##  JOURNAL OF ETHIOPIAN LAW



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Sixth Annual Report from the Dean
Quintin Johnstone
CASE REPORTS

## ARTICLES

Agricultural Communities and the Civil Code Bilillign Mandefro

Income Tax Exemption as an Incentive to Investment in Ethiopia
Timothy P. Bodman


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The Journal of Ethiopian Law was inaugurated by His Imperial Majesty Haile Sellassie I in the summer of 1964 as an important step in the development of Ethiopia's legal system. Subsequently, the Board of Editors of the Journal has invited those who are interested in the continuation and expansion of the Law Journal's activites to express their support by becoming Patrons of the Journal of Ethiopian Law.
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# SIXTH ANNUAL REPORT OF THE DEAN <br> 1968-69 (1961 E. C.) <br> Quintin Johnstone, Professor and Dean, Faculty of Law <br> Haile Sellassie I University 

I have written this report near the end of the 1968-69 academic year and at the close of what to me have been two pleasant and exciting years on the Law Faculty staff. It is with regret that I leave but with appreciation for the opportunity of having been here. My successor as dean is an able teacher and scholar, Cliff F. Thompson, who for almost a decade has specialized in African law and has taught on the Law Faculties of both the University of Khartoum and the University of Zambia.

Events at the University and the Law Faculty this past year have been dominated in large part by the student protest movement that resulted in brief closure of the University early in the second semester, and later in withdrawal for the balance of the term of a substantial majority of day degree students. About twothirds of the Law Faculty's day students withdrew. The impact of this student dissension on the corporate life of the University, both academic and non-academic, has been considerable. These are facts and they should be noted.

The Law Faculty staff has tried to take a neutral attitude toward the political issues behind the protest movement, honoring each student's decision to stay or leave but opposing violence and threats of intimidation. Many law students went through weeks of personal anguish in making up their minds of the question of withdrawal, and I admire the honesty they displayed and sympathize with the agony they faced during those troubled weeks. However, as someone from an older generation and a different national background, perhaps I will be excused the observation that it seems to me anomalous and somewhat masochistic that in what purportedly was a movement to improve Ethiopian education so many students were willing to cripple severely the University and their own educational advancement.

Finances This Law Faculty has been developed largely with grant moneys from foreign sources. However, balances in our big Ford Foundation grants will be almost all expended within the next twelve to twenty-four months, and thereafter foreign financial help to the Law Faculty can be expected only in more modest amounts. What this means is that the Faculty increasingly must rely on Ethiopian money and manpower resources to caxry out its programs.

Staff Our teaching staff this year was composed of nineteen teachers on the full-time staff and twenty part-time teachers, the latter involved only in certificate and diploma instruction for one or both terms. Three Ethiopians joined the full-time teaching staff this past year and will continue next year, and we hope to add three more full-time Ethiopians this coming semester. One is already under contract: Yohannes Heroui, a high ranking graduate of our law school. This year Ato Yohannes has been doing advanced study in London.

At the end of this year we are losing nine members of our full-time staff, including the key administrators and nearly all of those who are senior in period

## JOURNAL OF ETHIOPIAN LAW - VOL. VI - No. 1

of service. Acute turnover problems will continue at least until our teachers are mostly Ethiopians, one of the costs of an expatriate staff.

Most of our departing colleagues will be teaching law next year and the stature of the institutions where they will be working indicates the caliber of foreign personnel that the Law Faculty here has been able to attract. Richard Cummings is returning to the University of Louisville School of Law, Harrison Dunning is going to the University of California School of Law at Davis, Julian Juergensmeyer to the University of Florida College of Law, Michael Kindred to Ohio State University College of Law, John Marshall to Vanderbilt University School of Law, Zacharias Sundstrom to the University of Uppsala Law Faculty and I will be returning to the Law School at Yale University. Six new expatriates have been hired to help replace those who are leaving.

The full-time teaching staff has as usual been engaged in many academic and administrative activities outside the classroom, indicating not only the contributions of individual teachers but the variety of functions that the law school is involved in. Some of the more important are these:

Richard Cummings. Chairman of the Research and Publication Committee early in the year and completed the manuscript of a book on international law.

Harrison Dunning. Assistant Dean, Chairman of the Curriculum Committee during the first semester, member of the University Faculty Council, completed several articles on Ethiopian and African law including one published by the Columbia Law Review.

William Ewing. Chairman of the Law School's Student Relations Committee, Chairman of the Curriculum Committee during the second semester, supervisor of our placements on Ethiopian University Service, and director of the Consolidation of Ethiopian Laws project; he also wrote an article on the right of Ethiopian public servants to organize, for the Journal.

Fasil Nahum. Member of the Ethiopian University Service Committee, completed several articles on Ethiopian law and has a good start on a set of Amharic teaching materials on constitutional law.

Julian Juergensmeyer. Completed teaching materials on East African water law and substantially completed a monograph on Ethiopian water law.

Michael Kindred. Chairman of the Research and Publication Committee during most of the year, Chairman of the New Appointments and Promotions Committee, translated for publication several Rene David articles relevant to Ethiopian law, completed a major comparative law article and has well under way an article on Ethiopian suretyship law.

Gcorge Krzeczunowicz. Published an article on the Ethiopian law of marriage, completed a manual on the Ethiopian law of extra-contractual obligations and made substantial progress on two other articles and a manual on damages.

John Marshall. Assistant Dean in charge of the extension program and $d e$ facto Dean of Students, Chairman of the Admissions Committee, Chairman of the Extension Program Committee, member of the University Faculty Council, member of the University Admissions Committee, substantially completed teaching materials on administrative law and on taxation.

## SIXTH ANNUAL REPORT OF THE DEAN

James Paul. Academic Vice President of the University, completed Volume II of his treatise and materials on Ethiopian Constitutional Development.

Zygmunt Plater. Assumed major obligations in the publication program and in che financing and organizing of Law House, has an article in progress on Ethiopian tonstitutional law.

Paul Ponjaert. Deputy in charge of the Center for African Legal Development, completed one article with Dr. Vanderlinden and has another under way, is the Assistant Dean-Designate to take over Mr. Marshall's extension and student affairs duties.

Semereab Mikael. Case Editor for the Law Journal, published an article on Ethiopian law and has another in progress.

Ronald Sklar. Chairman of the Library Committee, Chairman of the Honor Board (that this year fortunately had no cases), has a major article under way on indirect intention in civil law.

Zacharias Sundstrom. Chairman of the Law House Committee, published two monographs on international trade and one on conflict of laws, completed an article on international corporations and made substantial progress on a comparative study of international corporations.

Michael Topping. Did the final editing of the English edition of the Fetha Negast that was published during the year, completed one jurisprudential article and revised his Roman law monograph for publication.

Jacques Vanderlinden. Director of the Center for African Legal Development, edited our Legal Education Conference proceedings, published several articles, completed a manual on the Ethiopian law of persons and with Paul Ponjaert has a manual in progress on the Ethiopian law of marriage, was elected president of the International African Law Association.

Worku Tafara. Secretary of the Executive Committee of the Faculty Council, Chairman of the Alumni Relations Committee, in charge of legal aid planning.

Two staff members merit special mention as the above notations fail to convey adequately their outstanding contributions to the Faculty. One of them is Michael Kindred who reorganized our publications program, substantially increased output and put the entire operation on a sound business basis. The other is Assistant Dean John Marshall. In his organization of student and course records and in his administration of the certificate and diploma program, the latter requiring his presence at the school most eveaings during the week, Mr. Marshall did an extraordinary job. Proof of this is the smooth way in which these operations have run since he took over principal administrative responsibility for them.

Special attention should also be directed to the success of our young colleagues representing one or another of the various foreign peace corps programs: Zygmunt Plater of the U.S. Peace Corps and Paul Ponjaert and Eric Edel sponsored respectively by Belgian and French programs similar to the U.S. one. In their ability, dedication and non-political involvement in student and Faculty affairs they have performed in the best tradition of these services and have proved that there is a place in professional schools such as ours for the best peace corps types.

Since the inception of our certificate and diploma programs, our Facuity has been successful in having as part-time teachers an able and distinguished group of

Ethiopian lawyers and judges. This past year was no exception as our part-time staff included the following: in Addis Ababa -- Abebe Guanguol, LL.B., Legal Adyiser, Ministry of Pensions; Abiyu Geleta, LL.B., Legal Adviser, Imperial Board of Telecommunications; Assefa Liban, B.A., B.C.L., Judge of the High Court, Commercial Division; Colonel Belatchew Jemaneh, LL.B., LL.M., Assistant Chief of Security, Ministry of Interior; Berhane Ghebray, Dooteur en Droit, Legal Expert, Office of the Prime Minister; Habtemariam Assefa, Dr. Rechtswissenshaft, Legal Adviser, Ministry of Commerce, Industry and Tourism; Major Legesse Wolde Mariam, M.C.L., Chief Instructor in Law, Abadina Police College; Mohammed Abdurahman, B.A., B.C.L., Vice Minister, Ministry of Pensions: Nabiyeleul Kifle, LL.B., Vice Minister, Private Cabinet of His Imperial Majesty; Ato Negga Tessema, B.A., B.C.L., Vice Mayor, Municipality of Addis Ababa; Selama Bekele, L.L.B., Senior Attorny, Ethiopian Tobacco Monopoly; Shibru Seifu, B.A. M.A., LL.B., Legal Adviser, Ethiopian Airlines; Major Tadesse Abdi, LL.B., Judge, Supreme Imperial Court; Tafari Berhane., B.A, B.C.L., private practitioner of law; and Ato Zerabruk Aberra, LL.B., Legal Adviser, Ethiopian Airlines; in Asmara -- Major Berhane Bayih, LL.B., Legal Office, Second Army Division Headquarters; Kassa Beyene, LL.B., Vice Afe Negus (Deputy Chief Justice), Supreme Imperial Court; and Ato Kessete Haile, LL.B., Legal Adviser, Commercial Bank of Ethiopia; in Harar - Captain Getahun Damte, LL.B., Legal Adviser and Instructor, Imperial Ethiopian Military Academy; in Jimma -- Yoseph Grebre Egziabher, Prosecutor's Office, Ministry of Justice. Ato Yoseph, our Jimma instructor, is the first person to teach in our extension program while on Ethiopian University Service. Next year we expect to have E.U.S. students teaching in both Jimma and Harar and the availability of service students may overcome our most serious problem in opening provincial certificate courses in other cities, namely finding qualified instructors in these communities.

Special reference should be made to several visiting scholars who were here during the year. In October, Professor Max Rheinstein, a comparative law specialist from the University of Chicago, spent two weeks with us lecturing to students and at our request prepared an evaluation report on the Law Faculty. For several weeks during December, Professor Israel Drapkin, a renowned criminologist from the Hebrew University, Jerusalem, visted the Faculty and took over our penal law classes. He proved to be a superb teacher and also helped in organizing for subsequent years the portion of our penal law course dealing with criminology. Throughout the second semester Professor John H. Beckstrom of Northwestern University School of Law was on our staff and with two student assistants he brought with him from Northwestern, Thomas Geraghty and Lynn Morehous, carried out three research studies on the functioning of Ethiopian law and legal institutions. The subject areas of the studies are Ethiopian lower courts, arbitrators in Ethipian divorce laws and Ethiopian labor standards. A number of our students were employed as interviewers during the course of the studies. Although at the time of this writing, the final reports by Professor Beckstrom and his associates were not yet available, these projects may prove to be among the most significant legal research efforts yet attempted in Ethiopia. They have shown that a great deal of data concerning the Ethiopian legal order can be systematically obtained in a comparatively short time; that our students when properly supervised are excellent field research assistants; and that through the use of our students, non-Amharic speaking resaerch supervisors can effectively conduct detailed studies on the operation of key Ethiopian institutions. One reason, I think, for the apparent success of the projects is that Professor Beckstrom and his associates waited until they arrived

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in Ethiopia to work out their research designs and procedures, and they selected topics that were manageable in the six months or so available to them.

Students At the beginning of the academic year we had 159 degree students, exclusive of those on Ethiopian University service but including 23 evening LL.B. candidates. As of that time we also had 670 certificate and diploma students, 210 of these in Harar, Jimma and Asmara certificate courses. At the beginning of the second semester a new certificate class was opened in Addis Ababa for which 700 applied and 200 were accepted. As part of the selection process for this new course a written test was given and many applicants personally interviewed. Nineteen students are scheduled to receive LL.B. degrees at this year's graduation, most of them students who just recently completed their ten months of Ethiopian University Service. About 130 certificates and 150 diplomas in law will be awarded at this year's graduation.

For the academic year 1968-69 the following awards are given for excellens performances by students at the Law Faculty: Billilign Mandefro, the Chancellor's Medal; Gemeda Gonfa, Outstanding Law Student of the Year.

English Diploma graduates with distinction: Sahilu Biru and Beyene Abdi; Amharic Diploma graduates with distinction: Demelash Tegegn, Shimelis Abeba, Getachew Mengiste and Dessalegn Alemu; and Certificate graduates with distetion: Wideneh Woldemedhin and Tecola Gebre Medhin. These students are to be congratulated for their hard work and outstanding achievement.

In the middle of the second semester, one Law IV student and four Law III students started their service period. In this group, three are working for the Ministry of Justice, one for the Election Board and the service assignment of one is teaching in our Harar certificate course. At least ten more of our students will go on service immediately after their examinations at the end of the second semester.

Due to the student protest movement, law student organizations were relatively inactive this year. The Law Journal has been an exception to this, and during the first semester students were also busy in raising money for Law House.

Library and Documentation Library holdings continued to grow this year at a fairly substantial rate. A large French Government gift of books was received and the British Government gave us a full set of English reports back to 1860, valued at about E $\$ 12,000$. Other book gifts came from UNESCO, University College in Tanzania, and the Governments of Nigeria, United Arab Republic, Ivory Coast, Malawi, the Netherlands, Germany, Canada and the United States. During the year the west portico of the main law school building was enclosed, shelving for several thousand books installed, and our bound periodical collection moved to this new library area. Within the next year or so it is planned similarly to enclose the south portico of the main building to provide still more stack space for our expanding library.

We had no permanent head librarian during 1968-69, but early in the first semester Miss Frieda Brown of the Main University Library filled in part-time and later the very able Miss Carole Rowsell took over full-time. Unfortunately Miss Rowsell is leaving Ethiopia soon, but a replacement has been hired with professional qualifications in both law and library science.

The Center for African Lcgal Development, a unit within the Law Faculty, continued its bibliographical work on African law and added to our holdings over

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a thousand microfiche card duplications of African legislation. Within a few months a Center-prepared African law bibliography covering the period 1947 to 1966 will be ready for printing, and annual supplements will be published in subsequent years. The Center is also assisting us to obtain the revised statutes of African countries, and personnel form the Center edited in English and translated into French the proceedings of the 1968 Conference on African Legal Education. Major Belgian Government support for the Center is scheduled to end in mid-1970, so this coming year must be a most active one for the Center staff if it is to complete as planned its African bibliography and microfiche collections of African laws.

Publications This year the Faculty published more and contracted for the publication of more than it ever has previously. It also contracted to have several important works in English and French translated into Amharic for printing and distribution at a later date. Several numbers of the Joumal of Ethiopian Law were put out and it is expected that with publication of Volume 7, Number 1 next academic year, the Journal will finally be on schedule. Some numbers of the Journal have sold out and had to be rerun, so in the future four thousand copies will be printed of each new Journal issue. Similarly, from now on we will also expand the output of all new books and monographs. We are convinced that the market for works on Ethiopian law in both English and Amharic has been underestimated and that with a planned sales push we can dispose of everything we publish.

Early in the year we hired Ato Zewde Seyoum to keep our publication inventory records and to assist in sales and distribution. He has been of great help to Mr . Kindred in revamping and systematizing the entire operation and, as he will be a permanent addition to our organization, he should help ease the transitions required from periodic turnover of students and teachers who work on our publications.

After some delay the Addis Ababa laws recently went to the printers and will be out soon. This is the first completed portion of the Consolidated Ethiopian Laws and the rest of the Consolidation, in both English and Amharic, should be published and ready for distribution sometime during the next academic year. This edited version of all Ethiopian legislation other than the major codes should be of great help to Ethiopian judges and advocates as well as to our students. It has been heavily subsidized by Ford Foundation funds. Substantial domestic and foreign sales are expected.

Law House This combined law student dormitory and lounge building, financed by popular subscriptions raised by students and staff, is now completed and will be occupied by students at the beginning of the coming academic year. Approximately ten per cent of the cost of the building and its furnishing is yet to be raised. As living quarters for many of our students and as a social and professional center, this new structure will fill major needs.

Legal Aid A modest legal aid program consisting of student assistance to court appointed defence counsel in criminal cases was inaugurated in the middle of the year. Before it was well under way this program had to be cancelled as a result of uncertain student availability caused by the student protest movement. Next semester it is again planned to institute assistance to court appointed counsel and if a pending request for foreign foundation aid is granted, a much expanded legal aid program will be launched.

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Conference on Legal Education in Africa From October 20 to 24, 1968 the Law Faculty was host to a conference on African legal education held in Addis Ababa. The conference was largely planned and administred by our staff, and our people also prepared and distributed the rather lengthy proceedings of the conference. In attendance were representatives of fifteen African countries: Ethiopia, Cameroun, Congo Kinshasa, Ghana, Kenya, Lesotho, Liberia, Malawi, Nigeria, Somalia, Sudan, Tanzania, Uganda, United Arab Republio and Zambia. All participants were either law teachers in. African law schools or directly concerned with problems of legal education in Africa. The conference dealt with such subjects as the goals of legal education in developing countries, curriculum, teaching methods and materials, research priorities and publication, sub-degree education and prospects for closer cooperition among African law schools. One afternoon was devoted to demonstration classes at our Faculty put on by some of our teachers and studdents. Expenses of the conference and preparation of the proceedings were paid for by the International Legal Center.

Needs and problems At the close of my annual report last year I set forth a list of Law Faculty needs, each of which raised difficult and persistent problems not readily overcome. In reviewing the Faculty's situation at the end of this year I feel that these needs still exist and are still of major importance even though in some instances there has been progress making them less critical. More money would help in satisfying some of the needs but for others a change in policy or shift of effort by the University, our staff or our alumni is needed. It may prove helpful to those who can influence our Faculty's development if I expand somewhat my prior remarks on these needs and in the course of doing so indicate what progress has been made and what prospects now appear for alleviating these needs in the future.

## 1. Transition to a predominately Ethiopian full-time teaching staff

We have made a start on this with appointments of the past year and next. There appears to be general University approval of our goal of annually adding three new Ethiopians to the full-time staff for the next five or six years and if they wish sending these newcomers abroad for a year or so of foreign study after they have been with us for two years. This rate of transition to a predominately Ethiopian staff is gradual enough to permit assimilation of inexperienced Ethiopian teachers without unduly impairing prospects for enough financial help from abroad to employ the declining number of expatriate teachers needed. But without full cooperation of the University administration this three-a-year goal cannot be met, for at any one time the number of Ethiopian law graduates of sufficient intellectual caliber to make teaching a permanent full-time career is extremely limited. The University must provide salaries for Ethiopian law teachers commensurate with what the best lawyers of similar age and background are receiving in government legal positions. Also, in my opinion, the University must be willing to take on as teachers at least some of our top students immediately upon graduation. Professional experience beyond EUS is not essential for a good law teacher. In fact it has been my observation that too long a period of experience in government or private practice can ruin a good law teaching prospect. Lastly, if we are to recruit the Ethiopian teachers we need, the University administration must be less dilatory in passing on candidates submitted by the Law Faculty than has been true in the past.
2. More degree students Quite apart from the temporary attrition in the number of our degree students caused by the student protest movement, there is a threat
that we will be given a very low number of new day LL.B. students under the rigid faculty-by-faculty quota system that the University plans to put into effect. If our permissible quota is fixed too low, the effect on the legal order of this country will be catastrophic. In relation to its size and need no African country has a greater shortage of degree-level law trained personnel than Ethiopia and this shortage is largely responsible for the undeveloped state of much of Ethiopian law, especially public law, and the many shortcomings in the administration of justice. I strongly urge that within the next five years the enrollment of day degree students in the Law Faculty be increased to 300 . We can handle this number at very little added cost, and with anticipated growth in the University student body and an adjustment in the quota for law, this number of qualified and interested students can readily be provided. A modern and efficient legal order is as necessary to a nation's development as increased agricultural and industrial output.

