HIERARCHY OF LAWS IN ETHIOPIA

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In a report to the 6th International Congress of Comparative Law on the Regime of Assembly in Ethiopia[1] I have set forth some instances of the Ethiopian Constitution's minor borrowings from the United States Constitution. But the major impact of the United States Constitution[2] seems reflected (in strong overtones) in Art. 122 of the Ethiopian Constitution providing that all acts inconsistent with the latter shall be void.[3] I shall now discuss the local significance of this sweeping article within the frame of a still wider problem, that of the hierarchy of Ethiopian laws in general.

Hierarchy is a chain of subordination. As it does between persons, it exists between laws. On top is the Constitution. Below is ordinary legislation. Still below are the Administrations' general orders and particular decisions, in turn subdivided into higher and lower. The lower should not contradict the higher. This principle is simple enough; its implementation is less so. The following analysis is based chiefly on the Ethiopian Constitution of 1955, to which I shall refer by articles (Art.). The term, "Administration", will denote the executive branch of Government. I shall discuss, consecutively, the respective hierarchical standing of (1) Constitutional, (2) Legislative, and (3) Administrative enactments:

1. CONSTITUTION

A constitution is "... superior to ordinary law and ... places primary principles above the fluctuations of politics. A Constituent power exists ... apart from the ordinary Legislative power."[4] Under the Ethiopian Constitution (Art. 131), three-fourths of each chamber's membership form, with the Emperor's approval, the superior "Constituent" power.

An "unconstitutional law" should be of no effect. But *e. g.*, in pre-1958 France "... there exists no power having the authority to pass upon it and annul it ... Such is not the case in the United States; the Supreme Federal

1. See Journal of Ethiopian Studies, Vol. I, No. I, p. 79.
2. Art. VI., section 2.
3. Another major impact is discernible in the whole of Chapter III. (Rights of the People).
4. M. Planiol, *Treatise on the Civil Law*, transl. 1959 by Louisiana State Law Institute, No. 150.

Court has a right to verify the constitutionality of laws."[5] What is the Ethiopian position in this respect?

In Ethiopia, the Constitution and international treaties "... shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith, shall be null and void" (Art. 122). "Legislation" here apparently means the Parliamentary statute-law (Arts. 88-90). "decrees", the emergency legislation under Art. 92; "orders", the general administrative rules;[6] "decisions", the particular administrative acts. It, therefore, follows that any unconstitutional enactments, of whatever kind they be, shall be null. But who shall find them to be such and make them of no effect, and how shall this be done? Where an enactment's nullity depends on its unconstitutionality, the latter must be first stated to exist, which involves subtle or controversial interpretation processes (as shown by the United States cases or our own "federal" cases) affecting the State and being often beyond the average court's capability. Under our now abolished[7] federal system, such cases of unconstitutionality were dealt with by the Federal High Court and the Federal Supreme Court pursuant to Proclamation No. 135 of 1953.[8] It seems that only cases concerning Eritrea were brought before those courts. In any event, the latter seem to be now in liquidation, as are other Federal institutions. The unified Empire appears to have no courts specially empowered to deal with constitutionality problems. Is therefore every Ethiopian courts competent, in every relevant case, to pass on the delicate questions of constitutionality? On the face of Art. 122, one may be tempted to take this view. But the dearth of significant cases and the restrictive content of Art. 62. (see below) seem to go against such a sweeping approach. Tentatively, the following analysis is offered regarding *unconstitutional* (a) Administrative, (b) Legislative, (c) Judicial acts, and (d) the Emperor's special position:

a) Art. 62 allows residents to sue the *Administration* (the "Government" in its Executive sense, together with its subdivisions: Ministry, Department,

5. *Ibid,* No. 156
6. The sovereign orders or decisions, however, taken pursuant to the Emperor's Constitutional prerogatives (Arts. 26-36), *e.g.*, under Art. 36 or 27, stand in a distinct category in that they are basically *non*-subordinate to ordinary legislation (see *infra*). This important category is reserved for separate discussion and will be only incidentally mentioned in the present paper.
7. See Order No. 27, of 1962: since the liquidation of Federal institutions and cases is gradual, the following analysis is open to temporary qualifications.
8. Which is now impliedly abrogated, together with other federal proclamations, by a. m. sovereign order abolishing the Federal system (after unanimous parliamentary votes to this end). For a qualification of this proposition, see note 7.

