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## JOURNAL OF ETHIOPIAN LAW

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1982

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Law Faculty Staff (1982)
The following are the staff members of the Faculty of Law of Addis Ababa University established in 1963 which offers courses leading to the LL.B Degree , and Diploma in Law.

| Daniel Haile; | LL.B, LL.M, Assistant Professor, |
| :--- | :--- |
|  | Dean |
| Efrem Yemaneberhan; | LL.B, Lecturer, Assistant Dean |
| Andargachew Teruneh; | LL.B, LL.M, Lecturer |
| Belayneh Seyoum; | LL.B,LL.M, Lecturer, (on study leave) |
| Fasil Nahum; | LL.B,LL.M. J.S.D., Associate Professor |
| Girma Woldeselassie; | LL.B,LL.M, J.S.D., Assistant Professor |
| Horst Kellner; | LL.B,LL.M, LL.D. Visiting Professor |
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| Michael Herman; | LL.M, LL.D, Visiting Professor |
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| Solomon Jiru; | LL.B, LL.M, Lecturer (on study leave) |
| Worku Tefara; | LL.B, LL.M, Assistant Professor |
| Yittayih Zelalem; | LL.B, Lecturer (on study leave) |
| Yoseph Gebre Egziabher; | LL.B, Assistant Professor |
| Zekarias Keneaa; | LL.B, Assistant Lecturer |

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# Addis Ababa Universily Faculty of law 

Annual Report from the Dean 1980-81 (1973 Ethiopian Calendar) by DANIEL HAILE

Assistant Professor and Dean, Faculty of Law.
This academic year, the year in which we celebrated the 30th anniversary of University education in Ethiopia, has been quite a remarkable one. Not only have we, as a University, come of age by celebrating our 30th anniversary, but we have taken decisive steps to ameliorate the academic standards by reverting to some of the better methods of our old educational system. Thus, in the Faculty of Law, the duration of legal studies has been increased by one additional year, which will certainly enable us to produce more competent and mature lawyers.

The brief report hereunder gives the basic facts about staff and students, and highlights of major activities in terms of research, curriculum review, and efforts to form an alumni association, and concludes by pointing out some of our major needs and problems.

## 1. Students

At the opening of the school year 1980-81 there enrolled in the Law Faculty 214 students in our regular degree programme and 176 students in our evening diploma programme.
The breakdown of students by year and academic status is shown in the table hereunder.

Students Enrolment in the LL.B. Programme of the taculty of Law,
Academic vear 1980-81
Semester One

| Enrolment |  |  |  |  |  |  |
| :--- | :---: | :---: | :---: | :---: | :---: | :---: |
| Warning | Probation | Dismissal | Drop-outs | Withdrawal |  |  |
| Law | 78 | 7 | 7 |  | 2 | 3 |
| Law II | 84 | 24 | 4 | 4 | 3 | 1 |
| Law III | 43 | 14 | 1 |  |  |  |
| Law IV | 9 |  |  |  |  |  |
|  | 214 | 45 | 12 | 4 | 5 | 4 |


| Semester Two |  |  |  |  |  |  |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: |
| Enrolment |  | Warning | Probation | Dismissal | Drop-out Withdrawal |  |
| Law I | 73 | 2 | 5 | 2 | 1 |  |
| Law II | 84 | 8 | 9 | 4 | 1 | 2 |
| Law IIf | 45 |  | 1 |  |  |  |
| Law IV | 8 |  |  |  | 1 | 1 |
|  | 210 | 10 | 45 | 6 | 3 | 3 |

## Evening Diploma Programme

During the academic year 1980-81, the diploma programme ran at full capacity. In the 1st semester we had 101 first year students, and 75 in the second year.

At the close of the academic year 7 students were granted LL.B. degrees and 61 were granted diplomas.

The academic performance of many LL.B. students during the 1st semester was not quite satisfactory, and as a result the faculty was compelled to start a system whereby students who were placed on warning and probation were assigned faculty advisors. Every faculty member was assigned three or four students in need of advice, and from the performance of these students during the 2nd semester we are convinced that the advisory system has been quite successful.

Another way by which the faculty has attempted to ameliorate the standard of students is by re-introducing the summer reading programme, in which students are assigned to read chosen material, upon which they are examined at the beginning of the academic year.

Finally, the faculty is in the process of beginning a trust fund to be known as the George Krzeczunowicz Fund, to enable it to give an award to the best law student every year. This will hopefully create and stimulate an atmosphere for attaining academic excellence.

## II. Staff

## A. LL.B. Programme

Our Teaching staff this year was composed of 14 members, of whom 11 were Ethiopians and 3 were expatriates. At the beginning of this year Professor G. Krzeczunowicz retired after 29 years of distinguished service to the Faculty

Also at the end of this year the contracts of the two expatriate staff. Dr. Henryk Leszczyna and Dr. Z. Galicki, expired. The two expatriates who had been seconded to us from Warsaw University, Poland, had been active members of our faculty for the past three years, and we are confident that this exemplary relationship between the Faculty of Law of Warsaw University and our Faculty will be enhanced and developed in the future.

Furthermore, in accordance with our staff development plan, two of our Ethiopian staff, Ato Belayneh Seyoum and Ato Solomon Jiru, were sent abroad for further training. Ato Belayneh went to MCGill University, Canada, and Ato Solomon went to Columbia University, U.S.A.

The arduous task of replacing these highly competent staff members started quite early, and we are glad to report that the efforts of the Faculty were generously rewarded by its ability to attract first-rate scholars. As of the beginning of the coming academic year, Dr. Michael Herman from the Peoples. Republic of Poland, Dr. Horst Kelner from the German Democratic Republic, Ato Mesfin Ghebre Hiwot and Ato Zekarias Kennea will be joining thd Faculty.

The teaching staff has been engaged in many academic and administrative duties, indicating not only the contribution of individual teachers but also the variety of functions that the Law School is involved in.

In addition, in order to keep each staff member abreast of his area of specialization and to assist us in discussing recent developments, we have this year started what we call "faculty seminars'.. This year.s seminars were limited only to senior students and staff, but we hope that in the future we shall expand them to include our alumni, who have expressed keen interest in the seminars. During the past academic year the following lectures and seminars were conducted.

1. "Problems of Development of Socialist Democracy", by Dr. Alexander Popov of Moscow State University.
2. "The Idea of Equality in the Marxist Theory of State'., by Dr. Henryk Lesczyna of our Faculty.
3. "Legitimation of Modern States in Africa", by Dr. Heinrich Scholer of the University of Munich.
4. "Products liability", by Professor G. Krzeczunowicz.

## B. Evening Diploma Programme

It has always been the policy of the Law Faculty to integrate, as much as possible, Continuing Education in Law with the day programme. One way this has been done was by arranging for the daytime instructors to participate in the evening teaching. Hence, of the 14 instructors that have been teaching in the 1st and 2nd semesters, only 2 have been recruited from outside the Law Faculty teaching staff. Almost invariably the instructors have been allocated to teach the same course in the evening as they teach in the day programme. Also, in pursuance of University regulations, no instructor has been allocated more than one subject at one time in the evening programme.

## III. Curriculum Review

Since review of the curriculum is an ongoing process, the concern of the Faculty in general and of the Academic Standards and Curriculum Committee in
particular was focused on this major item. Even though the major task of composing and submitting the new five-year LL.B. curriculum was completed during the academic year 1979-80, the Committee was then faced with the task of applying this programme to students who were already in the pipeline. Its recommendation that students who were in Law Ill (University 4th year) should graduate at the end of the 1 st semester of the academic year 1981-82 was approved by the Academic Commission of the Faculty and the University Curriculum and Standards Comomitte.

In addition to the task of applying the five-year LL.B. programme, the Committee scrutinized the question of academic standards. In this regard it recom-* mended the following provisions:
(a) Introduction of summer reading
(b) Division of classes into smaller sections
(c) Emphasis to be put on practical experience, and
(d) The adoption of standard course content.

The recommendations which were submitted at the end of the academic year will be fully implemented during the coming academic year, 1981-82.

Another point which the Committee discussed is the question of examination scrutiny by the Academic Commission. The Academic Commission has been reviewing all exams before they are given, and it is felt that a balance between its powers and the independence of the instructor has become quite essential. The Committee has submitted its recommendation, which will be discussed by the Academic Commission.

## IV. Research and Publications

The research and publication activities of the Faculty are being revived, and since not all of its former projects have become fully operative, due to staff shortage in the Faculty, we have been discussing as to how best to revive them, in the hope that our staff will increase.

## A. On-going Research Projects

## (i) Journal of Eth:opian Law

As the Faculty's oldest on-going project the Journal of Ethiopian Law was revived about two years ago. Volume XI, No. 1, came out in 1980, and this year the faculty has been working on the production of Journa/ of Ethiopian Law Vol. XI. No. 2. We hope that this issue will appear in print during the first quarter of the coming a cademic year, 1981-82.

## (ii) Consolidated Law of Ethiopia

This project was revived last academic year and we are in the process of preparing the second Supplement to Consolidated Law of Ethiopia, expected to come out by July 1982.

## (iii) African Law Digest

The last issue of this publication appeared in 1974. The Faculty has repeatedly resolved to revive its publication in a number of meetings; however, because of our failure to secure the services of a multilingual expert, we have not been able to secure its revival. We hope that this and other problems will be resolved during the first half of the coming " academic year, and that we can recommence publication of the Digest.

## B. Individual Research Project

In addition to the above on-going Faculty projects, all staff were engaged in individual research, culminating in the production of articles for the Journal and teaching material.

Noteworthy amongst these projects is the manuscript on the formation of contracts prepared by Professor George Krzeczunowicz. Professor Krzeczunowicz completed and submitted his commentary on the formation of contracts to the Faculty early this year. The work was evaluated both by an internal and external assessor and was found to be publishable. The commentary, along with the evaluations, has been submitted to the Research and Publications Office of the University for its final decision.

The business side of our research and publication efforts are not praiseworthy. The only outlet for our publications remains the University Book Shop (Addis Bookshop) in Arat Kilo Campus. Unless we adopt a system whereby our publications can be made available to the public by giving commission to other bookshops, our operation will remain a futile exercise; and unless our publications are made available to the public, our operation cannot be self-sustaining, far less profitable. While we recognize that we have had problems in the past with this end of our operations, a workable procedure must be worked out, whereby not only the profitality of our operation is ensured but our main goal of educating the members of the legal profession can be attained.

## V. Library and Documentation

Library holdings continued to grow this year at a fairly substential rate. Large gift of books, from the Government of the Federal Republic of Germany and from the International Red Cross, have augmented our library collection. The list hereunder shows the augmentations of the library during the period 1 August 1980 to 31 August 1981.
New additions by title ..... 130
Matenals received as gifts, by volume ..... 170Current periodical atitles onsubscription by title76
Current periodical titles on exchange, by title ..... 25
Current periodical titles received as gifts, by title ..... 20

In terms of service, not only has the population served by the library increased, but also the frequency of use has shown rapid growth. The library has served a student population of 390 , a teaching staff of 16 , and technical and administrative staff of 21 persons. Moreover, it has served the students, the teaching and non-teaching staff of other departments of the University, external readers and members of the legal profession.

## VI. Alumni

Many attempts to form a Law Alumni Association have been made in the past, and one of the most important developments during this academic year was the laying of the cornerstone for the Law School Alumni Association. A draft constitution was prepared by a drafting committee composed of Ato Haile Kebede (Attorney), Ato Girma Asfaw (Legal Department of the Ministry of Justice), Ato Mekbib Tsegaw (Supreme Court Judge), Ato Yoseph Gebre Egziabher (Assistant Professor, Faculty of Law) and Ato Zerabruk Aberra (Chief Legal Adviser, HVA).

The draft constitution was discussed and reviewed by the coordinating committee, composed of representatives from each class, and the Memorandum of Association is currently being redrafted. It is hoped that the Association will become operative by the beginning of the coming academic year.

## VII. Needs and Problems

## Physical Plant

In terms of students and activities, the Faculty of Law has been expanding at great speed; however, it is still bound in the same premises where it was founded. The main building and the others scattered around it are not only becoming noticeably too small for its activities, but also, because of age and'or lack of maintenance, they are becoming hazardous to work in. It is, in my opinion, high time to start thinking of building a satisfactory construction for housing the Faculty of Law.

## Links with the Outside World

The Faculty's high standards and reputation were in the first instance a result of cross-breeding of ideas and heavy financial assistance from several foreign institutions. Our former links have been severely cut, and not much has been done to create new relationships with other institutions. While efforts on the part of each faculty are undeniably useful, a university-wide, centralized approach to this problem is likely to be more frutful and consideration should be given to a solution to the problem.

## Conclusion

We are faced with a challenge which ali growing institutions must face: to maintain what we have while at the same time moving forward with ideas. As a former Dean of our Faculty once said. 'The laws of science inform us that it is harder to start an object moving than to keep it moving. But for human institutions, we know there is another rule: it is often easier for us to start an institution or project then to continue it or finish it well ..." However, I have no doubt whatsoever that, with the corporate spirit of my Faculty colleagues and students, we shall not only be able to keep things rolling but we shall make the school live up to its expectations by producing dedicated professionals with perspectives and ideals worthy of emulation.

# Punishment and Sociery: <br> A Developmental Approach 

by FASIL NAHUM*

## Relationship of Punishment to Society

The modes and type of punishment ${ }^{1}$ its frequency and severity, as well as the processes that culminate in the punishment of a deviant in a society, are reliably good indicators of the society itself. All the values of a society are crystaltised in its punishments. What elements of life a society considers of value, their degree of valuability, as well as the extent society goes to protect these values, are clearly reflected in the punishment society imposes on a deviant. Thus punishmen: serves as a limtus-paper test of whether and to what extent a society is noble, creative and progressive. ${ }^{2}$

Although by no means impossible and hopefully the implications will not be lost on social scientists with sociometric interest - quantification of values and social conclusions with mathematical precision are outside the scope' of this paper. Here, the modest intention of the author is to arouse concern in this decisive area by dealing with punishment in a general manner. Where it is possible to be specific, heavy reliance is placed on the Ethiopian experience, although within a comparative world context. ${ }^{3}$

Since this paper is on a social science topic, at this introductory juncture a word or two about social science may also be appropriate. The social science tendency in some quarters, which opts for the shortcut and popularizes the concept of development along purely and narrowly economic lines, as if man lives for and by bread alone, is, to the extent it directs results, unfortunate. Development, namely socio-human development, aims at the advancement of man and. society in a contextual reality, not only from material subsistence to abundance, but also from superstition to scientific knowledge, and from savagery to nobility. Interelated as these areas may be, anomalies are not uncommon where one type of development may be present but not another. To illustrate this point, it suffices to refer to the "apartheid" regime of South Africa, which in a continuum may be placed relatively more towards abundance and scientific knowledge rather than subsistence and superstition. Yet, in the treatment of the overwhelming majority of its citizens as well as in its overall racial outlook, that this "apartheid" regime

[^0]has to be classified as savage rather than noble is painfully clear. The fact that South African Blacks may be economically better off than workers in other African States Is only part of the truth. Another part of the truth is to be found in the many legislations which negatively affect the Black South African worker. Some of these are the Native Labour Regulation Act of 1911 and the Bantu Labour Act of 1964, imposing contract labour system; the Native Land Act of 1913 and the Bantu Trust and Land Act of 1936, denying Africans the ownership of Immovable property; the Mines and Works Act of 1911 and the Apprenticeship Act of 1944. closing training opportunities to non-Europeans; the Bantu Laws Amendment of 1964, eliminating permanent residence for Africans outside the Bantustans; and the Bantu Laws Amendment of 1970, allowing the Ministers of Bantu Administration and Labour to prohibit the employment of any Black in any job in any area by any employer. ${ }^{4}$ The strong and unreserved condemnation of South Africa by public world opinion, ranging from socialist and capitalist camps to the third world reflects humanity's enduring expectations that socio-human development means, and should mean nothing less than, the overall contextual enhancement of human dignity.

Thus, vital as bread is to the existence of man, his development is not limited to that factor alone. Nor is it limited to any other individual factor. What this means is that any (every) area of human concern has to be examined for purposes of establishing adequate theories of socio-human development, as well as for reaching proper conclusions which can then serve as foundation for directed action. If it is to adequately reflect socio-human reality and expectations, the spiralling continuum from non-development to development must of necessity be a multi-factor one. It is in this context that the preliminary examination of punishment and society is submitted.

## Justice and Objectives of Punishment

Justice would seem to be equitable with the protection and retention of broad outlines of the status quo, within a given socio-political framework, ${ }^{5}$ And it is when this balance of necessary convenience is tipped over that punishment is applied so as to reinstate the previous order, or to establish a new balance that is as close as possible to the previous one, and to protect the status quo in the future. An example may clarify the statement. Where a thief steals a cow
4. J. A. Hornet, "Black Pay and Productivity in South Africa", South African Institute of Race Relations, September 1972. Note also that the Poverty Datum Line (PDL) is actually not a living wage but one intended to keep body and soul together. S.G. Rogers, "Apartheid and the African Worker', U.N. Document of May 1975.
5. Justice may be jurisprudentially looked at from the point of view of "positive law theory" that makes it dependent on positive law; or from the "social good theory" which insists that justice derives exclusively from society and consists ultimately in the improving of the social good; or from a "naturai right theory" which does not make justice dependent on positive law but rather on natural right, and makes it consist in rendering to each his due. Many jurisprudential works may be referred to. Cf. Otto Bird, the Idea of Justice, New York 1972
for general presentation, and V. A. Tumanov, Contemporary Bourgeois Legal Thought, Moscow 1974, for a Marxist approach. But, no mitter how it is defined, justice is a concept relative to a changing society. Justice takes on new dimensions of meaning as man moves forward (impossible to postulate) on his evolutionary course.
from a farmer, the status quo is upset; and to let things be as they are would be to sin against justice. ${ }^{6}$ Some kind of action has to be taken by society; but what? The return of the cow, i.e. reinstatement of the previous order, or the handing over to the victim by the offender of a comparable value, e.g. a similar cow or cash, etc., i.e. establishment of a new order that is as close as possible to the previous one, would satisfy the status quo from the material point of view. But from a non-material point of view we have in our hands the fact of the incident that disturbed the status quo, which by now becomes a historical fact, and the future risk of similar incidents both by this offender and by others who may follow his example. To let the offender go, after material reinstatment, would be to invite future disruption of the established order. In order to minimize the possi- bility of future disturbances to the status quo, the obligation of the offender must be such that the resultant status quo, after the incident, places the offender in a disadvantageous position vis-à-vis what he was in before the incident. ${ }^{7}$
6. There are crimes of different nature, for instance where the previous status quo cannot be reinstated because a value has been lost forever, as in homicide, or where there is no primary victim but the State as a whole, as in espionage.
7. It should also be noted that justice is not only substantive, it is procederal as well. Justive is concerned not only with what we do about the thief who steals the farmer's cow, but also with how we go about doing whatever it is. Moreover the procedural aspect of justice is not of secondary importance. Substantive justice cannot be rendered in the absence of procedural justice. Whether and to what extent a society is noble, creative and progressive is again reflected in its adherence to these basic prodcedures for the attainment of justice in the processes that culminate in the punishment of a deviant. The basic elements of procedural justice can be easily summarized. Elenentary as they may seem to be, their application is absolutely crucial to the attainmens of justice.
The first of these elements of procedural justice is the principle of legality, i.e. that notice has to be given prior to the commission of an act (or omission) that such an act constitutes an offence. Inciuded in the principle of legality is also the notification as to the seriousness of such a deviation, as reffected in the punishment the offence carries. The second element of procedural justice refers to the presumption of innocence.
The third element of procedural justice requirs the existence of a neutral competent tribunal; within this element of a neutral tribunal one may also include the idea of appeal.
The fourth element of procedural justice refers to the actual process as the drama unfolds in a court-room and contains various inter-related points. Unless there are justifiable reasons (of morality, fairness to imnocent third parties, the security of the state, etc.) a trial should be open. As a principle, not only must justice be done but it must be seen to be done. The trial mast also be completed without unnecessary delay, for justice delayed is justice denied. The defendant must be told what offence he is charged with, as well as what evidence exists against him. The delendant must be given adequate time and reasonable help to be able to answer the charge. The right to examine and cross-examine witnesses, the right to question evidence presented and the right to produce his own evidence, expert and otherwise, are rights that should be made available to the defendant.
The fifth and f:nal element of procedural justice deals with the punishment itself. Punishment should always be personal; only the one who has commited the offence should be liable to punishment. Vicarious criminal liability of the communal or spacial type, by which relatives or neighbours of the offender are punished, does not accord with basic concepts of justice. Moreover, personal punishment must be adequate but not redundant. The more scientific the punishment the more completely rehabilitated a deviant will be; hence double punishment or continuous punishment would serve no constructive purpose whatsoever.
These elements of procedural justice are expounded in detail in modern legal systems. In their application, not only can they vary from system to system but also they may require special exper ise. However, a society that fails to provide for these elements and to abide by then denies procedural justice, and to that extent fails to render justice.

Two interrelated questions logically follow such a statement, namely (1) to what extent should he be disadvantaged, and (2) to achieve this, what sort of measures should society resort to? In ancient times (and in some societies not so ancient) lex talioni provided a rough and ready justice by answering "an eye for an eye" and "a tooth for a tooth" Other systems may not come up with as simple and straightforward an answer. Neither is it suggested here that they should, this being a delicate and complex area. It would however be unfortunate for society not to know what it is achieving through punishment.

Hence, society is inevitably always confronted with the problem of the purposes that punishment must serve. One way of tackling the problem may be by deciding from what points of view society should look at a given incident in order to reinstate the status quo and protect it from further disturbance. Should society focus on the incident, on the victim, on the deviant, or on general expectations of society? To put the question in more comprehensive way, what objectives should society specifically have in mind? Shall it be that of satisfying the victim - if need be, even satisfying the revenge-oriented psychological make-up of the victim, thus moving into retribution? Or, in a slightly different approach, shall it focus on the incident and try to make good for it, and in homicide cases, for instance, say, "there is no atonement without blood." ? Or, shall society focus on the deviant with the purpose of understanding and rehabilitating him so that society is in the future protected from him, and incidentally from others who could become like him but would not, if by focussing on him and understanding him, society can eliminate the root causes for such deviation?

The objectives society tries to achieve through punishment of a deviant can probably be best summarised in three broad categories. The first is retribution: the objective society is most acquainted with in man's long history, ranging from the age of slavery through the age of feudalism to the present. In a socio-human development continuum from savegery to nobility, retribution is also the least desirable, the objective nearest to the theoretical starting point of savagery. The lex talioni school with its fatal overdose of retribution probably best exemplifies it. ${ }^{8}$ That man has yet to divorce himself totally from retribution will become clear when, a few pages hence, we refer to specific types of punishment securely fastened to many modern societies in this late hour the eve of the twenty-first century $A D$.

The second objective society tries to achieve through punishment, that of rehabilitation, is found at the other end of the spectrum. It is the objective man

8 Hammurabi's code (18th century Before Christ) provided for elaborate provisions on the rights of a master over his slaves, although the slave had no rights with respect to the mastera While a bad buil der was subjected to the same grief the owner suffered through the loss of son, there was no concern for justice to the innocent son of the bad builder. A wife accused of unfaithfunness which could not be proved was expected to throw herself into the water and drown "for the husband's sake, since good name was valued more than the woman's life" However, to be fair, it should be pointed out that Hammurabi's code was designed to protect the weak from the strong and to give safety to widow and oprhan. And at the time these were considered idealistic declarations appropriate to the society then current in Babylon.
is least acquainted with, and one whose threshold we are just crossing. The expansion of scientific knowledge in the behavioural sciences will undoubtedly have a far-reaching impact on punishment. Rehabilitation as an objective stands to gain handsomely thereby, and so does society.

The third objective society tries to achieve through punishment, that of deterrence, serves a dual purpose by being aimed both at the deviant and at the public at large. ${ }^{9}$ Individual deterrence intends to teach the offender the lesson not only that crime does not pay but that the overall experience is too costly and painful to be enjoyable. Individual deterrence tries to defeat recidivism by convincing the offender, not through the power of gentle persuasion but through the power of the strong arm, that crime is not worth repeating. By the same token, the punishment inflicted on the deviant can serve an educational purpose directed at the public at large. Thus punishment aims towards the goal of general deterrence by notifying would be offenders what the unsavoury consequence of crime is to the criminal.

No system of punishment has a legitimate raison d'étre other than the wellbeing and protection of society. And society protects itself best by approaching questions of punishment from the point of view of rational focussing on offenders and would-be offenders. On the basis of the correctness of this statement, a number of assumptions and implications, with possibly far-reaching conclusions, become inescapable. One basic assumption revolves around the rationality not only of society but also of the offender. Any message society is trying to convey properly gets at an offender only if the offender is also rational. In other words, one should be subjected to punishment only to the extent one is capable of rationality. A person who is incapable of either knowing what he is doing or appreciating the consequences of what he is doing, whatever else he may be subjected to, should not be subjected to punishment. ${ }^{10}$

Another assumption is that only one who through personal guilt offends in the carrying out of his obligation to society is subject to punishment. Guilt is a technical term referring to the socially negative state of mind of a person. Such a negative state of mind may be the result of intention, i.e. committing an antisocial act knowingly and willing the consequence, or it may be the result of negligence, i.e. failing to take such precautions as might reasonably be expected in given circumstances. An accident resulting in an antisocial act but without the accompanying mental element of guilt being present, i.e. without either intention or negligence, would not fall within the scope of punishment. ${ }^{11}$

[^1]A rational system of punishment would take the individual needs of an offender and would mete out an individually tailored punishment, suitable to the particular offender in terms of both the type and degree of measures to be taken. And in order to do so, society would have to have a scientific approach, namely that of reaching conclusions based on the observation and analysis of facts.

Finally, rational focussing on offenders and would-be offenders as a means of protecting society negates the whole realm of retribution as a valid objective of punishment. Only deterrence (general and individual) and rehabilitation remain as valid objectives of punishment. This means that punishment, to be efficient and useful, has to pass the dual test of deterrence and rehabilitation. Any pugishment that is neither deterrent nor rehabilitative has no efficecy, and therefore should have no place in society. It should be promptly discarded and replaced by alternative rational measures. An ideal system of punishment would combine both objectives of rehabilitation and of deterrence in varying degree. The dangerous disposition of the offender and the nature of the crime, as well as the motivation for and circumstances of the crime, are determinant factors for the ratio in which deterrence and rehábilitation are combined.

The social cost of punishment is also an important factor that cannot be overlooked. A system of punishment of fatal overdose that goes beyond deterrence and rehabilitation so as physically or psychologically to cripple and handicap a deviant for life, so that he can no longer fully function as a healthy member of society and contribute his utmost in life, is undesirable. In such a case one is not only punishing the deviant, but is over-punishing the deviant and punishing society. The social cost of punishment directs one to consider the cost to the immediate group of family and friends that punishment of the deviant imposes as well. For instance, the incarceration of the breadwinner without providing for dependants would be a measure taken not only against the offender but against the innocent dependants. And exploitative societies that take irrational measures sow seeds for far-reaching negative consequences.

An examination of traditional types of punishment is quite revealing as to what objectives of punishment are given prominence. And, as already observed, this makes punishment an acid test of whether and to what extent a society is noble, creative and progressive. We will next turn our attention to some typical traditional forms of punishment.

