character, even different customs and the people of those divisions are conscious of these differences."[11]

Chapter I. Social Organization and Land Tenure Principles Among the Christian Highlanders of Eritrea

A. Social organization

It is difficult and quite risky to discuss the social organization of the Christian communities divorced from a consideration of their tenure principles. These are overlapping subjects which ought to be treated together. As we will see, in these communities society is organized around land: the rights and duties of individuals are defined in terms of the "relationship" they bear to land. However, for the sake of clarity, general principles will be mentioned in this section.

As has been correctly pointed out, "(t)he Abyssinian farming communities of the three highland provinces of Eritrea (Hamasien, Akkele Guzai and Serae) may be said always to have had two agencies of government: on the one hand, the institu-

9. Mesfin Wolde Mariam, *Some Aspects of Land Ownership in Ethiopia* (A paper prepared in advance for the seminar on Ethiopian studies, 1965) (unpublished, Archives, Library, Faculty of Law, Haile Selassie I University), p. 1.
10. British Military Administration, *Races and Tribes of Eritrea* (1943), pp. 1-2.
11. Id., p. 30.

tion of village society, and on the other hand, the central government of Ethiopia known in Eritrea as Mengesti".[12]

For the "peasant society", the main political units are the village (the smaller unit), and the district (the larger unit).[13] The former is headed by a *Chikka* who runs village affairs. The districts, composed of various villages, are under a *Mislene* (a district chief) responsible for their affairs.

In most villages (for the details of custom vary from village to village), the *Chikka*[14] acts as a link between the central government and the village.

He collects taxes and communicates government orders.[15] Sometimes, he acts as a judge for certain minor offences,[16] although there are regular judges whose business it is to adjudicate disputes. In Serae, villagers are required to accept the orders of a *Chikka*, acting within his traditional customary rights.[17]

In the so-called "family land" areas, the communities are organized on the basis of kinship.[18] The basic unit is the *enda* (kindred) and it is composed of the descendants of an individual. "Historically then, the *enda* has grown out of the individual family: fully crystallized it embraces a greatly varying number of individual families. The latter are mainly economic and living units, i.e. consist of the few family members (parents and children) who live together in the same house, work together and share the fruits of their labour."[19] Although Nadel states that an *enda*, unlike a village, does not have a head or a chief,[20] there are *Chikkas* in Serae, a "family-land" area.

Now the *Chikka* in Serae must belong to a "Land-owning" (*Balabat*) group whose forefathers were once *Chikkas*.[21] If no person whose forefathers were once *Chikkas* can be found, then next in line of eligibility for the office is any owner of inherited land. But it is essential to own *inherited* land to become a *Chikka* because "Chieftainship is like inherited land."[22]

The reader will now sense the landowning/non-landowning division of society in the family land areas. This division of society is found even in the so-called "village land areas."

12. D. Duncanson, "Seràt 'Adkeme Milga' - A Native Code Law of Eritrea," *Africa*.
13. S. Nadel, *Land Tenure on the Eritrean Plateau* (1944, Photocopy, Law School Archives), pp. 2 ff. This article appeared in *Africa*, Vol. XVI, No. 122, 1946.
14. Compare Gebre Wolde Ingida Work, "Ethiopia's Traditional System of Land Tenure and Taxation," *Ethiopia Observer*, Vol. V (1962), pp. 302 ff.
15. Ambaye Zekarias, cited above at note 8, p. 15.
16. *Ibid.*
17. Customary Law of Serae (English translation by Tesfa Tsion Medhane, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University) under "Duties of the residents of the village."
18. Nadel, cited aboev at note 13, p. 3.
19. *Ibid.*
20. *Ibid.*
21. *Customary Law of Serae*, cited above at note 17, under "Miscellaneous."
22. *Ibid.*

In family land areas, "(t)he land rights ... round which ... (an) *enda* revolves are ... the foundation of a social division vaguely reminiscent of class or caste distinctions. This division groups on one side the people who are regarded as the old original inhabitants of the country, and on the other, the new-comers to the area."[23] The former own land: the latter do not. That, however, is not the end of the story; rather it is the beginning.

To belong to the landowning class entitles one to a bundle of rights and privileges (called *rim*),[24] including leadership in community affairs. In all three areas of Akkele Guzai, Serae and Hamasien, only landowners may take part in *shimgelenet* (ሽምግልናት) "(this) embrace(s) all the administrative concerns of the village community. Thus, the supervision and organization of communal labour; the care of the village church; the appointment of ... guardians of the village fields and pastures; and the right to act as arbiters in land disputes ... When the rights and duties represent a regular office, it changes hands periodically, often annually, being taken in turn by each of the families."[25]

The important point to be observed is that to belong to the landowning group entitles one to important privileges which are "... permanent and inalienable, more so than are the possessions (i.e. the plots of land) themselves. The owner of (family land) can sell it or let it; but the fact that he once owned (family land) ...will rarely be obscured. It invests him almost forever with the status of a member of the hereditary family, almost of landed aristocracy which looks down upon 'new-comers' who have come later ...".[26] Thus, in some cases, the fact of belonging to a hereditary family is more important than the possession of land itself.

To the class considered 'inferior,' or more accurately new-comer, belong the Muslims[27] who may live in the Christian communities. In Serae, "slaves", blacksmiths and *Meleket* players (players of a musical instrument) are also considered 'aliens', not entitled to a share of land and the privileges consequential thereto. This fact is expressed by the law most politely: blacksmiths and *Meleket* players are "exempted" from payment of taxes.[28]

Now, payment of taxes symbolizes ownership of land. This sentiment is very well reflected in the customary law of Logo Chewa.[29] Article 15 provides in relevant part: "In the territorial regime of Logo Chewa, he who while cultivating land, does not pay tribute to the *negus*, does not have the right to call himself ... *balemeret* (landowner). If forty years pass and he does not pay tribute, (his) ... land shall be given to another who can pay the tribute ... The man is free, but the land subject to tribute."

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23. British Military Administration, cited above at note 10, p. 35. The effects of this division are being minimized by the passage of time and the possibility of purchasing land.
24. Nadel, cited above at note 13, p. 3.
25. *Ibid.*
26. Nadel, cited above at note 13, p. 7.
27. In the Mekkara Yesus community of Begemedir, Felashas (or Bete-Israelites) and Muslims do not, on the basis of race and religion, own land. Debebe Worku, the *Land Tenure System in Mekkara Yesus Community and its Effects on the Agricultural Labour* (1965, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), pp. 3–4.
28. *Customary Law of Serae*, cited above at note 17, under "Blacksmiths."
29. *Customary Law of Logo Chewa* (English translation by Yohannes H. Sellassie, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University).

This matter of tax raises an interesting question. What is the role of the central government in village affairs? It has been suggested that it is minimal, as is supported by a reading of the various customary laws. "Traditionally, these communities enjoyed a rather autonomous status, administered by the village heads. The representatives of the central government, who were mostly alien to the country under their administration, acted rather as the tax-collectors".[30]

As has been mentioned, the central government was represented in the villages (the smaller units of social organization) by *Chikkas* beloging to the landowning class. It must be emphasised that even in the village land areas where descent plays a limited role in rights over land, it was essential to belong to a one-time landowning family, a "hereditary family,"[31] to become a *Chikka.*

The superiority of the privileged members in charge of community affairs is reflected in the special advantages they enjoy. In Logo Chewa (presently in the administrative unit of Serae) every person who slaughters a cow or an ox is obliged to present the Chikka with the tongue *(Lessanmanka)*.[32] In Serae, "anyone who has a *teskar* (a feast to commemorate the dead) or marriage shall give the district chief, the lawkeeper or the notable of the village, a *sarma* (pot) of *swa*, a *tzechali* of *tzebhi (wat)* and five *injeras*."[33] Failure to fulfil these obligations subects one to penalty.

In Serae, again, the *Chikka* has the privilege of blessing first every bridal band in the village, which privilege imposes on the *Chikka* the duty to be always present in the village, especially during marriages.[34]

The most important privilege of *Chikkas*, however, is that of a special share of land over and above that to which they are entitled as members of the community.[35]

From our references to various customary laws, it will have been clear that the traditional communities under examination had, and still have, laws of their own. The majority of the people in Akele Guzai follow the "Law of Meen Mehaza" and those in Serae, the "Adkeme-Melga" (referred to in this article as the Customary Law of Serae). In addition various districts of Hamasien and Akkele Guzai have laws of their own.[36] Logo Chewa is a district in Serae and Hamasien with its own laws.

These customary laws purport to regulate every aspect of community life and appear supremely adapted to a small closely-knit family or village grouping.[37] They

30. British Military Administration, cited above at note 10, p. 37.
31. Id., p. 36.
32. Customary Law of Logo Chewa. cited above at note 29, Art. 15. Interestingly enough, Art. 15 is entitled "Land Tax."
33. Customary Law of Logo Chewa, cited above at note 29 Art. 51.
34. Customary Law of Serae, cited above at note 17, under "Miscellaneous"
35. Compare Nadel, cited above at note 13, pp. 20-21.
36. British Military Administration, cited above at note 10, p. 31. The BMA refers to these laws as codes.
37. The present author has not been able to find any documentary information on the size of these groupings. However, comparable villages in Tigré, also envisaged by the Code, appear to be made up of 200-500 persons. Interview with Ato Yoseph Gebre Egziabher, Law School, Nov. 5, 1967. In *Kes Wolde Sellassie v. Grazmatch Gebre Egziabher Desta* (Sup. Imp. Ct. 1959, Civ. App. No. 82/59) (unpublished), the court states that an Agricultural Community of the type under examination (and which is in Tigré) was made up of 188 persons and "administered" by "three elders."

treat in the same place criminal, civil as well as administrative matters, and contain detailed rules on procedure.

An interesting aspect of these laws is that they also regulate the church and clergy as to the advantages they enjoy in society. Unlike the *Fetha Negest*, which governs both spiritual and secular matters, these customary laws contain no provisions on spiritual matters to which priests or laymen are required to conform.

It must be noted that these laws were reduced to writing only recently.[38] In the past "(t)he customary laws ... by which the humbler agencies of the government regulated ... village life in Eritrea (were) for the most part expressed in maxims, which however, have for long been regarded almost as unwritten codes because tradition ascribes many of them to specific authorship."[39]

It is not difficult to speculate on some of the reasons for the codification of the various customary laws. Duncanson has stated these succinctly in his consideration of the Serat Adkeme Milga (compiled in 1942): "Rising population, the development of urban life since the Ethiopian war of 1935-1936, and the inevitable association of Eritrean economy with the Italian military defeat in 1941 had to some extent dislocated village society everywhere in highland Eritrea. Traditional rules for the inheritance or allocation of village office and of agricultural land, intimately connected with Abyssinian custom, were particularly in question; disputes were growing more and more numerous and more insoluble because the customary law was not prescribed by generally accessible or acceptable authority. A secondary consideration no doubt lay in the self-consciousness of Abyssinian culture, vaguely anxious to assert against the encroachment of European ideas before its traditions were modified or lost."[40]

The codifiers of *Adgina Tegeleba* (Akkele Guzai) state their reasons in a beautiful introduction to the code,[41] which for fear of misrepresentation is reproduced below.

"God, the creator, the Law Maker is inherently systematic and created the earth and skies systematically, assigning creatures to their respective places and ordering that they live in accordance with the rule set up for each of them.

"So the creatures of God are living.

"The inherent law-abidingness has been given to Man, the possessor of intellect ... (The story of Adam and Eve follows) ....

"From Adam's doom up to the time of Moses people lived in accordance with the law of the conscience because they had no written law.

"Man could not live without a written law because the law of the conscience was not sufficient to administer him, and, therefore, written law was started by Moses. (The story of Moses follows)...

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38. F. Russel, "Eritrean Customary Law," *J. Afr. L.*, Vol. 3 (1959), p. 102. Most of these laws were reduced to writing after the Second World War.

39. Duncanson, cited above at note 12, p. 141.

40. Id., p. 142.

41. *Customary Law of Adgina Tegeleba* (Tigrigna unpublished, Archives, Library, Haile Sellassie I University). The author is indebted to Ato Alemseged Tesfaye, for the translation of the introduction and selected provisions of the this code of customary law.

"Moses' laws operated until Christ.

"Ever since Christ, the necessity of having laws to suit the time was realised ...Constantine ... had a *Fetha Negest* codified by the 318 scholars.
Law is a means of attaining accord and harmony between God, Authorities (*mekuanint*) and man.

"This codified law is the result of a concerted, sincere move on our part to consolidate the laws (all unwritten) set up by our ancestors ... and apply them to our *present needs*. It is based on our respect for the Holy Books and the *Fetha Negest*. ...

"The lack of a codified law has put our legal system into a sad and deplorable state .... We have found it essential to codify our law to suit our present needs. Its main purpose is to eliminate personal interpretations of the law especially in the field of evidence, *and to make the code binding*. ..." (Emphasis added.)

A reading of the introductory remarks above would immediately reveal the tremendous influence of the church and the clergy, to which we shall now briefly turn.

In all the three areas under examination, priests, like village or district officials, enjoy an elevated position in life and derive material benefits by virtue of the office they occupy.

In the family-land areas of Serae, " ... the village church and its communities of priests own special land, tribute-free."[42] In certain village-land areas of Akkele Guzai, " ... the land alloted to the village priests is divided off from the communal land and is not subject to the periodic redistribution."[43]

Priests enjoy these advantages because of their role in sooiety as the link between God and Man. Baptism, marriage, funeral cermonies and commemoration of the dead are their areas of expertise.[44]

The concern to force priests to concentrate their energy on other-worldly affairs is such that under the law of Logo Chewa, they are prohibited from acting as advocates (except in matters concerning them or their children), become *Chikkas* or representatives. "(T)hey ... can only do ... their services as priests ... and shall not involve themselves ... in any worldly affairs because there is no profession as high as theirs".[45] The practical consideration behind the prohibition is obvious: the priests represent the literate, learned and most articulate members of society.

The advantages enjoyed by priests are of a personal nature. "A priest or a deacon who loses his status (either by committing adultery or by divorcing his wife) should not expect to be supported by the village because he cannot celebrate mass .... But the village shall give support to one who can celebrate mass. The priests who lose their status shall, however, receive their 'compensation for the

42. Nadel, cited above at note 13, pp. 21-22.
43. Ibid.
44. *Customary Law of Serae*, cited above at note 17, under "Churches and Priests."
45. *Customary Law of Logo Chewa*, cited above at note 29, Art. 49.

lip' because, (although they cannot celebrate mass), they can still sing, pray and take part in the commemoration of the dead with the other priests".[46]

Lastly, mention must be made of the *Shimmaglé Addy* (counsel of elders) to whom we had alluded earlier. These elders, whose numbers vary from village to village, constitute an assembly "... deciding the welfare of the community. They settle litigation through arbitration and conciliation, and cannot be summoned in the regular courts to give evidence. ... They decide and mark boundaries inter-villages (*sic*) and between litigants."[47] These elders must be descended from a one-time landowning family in some communities.[48] They play a dominant role in the village-land areas which we will examine below.

B. Tenure Principles

Three types of "ownership" are said to exist on the Eritrean plateau: individual,[49] including ownership by the heads of individual families, family ("... more precisely ownership by the kindred (enda) ...") and village ownership.[50] However, these categories are not water-tight. For instance, through inheritance and progressive sub-division, "family" ownership may evolve into individual ownership.[51]

Since the scope of this paper is limited to "land owned by an agricultural community," we shall exclude a consideration of individual ownership.