Agency, etc.) in the ordinary courts for acts "wrongful", which term obviously includes the unconstitutional orders or decisions contemplated by Art. 122.[9] The questions of unconstitutionality will here be settled solely in relation to the particular litigants involved, with no wider effects (relativity of judgments), so that particular awards under Art. 62 will not carry annulment of a general enactment, though they may indirectly induce its revocation.

b) The language of Art. 62 is perhaps open to interpretation as to whether the same remedy will apply regarding unconstitutional *legislation* initiated by way of Parliament. Conceivably not, though only future cases, if any, could enlighten us on this point. Incidentally, since the difference between the Legislative power and the Constituent power lies only in the voting majorities required (Arts. 87 and 131), unconstitutional legislation will probably occur – if at all – only rarely.

c) As to unconstitutional *judgments,* who is to implement Art. 122 on their nullity, since it is precisely the judges who, by virtue of Art. 62, pass on the wrongs of unconstitutionality? Final judgments are presumed correct both as to fact, and as to law *inter partes,* be it Constitutional or other. And where appeal or review is still open, it can in any event be brought on any relevant ground, be it of unconstitutionality or other. It follows that Art. 122 adds nothing to the law regarding judgments. It is gratuitous and meaningless in this respect.

d) By virtue of Art. 36 the *Emperor* is Himself the supreme sovereign guardian of the people's constitutional rights and liberties as set out in Arts. 37-63. In these and other matters, everyone has the traditional "right to present petitions to the Emperor" (Art. 63), Who also holds the supreme power of judicial review pursuant to the the spirit of Art. 35 as implemented by Art. 183 of the Criminal Procedure Code and the (suspended) Courts Proclamation of 1962 (Art. 9). As seems implied by Art. 26 *ff,* the Emperor, having supreme authority in all fields, is alone judge of the constitutionality of His *own* judgments (cf. *supra*) or legislative approvals (Art. 88) or sovereign acts (Arts. 26-36; cf. note 6), from which, it submitted. there should lie no appeal to persons other than Himself in the capacity appropriate to the occasion. This view, supported by practice (no cases *contra*), is in the logic of our system where, in accordance with a sensible tradition, there is no

9. See also Civil Code Arts. 2035, 2126, 2140, 2033 (2), and, incidentally, Art. 2138 on immunities.

real "separation of powers" at the *top* (incidentally, it may be inappropriate even to suggest that a separation of supreme powers doctrine – completely alien to the national tradition – be imported from abroad).

2. LEGISLATION

Legislation by Emperor *cum* Parliament under Arts. 88-90 or by imperial decree under Art. 92[10] constitutes the ordinary law between the Constitution above, and *non*-sovereign Administrative enactments below. Such legislation's dependence on the Constitution under Art. 122 may be, as stressed above, somewhat platonic. Conversely, such legislation's enforceability as against illegal lower enactments, although unmentioned in Art. 122, is a more practical proposition because under Art. 62 the *Administration* can be sued for any "wrongful" acts, which would include both those unconstitutional and those infringing ordinary legislation.

3. ADMNISTRATIVE ENACTMENTS

All Administrative acts are subordinate to the Constitution, and the *non*-sovereign ones (including, *e. g.*, those published by "Legal Notice") to ordinary legislation. There is a great variety of administrative enactments, and their nomenclature was far from unified, as a glance at past "Negarit Gazetas" will show. It will suffice here to stress that while *within*, respectively, the Constitutional or legislative category, rules are normally (subject to interpretation) equal. Administrative acts are further subordinated to one another:

a) Acts of lower authority obviously may not contradict those of higher authority;

b) According to world precedents and the "communis opinio doctorum"[11] an authority's particular decision may not infringe its own general rule or order. Until charged or repealed, such rule stands above its maker.

Infringement of either principle (a) or (b) or, *a fortiori*, of superior legislative provisions or of constitutional precepts, would be an illegality amounting to a "wrongful" act in the sense of Art. 62 of the Constitution and Art. 2035 plus

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10. There is hardly a difference, *in effect*, between legislation proclaimed pursuant to Arts. 88-90 and legislative decrees based on Art. 92. This Article, poorly drafted, is confusing. In actual constitutional practice, imperial decrees issued between Parliament's sessions:
    a) may repeal prior legislation;
    b) do not lapse upon non-submission to reconvened Parliament, but continue in force until positively repealed. Parliamentary approval, if any, merely changes the terms of legal reference
11. *E. g.*, G. Vedel, *Droit Administratif*, Paris, 1958, vol. I, p. 161.

2126 of the Civil Code, and would thus enable the ordinary courts to grant relief where appropriate. But Art. 62 also provides a "right of action" against those bringing malicious "or unfounded" suits against the administration: this may deter even genuine claimants from bringing borderline cases.[12] Incidentally, any appeals for relief should first be brought to higher authority within the Administration itself (administrative remedies should normally be exhausted before going to court).[13] This need cause no hardship where administrative appeals follow precisely regulated patterns (*cf.* note 13). To what degrees such patterns are followed is unknown to this writer. Another premise for effective remedies is psychological: how far are administrators considered as servants, rather than masters, of the administered?