III

## Traditional Punishment

## A. Imprisonment

When one thinks about the different kinds of punitive measures society traditionally imposes on deviants, the one type of punishment that immediately springs to mind is imprisonment. Indeed, in the vocabulary of everyday language imprisonment and punishment are synonymous. The prison system is such a common feature of governments the world over that one is tempted to think of
the prison as a sine qua non - part and parcel of government-an axiomatic institution. There is no doubt that incarceration is a practice of very ancient traditions, although it is difficult to say when and where it was started. Would it be too dariing to venture the theory that imprisonment statted by default? Society, at a loss as to what to do with deviants, simply locked them up until it could decide what to do with them? In the absence of brighter ideas, this temporary measure in time became the most important type of punishment.

In some systems today, imprisonment is categorized as simple or rigorous. ${ }^{12}$ Simple imprisonment is a punishment imposed on persons considered hot a serious danger to society, i.e. those who have not committed offences of a very serious nature. Simple imprisonment is also of relatively shorter duration. Rigorous imprisonment, on the other hand, is imposed upon what are considered dangerous offenders who have committed offences of a very grave nature. Prisoners undergoing rigorous imprisonment serve big chunks of their life in maximumsecurity central prisons. ${ }^{13}$

Prisons are by no means pleasure houses, which is not surprising, as they are often used as society's instrument of retribution par excellence. In feudal Ethiopia we have some descriptions of prison and prisoners, narrated by various traveliers who chanced to pass through the country from the sixteenth century onward.

The Portuguese priest Alvarez tells us of prisoners kept chained in prison tents. They were required to provide not only their own food but also that of their guards. ${ }^{14}$ In the 1850s, the English traveller Richard Burton refers to the Ethiopian prison as "a filthy dungeon" ${ }^{15}$ A century later another Britisher, Perham, refers to the Addis Ababa prison as "notorious." the prisoners being in a horrible condition of health, neglect and disease which lead to the prisons being cleared at intervals by typhus" ${ }^{16}$ Whatever improvements prisons may have since undergone, in many a society prisons could use a few improvements in order to elevate them to acceptable human institutions.

Tempted as one is to look at the prison as an axiomatic institution whose abolition would bring down on society the wrath of the gods, it is time to give the prison a closer look. All those whose concern is penal policy and administration, as well as those who have to work hard to maintain this very expensive system, have an interest in finding out the efficacy of the prison system. In order to be allowed to continue, the prison system should have to pass the dual test of its efficacy in deterrence and rehabilitation and pass it scientifically. It doesnot suffice to assume that incarceration is deterrent and rehabilitative. The facts have to be researched in order to arrive at solidly supported conclusions as to the deterrent and rehabilitative characteristics of the prison system.

12 Cf. Articics 105, 107 Ethiopian Penal Code.
13 A life sentence, it should be noted, is a variation of rigorous imprisonment.
14 E. Alvarez. Narrative of the Portuguese Embassy to Ethiopia During the Years 1520-1527, p. 335. New York, 1881.
15 R. Burton, First Footsteps In East Africa, p. 190. London 1866.
16 M. Pertam, The Govvramen of Ethiopia, p. 194. London 1969.

## B. Corporal Punishment

Another type of traditional punishment, which is fortunately phasing out, although it is by no means extinct, is corporal punishment. Corporal punishment, as a predominant type of punishment, appeared in very many forms in various societies. Criminals were forced to undergo afl sorts of mutilations under the crudest possible medical conditions which often cost the individuals their very lives. Thus, someone convicted of lying might be sentenced to the removal of his tongue, while another convicted of providing false evidence might be ordered to have his eyes plucked out. The cutting off of the nose or the ears, the doing away with the sexual organ for the male, and above all the axing off of a limb, were. rather common traditional punishments in most societies.

As in most traditional societies, in feudal Ethiopia for instance, corporal punishment was an instituted form of punishment. Travellers came across the execution of such punishments and have left us their evidence and impressions. In 1830 one visitor witnessed the King ordering "a hand and both feet of the thief to be cut off', and the execution of the order being carried out in the middle of the market; the thief was latter found devoured by the hyenas in the night. ${ }^{17}$ A late 19th-century traveller characterises the then emperor as "severe in his application of the cruel punishments; (he) did not hesitate to order the recedivist thief's hand to be cut off or the slanderer's tongue to be cut out. He once had the tongue of an advocate out because in defending his client too well he spoke ill of the government... ${ }^{18}$ Explaining the carrying out of mutilation, someone else reports:
... the penalty for the thief who had one previous conviction was the loss of a hand. Immediately after the verdict, a butcher would severe the tendons of the wrist and then cut the hand off with the chopper. In the meantime, women would be heating butter in a pot over a fire. As soon as the hand was severed, the stump would be dipped in the seething butter. In this way, the flow of blood would be stemmed and the deliquent's life would be saved. ${ }^{19}$

The doing away with mutilation in Ethiopia coincided with the introduction of the Penal Code in 1930, and, as the chapter dealing with punishment makes clear, the idea of corporal punishment was then limited to the sentence of flogging. Furthermore, the Penal Code of 1930 seemed to be uneasy about that sentence, and promised that flogging would soon be abolished. ${ }^{20}$ Despite such a promise, however, when a new and advanced penal Code was introduced in 1957, flogging was retained as a form of punishment. ${ }^{21}$ The drafter of the 1957 code had not maintained it in his work, and it was only included after heated

17 S. Gobat, Journal of Three Years Residence in Abyssinia, p. 336. New York 1851.
18 Perham, ibid, p. 148.
19 P. Hartlemaier, Golden Lion, p.172. London 1956
20 Article 3, Ethiopian Penal Code of 1930.
21 Article 120 A. Ethiopian Penal Code of 1957.
discussions in Parliament. ${ }^{22}$ Nevertheless, he justifies its inclusion by saying, ". it is no less possible to regard (flogging) as a useful institution among a proud and courageous people who are afraid not of suffering but of loss of respect, and who would approve of it, precisely because of its ethical implications" ${ }^{23}$

Initially the sentence of flogging was limited by the Code to aggravated; theft and aggravated robbery. ${ }^{24}$ By 1961, however, on the heels of the abortive coup d'état, several crimes were made punishable by flogging, and among them were included insults, abuses and slanders directed against the Emperor. ${ }^{25}$ The Penal Code of 1957, as a sign of progress and modernity, provides that flogging be carried out only on male offenders between eighteen and fifty years, of age, and that a maximum of 40 lashes be executed only after a doctor has certified the offender fit to receive the flogging. ${ }^{26}$

There is no question of the retributive value of flogging. What is at issue, however, is the reformative or deterrent value of flogging. In the absence of studies and statistics concerned with the issue, the author would, on the basis of its retributive foundation alone, question the usefulness of flogging from the deterrent and reformative points of view. Unless and until such usefulness is convincingly proven, one can only suggest that the corporal punishment of flogging should be allowed to follow the path of its sister institution, mutilation, into extinction and oblivion. ${ }^{27}$

## C. Capital Punishment

The ultimate traditional punishment in all societies through the ages has been the death penalty. The death penalty has been the punishment generally reserved for crimes considered exceptionally grave. And, presumably having convinced itself that these criminals were beyond any help and use, society has employed its imagination liberally in coming up with horrible means of destroying

22 S. Lowenstein. The Penal Law of Ethiopia, p. 340. Addis Ababa 1965.
23 J. Graven, "The Penal Code of the Empire of Ethiopia" in Journal of Ethiopian Law, Vo. L, p. 289, 1964.
24 Articles 635 and 637 respectively, Ethiopian Penal Code of 1957.
25 Articles 256, 445, 474, and 479-481, Ethiopian Penal Code of 1957, were included by Decree No. 60 of 1961. Others have since been included by the revolutional Special Penal Code of 1975.
26 Article 120 A, Ethiopia Penal Code of 1957.
27 While dealing with corporal punishment, it is tempting to mention torture. Although torture is almost as oid as man himself, today the practice seems to be on the increase. The U.N.'s Commission on Human Rights views torture as "a phenomenon of our times". "It is one of the grim truths of the second half of the 20th century that rately before in history has torture been in such widespread use"; this second statement is supported with facts and figures provided by human-rights-oriented international organizations.
(Time Magazine, 16 August 1976). Moreover, torture has moved into the technological age and sophisticated devices are employed to break down an individual without leaving visible signs or marks of brutality. Torture is, However, outside the scope of this paper. No matter how widely employed, torture is not officially used as a post-conviction punishment but rather as a means of extra-trial or pre-triat investigation and extraction of information. Hopefully, a time will come in man's development when, like slavery and most corporal punishment torture will be a thing of the past.
them. One description of the practice of ancient European states that executions were made "by knife, axe, and swords, heads being knocked off with a plank or cut through with a plough, people being buried alive, left to starve in a dungeon, or having nails hammered through their heads, strangulation and throttling, drowning and bleeding to death, evisceration, drawing and quartering, torture on the wheel, torture with red-hot tongs, strips being cut off the skin, the body being cut out to pieces or sawed through with iron or wooden instruments, burning at the stake, and many other elaborate forms of curelty" 28

Present-day penal codes and statutes that have retained the death penalfy have progressed to the extent of providing for executions that are free from other unnecessary cruelties. The 1957 Penal Code of Ethiopia is a good exàmple. Having retained capital punishment, it goes on to provide specific instructions. Punishment is to be executed by hanging or, on a member of the armed forces, by shooting. However, executions are to be carried out without any cruelties, mutilation or other physical sufferings. ${ }^{29}$

Having said that capital punishment was generally reserved for crimes considered exceptionally grave, it should also be stressed that the gravity of a crime and its corollary punishment are relative concepts, existing purely as factors of the values of the power elite of a particular society limited in time and space. To cite one example, at one time in England there were over two hundered specific crimes punishable by hanging. These included the shooting of a rabbit, the theft of a handkerchief, the cutting down of a cherry tree and fishing without permit. ${ }^{30}$ The assumption behind it all was that the property right of the landlord was absolute and, in a rigidly stratified feudalistic society, this right had a very important value. The feudalistic society would therefore go all the way to safeguard this right, even to the extent of providing capital punishment for what today we may consider petty infringements. (The Great Britain of the latter part of the 20th century, on the other hand, has for all practical purposes abolished capital punishment.)

A 1962 United Nations study on the subject of capital punishment points out that, out of over one hundred jurisdictions examined, 35 jurisdictions have abolished capital punishment by express constitutional or legislative enactment, and 9 jurisdictions have abolished it in practice, while the majority of the jurisdictions examined have retained the death penalty. (Total abolition of capital punishment by statute in Europe dates from 1786, when King Leopold II of Tuscany under the direct inspiration of Beccaria promulgated his celebrated code. In 1787, Joseph II of Austria did the same in his penal code. ${ }^{31}$ )

One cannot help asking the difficult question as to what makes some societies abolish the death penalty already in the 18th century, while others go on

[^2]retaining it even in the latter part of the 20th century. Where this is too complicated a question to ask or answer here, one may at least examine the various points that can be raised in support of or against the retention of the death penalty in the present-day world.

Explaining the tationale for the retention of capital punishment for homicide in the Ethiopian Penal Code of 1957, Jean Graven, the drafter, writes:
" In the Ethiopian context it would in particular have been an inconceivable mistake, and even an impossibility, to abolish the death penalty at the present time. It is not only necessary for social protection, but is based on the very deepest feelings of the Ethiopian people for justice and for atonement. The destruction of life, the highest achievement of the Creator, can only be paid for by the sacrifice of the life of the guilty person. As in the Christian European system of the Middle Ages, death is always a necessary condition for the pardon and salvation of the sinner, and also for expiation for the evil which he has committed, it is accepted and approved by all, and in the first place by the criminal who has deserved it, and is carried out in a dignified atmosphere quite different from that of our former executions with the ax or the guillotine." ${ }^{32}$

Again looking at capital punishment as a measure against homicide, one report states that "capital punishment is as harsh a punishment as murder is heinous a crime. Because wanton murder is so extremely morally wrong, the punishment therefore must remain proportionately extremely sovere to emphasize to other would-be murderers the high outrage that society feels against the commission of such crimes. Conversely, any unjustified lessening of the severity of punishment for murder in appropriate situations could be taken by the murderer and others as an indication that our socisty no longer regards such murders as the most heinous of crimes" ${ }^{33}$ it is interesting to note that the above rationales are limited to one crime only, namely intentional homicide. The implication seems to be that capital punishment is difficult, if not impossible, to justify satisfactorily as punishment for non-homicide crimes.

Among the arguments marshalled for abolition of capital punishment, the major ones include the following:

First, the state and its agents are involved in an act of supreme violence in the execution of the death penalty, and this takes place in circumstances of the greatest cruelty to the individual in question. The argument goes that this kind of barbarism need not be resorted to in order to meet the social need of fully condemning the gravest of crimes. Second, the death penalty introduces a seriously baneful effect on the administration of justice. A morbid and sensa-

[^3]tional factor is introduced in the trial with the danger that public sympathy will be on the side of the criminal whose life is at stake. This morbid factor continues during both the trial and the execution, often making public sentiment, which should support the law and its administration, stand on the side of the criminal. Third, erroneous convictions are bound to take place. Such inevitable errors cannot be established immediately, and certainly cannot be corrected after execution. Such injustices destrey the moral force of penal law in general. And finally, experience shows that the death penalry cannot be administered with even rough equality. ${ }^{34}$

This can then be topped up with the statement made by various abolitionists that the history of punishment shows no necessary correlation between the severity of punishment and incidence of crime, which is understandable if the 'act of the complexity of causation of crime is borne in mind. One is ultimately reminded from English history that, when the public hangings of pick-pockets were going on at Tyburn, others of the "light-fingered fraternity" were doing a thriving business in picking the pockets of the crowd looking in the scaffolds. ${ }^{35}$

One is entitled to ask what objectives society achieves through capital punishment; and the answers to this question are not difficult to come by. The death sentence and its ensuing cruelty has served society all too well as its maximum tetributive measure. This cannot be denied. But where retribution is an objective for society to be ashamed of rather than to be proud of, where retribution is symptomatic of savagery, this point has to be registered on the side of the abolition of capital punishment.

The-next objective, that of rehabilitation, cannot even be raised, since by employing capital punishment society has decided that such a person is by definition non-rehabilitable. Correctly or otherwise, society has also despairingly accepted its failure in its curative capacity. In addition, it has made the conscious decision that such a criminal cannot be purposefully and usefully employed by society any more. These are all rather heavy decisions to make. Nevertheless, that is what society decides by meting out the death penalty on an individual.

The final objective to consider with respect to capital punishment is that of deterrence. The question is, What deterrent value does the death penalty serve? As far as individual deterrence is concerned, the answer is that the criminal who is served with the death penalty is absolutely incapacitated from repeating a similar or, for that matter, any other crime. Thus capital punishment is, from the point of view of individual deterrence, not really deterrent. The objective of individual deterrence is geared towards teaching the criminal through his painful experience of social payment that crime is not worth repeating. Capital punishment is not. however, teaching the individual criminal any useful lesson thet he can apply later on. Although it absolutely makes it impossible for the criminal to offend
society again, capital punishment does not do so by teaching him through punishment; rather it simply and effectively removes him for good.

So whether the death penaity should be retained or not really depends on the general deterrence value it has. Does capital punishment, by notifying would-be offenders what the unsavory consequence of such crimes is, serve an educational * purpose directed at the public at large, and thereby deter would-be offenders from commirting crimes? This is a significant question which shouid be answered not from the top of one's head but on the basis of scientific studies.

One such study examined capital punishment in conjunction with the crime of intentionel homicide, and the author concludes:

If the death penalty carries a potential threat which has a restraining influence on human conduct, we may assume that the greater the threat the more effective it would be. It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:
(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects - character or population, social and economic condition, etc. in order to introduce factors known to influence murder rates in a serious manner but present in only one of these states.
(b) Murders should increase when the death penalty is abolished and should decline where it is restored.
(c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.

The data examined reveal that:
(1) The level of the homicide death rates varies in different groups of states.
(2) Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition states from the others.
(3) The trends of the homicide death rates of comparable states with or without the death penalty are similar.

The inevitable conclusion is that executions have no discernible effect on homicide death rates. ${ }^{36}$

The United Nations Report on capital punishment referred to supra states that capital crimes are still relatively numerous. It goes on to make the picture more
focussed by providing a breakdown of the crimes. It concludes that the number of jurisdictions in which offences other than murder are punishable by death is declining. This remark is however immediately qualified by what the report refers to as "the outstanding features of the legal sociology of the last thirty years - the reappearance of the death penalty for political crimes" What is responsible for this state of affeirs, the report suggests, is the "trend towards an authoritarian system of criminal lew" This "authortarien trend" according to the report, has in the first half of the 20th century checked the slow movement towards gradual ebolition of the death penalty that was becoming almost universel. It has also made it possible for the death penalty to reappear in a more or less permanent manner in jurisdictions where it was once abolished as well as extending the ${ }^{*}$ death penalty's application to new cases in other jurisdictions. ${ }^{37}$

In the present-day world, capital punishment is increasingly associated with political crimes. One Afican writer notes that a "distressing feature of African independence (sic) is the extent to which and the apparent ease with which the death penalty has become the answer to an increasingly wide range of political crimes" ${ }^{38}$ Incidentally, this is not a uniquely African characteristic, but one rather common throughout the third world.

Moreover, capital punishment continues to be employed as a means of solving legitimacy problems of dictatorial regimes, of which the miniority gove: $n$ ment of Southern Africa serves as an example. By their unacceptable policies, these are bound to increase societal conflict and hence the authoritarian trend. In 1974 the United Nations General Assembly passed a resolution celling upon the white minority governments of Southern Africa to treat captured guerrillas as prisoners of war rather than criminals. The appeal has gone unheeded by those governments, and captured guerrillas have periodically been served with the death penalty. The problem can in the near future be expected to increase in proportion to the increasing cognition of the exploited masses and their violent show of dissatisfaction. ${ }^{39}$

In concluding this section, one may sum up by stating that capital punishment has been employed by practically all societies. The 20 th century has seen a limitation of the use of capital punishment; indeed, a number of jurisdictions have abolished it altogether by law. Others who have retained it selectively have found justification for it, only as punishment for what is in certain jurisdictions

[^4]termed first-degree homicide. Unfortunately this century has also seen the accelerated use of the capital punishment for a wide range of political crimes. The employment of the death penalty for non-murder crimes, and particularly for wholesale political crimes, seems to have a very doubtful value, when considered from a detached intellectual viewpoint.

## IV

## Towards Scientific Punishment

In the third section of this work, three traditional types of punishment have" been taken up and evaluated and have been found wanting. This raises the next set of fundamental questions. Since we hâve minimized the importance of some traditional punishment, does it mean that society should then do away altogether with the idea of punishment ? The answer is no: punishment or corrective measures for deviants who violate the norms on which society is founded are vital to the continued existence of society. The fear that, urless such corrective measures legally exist, the very fabrics of society would disintegrate and we would plunge into the abyss of savagery and the "law of the jungle" is a real concern. Thus punishment should continue as a component of justice. But the important question is, In what forms should punishment then exist $?$ It is in line with this question that the value of traditional punishments is raised. And one simple theory we suggest is that punishment should not be retributive. Retributive punishment is a destructive force that consumes both society and the deviant, and negates the basic raison d'étre for punishment. Punishment should be deterrent and reformative. In order for it to be made so, it is incumbent on society to employ its creative faculties, and, aided by the ever-increasing level of scientific and behavioural knowledge, to come up with better and better corrective measures. Punishment is an area for creative experimentation, in which success in terms of reformed and rehabilitated citizens should be expected to be significantly increased. A conscious decision has to be made by society to tackle this problem courageously, and those who take initiative in this vital area should be encouraged for the benefit of society itself.

So then the real question, the question society must turn its attention to and tackle seriously, is What types of punishment are deterrent and reformative and hence successful? Although a radical approach to the question of punishment would be welcome, the likelihood is that most societies will follow slow evolutionary roads to changing from the traditional to more efficient and scientific forms of punishment. Various reasons dictate the evolutionary approach. The predominant one is the lack of a blueprint of modern punishment, a characteristic of societies by and large. This lack is symptomatic of the relative indifference with which such a vital and constant social problem has been viewed by society. Fine ll;, when society is forced to focus on the problem, it will have to do it not only on an experimental basis but also on a planned stage-by-stage basis. It should be pointed out that such experimentation and planning requires alloca-
tion of resources both human and material, and a conscious effort to achieve results. The ultimate transformation will not be simple and invisible, although the actual change will be on the mental plane in both deviants and society. It will necessarily be accompanied by such manifestations as outdating barbed-wire prisons and armed guards, just as previous tools for mutilation have been deposited in museums. In their place, various new institutions resembling specialised medical centres rather than prisons can be expected to emerge.

One area for reform, already under experimentation in some jurisdictions, deals with the , ndividualization of sentencing. In most jurisdictions and for almost all crimes the legislative organ of government not only defines what constitutes a crime but also fixes the penalty. In most penal systems, the legislative role in fixing penalties is one of establishing the range of maximum and minimum imprisonment terms for various crimes. it is then left to the judge to sentence a convicted criminal, and judicial sentencting is in general final. However, the idea is evolving of what may be termed the indeterminate sentence. ${ }^{40}$ What this means is that the generalised legislative prescription is first individualized by a judicial prescription during the trial, and then further individualized through an ongoing determination of the sentence by parole boards. The judge provides a maximum-minimum range for an individual offender, thus giving the parole board responsibility for determining the actual time a prisoner will serve. The logical extention of the indeterminate sentence is of course, the division of labour between judge and board, to the effect that the judge simply decides guilt and possibly the degree of guilt, and then passes the criminal over to the parole board, which then in a slow and careful process determines the actual time to be served. Inherent in the idea of the indeterminate sentence is the establishment of competent parole boards and the continued existence of the prison system together with its necessary supporting institutions.

Another area of experimentation gaining ground is that of replacing short prison sentences for less serious crimes by various measures known as secondary punishments, which include fines, special labour, temporary deprivation of particular rights, probation and conditional release. ${ }^{41}$ The significance of replacement of the short prison sentence by such measures is both social and economic. The offender is, first of all, not taken away from his productive function in society, nor does society have to provide him with guards, lodging and the usual expenses that go together with the prison system. Secondly, his immediate circle of family and friends do not have to suffer indirectly by his imprisonment. Thirdly, both the deterrent and rehabilitative objectives of society are retained undiminished. Which particular measure is most appropriate to a given offender is, of course, dependent on various factors and has to be individually decided.

[^5]Again, turning to the prison system, it may be noted that interesting experience has been gained in countries such as Sweden, Holland and Denmark. ${ }^{42}$ As a result of the sociological school in criminology, the prison system has been inspired to work along modern principles, of which the most important are (a) complete centralization in policy-making; (b) differentiation of institutions; (c) centralized and rational distribution of individuals to be treated in the particular institutions: and (d) a predominantly curative approach to the treatment of the individual inmates. Such prison systems have required careful and conscious planning, centralized policy-making at high governmental level, a large welltrained staff, many specialized prison units and substantial funds.

If one may throw in some food for thought for further research, the high frequency of recidivism which follows the prison system like a shadow would seem to be symptomatic of failure rather than success. And where any show of success has been possible in isolated instances here and there as outstanding exceptions to the general trend of failure, this has occurred thanks to the implementation of rational innovations and a creative attitude. The employment of psychiatrists, psychologists, social workers, sociologists, religious personnel and lawyers, rather than guards, more guards and better armed guards; the environment of spacious farm colonies rather than tiny dark prison cells; the establishment of halfway houses gradually to reintroduce prisoners to society; the use of humane and rational approaches such as creative or productive work encouragement of family ties, educational facilities, the provision of basic requirements, etc.; all these make prisoners feel they are still considered human beings rather than monsters, or, worse still, non-entities, and it is these supporting institutions that have introduced the possibility of some success in modern prisons. ${ }^{43}$ Those who have resigned themselves to the continued existence of the prison or who favour the retention of some sort of prison, have proposed that imprisonment should be looked at as a treatment, in medical terms. To be effective, this treatment must be placed on a voluntary footing, the argument being that prisons should not and cannot be cured against their wishes. Hence imprisonment should be an alternative form of treatment which an offender can choose. ${ }^{44}$

The only way out of the quagmire of recidivism and the upward spiral of crime, from the punishment angle, seems to lie in the behavioral sciences, of which the ideas mentioned above are only first fruits. The lion's share of research and concentrated effort, however, lies not on the clinical side of treating deviants but rather on the preventive side. The battle against crime must start not from punishment but through isolating and understanding primary factors causing crime, and through the consequent restructuring of society and the strengthening of its fabrics as needed.

42 N. S. Timasheff, "The Dutch Prison System", in Journal of Criminal Law, Criminology and Political Science Vol. 48 (1958).
43 C. Newman, Source Book on Probation, Parole and Pardons, New York 1964; Reckless, The Crime Problem, New York 1961; Neharasol, The Soviet Judicial System, Moscow 1975, and Ruschche and Kirchheimer,
44 N. Morris, The Future of Imprisonment, Chicago 1957.

# Irreconcilability Between the Ethiopian Commercial Code and Contracts of Insurance, with Special Emphasis on Personal Accident and Life Policies 

by BELAYNEH SEYOUM*

INTRODUCTION
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Insurance is a product of succeeding modes of production, and it is aimed at transferring the risks of individual entities to an insurer, who agrees for a consideration to assume to a specified extent losses by the insured. An insurance policy is a conditional contract whereby the insurance company agrees to pay the insured for some specified loss damage or liability which may arise from some contingent event.

As Ethiopia started to increase contacts with the outside world, more and more foreign insurance companies appointed agents and started to transect business in Ethiopia, even as early as in the 1920s. These agents were foreign merchants, some of which later opened branch offices of the parent companies. However, laws regulating these insurance companies did not appear until 1960.

The aim of all present-day insurance is to make a provision against the dangers which beset human life and property. Insurance is generally a scheme of distributing and equalising losses. Those who seek it enceavour to avert disaster from themselves by shifting possible losses on to the shoulders of others who are willing, for a consideration, to take the risks, and, in the case of life insurance, they can assure to those dependent on them a certain provision in case of their death, or provide a fund out of which their creditors can be satisfied. ${ }^{1}$

The purpose of a modern insurance scheme is not based on shouldering any unspecifjed risk which has not been agreed upon by the contracting parties, but on compensating for a risk undertaken by the insurer for a consideration called the premium. There are certain conditions, warranties and exceptions in the insurance policy contract, outlining the duties and respansibilities of the insured as well as of the insurer. There are also the Commercial Code provisions on insurance, regulating the business of insurance so as to protect the interests of the insured against abusive clauses, and the legitimate interests of the insurer.

The insurance part of the Commercial Code of Ethiopia was drafted by a European lawyer, and there has been a great influence of French and Italian laws

[^6]of insurance. But the concept and practice basically originated in England, and much influence has been exerted by English jurisprudential thought in this field. ${ }^{2}$ It is also true that the Ethiopian insurance market was originally dominated by Lloyds (a British insurance giant); the transactions are those of the English type with small amendments, and these amendments have not contributed to a major reconciliation between the policy and the law of insurance. The inconsistency has became even wider since the nationalization of insurance business. ${ }^{3}$ This paper tries to analyse the areas of inconsistency between the Commercial Code provisions on insurance, and the planning policy. The paper dwells on six major areas of inconsistency: payment of premium, limitation period, concealment of material fact, increase of risk, life policy and cumulative insurance.

