THE CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW OF ADMINISTRATIVE PROCEEDINGS: THRESHOLD QUESTIONS

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Among the as yet unresolved questions raised by the Revised Constitution is the question whether there is a constitutional right, enforceable in the courts, to judicial review of administrative proceedings which threaten to deprive a person of life, liberty or property. The question is most obviously presented where judicial review is expressly barred by statute. However, it also may arise where the relevant statute does provide for judicial review but only for a review which is in some way limited — as to the issues which may be considered, for example.

If such a constitutional right exists, it presumably will be found in Article 43,[1] and analysis of the problem would be shorter and more direct if, looking to the language of that Article, the issue could be reduced to a question of the proper interpretation of "due process of law" in this context. Initially thus to frame the issue, however, would avoid two questions and assume the answer to a third. These threshold question, which in one way or another fall outside of a discussion directed only at the meaning of due process of law, are the concern of this article. Depending on how they ultimately are resolved — and a definitive resolution is not here offered — the meaing of due process of law may emerge as a major issue of Ethiopian constitutional law or as a matter suitable only for academic discussion and hypothetical problems.

The Questions Avoided: The Meaning of Article 122

The first question avoided would be whether an Ethiopian court possesses the power to override legislative enactments on constitutional grounds. This question has already been taken up in the pages of this Journal by Professor Krzeczunowicz.[2] His argument and conclusion may, fairly it is hoped, be summarized as follows:

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1. Article 43:

> "No one within the Empire may be deprived of life, liberty or property without due process of law."

Arguably, a constitutional right to judicial review might also or alternatively be based on Article 62(b):

> "Any resident of the Empire may bring suit, in the courts of Ethiopia, against the Government or any Ministry, Department, Agency or instrumentality thereof, for wrongful acts resulting in substantial damage . . . ."

Of the issues discussed in this article, those as to supremacy of judicial construction of the Revised Constitution and as to the retroactive effect of the Constitution would still be relevant if the right to judicial review were based on Article 62(b), but the issue as to whether Article 43 does guarantee due process of law would not. This last issue would, of course, still be relevant in other contexts.

2. G. Krzeczunowicz, "Hierarchy of Law in Ethiopia," *J. Eth. L.*, vol. 1 (1964), p. 111.

Article 122 of the Revised Constitution[3] establishes the Constitution, together with Ethiopia's international obligations, as the supreme law of the Empire, and future statutes and other governmental acts inconsistent with the Constitution are declared to be null and void. Article 122 is similar to the so-called "supremacy clause" of the United States Constitution,[4] and where the two differ the language of Article 122 is the stronger and more explicit of the two. Since the supremacy clause is the constitutional basis for the power of the United States courts to override state legislation on constitutional grounds,[5] Article 122 establishes a *prima facie* case for the existence of a similar power in the Ethiopian courts relative to legislative enactments. However, a second necessary basis for the United States doctrine of judicial supremacy in interpreting the constitution — the separation of power among the judicial, legislative, and executive branches of the government — does not exist in Ethiopia. The three branches of the Ethiopian government are united at their top-most level in the person of the Emperor, Whose approval is necessary before any legislation may become effective, Who possesses the power to legislate independently, and Who is the ultimate court of appeal as well as the supreme executive. Accordingly, Professor Krzeczunowicz concludes, it would be pointless, and perhaps also inconsistent with the fundamental nature of the Ethiopian system of government, for an Ethiopian court to declare legislation void on constitutional grounds.

As Professor Krzeczunowicz notes, it is necessary in this respect to distinguish the power to render legislation void from the power to override legislation on constitutional grounds in a particular case, and he does not foreclose the possibility that the Ethiopian courts might properly exercise the latter, less sweeping power. Because his argument calls into question not so much the *power* of a court to void legislation as the prudence of its exercising such a power, he can leave open this middle path without logical inconsistency. Before attempting to answer his argument, however, it is worth noting that the middle path may not exist if the questions is thought to be one as to the courts' power. From that standpoint it makes no difference so far as the relationship between courts and legislature is concerned whether a judicial decision refusing on constitutional grounds to give effect to a statute applies only *inter partes* or has the effect of rendering the statute null and

3. Article 122:

> "The present revised Constitution, together with those international treaties, conventions and obligations to which Ethiopia shall be party, 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."

4. Constitution of the United States, Article V, Clause 2:
> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5. See McCulloch v. Maryland (Sup. Ct., U.S., 1819), *Wheaton*, vol. 4, p. 316, *Lawyers Ed*, vol. 4, p. 579. It is not the principal basis for the federal courts' power to override unconstitutional *federal* legislation, however. Although the supremacy clause establishes only "Laws of the United States which shall be made in Pursuance" of the Constitution as part of the supreme law of the land, the fate of federal laws contrary to the Constitution is not spelled out, and, in the case establishing the power of the federal courts to declare federal legislation void on constitutional grounds, Marbury v. Madison (Sup. Ct., U.S., 1803), *Cranch*, vol. 1, p. 137, *Lawyer Ed.*, vol. 2, p. 60, the supremacy clause was not cited. Chief Justice Marshall's reasoning in that case was (1) a written constitution is *by its nature* the paramount law; (2) ordinary legislation contrary to the constitution is therefore void; (3) courts are not bound by void legislation.

void. The court is in either case asserting the supremacy of constitutional law over statutory law and of the court's interpretation of the Constitution over that of the legislature. Where the two cases do differ is in the relationship between the deciding court and other courts. If a doctrine of stare decisis is accepted and there is a hierarchy of courts such that rules of law laid down by the higher are binding on the lower, then a decision holding a statute unconstitutional can have the effect of rendering the statute void within the limits set by the deciding court's position in the judicial hierarchy.

In other words, if judicial construction of the Revised Constitution is the supreme law of the Empire, a court may or may not have the power to render a statute void on constitutional grounds, depending on whether or not stare decisis is accepted and on the structure of the judicial hierarchy. But if judicial construction of the Revised Constitution is *not* the supreme law of the Empire, a court does not possess the power to override legislative enactments even as a matter of the law *inter partes*. Viewed in terms of the courts' power, a compromise solution which allows a court to override statutes on constitutional grounds but does not give effect to its decision beyond the case before it is possible only in the event of one resolution of each of three issues: Judicial construction of the Revised Constitution must be the supreme law of the Empire; a court must not be bound by its own decisions in earlier cases; and a lower court must not be bound by the decisions of a higher court.