It has been stated that "... communal land tenure is practically the only form of land tenure found in the north-western region of Ethiopia, comprising the divisions of Hamasien, Seraye and Akkele Guzai in Eritrea, the provinces of Tigré, Begemedir and Gojjam, and the sub-province (Awradja) of Lasta and Wag in Wollo".[52] The term "communal tenure" is intended to signify the non-individual nature of the existing rights and, therefore, includes both family and village "ownership", despite racial differences between the two.

Because the nature of the rights involved is different, we shall examine "family" and "village" land separately. Two factors must, however, be pointed out. Serae is a predominantly "family" land area, although one also finds there the village land system. In Akkale Guzai and Hamasien, village land predominates, although there also one finds "family" land.[53] Secondly, this factor of the unity of both family and village land must be underlined: both must be viewed in the light of the natural endowments of Eritrea, and especially the prevalent "land-hunger".[54] The latter holds the key to an appreciation of the tenure systems in Eritrea.

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46. *Customary Law of Serae*, cited above at note 17, under "Churches and Priests."
47. Ambaye Zekarias, cited above at note 8, p. 16.
48. Ostini, cited above at note 7, pp. 88-94. The English translation of pages 88-94 which the present author quotes is by Tesfa Tsion Medhane.
49. Individual ownership is reputed to be the most prevalent form of ownership in Ethiopia. See Demissie Gebre Michael, *Agrarian Reform: A proposal to contribute to Economic Development in Ethiopia* (1964, unpublished, University Library), p. 47.
50. Nadel, cited above at note 13, p. 45.
51. *Ibid.*
52. Lawrance and Mann, "Communal Land Tenure in Ethiopia," *Ethiopia Observer*, Vol. IX (No. 4), pp. 314-315.
53. Nadel, cited above at note 13, p. 8.
54. *Id.*, p. 1.

1. **Family land**

(a) **Origins**

Scholars who have had occasion to consider the question all suggest that family land in Eritrea has evolved from some kind of individual ownership originally acquired by occupation.

Thus, "... the conception of family land can be understood *only* historically, as an evolution admitting of several variants from an originally sharply defined and single concept of ownership - that found on the first occupation of land by an individual or individual family. With the natural growth of the family of original occupants the title to the land changed from an individual to collective title."[55]

Ostini describes this evolution as follows: "The progenitor of a certain tribe occupies a piece of ... land for one reason or another; his sons then share the land by their rights of succession or because division in it is necessitated. The land that was originally one becomes divided between the various branches that descended from the progenitor. ... Successively, the land that is divided among the first descendants of the head of stock (ancestor) is further sub-divided according to the needs of the descendants ...."[56] In such a way, Ostini concludes, a piece of land originally owned by an individual comes to be sub-divided between his descendants.

In describing the social structure of the Christian highlanders, the *enda*, the large kinship group ("... composed of large individual families claiming to descend from a common ancestor whose name the *enda* bears ..."), has been defined as a territorial unit: "the *enda* is in a sense a territorial unit, for the most important form of land tenure in Eritrea ..., the hereditary absolute land right of family land ..., is bound up with the *enda* group. Land of the family land ... type can also be owned by the individual within the *enda;* but these individual land rights are conceived of as being derived from the land right vested in the *enda* itself, in virtue of an ancient first occupation of the land. This corporate concept of land ownership is revived in every dispute over land, and indeed constitutes the strongest bond of cohesion in the *enda*".[57]

The "fluid, non-static nature of the enda" must be emphasized. "Though the *enda* unit is ... clearly defined, it is also a composite structure, and transitional forms occasionally blur the distinction between the *enda* and its component families. For some of these are very large; three or four generations of descendants may still be united by the narrower solidity of the family and still constitute an effective social unit, subordinated to the *enda*, yet itself an incipient *enda*."[58] Once an *enda* becomes very large, it breaks up into several sections, each known by a separate name.[59]

55. *Id.*, p. 5.
56. Ostini, cited above at note 7, pp. 88ff.
57. British Military Administration, cited above at note 10, p. 35. Compare Ambaye Zekarias, cited above at note 8, p. 3. It must be emphasized that an *enda* (inappropriately translated as "family") may be made up of hundreds of individuals Cf. Enda Belaway Beleza (Hamasien) v. Enda Gumer (Serae) (Sup. Imp. Ct., 1960, Civ. App. No. 56-60) (unpublished) in which a claim for a share of family land is based on descent from a man who lived nine generations or 450 years ago.
58. Nadel, cited above at note 13, p. 3.
59. *Ibid.*

(b.) Terminology

At this juncture, it is instructive to acquaint the reader with the terms used to describe land rights over cultivable family land in the family land areas under examination.

The most common term is *resti*. "This word is derived from Geéz *resete* ( ). It is a loose term denoting occupancy, possession, ownership ... in connection with (land). . . ."[60] The term is very general and covers "land titles" varying from "... land owned by an individual to land owned by the large kinship group."[61] Although Nadel seems to associate *resti* with family land, Ato Ambaye states that it should not be so. "(The) term is a generic name for all property in land. In distinguishing different property, this word is placed as a prefix".[62]

Thus is *resti desa* (village land) distinguished from *resti tselmy* (individual land) and *resti gulti* (chartered land). According to Ato Ambaye, therefore, *resti* denotes whatever rights one has over any type of land.[63]

It is of interest to note that in Serae, "(r)*esti* is a *land* inherited from parents or a *land* given as blood money or *land bought* ..., or *land* acquired by clearing a forest."[64] (Emphasis added).

Finally, the privileged group we examined in Section A is called *restegna* (ርስተኛ), or *restegnatat* (ርስተኛታት), plural. In family land areas, a *restegna* is one who is entitled to a share of family land and the attendant privileges. In the village land areas, a *restegna* is a descendant of a one-time land owning family.

(c.) Individual rights over cultivable land

Family land is known to have taken one of two forms in the course of its evolution. "(E)ither the collective title was maintained and certain mechainisms were evolved to ensure that the individual members of the group could exercise their rights of usufruct; or the individual nature of the *resti* would be re-established through inheritance and the division of the family estate between the various descendants".[65] The former is described simply as *resti* and the latter, as *tselmi* (ጽልሚ).

In some *resti* (used in contradiction to *tselmi*) areas, an individual family (i. e. husband, wife and their unmarried children) farms a plot of land[66] the size of which depends on the needs of the family.[67] The plot is simply referred to as *grat*, i.e. farm on field.[68] Shares of deceased members "fall back" to the community "store" out of which allocations are made to the newly married members. It

60. Ambaye Zekarias, cited above at note 8, p. 5. Cf. "The term *resti* defies simple translation because of the many and divergent customs associated with it in different communities. Perhaps the nearest English equivalent is *allod*, especially in the implied contrast with land occupied by tenure." Duncanson, cited above at note 12, p. 144, note 1.
61. Nadel, cited above at note 13. p. 5.
62. Ambaye Zekarias, cited above at note 8, p. 5.
63. Note that Ato Ambaye appears to use the word "property" in the quoted statement as the equivalent of the word "rights".
64. Customary Law of Serae, cited above at note 17, under "Regulation of *resti*".
65. Nadel, cited above at note 13, p. 5.
66. Note that the term family land covers more than simply cultivable land. "The territory comprising the *resti* of a certain family is determined on the basis of cultivable fields, grass, wood, water and building areas (under it) ...." Ostini, cited above at note 7, p. 88.
67. Nadel, cited above at note 13, p. 5.
68. *Id.*, p. 6.

must be observed that although a plot of land does *not* pass by inheritance, the *right* to claim a share of the community land does.[69]

Only the married males receive plots of land. Generally, the females and their descendants are excluded from claiming a share of the paternal *resti.*[70] A person who has received his share of cultivable land may farm it as he thinks fit, sell it,[71] or give it to another, provided members of his *enda* or village refuse to buy it or take it.

In the *tselmi*[72] areas, a family *owns a specific plot* of land. Again as a general rule, only male issue are entitled to claim a share of the paternal *resti.* Land is divided between married males by the father,[73] or where they are many, by elders (selected by the father) by the casting of lots.

In Serae, a male receives a share of family land when, "emanicipated" by marriage, he acquires "economic autonomy."[74] Indeed, the bridegroom is entitled not only to a plot of land, but to a house built by his father, farm implements, including a hatchet, a certain amount of cereal in the cultivation of which he had taken part before his marriage, living beasts, and one-third or one-fourth of the household "utensils" of his father.[75]

Why, it may be asked, are women and their decendants (described as *gual,* a daughter, and *deki-gual,* children of the daughter, respectively) excluded from claiming a share of the paternal land, whether *resti* or *tselmi*? Duncanson has offered an interesting explanation. "In the formal marriage pact (*kal kidan*) celebrated in church, the payment of dowry by the bride's father to the bridegroom's father discharges the former's family from any further obligations towards the girl's children, whether or not by the agreement of the two fathers ( )- the young couple are emancipated and given a new house and possession of the dowry during the lifetime of the bridegroom's father."[76] Duncanson states further that under the Sirat, "emanicipation of the kindred by the payment of dowry" is the real meaning of marriage.

This exclusion in some areas of daughters and their descendants from claiming a right to land from the paternal line is expressed in the maxim "to the sons their inheritance; to the daughters their dowry."[77]

In the areas where this exclusion does not operate, the rights of daughters and their descendents are subject to restrictions: they can neither sell family land nor convert it into village land, restrictions not imposed on the male issue of a family.[78]

69. *Ibid.*
70. Cf. Ambaye Zekarias, cited above at note 8, p. 15.
71. Ambaye Zekarias, cited above at note 8, p. 6. On this, more will be said later.
72. Ato Ambaye describes *resti tselmi* as "absolute" private property. Ambaye Zekarias, cited above at note 8, p. 7.
73. Ostini, cited above at note 7, pp. 88ff.
74. *Customary Law of Serae,* cited above at note 17, under "Economic Autonomy".
75. *Ibid.*
76. Duncanson, cited above at note 12, p. 144.
77. Nadel, cited above at note 13, p. 7.
78. *Customary Law of Logo Chewa,* cited above at note 29, Art. 12.

However, as of the year 1943 no one in Logo Chewa has been permitted to sell land.[79] "Land cannot be sold because even if a man is in poverty, it is not the will of God for him to sell the land and deny his descendents a *resti* .... Anyone in...Logo Chewa thirsty or hungry should be fed and no one shall buy land from him because in such a state a person can forget his children and his wife, and do a lot of wrong".[80]

This question of the sale of family land (*resti* or *tselmi*) raises a related question: the acquisition of individual ownership through long possession and payment of taxes (i.e. usucaption of family land).

Now, the "foreigner" in a family land area can farm a plot of land *only* with the permission of the landowners. The reason, according to the law of Serae "... is because if there is anything to be paid for a homicide, pillage or rapine that takes place in the village, it is the (land owners)..., and not the aliens who pay."[81] Should the necessary permission be obtained, then the alien is allowed to work three years on "fertile soil" and then two years on "mediocre soil". At the end of the fifth year presumably (for the law is silent) fresh permission must be obtained.

The aliens do not acquire any right to the plot they farm "... even if they live there for many years."[82] The position of the aliens is even insecure where, with the permission of the landowners, they receive plots at the outskirts of a village (*bereca*), plots never farmed by the landowners. They are expected to transfer these *anytime* the owners decide to cultivate them.[83]

Of course, an alien could buy a piece of family land (which is *then* called *medri worki*, literally land bought with gold) and acquire ownership, provided the seller has fulfiled the customary formalities: formalities cumbersome in nature and clearly aimed at discouraging the sale of family land. These formalities are very well reflected in the Law of Serae the requirements of which are summarised in Ostini:

"In order that a ... sale of an immovable (belonging to a family) be valid, it is required ... that the following conditions be satisfied:

1. that the sale take place before a *dagna* (a village judge) nominated by the common agreement of the parties;

2. that the seller present a guarantor (usually a relative) who stands surety that:

   (a) the seller is really the owner of what he sells;
   (b) an offer was made in vain to the person who has the right of precedence to buy (i. e. the right of preemption); and
   (c) the purchase price will be restituted in case of nullity of the contract of sale;

79. *Id.*, Art. 20 and 22.
80. *Id.*, Art. 20 and 21.
81. *Customary Law of Serae*, cited above at note 17, under "Aliens", "Residence and Immigration".
82. *Ibid.*
83. *Ibid.*

3. that there be stipulated the amount of food-stuffs or agricultural products that the buyer is required to give to the seller every year;

4. that there be stipulated the amount of grain to be paid to the guarantor from time to time as compensation for the guarantee he gives..., and;

5. that at the conclusion of the contract of sale there be not less than five witnesses, besides the *dagna* and the guarantor".[84] Children may act as witnesses although they can testify only"... when they become grown-ups...."[85] In some areas, the role of a witness in land transactions is undertaken by a priest, a Moslem and a blacksmith. The inclusion of the last two "... ensures the unassailable testimony of persons of necessity disinterested in land deals."[86]

The sale of a piece of a family land is, therefore, no ordinary matter. The effect of the annual obligation which the buyer owes the seller must be noted. It perpetuates the fact that the seller once owned land.

One must mention the special protection accorded to the family members of a seller. A brother who was away and consequently was unaware of the sale may recover "his" land from the buyer "any time".[87] On the other hand, "a brother or a nearest relative who sees but does not protest when the land is being ploughed and cultivated (by the buyer) does not have the right to take it back after three years."[88]

If usucaption of family land[89] by a "stranger" is thus conceivable, as where original possession is acquired through purchase, usucaption of family land against an absent family member is inconceivable. This is in the nature of things. As has been mentioned, a family member who possesses family land does so by virtue of a right vesting in "the family" and as a member of that family. A possessor is, therefore, in no better position, in terms of his rights to the land he possesses, than a non-possessor who is also a member of the family - the "corporate owner" of the land.

Local variations must, however, be mentioned. In Logo Chewa, absence from a village results in forfeiture of land rights.[90] We shall examine this in detail in the next section.

Finally, in some *tselmi*[91] and *resti*[92] areas, there is an interesting process called *assahaba* one of whose objectives is social justice. It is the process by which

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84. Ostini, cited above at note 7, pp. 88ff.
85. *Ibid.*
86. Nadel, cited above at note 13, p. 9.
87. *Customary Law of Serae*, cited above at note 17, under "Regulation of Resti." This is very well reflected in the Amhara proverb: "Land goes back to its true owner even after a thousand years". The thousand years is intended to represent infinity.
88. *Ibid.*
89. This is the topic of another paper. Girma Sellassie Araya, *Usucaption of Family Land under Ethiopian Law* (1968, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University).
90. *Customary Law of Logo* Chewa, cited above at note 29, Art. 12.
91. *Ibid.*
92. *Customary Law of Serae*, cited above at note 17, under "Regulation of *Resti*".

plots are re-partitioned after the lapse of a certain period of time either because some persons are found to possess more plots than others (in Logo Chewa, for instance) or because a share has to be made out of existing shares for a "new" claimant (in Serae, for instance).

2. Village land

(a) Origins

Scholars are again unanimous in their view that the so-called "village ownership" in Eritrea evolved from *resti* ownership.[93] This view finds some support in the customary laws of Logo Chewa[94] and Serae[95] which recognise the conversion of family land into village land.

The motives behind this conversion can only be speculated upon. Ostini suggests that the preservation of the "family spirit" underlies the village land system.[96] This seems to explain the privileges accorded to the *restegnatat* in the village land areas, whose name, incidentally, supports the view that village land must have evolved from family land.