## 3. More research and writing on high priority Ethiopian problems

Law Faculty research and writing have principally been of two kinds: (1) screening and translating important recent Ethiopian court judgments and opinions, and (2) summarizing important segments of Ethiopian law, usually some portion of a code, frequently with an analysis of logical ambiguities in the text. In the summarizing process the modern evolution of rules and concepts is often described and a comparison of Ethiopian legal doctrine with that of other countries, notably countries from which Ethiopian codes were in large part borrowed, is common. All of this is important and because it is relatively easy to do and because previously so little has been published on Ethiopian law, the priority it has received has probably been merited.

But what I submit is desperately needed and deserves greater Law Faculty research effort from now on is the description and critical evaluation of how Ethiopian law and legal institutions actually operate, and from such observations what modifications in and additions. to the law and its institutions are needed. This is a very difficult form of research for it requires slight reliance on libraries or archives and heavy reliance on data gathering through interviews, questionaires and participant observation. And because it often involves intimate and little publicized knowledge of how and why people act, it is more likely to meet with suspicion and resistance. However, if the problems with which Ethiopian law deals are to be fully understood and the most effective legal solutions worked out, more research of this sort is necessary and those on the Law Faculty are probably best qualified to do it. That such research is possible in Ethiopia and can be done by our staff and students has been proved by projects currently underway at the Law Faculty: those supervised by Professor Beckstrom and referred to earlier in this report, and one on suretyship being conducted by Michael Kindred with the aid of student assistants. Possibilities for such research may be enhanced if proposed plans for reorganizing and upgrading the social science side of the University are pushed through. One aim of the plans now under consideration is to increase the amount of University field research effort directed at identifying and solving the key problems of Ethiopian development. I hope that as these plans take shape attention will be given to cooperative law-social science research programs in which our staff will participate. We have much to offer and much to gain from joint research ventures.
4. Curricular improvement I increasingly have felt that in courses offered and their content we should be more daring and innovative. Our curriculum is

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still too reflective of what is done at American and European law schools and is not sufficiently geared to the unique needs of Ethiopia. Progress has been made, especially with such subjects as land reform, natural resources, transnational transactions and employment relations; but more needs to be done in emphasizing high priority Ethiopian problems and in using Ethiopian data and materials. Illustratively, greater stress should be given to such Ethiopian real world matters as judicial and police administration, the nature and quality of legal services provided by licensed advocates and others who are unlicensed, actual relations between central and local government, the success of means used for enforcing tax laws, dispute settlement among traders, care facilities available for abandoned and delinquent children, and controls exercised to regulate the growth patterns of urban areas. Emphasis also should be given to how new laws and new legal procedures could be used to help solve such chronic Ethiopian problems as excessive subsistence farming, heavy soil erosion, underindustrialization, inadequate transportation facilities, too few schools and an acute shortage of competent teachers, corruption in government, and inefficient utilization of white collar personnel by many ministries and government agencies. Most of our graduates are going into jobs where they must deal with matters of these kinds, so their law school courses should help orient them to understanding and solving such problems.

There is an obvious relationship between the kinds of curricular changes I am advocating and the forms of research discussed in item 3 just above. Little can be done in developing courses of the sort suggested until more relevant data is available, and University staff research is the most likely source for such data. Ethiopian students too have a part to play at the research level both in course and empioyment situations; and if properly directed, student research activities can be valuable educational experiences in addition to expanding needed bodies of knowledge.

Our certificate and diploma programs present special curricular problems. I am inclined to think that coverage in the two programs is too much alike and also that subject matter might be substituted that would have more significance for those whom these programs are designed to serve. My doubts extend beyond the curriculum and I have a feeling that the diploma courses should be upgraded and made more difficult, that more writing should be required of all sub-degree students and that students should be encouraged to engage more in class discussion. In addition to our certificate and diploma offerings perhaps we should consider giving short workshops of two weeks or so for specialized legal personnel such as prosecutors, registrars and lower court judges.

The opinions I have about non-degree level instruction are based more on hunch than solid evidence, but reservations concerning this level of instruction are held by a number of others and careful inquiry into present and potential non-degree programs seems needed. I am recommending that with funds available in our Ford grant a thorough evaluation of the certificate, diploma and other possible nondegree programs be made during the next year, and that the study also take into consideration present and potential future manpower resources in the legal service field so as to give a better basis for determining what the major educational needs really are. In any such study the Ministry of Justice should be consulted both for data it possesses about the legal profession and for its plans and preferences for training of legal service personnel. Other ministries and agencies that now or later may employ legal service personnel should also be consulted.

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My evaluation recommendations have been submitted to the Dean-Designate and the University administration.
5. An active and meaningful alumni association Suffice it to say that I have been disappointed at the lack of a more vigorous program by the Law Alumni Association following its organization a year ago. More should be expected of this group next year.
6. A satisfactory physical plant For probably five years we can get by with the buildings we now have. In establishing this law school a wise policy has been followed of spending available moneys on staff, library and publications rather than on a modern law school building; but the time is coming when the need for more adequate quarters cannot be postponed. How long we can continue where we are will be determined by the rate of expansion of our library, for when the library outgrows the ground floor of our main building we will have to move. Although there are still expansion possibilities for added library space adjacent to the present reading room, structural limitations prevent use of the second floor of the main building for heavy collections of books.

I cannot stress strongly enough the importance of having the law library physically situated in the law building, and under no circumstances should added space be made available by separating the library from our central office and classroom building.

Our main building is old and requires regular repair work to keep it presentable. The University building repair and maintenance people have been very cooperative in making necessary repairs. However, two of the three outbuildings we now occupy are in bad need of rehabilitation and will never last five years without considerable work on them.
7. Fruitful ties with the outside world Last year I called attention to the danger of our Law Faculty becoming increasingly isolated from intellectual and educational developments outside Ethiopia. I still see this as a long-term threat, especially when Ethiopians take over, as they should, the administration and most of the teaching at the Faculty. Up to now, due to its foreign staff and limited available data on Ethiopian law and institutions, I think the Faculty has been overly concerned with the laws of Europe and North America. This will gradually be corrected, but to prevent an undue swing in the other direction 1 hope several steps will be taken: that some visiting expatriate legal scholars will continue to be offered teaching and research opportunites bere, that our Ethiopian teachers who study abroad will continue professional ties with the foreign institutions they attended, and that eventually Ethiopian legal scholars will be encouraged to take periodic teaching and lecturing appointments at leading foreign universities.

It also would be desirable if more contacts were developed between our Faculty and those of other African countries. Student and faculty exchanges, common teaching materials, joint research projects and active participation in regional and continent-wide academic associations are possible means for creating and enlarging these contacts. Ethiopia's problems are common to much of Africa, and mutual awareness of how law is being used to solve these problems will be of benefit to each country and should be of high priority to all African law teachers.























## REPORTS

The following reports are cases decided by the Supreme Imperial and the High Courts of Ethiopia. The Amharic judgment is official and always precedes the English.

The Journal of Ethiopian Law is a scholary publication, addressing itself to all members of the profession. Its purpose in publishing judgments is to make known to the profession interesting decisions which in the opinion of the Board and Editors raise important issues of law. In selecting a particular judgment for publication, the Board and Editors do not wish to convey the impression that the judgment is definitive on any propsition for which it may stand although the quality of the the decision is always an important consideration in determining whether it should be included in the Journal. When, in the opinion of a Board Member or an Editor, a judgment is of interest and raises an important issue of law but there is reason to believe that aspects of the decision are contestable or that the result reached by the court is not clearly the only supportable conclusion, a note on the case is often included. The absence of such a note is not however to be interpreted as indicating complete finality on the issues raised in the case, as it is expected that members of the profession on all levels may hold differing opinions on the merits of any judgment published herein.

The Members of the Board and The Editors.

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#### Abstract

           


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# SUPREME IMPERIAL COURT 

## Asmara

Justices:
Dr. Yohannes Berhane
Fitawrari Tsegay Tefferi
Grazmach Yohannes Aman

TIRFE MEASHO v. ABREHET GEBREMESKEL<br>Civil Appeal No. 149/59

Family law-Divorce-Divorce for non-serious cause-Common debts-Maintenauce allowance for children-Civil Code Arts. 659, 660, 673(2), 667, 679-82, 694.

An appeal from the decision of the High Court granting divorce between the parties, custody of the child and maintenance allowance for the child to the mother, and settling common debts and property.
Held: Decision affirmed with modifications.

1. Although religious authorities have not given any decision on divorce, the marriage may be dissolved in accordance with the law if the family arbitrators cannot reconcile the spouses.
2. The family arbitrators shall decide whether the debts incurred by the husband were personal or common debts incurred in the interest of both spouses, and the manner of partition of common property.
3. Custody of the child is entrusted to her mother until the age of 5 , and the father shall pay a maintenance allowance.

## JUDGMENT

The two parties are spouses; they were formally married. They could not continue living together in peace. A dispute arose which was first dealt with by family arbitrators and then by a committee of religious authorities. Finally the case was taken to the Awradja Court, and, on appeal, to the High Court. Besides the declaration of divorce, the following decisions were made on the case.
(a) The female child born to the spouses shall be entrusted to her mother until she becomes five years of age; she shall be given $\mathrm{E} \$ 15$ per month as a maintenance allowance.
(b) Ato Tirfe shall pay E $\$ 720$ to Woz. Abrehet for the expenses she incurred in the past to support the child, and for other matters.
(c) Each party shall bear the expenses it incurred during the litigation.

Ato Tirfe lodged an appeal from this decision. The grounds of appeal are, briefly, the following:
(a) That the marriage should not be dissolved, according to Articles 647, 664 and 665 of the Civil Code.
(b) That the order requiring him to pay E $\$ 720$ was contrary to law.
(c) That Articles $669-670,677,679,736$ require that evidence be produced.
(d) That he was unlawfully denied the right to produce competent witnesses and documentary evidence.

The respondent briefly replies as follows:
(a) The provisions cited are irrelevant to the case.
(b) During the meeting with religious authorities the appellant had stated that the debts do not concern his wife, and that they were incurred on behalf of his mother.
(c) The facts established by the family arbitrators were found to be true by the courts.
(d) There is enough cause for divorce.

In her complaint filed to the Awradja Court, the respondent claimed only E\$519.25, which is the value of the furniture of the house; it was decided (by the Awradja Court) that she receive only half of her claim. On appeal the High Court decided the matter should first be referred to family arbitrators in accordance with the proper procedure. The family arbitrators passed a decision on the case. The provisions cited by the appellant do not invalidate the decision passed by the family arbitrators. Certainly, in their decision of April 21, 1967 the family arbitrators did not deal with the interests of the child as a separate issue. But there is no doubt that both in their decision of February 16, 1967 and that of April 21 the family arbitrators treated that issue in a general manner.

Hence, this court has to pass judgment regarding the following four points:
(a) The divorce.
(b) The debts, and the agreements entered into by the parties.
(c) Property and its ownership.
(d) The conditions of the child and its maintenance.

## (a) On the divorce

As stated by the committee of religious authorities and as the appellant pointed out by citing Articles 664-665 of the Civil Code, marriage, a serious bond as it is, cannot be dissolved unless there is a serious cause. The main purpose of marriage is to keep a husband and wife together with honest love. Hence, when love and smooth relationship disappear and hatred and avoidance prevail among the spouses, divorce becomes essential and justifiable. Other than the serious causes mentioned in Articles 667-670, under Articles 673(2), 677, 694, 606 of Civil Code the family arbitrators and the courts have the power to declare divorce.

The family arbitrators found out what kind of relationship existed among the spouses. After examining the case, the family arbitrators indicated that in their opinion divorce was the only solution. This court also made further findings regarding the relationship of the parties. We do not think that the parties could live together as a good and loving couple. First, they agreed, with the help of arbitrators, to continue to live peacefully; but they failed. Again, the arbitrators tried, but in vain, to have the parties agree to live together in peace; the hatred was not limited to the parties-it extended to their respective families; this fact is admitted by both parties. In view of the above facts, we think that, despite the fact that divorce may not be granted by the religious authorities, there is a ground to dissolve such a marriage in law and reason.

## TIRFE MEASHO v. ABREHET GEBREMESKEL

## (b) On the debts and the agreement between the parties

When a dispute arose between the spouses, a compromise was reached with the help of arbitrators. According to that compromise, Ato Tirfe was to pay his debts, and both the spouses were to continue living in peaceful wedlock. However, after the compromise, Ato Tirfe erred and Woz. Abrehet was offended. There was no peaceful marital relationship. Rather a bad atmosphere was created. Woz. Abrehet alleges that the debts concern only Ato Tirfe and that Ato Tirfe, in order to satisfy his debt, sold their common property. Although Ato Tirfe claims that he bought the property before marriage, he does not deny that he unlawfully sold cattle and was consequently brought to court.

There is no sufficient evidence to prove that the property in dispute i.e., one cupboard and another pedestal or bedside cupboard, four chairs, and one big table, was bought before the marriage. Furthermore, we do not have sufficient evidence to decide whether or not, according to the agreement entered into during the wedding ceremony, all the property that existed before the marriage was to be included in the common property.

Debts incurred in the interest of the spouses are deemed to be joint debts. (Articles 658 (c), 659-660 of the Civil Code). We could not get clear explanations with respect to the amount of the debt, to whom it was owed, when it was entered into and for what purpose, nor as to how the borrowed money was spent. In addition we could not get clear information with respect to the contents of the first and second contracts. Before the facts are clarified and decided upon by family arbitrators concerning the above two points, the courts cannot pass any judgment.

## (c) On property and ownership

Now we would like to deal with the question of the ownership of the property under dispute.

Article 647 of the Civil Code explains that property acquired before marriage is personal property and not common property. But, any property acquired after marriage is presumed to be common property, until it is proved that one of the spouses is the sole owner.

As we stated earlier, since a marriage has to be supported by both the spouses, any debt incurred in the interest of the household is deemed to be a joint debt; each spouse has the obligation to satisfy the debt. Furthermore, the spouses can agree and include personal property in the common property; (Article 652(3) of the Civil Code.) They can also modify the terms of the contract regarding their relationship (Articles $629,632,658$ of the Civil Code). All this can be done only when there is a good relationship between them. When the spouses become hostile to each other, divorce is granted. If it is ascertained that one of the spouses is at fault, the family arbitrators can award all the common property to the other; they can even award one spouse the personal property of the other spouse who was at fault (Article 692 of the Civil Code).

Furthermore, the family arbitrators can order that the spouses or one spouse restitute such presents and matrimonial benefits received to those persons who gave them (Article 691 Civil Code).

It is true that the family arbitrators, not having clear information, decided that he spouses make a fair decision or settlement regarding the property they received

## JOURNAL OF ETHIOPLAN LAW - VOL. VI - No. 1

as matrimonial gifts, the property they received for the purpose of setting up their economic autonomy, and their general common property. The Awradja Court, although it was not clear as to who was the owner of the furniture on which Woz. Abrehet sued, decided that since they are spouses, the two parties share, with the help of elders, the debt of $E \$ 519.25$. This judgment was affirmed by the High Court. This decision we think was fair.

The courts cannot pass a judgment until the arbitrators get the necessary clarification on the previous relationship of the spouses, the property the spouses acquired after marriage, if any, and its value.

## (d) On the situation of the child and its maintenance

It is ciear that the female child born in October, 1966 was up to now living with and maintained by her mother, Woz. Abrehet Gebremeskel. Within this expanse of time, Ato Tirfe never offered any amount of money to aid or maintain his daughter. In view of this situation the family arbitrators decided that Ato Tirfe pay $E \$ 30$ for every past month, $E \$ 720$ all in all (from the time of birth up to the time of decision by arbitrators). But the family arbitrators did not make any decision regarding the future of the child. On appeal, the High Court decided that the child be entrusted to her mother until she becomes 5 years of age, up to which time Ato Tirfe shall pay $E \$ 15$ every month as a maintenance allowance. We affirm this decision, not only because it is just, but also because it is supported by the law, (Articles 679, 682 of Civil Code). Furthermore, the mother and the child have not been receiving any maintenance allowance from Ato Tirfe from the time the family arbitrators gave their decision up to now. Although we did not receive any report regarding the expenses incurred by the mother and the child, we hereby decide, following the approximation made by the family arbitrators, that Ato Tirfe pay for May to October 1967 the amount determined by the High Court plus E \$ 15 which is E \$ 30 per month altogether. Totally for the said expanse of time Ato Tirfe shall pay ES 180, but we affirm the High Court's decision that Ato Tirfe shall pay E $\$ 15$ per month until the child becomes 5 years of age. So the payments which Ato Tirfe has to make are: E $\$ 720$, that which was determined by the family arbitrators; E $\$ 180$ for the time between the decision of the arbitrators up to now. Totally he shall pay $E \$ 900$. In addition to all these, he has to pay a maintenance allowance of E\$ 15 every month until the child becomes 5 years of age.

Hence, considering the arguments of the parties, the various documents and the laws, we decide as follows:

The High Court judgment given on July $d$ is affirmed but amended as follows:
(a) The two parties are divorced as from April 21, 1967.
(b) The question of the debts and the agreements entered between the spouses shall be decided upon by arbitrators.
(c) The movables and immovables they owned shall be ascertained and decided upon by family arbitrators.
(d) Ato Tirfe shall pay E $\$ 720$ plus $\mathrm{E} \$ 180$ (E $\$ 900$ ) to Woz. Abrehet. In addition, he shall pay $\mathbf{E} \$ 15$ every month until the child is 5 years old.
(e) We understand that this amount of money (\$900) is too much for Ato Tirfe to pay at once. We therefore decide that Ato Tirfe pay, starting from the end of the Month of November 1967, E \$ 35 (from the $\$ 900$ ) and the $\mathrm{E} \$ 15$ (monthly allowance) - all in all $\mathrm{E} \$ 50$ every month.
(f) Each party shall be responsible for the court fees and other expenses incurred in the litigation.

November 9, 1967

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# SUPREME IMPERIAL COURT 

Addis Ababa, Div. No. 3
Justices:
Vice Afenegus Abeje Debalke
Ato Wobe Woldeyes
Ato Damte Fanta

## KETEMA HAILE v. ETHIOPIAN ELECTRIC LIGHT \& POWER AUTHORITY

Civil Appeal No. 230/59
Contracts-Suretyship-Form of contract-Specification of amount of guarantee-Civil Code Arts. 1679, 1690, 1713, 1887, 1920, 1922, 1925.*
Application of Civil Code-Interpretation-Mandatory provisions-Civil Code Arts. 3347(1), 1731(3)-
An appeal from the decision of the High Court ordering the guarantor to pay the guarantee, where the amount of the guarantee was not specified in the contract.

Held: Decision reversed.

1. Since the Civil Code provides for all civil matters, all rules whether written or customary concerning matters provided in the Code are repealed.
2. A guarantee, customarily a special part of suretyship, now comes under the suretyship provisions of the Code.
3. Contracts entered into since the coming into force of the Civil Code must specify the amount guaranteed. Civ. Code Art. 1922(3).

4 Since Art. 1922(3) is a mandatory provision, an argument based on pre-Code contract law is of no avail where the disputed contract was made subsequent to the coming into force of the Code.
5. Consent of both parties is not enough to render a contract enforceable where mandatory prowisions of the law have not been adhered to.
6. Arts. 1922(3) and 1925 do not conflict. A future debt can be guaranteed, when it is in he form required for other contracts of guarantee.

The appellant and one Ghebreyes Wolde were sued jointly in the High Court in an action to recover $E \$ 7,643$ which sum was the amount the latter embezzled from the EELPA. The appellant was joined in the suit as guarantor.

The first defendant submitted no statement of defense in this present civil case. Prior to this case he was prosecuted criminally and upon his admission that he had put the sum in question to his own use and his plea of guilty, he was sentenced to two years imprisonment. Furthermore, he stated that he was not willing to appear in or defend the present case.

The second defendant admitted that be was the first defendant's guarantor but only in so far as the latter was employed as a clerk. The latter's employment as a cashier, he argued, was beyond the scope of his guarantee. He further argued

[^0]KETEMA HAILE v. E. E. L. P. A.

that the guarantee was of no effect because it did not, as is required by Civil Code Article 1922 specify the amount for which it was given.

The High Court rejected this argument on the ground that the provision cited dealt with giving a guarantee for a specified amount and not with what was involved in the present case, namely "teyajinet." Hence, it ordered the teyaj, i.e., the second defendant, to pay off the debt incurred by the first defendant, wherefore this appeal.