CONCLUSION

An approximate picture of the hierarchy of laws in Ethiopia results from an elementary analysis of the relevant Constitutional (and Civil Code) articles against a minimum background of Comparative Law. Theoretically, the Constitution is supreme, as in the United States. Practically there is, since the end of Federation, a remote analogy with those foreign systems where ordinary *legislation* is supreme (Great Britain), or at least free from judicial control (pre-1958 France). The following remarks on the pre-1958 French system may indeed bear some relevancy to our own situation: "It is the failure of the French courts to assert a review power over the constitutionality of acts of the legislature that . . . has in effect placed the French legislature in a position of practical supremacy not unlike that enjoyed by the British."[14] "The French courts . . . do not stand up against the legislator."[15] Neither do the

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12. Said provision has no other effect. Legally, it is meaningless:
   a) Even without this provision, the Administration can, as any defendant can, claim damages if the court finds that the suit was malicious in terms of Article 2032 Civil Code (Intent to injure).
   b) Even with this provision the Administration should not, it is submitted, as no defendant should, be awarded damages (apart from cost-awards) on the sole ground that the suit turned out to be "unfounded". Indeed, no legal "remedies or penalties" to such effect have been enacted here or elsewhere, and none could be so enacted without affecting everybody's right to have a legal dispute determined in court.
13. This principle is reflected, for instance, in Sec. 54—62 of Income Tax Decree No. 19 of 1956. Appeals from the tax assessments made by the income tax authorities go first to the administrative Commission of Tax Appeal. The latter's decisions, in turn, are appealable (on points of law) before the High Court.
14. B. Schwartz, *French Administrative Law and the Common Law World*, New York 1954, p. 95.
15. *Id.* at 300. At present day, this statement remains true only regarding ordinary courts. Since 1958 France has a peculiar Constitutional court, whose primary task is preservation of the Prime Minister's constitutional powers of legislation (which are residual) from parliamentary interference. See M. Prélot, *Institutions politiques et droit constitutionnel*, Paris 1962, No. 484, 592 and 593.

Ethiopian courts so stand up. Nor would it be very pointful for them to do it in our wise system where the supreme co-legislator (the Emperor) is *also* the supreme judge. Because of this peculiar constitutional context, our Art. 122, though much more pungent in form, is much less significant in fact than its counterpart (Art. VI p. 2) in the United States Constitutiton, which throws no light on our problem.

As to *Administrative* acts, they can be, in France, " . . . subject both of an action to annul and of an action for damages. . . . In the action to annul, the challenged act is set aside if the court determines that it is *ultra vires*. In the action for damages against the State, the determination of the illegality of the act causing the injury leads to a judgment against the State on the basis of the fault it has committed in not making sure that its officers respect the principle of legality while performing their function - a fault that involves its tort liability."[16] This second type of action can be entertained by the Ethiopian courts on the basis of Art. 62 (*cum* Civil Code Arts. 2035 and 2126). For the first type of action, no such specific legal basis can be found. Indeed, apart from the Emperor, in whom, conformably to a sensible tradition, is vested supreme authority in all fields (Art. 26), there seems to exist, in Ethiopia, no judicial instance generally empowered to annul governmental enactments on ground of illegality. This assumption seems indirectly supported by the fact that, after enactment of the 1955 Constitution, special legislation was still deemed necessary, *e. g.*, to vest in the High and the Supreme Court a power to review the legality of particular tax assessments.[17] *A fortiori*, general governmental enactments seem immune from judicial nullification *erga omnes* in either general, or precedent-setting terms (as distinct from ordinary case-decision terms *inter partes*), notwithstanding Article 122 of the Constitution, which is largely programmatic; this, unless Article 122 can be indirectly bolstered by applying a United States patterned *stare decisis* doctrine to Supreme Court case-disposals,[18] in other words by putting in force Art. 16 of the suspended Courts Proclamation of 1962;[19] or unless some special Court with powers generally to cancel[20] illegal or unconstitutional enactments[21] is created (Continental pattern), always bearing in mind that the whole problem may be a little unreal in our wise system where one person (the Emperor) is head of *both* the Administration and the Judiciary, and, the Federal duality of institutions is at end.

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16. *Id* at 278. All such actions are brought, in France, before special administrative courts, including the supreme "Conseil d'Etat."
17. See Income Tax Decree No. 19 of 1956.
18. In so far as not reversed by the Imperial *Celot*.
19. *Stare decisis*, however, may bring a premature rigidity into the legal system as a whole.
20. Subject to reversal by the Imperial *Celot*.
21. Such court could also give advisory opinions at drafting stage.

Due to lack of case-reports, this terse analysis is purely tentative. Future cases (or more reflection) may impose its modification. Our chief aim is to provoke thought on the issues involved, further discussion of which should be in practical detail. This paper's theoretical method may indeed be somewhat out of place in traditional society for which a living hierarchy of persons was always more significant than an abstract one of laws. A "flawless" hierarchy of laws is not an ideal of universal validity. I hope to have demonstrated that it may be incompatible – at top level – with a beneficial system of undivided supreme powers. At other levels, the obstacle may be merely lack of awareness and implementing devices.