The difficulty in accepting Ostini's view as a general explanation lies in this: that the supposed *raison d'être* of village land seems to disappear when one considers the fact that a stranger, i.e. one not related by blood to villages, may receive a share in the village land. Admittedly, Ostini had in mind the recent conversions of family into village land, the village consisting of the members of a family. One must, in this connection, mention the recent conversions of the Italian Government during its rule of Eritrea.[97]

Whatever the motives of the original settlers in converting family into village land, the village land system is an important feature of the tenure pattern of the communities under examination.

(b) Division of cultivable land and individual rights over it

Perhaps nothing is as interesting as the process of division of cultivable land among villagers entitled to shares. Perhaps nothing is more reflective and symbolic of the "community" feeling than this periodic re-distribution of land. We shall base our description of the process on the Customary Law of Logo Chewa.

93. Ostini, cited above at note 7, pp. 88ff. Cf. Ambaye Zekarias, cited above at note 8, p. 13. This evolution, or more accurately "conversion" into some kind of community ownership has also been noted in Tigre. See Zegeye Asfaw and Teame Beyene, *Report on Tigre province* (1967, unpublished) (not available), pp. 3-4.

94. *Customary Law of Logo Chewa*, Cited above at note 29, Art. 12.

95. *Customary Law of Serae*, cited above at note 17, under "Regulation of *Resti*". This village "ownership" is known as *desa* (in Hamasien and Serae) and *shehena* in Akele Guzai. Those who are entitled to shares by virtue of descent from a one-time landowning family are called *restegnatat* and are contrasted to the new-comers, the *machelai aliet* (translated as aliens, foreigners or strangers).

96. Ostini, cited above at note 7, pp. 88ff.

97. As we will see, this was done for political reasons. The Italians had earlier undertaken a settlement project in Eritrea for the implementation of which it was necessary to acquire land. An attempt to acquire land was based on false assumptions as to the nature of land rights in Eritrea, and indeed in Ethiopia. See some of these in R. Pankhurst, "Italian Settlement Policy in Eritrea and its Repurcussions, 1889-1896", *Boston University Papers*, Vol. I (1964), pp. 131ff.

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The task of re- distributing land among villagers is under-taken by six *Shimaggeles* (elders), the wise from every *marbet* (household) nominated and elected by the *dagna* (the village judge).[98] These elders are divided into two groups.

The first group, called *Gilafo* (screeners), decides the persons in the village entitled to receive shares of the village land and also "expels" from further allocation of plots persons possessing such lands under what it considers an unrecognized right.

The second group is called *Akkaro* (keeper) or more fully *Akkaro Meriet* (keeper of land).[99] Before re-distribution, this administrative group puts the village plots under its control and does two things. First, it sets aside "reserve" cultivable land and building sites, the former for village members who may come after re-distribution (and who would, therefore, have been forced to stay landless until another re-distribution). Second, it divides the village cultivable land into plots in view of the number of persons entitled to such plots.[100] and assigns them to members after the casting of lots.[101]

This re-distribution of plots is called *warieda* (literally assessment) and takes place every eighth year. "*Warieda* shall take place every eight years because that (period) allows the farmers to take good care of their farms."[102] On the other hand, a shorter period is undesirable because plots prepared by the hardworking might be alloted to the lazy. *Warieda* takes place between the 16th and 21st of Nehassie in order to allow a farmer to prepare his land for cultivation "...before the rainy season passes."[103]

The cardinal rule on re-distribution is that only the persons who have "established" themselves in Logo Chewa can receive plots of land. This applies, *sensu stricto*, only to aliens.

Now, when an alien wishes to settle in a village, he must first build himself a house, which he could do *only* with the permission of the three *shimageles* of the village in charge of the allocation of building sites.

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98. Customary Law of Logo Chewa, cited above at note 29, Art. 14.

99. *Ibid.*

100. "The allotment of land to be distributed corresponds to the number of those who acquire economic autonomy, widows who have legitimate children, women who had left the village of their fathers but who re-establish themselves there, the *machelai aliet* (aliens) who are admitted to take part in the lots of land distribution." Ostini, cited above at note 7, pp. 88ff. Note that a share received may be subject to lease or other similar arrangement. The shares of deceased members "fall back" to the community.

101. This process of casting lots appears to be a sacred process, in Tigre at least. After the the village or family land (which, as we have seen, is in some places assigned by the casting of lots) has been divided into plots corresponding to the number of the recipients, the village elders assemble small sticks which are named after the plots. Then one of the elders raises as many sticks as he could hold between the palms of his hands high above the head saying, "oh the lot of the Disciples! Come for the true owner" he shouts and then from the bundle he gives one stick to each member. Each member takes the plot represented by his stick. Interview with Yoseph Gebre Egziabher, Oct. 5, 1967.

102. *Customary Law of Logo Chewa*, cited above at note 29, Art. 12.

103. *Ibid.*

An alien is thus deemed "established" in a village, not as has been frequently supposed by "... simply building a hut for (himself) ...".[104] In addition to obtaining the assent of the village elders in charge of allocating building sites, who with the passage of time and rising population have become less warm in welcoming strangers,[105] one must be a villager in the true sense of the word. "Establishing oneself is not by simply building a small house and living there for a few days. One has to stay there and do everything expected of him as a villager. The wife of a person who claims he has established himself and receives land, shall not move from the villages unless she obtains the permission of the *dagna* or her relatives".[106] Failure to fulfil these conditions will cause one to loose the rights on the plot acquired through *warieda*.[107]

As Ostini remarks, "[t]he position of the *machelai Halet* (sic) is very interesting .... They are foreigners who have resided in a village for many generations, and for many generations have possessed and cultivated land. They have, however, not identified themselves with the *restegnatat* (i. e. those whose families once owned land) ....; and after centuries they still have conserved a situation apart from the life of the village."[108] Ostini is thinking of the exclusion of the aliens from leadership in village affairs. It must be noted that even a son of an alien who had been in the village for genarations must first "establish" himself in the village in order to receive plots of cultivable land.

This requirement does not, however, apply to the second group of candidates, the newly married sons of the village *restegnatat*.[109] The "establishment" of their fathers appears sufficient.[110] They can thus receive plots of village land, provided they are married, a proviso, which is applicable to aliens as well.

It must be mentioned that the male descendents of a daughter are equally eligible for "establishment" in a village as are those of the son.[111]

The motto of the *warieda* is equity, rather than economic productivity. "To ensure an almost mathematically exact division (of land), the available village land is graded according to its fertility. In the most common system of grading we meet with three categories: (the fertile, mediocre and the poor soil) .... The drawing of lots is repeated for each category of land, every (farmer) ... receiving his shares of each."[112]

104. Seifu Tekle Mariam, *Consolidation of Fragmented Holdings in Communal Tenure Areas* (1967, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University).

105. Compare Nadel, cited above at note 13, p. 10.

106. *Customary Law of Logo Chewa*, cited above at note 29, Art. 12.

107. *Ibid.*

108. Ostini cited above at note 7, pp. 88 ff.

109. Compare. "A son shall be given land upon the establishment of his own family, outside that of his parents. His parents shall help him establish it in the presence of the *Chikka* and three elders." *Customary Law of Akkele Guzai*, cited above at note 41, Art. 242.

110. But see. "In the *desa* or *shehena* system a right to a share of land is *solely* based on residence, and other factors like *descent* play no part." (Emphasis added.) *Amha Tsion Domenico, Allocation of Consolidated Units: Individual or Communal* (1967, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 5. We have seen how important it is to be descended from a one-time landowning family.

111. Compare Ambaye Zekarias, cited above at note 8, p. 15.

112. Nadel, cited above at note 13, p. 13.

It has been accurately said that this periodic re-distribution of land excludes sale.[113] But it is perhaps more accurate to say that the sale of village land is unknown, (the need not having arisen in the past) than to state categorically that it *cannot* be sold.[114] It must, however, be mentioned that lease is allowed. For instance, a female entitled to village land[115] may lease her share to one who has "the strength and the oxen",[116] as she cannot farm it herself.

C. Individual rights over other family and village land

1. Roads, building sites and reserves

The Customary Law of Serae goes to the extent of laying down the width of the major roads (Menged Arba)[117] as does the Customary Law of Logo Chewa.[118] Roads are, of course, at the disposal of everyone, alien or villager, although only the villagers are responsible for their maintainance.[119] In Logo Chewa, it is an offence to plough a road, or to leave rocks or timber on it.[120]

Since building a house and owning it is one of the requirements for obtaining a plot of the village land, the regulation of buildings and building sites is of immense importance in the village land areas. Thus, the Customary Law of Logo Chewa contains detailed rules on the allocation of building sites, the length and breadth of a site for an individual, party walls, inheritance of a building and even the general plan of buildings: "Houses to a row shall number six and a road shall then follow."[121]

A stranger who constructs a building in a village without the necessary permission is required to vacate it, in addition to paying a fine. If having received permission a stranger constructs a house and is subsequently asked to vacate it by the *restegnatat*, he is entitled to the building materials, which in the case where no permission has been obtained or the stranger of his own will decides to move to another village, revert to the "landowners."[122]

The son by the first wife is the one entitled to inherit his father's house because "... the first wife has contributed to the building of the house and it would be unjust for the son of the second wife to inherit what his mother (did not work for) ...."[123]

The newly married ones receive building sites from the reserve land which is composed of cultivable land, building sites not allocated to villagers and hunting

113. Lawrance and Mann, cited above at note 52, p. 315.

114. Compare K. Benti-Enchill, "Does African Land Tenure Require a Special Terminology?" *J. Afr. L.*, vol. 9 (1965), pp. 137-139.

115. *Customary Law of Logo Chewa*, cited above at note 29, Art. 12.

116. Id., Art. 19. Note that implicit in the "establishment" requirement is the prohibition to "own" two plots in two villages, thus, minimizing the temptations to sell one of them.

117. *Customary Law of Serae*, cited above at note 17, under "Regulation of Roads."

118. *Customary Law of Logo Chewa*, cited above at note 29, Art. 26.

119. *Ibid.*

120. *Id.*, Art. 16.

121. *Id.*, Art. 16.

122. *Ibid.*

123. *Id.*, Art. 17.

grounds. The villagers are entitled to the rent that may be due from reserve land where aliens, not entitled to it rent it with the permission of the landowners. In addition, villagers who may come after *warieda* are entitled to a share of cultivable land from the reserve.[124]

(b) Grass and wood

In Serae, the "... use and destination of grass is decided by the villages (or people working on their behalf)."[125] In certain village land areas, vast territories outside the village are set aside as pasture grounds and are usually divided into "restricted" and "accessible" ones.[126]

Obviously, only village cattle are allowed to graze on these pastures.

Both in family and village land areas, two kinds of trees are distinguished and separately regulated. Trees are either private or public. A person may plant trees on his plot of cultivable land or around his house and over these he has absolute rights. He may, therefore, cut them and put them to any use he deems proper, and exclude others from interference with them.

On the other hand, everyone is entitled to the use of the public trees. These are trees growing "in the open country", the gifts of nature. In Logo Chewa, a person who had begun cutting a tree "in the open country" has rights over it for thirty days, after which others could freely cut it and take it.[127] In certain family land areas, permission must be sought to cut public trees (which is really a mere formality).[128] For the building of a Church, trees may be cut from anywhere without obtaining permission from anyone.[129]

(c) Threshing fields

The Customary Laws of Serae[130] and Logo Chewa[131] are almost identicai in their regulation of threshing fields and farm implements.

Farm "implements", including living beasts, are the absolute property of the individual. In Logo Chewa, a person who, without the permission of the owner, uses "agricultural tools" is subject to fine as is one who is late in returning a yoke he has borrowed.

Both the Customary Laws of Serae and Logo Chewa treat a threshing field as the "individual" property of the person who had prepared it. Anyone who wishes to avail himself of a threshing field must first obtain the permission of the owner. To use the field without the permission of its owner is an offence.

Under the Customary Law of Serae, there is what is called a "common threshing field" which is an exception rather than the rule. A person who, for one rea-

124. Ambaye Zekarias, cited above at note 8, p. 26.
125. *Customary Law of Serae*, cited above at note 17, under "Regulation of Grass."
126. Ambaye Zekarias, cited above at note 8, pp. 22-23.
127. *Customary Law of Logo Chewa*, cited above at note 29, Art. 31 and 32.
128. Nadel, cited above at note 13, p. 22.
129. *Ibid.*
130. *Customary Law of Serae*, cited above at note 17, under "Regulation of Threshing Field."
131. *Customary Law of Logo Chewa*, cited above at note 29, Art. 24 and 30.

son or another, does not "own" a threshing field may use the community field prepared by the villagers.[132]

In the sedentary communities we just examined, thus, a person cultivates his plot of family or village land with *his* own farm implements, except for occassional farming, harvest or threshing when, as in all other parts of the Empire, the person may seek the aid of his fellow-farmers on a strictly reciprocal basis.[133]

We have examined the rights individuals have over other community land, roads, building sites, wood and pasture, and it is fair to conclude that these "other" resources are also "exploited" individually.

As has been stated, people who are under the misapprehension that land is "exploited collectively" use terms like "communal regime" to designate the tenure patterns of the Christian communities which we examined. "... [L]and is *not worked* communally. Every member or house-hold has its own fields, and works on (them)....".[134] The nearest that one comes to some kind of "collective farming" in these communities is in the cultivation of land by a nuclear family, consisting of a father, mother and their unmarried children (generally), under the direction of the father.[135]

D. Advantages and disadvantages of family and village land tenure[136]

Since a good deal of the literature on the so-called "communal land" appears to have concentrated on its disadvantages, we shall examine these first.

The reader, must, at the outset, be warned that the following "evils" are derived from limited empirical data,[137] and to a great extent, therefore, reflect individual bias. Given limited reliable information, the following description is simply a reflection of what individuals think they see in the communities we examined.

Foremost in the catalogue of dangers "... likely to be encountered..." in a communal tenure system is the insecurity of the holder.[138] The likelihood that a possessor of family land may one day be forced to share his land with another member is such that "... the present occupant ... has no incentive to improve his holding." [139]

Excessive fragmentation[140] resulting in uneconomic use of land is another alleged disadvantage. One may add the uneconomic nature of the division of village land

132. *Id.*, Art. 24.

133. In order to be positive on this, the author carried out detailed interviews with Ato Alemseged Tesfaye (who has lived in Serae), Ato Yohannes Habte Sellassie (who has lived in Logo Chewa and Akkele Guzai), and Ato Okba Michael Wolde Yohannes (who has lived in Hamasien). In addition, Ato Yoseph Gebre Egziabher (who has lived in Adwa and Enderta, Tigre) was interviewed. Nov. 7-10, 1967. They were unequivocal in their views.

134. Ambaye Zekarias, cited above at note 8, p. 14.

135. Compare Nadel, cited above at note 13, pp. 5-6.

136. See, generally, Amha Tsion Domenico, cited above at note 110, pp. 36-45.

137. "The extent to which these [evils] exist in the communal tenure regions of Ethiopia can admittedly *only be guessed*" Empasis added. Lawrance and Mann, cited above at note 52, p. 315.

138. *Ibid.*

139. *Ibid.*

140. Demissie Gebre Michael, cited above at note 49, pp. 61-62.

which is based on equity, rather than economic productivity, and the fact that it benefits the lazy on the same basis as the diligent.[141] In this connection, the "... lack of continuity of farming ..." [142] of village lands and the allegedly resulting non-improvement of holdings must not be overlooked.