The essence of the appeal is that the guarantee only covered the situation where the first defendant was employed as a clerk and not as a cashier or storekeeper. Moreover it would be of no effect because the amount it was given for was not specified in the instrument as is required by Civil Code Article 1922 (3). The appellant therefore requested that the High Court decision be reversed.

The respondent's representative pointed out that the appellant had undertaken to be held responsible for any delict committed by the first defendant while in the employment of the respondent. Civil Code Articles 1679, 1680, 1713, 1886 and 1920 he said, support the High Court decision, which decision ought to be affirmed.

This case raises several legal issues. Article 1922 cited by the appellant states that "a guarantee shall not be presumed, it' shall be express and may not be extended beyond its contractual limits, and the contract of guarantee shall be of no effect unless it specifies the maximum amount for which the guarantee is given." The instrument profferred in evidence shows that the appellant undertook to act as a "teyaj" on June 10,1962 , i.e. two years after the coming into force of the Civil Code. We have also examined the provisions cited by respondent's representative.

Articles 1679 and 1680 talk about the consent and express agreement of the parties to a contract. As pointed out earlier the appellant's principal argument is that he ought not be ordered to discharge an obligation based on a legally ineffective contract. The provisions cited by respondent are irrelevant to this case because the contracting parties' consent to conclude a contract cannot validate a contract which does not observe the requirements laid down by the law. This is so because mandatory provisions of the law must be adhered to by contracting parties.

Secondly, Article 1886 states that the parties may extend their liability under the contract and provide that they will be liable for non-performance notwithstanding that performance is prevented by force majeure.

Since there is nothing here to show that the contract was not performed because of force majeure this Article too is irrelevant.

Thirdly, Article 1920 states that "whosoever guarantees an obligation shall undertake towards the creditor to discharge the obligation, should the debtor fail to discharge it." And this case revolves around Articles 1920 and 1922 cited by respondent and appellant respectively. We will examine these provisions to decide whether or not the concept of guarantee embraces that of "teyajinet".

Article 1925 provides that there could be a future and conditional guarantee. This means that the "teyaj" would have to be held responsible as regards any future agreement that may be concluded between the person who produced the "teyaj" and the one who demanded it.

In other words, the "teyaj" is there to ensure the execution of the agreement should one of the parties fail to discharge his obligation. Thus, "teyajinet" connotes

## JOURNAL OF ETHIOPIAN LAW - VOL. VI - No. 1

a limited form of guarantee. Before the coming into force of the Civil Code, it was obvious that a "teyaj" would be held liable regardless of whether or not the exact amount for which he stood "teyaj" was specified. And when such a "teyaj" was sued, he would argue that this "teyajinet" did not cover the situation in question or that he was not "teyaj" at all.

The present case of "teyajinet" though, falls within the purview of the Civil Code. Under pre-code law a guarantor or "wass" undertook to guarantee an unspecified debt.

We will now proceed to consider whether Article 1925 clashes with Article 1922 or is consistent with it. While Article 1922 requires that the maximum amount be stated in the instrument of guarantee, Article 1925 deals with the possibility of giving a guarantee merely for a future obligation. Bearing in mind what we said earlier with respect to the latter, we come to the conclusion that these two provisions are consistent when it comes to specifying the amount the guarantee is given for.

It was the failure of the guarantor and the concerned department to specify the maximum amount of the guarantee, as is required by the Civil Code, which gave rise to the present dispute. The court cannot accept the argument that one could be held liable as a "teyaj" in accordance with the old customary rules. Past practices which are found to be useful are included in the new law, while harmful ones are rejected. A person should not be bound by a contract of guarantee which does not specify the maximum amount the guarantee is given for. To impose such an obligation on a person is unjust. It is for this reason that the concept of "teyajinet" was rejected by the Civil Code. The law must be fair and acceptable to the sense of justice of the community.

As we said earlier, a contract of guarantee is of no effect unless the maximum amount of the guarantee is specified. According to Article 3347(1) of the Civil Code, customary rules previously in force have been repealed.

We find that the High Court's judgment is contrary to the law. We therefore reverse the judgment of the High Court and hold that the appellant is not bound by the contract of guarantee. However, this judgment does not affect contracts of guarantee entered into before the Civil Code was promulgated. A copy of this judgment shall be forwarded to the High Court.

This judgment is given by a majority.

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# SUPREME IMPERIAL COURT 

Addis Ababa, Div. No. 6
Justices:

Ato Gebre Michael Wolde Tensae

Ato Kebede Habte Mariam

TADESSE KASSAHUN v. YADETE ROBI
Civil Appeal No. 259/60.
Property-Joint ownership-Right of recovery-"Aleka" and "minzir"-Antichresis-Civil Code Arts. 1384, 1397, 1399.
Civil Procedure--Judgments—Filing a suit-Civ. Proc. Code. Arts. 11(1), 215, 246-48
An appeal by the second defendant from the the decision of the High Court rejecting plaintiff's claim to a right of recovery on the land transferred to the second defendant by the first defendant pursuant to a contract of antichresis, and ordering the second defendant to transfer the land back to the first defendant upon receipt of the money involved in the contract of antichresis.
Held: Decision reversed.

1. There is no right of recovery on land transferred to a creditor pursuant to a contract of antichresis upon the debtor's default of payment.
2. The existence of "aleka" and "minzir" relations does not prove joint ownership.
3. A court can only render judgment where a dispute has been argued before it. Where one defendent had no chance to argue his position, the plaintiff cannot obtain judgment as against that defencant.

## JUDGMENT

Appellant's original cause of action was founded upon his claim that he was the person entitled to purchase the parcel of land involved in this dispute. Ato Yadete was the original owner of the land. Later. on Ato Yadete delivered part of the land to Ato Wolde Mariam Wolde Michael after receiving one hundred dollars from the latter, thereby creating a contract of antichresis. Soon after, prior to the expiry of the contract, Ato Wolde Mariam urged Yadete to repay him the said sum of money. Consequently the latter agreed to raise the amount to $\mathrm{E} \$ 160$ and repay it within a fixed period of time. It was also included in this new agreement that Yadete would transfer the piece of land in question to Wolde Mariam if the money was not paid within the said time. The period fixed in the contract expired without Yadete paying back the money. Consequently, Woide Mariam took over the ownership of the land and it is said that he thereafter paid land tax in his own name. This was done withonit taking into consideration the actual value of the land. Following this the present appellant brought suit against both Yadete and Wolde Mariam claiming that he was the person entitled to pre-empt the land in question. In the. High Court, Yadete denied having sold the land to Wolde Mariam. Furthermore, he argued that the Awradja Court decided the issue without his slightest knowledge of the matter. On the other hand, Wolde Mariam argued that the sale was carried out properly.

## JOURNAL OF ETHIOPIAN LAW - VOL. VI - No. 1

The High Court reasoned that a person who alleges that a piece of land was sold to him, should produce documents to that effect. The document plaintiff introduced, the court said, proves the settlement of the differences between the two parties but does not prove the existence of the alleged sale. It therefore dismissed the suit which involved the present appellant and Wolde Mariam.

It then took up an issue that was not raised in the suit and decided that Wolde Mariam should receive E $\$ 160$ and give the land back to Yadete. Both Ato Tadesse, original plaintiff, and Wolde Mariam appealed from this judgment in Civil Appeal No. $259 / 60$ and $359 / 60$ respectively. Although the purposes of the two appeals differ, the basic issues are the same in both. We have therefore consolidated them in accordance with Article 11(1) of the Civil Procedure Code.

The statement of appeal filed by Tadesse contained the argument that it was erroneous to dismiss his request once it was proved that the said land was transferred to Ato Wolde Mariam, be it because of time limit or any other way.

The other appellant, Ato Wolde Mariam, argued that he was ordered to give up his property without any suit being brought against him. He said he was denied his right to own land that was properly transferred to him.

An examination of the record of the lower court discloses that the original suit was brought by Ato Tadesse Kassahun against both Ato Wolde Mariam and Ato Yadete. Evidently the latter two were defendants throughout the suit and as such they never took opposite sides as plaintiff and defendant.

To start with, we shall deal with the issue raised by Ato Tadesse.
Firstly, Ato Tadesse cited Civil Code Articles 1388, 1397, 1398, 1399 as provisions of the law supporting his claim that he has the right to buy the piece of land. The High Court did not say whether or not the above provisions were relevant to the issue. This, it seems, was because the appellant himself did not prove the existence of a contract of sale. The document produced by Tadesse shows that the said land was transferred to Wolde Mariam because Yadete failed to pay the sum of money specified in their contract. This form of transferring ownership is neither a gift nor a sale nor a bailment. Consequently, the provisions of the code cited by Ato Tadesse are irrevelant to the case at hand. For instance, Article 1388 requires that the party who demands the recovery of a disposed piece of property be a joint-owner. Then the question arises whether Ato Tadesse was a joint-owner of the land he intends to buy. Ato Tadesse bases his claim on the ground that he was the heir to Woizero Ehte Mariam. Woz. Ehte Mariam and Ato Yadete were "Aleka and Minzir". Again the question should be asked whether being "Aleka" and "Minzir" establishes joint-ownership as required in Article 1388. Joint-ownership means owning a whole piece of property while awaiting its division among a number of people. It therefore excludes private exclusive ownership.

We have thus established that no contract of sale existed between Yadete and Wolde Mariam. Secondly, even if there was any such contract, Ato Tadesse does not satisfy the requirements of Article 1388. For all the above reasons we have reached the conclusion that Ato Tadesse does not have the exclusive right to buy the land in question. To that extent we affirm the decision of the High Court. Nevertheless we reject that part of the High Court's decision which recognized Tadesse's right of pre-empting the land if the owner decides to sell it.

We shall now consider the appeal filed by Ato Wolde Mariam. This Court has accepted the appeal because the High Court gave the judgment ordering this
appellant to give back the said land to Ato Yadete without paying any attention to Articles 246-248 of the Civil Procedure Code.

To have a cause of action against another, one must first satisfy Article 215 of the Civil Procedure Code. Moreover, he must bring a suit which establishes a cause of action. That one who fails to do so may not secure a judgment against another has been clearly stated by the law. In this case Yadete Robi was a defendant defending the charge brought against him by Tadesse Kassahun. During the course of the trial he mentioned that Wolde Mariam, who was also a defendant, took the land in an illegal manner. This complaint aroused the sympathy of the lower court as a result of which it ruled upon an issue that was not raised before it. Consequently, it was reasoned that Wolde Mariam took advantage of Yadete's weakness and took the land for only E $\$ 160$ while its actual value was E $\$ 3000$. Wolde Mariam was ordered to transfer the land back to Yadete after payment of E $\$ 160$. This court rejects this decision since it was made without any regard to procedure. The judgment could have been approved if Yadete had brought suit against Wolde Mariam. For all the above reasons we quash the decision of the High Court which ordered the transfer of the land to Yadete Robi. Yadete's right to bring suit against Wolde Mariam is reserved.

May 16, 1968
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# SUPREME IMPERLAL COURT 

Addis Ababa, Div. No. 2

Justices:
Afenegus Teshome Haile Mariam
Ato Tadesse Tekle Giorghis
Kegnazmatch Mulat Beyene

PUBLIC PROSECUTOR $v$. ALEMU URGA, ALEMU BORU and FIRE BORU<br>Criminal Appeal No. 1136/60

Criminal Procedure-Remand-Crim. Proc. Code Arts. 38, 59, 109.
An appeal from the order of the High Court declaring that the Ctim. Proc. Code Art. 59. does not authorize the detention of the accused after the police investigations are completed.
Held: Order reversed.

1. According to Crim. Proc. Code Art. 38, the public prosecutor should frame a charge under Art. 109 and institute proceedings within fifteen days of receipt of the police investigation, or, if necessary, order further investigations.
2. In order for the prosecutor to carry out these duties under Arts. 38 and 109 he must have the right to keep the accused in detention until he decides to prosecute.

The public prosecutor filed this appeal requesting the reversal of the order given by the High Court in File No. 864/60. We have rendered the decision given hereunder after examining the argument presented by the public prosecutor and the decision given by the High Court.

## JUDGMENT

Alemu Urga and his friends were arrested on suspicion of homicide and kept in custody. The investigating police officer forwarded his report to the public prosecutor in accordance with Article 37 of the Criminal Procedure Code. Then, in accordance with Article 59 of the Criminal Procedure Code, he asked the High Court to determine the terms of detention of these individuals until a charge was filed against them. The High Court examined the application of the investigating police officer and ruled that Article 59 does not apply to such a case but rather to a case where the police investigation is not completed, as a result of which the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed.

The public prosecutor appealed on the ground that the High Court interpreted Article 59 of the Criminal Procedure Code very narrowly. We deem it necessary to examine the provisions of the Criminal Procedure Code dealing with the present case to determine whether or not the High Court gave an erroneous interpretation.

The Criminal Procedure Code provides that the commission of an offence must be investigated by the police. The police may, for investigation purposes, detain the
person alleged to have committed the offence either by court order if deemed necessary, or without it if authorized by law. If the accused is detained without a court order, he has to be brought to court within 48 hours, whether the investigation is completed or not. The court to whom the offender has been brought has to decide on the basis of Article 59 whether he should be detained or be released on bail. Moreover, if the investigation is not completed, the investigating police officer could request the court for sufficient time and for an order that in the meantime the accused be detained. In this repect, the additional time awarded by the court shall not be more than 14 days.

The High Court interpreted this provision to mean that the investigating police officer could not ask for the detention of a person arrested for a criminal offence after completing his investigation. The Supreme Imperial Court does not agree with this interpretation for the following reasons:

In principle, any criminal offence is investigated by the police, but the charge is filed in court by the public prosecutor. The investigating police officer must submit his investigation report to the public prosecutor in accordance with Article 37. On receiving the report the public prosecutor may, in accordance with Article 38, prosecute the accused, order further investigation or refuse to institute proceedings.

If the public prosecutor deems the police investigation complete and decides to institute proceedings, he must file a charge within 15 days of the receipt of the police report as provided by Article 109. On the other hand, he could order that a further investigation be made where, unlike the police, he believes that this is in order. If this is so, the public prosecutor has to interpret Article 59 of the Criminal Procedure Code in such a way as to enable him to execute his duty. As stated above, the rights given to and the duty of the police and the public prosecutor are correlative, and the public prosecutor must be allowed to avail himself of the right given the police under Article 59. There are two reasons for this. One, the case is considered to be under investigation until a charge is filed. Two, in the meantime the accused could not be detained without a court order. If Article 59 is interpreted broadly in this manner, the purpose of Articles 38 and 109 would be deflated.

The investigation conducted by the police has to be studied by the public prosecutor, and the detention of the accused must be decided upon by the court as provided by Article 59. For the above reasons, we reverse the High Court's order given in File No. $864 / 60$ and hold that Article 59 is applicable even after the completion of the police investigation.

June 17, 1968




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## SUPREME IMPERIAL COURT

Addis Ababa, Div. No. 4
Justices:
Blatta Matias Helete Work
Ato Tebebe Gessesse
Ato Kifle Gemaneh

RAS INSURANCE S. C. v. ABDUL SEMED

Civil Appeal No. 1486/59

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\text { Contracts—Suretyship—Civil Code Arts. 1927, } 1928 .
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An appeal from the decision of the High Court releasing the counter-guarantor where the debtor had given security to the principal guarantor thereby allegedly increasing the liability of the counter guarantor.
Held: Decision reversed.

1. The contract pledging the security was made concurrently with the contract of guarantee-
2. Giving a security to the principal guarantor does not in any way increase the liability of the counter-guarantor, nor does it postpone the debt's due date.
Giving a socurity to the principal guarantor is actually advantageous to the conterguarantor, and does not release him from any obligations.

After examining the documents we have rendered the following judgment:

## JUDGMENT

This is an appeal from the judgment of the High Court releasing the counterguarantor of the principal debtor for a sum of $\mathrm{E} \$ 50,000$ lent to him by the Commercial Bank of Ethiopia under the guarantee of Ras Insurance Co., the appellant, on the ground that the principal debtor and the creditor (the appellant) have entered into a new contract which increased the liability of the counter-guarantor. The respondent, citing Articles 1927-28 of the Civil Code, contended that without his knowledge the creditor and the principal debtor had entered into a new contract of pledge whereby the debtor undertook to deliver property valued at $\mathrm{E} \$ 180,000$ as security for the performance of his obligation. The High Court released the counter-guarantor by a majority decision.

The relevant part of the memorandum of appeal is as follows:
The principal debtor, Mr. Papazakos, wanted to borrow E $\$ 50,000$ from the Commercial Bank and, as the bank required him to obtain a guarantor, he asked Ras Insurance Co. to be his guarantor. The company agreed to be the guarantor to the extent of $E \$ 50,000$, and the principal debtor also undertook to deliver property valued at E $\$ 180,000$ as security for the performance of his obligation. In addition he was also required by the company to get a counter-guarantor. He therefore brought forward Ato Abdul Semed to counter-guarantee the performance

## JOURNAL OF ETHIOPIAN LAW - VOL. VI - No. 1

of his obligation toward the Ras Insurance Co. The bank then forwarded the loan of $E \$ 50,000$ to Mr. Papazakos as agreed. When the date of payment arrived, the principal debtor failed to perform his obligation and the bank accordingly demanded that Ras Insurance Co. pay the E $\$ 50,000$ with interest. The company, having paid off the loan from its account in the bank, demanded that the counter-guarantor, Ato Abdul Semed, pay it back the E $\$ 50,000$ plus interest. To the contention of Ato Abdul Semed in the High Court that he was no longer bound because a new contract of pledge had been signed by the principal debtor and the insurance company, the said insurance company answered that it was not a new contract but the same contract of pledge signed on the same date as the contract of counter-guarantee and witnessed by the same witnesses. The company offered to introduce witnesses to this effect.

Counsel for the respondent argued that, since the contract of counter-guarantee released his client from his obligations, witnesses should not be introduced.

It has been proved that the contract of counter-guarantee was concluded on the same date as the contract of pledge, i.e., on January 6, 1966, and the same three witnesses attested both contracts.

It is also known that the contract of pledge submitted to the court was the same instrument signed on January 6, 1966. We do not find any reason why we should sustain the contention of counsel for the respondent since the contract of pledge does not in any way increase the liabilities of the counter-guarantor and does not allow time for payment to the debtor. In fact it works to the advantage of Ato Abdul Semed.

We have therefore reversed the majority opinion of the High Court and hold that the respondent, Ato Abdul Semed, is bound by the contract of counter-guarantee.

January 1, 1967

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## HIGH COURT

Addis Ababa, Div. No. 1
Judges:

Ato Yeshewa Work Hailu<br>Ato Goitom Beyen<br>Major Tadesse Abdi

PUBLIC PROSECUTOR v. YESHIGETA AREGA*
Criminal Case No. 359/60.
Criminal law-Offences committed by police officer in discharge of duties-Penal Code Art. 422(b).
Defendant was charged with retaining possession of the private complainant's pistol, seized in the course of his police duties, with intent to obtain unlawful enrichment thereby.
Held: Defendant convicted.

1. Defendant has violated Pen. Code Art. $422(\mathrm{~b})$ if he as a public servant, commits the act with intent to obtain an unlawful enrichment for himself or another, and the object retained by him came into his possession in the discharge of his official duties.
2. Even if it could be argued that he is not a public servant, Art. 422 applies to him pursuant to Pen. Code Art. 410.
3. As a policeman the defendant had a duty to deliver to the authorities any object seized on duty.
4. Defendant's use of the pistol as a pledge to borrow money showed his intent to obtain unlawful enrichment.
5. Under Art. 13(2) of the Police Proclamation of 1942, policemen are deemed to be on duty at all times.
6. Regardless of the propriety of seizing the pistol by force, the defendant gained possession of the pistol in the discharge of his duties.

## JUDGMENT

The defendant, Private Yeshigeta, was charged with the offence under Article 422 of the Penal Code. The charge stated that defendant in order to obtain for himself an undue material advantage misappropriated the pistol of Bedase Temesgen, the private complainant, which came into his hand, while he (the defendant) was executing his duty as a policeman, on August 30,1967 , around 1 a . m .

The defendant pleaded not guilty to the charge. Witnesses for the prosecution were heard.