## 1. Payment of Premium

On the payment of premium, in order to spare the insured from a sudden unforeseen rupture of the contract, a provision has been included in the Commercial Code requiring a mandatory waiting period followed by a period of one month, during which the insurance is only suspended. This provision is a matter of public policy and cannot be varied by the parties. ${ }^{4}$ In accordance with this policy, Article $666(2)$ of the Commerciał Code provides: "Notwithstanding any provision to the contrary, the policy shall not terminate as of right when the premium is not paid in due time. The Insurer shall demand payment". But Article 666 does not specify under what situations it is applicable. Is Article 666 applicable when there is non-payment of an instalment premium before the expiry period of the policy, or when renewal is sought for after the expiry period?

## (a) Payment by Instalments

The parties to an insurance policy may agree to the payment of premium by instalments which have a fixed date for payment. In cases in which the instalment premium is not paid in due time, the policy contract does not terminate, because there is a subsisting policy which provides the assured opportunity to pay the premium due within a certain period of time.

It seems that Article 666 is applicable to the question of nonpayment of an instalment premium before the expiry date of the policy. In cases in which a premium is paid by instalments which have a fixed date for payment, the policy does not terminate when it is not paid in due time. The insurer demands payment, and thereafter, after one month from a demand for payment, the policy shall be suspended.

## (b) Payment for Renewal

In practice, shortly before the expiration of the policy in force, the insurer sends to the insured a renewal notice intimating that the premium is about to fall
2. Berhanu Kidane, Insuronce Damages in Ethiopia: Compensation or myth, Addis Ababa 1971, p. 11
3. Proclamation No. 26, 11 March 1975.
4. Peter Winship, Background Documents of the Ethiopian Commercial Code. 1960, p. 86.
due. The sending of this notice to the insured amounts to an offer by the insurers to renew the policy, on the footing of the original proposal or of any variation of the terms indicated in the renewal notice, such as an increased premium.

The Ethiopian Commercial Code provisions on insurance do not make speci fic statements as to how an insurance policy can be renewed or the legal effect of such renewal. Can we apply by analogy other provisions of the Commercial Code to renewal?

The insurance provisions of the Commercial Code state only as to how a contract of insurance enters into force (Article 659) ; how an insurance; policy may be suspended for failure to pay the premium: how such a suspended policy re-enters into force with the payment of the premium (Article 666); and on the particular case of redeeming a life insurance policy (Article 710). Any attempt to use these Articles to apply for a renewal of insurance will fail, since the above Articles refer only to the issue of premiums and provide nothing as to expiration of a contract.

A contract lapses or becomes extinct as soon as it is performed in accordánce with the contract, or where the contract itself provides that it will lapse after a certain period or a given date (Article 1807, Civil Code). Once a contract is extinguished, then obviously there is no contract that can be enforced. Where the parties have agreed that an insurance poticy will be renewed by payment of premium, failure to pay it within the specified period or the period of grace stated in the policy will result in the termination of the policy contract; Article 666 of the Commercial Code, which provides that failure to pay does not give the power to the insurer to terminate the policy, does not apply here, since there is no policy or contract existing, because failure to pay extinguishes it.

However, Article 666 has frequently lent itself to different interpretations. In certain cases, courts have applied clear policy provisions, intimating that anobligation shall be extinguished on the date as agreed by the parties. In other cases, courts have used Article 666 (3) and (4) to revive an already extinct contract. The matter is made explicitly controversial in the cases explained below.

In the case of Dinsa Lapisa Aba Joubir v. Blue Nile Insurance Company, ${ }^{5}$ the plaintiff entered a contract of private car insurance in April 1969 with the Blue Nile Insurance Company, and the policy was renewed every year till 1 May 1972. The car of the insured was damaged as a result of an accident on 8 May 1972, i.e. seven days after the previous policy had expired. The insured notified the company of the accident and demanded that the risk that had occurred be made good. The Company disclaimed fiability on the grounds that the policy had expired at the time when the accident took place. The plaintiff instituted a suit in the High Court against the insurance Company after a failure to settle the case by arbitration. The High Court held for the defendant company on the ground
5. Civil Case No. 1099/1965 G.C.
that the policy had expired a the time when the accident took place, and added that no insurance claim could be indemnified on a policy that was ineffective. The case went to the Supreme Court on appeal, and the decision of the High Court was :eversed. The Supreme Count held that, al hough according to the policy contract the period of cover had expired, there was an obligation imposed by law * on the part of insurer to demand psyment, and then to provide a one-month grace period from the time of demand for payment (Article 666 (3) and (4)). The Supereme Court added that, since only one week had passed after the previous policy period had lapsed, and there was a one-month grace period from the time of demand for payment, the insured could claim indemnity.

This decision caused a considerable amount of worry and tension on the part of insurers and lawyers, because they feared that it might set a precedent for other cases on the same grounds. They felt that this decision undermined the value of policy contracts and their effect after the expiry date. Article 1806 of the Civil Code says that an obligation shall be extinguished where it is performed in accordance with the contrect, and that, according to the policy contract, the contract shall be binding only up to the expiry date and not after.

In the case of Wakene Feldasso v. Blue Nile Insurance, ${ }^{6}$ the plaintiff had insured his shop against fire and lightining on 13 June 1970. On 13 June 1971 the shop caught fire for unknown reasons, and most of the goods in the shop were destroyed. A day after the loss by fire, the Company was informed of this loss, but it repudiated liability on the grounds that the policy had expired, stating that the policy could be valid only between 13 June 1970 and 13 June 1971, at 4 p.m., as mentioned in the policy contract, whereas the accident took piace on 13 June 1971 at 7.30 p.m. The High Court held that since the insured took the majority of his goods out of his shop a few hours before the event of loss, this was an intentional act performed in order to claim indemnity from the defendant company, and therefore the insured could not recover. The Suprome Court, on appeal, examined the various arguments of both the plaintiff and the defendant company and upheid the High Courts decision, but on a different ground. The major emphasis was on whether indemnity could be recovered for a risk of loss after the period of expiration of the insurance policy. The accident took place on 13 June 1971 at 7.30 p.m., and the period of cover was till 13 June 1971 at 4 o'clock in the afternoon. The insurance policy read as follows: "The (insurance) corporation agrees with the insured, subject to the terms and conditions contained herein or endorsed or otherwise expressed herein, which terms and conditions shall be deemed to form part of this policy, that if, after payment of the premium, the property insured described in the schedule hereto or any part thereof shall be destroyed or damaged by fire or lightning at any time before 4 o'clock of the last day of the period of insurance stated in the schedule, or of any subsequent period in respect of which the insured shall have paid and the corporation shall have accepted the premium required for renewal of this policy, the corpora-

## 6. Civil Appeal Case No. 1184/1965 G.C.

tion will pay or make good to the insured the value of the property at the time of the happening of its destruction or the amount of such damage, or at its option reinstate or replace such property or any part thereof." 7 In accordance with the above condition in the policy contract, the Supreme Court held that the insured could not recover, because the loss by fire took place after the policy had expired.

## II. Doctrine of Limitation

Another relevant area is the doctrine of limitation. The main objective of including this provision in our Commercial Code is to fight against abusive clauses in a policy contract. ${ }^{8}$ The Personal Accident Policy Condition No. 4 says: " $\boldsymbol{F}_{\text {i }}$ If the corporation shall disclaim liability to the insured for any claim hereunder, and such claim shall not within six months from the date of such disclaim have been referred to arbitration under the provision herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."9 This is probably a good example of a direct copy of conditions from policies used in England, with no attempt to amend the standard of the condition to follow Ethiopian legal provisions. According to Article $674(1)^{10}$ of the Commercial Code, the period of limitation in Ethiopia is two years from the date of the occurrence of the damage giving rise to the claim, or from the date when the parties knew of the occurrence. This does not mean that the period of limitation will be two years when there is interruption of payment. According to Article 1852 (1) of the Civil Code, a new period of limitation shall begin to run upon each interruption. The Code policy does not provide for interruption, but simply reduces the period of limitation to six months. In a Personal Accident Policy, Condition No. 3 provides that in no circumstances will the insurance company be liable for any claim unless notice thereof be received within three months after the occurrence of the accident. Article 670 of the Commercial Code provides that, unless he is prevented by force majeure, the beneficiary shall inform the insurer of any occurrence likely to render the insurer liable as soon as he knows of such occurrence, or within not more then five days. Article 670 reduces the period of notification of an occurrence of damage to a period a great deal shorter than that provided in the policy provisions. On the other hand, both the provision of the insurance policy and Article 670 of the Commercial Code conflict with the period of limitation as provided in Article 674 of the Commercial Code.

Article 674 (1) says that the period of limiting the insurer's liability is two years from the date of occurrence of the damage. It is also interesting that Article 674 (3) specifically provides that this period may not be shortened in the policy, and this is indicative of the importance attached by the law-makers to this matter. There seems to be an interesting case that was decided relating to this contro-
7. Fire and Lightaing Policy - Paragraph 11.
8. Punctuated for reasons of increased clarity. (See note at top of page.)
9. Peter Winship - Background Docments of Ethiopian Commerciall Code, 1960, p. 86.
10. All Risks policy - Exceptions. No. 9 Consequential Loss Policy, Condition No. 11; 15; Workman's Compensation Policy; Condition No. 10, Burglary and Housebereaking Policy, Condition No. 11.
versial area of notice and limitation. It was that of Woizero Kidist v. Michell Cotts Ltd. Ato Getahun, the husband of Woizero Kidist, had taken out a personal accident policy from Mitchell Cotts Co. Ltd, Insurance-Division, whereby in the event of death or accident the company would pay the insured a sum of 40,000 dollars. While driving to Jimma, Ato Getahun had a serious car accident on 5 January 1967, and died on 23 January 1967. The company was informed in writing by the deceased family on 26 February 1967, together with documentary evidence that the cause of the death was the car accident. The insurance company disclaimed liability on the grounds that, according to condition No. 2 of the policy, the. insured was to submit a notice in writing to the corporation within fourteen days of the occurrence of the accident or the commencement of the disease. But since the notice in writing was submitted 21 days after the accident (5 January, 1967 to 7 February 1967), the company disclaimed liability. The High Court emphasised the policy condition which demanded notice within fourteen days, and held for the defendant. The Supreme Court, on appeal, examined the case and submitted that a person who had died of an accident could not provide a notice of the accident, and that the section applied only to people who are injured or sick as a result of an accident. In either of the courts, the decision was not based on a proper interpretation of the legal provisions in the Commercial Code.

Another recent case which again manifests the striking differences between the various policies and the Commercial Code on similar subject matter is that of Mekane-Yesus Church v. Ethiopian Insurance Corporation. A contract was made between Môroni Private Company Ltd. (contractor) and the African Solidarity (AFSOL) Insurance on 16 December 1974. This was a performance bond policy whereby the AFSOL Insurance Co. was "held and bound unto the Ethiopian Evangelical Church (the employer) to the sum of 200,000 birr in the event of default-on the part of the contractor".@

After construction of a certain portion of the building, the contractor suddenly left Ethiopia, and the building was left in an unfinished form for some months. After some indications that the contractor had left Ethiopia for good, the employer notified the insurance company of the damage and claimed that the damage sustained should be made good by the surety (i.e. the insurance corporation). The insurance corporation disclaimed liability, and (among others) some of the arguments submitted to the arbitral tribunal were as follows:
(a) that the employer had not submitted immediate notice of the situation to the insurance company as provided in policy No. 1. It submitted that the contractor left before June 1975, whereas the written notice was made on November 1976 to the insurance company.
(b) the limitation period as provided in policy No. 4 was 12 months from the time of the discovery of the act or omission of the contractor, and the corporation submitted that no legal proceedings could be

[^7]instituted against the defendant company, as the plaintiffs instituted legal proceedings about 16 months after having discovered the default on the part of the contractor.

Here there are two striking factors which fall within the ambit of irreconcilability.
(1) Performance Bond Policy Provision No. 1 makes it mandatory for any claimant (insured) to submit a written notice to the corporation immediately after the discovery of any act or omission that shall'or might involve a loss. Personal Accident Policy Condition No. 2. (as seen in the case of Woizero Kidist V. Mitchell Cotts) specifies the period after which no claim is valid. It says that the insured has to submit in writing to the corporation within fourteen days of the occurrence of the accident or of the commencement of the disease. While one policy provision requests immediste notice, another policy qualifies the exact period upon which notice of accident is to be made. In the former case, the word "immediate" could lend itself to different interpretations. This plainly illustrates the fact that, even among the various insurance policies which are in force, there are certain striking irreconcilabilities, with some policy provision being vague, while others are quite specific with regard to similar subjectmatter, as explained in the above case.
(2) Performance Bond Policy Condition No. 4 says that legal proceedings for recovery hereunder may not be brought unless begun within twelve months from the time of the discovery of the act or omission of the contractor on account of which claim is made.

The above provision is in conflict with Article 674 (1) of the Commercial Code, which says that the period of limitation in Ethiopia is two years from the date of the occurrence of the damage giving rise to the occurrence. This is another example of terms used in insurance policies used in England, with no attempt to amend the standard of such conditions to follow Ethiopian legal provisions.

## 111. Concealment of Material Fact

The Commercial Code also provides certain articles for cases of material concealment by the insured. The Ethiopian Jurisprudence has always recognised the principle of aberrima fide, "utmost good faith". ${ }^{11}$ This is required not only before but also after occurrence of loss. In fact, an insured person who suffers a loss and makes a claim under his policy must always realise that he may face a defence on the grounds that, upon the issuance of the policy, the insured did not fully and failry disclose to the insurer every fact which would have shown the nature or extent of the risk, or which might have prevented the undertaking of it, or affected the rate of premium. Generally speaking, there are three main classes

[^8]of breaches of good faith, in accordance with their effect on the validity of the contract under the provisions of the Ethiopian Commercial Code. They are
(a) Concealment this relates to a breach of good faith by intentional suppression of a fact which is material.
(b) Innocent Misrepresentation this relates to a statement which is inaccurate but made innocently, i.e. without any fraudulent intention.
(c) Fraudulent Misrepresentation this relates to a statement made knowingly that it is false. But a false statement which is made through want of care in investigation of the facts is not fraudulent. ${ }^{12}$.

According to Artic e $\mathbf{6 6 8 ( 1 )}$ ) of the Commercial Code, the insurance policy shall be of no effect where the beneficiary has intentionally concealed facts or has made false statements and where such concealment or false statements cause the insurer wrongly to appreciate the risks to be insured, so that, had he been aware of the truth, the insurer would not have entered into the policy or would have imposed terms less favourable to the beneficiary. But the law also provides for cases where the false statement is not deliberate. It says that the insurance policy shall remain in force where the concealment is in good faith and that, if this is discovered before the risk materialises, the insurer is given an option either of terminating the policy by giving one month's notice or of maintaining the policy and increasing the premium. ${ }^{13}$ But if the concealment is discovered after the risk meterialises, the code provides that the sum to be paid by the insurer will be reduced accordingly. ${ }^{14}$ But the insurence policy conditions tend to vary from the legal provisions. All Risks Policy Condition No. 8 says: "... and if the insured, either in the proposal aforsaid or in any renewal of this insurance or in connection with any claim hereunder, makes any misrepresentation or intentional overstatement or intentional omission, the policy shall be void, and premiums shall be forfeited.. ${ }^{15}$ The insurance policy end the legal provision impose a duty on the insurer to represent fully and fairly every fact which shows the nature and extent of the risk and every fact which may prevent the undertaking of it, or affect the rate of premium. But this cannot camouflage the major differences on the effect of concealment or non-disclosure of material facts between the policy conditions and the Commercial code. In summary, the situation is illustrated below.

[^9]
# EFFECT IN INSURANCE POLICIES AND LAW OF CONGEALMENT BY THE INSURED OF MATERIAL FACT 

Effect in the Commercial Code

1. Where concealment is intentional: Termination of contract by insurer; premium retained by insurer.
2. Where concealment is in good faith
(a) Discovery by insurer before risk: Termination of comiract after a month's notice
or
maintenance of contract and increase of premium.
(b) Discovery after risk: Indemnity reduced having regard to the difference between the premiums actually paid and premiums which , ought to have been paid, had the facts not been concealed.

Effect in the Insurance Poilcy Conditions
False statement in proposal
(either intentional overstatement
Policy shall be void and all premiums by the insured shall be forfeited. or. intentional omission)

Thus, the insurance policy says that any misrepresentation either intentional or non-intentional gives rise to the nullification of the policy, whereas the law divides the effect on grounds of deliberate concealment and unintentional misrepresentation. The law provides that where concealment is intentional, the contract may be terminated, whereas, when it is in good faith and discovered before the risk materializes, the insurer is given the option of either terminating the contract after a month's notice or maintaining the contract and increasing the premium. But when it is discovered after the risk materializes, the insurer may reduce the indemnity accordingly. Article 1678 of the Civil Code provides that parties are free to consent to any contract as long as the provisions in the contract do not depart from the obligatory provisions of the law. This is to remind us that, even though the insurer and insured are free to consent to any contract, their contract cannot be made in such a way as to depart from or contravene the mandatory provisions of the law.

MacGillvray ${ }^{16}$ says, "In order to establish that a fact is material and ought to have been disclosed, it is not necessary for the insurers to prove that they would have acted differently if the fact had been disclosed, it is sufficient for them to establish that the facts, if known, might have induced reasonable insurers to
16. MacGillvray - Insurance Law, Vol. 1 No. 893.
decline the risk or increase the premium" When a claim is made and the insurer disclaims liability on the grounds of non-disclosure of material facts, the burden pes on the insurer to establish:
(a) that the fact was misrepresented or was not disclosed; and
(b) that the said fact was material.

How would the court be satisfied that the said fact was material and was misrepresented? From the analysis of Ethiopian Commercial Jurisprudential background, we see that a material fact is any of the following: ${ }^{17}$
(a) a fact which shows the nature or extent of the risk, or
(b) a fact which may prevent the undertaking of the risk, or
(c) a fact which may affect the rate of premium.

Generally, the question of materiality is a matter of fact which can be proved by expert evidence, and then the court will be able to decide intelligently if, in truth, a reasonable insurer's appreciation of the risk would have been affected by the fact misrepresented or hidden. ${ }^{18}$ In the case of Woizero Kidist v. Mitchell Cotts, one of the defences of the defendant Company was that the insured had concealed certain material facts when filling in the proposal form, and that these facts would have made the insurer either terminate the contract or increase the premium. But the most dishertening point is that this issue was not even raised in the decision; hence we could not report the stand on this issue; the plaintiff submitted that the hidden facts were not material and that they could not therefore affect the basis of the contract. ${ }^{19}$

## IV. Increase of Risks

Article 669 of the Commercial Code provides for cases where there is increase cf risks. It says: "Where the risks increase in such a manner that the insurer, had he known the facts at the time when the policy was made, would not have entered into the policy or would have imposed terms less favourable to the beneficiary, the beneficiary shall inform the insurer within fifteen days from the occurrence increasing the risks, where such occurrence is due to the beneficiary, or within fifteen days from the beneficiary benng aware of such occurrence." The insurer may terminate the policy, or maintain it and increase the premium. But the effect of non-notification where there is increase of risk in the policy is quite different from what is provided in the law. The Personal Accident Policy, paragraph III, says: "if the insured engages in any occupation in which greater risk may be incurred without giving notice to the corporation and obtaining permission and paying additional premiums as may be required by the corporation, then this policy becomes absolutely void and no claim shall be made in respect thereof." Hence we see the difference between the law and the insurance policy in terms of
17. See Articles 668 and 669 of the Commercial Code of Ethiopia
18. Asegedech Indaylalu v. Imperial Insurance Co. Civil Case No. 1055-59.
19. W/Kidist y. Mitchell Cotts., Civil Case Case No. 1001/61
the effect of non-notification in the event of increase of risk. Where there is increase of risk and the insurer is notified within fifteen days of the occurrence increasing the risks or within fifteen days from the beneficiary being aware of such occurrence, the insurer may either terminate the policy or maintain it and ncrease the premium. But if there is no notification, then the effect will be according to the provisions of Article 668, as shown below.

## EFFECT OF NON NOTIFICATION WITHIN A SPECIFIED TIME OF IN: CREASE OF RISK BY THE INSURED IN THE POLICY AND THE LAW

Effect in the Commercial Code ${ }^{20}$

1. Where non-notification of increase of risk is intentional:
2. Where non-notification of increase of risk is in good faith
(a) Discovery by insurer before risk:
(b) Discovery after risk:

Termination of policy by insurer: premium retained by insurer.

Termination after a month's notice, or maintence of contract and increase of premium.

Indemnity reduced, having regard to the difference between the premiums actually paid and the premiums which ought to have been paid, had the facts been notified. Effect in the Poficy Conditions
3. Non-notification of increase of risk to the corporation

The policy becomes void and no claim is made in respect thereof.
Thus, the insurance policy generally invalidates the policy in the event of non-notifiction of increase of risk, but the law divides it into intentional and unintentional non-notification of increase of risk, and explains the legal effect accordingly.

## V. Life Policy

Insurance companies also make provisions in a policy to help to attract customers. The Life Policy, General Provision No. 9, says: "If the insured commits suicide, while sane or insane, within two years from the date of issue or from any reinstatement of the policy, the insurance under this contract shall be a sum equal to the premiums paid and no more." Here the policy talks of giving back the insured the total premiums paid, whereas the law looks at this aspect in a compartmentalised fashion. Article $699(1)$ says that, notwithstanding any
provision to the contrary, an insurance policy for the event of death shall be of no effect where the insured person knowingly commits suicide. It also adds that where the beneficiary can show that the suicide was not committed knowingly, the policy shall be effective. The general provision in a life insurance policy also has an area irreconcilable with the law as regards payment of premiums. The policy contract No. 2 says: "Thirty days of grace are allowed for payment of rene ${ }^{-5}$ : wal premiums and instalments of premium. Unless continued in force under the automatic premium loan or extended term insurance provisions, this policy shall lapse without the issue of a summons or of any other formality if any renewal premium or any such instalment is not paid on the due date or within the period of grace." This provision in the policy has two relevant points for us to analyse:
(a) The insurer shall give thirty days of grace for renewing premiums.
(b) At the time when the payment for renewal premiums is due, the insurer shall not demand payment. The law divides the effect of non-payment of renewal premiums according to the duration of the policy, i.e. a policy on which less than three annual premiums have been paid, and a policy on which at least three annual premiums have been paid. But in either of these cases, the law imposes an obligation on the part of the insurer to demand payment. Article 709 (2) says that, if a premium has not been paid at the due date on a policy on which less than three annual premiums have been paid, the insurer may demand payment. If payment is not made within one month from the date of demand, the insurer may terminate the policy. Article 709 (3) says: "If a premium has not been paid at the due date on a policy on which at least three annual premiums have been paid and payment is not made within one month from the date of a demand for payment, the policy shall not lapse. The insurer may issue a paid-up policy, ${ }^{21}$ or otherwise reduce the capital or life interest of the policy according to regulations and under Article 650." Thus we see that, according to the law, there is a duty on the part of the insurer to demand payment, whereas the policy does not say that, at the time when the payment for renewal premiums is due, the insurer shall demand payment. This is an area where either the insurer or the lawyer should look for a quick remedy.

[^10]
# EFFECT OF DISCONTINUATION OF PREMIUNAS ON A LIFE INSURANCE POLICY 

## Life Policy General Provision

Thirty days of grace allowed for renewal and instalments of premium.

When the premium that is due is not paid within the period of grace, the insurer shall not demand payment, and the policy shall lapse without notice.

## Provision of the Commercial Code

1. If less than three annual premiums are paid:
(a) the insurer demands payment;
(b) the policy is terminated if; payment is not made within one month from date of demand.
2. If more than three aninual premiums are paid:
(a) the insurer demands payment;
(o) if payment not made within one month from date of demand, the insurer may (i) issue a paid-up policy, or (ii) reduce the capital or life interest of the policy in accoroance with Article 656(1).

The Life Policy Generai Provision on misrepresentation ${ }^{22}$ says that the insurance company shall be free from all obligations under such a policy if, within two years from the effective date of the policy, it is proved that there has been any willful or fraudulent misrepresentation on the pert of the insured, in which ovent all monies paid to or payable by the corporation shall be forfeited by the insured. However, the policy goes on to say that if death occurs because of the undisclosed material fact after the policy has been in force for two years, then the insurance company shall be limited to a payment of the surrender value or the total premiums paid, whichever is greater, exclusive of any extra premiums paid. If material facts are dischosed at any time during the lifetime of the insured, then the insurance company may adjust the premium in accordance with its existing underwriting rules. Thus the law provides that, if there is discovery of material fact before the risk, ${ }^{23}$ then the insured can either terminate the policy by giving a one month's notice, or maintain the policy and increase the premium. But the life policy tends to ignore the right of the insured to terminate the policy by giving one month's notice, and gives only one avenue to the insurer, that is, adjusting the premiums in accordance with its existing underwriting rules if material facts are disclosed during the lifetime of the insured.
22. Life Policy., General Provision No. 10.
23. Commercial Code of Ethiopia 1960, Article 668.

## VI. Cumulative Insurance

Cumulative insurance is also an area where the insurance policy and the law do not consistently reflect the reality of the situation. The Personal Accident policy, parapgraph III, says: "... if the assured shall, at any time subsequent to the date of accepting or effecing this policy, be insured against death or disablement by accident with any other insurer, without the writen consent of the corporation, ... then this policy shall become absolutely void and no claim shall be made in respect thereof." ${ }^{24}$ The Commercial Law also deals with cumulative insurance. It says ${ }^{25}$ that, where severa! insurers insure the same object against the same risk so that the object is overinsured, each insurer, where there has been fraud on the part of the beneficiary, may require the termination of the policy and may in addition claim damages; where the beneficiary is in good faith, each insurer shall, where the risk materialises, pay compensation in proportion to the value insured by him.

## EFFECT OF CUMULATIVE INSURANCE IN INSURANCE POLICY

## AND IN LAW

If after effecting a policy with one insurer, the insured subsequently insures the same object against the same risk without the written consent of the corporation:
(a) If the insured insures with several insurers the same object against the same risk fraudulently:
(b) If the insured takes out cumulative insurance in good faith:

Effect in the Policy Contract The policy shall become absolutely void and no claim shall be made in respect thereof.


#### Abstract

Effect in the layw ${ }^{26}$ Each insurer may require the termination of the policy and may in addition claim damages.


Each insurer shall, when the risk materializes, pay compensation in proportion to the value insured.