Another disastrous problem observed in the family land areas is the flood of land cases coming before the courts. This problem, of course, is equally serious everywhere. It has been estimated that 75% of all civil disputes in Ethiopia involve land.[143] The land disputes in family land areas are, however, of a different order. These are generally claims to family land, and the "... most acrimonious ..." of all disputes.[144] These "... bitter, incessant feuds over *resti* ..." [145] so alarmed the Italian Government during its control of Eritrea, that it decided (around 1935) to introduce the *desa* system into *resti* areas. This provided a simple answer, on paper at least!

Communal tenure has also been seen as an obstacle to the introduction of any system of land registration because of the resistence shown to land measurement by the people concerned.[146] It has also been attacked as keeping "... agriculture in its primitive stages ..." [147] and "in a ... less advanced ... level of money economy." [148]

Finally, the communal tenure system's class division has been frowned upon and the more egalitarian, individualistic system of individual ownership preferred.[149] Those in favour of individualising communal holdings find comfort in the inevitable evolution of the system into individual ownership.[150]

There appear to be only a few supporters of the communal tenure system, one of whom, (Nadel), states in his consideration of the advantages of this system, that *resti* and *desa* correspond "... to that between individual enterprise and communal tenure, and between privilege and socialism (or communism) in our own English society".[151] Nadel emphasizes the equitable nature of the *desa* in an environment where land is "... of very unequal value ...", and the "communal spirit" which "... makes the temporary land-owner work in the interest of his successors as well, since they all belong to a closely-knit social unit." [152] Thus,

141. Compare Ambaye Zekarias, cited above at note 8, pp. 14-15.

142. Demissie Gebre Michael, cited above at note 49, pp. 61-62.

143. S. Buff, *A Key to Land Reform in Ethiopia: An Introduction to Cadastral Survey and Land Registration* (1960, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 10.

144. Duncanson, cited above at note 20, p. 143. Duncanson estimates that the greater number of civil cases in Eritrea, and the graver ones, involved family land. Two more recent local stiudies by the Ministry of Land Reform estimated the total at 30%.

145. Nadel, cited above at note 13, p. 14.

146. Interview with H.E. Afenegus Kitaw Yitateku, Nov. 13, 1967. Compare Mengesha Workneh, *Agrarian Structure and Agrarian Reform in Ethiopia* (1961, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 18.

147. *Id.*, p. 37.

148. *Ibid.*

149. Nadel, cited above at note 13, pp. 14ff.

150. Lawrance and Mann, cited above at note 52, pp. 315-316 Buff states that this evolution may be facilitated by educating the people concerned. Buff, cited above at note 151, p. 3.

151. Nadel, cited above at note 13, p. 15.

152. *Ibid.*

contrary to the views of Lawrance and Mann, Nadel is of the opinion that the "community spirit" is so strong that it overshadows the "insecurity" problem and makes the individual work in the interest of others.

Whatever the disadvantages of the tenure systems under examination and the advantages claimed for individualizing them, the Civil Code of Ethiopia has made a choice at the expense of individualization. We shall examine later what exactly the code has accomplished in this respect. Here, it must be emphasized that we examined the advantages and disadvantages of the communal tenure system simply to note current disatisfaction with them.

Chapter II. Social Organization and Land Tenure Principles in the Beni Amer and Dankalia Communities

A. Social organisation

Because of the extremely limited information about the non-christian communities of Eritrea, and indeed of Ethiopia, the inquiry of this section and the following will be limited to a consideration of two important communities which, in the author's opinion, adequately represent the type of communities contemplated by Articles 1489-1500 of the Civil Code.

During the British Military Administration of Eritrea (1943), the Beni Amer was "... the largest tribe in the west and south west, and indeed the whole of Eritrea. (They) ... occupy the north, west and south west of Agordat, spreading in the west, deep into the Sudan and overflowing in the east into (Keren and Serae) ..." [153] The Dankalia, on the other hand, are a "typioal plainsmen" occupying the Eastern Plains of Eritrea.[154]

On the basis of rather "fluid criteria", the Beni Amer tribe is said to be made up of seventeen "sections" or "branches," [155] each with its own name, but acknowledging membership in the tribe. "The affinities linking the Beni Amer sections are several: religion, language, common customs, habits and the link of common descent. But neither is the range of these affinities coextensive, nor are they solidly integrated. They do not coincide for the whole of the tribe, but rather overlap irregularly, different affinities extending over different sections."[156]

The Beni Amer are all Moslems,[157] and either speak Tigre or Beja.[158] Only the "rulers" claim descent from a man of the "Middle Nile" who married from among the aboriginal inhabitants of the Beni Amer "country" and whose descendants subjugated all the groups with which they subsequently came into contact.[159] The man is known as Amer, the person to whom the tribe also owes its name.[160]

153. British Military Administration, cited above at note 10, p. 6.
154. *Id.*, p. 23.
155. S. Nadel, "Notes on the Beni Amer Society,» *Sudan Notes and Records*, vol. XXVI, Part I (1945), p.3. But see British Military Administration, cited above at note 10, pp. 7, 23ff., according to which the Beni Amer tribe is composed of twenty-one divisions.
156. *Ibid.*
157. *Id.*, p. 4.
158. British Military Administration, cited above at note 10, p. 6.
159. Nadel, cited above at note 155, p. 5.
160. British Military Administration, cited above at note 10, p. 9.

Each of the Beni Amer sections is a "political unit," with chiefs and sub-chiefs. The whole tribe is under a paramount chief called *diglal*, whose office is hereditary.

The political system of both the Beni Amer and the Dankalia is based on the twin division of the social order into a "ruling aristocracy" and a serf class. In the Beni Amer, the rulers are called the *Nabtab*, and the serfs the *arabs* of the rulers; "...or they are referred to as the *ndessna* (those "who belong") of this or that Beni Amer section." [161] Among the Dankalia, the rulers are called *Assimara* ("red men") and the serfs, *Adoimara* ("white men").

Obviously, community leadership in both societies is in the hands of the ruling class, which, as we have seen, claims exclusive descent from Amer, in the case of the Beni Amer. The precise relationship of ruler and ruled in the Beni Amer deserves detailed treatment.

The serfs in the Beni Amer are not, as has been mentioned, considered children of Amer, but the private property of the master. They may thus be inherited as part of "... the hereditary estate ..." of a deceased,[162] or presented as birth gifts to a daughter on her birth of a grandson.[163] The male children of the serfs remain serfs, while the daughters pass on marriage to the masters of their husbands. However, serfs are *not* slaves, and, unlike slaves, cannot be sold.[164]

The serf owes the master a certain fixed, annual tribute,[165] and is expected to give presents when a child is born to the master. The master, in turn, is expected to protect the serf "like a father."[166] Thus, "the various cultural differences or distinctions of status erect no social barrier separating the lives of master and serfs. On the contrary, the dependence of the serf on his master's protection (now dying), and the dependence of the latter on the services of his serf, imply common living."[167]

B. Individual rights over land

Like every other pasturalist community, the majority of the Beni Amer and Dankalia, whose members own camels, goats, sheep and cattle, move within the traditional limits of their tribal land in search of grass.[168]

Master and serf are equally entitled to grazing grounds in the Beni Amer society. "The serf's grazing rights are full and absolute rights, derived from the tacit corporate title which the tribe or clan exercises over an area, and not from some primary property rights vested in the over-lords."[169]

On the contrary, only the rulers or serfs who have attained "autonomy" are entitled to a grazing ground among the Dankalia. "The serf may own herds, but

161. *Id.*, p. 7.
162. Nadel, cited above at note 155, p. 18.
163. *Ibid.*
164. *Ibid.*
165. *Id.*, p. 24.
166. *Id.*, p. 25.
167. *Id.*, p. 31.
168. Some of the Beni Amer lead a sedentary life. *Id.*, p. 4.
169. *Id.*, p. 32.

not the pasture on which to graze them. Landless and unfree, the serfs move with their masters and derive their claims to grazing lands from the submission to the ruling groups."[170] On moving into a new area, the serf must, therefore, obtain the permission of the rulers and "... submit, for the term of residence, to their political authority."[171]

It is obvious that in the two communities to which we have just referred, questions appropriate for sedentary communities—notably questions related to cultivable land, like inheritance, sale or transfer—do not arise.

It must be mentioned that in the Beni Amer, the concept of "collective grazing" appears not to be the mode of grazing. "Widely scattered and each intent upon its own varying needs of securing and holding vital grazing lands, the clans are not amenable to unitary command. Indeed *not even* the Beni Amer grazes its herd *collectively;* clan-sections and kinship groups may choose widely scattered pastures; even individual families and herdsmen move *independently*"[172] (Empasis added). Nadel mentions that, aside from war or marriage which brings the various clans together, the Beni Amer clans do not even know where others are.

Chapter III. Summary

Both the sedentary christian and pasturalist non-christian communities are organized on a class basis, based on race (as in the case of the pasturalists), religion (for instance, in the sedentary group), occupation (as in the case of the blacksmith and *meleket* players of the sedentary group) or descent (as in the case of the village land areas of the sedentary group).

Land rights exclusively belong to the privileged groups which by virtue of these rights also monopolise the administration of community affairs. The non-privileged group is at the mercy of the privileged group for whatever land rights the latter may generously extend to it.

In both types of community, land, the basic source of livelihood, is not a commodity considered *freely* disposable at the will of an individual who may happen to possess it. Land is treated as belonging to a tribe (among the Beni Amer, for instance), a family (among many of the community members of Serae, for instance), or a village (among many of the community members of Akkele Guzai, for instance).

In *resti* areas (used in contradiction to *tselmi),* a plot of cultivable land owned by an individual may be sold or transferred, provided that family members refuse to buy it or that they assent to its transfer. Shares of deceased members revert to the community and serve as a source for future allotments to "new" male members who have "inherited" the right to a share of family land.

In *tselmi* areas, plots of cultivable land are inheritable by the male and their male descendants generally. The rule regarding the disposal of cultivable land is the same as in the case of the disposal of *resti.*

170. British Military Administration, cited above at note 10, p. 23.
171. *Ibid.*
172. Nadel, cited above at note 155, p. 10. No similar explicit statement exists in the case of the Dankalia. It is fair, however, to conclude from the nature of their land rights that "exploitation" of grazing grounds is individual.

In *desa* areas, "establishment" and marriage entitle one to a plot of the village land. Absence from the village results in forfeiture of rights. The sale of a plot is excluded from the nature of the land rights.

In family and village land areas, members of a community are entitled to building sites, the free use of public wood and community grazing lands – the "other" property of the community.

A right to a grazing ground is heritable in the pasturalist communities[173] where problems associated with settled life do not arise.

Part II: The Civil Code on Agricultural Communities

"No law which is designed to define the rights 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 heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice. In preparing the Civil Code, the Codification Commission convened by us and whose work we have directed has constantly borne in mind the special requirements of our Empire and of our beloved subjects. . . ."

H.I.M. Haile Sellassie I, Preface,
The Civil Code of the Empire of Ethiopia

In this Part, we shall first examine the original draft on agricultural communities in order to set the stage for the following analysis of some of the difficult questions raised by the final draft.

Chapter I. The Original Draft

The original draft on agricultural communities[174] contained ninety-three provisions divided into five sections. It is useful to examine it under the following three headings.

A. Considerations underlying the draft

According to the drafter, a section of the Civil Code devoted to agricultural communities was a "necessity." "Si La propriété individuelle de la terre est règlé dans les parties les plus riches de l'Ethiopie, une part trés importante du territoire est en revanche exploité *selon la formule d'une propriété collective;* et ne peut sans doute (sic) étant données les circonstances, être exploite autrement."[175] (Emphasis added.)

As has been stated in the introduction to this article, two types of agricultural communities were envisaged by the draft. "Les unes existent entre des tribus nomades, non christianisés, qui vivent de l'élevage; les autres nisasent entre les habitants, chretins de village qui vivent l'agricultures. Malgré leur diversité, il nous est apparu que ces deux types de communautés agraires pouvaient être réglees dans un même chapitre, étant donné les dispositions que nous nous préposions d'insérer dans ce chapitre."[176]

173. The author cannot tell whèther such right may be transferred.
174. David, cited above at note 2.
175. David, cited above at note 2, p. 3.
176. *Ibid.*

These were the objectives of the draft: "... celle de *respecter l'autonomie* des communauté agraire existentes. A cette idée s'en ajoute une autre: le désir de clarifier les droits et obligations réciproques des membres de la communauté. Ajoutons encore une troisiéme idée: celle d'eliminer certains abus, en organisant un certain contrôle administratif des communauté agraire et de leur fonctionnement. On a, par ces trois idées, la clef de la réglementation proposée aux articles 1 à 93 du document C.Civ. 51".[177] (Emphasis added.)

It must, thus, be emphasised that the main aim of the draft was to preserve custom[178] with modifications in the interests of public order, and particularly the principles enshrined in the constitution.

A. Content of the draft

The first section of the draft, entitled "The charter of agricultural communities" (Articles 1-17), laid down the basic principles of "... exploitation selon un mode collectif,"[179] of land owned by an agricultural community.

The draft envisaged two kinds of charters. The first was a charter which must be drawn up by an assembly of the community upon the request of *any* member who has attained majority.[180] This request must be met within six months. The second kind of charter was that to be prepared by the Bureau of Agricultural Communities and supplied to an agricultural community on the decision of the governor of the province in which the community was found.[181] This was to be done where a community failed to draw up its own charter within six months after a member had requested the drawing up of one. The charter supplied by the Bureau could be amended by the community, but must enter into force one year after receipt.

The charter of each community was to specify the items listed under Article 1491 of the final draft.[182] Of particular interest here is Article 12 of the draft

177. *Ibid.*

178. This is not in conformity with the general view adopted by the drafter, as evidenced by the following statement. "While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structure completely, even to the way of life of her people. Consequently, Ethiopia does not expect the new code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a programme 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." R. David, "A Civil Code for Ethiopia: Considerations on the Codifiation of the Civil Law in African countries," *Tulane Law Review*, Vol. XXXVII (1963), p. 193.

179. David, cited above at note 2, Art. 1. We shall examine the phrase in detail in the next chapter.

180. David, cited above at note 2, Art. 3.

181. *Id.*, Art. 4.

182. "Article 1491. Contents of charter:
The charter shall specify in particular:
(a) the persons or families composing the community; and
(b) the land to which the rights of the community extend; and
(c) the manner in which the community is administered and its authorised representative; and
(d) the manner in which the land or other resources of the community are alloted and exploited; and
(e) the conditions on which the charter may be amended."

entitled "Mode of Exploitation and Measure of Collectivization." The draft required a charter to specify the manner in which land, "according to its nature," was exploited, the degree to which other community property was left for common use and the work of the members shared.[183]

Another interesting provision, entitled "common enjoyment of land", required the charter of a community to specify the manner in which property left for common enjoyment was exploited, and how and when products of and revenues from it were to be shared by the members of the community.[184]

Two items of this section omitted in the final draft of Article 1491 relate to the specifications of the conditions relative to the admission of new members and expulsion of old ones,[185] and the setting up of reserve land.[186]

In the absence of either type of charter, or where it was silent, uncertain, or contained provisions contrary to law on certain questions, then the draft provisions of Article 18ff. were to govern.

It must be noted, thus, that a charter was chosen as a device for clarifying the rights and duties of the members of an agricultural community, one of the objectives of the draft.[187]

Section II of the draft, entitled "Organs of the Communty" (Articles 18–36), constituted the assembly of the heads of families of a community, or their representatives (who must be of age and living with the heads concerned), as the "Supreme Organ" of the community.[188] On matters coming before the assembly, each member was to have one vote, irrespective of the number of persons living with him. That, however, was not mandatory. Thus, a charter might provide for the admission of all members above the age of fifteen and taking part in the "collective exploitation" into the assembly of the community. A charter or custom might, on the other hand, confer on a head of a family in the assembly of family heads, a vote corresponding to the number of persons living with him.