Is, then, judicial construction of the Revised Constitution the supreme law of the Empire? That the Constitution itself has this status is explicit in Article 122. And though Article 122 itself says nothing as to who should determine the Constitution's meaning, Article 110 would seem to place that responsibility on the courts:

> "The judges shall be independent in conducting trials and giving judgments in accordance with the law. In the administration of justice, they submit to no other authority than that of the law."

Taking as a starting point the language of Article 110 and the undisputed ancestry of Article 122, the conclusion that judicial construction should be supreme — not only as a matter of theory but in practice — would seem to follow as the most straightforward kind of statutory interpretation were it not for the argument from the unique position of the Emperor. This conclusion would, moreover, be supported by the historical context in which the Revised Constitution was drafted.

The Federal Act, establishing conditions for the federation of Ethiopia and Eritrea,[6] and the 1931 Constitution then stood as the supreme law of the Federated Empire, and the federal courts had expressly been granted the power to render legislation void on the ground that it was inconsistent with the provisions of either. If the provisions establishing these two principles are taken together, they suggest a model for Article 122 which was closer at hand than the supremacy clause of the United States Constitution:

> "The Federal Act and Our Constitution of 1931 and all federal legislation made pursuant thereto as well as all international treaties, conventions and

6. N. Marein, *The Ethiopian Empire Federation and Laws* (1955), Appendix I. The Federal Act consisted of the first seven articles of the United Nations General Assembly resolution of December 10, 1950, relating to the then proposed federation of Eritrea with Ethiopia. N. Marein, *ibid.*, p. 356.

obligations of our Empire as extended to the territory of Eritrea shall be the supreme law through the territories of Our Federated Empire."[7]

".... A final determination by a Federal Court that any legislation or administrative, executive or judicial order, decree, judgment, sentence, finding, or act is invalid in terms of conformity with our Constitution or the Federal Act, shall have as a consequence that such legislation, order, decree, judgment, sentence, finding or act shall be held throughout Our Empire as null and void and unenforceable and inapplicable by any officials or courts in Our Empire. . . ."[8]

It does not seem unfair, therefore, to rephrase the question as to judicial supremacy in the following terms: Does a doctrine of judicial supremacy so conflict with the position of the Emperor that what would be the ordinary interpretation of Article 122 must be regarded as merely suggesting a course for future evolution.[9]

It must be emphasized that the power of the Emperor to act as the ultimate interpreter of the Revised Constitution is not at issue. Whether supremacy be given to the legislature or to the courts, the result in terms of the power of the Emperor is the same, since he both passes on all legislation and can review any judicial decision. Rather, the question is whether it would be pointless for a court to override legislation on constitutional grounds in view of the fact that the Emperor had previously approved the legislation and would subsequently have the opportunity to pass on the decision of the court.

It is suggested that for two reasons the answer to this question is no. First, the declaration that a statute is unconstitutional and therefore void is not the only occasion on which a court might substitute the requirements of the Constitution for the judgment of the legislature, nor would it likely be even the most common one. If the experience of the United States is in any respect indicative, the far more common use of the court's power would be to hold that a statute cannot be applied in a particular circumstance or that it may not be interpreted in a particular way.[10] A statutory requirement that parties pay a fee on filing an appeal in the High Court,[11] for example, would in the general run of cases be entirely unobjectionable. But if the requirement prevented an indigent criminal defendant from appealing his conviction, it is arguable that its application would in that case amount to a

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7. Federation Incorporation and Inclusion of the Territory of Eritrea within the Empire of Ethiopia Order., 1952, Art. 8, Order No. 6, *Neg. Gaz.*, year 12, no. 1.

8. Federal Judiciary Proclamation of Ethiopia, 1953, Art. 3(s), Proc. No. 130A, *Neg. Gaz.*, year 13, no. 1.

9. See Krzeczunowicz, cited above at note 2, p. 116 (Article 122 described as "largely programmatic").

10. Cf. Advocate of the Ministry of Finance v. Sarris (H. Ct. 1959), *J. Eth. L.*, vol. 1, p. 198, 200, construing the phrase "automatically . . . executive" as used in the Personal and Business Tax Proclamation, 1949, Art. 13, Proc. No. 107, *Neg. Gaz.*, year 8, no. 12.

11. The statute supposed is only hypothetical. At present a five dollar fee is charged for the filing of criminal appeals in the High Court, but this is pursuant to the High Court's own rules. See Court Procedure Rules, 1943, Rule 83, L. Not. No. 33, *Neg. Gaz.*, year 3, no. 2. There is no provision in these rules for in forma pauperis proceedings, but it is understood by the author that in practice paupers are permitted to appeal without payment of the fee. This ad hoc modification of the High Court's own rules of course does not raise any issue as to the proper relationship between the courts and the legislature.

denial of the equal protection of the laws.[12] If the High Court took this view and held the requirement inapplicable to indigents on criminal appeals, the statute would by no means have been declared void. It would only have been modified to bring it into line with the court's interpretation of Article 37. And, it is suggested, the Emperor might consistently approve both the statute and the judgment modifying it, for the two operate at different levels of generality.

Second, although all legislation *must* be approved by the Emperor, the same is true of judicial decisions only in the limited sense that if there is a petition to have a case considered by the Emperor's chilot, He necessarily must either grant or deny the petition.[13] This distinction may be important in the case of a statute as to the constitutionality of which reasonable men could differ. Assume that in such a case the Emperor approved the statute, that is, He concluded that it was constitutional. Subsequently, a court reached a contrary conclusion and declared the statute void. The losing party now petitions to have the case considered by the Emperor's chilot. Does it necessarily follow from the Emperor's earlier approval of the statute that He should grant the petition and reverse the decision? Or might He determine that the Constitution would in the long run be better served if the courts were allowed some discretion in working out their responsibilities as interpreters of the law and that the petition should therefore be refused? That the latter course would be chosen is of course not certain, but the choice does not even exist unless the courts in the first place accept the responsibility seemingly conferred on them by Articles 110 and 122.