As we can see, there is an area of inconsistency between the policy and the law, but in addition to this fact, the area related to cumulative insurance in both insurance policy and law is out of date. Neirher matches the spirit and objective of Proclamation No. 26 of March 1975. In consequence of the attempt to socialise the economy, all the basic means of production-land, factories, mines, etc., be-
24. Private Car Policy Comprehensive, Condition No. 6; All Risks Policy, condition No. 7; Consequential Loss Policy, Condition No. 3, 12;
Workman's Compensation Policy, Condition No. 11; Commercial Motor Policy, Condition No. 6; Burglary and Housebreaking Policy, Condition No. 8.
25. Commercial Code of Ethiopia 1950, Article 681.
26. Commercial Code of Ethiopia 1960, Article 681
came social property, According to Section 2 (0) of Proclamation No. 26/1975, insurance was amongst one of the institutions exclusively undertaken by the government. This leads to one major conclusion: all the insurance institutions are under government control, and all the various branches are organised under the National Insurance Corporation. Hence, a person who insures a certain opfect against a risk cannot insure the same object against a similar risk with another insurance company because in Ethiopia at present there is only one insurer i.e. the National Insurance Corporation, under which there are several branches, e.g. the AFSOL Branch, the Lion Branch, the Blue Nile Branch, for the sake of expedience in terms of avoiding customers from overcrowding one firm.

## CONCLUSION

As Ethiopia has declared its intention to follow the socialist path of development, the existence of institutions and laws straightjacketed to suit the interests of the huge Insurance Multinational in the country appears to be out-of-date. The superstructure will have to reflect the economic base, even thoughinteraction is possible between the two. When we suggest that laws and institutions should suit the existing political and economic conditions, we do not mean that we have to throw away all the former laws and institutions. What we hope to emphasise is that we have to retain those components which are relevant in the light of our social conditions, and discard other components which are not only not in accordance with the spirit and objectives of the new socio-economic system but which also contribute to the perpetuation of the former confused and confusing relationships. Of course, distinguishing irrelevant components in order to discard them is not easy: it demands thorough research in the different fields, and wide reading in both the law and insurance policies.

The main theme of this paper is to pinpoint areas of inconsistancy between the Commercial Code provisions on insurance and the policy of insurance. How should we proceed to resolve such a problem? If it is found necessary to change the law to fit the needs of the insurance world and at the same time to protect the legitimate interests of the insured, of course the law will have to change.

It is apparent that one cannot have a policy contract outining the legal commitment of both contracting parties and a law governing a similar area going parallel with gross contradictions between each other. The solution lies in either (a) streamlining the policy as well as the law to reflect the actual conditions of the business; this entails the reconciliation of the various provisions in both the Commercial Code and the policy contracts. Or (b) we can change the various policy provisions in accordance with the existing legal provisions.

A failure to realise this would only in the long run help to contribute to the existence of two parallel rules which go on different dimension with no possibility of conciliation i.e. the policy and the law.

# The 1976 Monetary and Banking Proclamation: Innovations and Implications 

By BEFEKADU DEGEFE*

## INTRODUCTION

Although money in Ethiopia has a long history dating back to the Axumite Empire, ${ }^{1}$ comprehensive legislation and institutions are of relatively recent origin. The first bank in Ethiopia was the Bank of Abyssinia, a branch of the National Bank of Egypt which opened its doors for business in February 1905 with a capital of $£ 500,000$. This Bank was purchased in October 1931 by the Ethiopian Government, renamed the Bank of Ethiopia, thus becoming not only the first bank to be owned wholly by the nation, but also one of the first indigenous central banks in Africa.

The Bank of Ethiopia was closed in 1936, legally liquidated in 1945 and until 1942 no Ethiopian bank was in existence, although banking services were provided by four branches of Italian banks, namely Banco d'Italia, Banco Nazionale del Lavoro, Banco di Roma and Banco di Napoli, of which the latter two continued to do business until January 1975, when they were nationalized. In 1941 Barclays Bank of Britain followed in the footsteps of the British troops, and established a branch which operated until 1943. The first Ethiopian postwar bank was established by proClamation in 1942 (Proclamation No. 21 of 1942) and was named "State Bank of Ethiopia." It combined the functions of commercial and central bank until 1963.

The Monetary and Banking Proclamation (Proclamation 206, hereafter referred to as MBP1) of 1963 separated commercial and central banking, entrusting the latter responsibility to the National Bank of Ethiopia (hereafter referred to as NBE) which was created by an order in the same year. Although prior to 1963 there were a number of legislations on money and monetary affairs, MBP1 for the first time defined the national monetary policy and institutionalized its management in the NBE.

In December 1975 the Provisional Military Government articulated its policy as the development of a socialist society, and issued an economic policy that was

[^11]deemed to be consistent with and necessary to the realization of this intention. The policy, among other things, declared (PMAC, 1974) that those resources that were either crucial to economic development or were of such a character that they provide an indispensable service to the community would have to be brought under government control or ownership.

On : January 1975 the Government exercised its intention of controlling the commanding heights of the economy when it nationalized three commercial banks, about eleven insurance corporations and two financial intermediaries, and subsequently reorganized them on lines considered to serve the bestinterests of the society. The nationalized insurance companies were merged with those owned by the Government to form the Ethiopian Insurance Corporation. The two financial intermediaries were amalgamated to form the "Housing, and Savings Bank" and assigned to cater to the financial needs of the construction industry. The Government-owned "Agricultural and Industrial Bank" was re-established and given the task of providing credit for industry and agriculture. The reorganization of the commercial bank was completed in two stages. The first phase saw the merger of the three nationalized banks into "Addis Bank" while the last phase was implemented when this commercial bank was absorbed into the Go-vernment-owned "Commercial Bank of Ethiopia." The development in the financcial sector culminated in the repeal of the 1963 proclamation, which was replaced by the Monetary and Banking Proclamation of 1976. This paper attempts to delineate the differences between the MBP1, the 1963 Charter and Proclamation 211 of 1963 and the MBP2, along with the economic implications of the major innovations. Part | presents a comparative overview of the 1963 and 1976 legislations, with an accent on their differences, using the structure of the latter for ease of exposition. Part II discusses the implications of the important innovations.

## 1. Major Changes introduced by the 1976 Monetary Proclamation

The post-1963 monetary policy and its management was articulated in 78 articles spread over two proclamations ${ }^{2}$ and an order ${ }^{3}$ dealing with money and banking, regulation of foreign exchange, and the Charter creating the NBE respectively. ${ }^{4}$ With the four articles that created the Bank of Abyssinia in 1905 and the three articles that established the State Bank of Ethiopia in 1942, the sheer size of the 1963 legislations must appear awesome. But the difference in the number of articles at one and the same time reflected the complexity of the nation's monetary policy and its management. While, through its three articles, the 1942 proclamation is for example content to informing us of its title in the first, the establishment of State Bank in the second, its capital, (one million Maria
2. "Monetary and Banking Proclamation, 1963" (Proclamation 206 and Foreign Exchange Prociamation 1963' (Proclamation 211).
3. "National Bank of Ethiopia Charter 1963"' (Order No. 30)
4. Both the' Charter and Proclamation 206 have been amended over the years, and the final version is used in this paper.

Theresa doilars, a legal tender along with the East African shiling until July 1945 and February 1946 respectively) in the third, the 1963 proclamations go much further than this both in detail and scope, defining the objectives of the domestic and external monetary policy, along with the powers and instruments available to the NBE.

In 74 articles, the 1976 Monetary and Banking Proclamation consolidated the three different legislations of 1963 into one body of law, expanded some of the chapters, deleted and amended others, and as a whole developed comprehehensive and less vaguely defined goals and instruments.

## The Legislation

Chapter 1 of MEP2 is definitional, dealing with general provisions.
Chapter II defines the legal status, powers and duties of the NBE, amalgamating Chapter I of MBPI and Chapters I and II of the Charter. The 1976 provision recereates the National Bank, bestows on it legal personality and defines its powers and duties. The NBE is to regulate and control the monetary and banking regime of the nation. However, with regard to both purpose and power of the NBE, MBP2 is much more explicit than its predecessor. The 1963 provisions make it the monopoly source of notes and coins ${ }^{5}$ and grants it the power to regulate money supply, fix interest rates, manage the nations international reserve, licence and supervise banks ${ }^{6}$ with the goal of fostering monetary stability, credit and exchange rate, conditions conducive to the balanced growth of the economy; ${ }^{7}$ but MBP2 goes much further than this, and explicitly states the objectives under which it shall exercise these (end other powers) which should be in accordance with the national plan, to achieve high rates of growth with high employment and stable prices. ${ }^{8}$ The powers of the NBE are given in the 16 subarticles of Article 9 , which, in addition, grants NBE the right to require the socialised sector ${ }^{9}$ to maintain accounts which are open to its inspection, ${ }^{10}$ as well as to direct banks and other financial institutions to deny credit to enterprises which misuse financial resources at their disposal, ${ }^{11}$ with the objective of increasing the efficient utilization of resources. ${ }^{12}$ in general, MBP2 defines the purpose less vaguely and amplifies the power of the NBE more clearly.

Chapter III deals with capital, reserves and financia! statements of the NBE, which matters were treated previously in the Charter: ${ }^{13}$ the important differences being the increase in the capital ${ }^{14}$ and the distribution and management of the profits. ${ }^{15}$
5. Charter, Article 8.
6. Article 2 of MBPI.
7. Charter, Art. 3.
8. Art. 6.
9. Defined under Articles 2(5) (a) and (b).
10. Art. $9(8)$
11. Art. $9(7)$
12. Art. 9(6)
13. Chapter 3, section 9-14
14. Charter Art. 9 and MBP2, art. 10, respectively.
15. See Art. 12(1) of MBP2 and Art. 11(1); Art. 12(2) of MBP2 and Art. 11(2); Art. 12 (3) (a) and (b) of MBP2 and Art,11(3) (a) and (b) of the Charter, respectively.

Chapter IV deals with organization and administration of the NBE, and again this was part of the Charter. ${ }^{16}$ Under both systems the NBE is to be administered by a Board of Directors. The remaining Articles detail the general organizational and administrative aspects.

Chapter V defines the relations between NBE and the Government, a subject treated in Chapter III of MBP1, some of which was amended in 1969. ${ }^{17}$ The NBE serves the Government as its fiscal agent and banker, In this respect it can extend credit, accept deposits and make payments on its behalf.

With respect to credit, MBPI (as amended) forsees that the Government can borrow from NDE on the bases of (a) direct advance, (b) treasury bills, and (c) bonds. ${ }^{18}$

Secondly, as far as the size of credit goes, MBP1 (as amended) limits direct advance to $20 \%$ of the ordinary revenue collected during the previous fiscal year, subject to interest payment, the exact rate of which is to be negotiated between the Ministry of Finance and NBE, but should never be less than 3\% per annum. It also specifies the payment of any debt previously contracted under this heading as a condition for further extension of credit. ${ }^{19}$ MBP2 increases the size to $25 \%$ makes the $3 \%$ interest the maximum and rules out repayment as a precondition for further extension. ${ }^{20}$

The Government can acquire credit from or through the NBE by selling treasury bills ${ }^{21}$ the amount of which is limited to $12 \%$ of the ordinary revenue collected during the previous fiscal year under MBP1 (as amended), while under MBP2 this ratio is increased to $20 \% .^{22}$

The third credit instrument available to the Government is bonds, limited to three times the capital plus the general reserve fund of the NBE plus 82 million Birf, ${ }^{23}$ while under MBP2 the base is changed to ordinary revenue collected in the previous fiscal year and the ratio is $50 \% .^{.{ }^{14}}$

Chapter VI deals with relation of the banks and other financial institutions, and has three parts: (a) regulation and control of credit, (b) credit transactions, deposits and related matters, and (c) transactions in international reserve assets. The latter point does not concern us here, nor is it different from its predecessor, ${ }^{25}$ endowing the NBE with a monopoly involving foreign exchange transactions, along with its power to delegate this authority to others.
(a) Regulation and Control of Credit. This part is similar in both legislations, ${ }^{26}$ and grants the NBE the power to direct its own credit as well as those of other banks and other financial institutions, to set the interest rate at which it is to lend to other banks and other financial institutions, and to control the purpose,

| 16. Chapter IV, Art. 15-21. | 20. Art. 26(3) (a). |
| :--- | :--- |
| 17. "Monetary and Banking Proclamation | 21. Decree Art.2(6) |
| (Amendment) Decree (Decree No. 54, 1969." | 22. Art. 26(3)(b)(3). |
| Hereafter referred to as the Decree). | 23. Decree Art. 2(c). |
| 18. Art. 13(3); (4); (7) 24. Art. 26(3) (c). <br> 19. Deree Art. 2(a) and MBP1 Art. 29 25. Cornpare Chapter IV part 3 Arts. <br> and 26(3) (a). 26. Art. 20-35 of MBP2 and Art. 15-20 of MBP1. |  |

size, period and interest rate they are to charge and pay on deposits of different kinds. Two important points of departure between the two legislations concern reserve and liquid assets requirements. Both legislations ${ }^{27}$ require banks and other financial institutions to deposit in cash or other liquid assets, including treasury bills, ${ }^{28}$ a certain proportion of their deposit liabilities. The cruciaf diffes, rence is that, under the MBP1, a bank is limited to a maximum of $20 \%$ of its deposit liability, while under MBP2 the limit is left to the discretion of the NBE. Similarly, both legislations empower the NBE to require banks and other financial institutions to keep a certain proportion of their short-term liabilities intliquid assets. However, under MBP1 it is limited to a maximum of $30 \%$, while under MBP2 the ceiling is left to the NBE's direction. ${ }^{29}$
(b) Credit Transactions and Deposits. Both MBP1 and MBP2 prescribe the conditions under which banks and financial institutions may borrow from the bank. ${ }^{30}$ The NBE may discount, rediscount, purchase or sale bills of exchenge, treasury notes, etc., from banks and other financial institutions.

Chapter VII deals with supervision and control of banks and other finapcial institutions. While Chapter V of MBP1 deals with licensing and supervision of banks, MBP2 does not include licensing, since this matter has been succinctly dealt with by granting the NBE the monopoly powet to establish, consolidate or dissolve banks and other financial institutions. ${ }^{31}$ A point worth mentioning here is that, while the result of inappropriate financial management by banks would lead the NBE under MBP1, depending on the gravity of the situation to (a) suggesting corrective action, (b) prohibiting its receipt of desposits, (c) suspension of business in whole or in part, and (d) liquidation ${ }^{32}$, under MBP2 it would simply lead to "appropriate measures" to be taken ${ }^{33}$

Chapter VIII deals with the monetary unit, the legal tender and administration of foreign currency; this had its counterpart in Chapter Two of MBP1. MBP2 changes the monetary unit from the Ethiopian dollar ${ }^{34}$ to the Birr ${ }^{35}$ with the same gold parity, i.e. 0.355468 gm . of fine gold. The gold content of the Ethiopian dollar (devaluation or revaluation) was to be effected by the Emperor upon the recommendation of the Council of Ministers, ${ }^{36}$ whilc under MBP2 it is to be done by the Government upon the recommendation of the NBE. ${ }^{37}$

A rather significant ammendment is one which deals with the distribution of the assets of the NBE. While both legislations require the NBE to hold part of its assets in an international reserve fund, consisting of gold, foreign currencies and
27. Art. 18 of MBP1 and Art. 33 of MBP2.
28. Art. 13 (5) of MBP1 and Art. 26 (3) (b) (2) of MBP2.
29. Art. 38 (1) of MBP1 and Art. 50 of MBP2.
30. Art. 21-23 of MBP1 and Arts. 36-38 of MBP2.
31. Art.9(3). 35. Art. 51
32. Art.37. 36. Art. 3(3).
33. Art. 49
37. Art. 52.
34. Art. 3(1) of MBP1.
securities, etc., ${ }^{38}$ MBP2 drops the specific provision from MBP1 which required the NBE to hold an amount equal, at a minimum, to $25 \%$ of the notes (but not coins) it issued and its liabilities paysble on demand. ${ }^{39}$ On the other hand, MBP2 requires the NBE to hoid part of its assets in an international reserve fund, enough to meet (a) the import needs of the country, (b) foreign debt servicing, and (c) the imports of essential services. ${ }^{40}$

Chapter IX deals with the regulation of foreign exchange, which like the proclamation is repealed, contains the definition of the conditions and circumstances governing foreign exchange transactions. It specifically underlines that the NBE or authorized decler(s) are the only persons (physical or juridical) to hold and deal with foreign exchange, while others have the obligation to surrender all the foreign currency in their possession. ${ }^{41}$

Chapter X of MBP2 deals with general provisions, and includes laws that are repealed, those still in force, its precedence over others in case of conflict, delegating the NBE to issue regulations, penal clause in case of contraventions, the effective date of the prociamation, etc. ${ }^{42}$ An interesting article is that which introduces a secrecy provision into the banking operation. ${ }^{43}$ Although secrecy is considered a traditional characteristic of the banking industry, the Ethiopian Law, for the first time after 1963, states this obigation clearly. ${ }^{44}$

## II. Implications of some of the major innovations of the MBP 2

MBP2 is the product of the revolution that introduced novel philosophical and economic factors into the country, and it was meant to adjust the monetary and banking policy into the now system as well as providing the necessary instruments for the attainment of its objectives. Consequently, the difference between MBP2 and the legisiations that it repealed must be viewed as reflecting the differences between the systems, conditions and objectives under and for which they were produced. ${ }^{45}$

The fulcrum on which MBP2 was developed is the national goal of developing an independent economy, the essence of which is selfreliance. Instead of depending on external factors, the nation is to rely on its own resources to provide it with the necessary developmental baselines. This goal is reflected in MBP2 in the articles that deal with (a) the issue of notes, (b) control of money supply and credit, and (c) Government credit from the NBE.

[^12]
## (a) Issue of Notes by the NBE

An innovation that could be considered as a watershed in the development of the nation's monetary policy is introduced into MBP2 under Article 60. This article, while governing the distribution of the assets of the NBE, is a landmark in that for the first time in the nation's monetary history, it breaks the link between the issue of domestic legal tender notes from its foreign assets. To appreciate the significance of this provision it may be helpful to review the pre-1976 conditions under which the country's legal tender notes were issued along with their economic repercussions.

Although the Government vested the exclusive power of issuing notes"and coins to the State Bank of Ethiopia in $1945,^{46}$ it was at the same time required to back all issues of notes (i.e. excluding coins) with capital in the international reserve fund consisting of gold, silver, foreign currencies, foreign bank balances or prime securities readily convertable into foreign currencies or foreign bank balances to the minimum extent of $75 \%$ and the remaining $25 \%$ by Imperial Treasury obligations. ${ }^{47}$ At the same time the country operated under the free exchange system. ${ }^{48}$ It should be clear that under such an agreement, the amoun't of notes issued, and thus the quantity of money floating in the economy, depended on the balance of trade (strictly speaking the balance of payment), and not on the needs of the domestic economy. With reference to the Imperial treasury, obligations, we may, consider in this instance an exporter who sold coffee abroad to the value of 1,000 Birr, which sum would be released by the State Bank when it was in receipt of foreign exchange of an equal value. If this exporter (or other importer for thet matter) imported goods whose value in foreign exchange equalled 1,000 Birr, then this amount of money had to be handed over to the State Bank. Again for example, abstracting from the $25 \%$ Treasury obligation the amount of notes to be issued by the State Bank and consequently the volume of money (i.e. currency outside banks plus net demand deposit plus saving and time deposit floating in the economy) would be equal to the excess of the value of exports over imports. Where the value of exports equalled that of imports, no additional notes would be issued, as the amount issued due to exports would be cancelled out by the notes absorbed by the State Bank to finance imports, etc. This in essence meant that the domestic money supply was a function of the internationa! reserve fund held by the State Bank, to the exclusion of domestic needs. No matter what the requirements of the domestic economic activity was, and regardiess of the purpose, the State Bank of Ethiopia could not issue notes that were not backed, at the minimum, by $75 \%$ in foreign assets.

The economic implication of such an arrangement was that it incapacitated the nation from developing an independent economic policy, for the simple
46. Art. 3 of Currency and Legal Tender Proclamation (Proclamation No. 76 of 1949).
47. Art. 4
48. There was no Foreign Exchange Control until 1949. See Currency Amendment Regulations (Legal Notice No. 127), 1949.
reason that the command over the pursestrings, so to speak, was held by externat factors. The direction and tempo of the national economic activity was thus dictated and controlled not by policies that were developed in the country, but by the international economic environment. The fact that the amount of money floating in the economy was determined by the balance-of-payment position, and since future production of exportables and non-exportables was a function of past performance as well as future expectations, the growth of output and employment were brought under the effective contro' of the demand for the nations output by the rest of the world, as well as the demand for imports by the country.

Such a system of issuing notes, notwithistanding the position of the balance of trade, was also dangerous to the domestic economic stability. If the balance of trade is positive, this increases the domestic money supply and thus demand, and, in the absence of tools and mechanisms for demand management, proves inflationary. If, on the contrary, the balance of trade is negative, it decreases the domestic money supply as wel' as demand, and this decreases prices and eventualiy output. In the broader context, such an arrangement required the domestic economy to adjust "ex post" to an "ex ante," external activity, a situation that is impossibie.

It was not until 1949, when as a result of the decline in the price of coffee and the ensuing problems whose nature were discussed above, that the Government perceived the need to change the base on which domestic notes were to be issued, and at the same time to institute a system of foreign exchange control. Between 1949 and 1950 two important laws were enacted, the one introducing foreign exchange control ${ }^{49}$ and the other reducing the dependence of the domestic note issue from a minimum of $75 \%$ in foreign assets to a maximum of $30 \%$, with Imperial Treasury obligations carriying the balance. ${ }^{50}$ This amended definition of the relationship between the domestic legal tender notes and foreign assets continued to be operative until 1963, when MBP1 reduced the ratio to a minimum of $25 \%{ }^{31}$ Thus between 1950 and 1963 the dependence of the issue of domestic legal tender notes (and by implication the domestic money supply) on the country's foreign assets was gradually attenua+ed.

Under MBP2, the NBE is granted the monopoly of notes issue, and is at the same time required to hold part of its assets in an international reserve fund. ${ }^{52}$ However, the significance here is that it excludes any relationship between the amount of legal tender notes to be issued and the assets held in the internationat reserve fund. While, by presumption, the quantity of notes to be issued is to depend on the needs of the domestic economy, the amount of assets to be held in international reserve at any time is to be sufficient to pay for imports of goods and

[^13]services as well debt-servicing, Thus MBP2 separated the linkage that existed between the issue of domestic legal tender notes, and thus the money supply and the nation's international reserve, completing the metamorphosis of developing an independent, domestically managable monetary policy, a sine qua non for the development of an independent domestic economic policy, started a quarter of century earlier

## (b) Control of Money Supply and Credit by the NBE

While the dissociation of issuing domestic legal tender notes (and this the money supply) from the vagaries of the international economic envirenment, over which the country does not have any control and with which its interest may not conform, is welcome, MBP2 at the same time has broadened the responsibility of the NBE to include (1) the fostering of balanced and accelerated economic development, (2) the promotion and maintainance of a high level of production, employment and real income, and (3) encouraging and promoting the full development of the productive forces of Ethiopia by using monetary instruments to adjust the quartity of money to what is required. The meney supply has its primary base in the quantity of legal tender notes issued, and its secondary base how they are used by the three important institutions, namely the Government, other banks and other financial institutions, and the non-banking public. Whether the NBE, independent of external controlling factors, can successfully adjust the quantity of money fioating in the economy to what is actually desired depends on how it controls itself, as well as dealing with these three institutions. Two of these problems can be dealt with easily. With respect to controlling itself, the NBE is assumed to have come of age and to have grown sufficiently responsible to take measured and prudent actions in all its dealings. Secondly, with respect to the non-banking private sector, which is otherwise completely outside the direct control of NBE (and which as of December 1979 accounted for $76 \%$ of the money supply in the form of currency outside banks), ${ }^{53}$ it is expected to influence the management of their monetary resources through the interest rate it allows banks and other financial institutions to pay or charge their customers, and by encouraging them to use the monetary institution to a greater extent than they do at present. Monetary control through banks and other financial institutions, as well as the NBE's relation with the Government, is more complicated.
(1) Banks. Other Financial Institutions and the NBE. A monetary policy that is not directly linked to external variables becomes a sensitive undertaking that calls for prudence and vigour. The equilibrium in the domestic economy can be wrecked if there is too large or small amount of money floating than is required, resulting either in recession or inflation or both. As a result, the close and constant monitoring of the money supply with the objective of maintaining a balance with the needs of the current economic activity becomes crucial.

[^14]Under both MBP1 and MBP2, ${ }^{\text {se }}$ the NBE is entrusted with the responsibility of regulating the money supply which is defined in the case of Ethiopia as currency outside banks plus net demand deposit. While the instruments of control are the same under both legislations, the NBE is in a more powerful position under MBP2 relatively to MBP1, as a result of an important provision dealing : with banks and other financial institutions. Briefly, the more important policy instruments available to the NBE to control money supply are (a) open market operations, (b) discount rate, and (c) reserve requirement. To illustrate how the NBE uses these instruments (separately or in any combination), let us assume that the amount of money as defined above is more than what the economic activity requires. Then the policy objective calls for decreasing the extra amount of money floating in the economy. If it opts to use open market operation, then it will exercise its power ${ }^{55}$ to sell government securties (bonds, treasury bills, promissory notes etc.) to banks, financial institutions and individuals. ${ }^{56}$ When the NBE sells securities, it releases certificates of government debt and collects money. Since the money in the NBE is not considered to be part of the money supply, this action automatically decreases the money supply, in the first instance by the amount that financed the purchase from currency outside banks and demand deposit. When the NBE feels that the economy needs more money than is currently floating, it reverses the process.

On the other hand, the NBE can use discount rate ${ }^{57}$ to control the money supply. This instrument functions either by encouraging or discouraging banks and financial institutions to borrow from it to increase or decrease their creditcreating capacity; which has a potential to increase money supply. If the NBE feels that the amount of money floating in the economy is sufficient or greater than what the economy needs, and if at the same time banks and other financial institutions want to borrow money from it to lend to their customers, it will increase the interest rate at which it would grant them credit to a level high enough to discourage them. When and if it feels that the money supply should increase, but the banks and other financial institutions are short of cash, it will encourage them to borrow from it by decreasing the discount rate.

However, while the open market and discount rate are necessary instruments, they are not sufficient, in and by themselves, to make possible an effective adjustment of the money supply to the needs of the economy. This is so because of two basic characteristics of the banking industry. The first is that the effectiveness of these two instruments is possible if and only if the banks and other financial institutions are willing to purchase (or sell as the case may be) government securities and/or want to borrow money, and there is no way in which the NBE can otherwise enforce compliance. Secondly the interest of the NBE

[^15]and that of the banks and other financial institutions might be at variance. While the former is interested in adjusting the money supply to the needs of the economy, the latter is interested in maximizing profit. Thus, if the NBE wants to decrease money supply by selling securities and/or increasing the discount rate, the banks and other financial institutions can increase the money supply by re ${ }_{-}$ cycling the financial assets deposited by their customers to satisfy their profit motive. The reserve reauirements and liquidity ratio (aiong with quantitative and qualitative credit control) ${ }^{58}$ are the instruments by which the NBE controls the money supply by controlling the loanable funds of the banks and other financial institutions; hence the importance of these two instruments. ${ }^{59}$

The reserve requirement is available to the NBE, ${ }^{60}$ and when it uses this instrument, it requires banks and other financial institutions to deposit a certain percentage of their deposit liabilities in its account; this money is therefore not available to them to lend out or use otherwise. ${ }^{61}$ Similarly, the liquid assets that are assigned to cover the required liquidity ratio cannot be used for any other purpose.

