

Sometimes the Law is ‘a Ass’

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It is interesting that religion and law have so much in common. To a large extent, both are dogmatic. You shall ... lest you be condemned to hell or to jail.

Sometimes they insist on blind faith – certainly the one more than the other. But they both do. Blessed are those who believe without seeing is perhaps the biggest challenge most believers are confronted with. Law has its counterparts- we call them presumptions or legal fictions.

The latter are often cruder than the religious dogma because it is easier to believe what you don't see than to believe the contrary of what you see. It was this apparent anomaly that impelled one of the not-much-literate characters of Charles Dickens to pronounce a candid indictment: sometimes the law is a ass, a idiot.

Religion, however, has one superior virtue over law-the dogma is preached far and wide. The pulpit is important. In law it is not. Law takes the lazy way out- it presumes knowledge regardless of consequence.

In the 1950's and 60's, Ethiopia imported a massive body of essentially European laws. The environment into which these ‘modern’ laws were introduced could not have been less conducive. Whatever its status today, Ethiopia then was an almost entirely rural country with an overwhelmingly illiterate population that is dipped in traditions- the traditions of dozens of ethnic groups. There were only a handful of trained lawyers in the entire country and legal institutions were largely manned by feudal personages and church educated civil servants. Modern means of transportation and communication were, at best, in their infancy.

It is probably hazardous to ponder what rationale underpinned the decision to import European laws- obviously laden with European values- into such an environment. Did the western advisors and the recipient local elite believe that European values were superior to those of Africans (as were their muskets and quinine)? Were they

convinced that African values would ultimately and inexorably evolve toward the European (thereby anticipating globalization) and that they should hasten the process?

One thing was certain- all parties concerned must have earnestly believed that, when it comes to Africans, law must serve as a vehicle of modernization. But Westerners then, as now, believed that laws should gradually and deliberately evolve from and reflect local values. Why the double standard?

With a stroke of a pen, the Civil Code of 1960 repealed all customary rules in conflict with any of its provisions covered a lot of ground. Many of these rules were hundreds of years old and were deeply imbedded in the psyche of the people.

Earlier in 1957, a brand new Penal Code had come into force and every peasant and nomad in the country was immediately presumed to know every word of its content. Article 78 boldly proclaimed that ignorance of the law is no defense. One would be tempted to cry out loud- but this really is not true! Most people of this country are not only illiterate but they have little means of getting to know about these alien laws!

Even so, for decades millions of Ethiopians remained totally oblivious of this daring decision made in Addis Ababa. Most people carried on with their lives as if nothing had changed. That, however, did not mean that all of them escaped its radical effects. I do not know of any study that could shed light on the effect this presumption had, and is still having, on the Ethiopian people. How many lost their property for not complying with some technical requirement of the law of contracts? How many went to jail or to the gallows for doing things their forefathers did and for which they were admired and honored by everyone in the tribe? We may never know.

Why am I beating on a dead horse? After all, this presumption is almost universally accepted and no substitute is in sight. For all one knows, it's here to stay. But I am concerned because while we continue to copy laws en masse from other countries and presume that every Ethiopian gains knowledge of them automatically, we are not doing enough to mitigate the negative effects of that presumption on innocent people. We have become adept at copying laws so much so that drafting has become equated with coping. We copy constitutions as well as simple regulations and everything in between.

The problem gained sharper focus recently when the country revised its Criminal Code. Among other things, it incorporated new provisions that sought to obliterate centuries-old traditions and practices. Prominent among them were a number that

criminalized female circumcision (FC). (Call it FGM- female genital mutilation- if you are inclined to emphasize the horridness of the act). FC has long been an accepted practice that millions of Ethiopians believed necessary and even honorable. To many, it was ordained by the holy books. Overnight, however, what was long perceived respectable became an offense. The Revised Criminal Code proclaimed:

Whoever circumcises a woman of any age, is punishable with simple imprisonment of not less than three months, or fine not less than five hundred Birr. (Art. 565)

A parent or any other person who participates in the commission of one of the crimes specified in this Chapter, is punishable with simple imprisonment not exceeding three months or fine not exceeding five hundred Birr.(Art. 569)

Of course, the millions of people who until the previous evening believed FC was the farthest thing from constituting a criminal act would, as of the very day of the enactment of the law, know otherwise. This is so not because anyone made an extraordinary effort to inform them about the change but because the law said so. The Revised Criminal Code has, in fact, reinforced the presumption contained in its predecessor. The current provision (Art. 81) reads: Ignorance or mistake of law is no defense.