The second question avoided would be that posed by the limitation of Article 122 to "*future* legislation, decrees, orders, judgments, decisions and acts." (Emphasis added.) Article 122 by its terms divides governmental acts (using that term here to encompass legislation, decrees and the rest) into two classes, the one consisting of those done prior to promulgation of the Revised Constitution on November 4, 1955, and the other consisting of those done subsequent to its promulgation. Only the latter are declared to be null and void on constitutional grounds.

If Article 122 is taken to be the sole basis of the power of the Ethiopian courts to override the acts of other branches of the government on constitutional grounds,[14]

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12. Revised Constitution, Article 37: "No one shall be denied the equal protection of the laws." The United States Supreme Court has in a number of cases held that indigent criminal defendants may not be placed in a less favorable position with respect to appealing their conviction than they would be in if they were able to pay all fees. See, e.g., Douglas v. California (Sup. Ct., U.S., 1963), *U.S. Rep.*, vol. 372, p. 353, *Lawyers Ed. 2d*, vol. 9, p. 811. The ground for decision in these cases appears to be the equal protection clause of the United States Constitution. See The Supreme Court, 1962 Term, *Harvard L. Rev.*, vol. 77 (1963), p. 62, 107-08.

13. The distinction is more clear if the Emperor's chilot is regarded not as a final court of appeal but as part of the sovereign prerogative. See R. Sedler, "The Chilot Jurisdiction of the Empire of Ethiopia," *Journal of African Law*, vol. 8 (1964), pp. 59, 66 *et seq.* Even if it is regarded as a final court of appeal, however, it is a court with unlimited discretion as to whether it will consider any case, and a discretionary decision not to consider the judgment of a lower court need not be the equivalent of a decision approving the lower court's judgment. See A. Bickel, "Foreword: The Passive Virtues," *Harvard L. Rev.*, vol. 75 (1961), p. 40.

14. It might be argued from the United States analogy that it is not. See note 4 *supra*. However, even if the Ethiopian courts would have had the power to override legislative enactments without Article 122, it seems the better view that, Article 122 having been included in the Constitution, the courts' power in this respect is limited by its terms.

it is only acts done subsequent to November 4, 1955 which should be vulnerable to the courts' power.[15] So much is clear even to a partisan of judicial review. What is not clear, however, (at least to such a partisan) is the proper application of this limitation where two governmental acts, the one done before and the other after promulgation of the Constitution, must be considered together. Take the following hypothetical cases:

Case no. 1: As provided by the terms of a statute enacted in 1950, a government department in 1965 orders P's land taken without payment of any compensation. P argues that the taking is unconstitutional under Article 43 and 44.[16]

Case no. 2: The Municipal Council of Addis Ababa in 1965 affirms an assessment of municipal fees against P. At no stage in the proceedings before the Council or earlier was P given an opportunity to present evidence or argument with respect to his assessment. He asserts that this amounts to a deprivation of his property without due process of law. By the terms of a 1950 statute, decisions of the Municipal Council are final and not subject to judicial review.[17]

Case no. 3: The Income Tax Proclamation of 1961 is amended in 1965 to foreclose review of the Inland Revenue Department's assessments by either the Tax Appeal Commission or the courts. P subsequently attempts to challenge his income his income tax assessment on grounds similar to those raised in case no. 2.

Case no. 3 is included only to indicate what is *not* in doubt. Whatever ambiguities there may be in that case, they are not created by the limitation of Article 122 to future governmental acts. Both of the acts possibly at issue—the amendment of the Proclamation and the allegedly improper assessment procedure—were done subsequent to promulgation of the Constitution.

The first two cases present the court with a dilemma, however, or rather they do so given one view of the court's responsibilities. If the court declares invalid the taking of property in case no. 1, it will have overriden on constitutional grounds a statute enacted before the Constitution was promulgated. It will have done the same in case no. 2 if it even takes jurisdiction over the case. Whatever phrase the court might use, the import of its holding would in each case be that it regarded the 1950 statute as of no effect — as null and void — so far as cases like the one before it were concerned. If government agents are not permitted to follow the directives of the 1950 statute in case no. 1, or if the 1950 statute in case no. 2 does not bar judicial review, the statutes are no longer effective, and it would be merely a verbal formalism to say that it is only the 1965 acts and not the 1950 statutes which have been overturned.

15. See Lij Araya Abebe v. The Imperial Board of Telecommunications (H. Ct., 1964), *J. Eth. L.*, vol. 2, p. 303.

16. This hypothetical case is based on Lij Araya Abebe v. The Imperial Board of Telecommunications of Ethiopia, cited above at note 15.

17. Addis Ababa Municipal Water, Rate, Licences and Fees Order, 1947, Art. 5, L. Not. No 112, *Neg. Gaz.*, year 7, no. 5, issued pursuant to Municipalities Proclamation, 1945, Art. 11, Proc. No. 74, *Neg. Gaz.*, year 4, no. 7, purports to make decisions of the Municipal Council of Addis Ababa with respect to the assessment of municipal fees final. This provision has been considered in at least two cases, Shah v. Addis Ababa Municipal Finance Guard Dep't (Civil Case No. 194/53) (H. Ct. 1961) (takes juridiction over appeal); Societe Hoteliere du Tourisme Share Co. v. Municipality of Addis Ababa (Civil Appeal No. 238/56) (H. Ct. 1964) (declines to take judisdiction over appeal) (semble).

If the court should instead take the opposite course, looking to the date of the earlier statute rather than to that of the later act, the result would be that a post-1955 government act which arguably infringed P's constitutional rights would be insulated from judicial review. There is nothing objectionable about this result if the (presumed) conclusion of the government department or Municipal Council that P was given his constitutional due is considered no less authoritative than the conclusion of a court that he was not. If Articles 110 and 122 are taken to imply the supremacy of the courts as interpreters of the Constitution, however—as it has been argued they should be—fully to honor Article 122 is not among the alternatives open to the court.[18]

Stated in the above terms, the same dilemma is presented in each case. The problems are in fact not the same, however, nor, it will be argued, should be their resolutions.