In this connection, "... certaines principes, d'ordre émpératif, qui se rattachent aux principes formulée par la constitution éthiopiénne"[189] were imposed. Thus, no one was to be discriminated against on the basis of race, religion or social condition;[190] no family was to be denied representation in the assembly of the community nor was its right to freely choose representatives to be restricted.[191]

183. The actual text is as follows. "La charte de la communaute preciseé la maniére dont les terres, selon leur nature, seront expoiltées, et la mesure dans laquelle d'autres biens, et le travail des membres de la communaute, seront mis en commun."

184. David, cited above at note 2, Art. 14. In the light of the draft, "Other resources of the Community" in Art. 1491(d) appears to mean nothing but uncultivated or uncultivable land (i.e. forests and pastures).

185. David, cited above at note 2, Art. 11.

186. *Id.*, Art. 15.

187. David, cited above at note 3, p. 3.

188. David, cited above at note 2, Art. 18-19.

189. David, cited above at note 3, p. 3. These principles are contained in Art. 37, 40, 47 and 48 of the Revised Constitution of Ethiopia.

190. David, cited above at note 2, Art. 21(2).

191. *Id.*, Art. 22(2).

As a general rule,[192] the Supreme Organ was to meet each year, at a specfied date or dates,[193] to consider these matters: modification of the charter;[194] admission of new members;[195] expulsion of old members;[196] designation, revocation and control of the managers of the community;[197] and union, secession and dissolution of communities.[198] Decisions were to be taken by simple majority[199] and could be attacked in court by every member where they were contrary to law or the charter of the community in question.[200] Where their annulment had been requested, a court could annul them or its president order the suspension of their execution.[201]

Section III of the draft (Articles 37–48) governs the rights and duties of the community vis-à-vis third parties.

The most interesting provision, and the one which holds the key to the nature of an agricultural community, is Article 37. Over the land and other property belonging to it, an agricultural community was to have, vis-à-vis third parties, the same rights and obligations as a private owner. However, it could not alienate, mortgage or enter a contract of antichresis on land belonging to it except with the authorisation of the Minister of Agriculture,[202] whose authorisation was also necessary where the community decided to put its land to a non-agricultural use.[203]

The most significant protection given to an agricultural community was against the acquisition of the ownership of its land by usucaption by a member or a stranger.[204]

As a "sujet de droit", a community was allowed to conclude contracts, sue or be sued through an intermediary.[205] It was to incur vicarious liability where its employees or managers incurred liability in the execution of functions incumbent upon them.[206] Liability was to be incurred for an act or omission. A community was also to be held liable for unjust enrichment resuting from the acts of its employees or managers.[207]

Primarily, thus, Section III of the draft was aimed at defending"....le patrimonie des communautés agraires contre les spéculateurs."[208] It was one of the sections where foreign experience was usefully considered. "Le Section III est la seule section dans

192. *Id.*, Art. 22(2). These are exceptions in case of urgency.
193. *Id.*, Art. 22(1).
194. *Id.*, Art. 23.
195. *Id.*, Art. 25.
196. *Id.*, Art. 27.
197. *Id.*, Art. 28.
198. *Id.*, Art. 31-33.
199. *Id.*, Art. 34.
200. *Id.*, Art. 35.
201. *Id.*, Art. 36.
202. *Id.*, Art. 38.
203. *Id.*, Art. 39.
204. *Id.*, Art. 40.
205. *Id.*, Art. 44. Cf. Art. 1494(1) of the Civil Code.
206. *Id.*, Art. 47(1).
207. *Id.*, Art. 47(2) and (3). Cfs. Art. 1494(3).
208. David, cited above at note 3, p. 4.

laquelle il a été jugé possible de tenir compte du code agraire de la Russie Sovietique de 1922 (lequel est à l'heure actuelle du reste, partiquement tombé en désuètude avec la development des kolkhols)."[209]

Section IV of the draft (Articles 49-82) dealt with the rights and obligations of the members of an agricultural community.

Every member of an agricultural community was entitled to a building site upon marriage or the attainment of legal majority.[210] This right was to last as long as membership in the community was retained.[211] A member was not to be deprived of a building site except in the cases and under the procedure laid down by the law on expropriation.[212]

Cultivable land belonging to a community might be broken into private allotments for the benefit of every member. It might, on the other hand, be commonly cultivated. Or, one "mode of exploitation" might be adopted for certain land, and another for other land. A member might be given a private allotment for a period of nine years (but not for less) or for such longer period as may be fixed by the assembly of the community.[213]

"Equality of treatment" of members was guaranteed by Article 56 and must be observed on every periodic allotment of cultivable land.[214] In determining the equivalence of lots, one was to take into account the quality, situation, importance of the lots and the nature and risk of the work which an exploitation or cultivation of the land might involve.[215] Depending on circumstances, a member might be given one or multiple lots.[216]

A member to whom ". . . .a private right of use and enjoyment..." had been given over community property might ". . . accomplish on (that) .... property all the material acts of use and enjoyment which are permitted to owners."[217] The member might, thus, incur liabilities which fall on owners.

A member was to be the absolute owner of whatever he had, through his own efforts, sown and harvested, except where he had agreed to contribute part of it (not to exceed one-third of the harvest) to the community gratuitously or for consideration.[218]

When the assembly of a community had decided to cultivate land in common ("culture en commun"), which it was free to do, it was obliged to specify the rights

209. *Ibid.*

210. David, cited above at note 2, Art. 51.

211. *Id.*, Art. 53(1).

212. *Id.*, Art. 53 (2). The right to a building site, governed by Art. 51-53 of the draft, is referred to as a "droit d'habitation" in the commentary. David, cited above at note 3, p. 4. Cf. Art. 1353 ff. of the Civil Code which deal with the right of occupation of premises (le droit d'habitation).

213. *Id.*, Art. 55.

214. *Id.*, Art. 56(2).

215. *Id.*, Art. 57.

216. *Id.*, Art. 59.

217. *Id.*, Art. 60.

218. *Id.*, Art. 62 and 63.

and duties of each member.[219] The assembly of the community must "...as far as possible, conciliate the interests of common exploitation with respect of the liberty of each (member)".[220] It must be emphasized that it was the assembly of an agricultural community which was to decide the mode of farming of its cultivable land.

The following was the procedure for sharing the common cultivation harvest. First, an amount of the harvest (not to exceed half) was to be attributed to the community for purposes of covering expenses incurred by the mode of cultivation (eg., expenses for buying tools) and accomplishing tasks falling on it (eg., paying salaries of managers).[221] The remaining amount was to be shared among the members who had taken part in the cultivation on the basis of a scale (barêmes), which evaluated individual work, or in its absence, the duration of individual work.[222] Where the community decided to sell part or the whole of the harvest, each member was entitled to his share of the proceeds.

The drafter states that in drafting the provisions on "common cultivation," he was inspired by the Russian kolkhoz rules.[223]

The last part of Section IV dealt with two questions. First, the rights and duties of members of an agricultural community on land *not* alloted to any one. The general rule was that everyone was entitled to the free use and enjoyment of such land.[224] Thus, subject to restrictions of custom, public regulations and those of the community, each member might graze his cattle on land destined for pasturage, and gather wood from forests or wooded areas.[225] The community might, on the other hand, claim a certain proportion (not to exceed a quarter) of the hide (cuir) of the animals grazing on its grounds.

The second question dealt with was the nature of the rights of members of an agricultural community over *all* community property. These were personal: they were conferred in the interest of the individual and the persons living with him,[226] and were inalienable and unattachable.[227] The rights of the deceased members devolved upon those who lived with them before their death.[228] Should none be found, these rights reverted to the community.[229]

Section V (Articles 85-93), the last section, dealt with the control of agricultural communities. It foresaw the establishment of a bureau of agricultural communities in the capital of every province. The bureau was to be connected with the provincial administartion. A Department of Agricultural Communities in the Ministry of

219. *Id.*, Art. 64 (1).
220. *Id.*, Art. 64 (3).
221. *Id.*, Art. 65.
222. *Id.*, Art. 67.
223. David, cited above at note 3, p. 3-5.
224. David, cited above at note 2, Art. 69.
225. *Id.*, Art. 70 and 71.
226. *Id.*, Art. 73.
227. *Id.*, Art. 74.
228. *Id.*, Art. 75 and 76.
229. *Id.*, Art. 77.

Agriculture was to act as a central organ in the direction and coordination of the activities of the various bureau[230]

The function of each bureau was to ascertain the existing agricultural communities in the province and assist them in the better exploitation of their resources,[231] in addition to seeing that they were provided with charters.[232] If in the period provided by the draft, the assembly of an agricultural community failed to draw a charter on the request of a member, or where the community requested a charter the bureau was to supply one, preferrably a model charter prepared by the Ministry of Agriculture.[233]

The bureaux were to exercise control over agricultural communities through the assemblies of the latter. To be able to send observers, every bureau was to be notified in advance of any assembly meeting.[234] Within the three months following a decision by its assembly, every community was to communicate this decision to the bureau if such communication was required by law.[235] The bureau was entitled to challenge in court any such decision which was contrary to law or regulations.[236]

Lastly, the Ministry of Agriculture was empowered to prescribe measures within the framework of existing law which it thought fit with a view to permitting the bureaux to exercise effective control over agricultural communities.[237]

B. Why was the draft rejected?[238]

The Codification Commission rejected the draft primarily because it felt that the draft gave the appearance of a sudden, complete break with the past, an appearance partly created by its detailed nature. It was felt that in particular the communities concerned might not be able to grasp the objectives of the draft and appreciate some of its innovative aspects. In this connection, one may point to the "assembly" and "equality" provisions of the draft which mark a drastic change in the decision-making techniques of the traditional communities. The idea of an assembly of community members deciding community affairs on a "one-man-one-vote" and "majority basis," or something similar, appeared alien to the customs and traditions of the communities concerned where important decisions are taken by a handful of elders on an informal, consensus basis. In short, thus, the draft appeared too sophisticated for the tastes of the communities to whom it was directed.[239]

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230. *Id.*, Art. 83.
231. *Id.*, Art. 84 (2).
232. *Id.*, Art. 86.
233. *Id.*, Art. 87 and 88.
234. *Id.*, Art. 89.
235. *Id.*, Art. 90.
236. *Id.*, Art. 91.
237. *Id.*, Art. 92. Art. 93 is a penalty provision. Directors who fail to communicate matters which ought to have been communicated to the bureaux under the draft were to be penally liable.
238. The author of this article has not been able to trace any documents which contain the reasons of the Codification Commission's rejection of the draft. The final draft has only the following introductory sentence: "The following text replaces C.Civ. 51." The first paragraph of this section is, therefore, based on information gathered through interview.
239. Interview with H.E. Afenegus Kitaw Yitateku. He was a member of the Codification Commission and the official responsible for the carrying of the Civil Code through its parliamentary stages. Nov. 13, 1967.

One may speculate on some of the other reasons.

The idea of establishing the bureaux envisaged by the draft in each of the provinces may have been considered expensive. The Government may not have been prepared in terms of the necessary skill and finance.

The sudden application of the draft provision, especially those in Sections II-V, may also have been feared in view of the fact that many of the communities concerned would have taken time to draw up their charters. This fear may have arisen from the fact that the draft departed from custom in important respects without providing sufficient time and notice for the transformation of the communities concerned.

It must be noted that the draft had been designed to accomplish two purposes. First, it was to supplement custom on certain questions and in this, the draft, as had been stated, was inspired by the Constitution. These supplementary rules were inderogable, and the charter of every community was to conform to them. Second, the draft was to serve as a temporary charter—a charter in transition—for communities which might not manage to draw up their own charters.

The present author submits that none of the above considerations warrant a rejection of the draft, and that in rejecting the draft, the Commission had not taken a wise course. Given the nature of the problems to be resolved, the draft could have been accepted with slight modifications. This conclusion is reached for two main reasons.

The first is based on the nature of the draft proposed. The draft was meant to be—and indeed was—a codification of certain leading customary laws. To a large extent, the customary laws of the communities which we examined in Part One of this paper provided the necessary background material. What the drafter did mainly was, therefore, to reduce those customary laws into proper, modern legal form. As has been stated, the draft had introduced changes in order to put custom in line with the Constitution. In this respect, the draft was not innovative. It simply purported to implement certain principles enshrined in the Constitution proclaimed approximately two years earlier.

It follows that as the draft was, to a large extent, an embodiment of certain customary rules, it would have been readily accepted in most of the sedentary communities concerned. It would also have been accepted in the pasturalist communities, which would have been affected by it only in a very limited number of cases. As the draft had a sedentary inspiration, most of its provisions would not have been applicable for resolving disputes particularly connected with a pasturalist mode of living. The provisions which appear relevant for such a mode of living (eg., the provisions on the regulation of grass) are not so repugnant as to be unacceptable by any pasturalist community.

Secondly, the draft contained devices precisely aimed at preparing the communities intended to be governed by it for their transformation into the "new" mode of living.

There is Article 6, for one, which gives every community a period of *six months* to prepare its charter should a member request one, which request, it is submitted, would not have come forth for many years from "faithful traditionalists."

Assuming a community managed to draw up its own charter, this charter was to enter into force after the lapse of a period "judged sufficient"[240] by it.

There is, for another, Article 4 which allows communities a period of *one year* to study the contents of a charter supplied by the Bureau of Agricultural Communities.

If these "briefing" periods were considered insufficient, the draft could have been amended to provide for longer periods.

It is further submitted that the question of resources should not have been a major consideration. After all, it was *not* essential for the workings of agricultural communities to set up the bureaux envisaged. The draft provisions were to govern should a community not have a charter either because it had not drawn one up or had not been supplied with one by the Bureau of Agricultural Communities. Thus, the draft provisions on the bureaux could have been eliminated and the draft accepted without fear, for the moment, of destroying a source of charters.[241]

That the draft was perhaps *not* fully appreciated by the Codification Commission appears from the extremely loose fashion in which the drafter uses his terms and their apparent conflict. For instance, Article 1 (corresponding to Article 1489 of the Code) would lead one to believe that Kolkoz-type farming on directives emanating from a central authority, is being introduced.[242] Then Article 54 provides for either "common cultivation" ("cultures en commun") or "individual cultivation" "(allotisements privatifs)" thus appearing to contradict the principle of Article 1. Perhaps, it is this uncertainty about the objectives of the draft brought about by the apparent conflict of its provisions that is really the reason for the Commission's rejection of the draft.

Whatever the reasons of the Commission in rejecting the draft, the consequences of accepting the final draft appear serious: without the original draft, it is very difficult to conceive of the situations governed by Articles 1489-1500.

With the passage of time and a better understanding of Article 1489 ff. by the communities concerned, however, it may one day be useful to resort to the draft, particularly as the draft can serve as a model of the charter envisaged by Articles 1490ff. It is, therefore, instructive to summarize its objectives.

Stripped of its "sophistication", the draft allows every agricultural community to reduce *its* customary rules concerning the rights and duties of its members into a charter. In doing this, it must observe certain mandatory provisions aimed at eliminating abusive and unjust rules–rules not in harmony with the progressive principles of the Constitution.

Should a community manage to draw up its charter (which, it is submitted, the sedentary communities we examined could easily do), then the rather bizarre

240. David, cited above at note 3, p. 4.

241. Another alternative could have been to accept the draft, but suspend its application for a period of time. Compare Art. 3363 of the Civil Code suspending the applications of title X of the Code on registration.