But it's partly gratifying that the legislature was conscious of the radical nature of the measure that criminalized FC and its potential to harm a large number of innocent people. The ignorance of the parties who committed the crime could constitute a mitigating factor and judges may not even impose any penalty. As considerate as that is, it does not change the fact that the accused would, in all likelihood, spend the rest of their lives as convicts. Given the size of the population that practices FC, and the number of people who may participate in a single ceremony, (it may involve not only parents but also members of the extended family and neighbors) we run the danger of turning ourselves into a nation of convicts.

My own appreciation of the problem was heightened recently when I was on a training mission in one of the regions. Two young men, a judge and a prosecutor, shared with me their perplexity. "Where we work", they told me, "the entire community believes in circumcising girls and the practice goes on every day under our very noses. Should we prosecute all these people?"

The foremost purpose of the Ethiopian Criminal Code is the “prevention of crimes by giving due notice of the crimes and penalties prescribed by law.” (Art.1). It is only where this fails that punishment is resorted to. Thus notification (publicity) and prevention of crime should precede any other measure.

Accordingly, it should be underscored that the presumption that burdens the citizen with knowledge of the law also imposes a concomitant duty on the government- the duty to notify, to inform and to educate the public every time it enacts a new piece of legislation. It is my submission that this duty has been neglected far too long with perhaps dire consequences.

Ignorance of (the law) will not excuse the offender. It is the duty of the subject to know it, and knowing, to obey it. The existence of the implication and duty, demands the correlative obligation of government, to publish its requirements. Men cannot be required to know that which is unrevealed, or to obey that which is unannounced. They cannot be punished but for sinning with knowledge, or with the means of knowledge. History has immortalized the shame of the ancient lawgiver, whose edicts were only published upon the city walls, high above the observation of the people. If ever a.... citizen shall be condemned under an unknown law, history will be true to her trust, and perpetuate the memory and condemnation of the prodigious wrong.¹

True, Federal laws are published in the national gazette which is available to the public from a single sales office in Addis Ababa. Not surprisingly, its circulation is miniscule and it appears that litigants looking for a specific law and government agencies are its principal customers. Hence, the gazette’s role in informing the general public is negligible, at best. In view of its inadequacy, for the majority of Ethiopians the situation is comparable to the ancient practice of posting edicts upon the city walls, too high for people to read them. Both may meet the formal requirement of the law but they fail to serve the real and important purpose of informing the public.

Over a decade ago, nine regional States acquired law-making power. While decentralization of legislative authority does, to some degree, increase the publicity of new legislation (at least, through word of mouth), it is disappointing that all of the States have yet to devise an effective mechanism through which they could disseminate news of laws they enact.

The mass media has rarely owned the responsibility of regularly informing the public about legislative measures taken by the Federal and State governments. Its occasional forays into the subject are haphazard and selective.¹

It should also be recognized that the more the new law seeks to overturn a longstanding custom or practice and the larger the segment of the population that is illiterate, the greater the need for a concerted effort to inform, and inform in a manner comprehensible to the general public. The purpose of legal presumptions is not to condemn the innocent but to deprive the dishonest and the crafty of an all-purpose defense the State may not be able to surmount. "The citizen cannot be entrapped into crime. He must be notified of the demand of society ... before obedience can be exacted and disobedience punished."²

Let me urge in the same tone that we put the horse before the cart. Let us educate before we criminalize; let us inform before we punish. If we fail in doing this, one of two things occurs; either the law becomes impossible of application and remains dead on the books or we zealously impute criminality to many with no criminal intent whatsoever. Both would be wrong.

Female circumcision offends me as much as it offends the next person. But so does the conviction of a mother without any criminal intent.²

¹William A Beach, quoted in *Manual of Forensic Quotations*, by Leon Mead, P. 125

² *Ibid*, p. 125