The witnesses testified that they saw the defendant and the private complainant leaving a bar together on the night of the alleged crime. The private complainant testified to the effect that he left the bar with the defendant on the night in question and shortly afterwards the defendant asked him to show him his permit for the pistol which he (the private complainant) was carrying at the time. He then asked the defendant not to report the matter to the authorities, but the defendant insisted on reporting it. When they came near the private complainant's house, he tried to escape. But the defendant caught him and while they were struggling the pistol fell down. At this point two policemen arrived at the scene and caught the private complainant. The defeadant picked the pistol up and showed it to the

[^2]policemen. The private complainant reported the incident to the police. After a few days the defendant sent him E $\$ 300.00$ through mediators, and he dropped the charge against the defendant.

This was the testimony of the private complainant. The third witness testified that he heard the private complainant shouting that some people were trying to take away his pistol. He said he saw the private complainant struggling with a man in a police uniform. According to Witness No. 3, two other policemen then arrived at the scene and went away with the private complainant. The person who was struggling with the complainant returned to the place of the fight with a light and, after searching for some time, picked up a pistol from the ground. Witness No. 4 identified the pistol which was produced as an exhibit by the prosecution, as the one which the defendant had shown him. He testified that the defendant had asked him to find him a loan of E $\$ 100.00$ using the pistol as a pledge. He said that the defendant told him that the pistol belonged to him. He testified that he gave the pistol as a pledge and borrowed some money for the defendant. Witness No. 2 testified that on the date of the commission of the alleged crime the defendant and the private complainant had gone to the police station and, when the defendant complained that the private complainant fired a shot at him, the private complainant reported that the defendant together with his friend took his pistol from him. He further testified that the defendant disappeared from the police station. After the case for the prosecution was concluded, the accused was called upon to proffer his defence. But the accused stated that he had no evidence to put forth.

Article 422, the violation of which the defendant is charged with, states:
(a) Any public servant who, with intent to procure for himself or another an undue material advantage:
(b) misappropriates such objects or securities which have been entrusted to him or which come into his hands by virtue of or in the course of his duties, is punishable with rigorous imprisonment not exceeding ten years, and fine not exceeding ten thousand dollars.
We have seen the charge and the law cited as well as the case of the prosecution. The court should now answer the question of whether or not the defendant misappropriated an object which had been entrusted to him or which had come into his hands in the course of his duties, with intent to provide for himself an undue material advantage.

In order to answer this question, one has to examine the requirements of the law.
A man is guilty of the offence under Article 422 only if the following requirements are satisfied:
(1) the defendant must be a public servant;
(2) the defendant must have committed the alleged crime with intent to procure for himself or another an undue material advantage;
(3) the misappropriated object must have come into the hands of the defendant or must have been entrusted to him by virtue of or in the course of his duties.
In examining the first requirement one has to refer to Article 410 (1) of the Penal Code which says, "...members of the armed or police forces are subject to the punitive provisions which follow where, in the discharge of their office, duties or employment, they commit any of the offences under this chapter." Therefore,
since the defendant is a member of the police force, the law applies to him even if an argument could be raised to the effect that the defendant is not a public servant. Second, the charge against the defendant is that he misappropriated the pistol of the private complainant. The testimony of Witness No. 1 and the other prosecution witnesses show that the defendant took the pistol from the private complainant. The pistol was seized by force and was given as a pledge by the defendant for the loan he took. The facts that the defendant took a pistol which did not belong to him and that he gave the pistol as a pledge for the loan show that le committed the offence with intent to procure for himself an undue advantage.

The defendant, as a member of the police force, has the duty to hand over to the authorities every object which he finds, let alone an object which he has seized from another person. The fact that he ignored his duty and that he used the object for his own purposes shows that he has acted with intent to procure for himself an undue material advantage and thereby committed an offence. Thirdly, we must examine the issue of whether or not the object was entrusted to the defendant (a public servant), or came into his hands by virtue of or in the course of his duties.

The defendant is not accused of misappropriating an object which has been entrusted to him; no evidence was produced to this effect. So, let us look at the second requirement. Did the pistol come into the hands of the defendant by virtue of or in the course of his duty? The fact the defendant asked the private complainant to show him his licence to carry the pistol shows us that the defendant knew that carrying a pistol without authorization is illegal and that it was his duty as a member of the police force to enforce the law. At this point a question may be posed as to whether or not the defendant was on duty at that particular time. Article 13 (2) of the Police Proclamation, No. 6 of 1942 states that "every police officer shall be deemed to be on duty at all times...." Therefore, since the defendant is a member of the police force and since he is on duty at all times, he is deemed to be on duty when he committed the offence with which he is charged.

Therefore, since the defendant was on duty at the time of the commission of the crime, and the private complainant had no licence to carry the pistol and since the defendant believed that he was exercising his duty as a policeman when he toolk the pistol by force from the private complainant, we conclude that the pistol came into his hands in the course of his duty irrespective of the fact that use of force by the defendant to obtain the pistol may or may not be legal.

The defendant failed to hand over to the authorities the pistol he took from the private complainant. Instead he took the pistol home and afterwards gave it to a creditor as a pledge for the money he borrowed. This shows that the defendant committed an offence in that he misappropriated the pistol with intent to procure for himself an undue material advantage. We have, therefore, found him guilty of the offence under Article 422 (b) of the Penal Code.

## SENTENCE

It has been proved that the defendant, with intent to procure for himself an undue material advantage, misappropriated an object which came into his hands in the course of his duty. After considering the provisions of Articles 83 and 422 (b), we hereby sentence the defendant to 5 years rigorous imprisonment starting from the day of his arrest, December 7,1967 and to a pay fine in the sum of $\mathrm{E} \$ 2000$. If the defendant fails to pay the fine he shall serve two more years of rigorous imprisonment instead, which brings the total to seven years of rigorous imprisonment.

April 1, 1969.

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## HIGH COURT

## Addis Ababa, Commercial Division

Judges:
Ato Nigussie Fitawake
Ato Assefa Liban
Ato Mohammed Berban Nurbussen
ORBIS COMPANY, INDUSTRIAL \& TECHNICAL SECTION v. THE INLAND REVENUE DEPARTMENT.

Civil Case No. 708/59

Taxation-Turnover tax-Tax exemption-Wholesale selling-Obligation to pay tax while appeal is pending in High Court-Right to appeal to High Court from Tax Appeal Comm. before paying tax-Right of taxpayer to be supplied with copy of Tax Appeal Comm. decision-Arts. 3, 16, 18 of Proc. No. 205 of 1963; Art. 61 of Proc. No. 173 of 1961.

An appeal from the decision of the Tax Appeal Commission holding that the appellant should pay turnover tax on cars sold to government departments.
Held: Decision affirmed.
1 Art. 16 of Proc. No. 205 of 1963 provides for payment of turnover tax by sellers regardless of the fact that the buyer is a government department.
2. According to Art. 18 of the same proclamation, payment of tax is exempted only when the goods are sold wholesale, and the buyer is a trader.
3. Under Art. 61 of Proc. No. 173 of 1961 (construed separately from Proc. No. 205 of 1963) the Inland Revenue Department has the duty to collect taxes despite appeals pending in the High Court, unless a stay is issued by the court.
4. An appeal against the Tax Appeal Comm. decision can be lodged in the High Court even if tax has not been paid.
5. A copy of the Tax Appeal Comm. decision must be given to the taxpayer upon request.
6. The word "persons" in Art. 3 of Proc. 205 of 1963 does not include government departments."

## JUDGMENT

This is an appeal from the decision of the Tax Appeal Commission requiring the appellant company to pay turnover tax on the total income received from the sale of cars, sold free of tax, to the Ministry of the Imperial Court, various embassies, the Police Force, the Territorial Army and other departments. The appellant alleges that this decision contains an error of law. It claims that it should not be required to pay turnover tax because it was authorized to sell the cars in question free of tax in the first place. The advocate for the appellant company raised the following legal arguments on appeal:

1. The decision of the Tax Appeal Commission failed to consider provisions of the general law which exempt the department to which the cars were sold from the payment of all kinds of taxes, including turnover tax.
2. Although the Tax Appeal Commission based its decision on the rules which exempt certain sales from the payment of turnover tax (found at Article 16 of Proclamation No. 205 of 1963, according to the terms of Article 18 of thye same Proclamation), it failed to consider the rules which exempt wholesale sales of imported goods from turnover tax.

The advocate argued that cars are not sold in dozens or retailed and therefore the sale of cars should be considered as a wholesale operation.

The advocate for the respondent submitted the following reply to rebut the appellant's arguments.

1. Article 16 of Proclamation No. 205 of 1963 states that turnover tax shall be paid by all traders selling any movable goods in Ethiopia. Article 17 (a) of the same Proclamation provides that turnover tax shall be charged, levied, collected and paid on gross revenues from sales received or due to traders for sale of goods. There is no law which exempts the seller from the payment of turnover tax where the purchaser is a government agency or an embassy; it is the seller that pays the turnover tax.
2. The appellant company alleges that it sold the cars on a wholesale basis according to Article 18 of Proclamation No. 205 of 1963 and therefore is exempt from the payment of turnover tax; but the sale of one car is a retail sale, not a wholesale operation. A wholesale operation refers to things which can be used and sold either on a wholesale or retail basis. Even if it were said that the sale of one car is a wholesale sale, the Tax Appeal Commission was correct in deciding that the appellant company pay the turnover tax, as the cars in question were sold to consumers and not to a retail trader.

The advocate for the respondent prayed the court to affirm the decision of the Commission and to order the appellant company to pay damages and advocate fees.

In addition the respondent raised a cross-objection wherein he contended that the appellant company should pay the tax determined by the Commission before the appellate court decided on the appeal.

After examining the arguments of both parties, we have found that there are two issues to be determined.

The first issue is whether a seller is exempted from the payment of turnover taa when he makes sales to government agencies which are exempt from all taxes.

The second issue is whether or not the appellant company should pay the tax determined by the Commission before the appeal is heard.

Let us consider the first issue. As regards this issue, the appellant company argues that it should be exempted from the payment of turnover tax on the ground that the cars in question were sold to agencies which are exempted from all taxes. Article 16 of Proclamation No. 205 of 1963 states that "turnover tax shall be paid by all traders selling any movable goods in Ethiopia." The appellant company under No. 2 (a) of its memorandum of appeal of July 29, 1967, stated that the Tax Appeal Commission failed to consider the general provisions which exempt agencies from payment of turnover tax, but the appellant failed to cite any law which exempts a seller from paying turnover tax when he sells goods to the aforesaid agencies. The second argument found under No. 2 (a) and 4 of the same

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memorandum is that the company should not pay turnover tax because the sale of cars is a wholesale operation as defined in Article 18 of Proclamation No. 205 of 1963.

After considering the appellant's argument and Article 18 (a) of Proclamation No. 205 of 1963 which exempts wholesale sales from the payment of turnover tax, we are of the opinion that the appellant has failed to grasp the thrust of this provision. A trader may claim exemption from the payment of turnover tax under Article 18 (a) when:
(a) he sells goods on a wholesale basis; and
(b) the sale is made to traders and not to consumers.

In the present case, even if we say the sale is a wholesale operation and that one of the requirements of Article 18 (a) is satisfied, the second requirement would not be satisfied, because the cars were sold to government agencies and not to traders. Therefore the appellant cannot avail himself of Article 18 of Proclamation No. 205 of 1963.

In his reply of September 28, the advocate for the appellant company cited Article 3 of the same Proclamation in support of his argument that the company should not pay turnover tax. He argued that the term "person" in Article 3 means a natural person and any associations of persons whether incorporated or not, but does not include the agencies the company sold the cars to. Therefore the company should not pay the tax which the purchasers are not required to pay.

Since, according to Article 16 of the Proclamation, it is the seller who pays turnover tax and since the appellant company is a tax payer and not a tax collector, the court does not accept this argument.

And now for the second issue, Article 61 of Proclamation No. 173 of 1961 states that notwithstanding any appeal taken thereunder the tax payer shall pay the tax in aocordance with the decision of the Tax Appeal Commission, and the appellant company should have paid the assessed amount. However, after the appellant brought this appeal to this court, this court ordered the Inland Revenue Department to give the appellant a copy of the decision of the Tax Appeal Commission, but the order was not carried out. Consequently, this court, at the request of the advocate for the appellant, ordered that the decision of the Tax Appeal Commission be stayed until the court gave a final decision on the matter. Therefore, in this case it is not necessary to rule that the appeal cannot be heard unless the assessed amount is paid. However, in the future, unless the decision of the Tax Appeal Commission is barred by the court for any reason, it is the duty of the Inland Revenue Department to collect the tax according to Article 61 of Proclamation No. 173 of 1961. But, since the law does not provide that the appeal shall not be heard unless the tax is paid, we do not accept the argument that the court cannot hear the appeal unless the tax is paid in accordance with the decision of the Tax Appeal Commission. But now, as the case has been finally disposed of, the bar is lifted. We warn the Inland Revenue Department not to refuse to give to appellants copies of the decisions of the Tax Appeal Commission in the future. For the above reasons we have decided that the appellant company shall pay the turnover tax assessed by the Tax Appeal Commission on November 15, 1966 in accordance with Article 16 of Proclamation No. 205 of 1963, year 22, No. 18.

The costs shall be determined when we receive the details in accordance with Articles 463 and 464 of the Civil Procedure Code.

January 8, 1968

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# AGRICULTURAL COMMUNITIES AND THE CIVIL CODE 

## A COMMENTARY

by Bililign Mandefro*

## Introduction

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

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

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

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

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

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

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## JOURNAL OF ETHIOPIAN LAW - VOL. VI - No. 1

entary and pasturalist communities to make it feasible to govern them by the same chapter of the Code. ${ }^{s}$

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

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

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

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

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

Moreover, as has been stated, Article 1489 governs matters whicn cannot be fully appreciated without an examination of their social background - the whole fabric of iife, unique and limited only to certain parts of the Empire. ${ }^{8}$

[^43]
## AGRICULTURAL COMMUNITIES AND THE CIVIL CODE

## Part I: Major Features of Traditional Agricultural Communities

"In some parts of the northern provinces, the seemingly innocent question of 'Do you possess any land?' may be easily taken as an insult. If the proud person to whom the question is addressed chooses to be polite, he may grin and reply, 'I may be poor, but 1 am a human being (Yesew lij)' What he means is that any human being ... possesses land simply by virtue of his being yesew lij. It is a birth-right for any yesew (ij.

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

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

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

One consequently finds that "...the three plateau divisions of Hamasien, Akkle Guzai and Serae are different 'countries' in the true sense of the word, with different history, different character, even different customs and the people of those divisions are conscious of these differences. ${ }^{111}$

## Chapter I. Sacial Organization and Land Tenare Principles Among the Caristian Highlanders of Eritrea

## A. Social organization

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

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

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## JOURNAL OF ETHIOPIAN LAW - VOL. VI - No. I

tion of village society, and on the other hand, the central government of Ethiopia. known in Eritrea as Mengesti". ${ }^{12}$

For the "peasant society", the main political units are the village (the smaller unit), and the district (the larger unit). ${ }^{33}$ The former is headed by a Chikka who runs village affairs. The districts, composed of various villages, are under a Mislene (a district chief) responsible for their affairs.

In most villages (for the details of custom vary from village to village), the Chikka ${ }^{14}$ acts as a link between the central government and the village.

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

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

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

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

## AGRICULTURAL COMMUNITIES AND THE CIVIL CODE

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

To belong to the landowning class entitles one to a bundle of rights and privileges (called rim), ${ }^{24}$ including leadership in community affairs. In all three areas of Akkele Guzai, Serae and Hamasien, only landowners may take part in shimgelenet ( 7 goons. ${ }^{2}$ ) "(this) embrace(s) all the administrative concerns of the village community. Thus, the supervision and organization of communal labour; the care of the village church; the appointment of $\ldots$ guardians of the village fields and pastures; and the right to act as arbiters in land disputes... When the rights and duties represent a regular office, it changes hands periodically, often annually, being taken in turn by each of the families." 25

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

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

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

[^45]This matter of tax raises an interesting question. What is the role of the central government in village affairs? It has been suggested that it is minimal, as is supported by a reading of the various customary laws. "Traditionally, these communities enjoyed a rather autonomous status, administered by the village heads. The representatives of the central government, who were mostly alien to the country under their administration, acted rather as the tax-collectors". ${ }^{30}$

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

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

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

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

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

These customary laws purport to regulate every aspect of community ife and appear supremely adapted to a small closely-knit family or village grouping. ${ }^{37}$ They

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

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

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

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

The codifiers of Adgina Tegeleba (Akkele Guzai) state their reasons in a beautiful introduction to the code, ${ }^{41}$ which for fear of misrepresentation is reproduced below.
"God, the creator, the Law Maker is inherently systematic and created the earth and skics systematically, assigning creatures to their respective places and ordering that they live in accordance with the rule set up for each of them.
"So the creatures of God are living.
"The inherent law-abidingness has been given to Man, the possessor of intellect... (The story of Adam and Eve follows) ....
"From Adam's doom up to the time of Moses people lived in accordance with the law of the conscience because they had no written law.
"Man could not live without a writter law because the law of the conscience was not sufficient to administer him, and, therefore, written law was started by Moses. (The story of Moses follows)...

[^47]"Moses' laws operated until Christ.
"Ever since Christ, the necessity of having laws to suit the time was realised ...Constantine ... had a Fetha Negest codified by the 318 scholars.
Law is a means of attaining accord and harmony between God, Authorities (mekuanint) and man.
"This codified law is the result of a concerted, sincere move on our part to consolidate the laws (all unwritten) set up by our ancestors... and apply them to our present needs. It is based on our respect for the Holy Books and the Fetha Negest. . . .
"The lack of a codified law has put our legal system into a sad and deplorable state ... We have found it essential to codify our law to suit our present needs. Its main purpose is to eliminate personal interpretations of the law especially in the field of evidence, and to make the code binding. ..." (Emphasis added.)

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

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

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

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

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

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

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

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

## B. Tenure Principles

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

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

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

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

[^49]1. Family land
(a) Origins

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

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

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

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

The "fluid, non-static nature of the enda" must be emphasized. "Though the enda unit is ... clearly defined, it is also a composite structure, and transitional forms occasionally blur the distinction between the enda and its component families. For some of these are very large; three or four generations of descendants may still be united by the narrower solidity of the family and still constitute an effective social unit, subordinated to the enda, yet itself an incipient enda." 58 Once an enda becomes very large, it breaks up into several sections, each known by a separate name. ${ }^{59}$
55. Id. $\overline{\mathrm{p}} .5$.
56. Ostini, cited abave at note 7, pp. 88ff.
57. British Military Administration, cited above at note 10, p. 35. Compare Ambaye Zekarias, cited above at note 8, p. 3. It must be emphasized that an enda (inappropriately translated as "family") may be made up of hundreds of individuals Cf. Enda Belaway Beleza (Hamasien) v. Enda Gumer (Serae) (Sup. Imp. Ct., 1960, Civ. App. No. $56-60$ ) (unpublished) in which a claim for a share of family land is based on descent from a man who lived mine generations or 450 years ago.
58. Nadel, cited above at note 13, p. 3.
59. Ibid.

## (b.) Terminology

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

The most common term is resti. "This word" is derived from Geez resete ( ). It is a loose term denoting occupancy, possession, ownership... in connection with (land)...."60 The term is very general and covers "land titles" varying from "... land owned by an individual to land owned by the large kinship group.'061 Although Nadel seems to associate resti with family land, Ato Ambaye states that it should not be so. "(The) term is a generic name for all property in land. In distinguishing different property, this word is placed as a prefix". 62

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

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

Finally, the privileged group we examined in Section A is called restegna (cn+ $\boldsymbol{c}$ ), or restegnatat (citrsi+), plural. In family land areas, a restegna is one who is entitled to a share of family land and the attendant privileges. In the village land areas, a restegna is a descendant of a one-time land owning family.
(c.) Individual rights over cultivable land

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

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

[^50]must be observed that although a plot of land does not pass by inheritance, the right to claim a share of the community land does. ${ }^{69}$

Only the married males receive plots of land. Generally, the females and their descendants are excluded from claiming a share of the paternal resti. ${ }^{\circ}$ A person who has received his share of cultivable land may farm it as he thinks fit, sell it, 7 , or give it to another, provided members of his enda or village refuse to buy it or take it.