242. As we will see, this is *not* the meaning of the term "collective exploitation" in the final any more than in the original draft.

provisions of the draft, particularly those related to assemblies and common cultivation would, to a great extent, be irrelevant. Sections II-IV of the draft would be relevant *only* when a charter was uncertain, silent or contained provisions contrary to law on certain questions.

Where a community failed to draw up its own charter, the draft is to serve as a temporary charter.

A community which decides to cultivate its land in common is free to do so.[243] No community is required to cultivate its land in common. On the contrary, a community may break up its cultivable land into plots for exclusive, individual cultivation.

Lastly, in the better exploitation of its resources a community is to be assisted by a guardian of "the public interest"— the Bureau of Agricultural Communities. This bureau is charged, in particular, with the duty of ensuring that agricultural communities are provided with charters.

Chapter II. The Final Draft

A. The setting

The provisions of the Civil Code on agricultural communities, Articles 1489-1500, appear in Book III, Title XI, on Collective Exploitation of Property. The chapter on agricultural communities is preceeded by a chapter on public domain and expropriation, and followed by two other variations of "collective exploitation": official association of landowners, and town-planning areas, entitled chapters 3 and 4 respectively. These are the four chapters of Title XI of the Code.

B. The juridical nature of "communal ownership" under the Code

The little that has been written on the nature of "communal ownership" of land under the Code is marked by confusion and imprecision. Technical terms used by the Code in a precise manner to describe a precise legal situation have been indiscriminately used to describe "communal" ownership.

We shall first briefly examine the nature of individual and joint ownership under the code,[244] and then turn to the question of the juridical nature of "communal" ownership. Article 1204 of the code, entitled "definition," defines ownerships as the widest right that may be had on a corporeal thing. Although Article 1204, thus, fails to provide us with a measure of ownership, Article 1205 does describe it in terms of the powers inherent in an owner: the power to use property and exploit it as the owner thinks fit, and the power to dispose of the property gratuitously or for consideration, which powers are subsequently subjected to restrictions.[245] Generally speaking, therefore, the code confers on individual owners the traditional tripartite powers which property owners enjoy, i. e. *usus*, *fructus* and *abusus*.

Now, the code also recognises another form of ownership, joint ownership, where the principle is the joint ownership of a thing by several persons.[246] Joint

243. This is clearly aimed at creating an environment conducive to the development of cooperative farming.
244. Civ. C., Book III, Titles VII and VIII respectively.
245. Cf. Civ. C., Art. 1205, 1225 and 1410ff. in particular.
246. Civ. C., Art. 1257(1).

ownership of a temporary and of a perpetual nature are envisaged. The former finds its source in the *free will* of parties [247]which may be absent in the latter.[248]

A temporary or a perpetual joint owner is entitled to the free use of *the thing* in accordance with the use to which it has been destined. A joint owner may claim a share of the fruits of the thing.[249] In the disposal, mortgaging or changing of the destination of the thing, the temporary joint owner has a veto power,[250] which power in case of disposal is denied the perpetual joint owners because of the nature of the arrangement.

An important characterstic of joint ownership of which ever type is that the owners own the *whole thing:* the shares of each on the thing are invisible "...(Le) droit de propriété de chacun (des propriétaires) .... est remené à une fraction arthimethique, à une quote-part, ½ ⅓ ¼, etc. Mais cette quote-part *ne* saurait être *localisée materiellement sur* tel ou tel segment de *la chose:* elle porte sur la totalité et sur chaque atome du bien."[251] (Emphasis added). Thus, the Code[252] speaks of the shares of the individual joint-owners conceived of as abstract concepts permeating through each and every "atom" of the thing jointly owned.

It is necessary to stress the fact that under the Code, the tripartite powers granted to individual owners over a thing are *shared* by joint owners over *the same thing,* the object of their ownership. The Code even requires joint owners to "administer" their thing jointly, "acting together."[253]

That the Code does not include within the purview of joint ownership the situation of tribal, familial or village land of the type examined in Part One must be obvious as the Code does not reflect the kind of rights which exist there.

We have seen that in the tribal, familial or village land areas, an individual occupies a specific, geographic unit of land over which the individual exercises an exclusive right of use and enjoyment. The individual may cultivate his land, or use his unit of grazing ground as he thinks fit; no other individual of the same family may use *that* unit of land without the permission of the holder of rights over it.

The principles of joint ownership envisaged by the Code are, therefore, absent in the village and family land areas notably because of the physical division of the object of ownership among members and the subsequent exclusive use of rights accorded them over their plots.

Even the exercise of the power of disposal of land by "a family" is radically different from that of the temporary joint owners. We have seen that an individual possessing a piece of family land may dispose of it, provided his family members so agree. This proviso, however, amounts to simply vesting in family members a

247. Implicit in Civ. C., Art. 1258.
248. Civ. C., Art. 1276-1277.
249. Civ. C., Art. 1263.
250. Civ. C., Art. 1266.
251. J. Carbonnier, *Droit Civil Tom II - Les Biens et les Obligations* (1956), pp. 88-89.
252. Civ. C., Art. 1259, 1260.
253. Civ. C., Art. 1265.

right of first refusal. Thus, should they be unwilling or unable (as is generally the case) to prevent the passage of a plot into the hands of a stranger (for instance, by buying the plot), the individual wishing to sell his plot is free to do so. Thus, family members have only a limited power over the disposal of any part of the sum total of plots belonging to their family.

This situation is clearly different from the case of joint ownership under the Code in that the disposal of a thing jointly owned requires *unanimous* consent.[254] In other words, a thing jointly owned may not be disposed of if one joint owner does not assent to its disposal.

The similarity of joint owners and possessors of tribal and family land may be reduced to this: the power of disposal of a "thing" is limited in both cases. It is submitted that there is no other similarity between the two.

The question of the juridical nature of "communal ownership" under the Code is not, therefore, answered by the provisions of the Code governing joint ownership. It is answered by the provisions of the Code specifically devoted to "village" and "tribal land", Articles 1489-1500. These provisions treat family, tribal or village land as the individual property of a corporate entity called an agricultural community. This entity is "a family" in the case of family land, a "village" in the case of village land, and a "tribe" in the case of tribal land. It is, therefore, no longer accurate to describe the ownership of family, village or tribal land as "communal"[255] or "joint" ownership.[256] Any doubt is dispelled by Articles 1287 (2) the purpose of which is to distinguish between and eliminate confusion of ownership by an agricultural community (and by an official association of owners) and joint ownership.

It must be mentioned though that the list of agricultural communities underf Article 1489 is not exhaustive, but rather is illustrative of the communities envisaged. The term "village" refers to the village system, also as is supported by the corresponding Amharic term, *desa*. The term "tribe" refers to the tribal land areas of the pasturalists we examined in Part One. "Tribe" does not, therefore, include the family land system.

The family land system is covered by Articles 1489-1500 for two reasons. Land owned by a family, which may consist of hundreds of persons, is analogous to land owned by a village or tribe because it exhibits the essential feature of an agricultural

254. Civ. Code Art. 1266.

255. It has been said of the "communal land tenure" that it is "... communal ownership of land which means that a given plot of land is owned by a family, tribe or a village." Seifu Tekle Mariam, cited above at note 104, p. 33. This definition appears vague.

256. Nebiyelul Kifle and others, *Land Tenure Systems in Ethiopia and Analysis of the Reform's Undertaken* (1966, unpublished, not available), p. 9. In this work, family members are said to be "perpetual joint owners" of their land. One obvious defect of this description is that the term "perpetual joint ownership" is given a meaning quite unintended by the code. Cf. Art. 1276. The drafter illustrates perpetual joint ownership by the ownership of wells, pits, roads and sepulcher where it is in accordance with the nature of these to be held in joint ownership and their division is impossible. R. David, *Commentaire du Titre: de la Copropriété, De l'usufruit et Des autres Droits Reels (C. Civ.* 43), *C. Civ.* 45 (1956, unpublished) (not available), p. 1. Other commentators have stated that in those situations, family members have only use rights over their plot of land. Lawrence and Mann, cited above at note 52, p. 315. It must be noted that it is inaccurate to use the term "usufructuary" to describe the rights of villagers over village land and family members over family land. Note the characterstic features of usufruct in Art. 1309(1) and 1322 of the Code in particular.

community — ownership of land by a community. Secondly, the drafter states that the draft on agricultural communities was intended to apply to the "village" communities of Tigre and Eritrea[257] where the "village" and "family" land systems exist side by side.

Family land is, therefore, covered by Articles 1489-1500.

One last point needs to be mentioned. The text of Article 1168 (1), making provisions for "jointly owned" family land, is apparently in conflict with Articles 1489-1500. However, this is simply due to a mistranslation of the text originally drafted in Amharic, which text does not contain the words "jointly owned" as understood under the section of the Code on joint ownership.[258] Article 1168 must, therefore, be read in the light of the specfiic provisions of Articles 1489ff which also govern family land and which do not recognize the joint ownership of family land.

C. Corporate nature of agricultural communities

What then is the corporate nature of agricultural communities, families, tribes and villages, the new owners of land under Articles 1489-1500? Are they "private" or "public persons"?

As M. David points out, "... [en] parlant de 'personnes' dans ce cas, on veut seulement dire que l'aptitude à être sujet de droit ou d'obligations est reconnue dans d'autres cas que celui des personnes physique. ..."[259] One must bear in mind that these "artificial" persons do not possess all the rights and obligations of physical persons. They have only those "bundle" of rights and duties necessary for their nature and the purposes they are intended to fulfil.[260]

This question of the corporate nature of an agricultural community calls for an examination of the rights accorded to and obligations imposed on agricultural communities, and a brief discussion of the nature of "private" and "public" bodies corporate under the Code.[261]

Foremost among the rights of an agricultural community is that against usucaption,[262] which we will examine later in some detail.

The creditors of an agricultural community may not attach its immovable property without the permission of the Minister of Interior.[263] Such permission must also be obtained where the creditors wish to attach a movable property belonging to the community which is necessary for the exploitation of land or the main-

257. David, cited above at note 3, p. 3.

258. The original draft contained no proviso comparable to that of Art. 1168(1). See Girma Sellasie Araya, cited above at note 89, p. 24.

259. R. David, *Exposé des motifs et commentaire du titre: Personnes Morales et des Patrimones d'Affectation. (Document C. Civ. 36), (Document C. Civ. 37)* (1956, unpublished) (not available), p. 4.

260. *Ibid.*

261. Civ. C., Art. 394-403, and 404ff., respectively.

262. Civ. C., Art. 1495(1).

263. Civ. C., Art. 1495(2) read in conjunction with Art. 1495(1).

tainance of the members of the community.[264] Creditors of the members, on the other hand, have no right over community property: movable or immovable.[265]

The most significant limit on the powers of an agricultural community is that under Article 1493(2). In order for a community to validly alienate or mortgage its land or charge it with antichresis, it must have the permission of the Minister of Interior. The significance of this provision which severely restricts the powers of disposal of the owners of land must be noted. This provision prohibits agricultural communities from alienating their land (gratuitously or for consideration) *even* to their *own* members unless permission has been obtained from the Ministry of Interior. In as much as no limits appear on the powers of the Ministry to deny such permission, the wishes of an agricultural community may, in some cases, be made subservient to the wishes of the Ministry. It is not inconceivable that the application of Article 1493(2) may in some cases result in forcing communities to continue to own land which they may not want.

Among the duties of the Ministry of Interior, those in connection with the charters of agricultural communities appear significant. The Ministry is to endeavour to ensure that every agricultural community draws up a charter detailing its custom, and where necessary, provisions to supplement its custom.[266] Once such a charter is drawn up, the Ministry is to endeavour to obtain the revision of the charter in order to ensure, among other things, the economic progress of the community concerned.[267]

In short, therefore, the Code has created a corporate entity called an agricultural community, conferred rights and imposed obligations on it, and charged an arm of the executive branch of the Ethiopian Government with its "protection".

From what we have seen, agricultural communities appear to lack the essential characteristic of associations – the free will to form a grouping between persons and by the same persons.[268] Agricultural communities, as we have seen, have been created and imposed on their members by law.

Unlike an association,[269] therefore, an agricultural community may not be deprived of its "personality" and the rights consequential thereto by a decision of its members, a decision which is clearly beyond the powers of the latter, because they cannot deprive their community of rights which they had not conferred on it.

Does it follow then that agricultural communities are public bodies corporate?

One objection to the view that agricultural communities are public bodies corporate may be based on the section of the Code on public bodies corporate,[270] which does not mention agricultural communities. However, as the drafter points out,[271] that section of the code was not intended to be an exhaustive list of all public bodies corporate.

264. *A contrario* from C. Civ., Art. 1495(1).
265. C. Civ., Art. 1495(3).
266. Civ. C., Art. 1490.
267. Civ. C., Art. 1498(1).
268. Civ. C., Art. 404.
269. Civ. C., Art. 459 and 460.
270. Civ. C., Art. 394ff.
271. David, cited above at note 256, p. 4.

The wording of Articles 394ff., and particularly Article 397, clearly conveys what the drafter had sought to accomplish in that respect.

A body corporate not expressly granted public personality under Articles 394-396 may, therefore, be considered as a public "person", provided it is a public administrative authority, office or establishment *and* such personality has been expressly given to it by administrative laws.[272]

An examination of Articles 394-397 (leaving aside the Church to which public personality has been granted under Article 398) reveals two important characteristics of the type of bodies contemplated by the lawmaker.

First, these bodies are subdivisions of the State or arms of the executive branch of the Ethiopian Government or bodies which carry out a public function — bodies, in other words, connected with the State or Government.

Second, public personality is expressly conferred on a corporate entity. The whole thrust of Articles 394ff., and particularly Article 397, would not warrant the conclusion that public personality may be impliedly conferred on an entity.

Measured against the two characterstics of public bodies corporate we just noted, agricultural communities are not public bodies corporate.

They are neither one of the territorial sub-divisions of the state specifically mentioned under Article 395, nor ministries under Article 396. They are not public administrative authorities or offices under Article 397.

It might be asked whether agricultural communities are public "establishments", a term which is in a state of flux even in French law[273] to which one is obliged to turn in the absence of the necessary legislative material.[274] However, in France it is agreed that whatever the precise contents of the term "public establishments," they carry out some kind of a public function in the general interest of the community.[275]

Agricultural communities do *not* carry out any public function. They have simply been created as a more progressive arrangement for the exploitation of purely private resources. They have been created as a modern version of ownership of private land traditionally owned by "families" "tribes" and "villages".

Even if we assume that agricultural communities are "public establishments" within the meaning of Article 397, they are not public bodies corporate because no such personality has been expressly granted to them by administrative laws.

It appears, therefore, that agricultural communities are neither private nor public bodies corporate. They are groupings *sui generis* governed by specific pro-

272. Civ. C., Art. 397.

273. Compare A. Martin-Pannetier, *Elèments d'Analyse Comparative des Etablissements Publics en droit Francais et en droit Anglais* (1966), pp. 2-23, devoted to an examination of the meaning of the term "public establishments," and A. de Laubadere, *Traite Elèmentaire de Droit Administratif* (1963), pp. 159-167.

274. The drafter has not commented upon the meaning of the term "public establishments" in his commentary. David, cited above at note 256.

275. Martin-Pannetier, cited above at note 273, p. 23.

visions of the Civil Code which confers on them, among other rights, the right to own land and to be represented in contractual arrangements and lawsuits.