We begin with case no. 2: One way out of the dilemma in that case is by recourse to the principle that a court's power to declare a governmental act null and void depends on the issue as to its voidness being presented in a case properly before the court, and that principle is perhaps the one which should control. There is also another line of analysis, however, which arguably accords better with the purposes of Article 122.

The basis for the latter approach is the fundamental difference between the natures of the two governmental acts at issue in case no. 2. The refusal of the Municipal Council to allow P to present evidence or argument raises the constitutional issues as to which a judicial decision is sought, and the court's decision, if it takes jurisdiction over the case, presumably will determine the procedure used by the Council in the future. The court's decision as to the statute barring judicial review, however — that is, its decision as to whether to take jurisdiction over the case — *by itself* determines nothing as to either past or future actions taken by the Council. What it does determine is which institution — court or Municipal Council — is to have the final word on the Council's actions. In other terms, from the court's point of view the two issues fall on opposite sides of the substance-procedure line.[19]

The significance of this distinction stems from the dual purposes of Article 122. It has been argued above that one purpose of the Article is to establish the supremacy of the Constitution, and in particular of the courts' construction of the Constitution. The evident purpose of the limitation of the Article to future governmental acts, on the other hand, is to avoid the difficulties which would be caused by retroactive application of constitutional limitations.

There is with respect to a purpose like the latter one an important difference between matters of substance and matters of procedure. A party to a contract, for

18. It can fairly be argued that supremacy of judicial construction of the Constitution is not sufficient to create the dilemma. Judicial supremacy exists only so far as the question of construction can be brought before a court, but to assume that there is a constitutional right to judicial review (for here there certainly is no statutory right) is to assume the answer to the question posed at the very beginning of this article. The answer to this objection is that the required assumption can be made *arguendo* without falling into logical error. If there is a constitutional right to judicial review, the assumption is correct; if there is not, it makes no difference so far as the purposes of this article are concerned how the issues discussed are resolved.

19. The issue which is a matter of substance from the court's point of view is so far as the Municipal Council is concerned a matter of procedure. It is the nature of the issue as viewed by the court which is here relevant.

example, might properly consider himself misled if the law governing the manner in which the contract was to be performed were changed before performance was completed. (Whether his complaint should be given constitutional status is another matter.) But there would in general be no substantial injury to the party's established expectations if the law were changed so that disputes arising out of the contract would be heard by a different court than before. Or, to use a different example, the Income Tax Proclamation of 1961 did not change the tax liability for years prior to 1961, and most persons would have considered it highly unfair had it done so. But there is no unfairness in having the procedure by which the liability for those earlier years is determined governed by the 1961 law.[20]

The problems with which the limitation of Article 122 to future governmental acts was intended to deal do not differ in kind from those raised by a new tax law or a new law of contractual obligations. The source of the problems in each case is that individuals — private citizens or government officials — have acted and planned in reliance on the old law; and the reason for limiting the retroactive application of the new law in each case is that the established expectations of these individuals are considered worthy of protection. The justification for distinguishing matters of substance from matters of procedure is that it is in general only changes in the former which threaten these expectations.

In case no. 2 it is a matter of legitimate concern to the Municipal Council whether it is required to follow one kind of procedure or another in its considerations. At least where its procedure is not determined by any pre-1955 governmental act, however, it is required by Article 122 to follow a procedure which is consistent with whatever standards may be set by the Revised Constitution; and, under the interpretation of Articles 110 and 122 adopted here, the primary responsibility for determining and applying those standards rests on the courts. The 1950 statute purports to withhold this responsibility from the courts. However, this statutory bar to judicial review is relevant to the *purposes* of Article 122 — as distinguished from the Article's language — only on the assumption that the Municipal Council prior to 1955 had somehow relied on its immunity from judicial review in a way relevant to case no. 2. How it might have done so is not easy to imagine, however. Under somewhat different facts, it might of course have relied on its immunity in drafting a set of procedural rules for its own deliberations, which would then have dictated the denial to P of any opportunity to present evidence or argument. But if such rules were drafted prior to promulgation of the Constitution — and only then would the Council's reliance be relevant to the purposes of Article 122 — case no. 2 would become like case no. 1.

That there might in some cases be injury to established expectations in ignoring pre-1955 limits on a court's jurisdiction is not impossible. But the likelihood of such injury seems sufficiently small that the use of the substance-procedure dichotomy appears on balance to offer the best solution in a case like case no. 2.[21]

The substance-procedure dichotomy offers no solution to the dilemma presented by case no. 1, however. Case no. 1 squarely presents the question whether

20. See Marples Ridgeway and Partners, Ltd. v. The Inland Revenue Department (H. Ct. 1964), *J. Eth. L.*, vol. 2, p. 312.

21. In Shah v. Addis Ababa Municipal Finance Guard Dep't, cited above at note 17, the High Court did override Article 7 of Legal Notice No. 112 of 1948 in order to review a decision of the Municipal Council. The court's rationale for avoiding the limitation of Article 122 to future governmental acts does not appear, however. In addition, the appeal appears to have presented only issues of statutory construction. This at the least somewhat weakens the argument for ignoring the bar to judicial review.

government officials are to be allowed to act in accordance with pre-1955 statutory provisions which are inconsistent with the provisions of the Revised Constitution.

It is difficult to see how that question can be answered other than in the affirmative if the limitation of Art. 122 to future governmental acts is to serve what appears to be its intended purpose. To some it will doubtless seem anomalous that the Revised Constitution should be of no effect with respect to a substantial range of government activity. However, it is just this anomaly which appears to have been intended in Article 122: that statutes and decrees enacted prior to the Constitution's promulgation should continue to be the law of the Empire in as legitimate a sense as is the Constitution itself.

If the limitation of Article 122 to future governmental acts does not have this meaning, its significance is quite limited — much more limited than the problem with which it presumably was supposed to deal. Most governmental acts of any importance are significant principally as directives for other governmental acts to be done in the future. The enactment of a tax statute and the sentencing of a criminal defendant to a prison term are themselves governmental acts, but they are important only because other governmental acts can be expected to follow from them: Tax collectors can be expected to collect taxes in the manner required by the statute, and prison officials can be relied on to keep the convicted defendant incarcerated for the term of years specified in the sentence.