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

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

Why, it may be asked, are women and their decendants (described as gual, a daughter, and deki-gual, children of the daughter, respectively) excluded from claiming a share of the paternal land, whether resti or iselmi? Duncanson has offered an interesting explanation. "In the formal marriage pact (kal kidan) celebrated in church, the payment of dowry by the bride's father to the bridegroom's father discharges the former's family from any further obligations towards the girl's children, whether or not by the agreement of the two fathers ( )- the young couple are emancipated and given a new house and possession of the dowry during the lifetime of the bridegroom's father." ${ }^{376}$ Duncanson states further that under the Sirat, "emanicipation of the kindred by the payment of dowry" is the real meaning of marriage.

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

In the areas where this exclusion does not operate, the rights of daughters and their descendents are subject to restrictions: they can neither sell family land nor convert it into village land, restrictions not imposed on the male issue of a family. ${ }^{78}$
69. Ibid.
70. Cf. Ambaye Zekarias, cited above at note 8, p. 15.
71. Ambaye Zekarias, cited above at note 8, p. 6. On this, more will be said later.
72. Ato Ambaye describes resti tselmi as "absolute" private property. Ambaye Zekarias, cited above at note 8, p. 7.
73. Ostini, cited above at note 7, pp. 88ff.
74. Customary Law of Serae, cited above at note 17, under "Economic Autonomy".
75. Pbid.
76. Duncanson, cited above at note 12, p. 144.
77. Nadel, cited above at note 13 , p. 7.
78. Customary Law of Logo Chewa, cited above at note 29. Art. 12.

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

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

Now, the "foreigner" in a family land area can farm a plot of land only with the permission of the landowners. The reason, according to the law of Serae "... is because if there is anything to be paid for a homicide, pillage or rapine that takes place in the village, it is the (land owners)..., and not the aliens who pay." ${ }^{181}$ Should the necessary permission be obtained, then the alien is allowed to work three years on "fertile soil" and then two years on "mediocre soil". At the end of the fifth year presumably (for the law is silent) fresh permission must be obtained.

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

Of course, an alien could buy a piece of family laad (which is then called medri worki, literally land bought with gold) and acquire ownerskip, provided the seller has fulfiled the customary formalities: formalities cumbersome in nature and clearly aimed at discouraging the sale of family land. These formalities are very well reffected in the Law of Serae the requirements of which are summarised in Ostini:
"In order that a ... sale of an immovable (belonging to a family) be valid, it is required ... that the following conditions be satisfied:

1. that the sale take place before a dagna (a village judge) nominated by the common agreement of the parties;
2. that the seller present a guarantor (usually a relative) who stands surety that:
(a) the seller is really the owner of what he sells;
(b) an offer was made in vain to the person who has the right of precedence to buy (i.e. the right of preemption); and
(c) the purchase price will be restituted in case of nullity of the contract of sale;

[^51]3. that there be stipulated the amount of food-stuffs or agricultural products that the buyer is required to give to the seller every year;
4. that there be stipulated the amount of grain to be paid to the guara ntor from time to time as compensation for the guarantee he gives..., and;
5. that at the conclusion of the contract of sale there be not less than five witnesses, besides the dagna and the guarantor". ${ }^{84}$ Children may act as witnesses although they can testify only"... when they become grown-ups...."8s In some areas, the role of a witness in land transactions is undertaken by a priest, a Moslem and a blacksmith. The inclusion of the last two "... ensures the unassailable testimony of persons of necessity disinterested in land deals."86

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

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

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

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

Finally, in some tselmi ${ }^{91}$ and resti ${ }^{92}$ areas, there is an interesting process called assahaba one of whose objectives is social justice. It is the process by which
84. Ostini, cited above at note 7 , pp. 88 ff .
85. Ibid.
86. Nadel, cited above at note 13, p. 9.
87. Customary Law of Serae, cited above at note 17, under "Regulation of Resti." This is very well reflected in the Amhara proverb: "Land goes back to its true owner even after a thousand years". The thousand years is intended to represent infinity.
88. Ibid.
89. This is the topic of another paper. Girma Sellassic Araya, Usucaption of Family Land under Ethiopian Law (1968, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University).
90. Customary Law of Logo Chewa, cited above at note 29, Art. 12.
91. Ibid.
92. Customary Law of Serae, cited above at note 17, under "Regulation of Resti".
plots are re-partitioned after the lapse of a certain period of time either because some persons are found to possess more plots than others (in Logo Chewa, for instance) or because a share has to be made out of existing shares for a "new" claimant (in Serae, for instance).

## 2. Village land

## (a) Origins

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

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

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

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

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

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

[^52]The task of re-distributing land among villagers is under-taken by six Shimaggeles (elders), the wise from every marbet (household) nominated and elected by the dagna (the village judge). ${ }^{98}$ These elders are divided into two groups.

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

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

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

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

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

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

99. Ibid.
100. "The allotment of land to be distributed corresponds to the number of those who acquire economic autonomy, widows who have legitimate children, women who had left the village of their fathers but who re-establish themselves there, the machelai aliet (aljens) who are admitted to take part in the lots of land distribution." Ostini, cited above at note 7, pp. 88 ff . Note that a share received may be subject to lease or other similar arrangement. The shares of deceased members "fall back" to the community.
101. This process of casting lots appears to be a sacred process, in Tigre at least. After the the village or family land (which, as we have seen, is in some places assigned by the casting of lots) has been divided into plots corresponding to the number of the recipients, the village elders assemble small sticks which are named after the plots. Then one of the elders raises as many sticks as he could hold between the palms of his hands high above the head saying, "oh the lot of the Disciples! Come for the true owner" he shouts and then from the bundle he gives one stick to each member. Each member takes the plot represented by his stick. Interview with Yoseph Gebre Egziabher, Oct. 5, 1967.
102. Customary Law of Logo Chewa, cited above at note 29. Art. 12.
103. Ibid.

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

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

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

It must be mentioned that the male descendents of a daughter are equally cligible for "establishment" in a village as are those of the son." ${ }^{11}$

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

[^53]It has been accurately said that this periodic re-distribution of land excludes sale. ${ }^{113}$ But it is perhaps more accurate to say that the sale of village land is unknown, (the need not having arisen in the past) than to state categorically that it cannot be sold. ${ }^{114}$ It must, however, be mentioned that lease is allowed. For instance, a female entitled to village land ${ }^{115}$ may lease her share to one who has "the strength and the oxen", 116 as she cannot farm it herself.

## C. Individual rights over other family and village land

1. Roads, building sites and reserves

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

Since building a house and owning it is one of the requirements for obtaining a plot of the village land, the regulation of buildings and building sites is of immense importance in the village land areas. Thus, the Customary Law of Logo Chewa contains detailed rules on the allocation of building sites, the length and breadth of a site for an individual, party walls, inheritance of a building and even the general plan of buildings: "Houses to a row shall number six and a road shall then follow." ${ }^{21}$

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

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

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

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grounds. The viliagers are entitled to the rent that may be due from reserve land where aliens, not entitled to it rent it with the permission of the landowners. In addition, villagers who may come after warieda are entitled to a share of cultivable land from the reserve. ${ }^{124}$
(b) Grass and wood

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

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

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

## (c) Threshing fields

The Customary Laws of Serae ${ }^{130}$ and Logo Chewa ${ }^{131}$ are almost identicai in their regulation of threshing fields and farm implements.

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

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

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

[^55]son or another, does not "own" a threshing field may use the community field prepared by the villagers. ${ }^{132}$

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

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

As has been stated, people who are under the misapprehension that land is "exploited collectively" use terms like "communal regime" to designate the tenure patterns of the Christian communities which we examined. "... [L]and is not worked communally. Every member or house-hold has its own fields, and works on (them)...." 134 The nearest that one comes to some kind of "collective farming" in these communities is in the cultivation of land by a nuclear family, consisting of a father, mother and their unmarried children (generally), under the direction of the father. ${ }^{135}$
D. Advantages and disadvantages of family and village land tenure ${ }^{136}$

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

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

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

Excessive fragmentation ${ }^{140}$ resulting in uneconomic use of land is another alleged disadvantage. One may add the uneconomic nature of the division of village land

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

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

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

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

There appear to be only a few supporters of the communal tenure system, one of whom, (Nadel), states in his consideration of the advantages of this system, that resti and desa correspond "... to that between individual enterprise and communal tenure, and between privilege and socialism (or communism) in our own English society". ${ }^{\text {ss }}$ Nadel emphasizes the equitable nature of the desa in an environment where land is "... of very unequal value ...", and the "communal spirit" which "... makes the temporary land-owner work in the interest of his successors as well, since they all belong to a closely-knit social unit." ${ }^{152}$ Thus,
141. Compare Ambaye Zekarias, cited above at note 8, pp. 14-15.
142. Demissie Gebre Michael, cited above at note 49, pp. 61-62.
143. S. Buff, A Key to Land Reform in Ethiopia: An Introduction to Cadastral Survey and Land Registration (1960, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 10.
144. Duncanson, cited above at note 20, p. 143. Duncanson estimates that the greater number of civil cases in Eritrea, and the graver ones, involved family land. Two more recent local stiudies by the Ministry of Land Reform estimated the total at $30 \%$.
145. Nadel, cited above at note 13, p. 14.
146. Interview with H.E. Afenegus Kitaw Yitateku, Nov. 13, 1967. Compare Mengesha Workneh, Agrarian Structure and Agrarian Reform in Ethiopia (1961, umpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 18.
147. Id., p. 37.
148. Ibid.
149. Nadel, cited above at note 13, pp. 14ff.
150. Lawrance and Mann, cited above at note 52, pp. 315-316 Buff states that this evolution may be facilitated by educating the people concerned. Buff, cited above at note 151, p. 3 .
151. Nadel, sited above at note 13, p. 15.
152. Ibid.
contrary to the views of Lawrance and Mann, Nadel is of the opinion that the "community spirit" is so strong that it overshadows the "insecurity" problem and makes the individual work in the interest of others.

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

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

## A. Social organisation

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

During the British Military Administration of Eritrea (1943), the Beni Amer was "... the largest tribe in the west and south west, and indeed the whole of Eritrea. (They) ... occupy the north, west and south west of Agorda1, spreading in the west, deep into the Sudan and overflowing in the east into (Keren and Serae) ..." ${ }^{153}$ The Dankalia, on the other hand, are a "typioal plainsmen" occupying the Eastern Plains of Eritrea. ${ }^{154}$

On the basis of rather "fluid criteria", the Beni Amer tribe is said to be made up of seventeen "sections" or "branches," 155 each with its own name, but acknowledging membership in the tribe. "The affinities linking the Beni Amer sections are several: religion, language, common customs, habits and the link of common descent. But neither is the range of these affinities coextensive, nor are they solidly integrated. They do not coincide for the whole of the tribe, but rather overlap irregularly, different affinities extending over different sections." ${ }^{56}$

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

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

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

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

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

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

## B. Individual rights over land

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

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

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

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

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

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

## Chapter III. Summary

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

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

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

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

In tselmi areas, plots of cultivable land are inheritable by the male and their male descendants generally. The rule regarding the disposal of cultivable land is the same as in the case of the disposal of resti.
170. British Military Administration, cited above at note 10, p. 23.
171. Ibid.
172. Nadel, cited above at note 155 , p. 10. No similar explicit statement exists in the case of the Dankalia. It is fair, however, to conclude from the nature of their land rights that "exploitation" of grazing grounds is individual.

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

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

A right to a grazing ground is heritable in the pasturalist communities ${ }^{173}$ where problems associated with settled life do not arise.

## Part II: The Civil Code on Agricultural Communities

"No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice. In preparing the Civil Code, the Codification Commission convened by us and whose work we have directed has constantly borne in mind the special requirements of our Empire and of our beloved subjects. ..."
H.I.M. Haile Sellassie I, Preface,

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

## Chapter I. The Original Draft

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

## A. Considerations underlying the draft

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

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

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

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

## A. Content of the draft

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

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

The charter of each community was to specify the items listed under Article 1491 of the final draft. ${ }^{182}$ Of particular interest here is Article 12 of the draft
177. Ibid.
178. This is not in conformity with the general view adopted by the drafter, as evidenced by the following statement. "While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structure completcly, even to the way of life of her people. Consequently, Ethiopia does not expect the new code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a programme envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create." R. David, "A Civil Code for Ethiopia: Considerations on the Codifiation of the Ciyll Law in African countries," Tulane Law Review, Vol. XXXVII (1963), p. 193.
179. David, cited above at note 2, Art. 1. We shall examine the phrase in detail in the next chapter.
180. David, cited above at note 2, Art. 3.
181. Id., Art. 4.
182. "Article 1491. Contents of charter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cultivable land belonging to a community might be broken into private allotments for the benefit of every member. It might, on the other hand, be commonly cultivated. Or, one "mode of exploitation" might be adopted for certain land, and another for other land. A member might be given a private allotment for a period of nine years (but not for less) or for such longer period as may be fixed by the assembly of the community. ${ }^{213}$
"Equality of treatment" of members was guaranteed by Article 56 and must be observed on every periodic allotment of cultivable land. ${ }^{214}$ In determining the equivalence of lots, one was to take into account the quality, situation, importance of the lots and the nature and risk of the work which an exploitation or cultivation of the land might involve. ${ }^{215}$ Depending on circumstances, a member might be given one or multiple lots. ${ }^{216}$

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

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

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

[^62]and duties of each member. ${ }^{219}$ The assembly of the community must "..as far as possible, conciliate the interests of common exploitation with respect of the liberty of each (member)". 220 It must be emphasized that it was the assembly of an agricultural community which was to decide the mode of farming of its cultivable land.

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

The drafter states that in drafting the provisions on "common cultivation," he was inspired by the Russian kolkhoz rules. ${ }^{223}$

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

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

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

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Agriculture was to act as a central organ in the direction and coordination of the activities of the various bureau ${ }^{230}$

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

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

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

## B. Why was the draft rejected ${ }^{238}$

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

[^64]One may speculate on some of the other reasons.
The idea of establishing the bureaux envisaged by the draft in each of the provinces may have been considered expensive. The Government may not have been prepared in terms of the necessary skill and finance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Chapter II. The Final Draft

## A. The setting

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

## B. The juridical nature of "commanal ownership" under the Code

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

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

Now, the code also recognises another form of ownership, joint ownership, where the principle is the joint ownership of a thing by several persons. ${ }^{246}$ Joint

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ownership of a temporary and of a perpetual nature are envisaged. The former finds its source in the free will of parties ${ }^{247}$ which may be absent in the latter. ${ }^{248}$

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

An important characterstic of joint ownership of which ever type is that the owners own the whole thing: the shares of each on the thing are invisible "...(Le) droit de propriété de chacun (des propriétaires) .... est remené à une fraction arthimethique, à une quote-part, $1 / 21 / 31 / 4$, etc. Mais cette quote-part ne saurait être localisée materiellement sur tel ou tel segment de la chose: elle porte sur la totalité et sur chaque atome du bien."251 (Emphasis added). Thus, the Code ${ }^{252}$ speaks of the shares of the individual joint-owners conceived of as abstract concepts permeating through each and every "atom" of the thing jointly owned.

It is necessary to stress the fact that under the Code, the tripartite powers granted to individual owners over a thing are shared by joint owners over the same thing, the object of their ownership. The Code even requires joint owners to "administer" their thing jointly, "acting together."2s3

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

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

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

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

[^67]right of first refusal. Thus, should they be unwilling or unable (as is generally the case) to prevent the passage of a plot into the hands of a stranger (for instance, by buying the plot), the individual wishing to sell his plot is free to do so. Thus, family members have only a limited power over the disposal of any part of the sum total of plots belonging to their family.

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

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

The question of the juridical nature of "communal ownership" under the Code is not, therefore, answered by the provisions of the Code governing joint ownership. It is answered by the provisions of the Code specifically devoted to "village" and "tribal land", Articles 1489-1500. These provisions treat family, tribal or village iand as the individual property of a corporate entity called an agricultural community. This entity is "a family" in the case of family land, a "village" in the case of willage land, and a "tribe" in the case of tribal land. It is, therefore, no longer accurate to describe the ownership of family, village or tribal land as "communal"25s or "jjoint" ownership. ${ }^{256}$ Any doubt is dispelled by Articles 1287 (2) the purpose of which is to distinguish between and eliminate confusion of ownership by an agricultural community (and by an official association of owners) and joint ownership.

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

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

[^68]community - ownership of land by a community. Secondly, the drafter states that the draft on agricultural communities was intended to apply to the "village" communities of Tigre and Eritrea ${ }^{257}$ where the "village" and "family" land systems exist side by side.

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

## C. Corporate nature of agricultural communities

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

As M. David points out, "... [en] parlant de 'personnes' dans ce cas, on veut seulement dire que l'aptitude à être sujet de droit ou d'obligations est reconnue dans d'autres cas que celui des personnes physique. ..."2s9 One must bear in mind that these "artificial" persons do not possess all the rights and obligations of physical persons. They have only those "bundle" of rights and duties necessary for their nature and the purposes they are intended to fulfil. ${ }^{260}$

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

Foremost among the rights of an agricultural community is that against usucaption, ${ }^{262}$ which we will examine later in some detail.

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

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tainance of the members of the community. ${ }^{264}$ Creditors of the members, on the other hand, have no right over community property: movable or immovable. ${ }^{265}$

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

Among the duties of the Ministry of Interior, those in connection with the charters of agricultural communities appear significant. The Ministry is to endeavour to ensure that every agricultural community draws up a charter detailing its custom, and where necessary, provisions to supplement its custom. ${ }^{256}$ Once such a charter is drawn up, the Ministry is to endeavour to obtain the revision of the charter in order to ensure, among other things, the economic progress of the community concerned. ${ }^{267}$

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

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

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

Does it follow then that agricultural communities are public bodies corporate?
One objection to the view that agricultural communities are public bodies corporate may be based on the section of the Code on public bodies corporate, ${ }^{270}$ which does not mention agricultural communities. However, as the drafter points out, ${ }^{271}$ that section of the code was not intended to be an exhaustive list of all public bodies corporate.

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

A body corporate not expressly granted public personality under Articles 394396 may, therefore, be considered as a public "person", provided it is a public administrative authority, office or establishment and such personality has been expressly given to it by administrative laws. ${ }^{272}$

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The French term "exploitation collective" has the following meaning in a recent UN report: ${ }^{281}$
"Collective farming (exploitation collective):
"The farming of a single holding by a group drawn from several domestic units, no individual family having any permanent rights to, or responsibility for, the farminal (sic) unit of any particular parcel of land making up the jointly farmed surface, and where the relationship between those with management and those with manual functions is not one of supply of employment but where individual rewards depend solely on the quality or quantity of labour contributed." (Emphasis added).

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

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

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

[^73](usage et jouissance en commun), ${ }^{285}$ private allotment for the members (allotisements privatifs au bénéfice des membres), ${ }^{286}$ and "common cultivation" (cultures en commun). ${ }^{287}$

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

The second term, "common use and enjoyment," designates the rights individuals have over non-cultivable land.
"Private allotment" and "common cultivation" are used exclusively to describe the mode of farming. "Common cultivation'" thus refers to farming under the central direction of the assembly of the community, the opposite of which is the cultivation of a private allotment by an individual (no shorter term being used by the drafter).

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

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

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

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

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

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

## E. Organization and control of agricultural communities

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

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

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

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

If the organization of agricultural communities is, for the present, left for the vagaries of custom, their control is not. The Code provides for various devices aimed at controlling these communities.
291. Such was the "mode" of exploiting non-cultivable land envisaged by the draft. David, cited above at note 2, Art. 70 and 71 (for instance).
292. We have seen the kind of "administrators" contemplated by Art. 1491(c) in Part I of this paper.
293. Ato Haile Michael Kebede had, last year, inquired of officials in the Ministry of Interior to see what has been done. Nothing has been done so far. Haile Michael Kebede, The Impact of Land Temure on Land Usage in Ethiopia (1966, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 107, Note 111.
294. Civ. C., Art. 1498(1). The high-sounding phrases appear merely a declaration of policy.
295. Civ. C., Art. 1491 (c) and 1494.
296. Civ. C., Art. 457, by reference from Art. 1494(3).