While the open market operation and discount rate provisions are carried into MBP2 from MBP1 whithout change, ${ }^{62}$ the reserve requirement and liquidity ratio provisions have undergone important revisions. Although the NBE was granted the powers under MBP1, it was however limited to raising the reserve requirement to a maximum of $20 \%$ and the liquidity ratio to a maximum of $30 \%$ of their deposit and short-term liabilities respectively. ${ }^{63}$ This meant that, even under conditions of inflationary pressure, the banks and other financial institutions could lend out $80 \%$ and $70 \%$ of their deposit and short-term liabilities, thus frustrating the policy of tight money which the interest of the economy would prescribe. Perhaps cognizant of this problem, the drafters of MBP2 gave the NBE $100 \%$ control over the loanable fund of the banks and other financial institutions ${ }^{64}$ when they left the percentage that could be imposed as required reserve and liquidity ratio to its discretion; this puts the NBE in a relatively better position than before. As a result of these provisions, the NBE can vary the required reserve as well as the liquidity ratio to a level it feels would produce the desired resulis.
(2) Credit Control. The NBE under MBP1 ${ }^{65}$ could, through regulations, issue conditions under which it would extend credit to banks and other financial

[^16]institutions, vary the interest rate it and banks and other financial institutions would charge for different lines of credit they extend to their customers, and determine the direction, duration, purpose and limit of credit. While all of these powers are carried into the MBP2, ${ }^{66}$ it includes, albeit by implication, the important implementational provision of examining the books of public enterprises to ascertain that they are using financial resources at their disposal in a sociallyt beneficial manner. 67 Where the NBE feels that public enterprises are misusing resources, it can direct the banks and other financial institution not to extend any credi;. ${ }^{68}$ Thus, not only can the NBE direct credit to activities that would contribute to the development of the country, and limit the amount when the general interests of the economy so dictate, it can also ensure the proper utilization of the resources.
(c) The Relation Between Government and the PIBE.

The relations between the Govermment and the NBE are better integrated under MBP2. While under MBP1 the relationship between the NBE and the Government is a relationship between a bank and a client, under MBP2 the NBE becomes an active participant in the formulation of the financial plan of the Government with the view to (a) ensuring monetary stability and balance of pay-j ment equilibrium, and (b) making available financial resources to cover its deficit. ${ }^{69}$

Secondly, the Proclamation has standardized the base on which the size of the Government credit from NBE is to be calculated in the three cases of direct adivance, treasury bills and bonds. Henceforth the base is to be the actual ordinary revenue collected during the previous fiscal year. It has also increased the coefficients relating the ordinary revenue to the size of credit to 0.25 in the case of direct advance, 0.20 in the case of treasury bills, and 0.50 in the case of bonds. The change in the base, the increased coefficients, and the maximum of $3 \%$ interest payment on direct advance are all designed to increase monies to be made available to the Government to finance its needs. ${ }^{70}$

The increase in the flow of financial resources from the NBE to the Government is understandable, considering the fact that the latter is the prime mover of the economy, a responsibility that will require an expenditure far greater than its revenue, at least in the foreseeable future.

## Anomalies Between the Law and the Goals of the Society

One objective of the Ethiopian revolution has been unequivocally defined as the development of a socialist society, whose achievement would require the
66. Art. 9 (8).
67. Art. 9 (8).
68. Art. 9 (7)
69. Arts. 9 (15) and 26 (2).
70. As of December 1979, Government internal debt was 1.2 billion birr of which $26 \%$ was direct advance, $24 \%$ was treasury bills (including promissory notes) and the $50 \%$ balance in bonds. See Quarterly Bulletin (NBE), Vol. 6 No. 1, March 1960.
subordination of all institutions to these objectives. The 1976 monetary and barking proclamation presents certan anomalies or discrepancies of which the two major ones are pointed out below.
(a) The competitive nature of the Law. The basic assumption of the NBE's relationship with banks and other financial insititutions, and especially with the Commercial Banks, is that there will be more than one of them, and that they will be operating in harmonious competition. However, the classic organization of banks in socialist or socialist-oriented societies is one in which there is only one central bank (with specialized banks under it) and no competition. Development in the Ethiopian banks suggests a move in this direction, with only one compercial bank. While the legislation is not against consolidation, it is nevertheless at variance with the goals and objectives of the society by assuming (tacitly) the legality of competition among banks and other financial institutions.
(b) second and more serious anomaly is the relationship between the NBE and the Government. Since a socialist economy operates under a central plan, the issue here is whether the plan should be subservient to financial resources that can be made available, or whether the money should be made avallable in order to fulfil the plan. The latter alternative does not seem to be operative in Ethiopia, since the Government is limited to the amount of financial resources that can be made available to it from the NBE, or even from banks and other financial institutions, since they are under the control of the central bank.

## CONCLUSION

Although MBP2 inherited most of its provisions from the legisiation that preceded it, it has nevertheless introduced important innovations into the nation's monetary policy and its management. For the first time, it has liberated the domestic monetary policy from external dependence, increased the monetary resources that can be made available to the Government, and at the seme time it has increased the power of the NBE to control the domestic monetary scene. However, this increased capacity, while very welcome, is limited to banks and other financial institutions, and, through the interest rate and selective credit control system to their customers. While these powers are perhaps sufficient in economies thet have a low ratio of currency outside banks to total money supply, it may not be sufficient in the case of Ethiopia, where more than three-quarters of the money supply is outside banks (and beyond the control of the NBE), and an effective monetary policy must create instruments capable of harnessing this wild giant. Until such time, the NBE's capacity to control the money supply remains incomplete.

# Products Liability in Ethiopia* 

## by GEORGE KRZECZUNOWICZ**

## FOREWORD

The intricacies of the report below, submitted at the Congress to the experts in our subject, may baffle readers not familiar with it. For their benefit, this Fore:word attempts to expose the gist of the matter in simple (indeed simplifying) terms.
"Products Liability" is a new and controversial legal concept concomitant with economic development, on which Ethiopia is now embarking. Industrializetion brings benefits, but is inseparable from risks of damage from its otherwise useful products (such as, e.g., motorcars or drugs). One of the tasks of Administrative law is to ensure, by preventive regulation of manufacturing and licensing processes, that products supplied to the public satisfy safety standards. Obversely, one of the tasks of Civil law (which concerns us here) is to ensure that where, despite such preventive administrative measures, if any, a person is injured by the product normally used, he is compensated by the producer, subject to the conditions exposed later in this paper. In this connection, the purportedly dominant role of the products liability provision of Art. 2085 Civil Code may be illustrated as follows:

1. A consumer injured by rotten tinned--food can sue its producer in contract (Art. 2287 ff .) in the unusua/ case where he purchased it directly from the producer.
2. In the absence of such direct purchase, the consumer can sue the producer in tort (extra-contractual liability) :
a, in the unusua/ situation where he is able to prove a fault (Art. 2028 ff .) in the producer's menufacturing process.
b. in the usual situation where he is only able to prove that his injury resulted from his norma/ use (eating) of the defective product (the tinned-food). Our report is concerned with this remedy, which is provided (with some qualifications) by Art. 2085. It is criticised in the report's Conclusion.

In this Journal, our report appears with some improvements.
PART I consists of Introductory Notes which, after setting forth the text of the

[^17]products liability provision, reproduce comment-extracts from our prior work and deals with the introductory aspects of the subject. This is followed by PART II, which discusses the basic (positive and negative) requirements for the products liability claim. The marginal part III is omitted. Part IV, now renamed Part IIf, contains our conclusion and is foliowed by an ADDENDUM on foreign trends and a POSTSCRIPT de lege ferenda.

Since the outline-questionnaire of the Academy's General Reporter (Professor W. Gray), based on American case law, did not fit the Ethiopian legal system, some redundancies could not be avoided in the report, despite that we. did not follow his outline closely. The report's present version includes some improvements not affecting substance. This Foreword, the Addendum, and the Postscript were added in 1980.

## PART I

## INTRODUCTORY NOTES

## 1. THE PRODUCTS LIABILITY RULE OF ART. 2085 CIV. C. MANUFACTURED GOODS

(1) A PERSON WHO MANUFACTURES GOODS AND SUPPLIES THEM (indirectly) ${ }^{1}$ TO THE PUBLIC FOR PROFIT IS LIABLE FOR DAMAGE TO ANOTHER PERSON RESULTING FROM THE NORMAL USE OF THESE PRODUCTS.
(2) NO LIABILITY IS INCURRED WHERE THE DEFECT WHICH CAUSED THE DAMAGE COULD HAVE BEEN DISCOVERED BY A CUSTOMARY EXAMINATION OF THE PRODUCT USED.

## 2. THRESHOLD GULDELINES ${ }^{2}$

We shall call "mixed" the criterion of strict liability (for damage) provided by Article 2085 because it uses both the "type of thing" and the "type of activity" tests. The instrument of harm must be a manufactured, i.e. man-made thing (not merely one produced by nature and collected by man). The activity must have been, on the defendant's side, that of manufacturing that thing and supplying it to the public ${ }^{3}$ for profit, ${ }^{4}$ and on the plaintiff's side that of using it in a

1. "Indirectly" by necessary inference, since "direct" suppiying for profit creates contractual relations which exclude extra-contractual (tort) remedies; see Arts. 2088 and 2037 Civ. C.
2. See olso G. Krzeczunowicz, The Ethiopian Law of Extra-Contractual Llability (Addis Ababa 1970), "Doctrinal Introduction" The English version of Art. 2085 Civ. C. is taken from the Appendix D to this work.
3. The "supplying to the public" test excludes "strict" extra-contractual liability for products that were supplied not to ultimate users but to another manufacturer for additional transformation (e.g. steel to a motorcar producer).
4. The "profit" test excludes, e.g., strict liability of the Ethiopian Rehabititation Center for defects in the cratches it supplies for invalids without profit.
normal way. So far from being the tiable defendant, as in the aforementioned cases (of strict liability), the "owner" or "holder" is here usually the plaintiff. claiming ageinst the person (physical or corporate) whose "manufacturing" activity had produced the instrument of his harm. This harmful thing cannot be an animal, which is produced by nature, but it can be a building ${ }^{5}$ or machinies which are manufactured. Indeed, the owner of a normally used motorcar liable to a victim of its invisibly defective steering gear may, in turn, recover damages from the manufacturer...

The manufacturer's "strict" liability to ultimate users (i.e. consumers) of his product seems hardly known in Romanist legal systems. In the commón law, it seems to have its remote and still "negligence-coloured" roots in the English "Donoghue v. Stevenson" case (1932), ${ }^{6}$

It is only in the U.S.A. that the manufacturer's liability to ultimate consumers is becoming clearly "strict" although both its scope (which products?) and its legal ground are still widely controverted. A fashionable "ground" is that of the original contractual "sales" warranty "running with the goods" (bylegal implication) to the ultimate consumer. ${ }^{7}$ Prosser ${ }^{8}$ deplores this by saying that "it would be far simpler if it were said that there is strict liability in tort, declared outright; without an illusory contract mask" This is precisely what the Ethiopian legislator has done for us (his "scope" test is also a simple one) :
(1) Although ... Article 2085(2) is similar to Article 2293(2) ("discoverability" of defects), our tort provision under Article 2085 is indidpendent of and incompatible with the remedies of contract law. ${ }^{9}$ We have no need for fictional reasonings.
(2) What is the material scope of Article 2085? Which man-made products are contempleted by it ? The answer is clear. They are all within the purview of Article 2085. None of the controversial and uncertain distinctions made in the U.S.A. in this respect ${ }^{10}$ are part of our law. A man-made product (manufactured goods) is everything that is produced, transformed of processed (e.g. foods cooked or pickled) by man ...

## 3: SCOPE OF THEME

The expression "products liability" is of American origin. An equivalent Ethiopian term cannot be looked for before the original term is itself defined and delimited. This, in turn, is hardly possible if the following statement is apt:
5. The using of Articie 2085 against the builder may, however, be excluded by the existence of a contractual remedy under Article 3039; see Article 2088.
6. Quoted in H. Street (The Law of Torts, London, 1963) p. 172.ff.
7. See W.L. Prosser (Handbook of the Law of Torts, St. Paul Minn, 1964), pp. 543 and 678.
8. Ibid. p. 681.
9. Which, where available, exclude application of the tort remedy against the same defendant, e.g. against the manufacturer who sold the product to the plaintiff : see Article 2088....
10. See, again, Professor.
"I am not quite sure whether the American expression 'products liability implies an aspect of delict or of contract or whether it is sui generis or perhaps all three" ${ }^{11}$
Consequently, we must start from the readily ascertainable Ethiopian definition of manufactured goods (i.e. products) liability ${ }^{12}$ (and leave to others the finding of equivalent foreign terms, if any). In the Ethiopian system, products liability can be based neither on contract nor on fault:
a. Products liability is extra-contractual it can arise only in tort law (Aert 2088). Contractual "breach of warranty of quality" liabilities:
(i) are governed by the distinct rules of contract law (Art. 2287 ff .) and
(ii) concern not only man-made products but also non-manufactured goods (hereinafter, products will be used in the narrow sense of "manufactured [man-made] goods").
b. Within tort law, the products liability provision is part of the Section on fiability not-based-on-fault, i.e. strict liability. In our system, therefore, liability based on a manufe cturer's "fault" should not be called "products ('manufactured goods') liability" ${ }^{13}$ Incidentally, within the section on strict liability, our products liability provision (Art. 2085) ${ }^{14}$ follows the provisions relating to dangerous activities, animals, buildings, machines, motor-vehicles (Arts. 2069-2084), and precedes rules common to all. These common rules exclude any purported general defences to strict liability from affecting eny of the above provisions, except for the defences raising a "fault of the victim" (Art. 2086), or a "contractual relationship" (Art. 2C88), or a "disinterested relationship" (Art. 2089). ${ }^{15}$. ${ }^{16}$

## 4. WHO CAN CLAIM? AGAINST WHOM?

Products liability claims can arise only between the product's user (plaintiff) and its manufacturer (defendant). ${ }^{17}$ "User" includes "consumer", i.e. the person who "uses up" the product (e.g. eats the processed food).

[^18]Products liability "cannot be invoked" by such users as are "connected with" the product "by virtue of a contract made with" the manufacturer (Art. 2088). ${ }^{18}$ Other users (e.g. sub-purchasers, sub-lessees, licencees, invitees) can invoke the products liability provision. But a non-authorized user's claim against the product's manufacturer may be defeated by the "fault of the victim" defence (Art. 2086 (2)).
5. WHAT HARMS ARE RECOVERABLE?

Where pursuant to Art. 2085 a products liability is incurred, the corresponding claim lies for any damage (whether to person or property) resulting from a normal use of the product. Thus, it is not the harm's nature but its origin (whether or not it resulted from a normal use of the product) that may support or exclude products liability claims. ${ }^{19}$
6. CLASSIFICATION OF PRODUCTS LIABILITY

In the Ethiopian system, product liability:
(a) is part of the Book on Obligations of the 1960 Civil Coder
(b) within the law of obligations, is based on tort law,
(c) within tort law, is based on the strict liability section,
(d) within the strict liability section, is defined in a special products liability provision (Art. 2085).
The classifications (b), (c) and (d) entail respectively - inter alia - the following effects regarding products liability:
(b) the contract law's "warranty of quality" concept is irrelevant to products liability; on the other hand, the tort law rules on compensation ${ }^{20}$ and on action for compensation are common to all torts and, consequently, apply to products liability;
(c) the defendant's "fault" is irrelevant to products liability;
(d) the rules (concerning defences) common to all strict liability categories mentioned under 3.b. above, apply to products liability (but see ftn. 15).
18. For example, by users connected with the product (e.g. as testers) by virtue of participating in its production as employees of the manufacturer. Instead of "products liability" they should invoke Article 2549 ff. Civil Code and any relevant Labour legislation.
19. The situation is of course different under contract law in warranty of quality cases where, regardless of use or nonuse by the plaintiff, a defect affecting only the value of the product bought by him can support his claim for compensation against the seller.
z0. Regarding compensation, contrast the tort rule of Art. 2091 with the contract rule of Art. 1799.

## PART [II ${ }^{21}$

## REOUIREMENTS FOR THE PRODUCTS LIABILITY CLAIM

## A. POSITIVE REQUIREMENTS

The following is the text of sub -article (1) of the products liability provision of Art. 2085 :
"A person who manufactures goods and supplies them (indirectly) to the public for profit is liable for damage to another person resulting from the normal use of these products" 22

In light of the above sub-article and of prior comments, the "positive" requirements for the products liability claim(on the "negative" requirements see B, below) may be stated as follows:
(i) The claimant must have sustained a damage;
(ii) the damage must have resulted from the normal use of a product (a thing "menufactured", i.e. made, transformed or processed by man) ;
(iii) only the user of the product can invoke product liability a "nonuser's" cleim cannot be based on products liability, but on the manufacturer's "fault", if any; ${ }^{23}$
(iv) the claim must be brought against the manufacturer (maker, transformer, processor) of the product;
(v) the latter's manufacturing activity must be aimed at obtaining profits from making such products available to the public.
While points (i), (iii), (iv) and (v) lend themselves, in some degree, to convincing elaborations, this is not the case with the essential point (iI). This point deals, in veiled terms (resu/ted from), with difficult causal problems. What must heve caused the damage? The required normal use of a product may have resulted in a harm caused by another product! To avoid absurd consequences, it seems reasonable to imply that the used product itself must have been an essential causal factor of the harm. If so, must it be the product or a "defect" in the product? Is it at all permissible to imply a "positive" requirement of a "defect" from the fact that the non-discoverability of a causal defect constitutes a "negative" requirement for products liability under sub-article (2) (analyzed under B.1, below) ? If (doubtfully) yes, what is a "defect" ? If (cleariy) not, how define "normal" ase? Surely, the deceptively simple passage
.. is liable for damage to another person resulting from the normal use of these products
21. This Part is sometimes repetitive, but it looks at problems from a different angle and in greater depth than Part 1.
22. "(indirectly)" is added for the reasons given in Part $I, 1$.
23. Non-users are sufficiently protected by strict liability remedies against persons other than the manufacturer, who own, use or control the harmful product: the owner (of the machine, motorvehicle, building: Arts. 2081 and 2077 ff .), the holder (Art, 2082), the creator of abnormal risks (Art. 2069). As to processed foods and most drugs, they can hardly injure non-users.
creates more problems than it solves. Our judges, some of whom still lack formal legal training, are hardly able consistently to cope with them. The zones of uncertainty created by this passage remain unfilled by any discernible trends in settlements or judgements, if any (the latter are neither reported, nor recorded by subject). In the extremely rare cases of which we have some (hearsay) knowledge, products liability claimants, although not required to do so by the abovecited passage, seem to strive to demonstrate what they deem to be "defects" in the products which they imply from, e.g., the defective "behaviour" (rather than "structure") of a motorcar or a mechanical device. ${ }^{24}$ On the other hand, they happen to wrongly to assume that the fact that the use of the product was "normal" should be presumed in their favour, subject to contrary proof. The"outcomes are bound to be haphazard and insignificant.

## Since

(a) confidence in the courts is not prevalent (for the reasons, see above),
(b) "potential" products liability claimants are often unenlightened and unaware of their rights,
(c) the manufacturing of many essential modern products used in this country takes place in foreign countries having, as a rule, no "exequatur" agreements with Ethiopia which, on the other hand, has no "confl ct of laws" legislation,
products liability claims are extremely rare. Where raised at all, they show a tendency toward "equitable" extra-judicial settlements. There is no pressure on the judiciary to develop the positive requirements for the products liability claim. Consequently, these vague requirements remain embryonic.

## B. NEGATIVE REQUIREMENTS

After the positive requirements for the products liability claim have been met, the claim may yet be defeated by the rais ng of certain defensive legal provisions where applicable. Their non applicability constitutes the negat:ve requirement for the products liability claim. Below, these provisions are considered in turn $(1,2,3)$.

1. Only one of the three defensive provisions is special to the products liability provision ${ }^{25}$ it is contained in sub-article (2) of Art. 2085. This subarticle reads as follows:

No liability is incurred where the defect which has caused the damage could have been discovered by a customary examination of the product used.
24. We are not aware of any products liability issues involving mere defects of design. The very wording of Art. 2085 makes the "design defect" notion irrelevant to products liability claims. But of course a defect in design may be corroborating evidence of a relevant defect in the product.
25. The other two defensive provisions (see 2-3, below) are more general: they can be raised also in cases of strict liability other than products liability.

The burden is thus on the defendent to
(i) point out a concrete "defect" in the substance or structure of the product, and
(ii) show that this is the defect which has "caused" the damage. ${ }^{26}$ and
(iii) prove that this defect "could have been discovered by a customary examination of the product used."
The above requisites for defence do not seem to have been tested in a case. The third requisite (discoverability of defect) is lifted from Art. 2293(2) of contract law, where it is used in sales-warranty cases.
2. The defensive provision of Art. 2088 is general in that it can be raised not only against products liability, but against other kinds of strict tort liability. The burden is on the defendant to show that the claimant is connected with the product ${ }^{27}$ by virtue of a contract (e.g. of sale) ${ }^{28}$ made with the defendant.
3. The defensive provision of Art. 2086 is genera/ in that it can be raised not only against products liability, but also against other kinds of strict liability. ${ }^{29}$ The burden is on the defendant to show that the claimant was injured solely through his own fautt (see b, below). In this connection, the following observations are in order:
a. Pursuant to sub-article (1) of Art. 2086, the defendant to strict tort liabilities, which include products liability, is expressly barred from raising any defences based on his own faultessness, or on third party fault, or on force majeure, ${ }^{30}$ or on the fact that "the cause of the damage remains unknown." These exclusions call for the following remarks:
(i) The exclusion of the defence "I am faultess" is superflous, since the very heading of the strict liability section reads "Liability Irrespective of Fault' i.e. not-based-on-fault.
(ii) The exclusion of the defence "the cause of the damage remains unknown" makes no sense. ${ }^{31}$ Since the "positive" requirements for
26. The clatmant has only to show that the damage has resulted from the "normaluse" of the product and perhaps also, at most, that it was caused by the product's defective "behaviour" (see A. point (ii) and its discussion, above).
27. Or, in other cases of strict liability, with the dangerous activity or the animal, building, machine, motor-vehicle (Arts. 2069, 2071, 2077, 2081).
28. See also ftn. 18 and accompanying text.
29. Liabilities for harm caused by dangerous activities, or by an animal, building, machine, motorvehicle (Arts. 2069, 2071, 2077, 2081).
30. Force majeure for short, according to the construction of Art. 2085(1) by the draftsman Rene David, in Avant projet de code civil pour lempire d'Ethiopie, Doc. C. CIV/13 (Addis Ababa 1955), p. 21. In contrast to this exclusion in strict tort, the "force majeure" defence is generally accepted in Ethiopian contratt law.
31. It is borrowed from inept formulations found in French case decisions.
all strict tort claims include causation, ${ }^{32}$ they preciude the very possibility of the cause of the damage remaining unknown at the "defence" stage. This, unless the cited phrase is arbitrarily taken to mean nondiscovery of a cause less immediate ${ }^{33}$ than the required "normal use of the product"
(iii) The exclusion of the defences "third party fault" and "force majeule" (which are prevalent in the French and related jurisdictions) in the strict tort area of Ethiopian law is expedient: it simplifies litigation without notably increasing insurance costs.
In particular, an Ethiopian defendant-manufacturer cannot invoke "third party fault" or "force majeure" against a prodücts liability claimant.
b. pursuant to sub-artic/e 2 of Art. 2086, the defendant is wholly relieved from strict liability where he shows that the claiment's harm is caused "solely" by the chaimant's fault. ${ }^{34}$ Incidentally, for reasons anslogus to those given under (ii) above, the adverb "solely" is devoid of sense unless it connotes not the absence of other causes but that of other causal, faults. ${ }^{35}$ In its application to products liabitity the "claimant's fault" defence is, as shown below, probably superfluous in most cases:

As a rule, the faults committed by products liability claimants consist in conduct contrary to the "positive" requirement that their use of the product be "normal" Since "normal" (non-faulty) use of the product is a prerequisite for the claim, ${ }^{36}$ it is not for the defendant to establish the cleimant's faulty (abnormal) use, but for the claimant to establish his non-faulty (normal) use of the product. For example, where the product was used in a way incompatible with the manufacturer's standard instructions or cautionary labels, the claimant may be unable to establish that such use was "normal" 37
32. In products liability, caustation by "the normal use of the product"' (discussed under A, point (ii), above).
33. Such as the precise causal defect in the substance or structure of the product. Its "discoverability" supports the defence examined under 1. above.
34. Where the defendant is also at fault, he is only partly relieved: see Art. 2098.
35. For further elaboration, see G.Krzeczunowicz, The Ethiopian Law of Compensation for Damage (Addis Ababa, 1977), p. 124.
36. See discussion under A, point (ii), above.
37. Incidentally, "contractual" warnings and/or disclaimers of liability cannot affect the position of) third party) products liability claimants.

## PART III

## CONCLUSION ${ }^{38}$

1. The Ethiopian products liability provision of Art. 2085(1), ${ }^{39}$ enacted with the Civil Code of 1960, has captured and generalized in a single phrase the gist of certain "forward" solutions proposed by some American legal writers ${ }^{49}$ of the fifties in order to secure a maximum protection for the "consumer" public ${ }^{41}$ of their affluent and powerful country. It is hardly surprising that, long after enactment, this provision remains dead-letter in Ethiopia, a non-affluent country on the threshold of development. If the elegant formula of Art. 2085(1) had any aims other than "cosmetic" it has not achieved them. Apart from other disadvantages, its full application would heve generated a flood of confused litigation. Rather fortunately, this formula's sweeping potentialities were and are not taken notice of. ${ }^{42}$ Since the revolution of 1947 , such negative attitude can be justified by new reasons:
(a) Purusuant to the nationalizations of 1975, most enterprises engaged in industrial production belong to the State.
(b) This non-affluent country must support the increasing costs of socialist development. Its austerity budget would be upset by liabilities of the producer-State and its enterprises for all damages caused by a "normal use" of their products. ${ }^{43}$
(c) In the initial stages of economic development, the aim of increasing production should prevail over that of indemnifying the consumers for harms other than substantive damage caused by a serious defect of the product used.
2. The continuous lack of products liability claims based on Art. 2085 seems to indicate that, in actual fact, even substantial harms due to serious defects in the products used do not give rise to extra-contractual suits against the producer (manufacturer). For example, a "hearsay" case of three deaths from a tinnedfood poisoning was not brought to court by the surviving dependants of the deceased victims. The manufacturing firm was located in a remote foreign jurisdiction (see Part II, A.(c)). On the other hand, it seems that the surviving dependants were not aware of their tights, and anyway had no means for suing abroad.
3. The text below is reworded on the basis of the distinct French version of this Report's Part IV.
4. See Part 1, 1. According to this writter's recollection, this provision was hastily drafted late in the codification process.
5. See, e.g., W.L. Prosser, cited in Part I at fin. 7
6. United States case law now often reflects this policy (as shown by Professor B. Schorth's report to the Congress).
7. See Part II, A, point (ii) ff.
8. Seeibid.
9. The contrast between the theoretical principle of maximum protection for the consumer and his position in actual fact is thus extreme. This situation should be remedied without, however, sacrificing the socio-economic postulates expressed under (b)-(c), above. To this end, we submit that the sweepingly general (but hardly observed) formula of Art. 2085(1) should be particularized in a way restricting its scope. Inter alia, there should be an express requirement that one damage sustained by the claimant be caused by a "defect" in the product used, followed by a definition of "defect" But in order to make a restricted protection of the consumer effective in practice, it may be useful to add an explanatory comment to the amending statute. Further suggestions are submitted in the POSTSCRIPT.