Such pairings of a directive governmental act with a subsequent continuing act of application pervade all of law and administration, and the validity of the directive act cannot be separated from the validity of the application required by it. If the act required by the statute is null and void, then so far for all practical purposes is the statute. And if a pre-1955 statute may effectively be declared void by preventing government officials from applying it, it is not apparent why a pre-1955 criminal conviction should not be equally vulnerable to an attack directed at the prison officials' continuing act of holding the convicted defendant.

This does not mean that any governmental act done with reference to a pre-1955 statute is immune from challenge on constitutional grounds. Most statutes — and particularly most earlier Ethiopian statutes — say little about the manner in which they are to be applied. Broad gaps are left to be filled in by regulation or administrative discretion. So long as there remains *some* other way in which the statute can be applied, such regulations or exercises of discretion can be treated as independent governmental acts, and they can be invalidated without at the same time in substance invalidating the statute.

In addition, where the interpretation of a pre-1955 statute is ambiguous, it is open to a court to adopt an interpretation which minimizes the conflict with constitutional standards. By such interpretation, by looking closely at claims that an act is *required* by an earlier statute, and through the gradually diminishing importance of pre-1955 statutes and regulations, both relative to the growing mass of later legislation and absolutely through repeal and supercession, the "anomaly" created by Article 122 can be restricted to a relatively small and narrowing compass.

The Answer Assumed: The Problem of the Two Constitutions

The most fundamental objection to framing the question of a constitutional right to judicial review of administrative proceedings in terms of the meaning of "due process of law" is that it is not certain that a right to due process of law is conferred by the Revised Constitution. The Revised Constitution was published in

the Negarit Gazeta with parallel Amharic and English texts; and Article 43 of the English version does purport to guarantee due process of law in language almost identical with that used in the United States Constitution:

> "No one within the Empire may be deprived of life, liberty or property without due process of law." Revised Constitution, Article 43.
>
> "No person shall be . . . deprived of life, liberty or property without due process of law." Constitution of the United States, Amendment V.[22]

But the language of the Amharic version, which is considered the official version,[23] is somewhat different. Literally translated, it provides that

> "No one within the Empire may be deprived of life, liberty or property *except according to law.*" (Emphasis added.)

Two interpretations suggest themselves in the light of this discrepancy. The first is that Article 43 was intended to embody something like the concept of due process of law developed in the United States and that the discrepancy in language reflects only the difficulty of concisely translating abstract legal concepts. Whether this constitutional standard would be similar in its details to that of due process of law under the United States Constitution is not important for present purposes. What is important is that it be a constitutional standard, superior to ordinary legislation.

The second interpretation is that the intended meaning of the Amharic version is accurately conveyed by a literal English translation: Life, liberty, or property is not to be taken except in accordance with the provisions of the law, but no limitation is placed on what the provisions of the law may be. Under the first interpretation a proceeding which threatens a deprivation of property raises two questions: Was the proceeding conducted in accordance with the requirements of the relevant law; and did it come up to the constitutional standard? Under the second interpretation only the first question is raised.

One Supreme Imperial Court decision dealing with this question of interpretation has to date been reported, Highway Authority v. Mebratu Fissiha.[24] The division of the Court before which the case came appears there to have adopted the second interpretation, holding that any act done in accordance with a statute cannot be considered improper under Article 43.[25] There have, on the other hand,

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22. The Fifth Amendment applies only to acts of the federal government. A substantially identical provision applicable to acts of the state governments was added to the Constitution by Section 1 of the Fourteenth Amendment.

23. See S. Lowenstein, *Materials for the Study of the Penal Law of Ethiopia* (1965), p. 385; G. Krzeczunowicz, "Ethiopian Legal Education," *J. of Eth. Studies*, vol. 1, no. 1 (1963), p. 68, 69. Under the Administration of Justice Proclamation, 1942, Art. 22, Proc. No. 22, *Neg. Gaz.*, year 1, no. 1, laws are to be published in both Amharic and English, and there is no suggestion that either enjoys a privileged position in the event of conflict. The assumption that the Amharic version should in that case prevail apparently rests on Article 125 of the Revised Constitution: "The official language of the Empire is Amharic." Since no similar provision appeared in the 1931 Constitution or, so far as appears, anywhere else prior to promulgation of the 1955 Constitution, the relative positions of the two languages during the 1942-1955 period should perhaps not be the same as it has been since 1955.

24. (1964), *J. Eth. L.*, vol. 2, p. 37, 39.

25. Strictly speaking, it appears that the court should not have reached this issue, since the statute which it was considering, Proclamation No. 115 of 1951, antedated the Revised Constitution.

been several High Court decisions seemingly based on the view that Article 43 does create a constitutional standard.[26]

A proper analysis of the import of Article 43 would have to rest in part on a consideration of the nuances of the precise words used in the Amharic versions, nuances which, I am informed, are conveyed neither by the literal translation nor by the English version published in the Negarit Gazeta.[27] Because that line of inquiry lies beyond my competence, the discussion which follows can amount only to a tentative and partial analysis of the question. At best, it may point to some of the arguments which should be taken into account.

One point which should be made at the outset is that under either interpretation Article 43 is an important procedural guarantee, although it is of course more important under the first interpretation than under the second. Whatever "law" may mean in the context of the phrase "except according to law," at the least it must imply a previously announced rule of decision, and this by itself if a substantial safeguard against arbitrary governmental acts.[28]

Certainly the most obvious argument in favor of the first interpretation, particularly to a United States-trained lawyer, is that Article 43 parallels the due process clause of the United States Constitution. To complete the argument based on this observation, however, it must be contended that the discrepancy between the language of the Amharic version and that of the due process clause of the United States Constitution has its origin only in the problems of translation. But the validity of this contention becomes less than self-evident when Article 43 is viewed in the context of the other articles relating to individual rights. Apart from Article 43, eight such articles are limited in one way or another by phrases similar to "in accordance with the law:"

> There shall be no interference with the exercise, *in accordance with the law*, of the rites of any religion . . . ." Article 40.
>
> "Freedom of speech and of the press is guaranteed throughout the Empire *in accordance with the law*." Article 41.
>
> Everone has the right, *within the limits of the law*, to own and dispose of property . . . ." Article 44.
>
> "Ethiopian subjects shall have the right, *in accordance with the conditions prescribed by law*, to assemble peaceably and without arms." Article 45.
>
> "Freedom to travel within the Empire and to change domicile therein is assured to all subjects of the Empire *in accordance with the law*." Article 46.
>
> Every Ethiopian subject has the right to engage in any occupation and, to that end, to form or join associations, *in accordance with the law*." Article 47.