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

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

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

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

It must be noted that a member of an agricultural community, an obviously interested party, may exercise "private control" over his community through his right of appeal under the law. ${ }^{300}$ As is implicit in Article 1500, this individual right of appeal against community decisions, whether made by "the community" ${ }^{301}$ or its representatives, ${ }^{302}$ may be restricted by the custom or the charter of the community. However, what is or is not a permissible restriction of the individual right of appeal is difficult to conceive of in the abstract, as is a decision taken by the representatives of the community "... in violation of fundamental rules of procedure [and] ... justice." ${ }^{503}$ These are best answered on a case-by-case basis in the Courts which must pay particular attention, not only to a decision in dispute, but also the circumstances surrounding it.

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

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

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

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

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

[^76]Thus, by virtue of Article 1492, custom or a charter drawn up detailing such custom, may no longer exclude the non-privileged group from being considered "the persons" or "families" comprising an agricultural community in question. 306 This group may no longer be excluded from "administering" community affairs or as acting as representatives of the community, both regularised under Article 1491 (c).

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

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

## Part III: Conclusion and Recommendations

" $/ t$ is cssential that the law be clear and intelligible to each and every citizen of Our Empire, so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life...."
H.I.M. Haile Sellassie I, Preface, The CiviI

Code of the Empire of Ethiopia. p. vii.

## Conclusion

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

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

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

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

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

[^77]1491, must be specified in the charters and the provisions of Article 1492 observed during their drawing up.

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

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

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

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

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

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

## Recommendations

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

[^78]The present author has taken the liberty to present the reader with much extra-legal material in an attempt to clarify what the Code sought to accomplish, and what it has accomplished. This material may, however, not be readily available to everyone, even if one assumed that it could be read, understood and profitably used. The author must admit that he relied very little on the Ambaric version of the Code, which is exactly as ambiguous as the English and gives one the impression that cooperative type farming is being introduced.

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

1. The Ministry of Interior must take the initiative to have the Code amended and to transfer its duties to the Ministry best fit to carry them out under present governmental arrangement.
2. In view of the fact that the Ethiopian Government has chosen the Ministry of Land Reform and Administration to carry out a land reform programme, ${ }^{309}$ agricultural communities are best entrusted to it. The Code in its amended form should therefore, substitute this ministry for the Ministry of Interior for the carrying out of the duties now contained in Articles 1490 and 1498.
3. The Ministry of Land Reform is the appropriate Ministry to carry out the duties now imposed on the Ministry of Interior because agricultural communities have been created by the legislator as a measure of a land reform, a purely transitional measure to facilitate the evolution of some kind of individual ownership.
4. Although, as we have seen in Part One, great disandvantages are said to exist in the traditional "communal tenure" systems, the Code's choice must carefully be understood by the Ministry of Land Reform, the recommended "care-taker" of agricultural communities. In this respect, particular attention should be paid to the exposé des motifs of the drafter to avoid not only a duplication, but also a contradiction of policies regarding other more desirable arrangements.
5. There is one innovation of the Code concerning agricultural communities upon which the Ministry of Land Reform could capitalize in order to fulfil its duties of ensuring the establishment and maintenance of registers of immovable property. ${ }^{310}$ We have seen that the ownership of traditional family, village and tribal land is vested in abstract entities, which could now be easily registered as owners. Thus, the Ministry may simply register the names of the family, village and tribal land and leave the problem of who is a member of such communities entitled to land rights to the communities themselves. The names of the members of such communities is, therefore, irrelevant for the purpose of registering their land.
6. It is the avowed aim of the Government in its Second Five Year Plan ${ }^{311}$ to make land tenure uniform in the Empire. The direction in this respect is towards
7. Ministers (Definition of Powers) (Amendment No. 2) Order, 1966, Art. 18, Order No. 46, Neg. Gaz., year 25 , no. 23.
8. Id., Art. 18 (f).
9. Imperial Ethiopian Government, Second Five Year Development Plan (1955-1959) E.C.) 19631967 G.C.), 1962, pp. 326-329. Compare Lawrence and Mann, cited above at note 52, p. 315.

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individual tenure, which we have seen is the most prevalent form of tenure. Given, then, that "communal tenure" will be transformed into individual tenure and the Code's choice as a first step to vest the ownership of the land in question in an "individual" abstract entity, the Ministry of Land Reform, the organ in charge of land reform, must take the following steps concerning agricultural communities.
7. It must endeavor to induce agricultural communities to draw up their own charter. Unless this is done, the steps taken by the Code will remain ineffective for a long period of time.
8. The Ministry could profitably use M. David's invaluable draft as a model charter which it could easily reproduce and distribute in the areas governed by Articles 1489 ff .
9. The distribution of this "model charter" is mainly for the purpose of informing the communities concerned as to their "new" mode of living, and particularly to provide a concrete example of $a$ kind of charter which they may draw up.
10. Once this distribution is carried out and the communities concerned sufficiently "briefed," they could either be asked to draw up a similar charter, a difficult undertaking, or to select persons who could represent them in the drawing up of their charters in cooperation with the Ministry of Land Reform, perhaps an expensive process.
11. The ameadment of the Code must, in other respects, be governed by two major consideration: the classification of the concepts used and a re-introduction of some provisions of the earlier draft.
12. Among other things, the one offending word in Article 1489 likely to be, and to have been, a source of confusion and uncertainty, "collectively", may be eliminated without fear of destroying anything. Article 1489 may, thus, read. "Land ... shall be exploited in accordance with custom and tradition." That, indeed, was the intention of the legislator.
13. In view of the fact that the purpose of Article 1490 may not be realised in the foreseeable future, even under the dedicated guidance of the Ministry of Land Reform, some of the provisions of the earlier draft may be re-introduced to supply flesh to the skeleton provisions of the Code.
14. In this respect, the provisions on the assembly of family heads, among other things, may be re-introduced leaving the quorum and the formal decisionadopting techniques to the communities concerned which, given their background, would certainly wish to operate on a much more informal basis. The provision on "collective farming" may fruitfully be introduced to offer alternatives as to how land may be cultivated, thus perhaps laying the foundations for the evolution of a kind of cooperative farming, the technique most likely to promote economic productivity in view of the relatively less generous natural endowments of the northern communities, at least.
15. The Code, under its amended version, may require agricultural communities to draw up their charters. This, it is suggested, may be used only if no other measure can be used because it is likely to breed disrespect for the law as the Code will definitely remain a dead letter for many of the communities concerned.

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

## APPENDIX

## A. Excerpts from the Original Draft

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

## "Section I. The charter of Agricultural Communities

## Art. 1. Existence of an agricultural Community

[The text is identical with Article 1489 of the final draft]
The charter of the agricultural community shall contain indications proper to identify the community to which it applies.

## Art. 7. Members of the Community

(1) All persons, without distinction of sex or age, who have their habitual residence on land belonging to a community and who live principally by the exploitation of such land shall be considered as the members of the agricultural community.
(2) A person does not lose this quality of membership in a community where being instructed or for the service of the Ethiopian state provisionally fixes his residence in another place.
(3) All agreements contrary to the provisions of this Article shall be null.

## Art. 8. Identification of land

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

## Art. 12 Mode of exploitation and measure of collectivisation

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

## Art. 13. Private allotment of land

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

## Art. 14. Common enjoyment of land

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

## Section II. The Organs of the Community

## Art. 21. Prohibited derogations

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

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(2) Similarly, all rules which lead to the deprivation of a family of all representation in the assembly, or which restrict its rights to freely choose its representatives among the members of the community shall be null.
(3) All rules which permit members of the community to be represented by a stranger, or which allow strangers to take part in the votes of the assembly of the community shall be null.

## Art. 35. Recourse against a decision of the assembly

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

Art. 38. Alienation and mortgage
(1) The community may not alienate, mortgage or give antichresis on land belonging to it except with the authorisation of the Minister of Agriculture.

## Art. 40. Usucaption

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

## Art. 44. Contracts and lawsuits

(1) An agricultural community may conclude contracts [contrats] through the intermediary of its representatives.
(2) It may, through the intermediary of its representatives, sue or be sued.

Art. 47. Responsibility of the Community
(1) An agricultural community is responsible for the acts and omissions of its administrators [gérants] and employees when these acts or omissions were committed in the execution of functions incumbent upon the administrators or employees, and they have incurred liability.
(2) The community is similarly held liable where it is unjustly enriched.
(3) The provisions of the title Other Sources of Obligation shall apply to such cases.

Art. 48. Creditors of a Community or of its members
(1) The creditors of an agricultural community may seize [saisir] the movabls property of the community which is not indispensable for the exploitation of ite land or the maintenance of its members.
(2) They may not seize other property except with the authorisation of the Minister of Agriculture.
(3) Creditors of the members of the community have no right over the property of the community.

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

Art. 49. Role of the assembly
(1) The assembly of the community shall fix the mode of exploitation of land belonging to the community.

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## Art. 54. Right of exploitation of cultivable land

(1) Arable land may be divided into private allotment for the benefit of members of the community.
(2) It may, on the other hand, be cultivated in common.

Art. 61. Directions concerning cultivation
(1) The assembly of an agricultural community may ... decide the mode of cultivation to be followed.
(2) A beneficiary of a lot shall be held to cultivate it conformably to the directives which he has thus received.

## Art. 64. Common CuItivation. 1 Principle

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

## Section V. Control of an agricultural Community

[No provisions appear to have been taken from this section]
B. Discrepancies between the various versions of the Code.

## Art. 1489.

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

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

## Art. 1490

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

Art. 1490
(c) "Authorised representative" must read "the organs qualified to represent." Note that although the wording of Subarticle(d) in all versions gives the impression that "other resources" means resources other than land, what is really meant, as we have seen, is resources other than cultivable land.
Art. 1492
The Amharic for "social condition" may be translated as "social status", perhaps better conveying what the drafter had in mind.

Art. 1493
(2) The requirement of a "written permission" is absent in the two other versions of the Code.

## Art. 1494

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

## Art. 1495

Note that this article has a Subarticle (3) contained in the corrigenda, p. 583 of the Code.
(2) The "written permission" requirement is absent in the other versions.

Art. 1496
The Amharic version for the first time uses a term which gives correct indications of the "land" contemplated under this provision. The term is "development" of land, always used in connection with cultivable land.
Art. 1497
(1) The French for "exploited collectively" is "framed in common". The Ambaric is vague.
(2) Note the French "diverse lands" (diverses terres) indicating that what is contermplated is all community land.

Art. 1498
(1) The two other versions do not impose a positive duty on the Ministry of Agriculture. The words used are "to endeavour to obtain" (s'efforcer d'obtenir).
(2) Note that "some usages" is a translation of "some of these [customs]". The first "custom" must be in the plural.
Art. 1499
In the French original, unlike the Amharic and English versions, the relationship of Articles 1499 and 1500 is one of principle and specific application, and are entitled "1. Principle" and "2. Public Order" respectively.

Article 1500 must be entitled "Recourse to the courts".
(2) The requirements of the latter part of this Sub-article are cumulative. "Or justice" should read "and justice".

## Art. 1500

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

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# INCOME TAX EXEMPTION AS AN INCENTIEXE TO INVESTMENT IN ETHIOPIA 

by Timothy P. Bodman

Introduction
In order to encourage development, Ethiopia offers exemption from income tax for certain kinds of enterprises which invest more than a stated amount of capital. ${ }^{1}$ Ethiopia is not unusual in this respect; many developing countries have similar provisions. ${ }^{2}$ The purpose of this paper is to discuss the use of income tax exemption as a technique to encourage economic development and, more particularly, to consider the desirability of the use of that technique in Ethiopia. This paper will draw heavily on the extensive research that has been done on the income tax exemption laws of Mexico ${ }^{3}$ and Puerto Rico. ${ }^{4}$ Very little material is available on most developing countries, including Ethiopia. The focus of this discussion of Ethiopia's income tax exemption law, therefore, is of necessity on its structure, and not on its actual implementation, except to the extent that conversations and correspondence with people who have had legal experience in Ethiopia permits.

## I. History of Business Income Tax Exemption in Ethiopia

There was no exemption provision designed to promote foreign investment in either of Ethiopia's first two income tax laws, Proclamation No. 60 of 1944 and Proclamation No. 107 of 1949. Income from agricultural activities was exempted under these laws, and it continued to be until $1967^{5}$; but the reasons for its exemption presumably were unrelated to any attempt to attract foreign capital. Although some enterprises may have had exemptions on an ad hoc basis to encourage investment, the first official mention of a general policy of using income tax exemption to encourage investment was in a notice published by the Minister of Finance in 1950, It reads in part, as follows:

The Imperial Ethiopian Government has decided upon a general working policy for the encouragement of foreign capital investment in Ethiopia of enterprises deemed to be beneficial to the country. For the achievement of this policy, the Government is prepared to grant special facilities to new enterprises started with foreign capital. The following are the benefits which are calculated to stimulate confidence on (sic) foreign investors of their status in Ethiopia: ${ }^{6}$

1. Investment Proclamation of 1966, Proc. No. 242 of 1966, Negarit Gazeta, Year 26 No. 2.
2. International Chamber of Commerce, Taxation of Income Originating in Countries in Process of Development (1959).
3. Ross \& Christensen, Tax Incentives for Industry in Mexico (1959), (hereinafter cited as Ross \& Christensen).
4. Taylor, Industry Tax-Exemption in Puerto Rico (1957), (hereinafter cited as Taylor).
5. The exemption was ended in Proclamation 255 of 1967, Negarit Gazeta Year 27, No. 4 (1967).
6. Notice No. 10 of 1950, Negarit Gazeta Year 9, No. 6, p. 15 (1950).

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New enterprises will be free from payment of profit tax for five years from the date production is started.
The notice also allowed an exemption from customs duties on "necessary machinery" for the "installation of the factory;" indicated that the government would be flexible in its requirements for Ethiopian participation in enterprises initiated by foreigners; and stated that arrangements could be made for remitting a percentage of profits abroad.

The notice applied only to "enterprises deemed to be beneficial to the country" although it is not clear who was to make this determination.? Only "new enterprises" were to be granted the income tax exemption. No limitation to this broad category was stated in the notice, but a limitation may be inferred if the customs duty exemption section of the notice is read as modifying the income tax exemption. The former granted exemption from customs duty on machinery for "the factory," which perhaps indicated that "enterprises" in the income tax exemption provision meant manufacturing enterprises. The absence of any limitation may be inferred with equal justice, from the reference of the introductory paragraph of the notice to "enterprises deemed to be beneficial to the country." This category presumably would include enterprises other than manufacturing enterprises.

The ambiguity of the notice may be explained by the fact that it was only a "statement of policy." The notice seems to have had no legal force of itself. Rather, it seems to have been in legal effect merely as an announcement of the policies that the Minister of Finance and other government officers intended to follow in exercising the discretion given to them by other laws. The phrasing of the notice, therefore, need not have been as precise as that of an enactment having the force of law.

The next step in the evolution of Ethiopia's use of income tax exemption to encourage investment was the Income Tax Decree of $1956 .^{8}$ Article 19 of the Decree, although it did not expressly withdraw the 1950 Legal Notice, provided that:

Industrial, transport or mining enterprises investing a capital of not less than Eth. $\$ 200,000 \ldots$ may be exempted from income tax. Such exemption shall not exceed a period of five years from the beginning of their activities.
The decree thus defined the enterprises eligible for the exemption, and a minimum investment requirement, $\mathrm{E} \$ 200,000$, was established for the first time. However, there was no requirement in the Decree that the enterprise be "new;" apparently, an existing enterprise could have qualified for exemption under the Decree. Although the Decree was more detailed than the Notice of 1950, in at least one way, it was less clear in its terminology. Whereas the Notice provided that the exemption was to be five years "from the date production is started," the Decree stated that it was to be for five years "from the beginning of (the enterprise's) activities."
7. Presumably the determination was made by the Emperor with the advice of the Minister of Finance.
8. Negarit Gazeta Year 16, No. 1, p. 1 (1956).

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Since the Decree did not define "activities," the five year period might begin to run well before the enterprise engaged in any profitable activity, and the value of the exemption might have been considerably diminished.

The Income Tax Decree was superceded by the Income Tax Proclamation of $1961,{ }^{9}$ which further refined the income tax exemption provision. Article 19(a) provided that new industrial, transport and mining enterprises which invested not less than $\mathrm{E} \$ 200,000$ before commencement of operations would be exempted from income tax for five years from the beginning of operations. It was thus made clear that the enterprise had to be "new," that investment had to be made before operations were begun, and that the exemption period began to run when operations were begun. Although all of these requirements create definitional problems of their own, the Proclamation was considerably more clear in its terms than was the Decree.

Article 19(a) of the Proclamation also required that proof of the amount of capital invested be submitted to the Minister of Finance, and that notification of the date of commencement of operations be made within thirty days thereof. These procedural requirements do not appear to have been intended to confer any discretion on the Minister, however. Article 19 provided that the enterprise "shall be exempted ..."to (Emphasis added). As long as all of the requirements of Article 19 were met, the enterprise appears to have been assured of the exemption.

Article 19(b) of the Proclamation empowered the Minister of Finance, upon recommendation of a special committee to be established by him, to grant exemption from income tax for a period "up to" five years to "existing industrial, transport and mining enterprises which invest additional capital of not less than five hundred thousand Ethiopian dollars ... in the extension of the enterprise ..."11 (Emphasis added). The extension had to be operated as "a separate technical unit with separate accounts," and the exemption only applied to "income derived from the operation of the new extension." The same reporting conditions of Article 19(a) were also to be met. Unlike the exemption under Article 19(a), however, the Article 19(b) exemption apparently was discretionary. The Minister of Finance made his decision on the recommendation of a committee, and the exemption could be granted for a period of time of five years or less.

Articles 19(a) and (b) of the Proclamation of 1961 were in turn replaced by Articles 5(1) and (2) of the Investment Decree of 1963. The structure of the provision remained basically the same, but a number of changes were made in its details. Eligibility for the exemption was extended to agricultural and touristic enterprises. Article 5(2), the counterpart of Article 19(b) of the Income Tax Proclamation, applied to an extension or expansion of the enterprise.

The minimum investment under Article 5(2) was reduced to E $\$ 40,000$. The period of the exemption under Article 5(2) was reduced to three years, while the Minister's discretion to provide for a shorter period seems to have been eliminated by deletion of the "up to" language.

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A further revision of Ethiopia's income tax exemption provisions was made by the Investment Proclamation of $1966,{ }^{13}$ presently in effect, which applies to all enterprises commencing operations on or after November 7, 1966. Perhaps the most significant change is the establishment, in Article 4, of a permanent Investment Committee:
which shall have as its principal purpose the study and determination of
measures to be taken with respect to facilities, tax exemptions provided
in this proclamation, and relative benefits and privileges to be accorded
to potential investors in order to stimulate and encourage capital investment
in Ethiopia. ${ }^{14}$
The structure of Article 5 of the Investment Proclamation of 1966 is basically the same as that of the Investment Decree of 1963. However, the Minister of Finance is to grant exemptions upon the determination of the Investment Committee rather than upon its recommendation. In addition, the minimum investment for an extension or expansion of an existing enterprise is lowered to ES 200,000 , the same investment as must be made by a new enterprise wishing to qualify.

## II. The Investment Proclamation and Foreign Laws

It will now be helpful to compare the provisions of the Investment Proclamation with the provisions of similar laws in effect in other developing countries. First we will survey the type of provisions typical of such laws, then return to the provisions of the Ethiopian law.

The period of the exemption and the extent of the relief
Income tax exemptions are granted for varying periods of time. Puerto Rico's 1948 act had a twelve year exemption period; the 1945 act reduced this to ten years. ${ }^{15}$ In Mexico, under the 1955 law, the period of exemption is ten, seven or five years depending on whether the industry involved is considered "basic," "semibasic" or "secondary." But an exemption period can be much shorter if it is granted under a "most favoured company"provision. Such a provision is found in both the Mexican and Puerto Rican laws. ${ }^{16}$ It operates to grant an exemption to all companies which produce the same product but only during the period of time for which the initial tax exemption granted continues in force. Without such a provision the company receiving the exemption might enjoy a substantial advantage over its non-exempt competitors.

The extent of tax relief can also vary. The exemption may relieve a company of all or only a part of its income tax liability for the period of the exemption. Under the 1955 Mexican law, for example, the Ministry of Public Finance and Public Credit is empowered to fix the tax exemptions or reductions to be granted after consulting with the Ministry of Economy; ${ }^{17}$ as of 1959, the exemption extend-
13. Proclamation No. 242 of 1966, Negarit Gazeta, Year 26 No. 2 (1966).
14. Ibid.
15. Kaufman, Income Tax Exemption and Economic Development (1959) p. 27 (hereinafter cited as Kaufman).
16. Ibid.
17. Law for the Development of New and Necessary Industries, Official Gazette, Jan. 4, 1955, Art. I (hereinafter cited as 1955 Mexican Law).