## 1980 ADDENDUM

on

## FOREIGN TRENDS

Comparing foreign laws or draft laws, and comments, with one's own obviusly helps to put the latter's virtues or defects in focus. It therefore seems proper to supplement our report with a minimum of remarks on some basic foreign trends in the field of products liability. ${ }^{44}$ The following observations will be based on:1) some of our fellow-reporters' national reports to the Congress, ${ }^{45}$ 2) Professor W. Gray's (Michigan University) summarizing General Report, and3) other sources.

The Congress's large Products Liabillty section (Section II-A-2) met without defining the exact meaning of this expression of American origin, which in the United Stetes is used rather loosely. As a result, the General Reporter's guidelines and the discussion of them were somewhat confusing. Hereafter, we shall continue to use the definition required by the wording of Art. 2085 Eth. Civ. C. in context. For us, "products liability" is the special (strict tort) liability for productcaused harm grounded on rules distinct from those dealing with contract or fault.

Our so far available (and perhaps incomplete) informations indicate that "products liability" in the above sense still exists only in some of the United States of America ${ }^{46}$ and, since 20 years, in Ethiopia, the precursor in this field (see Conclusion, above). Those USA products liability decisions which follow the strict-tort approach are often based on the persuasive authority of Section
44. A comprehensive survey would require a buiky monograph.
45. Due to inadequate organization of the Budapest Congress, many national reports were lost before their projected distribution to fellow-reporters.
46. Prof. W. Gray, Gemeral Report.

402-A of the American Law Institute's Restatement of Toris Second, ${ }^{47}$ but there is no Federal legislation on this subject.

In industrial countries lacking strict-tort products liability provisions, judicial inclination to protect injured product-users who have no contract with or are unable to prove a fault of the producer may lead or leads to the creation of fictions circumventing the law in their favour. The technical devices used vary, A device common to many counties is presuming the producer's fault from the mere fact that his product has a defect. This device is not foolproof unless the presumption is made irrebuttable in law (or prohibitively difficult to rebut in fact ${ }^{48}$ ), in which case its effects are practically the same as those of strict liability. In France, there is but a chumsy irrebuttable case-law presumption that the manufacturer is "aware" of defects in his products and is therefore at fault if he puts them on the market. A less common type of fiction-based device is described and criticized in Part 1, 2. of our report. It consists in presuming a contractrelation where none exists in order to give the contractual sales- A a ranty-againstdefects remedy to the injured ultimate consumer. This device is used in the case law of some American jurisdictions and in the French case law. The French reporter deplores the need to use such complex fictions, whether based on presumptions of fault of of contract. He calls them confusing and unsatisfactory. ${ }^{49}$

In many jurisdictions doctrinal opinion now favours introduction of stricttort products liabllity. Moreover, in the law reform bodies of several states, and on the international plane, there now emerge strong trends towards definite statutory regulation of liability for harm from defective products. Such trends are prominently apparent in certain recent documents, ${ }^{50}$ which are discussed with varying emphasis in the remainder of this Addendum:
A. The Yugos/av 1976 Draft Law on Obligations and Contracts. ${ }^{51}$

The translated version of its Article 151 reads as follows:
Whoever puts in the market a thing manufactured by him and which, due to a shortcoming or properties not known to him, represents a danger to provoke damage to persons or to property, is liable for the damage which would ensue due to such a shortcoming or properties. [We suspect shortcomings in this translation]
This rule resembles the Ethiopian products liability provision in that it is a strict-tort provision based neither on fault nor on contrect. However, it is different in that it is derived from the general concept of "dangerous
47. Prof. P. Schroth, United States Report.
48. As in England in cases where the famed res ipsa loquitur doctrine is being applied.
49. Prof. P. Malinvaud, French report.
50. Reproduced or referred to in Prof. Gray's General Report, which includes the translation under A., below.
51. We have no information on whether this draft law is already enacted. On the other hand, we regret that the Yugoslav report by Dr. J. Radisic \& Prof. D. Mitrovic was not distributed at the Congress (see ftn. 45). We offer apologics in case this affects the accuracy of the comment below.
thing", which is not used in Ethiopian law for reasons mentioned on page 41-F of our prior work. ${ }^{52}$ After enactment of the above Draft Law the manufacturer, holder of and thus responsible for his dangerous product, will continue to be liable for damage caused by it after he has put it in the market.
B. In the United Kingdom, the excellent joint report on "Liability for Defective Products" (favouring strict-tort liability) of the Law Commission and the Scottish Law Commission ${ }^{53}$ has not yet given birth to a draft statute, but offers, inter alia, penetrating insights into basic problems tackled also by the draft European Convention on Products Liability (discussed below), accession to which is tecommended by the Law Commission.
C. The full title of the just mentioned draft treaty is "European Convention on Products Liability in Regard to Personal lijury and Death" 54 hereafter called the Convention. Despite the fact that the Convention is destined for adoption by highly industrialized European states, its princiapl feature strict tort fiability is common with that of Ethiopian law. Morsover, certain of its features which are foreign to Ethiopian law would, if adopted by the latter, ${ }^{5 s}$ implement the concluding postulates of our report (Part IV), hereafter referred to as postulates. We shall therefore set out these features after reproducting the Convention's basic provision (Art. 3(1)), which reads as follows.

The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product. ${ }^{56}$

## Feature 1

Under the Convention (Art. 2 (a)) the term "product" includes only movables. This prevents producers of immovables from beirg affected by products liability. This restriction (to be discussed later) would meet our postulate 3.

## Feature 2

The Convention (Art. 3(1)) clearly requires that the injury be caused by a defect in the product. This, again, would meet our postulate 3. Our present law only requires that the damage result from a "normal use" of the product. ${ }^{57}$

## Feature 3

The Convention (Art. 2(c)) includes a definition of the product's "defect" (to be discussed later). This, agein, would meet our postulate 3.
52. The work first citcd at ftn. 6 , above.
53. Her Majesty's Stationary Office, London 1977.
54. I-15.341 Etropean Treaties Series, No. 91 (1977); so far signed by Austria, Belgium, France, Luxemburg.
55. They may be adopted for reasons dfferent from those of the Convention's Explanatory Report.
56. "Product", "producer" and "deiect" are defined in the preceding Article 2.
57. See critique in our report, Part II, A, (ii).

## Feature 4

The Convention (Art. 3(1)) limits products liability for damage to "death or persona/ injury" (the resulting exclusion of damage to property will be discussed later). ${ }^{58}$ This would meet postulates 1 (b) and 3.

## Feature 5

Under the Convention (Art. 3(2-3)) the term "producer" includes certain persons deemed producers for the liability-purposes of the Convention. These persons appear to be.
a) in the case of imported goods, the importer of the product.

This would meet our implicit postulate 2.
b) the person who "has presented the product as his product" by putting his trade name or mark etc. on it ("own-brand" product).
c) subsidiarily, the supplier of products which do not indicate the identity of the producer or the persons deemed producers unless he discloses such identity or that of his supplier.

## Feature 6

The Convention (Art. 5(1)) arms the producer with special defences which are fair, and would meet our postulate 1 (b). The producer ${ }^{59}$ is not liable
a) if the product was not put into circulation by him (but, for example, was stolen and sold before being tested) ;or
b) if, having regard to the circumstances, it is probable (e.g. in experts' opinion) that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that the defect was brought about afterwards (e.g. by a careless user or a third person); or
c) if the product was manufactured and/or distributed neither for the producer's economic purposes nor in the course of his business.
Incidentally, we have considered neither the Convention's international aspects, ${ }^{60}$ nor its solutions or problems fairly solved by our general tort law, ${ }^{61}$ nor its dispensable provisions. ${ }^{62}$
D. The "proposal for a Council (of the European Communities) Directive relating to the Approximation of the Laws... concerning Liability for Defective Products", ${ }^{63}$ hereafter called the Directive. Inter alia, it proposes limitations on the amount of the producer's liability, which are not directly relevant for us. We nevertheless mention it here because of the interesting rationale for the general concept of such limitations (which is relevant for
58. See Feature 4 in Postscript.
59. Reminder: "producer"' includes "deemed producer" (see above).
60. Convention Arts. 1 and 10-19.
61. Convention Arts. 3(5), 4(1), 5(2), 6, 7, 8. Compare Eih. Civ. C. Arts. 2086(1), 2086(2), 2143, 2147(3), 2155(1), 2156.
62. Es. Convention Arts, 2 (b) (unwelcome), 2(d) and 9(a) (superfluous), 9 (b) (premature).

63 Official Jowrnal of the European Communities (1976), No. C. 24179.
us), found in paragraph 22 of its Explanatory Memoradndum:
"Liability irrespective of fault without any kind of limitation place an incalculable burden of risk on the producer" and "Every (liability) insurance contract provides for a limit on the amount for which cover,
is given", etc. (See "The Directive" in Postscript, below).

## POSTSCRIPT

## de lege ferenda

The above Addendum on Foreign Trends in Products Liability has hopefully increased the reader's awareness of both the basic virtue (strict-tort liability) and the shortcomings in this country's products liability law, best seen in the light of the draft European Convention on this subject. We favour an adjusted reception of the Convention's features 1-6 (see above). We have so far only hinted at their consistency with the concluding postulates of our report. Further reasons for their reception in this country are added below.

## Feature 1

The exclusion of immovables from the coverage of the term "product" would eliminate the wasteful overlapping of products liability with the remedy available under Art. 2077 (1) against the owner of the immovable who, in turn, can "recover from the builder" (producer) pursuant to Art. 2077(2). ${ }^{64}$

## Feature 2-3

The requirement that the injury be caused by a defect in the product, coupled with a sensible definition of "defect", protects producers against abusive claims. The definition proposed by the Convention amounts to exclusion of that used in contract law. In tort law, the product's defect does not consist in lack of utility or commercial quality, but in lack of safety:

A product has a "defect" when it does not provide the safety which a person is (reasonably) ${ }^{65}$ entitled to expect having regard to all the circumstances, including the presentation of the product. (Art. 2 (c) of the Convention).
Often the "safety" defect lies only in the physical structure of the product (e.g. of an unsafe drug or brake). In other cases, a given product may or may not be deemed defective depending on various circumstances. The defect may consist, e.g., in unsafe packing. The Convention's Explanatory Report, para. 36, mentions the need to consider whether the product "was utilized more or less correctly

[^19](normally) or used in a more or less foreseeable way." The express inclusion of "the presentation" of the product among the circumstances to be considered means that "defect" includes, e.g., "incomplete or incorrect directions for use or warnings" or "the absence of directions for use or warnings" (where needed for safety reasons). "Presentation" defects may also consist in incorrect labelling or misdescriptions which create risks of injury.

## Feature 4

Several elaborate reasons for exclusion of damage to property from coverage by strict-tort products liability are formulated in paras. 117-121 of the United Kingdom's document cited at ftn.53, above. We can here cite only the following:
... the inclusion of property-damage in a regime that imposed strict liability on producers would mean a significant increase in the cost of insurance to the producer [who, in Ethiopia, is primarily the State or its enterprises]. ... the extra cost to the producer ... would be passed on to the general public in the price of the product.
We may add that damage to valueble property is or should usually be eovered by the owner's first-party insurance. We therefore recommend limitation of products liability to cases of personal injury and death. Incidentally, this would in no way prevent recoveries for property-damage under other strict liability provisions (e.g. Arts. 2081, 2082, 2077, 2069), or under "fault" provisions (e.g. Art. 2031).

## Feature 5

In compensation for seeing the scope of his protection curtailed under features 1-4 above and 6 below, the injured consumer well deserves to be given the possibility of briniging his claim against such defendants es can be reached easily. ${ }^{66}$ We therefore recommend assimilation of the Convention's Feature 5 points a) and c), while leaving out point b). ${ }^{67}$ Incidentally, the burden on the importer is not intolerable, since he can usually recoup himself by claiming damages for breach of "warranty-against -defects" in the product imported (Arts. 2287, 2289, 2300 (3), 2361 (1)). As for other commercial suppliers of products, they are protected by the "disclosure" faculty.

## Feature 6

We recommend reception of this feature. The defences at a) and b) protect the producer (who, in Ethiopia, is primarily the State or its enterprises) against abusive claims. Defence at c) is fair and is implicit in the present law (Art. 2085 (1)). Incidentally, the Convention does not provide any "discoverability of defect" defence. This defence, typical of sales-warranty of quality (Art. 2293(1-2)), is incongruous in a products liability law concerned with the consumer's safety

[^20](see Features 2-3). If the defect is so obvious (e.g. product rotten or marked "dangerous") that its nondiscovery amounts to fault, the producer's defence is that of Art. 2086 (2). We therefore recommend abrogation of Art. 2085(2).

## The Directive

In the Ethiopian system, the Directive's interesting concept of liability-limitations (see Addendum D.) cannot be discussed in the narrow framework of products liability. In Ethiopian law, whatever be the lega/grounds of the liability. ${ }^{68}$

1) in case of death, liability for material damage is limited to a compensation "in the form and nature of a maintenance allowance" (art. 2095(2));"
2) in case of death or personal injury ("bodily harm"), the "moral" component of the damages is limited to the trifling sum of 1000 Birr (Art.2116(3)) ${ }^{70}$
3 ) in case of non-mortal injury, there are, as a rule, ${ }^{71}$ no limits on fiability for material damage. ${ }^{72}$

## DRAFT LEGISLATION

In light of all above considerations, we respectfully submit the following draft provisions intended eventually to replace article 2085 Civ. C. (if our preceding arguments are acceptable) :

## PRODUCTS LIABILITY 1. PRINCIPLE

The producer is liable for death of or bodily injury to a user of his product caused by a defect in that product.
PRODUCTS LIABILITY 2. DEFINITIONS
(1) "Product" is a movable thing made, transformed or processed by man.
(2) A product has a "defect" when it does not provide the safety which a user is reasonably entitled to expect having regard to all the circumstances including the presentation of the product.
(3)
"Producer" is
a) the manufacturer of the product,
b) the importer of the foreign product, and
c) the supplier of the product if unwilling to indicate the identity of his supplier to the claimant.
68. E.g. under Secs. 1-2 of Chap. 1, Titie XIII Civ, C.
69. See critique of and conclusions on this confusing criterion on Pp. 146-153 of our work cited at ftn. 35 , above.
70. See critique and proposal ibid., top of p. 287 and p. 291 (d).
71. For exceptions, see ibid., Part II, Chap.3,
72. Incidentally, for the "loss of earnings" component of material damage from personal injury (whether or not mortal) we have proposed thid. (P. 153, 3.) after considering a Danish model, a limitation on liability for loss of earnings (or support-income) to a maximum based, for example, on the salary of the average public servant: persons with higher earnings would themselves have to acquire higher coverage insurance.

## PRODUCTS LIABILITY - 3. DEFENCES

The producer is not liable if he proves:
a) that the product has not been put into circulation by him, or
b) that, in consideration of all the circumstances, it is probable that the causal defect did not exist at the time when he put the product into circulation or that this defect was brought about afterwards, or
c) that the product was not manufactured and or distributed for profit in the course of the producer's business.
Incidentally, the "fautz of the victim" defence against strict liabilities, pro; vided by Article 2086 (2), includes products liability.

# THE PROVISIONAL MLLITARY GOVERNMENT OF SOCIALIST ETHIOPIA <br> <br> SUPRENE COURT, <br> <br> SUPRENE COURT, <br> ADDIS ABABA 

Criminal Appeal No.4/71
Hedar 7.1972 Eth. Cal. (November 17,1979 G.C.)
Haleka W.H.S. and B.T. - Appellants
The Public Prosecutor ... Respondent
Judges: 1
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After a careful consideration of the case we have given the following decision.

## DECISION

The first appellant was charged in the High Court with having bribed judges and investigators by giving Birr 5,000 , during the time when he was detained for examination and after he was released from detention, so as to make them act in a manner contrary to their duties in the investigation that was being conducted against him on the suspicion that he caused the death of Ato H.T., contrary to Article 20 of the Special Penal Code; the second appellant was also charged in the High Court on the grounds that, as an accomplice to the first appellant, he received Birr 2,000 from the first appellant, and gave this money to sergeant Major G.S., who was conducting the investigation while the two appellants were detained together, and that after he was released from detention he took another Birr 2,000 from the first appellant to be given as a bribe and used the money for himelf. The court of first instance found both appellants guilty as charged, and sentenced the first appellant to ten years' rigorous imprisonment and the second appellant to six years' rigorous imprisonment on 7 Meskerem 1972 (Ethiopian Calender) in file No. 203/71. The appelfants appealed against the judgement to this court.

The grounds of appeal as presented by the appellants' counsel were that the offence of which the appeilants were charged was not proved by other reliable witnesses ; the High Court based its majority judgement on the confession, which it is alleged that the appellants gave to police; but the confession was obtained not voluntarily, but through force and torture; the defendants, through their defence witnesses, have satisfactorily proved that they were severely beaten and suffered from heavy pain during the investigation: the High Court's admission
of the confession which the defendants are said to have given at the police station is improper, since it has been proved that it was obtained by force and not voluntairily. On these grounds, counsel for the appellants has requested that this court reverse the majority judgement of the High Court and set the appellants free, in accordance with the view of the minority.

In his three page reply, written on 29 Tikimt 1972, the Public Prosecutor, as respondent, stated that there was not sufficient evidence produced other than the confession the appellants made at the police station; their defence witnesses have testified that the appellants were inhumanly beaten for four consecutive days and seriously wounded, while they were detained during the investigation. Because of this, it cannot be said that the confession given at the police station was voluntary. Since the allegation that the appellants have committed the offence has not been proved by sufficient evidence, the Public Prosecutor has no objection if the appellate court sets the appellants free, affirming the opinion of the minority decision.

The appellants' previous argument at the High Court and their present argument before this court is total denial of their commission of the offence stated in the charge. The only evidence the Public Prosecutor introduced to prove the charge was the confession which is said to have been given at the police station, and the witnesses who were said to have been present when the confession was given. The appellants did not and do not want to deny the fact that they confessed at the police station. What they are arguing is that they admitted to having committed the offence only because they were tortured for four consecutive days. Through their defence witnesses, the appellants have proved that they were tortured.

The High Court, taking the confession of the appellants obtained under such circumstances as genuine and sufficient, found them guilty by majority. The majority decision's rationalizetions in its attempt to show that the confession obtained at the police station is sufficient and genuine are questionable. The majority decision states that "as there is mere fabrica"ion to save one's own life when one is tortured, one should not forget the fact that truth may be elicited by torture" This opinion confirms the majority's opinion that inducement, threat and coercion are proper during investigation. To overlook the clauses that use of force to get information or to obtain confession during investigation is punishable (Art. 417 Penal Code and Art. 21 Special Penal Code); to forget that confession in these circumstances is also doubtful; to ignore that the work of the courts is in accordance with the law, and that law is also proclaimed to do away with force; and to remark thet torture is good for it elicits truth: these actions performed by officials sitting on the forum of justice and entrusted with the duty to protect human rights, redress the injured, and punish the offender, are evocative of dismay and disappointment.

Of course, it is sometimes possible to elicit a hidden truth by inducement, threat and force. But, what should be borne in mind is that every person, suspected
and detained, is not necessarily a criminal. If every suspected and detained person is to be coerced for the purpose of eliciting truth, victimization of the innocent will be inevitable. Even if the suspect is indeed the real criminal, it does not necessarily follow that his confession under coercion is fully true, for he can be terrorized when tortured. The reason why the law and judicial opinions condemn such measures is to protect the innocent from unlawful coercion and selfincrimination. The law prefers the escape of the criminal to the suffering of the innocent. Since torture is unfawful a confession obtained through torture cannot be lawful.

Continuing its comment, the majority decision states that "as the peoples"bf the world have marched towards a higher level of civilization and, as the methods of committing offences are equally sophisticated, it has become absolutely necessary that in order to elicit truth, various means should be employed" So long as the level of development increases and so long as there is advancement in civilization, it is not debatable that methods of committing crimes will become equally sophisticated. Hence, in order to abort crimes and bring truth to light, and to arrest and bring the offender before the court, it is necessary that the agency in charge of maintaining law, peace and order should develop sophisticated means. To this extent our opinion is not different from the opinion expressed in the majority decision. Nevertheless we cannot agree that torture is a modern device invented to elicit truth. It should be known to everyone that torture is a primitive and not a modern means of investigation. But the majority decision tries to conince us that torture is a sophisticated means of investigation introduced by modern civilization to educe truth. The opinion does not limit itself to the attempt to convince that torture is a method of investigation that is allowed. It also lays down practical principles for courts, particularly those in socialist countries, as to what they should do when a confession obtained by torture is presented to them as evidence. Elaborating this view, it stated that "since the principal aim of courts in socialist countries, as state organs, is to find ways for educing truth after diligently considering the report of the police investigation, they should render a proper decision; but to rejec: the report of police investigation which has been obtained after much effort has been exerted under the pretext that certain minor legal procedures are not complied with, is not, we believe, a proper procedure to follow" While on the one hand it states that courts should find ways for eliciting truth, on the other hand the majority decision states that courts should not reject what has been inevstigated by the police, as the investigation is a result of much effort. We fail to understand how courts can find ways for eliciting truth if they are to accept the result of police investigation presented to them without any consideration and without examing as to whether or not the investigation was conducted in accordance with the law. It is confusing as to what is to be considered diligently, if courts are to accept the report of police investigation as it is, disregarding legal procedures and without examination and consideration. If it is to be disregarded that use of torture is punishable by law, and if one is to take the stand that one should not doubt the truth
of a confession of a suspect obtained even by torture, because use of torture is a minor procedura! irreguiatiry which should not be taken into account, and because much effort has alreaciy been exerted thereto; the enactment of laws and the establishment of courts becomes absolutely unnecessary. The reason why an accused is brought before a court is to enable him to obtain a proper judgement, after the truth has been elicited by examining the case and proving it on the basis of evidence properly weighted by an impartial judge. According to the majority opinion, however, the duty of courts is not to analyse and elicit the truth of the case but merely to endorse the evidence presented by the Fublic Prosecator without questioning and doubting its truth. But, if the duty of a court is mejely to give its biessings to the evidence of the prosecution, its very existence and the bring ng of an accused before it appears to be unnecessary, although directly or indirectly, the majority opinion seems to confirm this view.

After examination of the case that was brought against the first appellant before the High Court on the charge that he had H.T., killed, the High Court set him free on 21 Hedar 1971 E.C., and the division of the High Court which gave the decision in the present case knows this fact very well. This being the case, the majority decision states, "Although the question as to what motivated a person who claims to be like pilate innocent of the blood of this just person' to commit and to induce others commit the crime of bribery remains unanswered, we on our part cannot pass without remarking that the circumstances of the case have forced us to believe that it was intended to conceal the crime of the brutal murder of H.T" This remark was made eleven months after the first appellant had been acquitted of the offence of homicide. The majority opinion, on the one hand, states that the motive that prompted the first appellant to commit the present offence is not clearly known. On the other hand, it tells us that the motive was to conceal the crime of which the first appellant had already been declared innocent and acquitted. However, the basis for the majority's opinion is not consideration of objective evidence but its suspicion and feelings. But, this is not what is expected of a judge! Such emotionally laden phrases as "I am as free as Pilate", "the brutal murder of H.S." show that the case has not been considered on an impartial basis. The majority decision has been influenced by a subjective rather than by an objective consideration. It had done away with the cardinal principle of impartiality. It has completely undermined the very basis of justice. Finally, the majority decision concludes its opinion by stating that "since the evidence of the prosecution presented to us is sufficient and not open to doubt", the defendants are guilty. The majority decision quoted the opinion of the well-known jurists, Archbold and shaw, which states, "when a confession is corroborated by another confession and by circumstancial evidence, it becomes reliable", to support its view. However, other than quoting it for the sake of quoting, it did not relate it to the case presented to it. Had it done so, it might have understood that the jurists* theory is completely contradictory with the conclusion it arrived at. The said jurists did not forward the view that a confession by itself is sufficient and reliable. What they said is that a
confession should be reliable if it is corroborated by another confession and circumstantial evidence. We also agree with this opinion. If the evidence of the prosecution had been sufficient and not open to doubt, what prompted the need to quote the opinion of well-known jurists in the wrong place and to try to convince us that the confession of a suspect obtained through torture is sufficient and genuine?

However, in the case at hand, the only evidence presented is the confession which the defendants are said to have given at the police station. There is no circumstantial evidence which corroborates this confession. This being the case. we fail to understand why the opinion of the jurists was quoted.

To sum up, the only evidence presented against the appellants to prove the offence with which they are charged is the confession they gave at the police station. But, when the case was brought to court, the defendants denied that they committed the offence. They did not deny that they confessed at the police station. But their argument is that, since their confession was not given voluntarily because of torture, which they were not in a position to resist, it should be rejected as evidence. Their defence witnesses have testified that they were beaten for four consecutive days while under investigation at the police station. A confession given at the police station can be an additional evidence against an accused. But, even then, a confession can be additional evidence only if the accused gave it voluntarily and of his own free will, without any threat or inducement. In the case at hand, it has been proved by defence witnesses that the appellants were beaten for four consecutive deys while they were at the police station for investigation. If the fact that they were beaten is proved, then it cannot be said that they have given their confession voluntarily and of their free will. Had the appellants confessed at the police station of their own free will without any coercion that they have committed the offence, we do not see any reason why they would have denied it in court. In the absence of additional corroborative evidence, we cannot say that the confession they gave at the police station is authentic, on the assumption that they changed their minds and denied what they previously wanted to confess. It is completely unknown why the appellants are suspected of having committed the offence. Since it is established that the confession they gave at the police station was obtained through coercion, the appellants should not be held guilty and punished in the absence of corroborative evidence that establishes that their confession under coercion was authentic.

Therefore we hereby reverse the majority decision of the High Court and affirm the opinion of the minority decision and order that the appellants be set free. We order that a copy of this decision be sent to the High Court, so that it knows that its judgement has been reversed. We also order that an order be sent to the prison where the appellants are imprisoned to release them.

# Involuntary Confession: A Case Comment on Criminal Appeal No. 4/71 

b) YOSEPH GEBRE EGZIABHER*

In Criminal Appeal No. 4/71, reported in this issue of the Journal, the court * was faced with the issue of involuntary confession. The issues raised by this case are:
(a) Should a distinction be drawn between reliable and unrealiable evidence where a confession is obtained involuntarily by the use of force? or
(b) Should a court reject as evidence a confession obtained involuntarily by the use of force, regardless of whether or not it is reliable?

The legal requirement that whether or not a person has committed an offence must be proved beyond reasonable doubt ${ }^{1}$ by evidence sustainable at a court of law has a long history behind it.

There were times when people accused of crime had to fight a duel with their accusers and win in the duel in order to be found innocent. ${ }^{2}$ In our present era, although one may justify the legal prohibition of the use of force, threat or any other illegal means by deriving it from other principles, ${ }^{3}$ the probhibition seems to be tied in with the presumption of innocence when we look at it strictly from the law of evidence.