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26. See X v. Ministry of Posts, Telephone and Telegraph (H. Ct. 1964), *J. Eth. L.*, vol. 2, p. 321; *Cf.* Advocate of the Ministry of Finance v. Sarris, cited above at note 10; Shah v. Addis Ababa Municipal Finance Guard Dep't, cited above at note 17.

27. I am indebted to Ato Selamu Bekele, a third-year student, for pointing out to me the incomplete nature of any analysis which fails to take into account the particular words used in the Amharic version.

28. *Cf.* L. Fuller, *The Morality of Law* (1964), Chapter II.

"Punishment is personal. No one shall be punished *except in accordance with the law* and after conviction of an offence committed by him." Article 54.

"All persons and all private domiciles shall be exempt from *unlawful* searches and seizure." Article 61. (Emphasis added in each article.)

Since Articles 40 and 41 in particular also parallel United States constitutional provisions not modified by any similar phrase,[29] their language should discourage the easy assumption that reference to the United States Constitution is by itself sufficient to resolve the issue. On the other hand, however, their language falls far short of establishing a conclusive case for the second interpretation. Among the reasons why it does necessarily indicate an intention to abandon an independent constitutional standard in the case of Article 43, some are based on differences between Amharic words, all of which may be literally translated into English as "laws." Even accepting the literal English translations, however, it is still possible reasonably to contend for the first interpretation.

The meaning of "laws" in this constitutional context is ambiguous. It may be read as encompassing all manners of statutes and administrative regulations, but it also is possible to read it more narrowly. Historically, if Article 43 has as its ancestor the due process clause of the United States Constitution, it is also a lineal descendant of Chapter 29 of Magna Carta, from which the due process clause was itself derived. And Chapter 29 refers not to "due process of law" but to "per legem terrae" — "in accordance with the law of the land."[30] Moreover, even "due process of law" itself, read literally, means no more than the procedure required by law to which the party is due. Until the latter phrase came to have the special meaning now attached to it, it would have been difficult to find in English a means of expressing unambiguously and within the limits of a short phrase the distinction between law in its usual sense and law in the sense of principles beyond the reach of legislators and executives acting in their ordinary capacities. It should not be surprising that a similar difficulty now exists in Amharic.

That "law" or any other word may in some cases have something other than its ordinary meaning is not a difficult proposition to establish, of course. What is difficult is to overcome the presumption that it was the ordinary meaning which the draftsmen had in mind. Two arguments supporting this second step are offered here, the first based on the probable ancestry of Article 43 and the other based on its relationship to other articles of the Constitution.

No guarantee of due process of law was included in the 1931 Constitution. The traditional language of due process seems first to have appeared in Ethiopian law in the Federal Act, ratified by the Emperor on August 11, 1952.[31] Article 7(c) of the Act guaranteed to citizens of Eritrea "the right to own and dispose of property" and also that

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29. This is not to say that Articles 40 and 41, or the other guarantees of individual rights, were taken directly from the United States Constitution. Most of the guarantees had been introduced into Ethiopian law prior to 1955 through the Federal Act, cited above at note 6; the Public Rights Proclamation, 1953, Proc. No. 139, *Neg. Gaz.*, year 13, no. 3; and the Constitution of Eritrea.

30. "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him except by the legal judgement of his peers or by the law of the land."

Magna Carta, Chapter 39, as given in R. Perry, *Sources of Our Liberty* (1959), p. 17. Chapter 39 subsequently became Chapter 29 when Magna Carta was reissued by Henry III in 1225. *Ibid.*, p. 5.

31. N. Marein, work cited above at note 6, Appendix II.

"No one shall be deprived of property, including contractual rights, without due process of law and without payment of just and effective compensation."

The Federal Act was not Ethiopian legislation in the ordinary sense, as is indicated by its not having appeared in the Negarit Gazeta.[32] Rather, it was in the first place a resolution of the United Nations General Assembly, ratification of which by the Emperor was a necessary condition for the federation of Eritrea with Ethiopia. Accordingly, it is not to the Amharic but to the official languages of the General Assembly's proceedings, including English, that one must look for the Federal Act's meaning; and in its English version Article 7(c) guarantees in explicit terms due process of law.

The year following formation of the Federation, the Public Rights Proclamation[33] was enacted. Article 3 of the Proclamation guarantees that

"No government or part of the federation shall make or enforce . . . any law which shall abridge the privileges or immunities of nationals of the federation or deprive any person of life, liberty or property without due process of law . . . ."

The Amharic version of Article 3 presents the same ambiguity as exists in Article 43 of the Revised Constitution, but there is in the case of Article 3 much less doubt as to how the ambiguity should be resolved. Article 3's operative phrase is "no government . . . shall make or enforce . . . any law." If this phrase is coupled with a guarantee only against deprivations of life, liberty or property not in accordance with (ordinary) law, the guarantee becomes meaningless on its face. Or rather, to be more precise, it becomes a tautology: *By definition*, any deprivation of life, liberty or property achieved through enactment or enforcement of a law is in accordance with the law in the ordinary sense of that word. The guarantee rises above the level of a tautology only if laws depriving persons of life, liberty or property were intended to be judged by some standard superior to ordinary legislation.

Of course, the Public Rights Proclamation, itself ordinary legislation, could not create a *legally enforceable* standard superior to ordinary legislation. It must be regarded as having been more in the nature of a statement of policy or a pledge of good faith. But even a government's pledge of good faith should, if possible, be interpreted in a fashion which does not render it meaningless in important respects.