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ed only to $40 \%$ of the tax due. ${ }^{18}$ On the other hand, complete income tax relief is provided for in the 1948 and 1954 Puerto Rican acts, which also extend the exemption to property taxes and various municipal levies. ${ }^{19}$

## Eligibility for exemption

Income tax exemption laws usually do not give tax relief to all enterprises. According to Heller and Kaufman:

The most commonly encountered criterion (and in many statutes the only explicitly stated one) employed to ensure that ... income tax exemption (is) granted only to enterprises actually in need of a tax preference is that the product the enterprise manufactures be "new" to the country. ${ }^{20}$

The Mexican law of 1955 , for example, grants exemption only to "new" or "necessary" industries ${ }^{21}$ Both these classifications are subdivided into "basic," "semibasic" and "secondary" 22 in order to determine the length of time for which the exemption is to be granted. Which of the latter categories a given industry falis into depends on its importance to the development of the Mexican economy. The 1948 and 1954 Puerto Rican laws grant income tax exemption to "new" industries and to a list of existing industries, the encouragement of which is considered desirable. ${ }^{23}$ Similarly, the 1952 Ghana Income Tax Ordinance gives exemption to "pioneer industries," defined as industries which are "not being carried on in Ghana and... (for which) there is . . . favourable prospect for further development." ${ }^{24}$ The Philippine law extends exemption to "new and necessary" industries: the firm must also "operate on a commercial basis, contribute to a stable and well-balanced national economy, and in most cases import less than $60 \%$ of costs." ${ }^{25}$ The laws of these four countries appear to have a common objective: to encourage the development of industries which either have not been established at all or which are established but not on a scale adequate to the need of the country.

A common additional criterion limits exemptions to industrial enterprises. For instance, to qualify under the 1948 Puerto Rican act, an enterprise had to produce a "manufactured product," defined as "not only all products transformed from raw material into articles of commerce finished by hand or machinery, but also any product the value of which, in the judgment of the Executive Council, is substantially increased by processing, assembling or extracting." ${ }^{26}$ The 1955 Mexican act required that an enterprise seeking tax exemption add at least $10 \%$ to the value of the product it manufactured. ${ }^{27}$ This requirement was meant to insure that "the enterprise

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(would) contribute substantially to the national economy." ${ }^{28}$ There was also a requirement that $60 \%$ of all manufacturing costs be incurred within Mexico. This requirement imposed "a limit upon the percentage of direct costs which may be represented by raw materials from foreign sources." ${ }^{29}$

Provisions of this sort, limiting the exemption to manufacturing enterprises or requiring that the enterprise add a certain percentage to the value of the product, at least in part reflect a judgment as to the general course the country's development should take. To the extent that such provisions are effective, they tend to steer investment away from trade and the relatively simple processing of agricultural and other primary products (cleaning coffee, for example) to industry.

## The Ethiopian law

The Investment Proclamation differs in a number of respects from these laws. In general, these differences consist in the proclamation's more general terms, and concomitant lack of attention to a number of common and important problems.

The proclamation does not have a "most favoured company" clause. Under Article 5, an exemption can only be granted or disallowed. If a newly established enterprise would have a competitive advantage over an exising enterprise because of its tax exemption, then the Committee must choose between granting the exemption together with the advantage and denying the exemption outright. If an existing, enterprise could also be granted the exemption under a "most favoured company" clause, this problem would not arise. ${ }^{30}$

The proclamation also tends to be less strict in its requirements for eligibility for exemption. Under most statutes, "the conferral of benefits is confined to taxpayers who conduct their activities in corporate form ... (and benefits) are also typically confined to corporations that are domestically organised." 31 But in Ethiopia, as in Israel and Puerto Rico, ${ }^{32}$ exemption may be granted to enterprises of almost all types, ${ }^{33}$ without regard to the legal form or nationality of the enterprise.

A more important difference of this kind is that, unlike other nations, Ethiopia does not require that the exemption-seeking enterprise be in a "new," "necessary" or "pioneer" industry. The absence of such a requirement may mean that enterprises which do not require tax preference in order to become established will nevertheless receive it, depriving the nation of tax revenues which would be used to finance further development. To justify the absence of such a requirement, it might be argued that Ethiopia is at a lower level of economic development than many developing countries, and hence almost all enterprises may be considered "new," "recessary" or as contributing to Ethiopia's economic development. In addition, Article 5 of the proclamation provides that the exemption shall be granted by the
28. Mbid.
29. Id. at p. 70.
30. This problem may not be acute at the present stage of Ethiopia's economic development since there are so few existing enterprises which competition could seriously affect. It will become more acute, however, as economic development progresses.
31. Heller \& Kaufiman, p. 24.
32. 1d. at, p. 34, note 68 .
33. The only major omission is commercia enterprises.

Minister of Finance "upon the determination of the Investment Committce." 34 This determination can perhaps be used to limit exemption to enterprises that the Investment Committee feels would advance economic development in Ethiopia.

If the committee does have discretion of this kind, its determinations obviously are very important to the administration of the proclamation. The precise role of the Committee in the grant or denial of an application for exemption uader the proclamation is not clear, however, and this ambiguity could cause uncertainty in the mind of a potential investor. Article 5 of the proclamation tells the investor relatively little in this respect. For him to estimate his chances of receiving an exemption, he should also know the more detailed standards used by the Committee in applying the statutory requirements and also whether the Committee considers factors in addition to those enumerated in the statute, such as the value of the enterprise to Ethiopia's economic development. ${ }^{35}$ An outline of the standard applied by the committee could be published under Article 12 of the proclamation, which empowers the comittee to issue regulations; the writer understands, however, that the Committee has been slow to articulate and make generally known the standards it uses in making its decisions in the past. If the Committee is to make consistent determinations in a way which will further Ethiopia's economic development, it will have to develop general policies to facilitate its decision-making process and, equally important, make those policies known to the public.

One fruitful area for elaboration by the Committee is the definition of "industrial enterprise," one of the categories of enterprise specified in the proclamation as eligible for exemption. The lack of a definition of this term in the proclamation leaves open several important questions. Is an enterprise "industrial" if it adds only a small percentage of value to what it produces - for example a plant for assembling radios or buses from imported parts or a coffee cleaning plant? Should a certain percentage of the direct cost of the product be derived from Ethiopia before the Investment Committee determines, under Article 3 (2), that an enterprise is an "industrial" one? Questions such as these are answered to some extent by the Mexican and Puerto Rican laws, which include more complete definitions of the enterprises to be exempted.

## III. The Value of Income Tax Exemptions in Attracting Investment

The fundamental purpose of most income tax exemption laws is to promote economic development by making the investment climate more attractive than it would otherwise be. The law may be framed in terms that would cover both domestic and foreign investors, as is the Ethiopian law. ${ }^{36}$ However, developing countries usually do not have enough domestic capital to promote rapid economic development, and so it is primarily to the foreign investor that a tax exemption law is directed.

[^91]Thus, the crucial question in evaluating an income tax exemption law is whether it is effective in attracting foreign capital which would not have come, absent the exemption. If the enterprises that receive the exemption would have been established in any event, the government has sacrificed tax revenues and received nothing in return.

Many countries cite Puerto Rico's apparently successful income tax exemption policy as a reason for adopting a similar policy of their own. Taylor points out, however, that Puerto Rico is in a unique position vis-a-vis developing areas, and that this should be kept in mind in appraising the country's tax exemption policy:

Puerto Rico is the only area in the world that has the singular advantage of being within the tariff area of the mainland United States but not subject to federal taxes. ${ }^{37}$ and

Puerto Rico... is a unique tax exemption case; it is the only area within the United States economic and political complex in which it is possible for mainland enterpreneurs to obtain a virtually complete tax holiday for a limited period of time. ${ }^{38}$
The special relationship of the island to the United States is probably not given sufficient weight in determining whether income tax exemption will be as successful in other developing economies as it is thought by some to have been in Puerto Rico.

On the other hand, a survey by Taylor of companies which had recently located in Puerto Rico does give some support to the view that income tax exemptions have contributed to Puerto Rico's development. Forty-one out of forty-three companies cited the availability of the exemption as an advantage of Puerto Rico as an industrial location. ${ }^{39}$ In answer to the question, "Would you have started your new business in the absence of tax exemption?," thirty-seven out of forty-four firms questioned ( 84 per cent) "answered that they would not have initiated operations in the absence of this subsidy." ${ }^{40}$ However, Taylor discounts somewhat the impression these responses create, because of the "post-mortem nature of the inquiry." ${ }^{41} \mathrm{He}$ reasons that established firms have an interest in preserving tax exempt status, and so may tend to over-emphasize it as a motivating factor to encourage the government to retain the subsidy.

Ross and Christensen made a similar survey of Mexican firms. Their conclusion as to the effectiveness of income tax exemption as a stimulus is particularly interesting since Mexco's position is more akin to that of other developing countries than is Puerto Rico's. Ross and Christensen found that:

There appears to be no instance in the recent past when tax exemption was
the decisive factor in an investment decision in Mexico; in fact, there is probably no situation in which it was even a decisive factor .... (It) appears

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37. Taylor, p. 5.
38. Tbid.
39. Taylor, p. 124.
40. Id. at p. }129
41. Ibid.
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that in most cases the tax exemption possibility is not even taken into serious consideration when considering an investment in Mexico. ${ }^{42}$
If the purpose of income tax exemption is to attract foreign investment which would not otherwise have come, these findings indicate that such measures have not been successful in Mexico and they raise serious doubts as to the contribution they may make elsewhere. ${ }^{43}$ Other commentators have also expressed doubts as to the effectiveness of a tax exemption measure. ${ }^{44}$

One major reason for doubting the effectiveness of income tax exemption provisions is that it appears that income taxes are not an important factor influencing potential investors. Heller and Kaufman comment that:
in evaluating the utility of tax incentives, one crucial factor to be considered is that for many economically less developed countries the tax system is relatively unimportant, compared to other factors impeding development. and
since tax incentives are but one, and, especially in economically backward countries, only a marginal factor (in an investment decision), it is probably illusory to attribute any but marginal significance to their impact on the prospective investor's estimate of the congeniality of the "investment climate." 45
The force of these observations is even greater if the income tax rates in the exempting country are low. The basic rate on business income in Ethiopia is $20 \%{ }^{46}$ A surtax of $10 \%$ is imposed on income in excess of $E \$ 30,000^{47}$ and an additional surtax of $10 \%$ is imposed on income in excess of $\mathrm{E} \$ 150,000 .{ }^{48}$ These levels are raised in the case of corporations having paid-up capital of $E \$ 5,000,000^{49}$ or more. Only in a few cases would the effective rate ${ }^{50}$ of tax on all income exceed $25 \%$, which is a very modest tax rate by world standards.

Similarly, Taylor points out that tax exemption by state and local governments within the United States as an incentive for relocation of firms has not worked, because this factor alone is not enough to overcome other obstacles to investment in the locality such as "the cost of labor ... the distance from markets and the
42. Ross \& Christensen, 101.
43. Kauffman also doubts that the Puerto Rican income tax exemption provisions "were necessary elements in the investment decision." Kauffman p. 37.
44. See Heller \& Kauffman, op. cit.
45. Heller \& Kauffman, 60.
46. A Proclamation to Provide for Payment of Income Tax, Proclamation No. 173, Negarit Gazeta Year 20, No. 13, Art. 12(b) (i) (1961), as amended by Proc. No. 255 of 1967 , Negarit Gazeta Year 27, No. 4.
47. Proclamation No. 173, op. cit. supra p. 61, Art. 13(a).
48. Proclamation No. 173, op. cit. supra p. 62, Art. 13(b).
49. Proclamation No. 173, op.cit. supra p. 62, Art. 14.
50. The effective rate of tax is the total tax paid by the taxpayer divided by his total income. The marginal rate of tax, on the other hand, is the rate at which the taxpayer is taxed on each additional dollar of income. A taxpayer subject to both 10 per cent surfaxes under Schedule $C$ is taxed at a marginal rate of 40 percent - the government takes 40 cents out of each additional dollar of income. But his effective rate of tax wiil be lower because the 40 percent rate applies to only the top part of his income; the rest is taxed at $20 \%$ or $30 \%$.

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source of raw materials." ${ }^{\text {" }}$ The exemption has usually been of property taxes, which are relatively low. Ethiopia is in a position in the world community somewhat similar to that of a state which grants a property tax exemption in the United States. Exemption from a low tax, even in the case where the exemption is taken into consideration in making a decision to invest, will probably not be enough to persuade a hesitant investor to go forward if the primary reason for his hesitation is other cost factors.

Perhaps the strongest argument in favour of income tax exemption is that it "may engender a nonrational response from the potential grantee because it serves as an advertising lure which stimulates interest in the potentialities of an area." 52 However, the cost of this form of advertising may be more than the advertising is worth.

There is no great harm in an unsuccessful tax policy if it costs nothing. In the case of income tax exemption, however, the costs can be substantial. Most developing countries have few revenue sources to begin with, and to forgo taxation of a part of the industrial sector may seriously reduce government reveenues. The granting of income tax exemptions to industrial enterprises "increases the gap between basic development and the only reliable source of financing the annual costs of the development." ${ }^{53}$ In view of the considerable cost of granting exemptions, it may seem fair to place the burden of proof on their proponents. If it cannot be demonstrated clearly that an income tax exemption policy is fulfilling its purpose in attracting capital which would not otherwise have come, then perhaps the policy should be abandoned since the costs are so high. ${ }^{34}$

## IV. Alternatives to Income Tax Exemptions

Assuming that income tax exemption is not an effective measure for attracting new capital, what are some alternatives? Direct subsidies have been suggested by some writers. ${ }^{55}$ One form of direct subsidy might be a government guarantee of a certain percentage return on invested capital for a period of time. ${ }^{56}$ If six percent were guaranteed, for example, someone investing E $\$ 200,000$ would be assured of an annual return of E\$ 12,000 . If profits fell short of this during the period of time, the government would make up the difference. This would have the advantage of granting a benefit to all new investors and not just those who make a profit as is the

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case under the income tax exemption. ${ }^{57}$ The subsidy a company receives would be limited to this percentage return instead of extending to the total amount of profits and, since the income tax would be retained, the government would not lose revenue from this source. Under this scheme, however, the government would also have to subsidize losses which might be quite high, and a company which should go out of business might be kept needlessly in existence for the period of the subsidy. This objection might be met by subsidizing only a percentage of a company's losses; for example, up to $20 \%$ of invested capital each year for no more than three years in a row, for five years from the date of commencement of the enterprise. Taylor mentions a similar proposal which would tax "profitable firms and (underwrite) 50 percent of the losses of unprofitable units. (This) would have cost only about one-half of the amount expended on the present (Puerto Rican income tax) subsidy. In fact, it would have been possible to guarantee all new frms either a 15 percent return on intended investment in machinery and equipment, at a lower cost than the income tax subsidy."s8 Since many enterprises do not plan to make much of a profit in the first few years of operation anyway, income tax exemption is not a very great inducement to them. This kind of enterprise would find a guaranteed percentage return on invested capital more attractive than exemption from income tax.

Another proposal would retain the income tax exemption, but argues that "the relief should be tied to the amount of the capital investment without any limitation of the period of time (during which an exemption is allowed) at all." A company would not be taxed on income until an amount equal to its initial investment had been recouped. This would help the enterprise which has no profits in its early years. An enterprise which never makes a profit would not be taxed at all; neither would it receive a benefit, but "possibly there is no reason why such a business should be subsidized."

## Conclasion

It is doubtful that the income tax exemption provision of the Investment Proclamation of 1966 will be very effective in attracting foreign investment to Ethiopia. The exemption provision may even have an adverse effect if government officials consider it to be an important element in a program to encourage foreign investment, because it could divert attention from other efforts which may be less spectacular but more productive. In addition, the cost of the exemption may be higher than the benefits derived, and yet costs are very easy to overlook because they involve no direct expenditure by the government.

The appeal of income tax exemption as an inducement to foreign investment in developing countries, however, is strong. As long as other developing countries continue to grant such an exemption, the pressure on Ethiopia to do so will remain great.

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[^0]:    *Eds. Note: Arts. 1725 and $1727(2)$ provide for additional forms of contracts of guarantee. Under these articles a contract of guarantee must be in writing and attested by two witnesses. In this case it appears that the contract was attested by two witnesses.

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[^2]:    * Affirmed, Criminal Appeal No. 1032/60, Supreme Imperial Court, Div. No. 2.

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[^42]:    * LL.B. Haile Sellassie I University, 1969. This article was written originally as a senior paper for Prof. Harrison Dunning.