## *Assistant Professor, Faculty of Law, Addis Ababa University

1. See Crim. Pro. C. Art. 141.
2. Ploscowe, Morris, The Development of Present-Day Criminal Procedures in Europe and America, Harvard Law Review (Vol.48/1934-35), p. 440.
3. See, for example, Art. 176 of the Constitution of the Federalist Republic of Yugoslavia, which states "the inviolability of the integrity of the human personality, personal and family life and of other human rights shall be guaranteed.
"Any extortion of a confession or statement shall be forbidden and punishable". Frora this, it can be argued that extortion of a confession is considered as a violation of the integrity of the human personality. See also Wigmore, Evidence in Trials at Common Law (Little, Brown and Company, 1970), volume 3, pp. 329-344, for the theory that the reason why involuntary confession is excluded is that it is untrustworthy, and also that it violates the right against self-incrimination. However, the latter theory seems to be part and parcel of the principle of presumtion of innosence, since this presumption implies that before a person can be suspected of a crime and screened as such from other law-abiding and innccent citizens, there must be independent evidence that incriminates him.

That the principle of presumption of innocence is a principle aimost universally accepted can be seen from different commentaries, declarations and legal systems. Thus, in Articie 14, paragraph two of the International Covenant on Civil and Political Rights of 16 December 1966 it is provided that " $(\mathrm{e})$ very one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."4 Rudolf Hermann states that "under no circum" stances must suspicion alone be considered sufficient ground for giving up ones' fundamental belief in a fellow being as a law-abiding citizen". ${ }^{5}$ Section 14, paragraphs 2 and 3 of the Basic Principles of the Criminal Procedure of the USSR and the Union Republics read, respectively, "( t ) he court, the Procurator, the investigagator and the person who conducts the inquiry may not shift the burden of proof on to the accused" and "(i) $t$ is forbidden to extract information from the accused by force, threats or by other unlawful means" ${ }^{6}$

These declarations and legal provisions impose "on the organs of the administration of criminal justice the obligation not to be satisfied with an assumption of guit, but in criminal proceedings to base their judgements on demonstrable and irrefutable evidence" ${ }^{7}$

Thus presumption of innocence as a principle implies that the burden of proof cannot shift from the organs of the administration of justice to the accused before establishment of probable guilt.

As can be seen from the above quotations, it is provided in the Basic Principles of the Criminal Procedute of the USSR and the Union Republics that an accused person's right to presumption of innocence is applicable starting from the initial stages of criminal process, i.e., investigation. The implementation of this in practice should be such that, before pinpointing a citizen as suspect and subjecting him to the ordeals of criminal process, any investigating authority must establish that the suspect has probably committed an offence on evidence obtained independently of the suspect.

However, since they are burdened with the heavy responsibility of apprehending criminals and protecting a society from being exposed to criminal activities, investigating police officers at times find it difficult "not to shift the burden of proof to the accused "and to refrain fromextracting" information from the accused by force, threats, or by other unlawful means", to use the words of Section 14
4. Herrmann, GDR Criminal Procedure Law Governed by Socialist Principles, Law and Legisla. tion in the Germon Democratic Republic (1974, second issue), p. 29. See also Article 11(1) of the Universal Declaration of Human Rights where it is provided that "(e) veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Source, Hrownlie, Basic Documents on Human Rights (Clarendon Press, Oxford, 1971), p.109. For similar provisions in different national laws, see $i d$. pp.3-89.
5. Herrmann, cited at note 4 above, p.29.
6. Section 14, paragraphs 2 and 3 of the Basic Principles of the Criminal Procedure of the USSR and the Union Republics, as reproduced in Law in Eastern Europe (Vol,3), p.119.
7. Herrmann, cited at note 4 above, PP. 29-30.

Paragraphs two and three of the Basic Principles of the Criminal Procedure of the USSR and the Union Republics quoted above.

Awareness of this "abuse" has led different jurisdictions to devise different approaches to deter the police from violating a suspected person's right to presumption of innocence by the use of force, threat or other unlawful means.

Thus, in England, the "abuse" it is believed, will be avoided by forbidding "a// interrogation of the accused while he is in custody, the time when the abuse generally takes place"8. Moreover, the courts have the disrcretion to exclude the confession if it is obtained in violation of the accused's privilege against selfincrimination. ${ }^{9}$

In America, the "abuse", it is believed, will be avoided by making a suspect's right to counsel while in police custody always realistic, in that a denial of this right automatically makes a confession involuntary and unacceptable as evidence whether or not it is credible. ${ }^{10}$

In India, on the other hand, the approach is different. In order for a confession to be admissible against an accused person at trial, it must be made before a magistrate. This procedure, it is believed, will make a confession reliable as given volunterily. ${ }^{13}$

In Yugoslavia, still another approach is followed. Prior to 11 May 1967, the Yugoslav Code of Criminal Procedure recognized two authorities as investigators into the commission of a crime, viz., the police and the judiciary. However, by the Statute of 11 May 1967, inquiry, which was a pre-trial investigation and which fell within the exclusive domain of the police, was abolished. The only mode of investigation left now is the "investigation proper," which is within the exclusive domain of the judiciary. ${ }^{12}$ According to the amended Yugoslav Criminal Procedure Code, the new task of the police is "only to provide the public prosecutor with background information so that he can decide whether or not to set the investigative judicial machinery into motion... Thus, it was obviously the drafters' intention that the police should under no circumstances produce admissible evidence through the interrogation process" ${ }^{13}$ Considerations taken in adopting this approach seem to be "abuses" by the police of the principle of presumption of innocence. ${ }^{14}$
8. Fisher, Involuntary Confessions and Article 35, Criminal Procedure Code, Joumal of Ethiopian Law (Vol.III, No.1), p. 351.
9. Ibid.
10. Ibid. However, it is doubtful to what extent this right could be realistic in cases where the accused is indigent and where bias is likely against the indigent who is of "low class" in a bourgeousie society.
11. Id., p. 332.
12. Collection of Yugoslav Laws: Code of Criminal Procedure (Beograd, 1969), Vol, 19, p.9.
13. Id., p.10. That the judge should play a rote at the initial stage of the criminal process by investigating into the commission of a crime is a civil law development, see Ploscowe Morris, cited above at note 2, pp. 433-467.
14. Id., foot-note 2 at p.8.

The principle of presumption of innocence seems to be inbuilt in our criminal procedure, starting from the initial stage of our crininal process. Before the decision to pinpoint a given person as a possible offender and thus to sift him from the innocent is arrived at, the investigating police officer must first have reason to believe that the person has committed an offence. ${ }^{15}$ Moreover, it is provided that "( $\mathbf{n}$ )o police officer... shall... use... any inducement, threat, promise: or any other improper method to any person examined by the police" ${ }^{16}$

It is clearly provided in the law that where an investigating police officer, whose duty it is to investigate into the commission of a crime, uses induçement, threat, promise or any other improper method against the suspect, he is fiable to punishment. Article 22 of the Revised Special Penal Code Proclamation No. 214 of 1981 provides:
"(1) (a) ny public servant or official or any elected member of a mass organization or co-operative society or any member of any revolution defence committee charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or interned or imprisoned who in the performance of his duties, treats the person concerned in an improper or brutal manner, or in a manner incompatible with human dignity, is punishable with imprisonment not exceeding five years, except where his act may justify the application of more severe punitive provisions.
"(2) where the commission of the said offence was ordered by a public official or an official of a mass organization, the said official shall be punished with rigorous imprisonment from five to fifteen years". ${ }^{17}$

However, the legal consequences that must follow as far as the evidential value of the confession is concerned in cases where the police violate the law in the process of investigation is not spelt out in the Code. ${ }^{18}$

On the other hand, despite the absence of statutory power as far as the evidential value of involuntary confession is concerned, courts have to use their inherent power of decision. This was, to a certain extent, what happened in Criminal Appeal No.4/71.

[^21]In contravention of the principle of presumption of innocence and Article 25 of the Criminal Procedure Code, which is intended to implement this principle, it is plain from an examination of the case that the police did not try to look for evidence independent of the appellants and forced them to confess, thus violating Article 31 of the Criminal Procedure Code and Article 22 of the Revised Special Penal Code Proclamation cited above. Neither, did the police try to substantiate the appellants' confessions by facts that could corrobrate the veracity of the confessions.

Having ascertained from the facts of the case that the confessions given $b^{y}$ the appellants were neither voluntary nor corraborated by circumstancial evidence, the Supreme Court rejected them. However, whether the court would have accepted involuntary confessions corroborated by circumstantial evidence still remains to be a matter of conjecture, since the court was not in this case faced with involuntary confessions corroborated by circumstantial evidence.

## CONCLUSION

1) From the court's decision, the conclusion that can be drawn seems to be that an involuntary confession should be rejected if it is not found to be credible.
2) The court does not seem to be of the opinion that exclusion of an involuntary confession would deter the police from violating the principle of presumption of innocence. The court's stand seems to be that, since use of force to get information or to obtain confession during investigation is punishable, the better solution would be accepting the involuntary confession where it is credible and at the same time subjecting the concerned investigating police officers to penal sanction.
3) The court's decision is based on its inherent power to give decision on issues raised before it end not on the basis of a statutory power. However, in a country where we have codified laws, the vacuum in the law of evidence seems to be a vacuum that should befilled in without any delay. ${ }^{19}$
4) Possible abuses of this kind are bound to happen, not because it may be in police interest to use force to obtain a statement nor because of the police's disrespect of the law, but since it is the duty of the police to apprehand criminals, they may understandably violate the presumption of innocence because of the intuitive feelings they may have against possible suspects. ${ }^{20}$ However, abuses of this kind must be done
19. This is not in any way to imply that there is no law of evidence in our legal system. Thus, a reference to Arts. 2001-2026 of our Civil Code (Negarit Gazeta 19th year, No. 8, Proclamation No. 165/1960) shows that these are laws of evidence.
20. Fisher, Some Aspects of Ethiopian Anest Law: The Eclectic Approach To Codification, Journal of Ethiopian Law (Yol. 3 No.2), pp.473-74.
away with. In the commentator's opinion, making abuses of this kind a penal offence does not seem to have the desired effect. On the other hand, to follow the Yugosiav approach and to take away the duty of investigation from the police and give it to the judiciary may be premature. However in the opinion of the commentator, this form of abuse might be minimized by amending Article 27 of our Criminal Procedure Code so as to withhold from the police the burden of accepting any statement or confession from an accused person and by retaining Article 35 of the Code as has already been suggested; ${ }^{21}$ additional rules should ensure that the statement or confession taken by a court is not the result of "hidden" threats, inducements or force used by the police before the accused is trought to the court.
21. See Fisher, cited at note 8 above, pp. 332,338.

# THE PROVISIONAL MILITARY GOVERNVENT OF SOCIALIST ETHIOPIA <br> <br> SUPREME COURT. <br> <br> SUPREME COURT. ADDIS ABABA 

Criminal Appeal No.1515\%1
Hedar 6, 1972 (Etin.Cal.) (November 16,1979 Greg: cal.)
Judges: 1.
2.
3.

Appellants: .................................. 1.T.A.
2. B.H.

Respondent: .............................. Public Prosecutor
The Public Frosecutor has submitted his reply in his application dated 13 Tekemf 1972. The court, after a careful consideration of the case, gives the following judgement.

## JUDGEMENT

The appellants were charged with attempted fraudulant misrepresentation contrary to Article (32 (1) (a) $/ 27$ (1) $/ 656$ (a) of the Penal Code of Ethiopia before the High Court in Asella in that, together with other three co-offenders who were not apprehended, they went from Addis Ababa to Asella city after agreeing to commit the crime of freudulent misrepresentation; that they met a merchant, Ato Tesfaye Abebe by name, in Kebele 05 and, having decided to defraud the merchant, one of the co-offenders who was not apprehended and whose name is not known asked him whether he had heard that the Government gave money to poor farmers and merchants, and took him to the first appellant; that the first appellant took him to the second appellant, having told him that he would show him the place where he might collect the money; and that the second appellant, in furtherance of their criminal plan, told the merchant that he would show him the place where the money was given at $3: 00$ p.m. The court of first instance having considered the evidence presented by the Public Prosecutor, and noting that the accused were not able to produce defence evidence to rebut the evidence presented by the Public Prosecutor and the confession they made at the police station admitting their crime, found the appellants guilty of the offence as charged, and sentenced the first appellant to five yeas' rigorous imprisonment and a fine
of Birr 50, and the second appellant to two years' imprisonment. This appeal is lodged against this judgement.

The appellants, in their memorandum of appeal written on 2 Hamle 1971, have set forth their grounds of appeal in detail. The Public Prosecutor, in his ${ }_{a}$ application dated 13 Tikemt 1972, has given his reply.

In their memorandum of appeal the appellants argued that Prosecution witness No. 1 was a hostile witness and the confession they gave to the police was obtained by force. The testimony of other prosecution witnesses can at best be taken as circumstantial evidence that is not conclusive and not as direct evidence. Hence, the evidence being unreliable and insufficient, the appellants requested that the High Court's judgement be quashed and that they be acquitted.

The Public Prosecutor, on his part, in his written reply, argued that there was no reason why the evidence presented should not be sufficient and reliable to show that the appellants committed the acts they were accused of. The evidence was not doubtful. They themselves had admitted that they had committed the crime. That they gave their confession willingly and voluntarily was proved by the testimony given by the revolution defence squads who took them to the Police station. The appellants did not produce any evidence to show that their confession was obtained by force. Thus, the fact that they committed the acts that they were charged with having committed cannot be open to doubt. They committed the acts. However, when we consider the law, apart from the fact that the injured party went to the place where it was alleged that money was being given, and apart from the fact that, after taking an appointment from them, he had the appellants arrested, the evidence does not clearly show that the appellants, intending to commit an offence against the injured party's rights in property, attempted to make him act in a manner prejudicial to his propetty either by commission or omission. Hence, rather than stating that the facts establish the legal conclusion that the appellants fraudulently attempted to commit an offence against propety, it will be in accordance with the law to conclude that, intending to defraud the injured party to commit acts prejudicial to his rights in property and to create the conditions for its commission, they completed the first stage for the commission of the offence, i.e. preparatory acts. Accordingly, the Public Prosecutor, strongly arguing that the appellants' acts do not warrant their conviction under the Article under which they were found guilty, asked the court to give a fair judgement by taking into consideration the criminal intention of the appellants and the possible consequences thereof.

We, on our part, have examined the case. We have related the facts to the law. Our examination of the case in the light of the law shows that the appellants, thinking that the public in the town of Asella is naive and can be cheated very easily, went from Addis Ababa to Asella intending to obtain an unlawful enrichment by defrauding whomever they met in the town, by stating that the Government gave money to the needy; that the co-offender not yet apprehended met the private complainant and asked him whether he knew a certain person;
that, having received a negative answer, the co-offender not yet apprehended asked the private complainant what his job was, to which he answered that he was a trader; that he further asked him whether he had heard certain news, to which the private complainant replied that he had not heard, and in turn asked what the news was; that the co-offender who was not apprehended told him. that the Government gave money to poor framers and merchants, and to any other person who was needy, and thereafter took him to the first appellant who was standing a few steps away from them; that the first appellant then toid them that he would show them the place where the Government gave money, : and took them to the second appellant who was waiting for them near the Government treasury office; that after their arrival they met the second appellant there, and, with a view to making things seem true, the second appellant immediately asked the first appellant why he had come again, since he had already taken money in the morning, to which the second appellant answered that it was true he took money in the morning and that the reason why he came now was to show the others the place; that at this juncture the second appellant told them that they should come back at $3: 00 \mathrm{p} . \mathrm{m}$. so that they might receive the money; that after this the private complainant went to members of the revolution defence squad, and notified the matter to them; and that thereafter the present appellants were apprehended and taken to the police station. Upon their arrival at the police station, they admitted their acts without any coercion, and requested that they should be pardoned on the ground that their acts did not bring about damage to property. The High Court's judgement is based on the above-stated facts which the public prosecutor proved beyond any reasonable doubt. Since the appellants neither produced nor asked for the production of any evidence to rebut the sufficiency and reliability of the evidence presented by the public prosecutor, there is no reason why we should not accept the evidence presented to the High Court as credible. We have accepted it as credible. Under the law the provisions cited as relevant for the above-mentioned acts are Articles 27(1) and 655 (a) of the Penal Code. These provisions read as follows:

Art. 27(1) "Whoever intentionaily begins to commit an offence and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the offence shall be guilty of an attempt.
"The offence is deemed to be begun when the act performed clearly aims by way of direct consequence, at its commission".
Art. 656 (a) :Vhosoever, with intent to obtain or to procure to a third person an unlawful enrichment, * fraudulently causes a person to act in a a manner prejudicial to his rights in property, or those of a third person, whether such acts are of commission or omission, either

[^22]by misleading statements, or by misrepresenting his status or situation, or by concealing facts which he had a duty to reveal... is punishable with simple imprisonment or, according to the gravity of the case, with rigorous imprisonment not exceeding five years and fine".

It is provided in Articles 27 (3) and 30 of the Penal Code that basically, in an attempt to commit an offence, the penalty for an attempted offence is the same penalty attached to the offence which the offender intended to commit, without prejudice to the case where, if the acts committed constitute a separate offence, the penalty attached thereto is applicable, In the case at hand the reason why Art. 27 (1) is cited together with Art. 656 (a) must be on the assumption that the penalty specified in the latter provision should be applicable to the appellants, sirce the offence attempted by the Appellants is fraud, and since offences involving fraud are covered by Art.656(a) of the Penal Code.

The provision already cited above and provided in Art.656(a) of the Penal Code is applicable when the injured party, being defrauded, acts in a manner prejudicial to his rights in property or those of a third person, whether such acts are of commission or omission. In this particular case, except for the fact that the injured party went to the place where the Government was supposed to have been giving money to the needy either after he was misled, or without being misled but intending to have the appellants apprehended; the appellants did not cause him to act in a manner prejudicial to his or to a third party's rights in property either by commission or by omission. Nor did they attempt to make him so act. As it is commonly known the offence referred to as "Kutch Belu"** is committed when offenders having found a naive person, convince him by telling him that the Government gives either money or clothes or food to the needy, and when the naive person, believing this as true, asks them to show him the place so that he may also be given supplies. At this juncture, the offenders tell him to put away his clothes and other property and come back, since he must appear needy to get the money. They further tell him that he can leave his clothes and other property with them as well. The naive person must believe the offenders and leave his clothes and other property with them, and they must disappear with his clothes and property.

In the case under consideration, apart from the facts that the third co-offender who was not apprehended took the injured party to the first appellant after asking him whether he had heard the news that the Government was geving out money; that the first appellant, after telling them that he would show them the place where money was supposedly being given, took them to the second appellant; that after they took, him the second appellant, without being asked anything, told them that money would be given at 3:00 p.m. and then they parted; and that thereafter the injured party had them apprehended before $3: 00$ p.m., they

[^23]did not ask him to commit any act that was prejudicial to his rights in property. Perhaps we may assume that, had the injured party kept his appointment instead of having them apprehended, they might have asked him to act in the manner mentioned above. However, it can also be said that as the injured party informed them that he was a merchant, they might have thought that it was not easy to deceive a merchant, and gave him the pppointment, having decided not to be present at the appointed time.

Thus since the inferences that can be drawn from the acts performed by the appellants are more than one, we are convinced that, from the circumstances it cannot be concluded that the fraudulent acts performed by the appellants clearily aimed, by way of direct consequence, at the commission of the crime of fraudulent misrepresentation. It is with this understanding that the public prosecutor of the Supreme Court said that the acts committed were acts of preparation rather than of attempt. In our opinion, although the acts performed do not constitute attempt, we cannot conclude that the acts constitute only preparation and that the appellants did not commit any offence. Even taking the appellants' acts as mere preparation to commit an offence, we cannot let them go free.

Intending to commit an offence of fraudulent misrepresentation by deceiving certain of the dwellers in the city of Asella who, according to them, are naive, the appellants left Addis Abeba for Assela, met the private complainant with this motive in mind and made their conspiracy public. Their conspiracy did not remain a mere agreement. In other words, they commenced to implement their criminal conspiracy. That such a consipracy constitutes a separete offence by itself and is punishable is provided by law. We have found that the relevant provision is Art. 472 (a) of the Penal Code. The Amharic version of the Article is not similar to the French and English versions. However, since this discrepancy is due only to an error in translation, the correct version of this Article as provided in the Fnglish and French versions reads as foliows:

Art.472(1) "Whosoever conspires with one or more persons for the purpose of preparing or committing serious offences against public security or health, the person or property, or persuades another to join such conspiracy, is punishable, provided that the conspiracy materialises, with simple imprisonment for not less than three months and fine.
"For the purpose of this Article, serious offences are offences which are punishable with rigorous imprisonment for five years or more."

In the case at hand, since the offence that the appellants conspired to commit, as can be concluded from their acts, is, as prescribed in Art. 656 of the Penal Code, punishable with rigorous imprisonment not exceeding five years and fine depending on the gravity of the offence, Art. 472(1) of the Penal Code is applicable. Therefore, this court rules that it is under Art. 472(1) of the Penal Code that the appellants should be found guilty and be punished accordingly and not
under Art. 27/656 (a) es cited in the charge and as they were found guilty and convicted by the High Court, and finds them gulty under Art. 472(1) of the Penal Code.

As far as sentencing is concerned, we have seen that the first appellant was sentenced on the basis of the rules governing aggravation due to his prior con* victions. We have also noticed that the High Court concluded that the first appellant is a person who has made criminal activity his profession. However, the previous offence of which the first appellant was found guilty and for which he was sentenced for fifteen years imprisonment wes homicide. On the other hand, the present offence of which he is found guilty is a different offence, which has no similarity with the former one. Thus, it cannot be said that he has made criminal activity his profession. Rather, it would be proper to say that, since he has previously been found guilty and penalized, his antecedents show that he is a dangerous person. This is prescribed by Art. 81 (1)(c) of the Penal Code. Apart from stating that the first appellant did not finish the former sentence passed upon him but was released on probation after serving two-thirds of his sentence, the High Court did not ascertain whether the first appellant committed this offence within the probation period nor render its decision in accordance with Art. 204 (2) of the Fenal Code. If the first appellant committed the present offence while he was on probation, it would be evident that the suspension of: the former penalty has to be cancelled and sentencing would have to be determined in accordance with Art. 193 of the Penal Code, as specified in Article 204(3) of the Penal Code. However, the High Court does not seem to have realized this. As indicated in the High Court's judgement, the first appellant, after serving two-thirds of his prison term, was released on two years' probation period in 1967(Ethiopian Calendar). He committed this offence in 1971 (E.C.) Therefore, Art. 204(2)(3) of the Fenal Code does not apply to this case. The sentence has to be assessed in consideration of the present offence only. The appellant's antecedents are to be taken only for purposes of aggravation.

Art. 472(1) of the Fenal Code, under which the appellant is found guilty, provides a punishment of simple imprisonment for not less than three months, and fine. This provision, read together with Arts. 105 and 88 of the Penal Code, provides a punishment of simple imprisonment ranging from three months to three years, and a fine ranging from one Birr to five thousand Birr. The appellant's antecedents show his dangerous disposition. Thus the penalty to be imposed can be severe. However, as specified in Art. 188 of the Penal Code, it cannot exceed the maximum limit prescribed by Art. 472(1) of the Penal Code.

Although the first appeilant mey be considered as an incorrigible offender, he did not cause any damage in the present offence. Taking these circumstances into account, our consideration of the case convinces us that if the first appellant were to be sentenced to two years' imprisonment and a fine of Birr 50, it would be proportional to his act, would be reformative enough as far as he is concerned, and would also have a serious deterrent effect on others.

Since no evidence has been presented to show that the second appellant was previously punished for an offence, it cannot be said that he is a dangerous criminal. In the present offence, he did not cause any damage to property. Taking these circumstances into account our consideration of the case convinces as that if the second appellant were to be sentenced to one year's imprisonment and a fine of Birr 50, it would be proportional to his act, would be reformative enough as far as he is concerned, and would aiso have a serious deterrent effect on others.

For all the above reasons, having rejected the provisions under which the High Court found the appellants guilty, we find the appellants guilty under: Art. 472(1) and sentence the first appellant, T.A., to two years' imprisonment and a fine of Birr 50, and the second appellant, B.H., to one year's imprisonment and a fine of Birr 50 . It is ordered that the High Court collect the fine in accordance with Articles 91 -96 of the Penal Code; that it be written to the prison administration so that the sentence imposed on the first appellant be executed starting from 12 Hedar 1971; that, since the second appellant, having been in prison since 12 Hedar 1971, has served the sentence imposed upon him, a copy of this judgement be immediately sent to the prison administration so that he may be released from imprisonment; and that the fine imposed by the court, being collectable only in accordance with the law, the appellants' period of imprisonment may not be extended on the ground that they did not pay the fine. We hereby close the file.

# CRIMINAL ATTEMPT AND INCIDENTAL ISSUES: A CASE COMMENT ON CRIMINAL. APPEAL. NO. 1515/71 

By Yoseph Gebre Egziabher*

Criminal Appeal No. $1515 / 71$ reported in this issue of the journal raises one of the complex and controversial issues in Penal Law, i.e. When is a crime attempted ? Is the "beginning of execution" of a crime provided under Article 27(1), ${ }^{1}$ second proviso, clear and therefore a sufficient test to distinguish between preparation and attempt?

It is common to divide attempted offences into "incomplete attempts" and "complete attempts" ${ }^{2}$

Where, having performed certain acts necessary for the completion of the offence, the offender stops short of taking the "decis:ve act" that would normally. have brought about the intended result, either because he decides himself not to pursue his "criminal activity to its end" by deciding not to perform the "decisive act" or because circumstances beyond his control prevent him from performing the "decisive act", the attempt is an "incomplete attempt"

This would be the case where, for example, having decided to kill B, A goes to B's house with his revolver loaded and knocks at B's gate; the gate is opened for hịm, he goes straight to B 's bedroom and aims his revolver at B ; however, realizing that $B$ is with his child, $A$ changes his mind and leaves $B$ with his child, because of considerateness for the child. The "decisive act" in this case would have been A's going to $B$ 's house with a loaded revolver and aiming at $B$.

This would be the "decisive act", since, in the normal course of things, people do not stop short of committing the crime of homicide once they aim at their victim, being at a close range to their victim.

The situation is different where, having performed all acts necessary to bring about the intended result, the offender fails to achieve his criminal goal due to circumstances beyond his control. This is the so-called "complete attempt" This would be the case where having decided to kill B, A goes to B's house and shoots at him but misses him.

One may include under the category of "complete attempts" the situation where, having performed all the acts necessary to bring about the intended result, the offender prevents the result from taking place by performing certain other

[^24]acts. ${ }^{3}$ However, the term "complete attempt" seems to be a misnomer in such circumstances, since the offender has done every thing that needs to be done and has done it successfully. In other words. the offender has passed the stage of attempt and completed his criminal activity. ${ }^{4}$ If the criminal activity is completed, one cannot logically say there is merely an attempt.