By the time that the 1955 Constitution was promulgated, therefore, the principle that proceedings which would deprive a person of life, liberty or property should be judged by a standard superior to ordinary legislation appears to have been incorporated into Ethiopian law in two contexts: once in the Federal Act, which was above ordinary legislation, although applicable only to Eritrea; and once in the Public Rights Proclamation, which announced principles to be followed for the Empire in general, although they could lawfully have been altered by ordinary legislation. Against this background, the interpretation of Article 43 as guaranteeing no more than compliance with existing law requires (1) that the language of Article 43 be given a different interpretation than seems most reasonable for the substantially identical language in the Public Rights Proclamation enacted two years before and (2) that the Revised Constitution be assumed to have in this

32. Ratification of the Federal Act was referred to in Order No. 6 of 1952, cited above at note 7, but the ratification itself did not appear in the Negarit Gazeta.

33. Cited above at note 29.

respect retreated from standards already established. Whetever may be thought of the first requirement, the latter surely is at variance with the spirit in which the Constitution evidently was promulgated.[34]

The preceding argument dealt only with the interpretation of the phrase "except according to law" in the Amharic version of Article 43; the interpretation of the similar phrases in both the English and the Amharic versions of other articles was left to fall where it might. The second argument, on the other hand, applies no less to these other articles than it does to Article 43.

The starting point for the second argument is Article 65:

> "Respect for the rights and freedoms of others and the requirements of public order and the general welfare, shall alone justify any limitations upon the rights guaranteed in the foregoing articles of the present Chapter."

Article 65 is the final article of the chapter relating to individual rights. The important question for present purposes is, what are "the rights guaranteed" in the case of the articles qualified by phrases such as "in accordance with the law"? Are they rights defined by the entire articles, including the qualifying phrases? Or are they the (by their terms) absolute rights which these phrases purport to modify? If they are the latter, the combination of Article 65 and the qualifying phrases in the earlier articles can be read as fixing both inner and outer limits on the scope of the individual rights: As to the outer limit, the rights guaranteed — the right to freedom of speech, for example — are not absolute but are subordinate to legislation (and perhaps other measures) necessary to safeguard the interests enumerated in Article 65; *but* — the limit on the other side — whether legislation curtailing these rights is necessary for this purpose is a *constitutional* question, to be answered (when it arises in litigation) by the court and by reference to standards superior to ordinary legislation.[35]

Support for the latter interpretation is more diverse than conclusive, but it appears sufficient to establish it as alternative seriously to be considered. There is in the first place the judicial interpretation of analogous provisions of the Eritrean Constitution. The constitution adopted by Eritrea when it entered into the federa-

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34. See H.I.M. Haile Selassie I, Speech from the Throne on the Occasion of His Silver Jubilee and the Promulgation of the Revised Constitution, November 4, 1955, *Voice of Ethiopia*, November 10, 1955:

> "So important have we considered these guaranties of Human Rights and Fundamental Liberties that, in the Revised Constiution, We have stipulated not only the courts but, in particular, Ourselves, shall at all times, assure and protect these Human Rights. They constitute principles which no branch of the Government, *be it the Executive, Legislative or Judiciary*, can transgress, and which, in consequence must be placed under the particular protection of the Sovereign Himself." (Emphasis added.)

35. This interpretation is in substance the same as that given to Article 19 of the Indian Constitution, which, like Chapter III of the Revised Constitution of Ethiopia, first enumerates individual rights (but without the qualifying phrases found in Chapter III) and then states the grounds on which the rights may be restricted. See D. Basu, *Commentary on the Constitution of India* (4th ed., 1961), vol. 1, pp. 489-99. See also, e.g., Constitution of Kenya, Arts. 19-26.

The United States Constitution offers no express warrant for tempering the absolute language of its provisions conferring individual rights, but judicial interpretation has in effect been a surrogate for something like Article 65. See, e.g., Schenck v. United States (Sup. Ct., U.S., 1919), *U.S. Rep.*, vol. 249, p. 47, 52, *Lawyers Ed.*, vol. 63, p. 470, 473 (Holmes, J.): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."

tion with Ethiopia included a provision substantially identical with Article 65. In addition, one of the rights conferred by it — the right to practice any profession — was by its terms "subject to the requirements of the law."[36] There was thus the same question of interpretation as is now posed by Article 65 and the earlier articles of Chapter III of the Revised Constitution: Did the qualifying phrase subordinate the constitutional right to all legislation, or only to legislation which met some constitutional standard?

In a 1955 decision the Eritrean Supreme Court held that it did only the latter. The occasion for the court's holding was an appeal challenging the constitutionality of an Eritrean statute which barred persons convicted of delicts from the practice of law.[37] Clearly, no such law could be unconstitutional if the right to practice a profession were subject to the requirements of any law which the legislature might enact. The court held, however, that the statute was unconstitutional so far as it applied to the case before it, which involved a conviction for only a minor offence. The qualifying phrase, "subject to the requirements of the law," was held to subordinate the constitutional right only to legislation justified by "respect for the rights and freedoms of others and the requirements of public order and the general welfare;" legislation found not to be justified on those grounds was void so far as it conflicted with the constitutional right.

The second strand of support for this interpretation of Article 65 and the Chapter III rights is their historical development. As implicitly suggested above, Article 65 itself appears to have been taken from the Eritrean Constitution — or from the Federal Act, which includes the same language. The Eritrean Constitution and the Federal Act also included a number of the Chapter III rights, including the guarantees of freedom of religion, expression, and association, *but without qualification by any reference to the requirements of law*. Whether or not one agrees with the Eritrean Supreme Court's interpretation of the right to freedom of choice as to profession, therefore, one is all but forced to accept it for these other rights. One is thus driven to a dichotomy of the same kind posed earlier with respect to Article 43 alone: Either the phrases such as "in accordance with the law" are read to mean "in accordance with laws required to protect the important interests enumerated in Article 65;" or the Revised Constitution fell far short, so far as individual liberties are concerned, of the benchmark already set by the Federal Act and Eritrean Constitution.[38]

Third and finally, there is the presumption favoring an interpretation which does not render any of the articles concerned meaningless. Whatever interpretation may be given to the other articles of Chapter III, Article 65 itself does ap-

36. Both provisions were taken almost verbatim from the Federal Act, cited above at note 6. The provision of the Federal Act corresponding to Article 65 of the Revised Constitution was in turn taken, with only minor changes, from Article 29(2) of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in 1948.