As bodies *sui generis*, agricultural communities are protected against usucaption[276], defined in Article 1168(1) as the acquisition of the ownership of an immovable through possession and payment of taxes for fifteen years. Although there is no textual support even in the Amharic version of the Code, it has been held in a number of cases that the proviso of Article 1168(1) only prevents the usucaption of family land by a family member, and *not* the usucaption of family land by a stranger which is permissible.[277]

It is submitted that this view is inaccurate. If the proviso of Article 1168(1) is interpreted as allowing a stranger to usucape family land, Article 1168(1) would clearly contradict Article 1493(1) whose sweeping provisions exclude both family members and strangers from usucaping family, tribal or village land. This interpretation of Article 1168(1) is in conflict with the spirit and purpose of the chapter of the Code on agricultural communities where the ownership of the land in question has been vested in an abstract entity specifically protected against usucaption by both strangers and family members.[278]

It is further submitted that the correct view in the light of Article 1493(1) is that the proviso of Article 1168(1) complements Article 1493(1) by excluding the usucaption of family land by members or strangers, as its *words* do not draw a distinction between members and strangers.

It might be argued that the proviso of Article 1168(1) derogates from the general rule of Article 1493 where family land is involved, and that, therefore, the two provisions do not contradict if the former is interpreted as allowing the usucaption of family land by a stranger.

This argument, however, is *not* a valid argument. In order to argue that there is a "general rule-specific rule" relationship between Articles 1493(1) and 1168(1) respectively, one has to show that although the two provisions govern the same situation, there is a conflict between their application – the application of the one leading to one result, and the application of the other to another result. This is not possible because, as has been stated, there is *no* textual support for the view that Article 1168(1) *only* presents the usucaption of family land by a family member. Read "literally," the proviso in Article 1168(1) prevents the usucaption of family land by both strangers and family members. Therefore, there is no textual conflict between Articles 1168(1) and 1493(1).[279]

Reading into the proviso of Article 1168(1) the "family members" limitation and allowing a stranger to usucape family land would contradict a traditional rule

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276. Civ. C., Art. 1493(1).

277. See, for instance, Tefera Sebhat and Eskia Sebhat V. Bahata Tesfaye et. al., (Sup. Imp. Ct., 1957), *J. Eth. L.*, vol. 2, p. 202.

278. The reader may be reminded here that the original draft *specifically* excluded the usucaption of the land of an agricultural community by members and strangers. David, cited above at note 2, Art. 40. The omission of such an express exclusion in the final draft is not significant in view of the fact that the original draft of Art. 1168 had no proviso for the exclusion of the usucaption of family land.

279. The conflict really is between what had been intended and what is conveyed by the plain words of the proviso of Art. 1168(1).

of interpreting laws: *Ubi lex non distinguit nec nos distinguinus* ("... no distinction must be drawn where the law draws none. ...").[280] The law does not draw a distinction between strangers and family members as far as the usucaption of family land under Article 1168(1) is concerned. We must, therefore, conclude that both are excluded from usucaping family land under Article 1168(1).

D. The principles of "collective" and "individual" exploitation of land

We shall now examine the meaning of the apparently contradictory provisions of Articles 1489, 1491(d), 1496 and 1497, concerning the "mode of exploitation" of land.

It is useful to start out with a definition of the term "exploitation collective" which, given the original draft and the practices of the traditional communities we examined, could *not* have been the meaning intended by the Code.

The French term "exploitation collective" has the following meaning in a recent UN report:[281]

"Collective farming *(exploitation collective)*:

"The farming of a single holding by a group drawn from several domestic units, *no individual family* having any permanent *rights* to, or responsibility for, the farminal (sic) unit of *any* particular *parcel of land* making up the jointly farmed surface, and where the relationship between those with *management* and those with *manual functions* is not one of supply of employment but where *individual rewards* depend *solely* on the *quality or quantity* of *labour contributed*." (Emphasis added).

That this could not have been the meaning of the French term "exploitation collective" under the Code appears from the simple fact that the Code treats public domain, expropriation, association of owners (where collective or individual ownership may exist over land cultivated by the associates) and town-planning areas as "modes" of "exploitation collective" of property[282] (of immovable property, in the Amharic version). These "modes" by no stretch of imagination fit the definition of the term "exploitation collective" reproduced above.

That the English term "collective exploitation" under Article 1489 does *not* mean collective farming, or even the more realistic farming by an extended family "... under the direction of its head..."[283], found in tropical Africa, appears from the apparent contradiction of Article 1489 with Articles 1491(d) 1496 and 1497.

In the original draft, the key terms in this connection are "exploited in a collective fashion" (exploité selon un mode collectif),[284] "common use and enjoyment"

280. Planiol et Ripert, cited above.

281. FAO, ILO and UN, *Progress in Land Reform: Fourth Report* (1966), p. 166.

282. Civ. C., Art. 1447ff. Note, in particular, the title "collective Exploitation of property," Title IX, under which Art. 1444ff. are found.

283. FAO and UN, *African Agricultural Development: Reflections on the Major Lines of Advance and the Barriers to Progress* (1966), p. 49.

284. David, cited above at note 2, Art. 1.

(usage et jouissance en commun),[285] private allotment for the members (allotisements privatifs au bénéfice des membres),[286] and "common cultivation" (cultures en commun).[287]

The first term, used very loosely, designates whatever rights and duties individuals have over *all* community land., i.e. over cultivable land, forests pastures and building sites. More precisely, whatever rights the members of a community have on its land as members of a "collectivity" is described by the loose term "collective exploitation."

The second term, "common use and enjoyment," designates the rights individuals have over non-cultivable land.

"Private allotment" and "common cultivation" are used exclusively to describe the mode of farming. "Common cultivation" thus refers to farming under the central direction of the assembly of the community, the opposite of which is the cultivation of a private allotment by an individual (no shorter term being used by the drafter).

Thus, the term "collective exploitation" under Article 1489 does not refer to the manner of farming, but is used as a short-hand for describing the rights individuals have over all community land.

On the other hand, the alternatives of the "manner" of exploitation of the land contemplated under Article 1491(d) are partly spelled out in Articles 1496 and 1497. In connection with cultivable land, these alternatives appear to be none other than "common" or "individual", as is evident from Article 1497(1).

Thus, where the "mode of exploitation" is common cultivation, the custom or the charter of the community must specify that fact and the rights of the members on *all* the land of the community, including grazing grounds and forests.[288]

Where, on the other hand, "individual cultivation" is adopted, the custom or the charter of the community must specify that fact,[289] in addition to specifying the rights of the members on all the land of the community and the time and conditions on which decisions alloting parcels of land to members may be revised.[290] This last specification is, therefore, not necessary where the mode of farming is collective.

It must be noted that, given the history of Articles 1489-1500 and particularly the practice of *not* allocating parcels of grazing ground or wooded land in the communities we examined, the "manner" of exploitation of land under Article 1491(d), partly spelled out in Articles 1496 and 1497, is the manner of farming - not, for instance, the manner of using grazing land. Article 1491(d) would, therefore, appear to cover both cultivable and non-cultivable land, and in connection with the latter

285. *Id.*, Art. 69 (for instance).
286. *Id.*, Art. 54 (for instance).
287. *Id.*, Art. 64 (bearing this title).
288. Civ. C., Art. 1497(1), (2).
289. Civ. C., Art. 1497(1).
290. Civ. C., Art. 1497(3).

to contemplate such limitations as may be imposed on the member's grazing rights over community land.[291] Articles 1496 and 1497 would then appear to be specified applications of Article 1491(d) primarily regarding the mode of cultivation.

E. Organization and control of agricultural communities

In this section, we shall examine what the Code has done regarding the organization of agricultural communities, and their control once they have drawn up their own charters.

For the moment, the organization of these communities is at the mercy of the vagaries of custom and tradition. Agricultural communities are *not* required by the Code to draw up their charters specifying, among other things, the persons responsible for their "administration" (in the widest sense of the term).[292] The Ministry of Interior, as we have seen, is to endeavour[293] to get these communities to draw up their charter, and once this is done, to ensure its revision in view of the economic progress of the community and "... the implementation of the principles of justice and morality enshrined in the Ethiopian Constitution." [294]

Regarding the "representatives" of agricultural communities[295] to whom we have alluded earlier, one must admit their limited role and significance in the foreseeable future in the communities we examined. This is true even if one assumes that many of them will manage to draw up their own charter. The reason is that the "representative" provisions were primarily intended to govern cases of "common cultivation" where rights accrue to, or obligations are incurred for a community – a distinct entity responsible for and owner of farms. Unless communities, therefore, adopt collective farming, the provisions of the Code on the representatives of such communities may serve no useful purpose where the occasion for incurring obligations or acquiring rights for a corporate entity does not exist.

Where a community has decided to farm its land collectively and has appointed representatives for the purpose of achieving its objectives, then it is held vicariously liable for its representatives when two conditions are satisfied: that the representatives have acted or failed to act in the execution of functions incumbent on them and have incurred liability.[296] The community is likewise liable for unjust enrichment, also resulting from the acts of its agents, although it does not make any difference whether the community was enriched as a result of an act of an agent outside the scope of his powers.

If the organization of agricultural communities is, for the present, left for the vagaries of custom, their control is not. The Code provides for various devices aimed at controlling these communities.

291. Such was the "mode" of exploiting non-cultivable land envisaged by the draft. David, cited above at note 2, Art. 70 and 71 (for instance).

292. We have seen the kind of "administrators" contemplated by Art. 1491(c) in Part I of this paper.

293. Ato Haile Michael Kebede had, last year, inquired of officials in the Ministry of Interior to see what has been done. Nothing has been done so far. Haile Michael Kebede, *The Impact of Land Tenure on Land Usage in Ethiopia* (1966, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 107, Note 111.

294. Civ. C., Art. 1498(1). The high-sounding phrases appear merely a declaration of policy.

295. Civ. C., Art. 1491(c) and 1494.

296. Civ. C., Art. 457, by reference from Art. 1494(3).

First, the Ministry of Interior, in an endeavour to get communities to draw up their charter, may suggest and "realise" reforms in custom before it is reduced to writing in the charter. As the drafter points out, "[la charte de la communauté agraire] ... est commode aussi pour suggerer, et realiser, les reformes jugées utiles par [le Ministére de l'Interieur]."[297] It must be noted, thus, that the influence of the Ministry will be felt mostly on the "supplementary provisions to give effect ..." to the custom to be reduced to writing. These "supplementary provisions" are a necessity to fill gaps in custom-gaps inevitable in view of problems arising from a rapidly increasing population and desirable alternative adjustments originating in the rapid dissemination of ideas. The "supplementary provisions" many not only relate to land rights, but to the very community structure, to the running of affairs on a regularised basis in tune with the demands and philosophies of the time.

The influence of the Ministry of Interior could, thus, be tremendous in virtue of the position it occupies as the "legal advisor" of agricultural communities in the drawing up and amendment of their charters.

Another control provided for by the Code is in the nature of a limit on the powers of agricultural communities. Ministerial permission is necessary in order for a community to dispose of or mortgage its land, or charge it with anti-chresis.[298] Such permission must also be obtained where the creditors of a community wish to attach its immovable property, in particular.[299]

A third type of control is exercised over agricultural communities through the appeal provisions of Articles 1499 and 1500. The latter, although entitled "public order" appears to simply be a continuation of Article 1499. Under Article 1499, the public prosecutor is made a kind of overseer of "community interest." Being near agricultural communities in the running of their day-to-day affairs, the public prosecutor is for the moment in a much better position than the Ministry of Interior to exercise control over them.

It must be noted that a member of an agricultural community, an obviously interested party, may exercise "private control" over his community through his right of appeal under the law.[300] As is implicit in Article 1500, this individual right of appeal against community decisions, whether made by "the community"[301] or its representatives,[302] may be restricted by the custom or the charter of the community. However, what is or is not a permissible restriction of the individual right of appeal is difficult to conceive of in the abstract, as is a decision taken by the representatives of the community "... in violation of fundamental rules of procedure [and] ... justice."[303] These are best answered on a case-by-case basis in the Courts which must pay particular attention, not only to a decision in dispute, but also the circumstances surrounding it.

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297. David, cited above at note 3, p. 3.
298. Civ. C., 1493(2).
299. Civ. C., Art., Art. 1495.
300. Civ. C., Art. 1499.
301. Civ. C., Art. 1499(1).
302. Civ. C., Art. 1499(2).
303. *Ibid.*

Of all the controls provided for by the Code, the appeal control, and particularly that by a private individual under Article 1499 (1), is the control that is, for the moment, of any practical significance. It is doubtful whether, in view of the volume of other cases strictly within the jurisdiction of the offices of public prosecutors, the public prosecutor will lodge an appeal against decisions of a community where the members thereof, who may exercise the same right, have abstained from taking steps against their execution. It must be noted that the Code does not impose a positive duty on prosecutors to exercise their right of appeal under Article 1499.

Where a member lodges an appeal against a community decision under Article 1499 (1), he must allege and be prepared to prove that the decision violates the Ethiopian Constitution or the mandatory provisions of the Code or other Ethiopian laws. Proof of a violation of a consititutional provision is relatively easier than proof of a violation of a mandatory provision of the Code or other laws since the appellant has to first of all show that the law involved is a *mandatory* law.

In the case of *Woizero Wellete Selassie Gebre Medhin v. Balambaras Gebre Kidan Abraha*,[304] the Supreme Court briefly described the rights accorded to members of an agricultural community under Article 1489-1500. It stated that a suit against an agricultural community instituted by its member must be based on the appeal provision of Article 1499. The appeal was rejected on the ground that the appellant did not rely on Article 1499.[305] Implicit in the court's judgment is that Article 1492 is one of the mandatory provisions of the Civil Code the violation of which gives rise to a right of appeal under Article 1499 (1). Thus, where a community decides to deny shares of land to some of its members on the grounds that they are adherents of a different religious faith, this decision is contrary to Article 1492 which forbids custom or the charter of the community from creating discrimination between members based on religion. This, according to the Supreme Court, gives rise to a right of appeal under Article 1499 (1).

This reading of Article 1492 is a rather strained reading, because in cases falling under Article 1499 (1), Article 1492 can be relevant only where the decision in question has been included as a provision of the charter drawn up or to be drawn up under Articles 1490ff.

The significance of the sweeping provisions of Article 1492 cannot be overestimated. It is clearly aimed at destroying the social set-up of the two groups of communities we examined in Part One - a social set-up in complete disharmony with the progressive principles of the Revised Constitution.

304. *Woizero Wellete Sellasie Gebre Medhin V. Balambaras Gebre Kidan Abraha* (Sup. Imp. Ct., 1959, Civ. App. No. 1031-59) (unpublished).

305. The same result was reached in *Aregawie Naizgie V. Arega Menkir* (Sup. Imp. Ct., 1959, 1959, Civ. App. No. 111-59) (unpublished). The reasoning in this and the preceding case is almost identical.
Through the generous permission of the President of the Supreme Court, H.E. Afenegus Kitaw Yitateku, the present author had been allowed to examine Supreme Court files. Having gone through the files of 1958 and 1959, he was able to trace three cases in which Art. 1489-1500 are mentioned. The reasoning of the Court in the three cases has been summarised above. The third case is not cited simply because in that case the Court reiterates the reasoning contained in the two other cases.

Thus, by virtue of Article 1492, custom or a charter drawn up detailing such custom, may no longer exclude the non-privileged group from being considered "the persons" or "families" comprising an agricultural community in question.[306] This group may no longer be excluded from "administering" community affairs or as acting as representatives of the community, both regularised under Article 1491 (c).