However, this division of attempted offences into complete and incomplete offences helps very little in the demarcation between preparation and attempt. ${ }^{3}$ Where one has to deal with complete attempts, it will be clear that an offender who has committed a complete attempt has definitely passed the stage of preparation. Thus, if A were to shoot at B but miss him, this would be a clear casef of attempt. Whether it is an attempted homicide or an attempted bodily injury may not be easy to determine from A's act of shooting at B; but that A had attempted to commit an offence, it seems, would be a clear case.

When one considers incomplete attempts, however, it becomes very difficult to delineate "the beginning of execution" and thus provide a clear distinction between incommlete attempts and preparation. However, it becomes necessary to distinguish between preparation and incomplete attempts, since preparation to commit an offence is not, generally speaking, ${ }^{6}$ punishable unless the preparation itself constitutes an independent offence.?

To illustrate the simplicity and difficulty that one faces in classifying whether a given case is a case of preparation or attempt, let us take the following examples. $A$ buys a revolver with the intention to kill $B$. Let us assume that $A$ does not obtain the necessary license to keep the revolver in his possession. This would be a clear case of preparation as for as A's intent to kill $B$ is concerned, but a complete offence as far as Art. 763. Control of Arms and Amunition, of the Penal Code is concerned; and this is in line with Art 26 (a), since possessing a revolver without the necessary license constitutes, in itself, an offence defined by law. We would agree that this is a clear case of an act of preparation as fer as A's intention to kill be is concerned, since A's act of buying the revolver is an act Intended to procure the means for the commission of the crime of homicide.
3. The example given by Graven (ibid) is the case where "after $B$ has drunk the coffee ia which $A$ had pat some arsenic, A gives him an antidote so that he should not die." However, otassifying cases of this kind as "complete attempt" could be misleading. What we see here is a case of "active repentance", and an undoing of a complete offence that would otherwise have definitely brought about the result in the normal course of things.
4. P.C.Art.28(3).
5. Art. 26 Preparatory Acts: Acts which are merely designed to prepare or make possible an offence by procuring the means or creating the conditions for its commission are not punishable unless:
(a) in themselves they constitute an offence defined by law; or
(b) they are expressly constituted a special offence by law by reason of their gravity or the general danger they entail.
6. See P.C. Art.26(b), foot note 5 above.
7. See P.C. Art.26(a), foot note 5 above.

When we take the borderline cases, on the other hand, it becomes clear how difficult and controversial it becomes to classify a given case as a case of preparation or attempt. This would be the case where, with the intention to kill $B$ with premeditation, A goes to B's house with a loaded revolver, knocks at B's gate; the gate is opened and goes straight to B's bedroom having been told by the person who opened the gate that $B$ is in tis bedroom; and seeing that $B$ is with his child changes his mind and leaves $B$ with his child out of considerateness for the child.

Different theories have been suggested by jurists to distinguish preparation from attempts (incomplete) and to define "the beginning of execution"8 For our purpose, however, suffice it to say that from the structure of our Penal Code, a Code that penalizes impossible offences, ${ }^{9}$ a person who attempts an offence is subjected to punishment mainly because of the manifestation of his dangerousness to society. ${ }^{10}$
"The beginning of execution." must thus rest more on the manifestation of the person's dangerousness than on the imminence of the danger that could materialize from the acts of the offender. The materialization of the danger should ' be taken into consideration only to the extent that it helps to decide the determination of the offender to commit the crime.

However, we have not said much in the way of defining "the beginning of execution" Indeed we cannot say much, except to indicate a very broad and general guideline in cases where we try to deal with human nature, since 'the beginning of execution" or "the point of no return", (i.e. the "decisive act" after the performance of which one could conclusively say the person wifl not under the normal course of things quit but will commit the offence) may vary according to the character and antecedents of the person. Hence, where we have to deal with "incomplete attempls", we have to agree that whether or not a person attempted to commit an offence is something that has to be decided on a case-to-case basis, and is not something for which, to the extent that human behaviour can be forecast, we can lay down a formula that can be applicable to each and every case like litums paper. ${ }^{11}$

Analysis of the case, criminal Appeal No. 1515/71, shows that the court has found the following facts established:
a) that the appellants, together with other three persons went from Addis Ababa to Asella, Arsi Administrative Region, in order to defraud citizens iñ Asella;
8. See Graven, cited al footnote 2 above, p. 71.
9. Ibid., and P.C. Art. 29.
10. That this is also the reason why a person who commits an attempt is liable to punishment under common law, see Turner (ed.), Kenney's outlines of Criminal Law (Cambridge At the Unjversity Press, 1952), pp.79-83.
11. See Graven, cited above at note 2,p.73; Andeneas, The General Part of the Crininal Law of Norway (Sweet \& Maxwell Limited London, New York University, New York, 1965), Vol. 3, pp. 88-290.
b) that in Asella city, Kebele 05 (a local self administrative unit) they met a merchant:
c) that one of the three persons who was not apprehended informed the merchant that the state gives money to poor framers, merchants and to other needy people and took him to the first appellant;
d) that the person who was not apprehended and the first appellant took the merchant to the second appellant;
e) that the second appellant asked the first appellant why he came to him since he had already been given money in the morning;
f) that the first appeslant stated to the second appellant that it was true that he took money in the morning, and that the reason why he went to him was not to take money again, but to show the merchant and the person who was not apprehended the place where they could get the money:
g) that the second appellant fold the merchant and the person who was not apprehended that they should come at 3:00 p.m. to collect the money;
h) that afterwards the merchant informed revolutionary defence squads on duty of the incident as a result of which action the two appellants were arrested; and
i) that the two appellants voluntarily confessed to the police and requested that, since their acts did not bring about any proscribed result, they should be excused.

From these facts that the court considers as established, what legal conclusion should be drawn? Should the conclusion be that there was no attempted fraudulent misrepresentation but preparation, and hence conspiracy, or should the conclusion be that the facts established prove that "the act performed clearly aims, by way of direct consequence" at the commission of fraudulent misrepresentation and hence there was attempted fraudulent misrepresentation and conspiracy contrary to Articles 27/656 (a) and 472 of the Penal Code concurrently ${ }^{12}$

The fact that the appellants, together with the three persons who were not apprehended, went from Addis Ababa to Asella with the determination to defraud people in Assella by itself cannot, it seems, amount to attempt. This is a clear case of preparation for the commission of an offence; hence, leaving aside procedural requirements for the moment, if the appellants had not proceeded further and committed additional acts, they could have been found guilty under Article 472 of the Penal Code only.

However, the appellants went further and approached a person who told them that he was a merchant; nor did they stop there they tried their best to
12. See P.C. Art, 472(3) wherein it is provided that conspiracy to commit an offence and commission of the offence are not to be merged by the principle of "unity of guilt and offence."
convince him wrongly by uttering false statements to the effect that the government gives money to poor merciants and farmers. They went still further; one of them, by posing as a government official, tried to mislead the merchant and to make him believe that the government gives money to poor merchants and farmers and that he could get the money if he came to a certain place at $3: 00 \mathrm{p} . \mathrm{m}$. Should we conclude, as the court did, that the appellants' acts do not clearly aim, by way of direct consequence, at the commission of fraudulent misrepresentation?

As has already been mentioned above, offences impossible of completion are liable to punishment if attempted. Thus, a person who shoots a dead person under the impression that he is alive is subject to punishment. ${ }^{13}$ However, in such circurnstances, there is no danger that could result from the shooting. If suct a person is to be punished, he is punished not because of the danger that his act would bring about but because of the fact that he has manifested his dangerousness. Thus in deciding whether or not there was "a beginning of execution" and hence attempt, the stress should be more on the manifestation of the dangerous disposition of the accused and not literalfy on the beginning of the commission of the crime.

However, the court seems to express the opinion that unless the commission of the offence is literally begun, there cannot be an attempted offence. That the court seems to express this opinion can be inferred from its statement, which reads, "in this particular case, except for the fact that the injured party went to the place where the Government was supposed to have been giving money to the needy either because he was misled or without being misled but intending to have the appellants apprehended; the appellants did not make him perform any act that was prejudicial to his or to a third party's rights in property either by commission or by omission. Nor did they attempt to make him so act...
"In the case under consideration apart from the facts that the third co-offender who was not apprehended took the injured party to the first appellant after asking him whether he heard that the Government was giving out money; that, after telling them that he will show them the place where money was supposedly being given, the first appellant took them to the second appellant; that after they took him there, the second appellant, without being asked anything, told them that money would be given out at 3:00 p.m., and they parted; and that thereafter the injured party had them arrested before 3:00 p.m., they did not ask him to commit any act that was prejudicial to his rights in property..."

This conception of "the beginning of execution," however, is too narrow, and goes contrary to the policy considerations that must have prompted the legislature to provide that attempted offences should be liable to punishment, for the following reasons:

As the term itself implies attempted offence means that the offence has not materialized. When the law provides that attempted offences are liable to punishment, the mann policy consideration seems to be to protect society from dangerous
13. See Art. 29 and comments on this in Graven, cited at footnote 2 above, Pp. 87-91.
parsons, persons who have manifested their determined intention to bring about haim to society by the proximity of their acts to the final act or acts necessary to bring about the proscribed harm. If the line of demarcation between preparation and attempt is drawn such that certain acts that violate some of the elements of the offence must necessarily be pefformed before one can say there is attempt, the machinary of justice may step in too late. ${ }^{14}$

Moreover, as has already been pointed out, this conception of the beginning of execution assumes that there cannot be attempted offences in cases where the complete offence "does not imply a combination of acts or is not aggravated by reason of legally defined circumstances preceding the doing of the act" ${ }^{15}$.

To illustrate this, let us take the case of theft as an example. Theft is abstraction of a movable, the property of another. ${ }^{16}$ Thus, as far as this offence is concerned, there cannot be attempt except incases where the offender is caught redhanded and prevented, beyond his control, from carrying away the property, or where he changes his mind after he gets hold of the property and leaves it to its owner. The latter case is very unlikely to happen in reality. However, in the case of robbery which is intent to commit theft or theft plus violence, ${ }^{17}$ we can conceive attempt in all its forms, i.e. incomplete or complete, in a realistic way. This is true for the simple reason that when we take the definition of robbery as theft plus violence, more than one act must be completed in order for robbery to be a complete offence. There must be abstraction of property of another, and use of force, or threat of its use, to prevent any resistance against the intention to abstract or the abstraction. However, as illustrated above, all offences are not offences that call for more than one act for their completion, as an examination of the special part of the Penal Code reveals. Thus, to conceive of the "beginning of execution" as an act that must violate at least one of the acts proscribed by the special part of the Penal Code that defines the offence would be obviously to derogate the beginning of the offence as is comprehensively defined in the second proviso of Art.27(1) of the Penal Code; this definition is intended to be completely comprehensive and thus to provide for attempt, regardless of whether the special part of the Penal Code that lays down the elements that constitute an offence call for one act or more than one act for its violation.

On the other hand, however, even if we take the conception of "the begginning of execution" as the court did, the court seems to have erred in its finding. The court states: "... perhaps we may assume that, had the injured perty kept his appointment instead of having them apprehended, they might have asked him to act in the manner mentioned above. However, it can also be said that as the injured party informed them that he was a merchant, they might have thought that it was not easy to deceive a merchant, and gave him the appointment, having decided not to be present at the appointed time.
"Thus, since inferences that can be drawn from the acts performed by the
14. Williams, Police Control of Intending Criminals', The Criminal Law Rewiew (1955), pp.66-70.
15. Graven, cited above at note 2, p. 71 .
16. See P.C. Art. 630.
17. See P.C. Aft 636 . Note, however, that only intention to commit theft is enough.
appellants are more than one, we are convinced that, from the circumstances, it cannot be concluded that the fraudulent acts performed by the appellants clearly aimed, by way of direct consequence, at the commission of the crime of fraudulant misrepresentation ..."

Even if we take the second alternative posed as possible by the court, it is clear that the appellants tried to see whether or not the injured party might be misled. The person who was not apprehended and the first appollant tried to foed the injured party with "misleading statements," in the words of Art. 656 of the Penal Code. The second appellant in collaboration with the other two, posed as a government official "by misrepresenting his status" (Article 656). This clearly shows that the commission of the offence had begun since elements of Article 656 have been violated. Thus, even if we take the second alternative, the conclusion that should have been drawn seems to be that the appellants were unable to pursue their criminal activity because they were convinced that they could not deceive their victim. Had they been convinced otherwise, they would not have given their victim another appointment. Their criminal activity must have been foiled because of their conviction that they could not deceive the injured party.

Thus, even if we take the court's narrow conception of "the beginning of execution", the court should have arrived at the conclusion that there was attempted fraudulent misrepresentation.

Another interesting issue that the court dealt with in this case is the question of discrepancy between the different versions of the Penal Code. The court correctiy pointed out that in the Amharic version of Article 472(1) of the Penal Code, a sentence which in the English and French versions reads, "For the Purpose of this Article, 'serious offences' are offences which are punishable with rigorous imprisonment for five years or more" is left out. The Amharic version of Art. 472 (1) thus is not limited to "serious offences" This being the case, can one boldly assert, as the court did, that "this is a result of an error in translation, and the law is as it is provided in the English and French versions of the Code"?

It is a fact that the legislative body that promulgated the Penal Code discussed and approved it in the Amharic language. It is also true that Amharic is the official language of our country. Since law, especially Penal Law, is municipal law, one should take the Amharic version of the Penal Code as the law of the country, in the absence of authority to the contrary. The court did not cite as authority any minutes of the codification commission or the legislative body to show that the discrepancy between the Amharic version of Article 472(1) and the French and English versions was simply due to error in translation and not a deliberate exciusion of the requirement that the offence be "serious" In the absence of such authority, it seems more logical to conclude that the legislature deliberately excluded the requirement of a "serious" offance. ${ }^{18}$
18. This is not in any way to imply that, where the Amharic version of the Code is ambigous, courts should not refer to the other versions of the Code. Consulting the French version of the Penal Code in cases where the Anhlaric version is ambigous is, in the commentator's opinion, a commendable approach that should be continued.

Even if one were to agree with the court that the Amharic version of Article 472(1) of the Penal Code is erroneously translated, it is irrelevant to raise this point to arrive at a proper finding, since the appellants would be liable to punish ment under Article 472(1), whether we accept the Amharic version or the English and French versions; this point would have been relevant only if the maximum penalty provided under Article 656 of the Penal Code were below five years' rigorous imprisonment. Thus the court raised and decided upon an issue that was not material for the decision of the case.

Other points raised and discussed by the court are contained in Articles 204(2), 204 (3) and 193 of the Penal Code in relation to sentencing the first appellant. It is true that, as the Supreme Court pointed out, the High Court did not ascertain whether or not the first appellant committed the present offence during his period of probation. It is also true under the law that if a person on probation committed an offence during this period, the penalty pronounced for the fresh offence must be added to the previous penalty that was suspended in accordance with Art. 193 of the Penal Code. ${ }^{19}$

However, as the Supreme Court found out, the first appellant did not commit the offence of conspiracy during his period of probation. This being the case, it is immaterial and irrelevant to raise this issue, since it does not in any way help to decide on the sentence that ought to have been imposed on the first appellant.

Another point that one observes is that the court found the appellants guilty of an offence with which they were not charged. As the case shows, the appellants were charged with attempted fraudulent misrepresentation, but were found guilty, on appeal, of conspiracy as defined in Article 472 (1) of the Penal Code.

Although it is a basic principle of the criminal process that a person cannot be found guilty of an offence with which he was not charged, ${ }^{20}$ the appellate court did not give a legal justification as to why this principle (aimed at enabling a person accused to defend himself and thereby achieving the aims of justice) was not followed in this case.

The aim of this comment is not in any way to imply that the court was not aware that a defence to attempted fraudulent misrepresentation necessarily implies a defence to conspiracy to commit this offence. Rather, the aim is that the court should have tried to justify its finding under our criminal procedure, since our criminal procedure, like eny other procedure, is intended to complement the criminal law by providing procedural justice. The court should have done this especially in light of Article 472(3), which provides that conspiracy and offences against property are to be dealt with concurrently, thus implying that "unity of guilt and penalty" does not operate. This in turn implies that Article $113^{\mathbf{2 1}}$ of our Criminal Procedure Code may not apply and hence there should have been concurrent charges to begin with.
19. P.C.Art.204(3), second Proviso.
20. See Cr. Pro.C. Art. 108(1).
21. Art.113 - where it is doubtful what offence has been committed.

## CONCLUSION

(1) Although one cannot lay down a general criterion that would enable to differentiate attempts from preparation, whether or not there was attempt can be decided on a case-to-case basis. In this case, even if we take the narrowest conception of attempt contrary to our Penal Code, it seems that the court should, have found both attempted fraudulent misrepresentation as defined in Article 27/656 (a) and conspiracy as defined in Article 472 (1).
(2) The court's conclusion that the English and French versions of Article 472(1) state the law and not the Amharic version seems to be unwarranted in the absence of authority that the term "serious" was not deliberately left out in the Amharic version of Article 472(1) of the Penal Code in order to establish that this Article may apply to any conspiracy to commit any offence.
(3) The court's reference to Articles 204 and 193 of the Penal Code seems to be irrelevant, since these Articles were not relevant in determining sentence on the first appellant.
(4) The court's finding the appellants guilty of an offence on which they were not apparently charged seems, in the absence of legal justification, to go contrary to a basic principle laid down in our criminal Procedure Code.
(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.
(2) Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.
(3) Nothing in this Article shall prevent the court from applying the provisions of Art. 6 and 9 Penal Code.


[^0]:    *Faculty of Law, Addis Ababa University. The author is grateful for various constructive suggestions made on a draft of this paper.

    1. Although, in a broad sociological sense, punishment may imply the measures society imposes on a deviant, here it is used as a narrow legal term referring to post-conviction measures.
    2. This paper approaches problem-oriented research not with the Webrian value-free approach, but rather with a value-laden approach. Concepts like "noble"' and "progressive"' are obviously value-laden. The purposes for which the paper is written are also value-laden; it aims at a humane and just society, oriented towards human dignity.
    3. What sources one employs are determined by availability and competence. The Ethiopian Penal Code of 1957 is referred to because the author is conversant with it. African and Uaited Nations sources are relevant in that the paper considers society in general.
[^1]:    9 Some penologists prefer to distinguish the individual from the general and consider them as two separate objectives. See C.F. Jeremy Bentham, Bentham's Works, pp. $399-402$ (London 1843) for various policy roles on establishment of maximum and minimum punishment.

    10 Modern penal law, unlike its predecessors, recognises various defences such as absolute irresponsibility, partial irresponsibility and immaturity. Irresponsibility entered into intentionally or negligently is, however, not covered as a defence. The relevant Ethiopian Penal Code Atticles are Articles 48 , and 50 .
    11 The relevant Ethiopian Penal Code Articles are Articles 58 and 59.

[^2]:    28 G. Rusch and O. Kirchhemier, Punishments and Social Structure, pp. 21-22. New York 1939. e9 Article 116, Ethiopian Penal Code of 1957.
    30 Africa Marazine, P. 17, March 1975.
    31 Department of Social and Economic Affairs, United Nations, Capital Punishment, U.N. Publicatiou ST/SOA /SD9, pp. 28-30. New York 1962

[^3]:    2 Graven, ibid, p. 289.
    33 Report of the Temporary New York State Commission on Revision of the Penal Law (1965), as quoted in Lowenstein, ibid, pp. 337.38.

[^4]:    37 The "authoritarian tread' referred to in the United Nations Report should be viewed as a factor of the upheavals and the struggies for a new world order precipitated this century. The world wars and the emergence of newly independent states in the third worid, with political elites jealous of their newly gained powen, make up the picture that reveals this authoritarian trend. Department of Social and Econonic Affairs, ibid.
    38 Africa Magazine, ibid, p. 16.
    39 To put the problem in perspective, however, one is forced to agree that "the bitter truth is that most African governments ane not in a strong position morally to ask the white minority governments to extend liberal interpretations of the law to their opponents, since they themselves are ruthless in dealing with dissidents". African Magazine, ibid, p.17.

[^5]:    40 U. N. Publication ST/SOA/SD/2; and N. Hyner, "Sentencing By an Administrative Board" in Law and Contemporary Problems Vol. 23 (1958).
    41 Articles 88, 102, 122, 123, Ethiopian Penal Code of 1957.

[^6]:    -Lecturer, Faculty of Law, Addis Ababa University (on study leave, Mac Gill University)

    1. Preston and Clinvaux, Laws of Insurance, p. 1
[^7]:    ${ }^{\text {a Civ. App. No. }}$ 1166/1974

[^8]:    11. See Commercial Code, Article 668.
[^9]:    12. Disdale \& Mcmurdie, Elements of Insurance p. 84.
    13. Commerciel Code of Ethioeia, Article 668(2)
    14. Commercial Code of Ethioeic, Article 668(3)
    15. Consequential Loss Policy, Condition Nor 1, Money Policy Conditions, No. 3;6, Public Liability Policy Condition, No. 12, Burglary Policy Condition, No. 2.
[^10]:    21. Issue of paid-up policy - A reduced sum assured payable on the maturity of the policy or in case of previous death to the bezeficiary. The payment of a paid-up value takes place after at least three annual premiums have been paid and when the insured, for certain reasons, does net want to or cannot pay my further premum. In this case, the insured will be paid in the event of the maturity of the policy or, in the event of his previous death, the beneficiaries will be paid. Paid-up value $=$ No. of years paid the sum assured. duration of policy
    A paid-up value is different from the surrender value of a policy; surrender value is a reduced sum assured payable to the insured on the cancellation of the policy. It is generally called a paid-up value, bat it is given a discount rate since it does not wait till the maturity period is up. The option of demanding the surrender (cash) value or reduced paid-up insurance is given to the insured if the premium payment is discontinued; and written notice has to be given within 3 months following the due date of the unpaid premium. (See General Provision No. 4 of the Life nsurance policy.)
[^11]:    *Assistant Professor and Research Associate, Addis Ababa University, I would like to acknowledge helpful comments from the Editorial Board. All errors and shortcomings are mine.
    1 Fo the history of banks and banking in Ethiopia, see Ethiopian Observer, Vol. VIII No. 4.

[^12]:    38. Art. 8(1) of MBPI and Art. 60 (1) of MBP2.
    39. Arts. 61-67.
    40. Arts. 69-74.
    41. Art. 68.
    42. Secrecy of the individual's account was first introduced into the country explicitly under the 1943 charter of the State Bank of Ethiopia, Art. 5 (11). However, this was not carried into MBP1.
    43. Art. 8(2) of MBP1.
    44. Art. 60 (1) and (2).
    45. This paper does not treat the problematics of MBP2 and the effectiveness of the monetary policy, a subject treated in another work. See Befekadu Degefe, Monetary Policy for the Mobilization and effecrive Utilization of Financial Resources, pp. 80-158.
[^13]:    49. Currency Amendment Regulation (Legal Notice No. 127), 1949.
    50. Art. 3 of the "Currency (Amendment) Proclamation 1950 (Proclamation No. 112 of 1950).
    51. Art. 8 (1) of MBP1.
    52. Arts. 7 and 60 respectively
[^14]:    53. NBE, Quarterly Bulletin, Vol. 6, No. 1, March 1960.
[^15]:    54. Arts. 2 (9) and 9 (1) respectively.
    55. Art. 26 (1) (b) and Art. 26 (3) (c).
    56. Art. 26 (3) (b) (4), in addition to those in footnote 57.
    57. Art, 31.
[^16]:    58. Art. 50 and Art. 9 (2) a'ong witin Art. 34 of MBP2 respectively.
    59. Another objective of the reserve requirement and liquidity ratio is partial insurance for depositors. in case of bankriptcy of the banks and otler financial institutions' bankruptcy.
    60. Art. 33.
    61. Currently the rescrve requirement is $10 \%$ of the on-demand deposit, and $5 \%$ of the savings and time deposit.
    62. Compare Art. 13 (2) (b); 13 (4); 13 (5); 13 (6) and Art. 16 of MBPI with the relevant articles of MBP2, cited supra.
    63. Art. 18 (1) and 38 (1) of MBP1, respectively.
    64. Arts. 15-23.
    65. Arts. 30-35,
[^17]:    *A report submitted to the International Acadeny of Comparative Law Congreses-Tenth Congress (1978)
    **Former Professor, Faculty of Law, Addis Ababa University.

[^18]:    11. T.B. Smith "Law Reform in a Mixed ... Jurisdiction", Louisiana Law Review, Vol. 35, 1975 Special Issue, p. 956.
    12. See its analysis under 2 , above.
    13. This very expression is foreign to ail provisions (Arts. 2028-2065) of the Section on liability based-on-fautt.
    14. Whese not otherwise qualified. "Scction" or "Article" (and "Sec." or "Art.") stand, respectively, for sections or articies of the Ethiopian Civil Code.
    15. But this last defence is irrelevant to products liabiity, since it is available only against "owners or holders'" of the things mentioned under Arts. 2071-2084.
    16. The Ethiopian tort provisions (Arts. 2027-2161 of Title XIIL Civ. C.) are largely distorted in the pubbished English version of the Ethiepian Civil Code. For this reason, we refer the reader to their revised translation in G. Krzeczunowicz, The Ethiopian Law of Extra-Contractual Liability (Addis Ababa 1970) Appendix D, or The Ethiopian Law of Compensation for Damage (Addis Ababa 1977). pp. 316-354.
    17. Contrast contract law, where in "warranty of quality" actions the plaintiffs need not be "users". and the defendants need not be "manufacturers" of the product: the contractual relation alone matters.
[^19]:    64. See p. 44 of our work first cited at ftn, 16, above.
    65. The term reasonably was left out by the Convention (see its Explanatory Report, para. 35) because it had an inconvenient connotation in its French version's counterpart (raisonnablement'"). We deem it proper to refer to the objective "reasonability" standard of expectation.
[^20]:    66. For additional arguments, see para. 102 of the United Kingdom docunent cited at ftn. 53 . They fit, a fortiori, the situation of unenlightened claimants in Ethiopia.
    67. Because "own-brand" products are little known in this country, and exceptional cases can be solved by application of the subsidiary remedy at c.)
[^21]:    15. Cr. Pro.C. Art. 25.
    16. Cr. Pro. C. Art. 31.
    17. Negarit Gazta, 4 ist yr.No. 2. See also P.C. Art. 417.
    18. Art. 462 bis of the Avant-Project of the Criminal Procedure Code in its sub-article 2 as reproduced in Fisher, Ethiopian Criminal Procedure Code: A Source Book (Addis Ababa University, in association with Oxford University Press, 1969). p.458, provided that confession obtained in violation of the law shall be null and void. However, this draft Article in the Avant-Projet was replaced by Article 31. The reason why Art. 31 of the Criminal Provedure Code does not mention the effect as far as the evidential vaiue is concerned, as pointed out by fisher, cited at note 8 above, pp. $333-34$, Seems to be the legislature's belief that this would be provided in a Code of Evidence.
[^22]:    *The word "enrichment" does not appear in the English version of art. 656 of the Penal Code (Commentator).

[^23]:    **Leterally meaning "sit down" (commentator).

[^24]:    *Assistant Professor, Faculty of Law, Addis Ababa University.

    1. For a full text of Art.27(1), see the case Criminal Appeal No. 1515/71.
    2. Graven, An Introduction to Ethiopian Penal Law (Facuity of Law, Addis Ababa Eniversity in association with Oxford University Press, Addis Ababa-Nairobi 1965), p. 27.