37. The decision has not been reported, but it has been summarized in J. Smith, "Human Rights in Eritrea," *Modern L. Rev.*, vol 18 (1955), p. 484, 486. This summary is the basis for the description of the case in the present article.

38. If the Revised Constitution did fail to go as far in the area of individual rights as had the Eritrean Constitution, Eritrean citizens arguably at present possess *fewer* rights than they possessed before the Revised Constitution was promulgated. Whether that is the case depends on the effect on the Federal Act and the Eritrean Constitution of the order terminating Eritrea's federal status and incorporating it into a unified Empire, Order No. 27 of 1962, *Neg. Gaz.*, year 22, no. 3. Articles 4-6 of the Order, which are quoted immediately below, presumably saved many of the laws previously applicable only to Eritrea.

pear to have been intended to establish the two principles suggested earlier: that the individual rights conferred by the Revised Constitution may be limited in order to protect certain other important interests; but that they may not be limited otherwise. If the import of phrases such as "in accordance with the law" is that the rights to which the phrases are attached are subordinate to all legislation, however, Article 65 is redundant in its first purpose and defeated in its second. There is no need to ensure that rights may be limited when the rights are in any event subordinate to any statute, and there is in that case no meaning in a guarantee that the rights shall not be limited other than on certain grounds.

It is, on the other hand, the interpretation here suggested which lacks meaning with respect to the articles which do *not* contain any such qualifying phrase, and numerically these latter articles are predominant in Chapter III: Of the twenty-six articles in that Chapter, other than Article 65 itself, which purport to confer rights on individuals, only nine are modified in such a fashion. It is, however, the articles which are thus modified which the draftsmen of Article 65 might be expected to have had in mind — the guarantees of freedom of speech, religion, assembly and association, and Article 43 itself. If Article 65 has no meaning in its application to these articles, it has very little meaning at all.

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4. All rights, including the right to own and dispose of real property, exemptions, concessions and privileges of whatever nature heretofore granted, conferred or acquired within Eritrea, whether by law, order, contract or otherwise and whether granted or conferred upon or acquired by Ethiopian or foreign persons whether natural or legal, shall remain in force and effect.

5. All rights, powers, duties and obligations of the former Administration of Eritrea become by virtue of this Order, the rights, powers, duties and obligations of the Imperial Ethiopian Government.

6. All enactments, laws and regulations or parts thereof which are presently in force within Eritrea or which are denominated to be of federal application to the extent that the application thereof is necessary to the continued operation of the existing administration until such time as the same shall be expressly replaced and repealed by subsequently enacted legislation, remain in full force and effect and existing administrations shall continue to implement and administer the same under the authority of the Imperial Ethiopian Government."

The constitutional provisions here in question, and the Federal Act, probably cannot be considered "enactments . . . necessary to the continued operation of the existing administration" (Article 6), but they did confer rights on persons (Article 4), and they imposed corresponding duties on the Eritrean government (Article 5). Whether either the rights or the duties were of a kind contemplated in these two articles is another question, however. If not, and if the Imperial order is considered superior to the earlier Eritrean Constitution, the provisions of the Eritrean Constitution relating to individual rights would seem not to have survived the promulgation of Order No. 27.

Even assuming that these constitutional provisions were swept away by Order No. 27, however, the provisions of the Federal Act are perhaps still in force. Since ratification of the Federal Act was a condition for federation imposed by the United Nations, compliance with the Act's provisions might be regarded as having been among Ethiopian's *international* obligations. On this view of the matter, the Federal Act would have been protected from ordinary legislation, including orders, by Article 122 of the Revised Constitution, which makes not only the Revised Constitution itself but also Ethiopia's international obligations the supreme law of the Empire and states that all "legislation, decrees, *orders*, judgments, decisions and acts" inconsistent with the supreme law are nul and void. (Emphasis added.) This line of argument raises serious problems, however, since the Federal Act guaranteed not only individual rights but also Eritrea's autonomous status.

Conclusion

The frame of reference for this article has been an issue not discussed: whether a guarantee of due process of law requires that an administrative proceeding which threatens a deprivation of life, liberty or property be subject to judicial review, statutory provisions to the contrary notwithstanding. Each of the issues which were discussed stands, in some or in all cases, as a threshold issue relative to this question. If the courts do not possess the power to override statutory provisions deemed unconstitutional, or if Article 43 does not create a constitutional standard of procedure, a court would in no case of the kind here supposed have occasion to consider the implications of a requirement of due process of law. The issue as to the meaning of the limitation of Article 122 to future governmental acts, on the other hand, may or may not arise in a particular case, depending on the dates of the governmental acts involved. Where it does arise, however, it too offers the possibility of disposing of the case — of refusing to allow the appeal — without proceeding further.

The approach taken to these issues undoubtedly reflects the author's prejudices, which favor a broad role for the courts as correctors of administrative abuses. It has been argued above that judicial construction of the Revised Constitution is the supreme law of the Empire and that the fact that a statute barring judicial review is senior to the Revised Constitution should by itself not foreclose review. And, though the analysis of the linguistic problem in Article 43 has been too incomplete to allow a conclusion to be drawn from it, two lines of argument favoring the view that Article 43 does guarantee something like due process of law have been suggested.

If the conclusions with respect to the first two issues and the direction of argument with respect to the third are accepted, it still remains for a court to determine whether due process of law should in the Ethiopian context entail a right to judicial review. That issue is a complex one, and the final thing to be said in this article is that the fact that the issue has been framed as a single question should not be taken as implying that it should be given a single answer. The answer should perhaps not be the same for one kind of administrative proceeding as for another and, with respect to any one kind of administrative proceeding, it should perhaps vary depending on the issue as to which review is sought.