    1. "Land owned by an agricultural community such as a village or tribe shall be exploited collectively whenever such mode of exploitation conforms to the tradition and custom of the community concerned."
    2. R. David, De l'exploitation collective des Immeubles: Chapitre 1. Des Communautés Agraires, C.Civ. 51, (1957, unpublished) (not available).
    3. R. David, Exposé des motifs et commentaire des documents C.Civ. 59 et C.Civ 51 . relatifs au domaine public, à l'expropriation, et à l'exploitation collective des biens, Document C.Civ. 63 , (1957, unpublished) (not available), p. 3.
    4. Interview with H.E. Afe Negus Kitaw Yitateku, President of the Supreme Imperial Court, member of the Codification Commission, Nov. 13, 1967.
[^43]:    5. David, cited above at note 3, p. 3.
    6. Ibid.
    7. These are F. Ostini, Diritto consuetudinario dell'Eritrea (1957) and C. Rossini, Diritto consuetudinaria dell Eritrea (1916).
    8. "The traditional land tenure [of Eritrea] is interwoven with historical, social [factors] and customs of the inhabitants. Unless salient points of these interlocked subjects are related, the picture will not be clear. ..." Ambaye Zekarias, Land Tenure in Eritrea (1966), p. 1.
[^44]:    9. Mesfin Wolde Mariam, Some Aspects of Land Ownership in Ethiopia (A paper prepared in advance for the seminar on Ethiopian studies, 1965) (unpublished, Archives, Library, Faculty of Law, Haile Selassie (I University), p. 1.
    10. British Military Administration, Races and Tribes of Eritrea (1943), pp. 1-2.
    11. Id. p. 30.
[^45]:    23. British Military Administration, cited above at note 10, p. 35. The effects of this division are being minimized by the passage of time and the possibility of purchasing land.
    24. Nadel, cited above at note 13, p. 3.
    25. Ibid.
    26. Nadel, cited above at note 13, p. 7 .
    27. In the Mekkara Yesus community of Begemedir, Felashas (or Bete-Israelites) and Muslims do not, on the basis of race and religion, own land. Debebe Worku, the Land Tenure System in Mekkara Yesus Community and its Effects on the Agricultural Labour (1965, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), pp. 3-4.
    28. Customary Law of Serae, cited above at note 17, under "Blacksmiths."
    29. Customary Law of Logo Chewa (English translation by Yohannes H. Sellassie, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University).
[^46]:    30. British Military Administration, cited above at note 10, p. 37.
    31. Id., p. 36.
    32. Customary Law of Logo Chewa. cited above at note 29, Art. 15. Interestingly enough, Art. 15 is entitied "Land Tax."
    33. Customary Law of Logo Chewa, cited above at note 29 Art. 51.
    34. Customary Law of Serae, cited above at note 17, under "Miscellaneous"
    35. Compare Nadel, cited above at note 13, pp. 20-21.
    36. British Military Administration, cited above at note 10, p. 31. The BMA refers to these laws as codes.
    37. The present author has not been able to find any documentary information on the size of these groupings. However, comparable villages in Tigre, also envisaged by the Code, appear to be made up of $200-500$ persons. Interview with Ato Yoseph Gebre Egziabher, Law School, Nov. 5, 1967. In Kes Wolde Sellassie v. Grazmatch Gebre Egziabher Desta (Sup. Imp. Ct. 1959, Civ. App. No. 82/59) (unpublished), the court states that an Agricultural Community of the type under examination (and which is in Tigre) was made up of 188 persons and "administered" by "three elders."
[^47]:    38. F. Russel, "Eritrean Customary Law," J. Afr. L., Vol. 3 (1959), p. 102. Most of these laws were reduced to writing after the Second World War.
    39. Duncanson, cited above at note 12, p. 141.
    40. Id., p. 142.
    41. Customary Law of Adgina Tegeleba (Tigrigna unpublished, Archives, Library, Haile Sellassie I University). The author is indebted to Ato Alemseged Tesfaye, for the translation of the introduction and selected provisions of the this code of customary law.
[^48]:    42. Nadel, cited above at note 13, pp. 21-22.
    43. Ibid.
    44. Customary Law of Serae, cited above at note 17, under "Churches and Priests."
    45. Customary Law of Logo Chewa, cited above at note 29, Art. 49.
[^49]:    46. Customary Law of Serae, cited above at note 17, under "Churches and Priests."
    47. Ambaye Zekarias, cited above at note 8, p. 16.
    48. Ostini, cited above at note 7, pp. 88-94. The English translation of pages 88-94 which the present author quotes is by Tesfa Tsion Medhane.
    49. Individual ownership is reputed to be the most prevalent form of ownership in Ethiopia. See Demissie Gebre Michacl, Agrarian Reform: A proposal to contribute to Economic Development in Ethiopia (1964, unpublished, University Library), p. 47.
    50. Nadel, cited above at note 13, p. 45.
    51. lbid.
    52. Lawrance and Mann, "Communal Land Teaure in Ethiopia," Ethiopia Observer, Vol. IX (No. 4), pp. 314-315.
    53. Nadel, cited above at note 13, p. 8.
    54. Id., p. 1.
[^50]:    60. Ambaye Zekarias, cited above at note 8 , p. S. Cf. "The term resti defies simple translation because of the many and divergent customs associated with it in different communities. Perhaps the nearest English equivalent is allod, especially in the implied contrast with land occupied by tenure." Duncanson, cited above at note 12 , p. 144 , note 1.
    61. Nadel, cited above at note 13. p. 5.
    62. Ambaye Zekarias, cited above at note 8, p. 5.
    63. Note that Ato Ambaye appears to use the word "property" in the quoted statement as the equivalent of the word "rights".
    64. Customary Law of Serae, cited above at note 17 , under "Regulation of resti".
    65. Nadel, cited above at note 13, p. 5.
    66. Note that the term family land covers more than simply cultivable land. "The territory comprising the resti of a certain family is determined on the basis of cultivable fields, grass, wood, water and building areas (under it) ..." Ostini, cited above at note 7, p. 88.
    67. Nadel, cited above at note 13, p. 5 .
    68. Id., p. 6.
[^51]:    79. Id., Art. 20 and 22.
    80. Id., Art. 20 and 21.
    81. Customary Law of Serae, cited above at note 17, under "Aliens", "Residence and Immigration".
    82. Ibid.
    83. Ibid.
[^52]:    93. Ostini, cited above at note 7, pp. 88ff. Cf. Ambaye Zekarias, cited above at note 8, p. 13. This evolution, or more accurately "conversion" into some kind of community ownership has also been noted in Tigre. See Zegeye Asfaw and Teame Beyene, Report on Tigre province (1967, unpublished) (not available), pp. 3-4.
    94. Customary Law of Logo Chewa, Cited above at note 29, Art. 12.
    95. Customary Law of Serae, cited above at note 17, under "Regulation of Restl". This village "ownership" is known as desa (in Hamasien and Serae) and shehena in Akele Guzai. Those who are entitled to shares by virtue of descent from a one-time landowning family are called restegnatat and are contrasted to the new-comers, the machelai aliet (translated as aliens, forcigners or strangers).
    96. Ostini, cited above at note 7 , pp. 88 ff .
    97. As we will see, this was done for political reasons. The Italians had earlier undertaken a settlement project in Eritrea for the implementation of which it was necessary to acquire land. An attempt to acquire land was based on false assumptions as to the nature of land rights in Eritrea, and indeed in Ethiopia. See some of these in R. Pankhurst, "Italian Settle ment Policy in Eritrea and its Repurcussions, 1889-1896", Boston University Papers, Vol. 1 (1964), pp. 131ff.
[^53]:    104. Seifu Tekle Mariam, Consolidation of Fragmented Holdings in Communal Tenure Areas (1967, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University).
    105. Compare Nadel, cited above at note 13, p. 10.
    106. Customary Law of Logo Chewa, cited above at note 29, Art. 12.
    107. Ibid.
    108. Ostini cited above at note 7, pp. 88 ff
    109. Compare. "A son shall be given land upon the establishment of his own family, outside that of his parents. His parents shall help him establish it in the presence of the Chikka and three elders." Customary Law of Akkele Guzai, cited above at note 41, Art. 242.
    110. But see. "In the desa or shehena system a right to a share of land is solely based on residence, and other factors like descent play no part." (Emphasis added.) Amha Tsion Domenico, Allocation of Consolidated Units: Individual or Communal (1967, unpublished, Archives, Library, Faculty of Law, Haile Sellassie I University), p. 5. We have seen how important it is to be descended from a one-time landowning family.
    111. Compare Ambaye Zekarias, cited above at note 8, p. 15.
    112. Nadel, cited above at note 13, p. 13.
[^54]:    113. Lawrance and Mann, cited above at note 52, p. 315.
    114. Compare K. Benti-Enchill, "Does African Land Tenure Require a Special Terminology?" J. Afr. L., vol, 9 (1965), pp. 137-139.
    115. Customary Law of Logo Chewa, cited above at note 29, Art. 12.
    116. Id., Art. 19. Note that implicit in the "establishment" requirement is the prohibition to "own" two plots in two villages, thus, minimizing the temptations to sell one of them.
    117. Customary Law of Serae, cited above at note 17 , under "Regulation of Roads."
    118. Customary Law of Logo Chewa, cited above at note 29, Art. 26.
    119. Ibid.
    120. Id., Art. 16.
    121. Id., Art. 16.
    122. Ibid.
    123. Id., Art. 17.
[^55]:    124. Ambaye Zekarias, cited above at note 8, p. 26.
    125. Customary Law of Serae, cited above at note 17, under "Regulation of Grass."
    126. Ambaye Zekarias, cited above at note 8, pp. 22-23.
    127. Customary Law of Logo Chewa, cited above at note 29, Art. 31 and 32.
    128. Nadel, cited above at note 13, p. 22.
    129. Ibid.
    130. Customary Law of Serae, cited above at note 17, under "Regulation of Threshing Field."
    131. Customary Law of Logo Chewa, cited above at note 29, Art. 24 and 30.
[^56]:    132. Id., Art. 24.
    133. In order to be positive on this, the author carried out detailed interviews with Ato Alemseged Tesfaye (who has Iived in Serae), Ato Yohannes Habte Sellassie (who has lived in Logo Chewa and Akkele Guzai) and Ato Okba Michael Wolde Yohannes (who has lived in Hamasien). In addition, Ato Yoseph Gebre Egziabher (who has lived in Adwa and Enderta, Tigre) was interviewed. Nov. 7-10, 1967. They were unequivocal in their views.
    134. Ambaye Zekarias, cited above at note 8, p. 14.
    135. Compare Nadel, cited above at note 13, pp. 5-6.
    136. See, generally, Amha Tsion Domenico, cited above at note 110, pp. 36-45.
    137. "The extent to which these [evils] exist in the communal tenure regions of Ethiopia can admittedly only be guessed" Empasis added. Lawrance and Mann, cited above at note 52 , p. 315.
    138. Ibid.
    139. Ibid.
    140. Demissie Gebre Michael, cited above at note 49, pp. 61-62.
[^57]:    153. British Miitary Administration, cited above at note 10, p. 6 .
    154. IK, p. 23.
    155. S. Nadel, "Notes on the Beni Amer Society" Sudan Notes and Records, vol. XXVI, Part I (1945), p.3. But see British Military Administration, cited above at note 10, pp. 7, 23ff., according to which the Beni Amer tribe is composed of twenty-one divisions.
    156. Hisid.
    157. Id., p. 4.
    158. British Military Administration, cited above at note 10, p. 6.
    159. Nadel. cited above at note 155, p. 5.
    160. British Military Administration, cited above at note 10, p. 9.
[^58]:    161. Id., p. 7.
    162. Nadel, cited above at note 155, p. 18.
    163. Ibid.
    164. Ibid.
    165. ld., p. 24.
    166. Id., p. 25.
    167. Id., p. 31.
    168. Some of the Beni Amer lead a sedentary life. Id., p. 4.
    169. Id., p. 32.
[^59]:    173. The author cannot tell whether such right may be transferred.
    174. David, cited above at note 2.
    175. David, cited above at note 2, p. 3.
    176. 1bid.
[^60]:    183. The actual text is as follows. "La charte de la communaute preciseé la maniére dont les terres, selon leur nature, seront expoiltées, et la mesure dans laquelle d’autres biens, et le travail des membres de la communaute, seront mis en commun."
    184. David, cited above at note 2, Art. 14. In the light of the draft, "Other resources of the Community" in Art. 1491(d) appears to mean nothing but uncultivated or uncultivable land (i.e. forests and pastures).
    185. David, cited above at note 2, Art. 11.
    186. Id., Art. 15.
    187. David, cited above at note 3, p. 3.
    188. David, cited above at note 2, Art. 18-19.
    189. David, cited above at note 3, p. 3. These principles are contained in Art. 37, 40, 47 and 48 of the Revised Constitution of Ethiopia.
    190. David, cited above at note 2, Art. 21(2).
    191. Id., Art. 22(2).
[^61]:    192. Id., Art. 22(2). These are exceptions in case of urgency.
    193. Id., Art. 22(1).
    194. Id., Art. 23.
    195. Id., Art. 25.
    196. Id., Art. 27.
    197. Id., Art. 28.
    198. Id., Art. 31-33.
    199. Id., Art. 34.
    200. Jd., Art. 35.
    201. Yd., Art. 36.
    202. Id., Art. 38.
    203. Id., Art. 39.
    204. Id., Art. 40.
    205. Id., Art. 44. Cf. Art. 1494(1) of the Civil Code.
    206. Id., Art. 47(1).
    207. Id., Art. 47(2) and (3). Cfs. Art. 1494(3).
    208. David, cited above at note 3, p. 4.
[^62]:    209. Ibid.
    210. David, cited above at note 2, Art. 51 .
    211. Id., Art. 53(1).
    212. Id., Art. 53 (2). The right to a building site, governed by Art. $51-53$ of the draft, is re-
    ferred to as a "droit d'habitation" in the commentary. David, cited above at note 3, p. 4.
    Cf. Art. 1353 ff. of the Civil Code which deal with the right of occupation of premises (le droit d'habitation).
    213. Id., Art. 55.
    214. Id., Art. 56(2).
    215. Id., Art. 57.
    216. Yd., Art. 59.
    217. Id., Art. 60.
    218. Id., Art. 62 and 63.
[^63]:    219. Id., Art. 64 (1).
    220. Id., Art. 64 (3).

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

[^64]:    230. Id., Art. 83.
    231. Kd., Art. 84 (2).
    232. Id., Art. 86.
    233. Id., Art. 87 and 88.
    234. Id., Art. 89.
    235. Id, Art. 90.
    236. Id., Art. 91.
    237. Id., Art. 92. Art. 93 is a penalty provision. Directors who fail to communicate matters which ought to have been communicated to the bureaux under the draft were to be penally liable,
    238. The author of this article has not been able to trace any documents which contain the reasons of the Codification Commission's rejection of the draft. The final draft bas only the following introductory sentence: "The following text replaces C.Civ. 51." The first paragraph of this section is, therefore, based on information gathered through interview.
    239. Interview with H.E. Afenegus Kitaw Yitateku. He was a member of the Codification Commission and the official responsible for the carrying of the Civil Code through its parliamentary stages. Nov. 13, 1967.
[^65]:    240. David, cited above at note 3, p. 4.
    241. Another alternative could have been to accept the draft, but suspend its application for a period of time. Compare Art. 3363 of the Civil Code suspending the applications of title X of the Code on registration.
    242. As we will see, this is not the meaning of the term "collective exploitation" in the final any more than in the original draft.
[^66]:    243. This is clearly aimed at creating an environment conducive to the development of cooperative farming.
    244. Civ. C., Book III, Titles VII and VIII respectively.
    245. Cf. Civ. C., Art. $1.205,1225$ and 1410 ff , in particular.
    246. Civ. C., Art. 1257(1).
[^67]:    247. Implicit in Civ. C., Art. 1258.
    248. Civ. C., Art. 1276-1277.
    249. Civ. C,, Art. 1263.
    250. Civ. C., Art. 1266.
    251. J. Carbonnier, Droit Civil Tom $I$-Les Biens et les Obligations \{1956, pp. 88-89.
    252. Civ. C., Art. 1259, 1260.
    253. Civ. C. Art. 1265.
[^68]:    254. Civ. Code Art. 1266.
    255. It has been said of the "communal land tenure" that it is "... communal ownership of land which means that a given plot of land is owned by a family, tribe or a village." Seifu Tekle Mariam, cited above at note 104, p. 33. This definition appears vague.
    256. Nebiyelul Kiffe and others, Land Tenure Systems in Ethiopia and Analysis of the Reform's Undertaken (1966, unpublished, not available), p. 9. In this work, family members are said to be "perpetual joint owners" of their land. One obvious defect of this description is that the term "perpetual joint ownership" is given a meaning quite unintended by the code. Cf. Art. 1276. The drafter illustrates perpetual joint ownership by the ownership of wells, pits, roads and sepulcher where it is in accordance with the nature of these to be held in joint ownership and their division is impossible. R. David, Commentaire du Titre: de la Copropriété, De l'usufruit ef Des autres Droits Reels (C. Civ. 43), C. Civ. 45 (1956, unpublished) (not available), p. 1. Other commentators have stated that in those situations, family members have only use rights over their plot of land. Lawrence and Mann, cited above at note $52, p .315$. It must be noted that it is inaccurate to use the term "usufructuary" to describe the rights of villagers over village land and family members over family land. Note the characterstic features of usufruct in Art. 1309(1) and 1322 of the Code in particular.
[^69]:    257. David, cited above at note 3, p. 3.
    258. The original draft contained no proviso comparable to that of Art. 1168(1). See Girma Seliasie Araya, cited above at note 89, p. 24.
    259. R. David, Exposé des motifs et commentaive du titre: Personnes Morales et des Patrimones d'Affectation. (Document C. Civ. 36), (Document C. Civ. 37) (1956, unpublished) (not available), p. 4.
    260. rbid.
    261. Ciy. C., Art. 394-403, and 404ff., respectively.
    262. Civ. C., Art. 1495(1).
    263. Civ. C., Art. 1495(2) read in conjunction with Art. 1495(1).
[^70]:    264. A contrario from C. Civ., Art. 1495(1).
    265. C. Civ., Art. 1495(3).
    266. Civ. C., Art. 1490.
    267. Civ. C., Art. 1498(1).
    268. Civ. C., Art. 404.
    269. Civ. C., Art. 459 and 460.
    270. Civ. C., Art. 394ff.
    271. David, cited above at note 256. p. 4.
[^71]:    272. Civ. C., Art. 397.
    273. Compare A. Martin-Pannetier, Elèments a"Analyse Comparative des Etablissements Publics en droit Francais et en droit Anglais (1966), pp. 2-23, devoted to an examination of the meaning of the term "public establishments," and A. de Laubadere, Traite Elementaire de Droit Administratif (1963), pp. 159-167.
    274. The drafter has not commented upon the meaning of the term "public establishments" in his commentary. David, cited above at note 256 .
    275. Martin-Pannetier, cited above at note 273, p. 23.
[^72]:    276. Civ. C., Art. 1493(1).
    277. See, for instance, Tefera Sebhat and Eskia Sebhat V. Bahata Tesfaye et. al., (Sup. Imp. Ct., 1957), J. Eth. L., vol. 2, p. 202.
    278. The reader may be reminded here that the original draft specifically excluded the usucaption of the land of an agricultural community by members and strangers. David, cited above at note 2, Art. 40. The omission of such an express exclusion in the final draft is not significant in view of the fact that the original draft of Art. 1158 had no proviso for the exclusion of the usucaption of family land.
    279. The conflict really is between what had been intended and what is conveyed by the plain words of the proviso of Art. 1168(1).
[^73]:    280. Planiol et Ripert, cited above.
    281. FAO, ILO and UN, Progress in Land Reform; Fourth Report (1966), p. 166.
    282. Civ. C., Art. 1447fi. Note, in particular, the title "collective Exploitation of property," Title IX, under which Art. 1444ff, are found.
    283. FAO and UN, African Agricultural Development: Reflections on the Major Lines of Advance and the Barriers to Progress (1966), p. 49.
    284. David, cited above at note 2, Art. 1.
[^74]:    285. Id., Art. 69 (for instance).
    286. Id., Art. 54 (for instance).
    287. Id., Art. 64 (bearing this titte).
    288. Civ. C., Art. 1497(1), (2)
    289. Civ. C. Art. 1497(1).
    290. Civ. C., Art. 1497(3).
[^75]:    297. David, cited above at note 3, p. 3.
    298. Civ. C., 1493(2).
    299. Civ. C., Art., Art. 1495.
    300. Civ. C., Art. 1499.
    301. Civ. C., Art. 1499(1).
    302. Civ. C., Art. 1499(2).
    303. lbid.
[^76]:    304. Woizero Wellete Sellasie Gebre Medhin V. Balambaras Gebre Kidan Abraha (Sup. Imp. Ct., 1959, Civ. App. No. 1031-59) (unpublished).
    305. The same result was reached in Aregawie Naizgie V. Arega Menkir (Sup. Imp. Ct., 1959, 1959, Civ. App. No. 111-59) (unpublished). The reasoxing in this and the preceding case is almost identical.
    Through the generous permission of the President of the Supreme Court, H.E. Afenegus Kitaw Yitateku, the present author had been allowed to examine Supreme Court files. Having gone through the files of 1958 and 1959, he was able to trace three cases in which Art. 1489-1500 are mentioned. The reasoning of the Court in the three cases has been summarised above. The third case is not cited simply because in that case the Court reiterates the reasoning contained in the two other cases.
[^77]:    306. Art. 1491(a) in conjunction with Art. 1492.
    307. Art. 1491(d) in conjunction with Art. 1492.
[^78]:    308. Or, it may simply lack the necessary finance and personnel.
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[^89]:    9. Proclamation No. 173 of 1961, Negarit Gazeta Xear 20 No. 13 (1961).
    10. Ibid.
    11. Ibid.
    12. Investment Decree of 1963.
[^90]:    18. Kauffiman, p. 27.
    19. Id. at, p. 28
    20. Heller and Kauffman, Tax Incentives for Industry in Less Developed Countries (1959) p. 42 (hereinafter cited as Heller \& Kauffman).
    21. Ross \& Christensen, p. 55.
    22. Ibid.
    23. Kauffman, op. cit.
    24. A.H. Smith, Tax Relief for New Industries in Ghana, 11 National Tax Journal 362 (1958).
    25. Kaufiman, p. 27.
    26. Taylor, p. 51.
    27. Ross \& Christensen, p. 69.
[^91]:    34. Investment Proclamation of 1966 , Art. 5.
    35. Of course, how applicants in a similar position have been treated in the past will also be helpful in estimating one's own chances of success.
    36. See, e.g., 1955 Mexican Law, Art. I: "The purpose of the present law is the development of national industry through the granting of tax concessions which stimulate the establishment of new industrial activities and the better development of existing ones."
[^92]:    51. Taylor, p. 5.
    52. Kauffiman, p. 24.
    53. A.H. Smith, op.cit. Supra note 8, at, p. 367.
    54. Taylor comments that "the aggregate cost of exemption ... has been inordinately high. Much of the burden is in the nature of indirect effects and disguised social costs... The principal disadvantages of tax exemption are: (1) The direct revenue loss of tax exemption is sizeable but is largely concealed and indeterminate. (2) Tax exemption lacks selectivity to a marked degree. (3) Tax exemption tends to become permanent and to proliferate to other taxable areas of the economy, as well as to other political areas. (4) The administration of tax exemption is difficult and burdensome. (5) Tax exemption frustrates the achievement of a fair distribution of the tax burden." Taylor, p. 152.
    55. Supra, note 32.
    56. Some sort of limitation as to the reasonableness of the investment in relation to the business activity would have to be made to prevent inflated investments for the purpose of taking advantage of the subsidy.
[^93]:    57. Since the income tax is levied on profits, only a firm that begins to operate at a profit before the end of the exemption period would receive any benefits from an ancome tax
    exemption.
    58. Taylor, p. 118.