More important, however, the "manner" of allocating cultivable community land may no longer be race, religion or social condition.[307] It must be mentioned, though, that the "manner" of allocating land, also contemplated, is the manner of drawing lots that precedes the distribution of land in some family, and all village land areas.

Article 1492 is, thus, progressive and guarantees equality of treatment to a group heretofore denied basic rights over the major and indeed the sole means of livelihood in the traditional communities examined in Part One.

Part III: Conclusion and Recommendations

"It is essential that the law be clear and intelligible to each and every citizen of Our Empire, so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life...."

H.I.M. Haile Sellassie I, Preface, *The Civil Code of the Empire of Ethiopia*. p. vii.

Conclusion

The provisions of Articles 1489ff. vest the ownership of land traditionally owned by communities such as a family, village or tribe and described notably as "communal" in a corporate entity called an agricultural community. This community is either a family, village or a tribe and is given rights and duties of its own—rights and duties independent of those of its members.

The term "communal ownership" as a description of the ownership of family, village and tribal land is, therefore, out-of-date under the Code.

Agricultural communities are not private associations because they have not been created and given certain rights of personality by their own members, an essential characteristic feature of private associations. On the other extreme, agricultural communities, although created and imposed on their members by law, are not public "persons" because they carry out no public function, and no such "personality" has been expressly conferred on them by law.

Agricultural communities are, therefore, bodies *suis generis*. In as much as they are creations of the law, they may not be "dissolved" and consequently deprived of their rights of personality by their members.

In order to minimize uncertainties in custom and tradition which regulate the rights and duties of members of the traditional family, village and tribal land, the Code allows these members to draw up their own charters in which their rights and obligations are to be specified. In particular certain items, listed under Article

306. Art. 1491(a) in conjunction with Art. 1492.
307. Art. 1491(d) in conjunction with Art. 1492.

1491, must be specified in the charters and the provisions of Article 1492 observed during their drawing up.

However, in view of the fact that many of the communities concerned may not manage to draw up their charter in the foreseeable future, particularly in the absence of an organ to goad them, the Code, through the provisions of Article 1492, aims at minimizing abuses in custom—abuses particularly connected with the management of the everyday affairs of communities.

Although in the absence of a charter which an agricultural community may draw up we do not know what the organization of such communities may look like, the Code ensures that at least the race, religion or social condition of an individual will not be considered as a factor disqualifying him from taking part in the administration of the affairs of his community. In this respect, the Code is innovative.

Two modes of farming are envisaged by the Code, collective and individual. An agricultural community may adopt whichever mode it thinks fit, but must in its charter specify among other things, the mode it has adopted. Most of the rights accorded to agricultural communities, for instance, under Articles 1494-1495 (1), appear phrased particularly to facilitate collective farming.

Basically two types of controls are imposed on agricultural communities. The first is in the nature of a limitation on the powers of agricultural communities (Articles 1493 (2), 1495 (1), 1498 (2) and 1500). The second type is exerted through the appeal provisions of Article 1499. Of these controls, the individual right of appeal is the most effective at this point in time.

It must be noted that until such a time as charters will be drawn up by agricultural communities and they start "normal" operations under the Code, one cannot say whether the Code arrangement is, in economic terms, the best, given what appear to be two contradictory concerns of the legislator: economic progress of agricultural communities and preservation of their customs and traditions.

The significance of Articles 1489-1500 for present purposes lies in their removing of vast stretches of land in the Empire from the ordinary application of the Civil Code. Although in this article we examined only the communities of Eritrea in order to illustrate the kind of communities contemplated by the legislator, it must be emphasized that the so-called family land system which exists in Begemedir, Gojjam, Shewa (Shoa) and Wello is also governed by Articles 1489-1500. In those areas also, Articles 1489ff. vest the ownership of the land in question in abstract entities called agricultural communities.

Recommendations

The provisions of the Civil Code on agricultural communities in their present form make little sense to a good many people, particularly to people called upon in their day-to-day application. Indeed this guess may be hazarded: the Ministry of Interior may not have so far endeavoured to get even the more progressive agricultural communities of the sedentary group which have detailed codified customary rules to reduce these into a charter simply because it may not have fully appreciated the meaning and purposes of Articles 1489-1500.[308]

308. Or, it may simply lack the necessary finance and personnel.

The present author has taken the liberty to present the reader with much extra-legal material in an attempt to clarify what the Code sought to accomplish, and what it has accomplished. This material may, however, not be readily available to everyone, even if one assumed that it could be read, understood and profitably used. The author must admit that he relied very little on the Amharic version of the Code, which is exactly as ambiguous as the English and gives one the impression that cooperative type farming is being introduced.

In view of the inherent difficulties, the author would recommend an amendment of the Code provisions on agricultural communities. The specific measures for the attainment of this objective are listed below.

1. The Ministry of Interior must take the initiative to have the Code amended and to transfer its duties to the Ministry best fit to carry them out under present governmental arrangement.

2. In view of the fact that the Ethiopian Government has chosen the Ministry of Land Reform and Administration to carry out a land reform programme,[309] agricultural communities are best entrusted to it. The Code in its amended form should therefore, substitute this ministry for the Ministry of Interior for the carrying out of the duties now contained in Articles 1490 and 1498.

3. The Ministry of Land Reform is the appropriate Ministry to carry out the duties now imposed on the Ministry of Interior because agricultural communities have been created by the legislator as a measure of a land reform, a purely transitional measure to facilitate the evolution of some kind of individual ownership.

4. Although, as we have seen in Part One, great disandvantages are said to exist in the traditional "communal tenure" systems, the Code's choice must carefully be understood by the Ministry of Land Reform, the recommended "care-taker" of agricultural communities. In this respect, particular attention should be paid to the *exposé des motifs* of the drafter to avoid not only a duplication, but also a contradiction of policies regarding other more desirable arrangements.

5. There is one innovation of the Code concerning agricultural communities upon which the Ministry of Land Reform could capitalize in order to fulfil its duties of ensuring the establishment and maintenance of registers of immovable property.[310] We have seen that the ownership of traditional family, village and tribal land is vested in abstract entities, which could now be easily registered as owners. Thus, the Ministry may simply register the names of the family, village and tribal land and leave the problem of who is a member of such communities entitled to land rights to the communities themselves. The names of the members of such communities is, therefore, irrelevant for the purpose of registering their land.

6. It is the avowed aim of the Government in its Second Five Year Plan[311] to make land tenure uniform in the Empire. The direction in this respect is towards

309. Ministers (Definition of Powers) (Amendment No. 2) Order, 1966, Art. 18, Order No. 46, *Neg. Gaz.*, year 25, no. 23.

310. *Id.*, Art. 18(f).

311. Imperial Ethiopian Government, *Second Five Year Development Plan* (1955-1959) *E.C.*) 1963-1967 *G.C.)*, 1962, pp. 326-329. Compare Lawrence and Mann, cited above at note 52, p. 315.

individual tenure, which we have seen is the most prevalent form of tenure. Given, then, that "communal tenure" will be transformed into individual tenure and the Code's choice as a first step to vest the ownership of the land in question in an "individual" abstract entity, the Ministry of Land Reform, the organ in charge of land reform, must take the following steps concerning agricultural communities.

7. It must endeavor to induce agricultural communities to draw up their own charter. Unless this is done, the steps taken by the Code will remain ineffective for a long period of time.

8. The Ministry could profitably use M. David's invaluable draft as a model charter which it could easily reproduce and distribute in the areas governed by Articles 1489ff.

9. The distribution of this "model charter" is *mainly* for the purpose of informing the communities concerned as to their "new" mode of living, and *particularly* to provide a concrete example of *a* kind of charter which they may draw up.

10. Once this distribution is carried out and the communities concerned sufficiently "briefed," they could either be asked to draw up a similar charter, a difficult undertaking, or to select persons who could represent them in the drawing up of their charters in cooperation with the Ministry of Land Reform, perhaps an expensive process.

11. The amendment of the Code must, in other respects, be governed by two major consideration: the classification of the concepts used and a re-introduction of some provisions of the earlier draft.

12. Among other things, the one offending word in Article 1489 likely to be, and to have been, a source of confusion and uncertainty, "collectively", may be eliminated without fear of destroying anything. Article 1489 may, thus, read. "Land ... shall be exploited in accordance with custom and tradition." That, indeed, was the intention of the legislator.

13. In view of the fact that the purpose of Article 1490 may not be realised in the foreseeable future, even under the dedicated guidance of the Ministry of Land Reform, some of the provisions of the earlier draft may be re-introduced to supply flesh to the skeleton provisions of the Code.

14. In this respect, the provisions on the assembly of family heads, among other things, may be re-introduced leaving the quorum and the formal decision-adopting techniques to the communities concerned which, given their background, would certainly wish to operate on a much more informal basis. The provision on "collective farming" may fruitfully be introduced to offer alternatives as to how land may be cultivated, thus perhaps laying the foundations for the evolution of a kind of cooperative farming, the technique most likely to promote economic productivity in view of the relatively less generous natural endowments of the northern communities, at least.

15. The Code, under its amended version, may require agricultural communities to draw up their charters. This, it is suggested, may be used only if no other measure can be used because it is likely to breed disrespect for the law as the Code will definitely remain a dead letter for many of the communities concerned.

It is submitted that the above measures must and can be undertaken right away.

APPENDIX

A. Excerpts from the Original Draft

In order to enable the reader to see Articles 1489-1500 in the light of the original draft, we shall present below the relevant provisions together with their section headings. The English translation of the original French text is by the present author.

"Section I. The charter of Agricultural Communities

Art. 1. Existence of an agricultural Community

[The text is identical with Article 1489 of the final draft]

The charter of the agricultural community shall contain indications proper to identify the community to which it applies.

Art. 7. Members of the Community

(1) All persons, without distinction of sex or age, who have their habitual residence on land belonging to a community and who live principally by the exploitation of such land shall be considered as the members of the agricultural community.

(2) A person does not lose this quality of membership in a community where being instructed or for the service of the Ethiopian state provisionally fixes his residence in another place.

(3) All agreements contrary to the provisions of this Article shall be null.

Art. 8. Identification of land

The charter of the community shall specify the organs of the community, and in particular, the manner of composition of the assembly of the community, the date and conditions under which it is convoked.

Art. 12 Mode of exploitation and measure of collectivisation

The charter of the community shall specify the manner in which land according to its nature [les terres selon leur nature], will be exploited, and the degree to which property, and the work of the members will be shared.

Art. 13. Private allotment of land

The charter shall fix the basis and duration of allotments of land for the private enjoyment of members.

Art. 14. Common enjoyment of land

The charter shall equally fix the manner in which property left for common enjoyment shall be exploited, and the time and manner for the division of common products [produits] or revenues.

Section II. The Organs of the Community

Art. 21. Prohibited derogations

(1) All rules which create a discrimination between the members of the community based on race, religion or social condition [sociale] of members shall be null.

(2) Similarly, all rules which lead to the deprivation of a family of all representation in the assembly, or which restrict its rights to freely choose its representatives among the members of the community shall be null.

(3) All rules which permit members of the community to be represented by a stranger, or which allow strangers to take part in the votes of the assembly of the community shall be null.

Art. 35. Recourse against a decision of the assembly

(1) All members of a community may, not withstanding agreements to the contrary, attack in court all the decisions of the assembly where they are not in conformity with or violate the law or the charter.

Art. 38. Alienation and mortgage

(1) The community may not alienate, mortgage or give antichresis on land belonging to it except with the authorisation of the Minister of Agriculture.

Art. 40. Usucaption

(1) A member of the community or a stranger may not usucape land belonging to an agricultural community.

Art. 44. Contracts and lawsuits

(1) An agricultural community may conclude contracts [contrats] through the intermediary of its representatives.

(2) It may, through the intermediary of its representatives, sue or be sued.

Art. 47. Responsibility of the Community

(1) An agricultural community is responsible for the acts and omissions of its administrators [gérants] and employees when these acts or omissions were committed in the execution of functions incumbent upon the administrators or employees, and they have incurred liability.

(2) The community is similarly held liable where it is unjustly enriched.

(3) The provisions of the title *Other Sources of Obligation* shall apply to such cases.

Art. 48. Creditors of a Community or of its members

(1) The creditors of an agricultural community may seize [saisir] the movabls property of the community which is not indispensable for the exploitation of ite land or the maintenance of its members.

(2) They may not seize other property except with the authorisation of the Minister of Agriculture.

(3) Creditors of the members of the community have no right over the property of the community.

Section IV. Rights and obligations of the members of the Community

Art. 49. Role of the assembly

(1) The assembly of the community shall fix the mode of exploitation of land belonging to the community.

Art. 54. Right of exploitation of cultivable land

(1) Arable land may be divided into private allotment for the benefit of members of the community.

(2) It may, on the other hand, be cultivated in common.

Art. 61. Directions concerning cultivation

(1) The assembly of an agricultural community may ... decide the mode of cultivation to be followed.

(2) A beneficiary of a lot shall be held to cultivate it conformably to the directives which he has thus received.

Art. 64. Common Cultivation. 1 Principle

(1) When land is to be cultivated in common, the assembly of a community shall fix the obligations of each member in that which concerns the cultivation.

Section V. Control of an agricultural Community

[No provisions appear to have been taken from this section]

B. Discrepancies between the various versions of the Code.

Art. 1489.

The Amharic version contains a term which is absent in both the English and French versions. The term is given in parenthesis, and is "desh", Amharic for *desa* or *shehena*, the village land system. Thus, Article 1489 in Amharic starts out as "Land owned Collectively (desh) such as ...." It is odd that the term "village land" is also used.

Note the sense of both the Amharic and French versions: land shall be exploited collectively if it *appears to conform* to the custom and tradition of the community concerned.

Art. 1490

The Amharic and French versions are not as strongly worded as the English; "... shall take steps to ensure" is an erroneous translation of "... s'efforcer d'obtenir ...", "... shall endeavour to obtain ...."

Art. 1490

(c) "Authorised representative" must read "the organs qualified to represent." Note that although the wording of Subarticle(d) in all versions gives the impression that "other resources" means resources other than land, what is really meant, as we have seen, is resources other than cultivable land.

Art. 1492

The Amharic for "social condition" may be translated as "social status", perhaps better conveying what the drafter had in mind.

Art. 1493

(2) The requirement of a "written permission" is absent in the two other versions of the Code.

Art. 1494

(1) "authorised representative" is a mis-translation of "intermediary of its organs."

Art. 1495

Note that this article has a Subarticle (3) contained in the corrigenda, p. 583 of the Code.

(2) The "written permission" requirement is absent in the other versions.

Art. 1496

The Amharic version for the first time uses a term which gives correct indications of the "land" contemplated under this provision. The term is "development" of land, always used in connection with cultivable land.

Art. 1497

(1) The French for "exploited collectively" is "framed in common". The Amharic is vague.

(2) Note the French "diverse lands" (diverses terres) indicating that what is contemplated is *all* community land.

Art. 1498

(1) The two other versions do not impose a positive duty on the Ministry of Agriculture. The words used are "to endeavour to obtain" (s'efforcer d'obtenir).

(2) Note that "some usages" is a translation of "some of these [customs]". The first "custom" must be in the plural.

Art. 1499

In the French original, unlike the Amharic and English versions, the relationship of Articles 1499 and 1500 is one of principle and specific application, and are entitled "1. Principle" and "2. Public Order" respectively.

Article 1500 must be entitled "Recourse to the courts".

(2) The requirements of the latter part of this Sub-article are cumulative. "Or justice" should read "and justice".

Art. 1500

Note that this article appears to indicate who the "interested party" is under Article 1499. This party seems to be none other than a member of an agricultural community.

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